

The Sonoma County District Attorney has been pursuing criminal charges against the Pacific Gas & Electric Company (PG&E) for its role in sparking the 2019 Kincadee fire, which reportedly destroyed 374 structures and led to over \$600 million in damages. These criminal charges returned to the news today because the District Attorney has asked to postpone the related trial as it pursues a settlement with PG&E.

This would not be the first deal PG&E would have struck related to the fire. In December, the California Public Utilities Commission (CPUC) penalized PG&E \$125 million for its malfeasance leading to the Kincadee fire. An obvious question is whether this penalty was the right outcome. It looks like we will never know, and this raises greater concerns about the way the Commission is currently doing its work.

The CPUC is an extraordinarily powerful agency – controlling tens of billions of dollars of the state's economy. And if it makes the wrong decision, there is almost nothing that anybody can do about it. State courts of appeal, including the Supreme Court, can overturn a Commission decision, but the courts seldom exercise their discretion to hear such cases. Even when they do, they are likely to defer to the judgment of the commissioners. That means that the only way to ensure that the Commission makes good decisions is by insisting that it does its work in the open and gives anyone with a stake in the outcome a fair opportunity to participate. In issuing the Kincadee decision, the very good commissioners who supported the decision failed to provide this opportunity and have arguably failed to provide due process.

Normally, when there is a suspicion that a utility did something wrong, the staff of the agency would undertake an investigation. The Commission would release any resulting report and allow for a fair and open exchange of evidence and expressions of opinion. And if some combination of parties offered a settlement of disputed matters, the settling parties would be required to have a public meeting where others can question the deal. Then, there would be a chance to file a formal objection to the settlement. The Commission can only approve the deal if it is found to be reasonable, consistent with the law, and in the public interest. This time, the Commission allowed the staff to negotiate a deal behind closed doors and then rubber-stamped the deal using a relatively new option called an Administrative Consent Order – issuing an order that did not discuss what the utility did wrong or explain why the deal cut by the staff was the right deal.

This might have saved some time, but it denied the public any meaningful avenue for participation. The Commission sits in judgment when considering a utility's role in something like the Kincade fire much as a court judges a defendant's behavior in a civil trial. What the Commission did in reaching this decision was to ignore its judicial role and rely on whatever the staff had decided to do.

Imagine a superior court judge disturbed by news of the horrific Ghost Ship fire. Suppose that she asked her clerk to look into the circumstances leading to the fire and try to cut a deal with the owners of the building for a penalty. Imagine how the public would react if the judge refused to let anybody take the matter to trial, ignored any of the facts underlying the case, and simply approved the deal submitted by her clerk without explaining why the outcome was the right one. That is what the Commission did in approving the Kincade penalty. The staff, which ultimately reports to the commissioners, worked out a penalty with PG&E that was acceptable to the company. Although the Commission gave interested parties a chance to offer comments on the merits of the deal, the majority of the commissioners refused to provide those outside parties a way to understand whether the penalty amount was appropriate. And then the Commission issued a short resolution approving the penalty without giving any weight to the concerns of interested parties and without explaining why the outcome was the right one.

The Commission's explanation for approving the deal reached by its staff was that it represented a deal reached by its staff - a circular argument that could support approval of any settlement, regardless of the merits. As a result, the Commission remains unaccountable for the outcome. It is simply deferring to its staff. Due process does not just give stakeholders a chance to file comments. It also gives them an opportunity to be heard. The resolution approving the deal responds to almost none of the concerns raised by stakeholders.

It is the Commission itself that is supposed to make the hard calls, rather than delegating them to civil service staff, regardless of how capable those staffers might be. It makes sense to delegate certain ministerial actions to the staff - such as stamping a utility report as timely, or issuing the equivalent of traffic tickets to truckers for a clear violation of safety rules. Usually, however, the commissioners take the discretionary actions - such as approving rate changes or issuing substantial fines. Even in the multi-billion-dollar utility world, a \$125 million penalty is substantial. But what the Commission has done in this instance is turn the usual arrangement on its head - it is the staff that exercised discretion and the Commission that applied the rubber stamp.

Having declared itself able to walk around the normal rules by issuing this type of Administrative Consent Order for a \$125 million penalty, it is fair to ask how the Commission might use the Consent Order next. How about approval of a \$125 million rate increase? Or how about a decision that lets a utility entirely off the hook for the next big wildfire?

Undoubtedly, this new approach is an effort to speed up what can be a long and tedious decision-making process. Looking for efficiencies in government action is a good thing. Reducing public accountability for government action is not. Perhaps this is a good time to set reasonable limits for using this new Consent Order process, or to eliminate it entirely.

With its current notoriety, PG&E should love to settle any disputes related to recent wildfires — to move the controversies beyond the public stage as quickly and quietly as possible. If Sonoma County agrees to a settlement related to alleged criminality leading to the Kincadee fire, let's hope that it offers greater transparency about the merits of the deal.