

PUBLIC UTILITIES COMMISSION

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September 16, 2011

Kathleen Morris
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City and County of San Francisco
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Re: *City and County of San Francisco Notice of Intent to Sue* and Request for Information Relating to PG&E's Operation of Natural Gas Transmission Lines CPUC Reference No.: PRA #0493

Dear Kathleen:

The purpose of this letter is to respond to the City Attorney's letter dated July 14, 2011, which was characterized as a Notice of Intent to File Suit under the Federal Pipeline Safety Act, and to provide a status report on our agency's efforts to respond to a subsequent letter you sent on August 4, 2011, requesting certain information from us.

As you know, you and I have spoken and conferred on several occasions about the prospect of an amicable resolution of the City's threatened lawsuit. Your August 4 information request was sent as part of that effort.

At this point, we hope the City is satisfied that the California Public Utilities Commission is carrying out its statutory and regulatory responsibilities for pipeline safety in a manner that is not only lawful but exemplary, in the wake of the tragic rupture and explosion of a Pacific Gas and Electric Company ("PG&E") high-pressure gas transmission line in San Bruno, California, on September 9, 2010, and therefore that there is no reason for the City to pursue the lawsuit described in the City Attorney's July 14 letter.

On the contrary, for the City to pursue a lawsuit at this juncture would be a needless distraction from the good efforts of this Commission and its professional staff. Indeed, the City and County of San Francisco, represented by the Office of the City Attorney, is itself an active participant in several Commission dockets initiated in the wake of the San Bruno tragedy. The City would be wasting its own precious resources on a federal lawsuit, at a time when your participation at the Commission is unquestionably a far more productive course of action.

Please allow me to explain six reasons why the City Attorney should reconsider his threat of a federal lawsuit over these pipeline safety issues. We are providing this information to you in advance of a meeting scheduled at City Hall next Tuesday, September 24, between your office and mine, along with counsel for the United States Department of Transportation's Pipeline and Hazardous Materials Administration (PHMSA), which was also mentioned as a potential defendant in the City Attorney's letter of July 14. We hope this letter will help inform your views in advance of Tuesday's meeting, and look forward to further discussion with you.

First, with respect to the ongoing investigation into the San Bruno accident, in an email dated September 13, 2011, you asked what our Commission intends to do with respect to its regulation of PG&E's pipeline operations in light of certain findings in the summary of the National Transportation Safety Board ("NTSB") report about the accident. As you know, the NTSB has not yet issued its full report, but in its summary report and in the comments by Board members, the NTSB has been very critical of PG&E's lack of safety measures, both prior to and during the rupture and its aftermath. Our Commission, as you know, has been a party to the NTSB's investigation of PG&E and the San Bruno explosion since immediately after the accident. Until the NTSB's full report becomes public (which has not yet occurred), the NTSB continues to have priority over all other investigations concerning the San Bruno explosion. *See* 49 C.F.R. §§ 831.5, 831.13. Until the NTSB's final report becomes available, our Commission is not able to issue an Order Instituting Investigation ("OII") into the San Bruno explosion. We expect that the NTSB's full report will be made public within the next few weeks, which in turn will afford our Commission the opportunity to consider whether to initiate an enforcement action against PG&E by issuance of an OII. For our Commission, an OII is a formal, adjudicatory enforcement proceeding in which alleged violations of laws and regulations can be pursued and appropriate remedies (including but not limited to civil penalties) can be considered. If an OII is issued, of course, the City and other interested members of the public will be afforded a full opportunity to participate as parties in the proceeding.

Second, following the NTSB's issuance of "Urgent Safety Recommendations" in letters to our Commission and to PG&E dated January 3, 2011, alleging inadequate recordkeeping practices by PG&E, on February 24, 2011, the Commission issued an OII (Investigation No. 11-02-016), to determine the safety issues posed by PG&E's lack of adequate recordkeeping, whether PG&E's past actions violated its obligations under § 451 of the California Public Utilities Code or any other laws, rules or regulations, and if so what remedies should be imposed. The City and County of San Francisco, represented by the Office of the City Attorney, has been granted full party status in this ongoing adjudicatory proceeding. The attorneys in your office and your professional engineering and safety consultants have been given access to a huge amount of information provided by PG&E in the OII proceeding. In addition, our staff have devoted considerable time and attention to providing yet additional information to your office pursuant to the Public Records Act request referenced at on page 1 of this letter, above. By a separate letter

dated September 15, 2011, one of our staff attorneys, Fred Harris, has documented fully the material we have provided to the City and its consultants. I think it is fair to say the City has received from our Commission substantially all of the information it has sought about pipeline safety issues. We remain available, as well, to provide additional information you might seek in follow-up requests.

Third, and perhaps most importantly, our Commission has been very proactive, in a forward-looking manner, about the safety of natural gas transmission pipelines under its jurisdiction. Towards this end, early this year the Commission issued a comprehensive Order Instituting Rulemaking ("OIR") (Rulemaking No. 11-02-019, filed February 24, 2011), to reexamine natural gas pipeline safety regulations in California. Once again, the City and County of San Francisco, represented by the City Attorney's office, is an active party participant in this ongoing proceeding, and so your office is fully aware of the issues and able to participate in the decisional process. On June 16, 2011, the Commission issued Decision No. 11-06-017, which ordered all jurisdictional high-pressure natural gas transmission pipeline operators in California, including PG&E, to file with the Commission implementation plans to replace or test all natural gas transmission pipeline that have not been pressure tested. On June 16, 2011, the Assigned Commissioner issued a scoping memo and ruling, providing an opportunity for parties to submit testimony on the pipelines' implementation plans and related matters. The Commission in this rulemaking also has ordered PG&E to operate its pipelines at substantially reduced pressures where PG&E is unable to document a valid pressure test. In Decision No. 11-09-006, issued just a week ago, the Commission denied a motion filed by PG&E which sought to delegate to the Commission's Executive Director the authority to allow PG&E to restore pressure on affected line segments to the previous higher levels. There is a hearing scheduled on this issue on September 19, 2011.

Fourth, the Commission, with the support of Governor Brown and the State Legislature, has substantially improved our staffing in the area of pipeline safety. The Commission's authorized budget for the current Fiscal Year (i.e., July 2011-June 2012) has nine new positions for safety experts, which the CPUC is currently in the process of filling. These new personnel will include both additional safety inspectors as well as a new risk assessment unit to help guide and prioritize the Commission's efforts in the area of natural gas pipeline safety.

Fifth, in view of the above, we can foresee no injunctive relief a federal court could conceivably grant in a lawsuit under the Federal Pipeline Safety Act, 49 U.S.C. § 60121, beyond what the Commission already is doing. Indeed, as a threshold matter, a federal lawsuit of this type would face numerous other defenses our Commission would assert under the Federal Pipeline Safety Act, such as the following: (i) Congress did not attempt to abrogate, but on the contrary explicitly recognized, the State's sovereign immunity under the Eleventh Amendment in § 60121(a)(1) ("to the extent permitted under the Eleventh Amendment to the Constitution"); (ii) in § 60121(a)(1)(B), Congress

precluded any party from bringing the action if the State authority is pursuing an administrative proceeding for the violation (which our Commission clearly is doing in the case of PG&E on three fronts – the record-keeping OII, the pipeline safety rulemaking, and a possible future OII on the San Bruno accident following issuance of the NTSB’s final report); and (iii) State violations are deemed to be violations only to the extent that that the State standard or practice is not more stringent than a comparable minimum safety standard. Our Commission’s General Order 112-E has adopted all minimum Federal pipeline safety standards, and its General Order 112-E, § 104, contains a provision automatically adopting any new Federal pipeline safety standards. The requirements now in effect in California under the terms of Decision No. 11-06-017, which obligate jurisdictional natural gas pipeline operators to submit implementation plans to replace or test all natural gas transmission pipeline that have not been pressure tested (regardless of whether they were grandfathered under the existing Federal standards), exceed existing Federal requirements. In these circumstances, there is no basis for a lawsuit alleging a violation of the Federal Pipeline Safety Act, nor any remedy available to a federal court in such a lawsuit.

In this regard, we wish to note that in *Williams Pipe Line v. City of Mounds View, Minn.*, 704 F. Supp. 914, 918 (D. Minn. 1989), a federal district court overruled the assertion by a city that Office of Pipeline Safety had failed to diligently pursue its duties in the area of pipeline safety. The court in that instance noted that the agency had commenced its investigation immediately, required hydrostatic pressure testing of the pipeline, and eventually had fined the company and ordered other corrective action. The court further declared that one purpose of the “diligent pursuit” provision in the federal law is to prevent citizen suits from interfering with the agency’s implementation of the Act, and found analogous cases where courts deferred to the agency’s remedies it chooses to pursue and those it chooses to forego. *Id.* The reasoning of the court’s decision in the foregoing case would present an insurmountable barrier to the type of lawsuit outlined in the City Attorney’s letter of July 14.

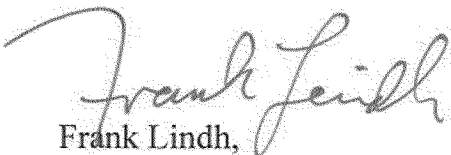
Sixth, and finally, we think it important to recognize that the City Attorney’s Office has been provided extensive information about PG&E natural gas transmission line segments located within San Francisco. The information you have been provided confirms that these are located downstream of regulator stations, where their pressure is substantially reduced, before these lines enter the City and County of San Francisco. It is my understanding that you have been provided complete information about pressure testing, maintenance and inspection of these line segments. Unless there are deficiencies in the information you have been provided (and we do not believe there are), you are in possession of all the information your expert consultants reasonably need in order to perform an independent assessment of the safety of these lines. Should you discover any deficiencies, moreover, the City can seek appropriate remedies in the above-referenced Commission dockets (the OII and/or the OIR). In short, a lawsuit under the Federal

Pipeline Safety Act would yield nothing the City has not already obtained or cannot readily obtain through its participation in the above-referenced Commission dockets.

As I told you when we first spoke by telephone shortly after we received the July 14 letter, we believe it is far more constructive for us to discuss this matter in an amicable and professional manner than to have the City initiate federal court litigation. A lawsuit would needlessly divert the limited resources that both the Commission and the City could more prudently utilize in the ongoing Commission proceedings and investigations concerning natural gas pipeline safety issues. At this juncture, our highest priority must be protecting public safety. We should concentrate our efforts and our resources on identifying what went wrong and how we can avoid these types of tragedies in the future.

I look forward to our meeting next Tuesday for further discussion on these matters.

Sincerely,



Frank Lindh,
General Counsel

cc: James M. Pates, Assistant Chief Counsel, PHMSA
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