

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms.

Rulemaking 11-02-019
(Filed February 24, 2011)

**WORKSHOP REPORT AND PROPOSED REGULATIONS
REGARDING WHISTLEBLOWER PROTECTIONS**

I. SUMMARY

Pursuant to Administrative Law Judge Bushey's authorization, this workshop report can be filed today, which is one business day later than provided in the deadline in the Assigned Commissioner's Ruling on March 14, 2012. The workshop in this proceeding was conducted on June 14, 2012, pursuant to the Assigned Commissioner's Ruling (issued March 14, 2012) to identify deficiencies in current company internal employee reporting protocols and California laws or regulations, and to develop proposals for a new Commission regulation. The purpose of this workshop and any regulation protecting whistleblowers is to help the Commission learn significantly more information from the people most knowledgeable about the safety problems of California natural gas utilities—the employees, who are in the fields conducting inspections, in the natural gas control rooms or in the offices, and who know when, where and why there are unsafe conditions and/or when there are efforts to cover-up these safety problems.

As a result of the workshop report and attachments hereto, the Commission should find that there is a need for a regulation regarding protections for employees of natural gas utilities and their independent contractors. Consequently, Commission staff proposes a regulation that would require the natural gas utilities to post the Commission's Whistleblower phone number and e-mail information in physical locations where the

employees are likely to see the notice (such as on a bulletin board where employees' unions may post their notices) and electronically on their website in a place where employees are likely to see the information. In addition, staff proposes that the regulation makes it clear that retaliation by a natural gas utility against a whistleblower, who contacts the Commission for what the employee in good faith believes to be an unsafe condition, would be considered a violation of the proposed regulation, and could be considered a violation of other pertinent laws enforced by other Federal or State agencies, as well. In this regard, the Commission should clarify in the proposed regulation, that it relies upon public policy, as reflected in the utility's obligation to provide safe services and facilities in §§ 451, 961(e) and 963(b)(3) of the California Public Utilities Code, and may support any concurrent jurisdiction with other State or Federal Agencies, which also may have protections for whistleblowers under other statutes.

II. BACKGROUND

On September 9, 2010, Pacific Gas and Electric Company's (PG&E) 30" diameter, high-pressure transmission pipeline exploded, which resulted in eight fatalities, numerous other injuries and extensive damage to many homes and businesses in San Bruno. In conjunction with its investigation into the San Bruno explosion., on January 3, 2011, the National Transportation Safety Board (NTSB) sent out "urgent" safety alerts to PG&E, the Commission and to the Pipeline and Hazardous Materials Safety Administration (PHMSA), the Federal agency with safety authority over pipelines, warning us of the urgent need to make sure that all of the pipelines have traceable, verifiable and complete documents establishing that their transmission pipelines had been properly pressure-tested. These NTSB safety alerts were based, in part, upon PG&E's inaccurate inputs into its computer, stating that the pipeline segment that had exploded was a 30" diameter, seamless transmission line, when no such line existed in the 1950s.

On February, 25, 2011, the Commission issued an order instituting rulemaking (OIR) to adopt new safety and reliability regulations for natural gas transmission and distribution pipelines. The Commission followed the NTSB's recommendation that all of the California natural gas utilities should thoroughly search for traceable, verifiable and

complete documents establishing that their transmission pipelines had been properly pressure-tested, and if they could not produce such documents, then they would have to use hydrostatic (water pressure) testing to establish the Maximum Allowable Operating Pressure (MAOP) or replace the pipelines. Much of the Commission's efforts in this OIR have been spent in this pursuit of the proper MAOP (i.e., finding whether or not the utilities had verifiable recordkeeping, and, for those pipelines missing this critical information, requiring the utilities to submit their plans for hydrostatic testing or replacing pipelines). The Commission has also separately issued three Orders Instituting Investigations (OIs) with regards to PG&E's past practices.

The Commission will not be deciding in this phase of the proceeding the other issues in this OIR proceeding, let alone adjudicate the issues in the enforcement proceedings. This workshop was designed to address the 10th issue listed in the OIR, on pages 15-16, "Whistleblower Protections." The Commission noted in the OIR that we did not presently "have a comprehensive program to protect persons who have and wish to protect an on-going relationship with a public utility but who are in possession of information regarding a threat to public safety concerning that utility's operations." The Commission asked whether we should adopt rules to protect utility employees from management retaliation for bringing such unreported public utility safety issues to the Commission's attention?

In this OIR proceeding and in the consolidated Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E) general rate cases (GRCs), the Utility Workers Union of America (UWUA) filed motions for "a directive to protect employees participating directly as witnesses or indirectly as sources of information." Although SoCalGas filed responses in opposition to UWUA's motion in both proceedings, PG&E did not file a response to UWUA's motion, and the Commission's Division of Ratepayer Advocates (DRA) filed a response in support of the motion.

In the SoCalGas/SDG&E GRCs, the Assigned Commissioner, Commissioner Ferron, and the Administrative Law Judge issued a Ruling on January 25, 2012 (GRC

ACR), which granted UTUA's motion, but left the overall issue of preventing utility management retaliation to this proceeding. *See* Attachment A to this report. On March 14, 2012, the Assigned Commissioner in this OIR, Commissioner Florio, issued a Ruling (OIR ACR), which granted UTUA's motion on an interim basis, and established procedures for considering a permanent and comprehensive Commission regulation protecting the employees of utilities or contractors. *See* Attachment B to this report.

The OIR ACR's procedures required Respondents to file reports as to their internal employee reporting requirements by May 11, 2012, which PG&E has filed herein (*see* Attachment C to this report), and SoCalGas and SDG&E have jointly filed herein on May 11, 2012. *See* Attachment D to this report. The OIR ACR's procedures further required that the staff conduct this workshop on June 14, 2012, prepare a Workshop Report and Recommendations for a proposed regulation, and thereafter any parties to this proceeding could file initial comments on August 10, 2012 and reply comments on August 24, 2012. It is anticipated that there will be a proposed decision and final decision addressing the whistleblower protections.

This is therefore a forward looking proceeding where all parties should have the same goal—keeping the natural gas pipelines as safe as possible.

III. THE WORKSHOP CONDUCTED ON JUNE 14, 2012

The following parties were represented at the workshop: the Consumer Protection and Safety Division (CPSD); PG&E; SoCalGas; SDG&E; and The Utility Reform Network (TURN). The subject areas covered at the workshop were the following:

- 1.) The small number of employees, who reported unsafe conditions to their own companies and, except for SDG&E, the impression the utilities gave to employees that they may face retaliation.
 - PG&E received only 30 reports of unsafe conditions over a five-year period (averaging 6 reports per year) and 12 of those reports came in 2011 after San Bruno. *See* Attachment C, pp. 3-4. This is notwithstanding what we all now know: such as leak surveys were not being done and that pipeline records were scattered all over, were inaccurate, or no longer exist.

- SoCalGas received only 9 reports over a five-year period (averaging 1.5 reports per year). SoCalGas' reaction to these reports not only indicated that it believed that the employees claims were not substantiated, but it resulted in further monitoring of the employees as well as the employees being reminded of their work rules and responsibilities. Moreover supervisors met with employees to clarify expectations. *See Attachment D, pp. 11-12.*
 - SDG&E received 3 reports of unsafe conditions over the 5 years. Its transmission system, however, is much smaller than PG&E's or SoCalGas's transmission system. Moreover, SDG&E reported that its employees' supervisors were counseled to meet with employees often, to listen to and address their concerns, and that SDG&E has a strict policy against retaliation. *See Attachment D, pp. 11, 13.*
- 2.) The Commission received even less safety reports from employees than the utilities did. Perhaps, this is due to the fact that many employees in the utilities were unaware of the Commission's 800 number for Whistleblowers or that if they were aware, they were worried about retaliation from management. CPSD staff revealed at the workshop that his contacts with employees had expressed such a fear.
 - 3.) The significance of the anonymous reports reveals fear of retaliation. Approximately 1/2 of the employee safety reports to PG&E were done anonymously (i.e., 14/30 reports or 14/28 since 2 were withdrawn.) *See Attachment C, p. 4.* Approximately 1/3 of SoCalGas's employee safety reports were done anonymously. *See Attachment D, p. 12.* This supports the notion that the employees are fearful of retaliation. However, it does provide a solution for at least obtaining the reports from employees.

At the workshop, one of the staff's proposals was that the utilities should post the Commission's existing 800 number for whistleblowers, physically and electronically, in a prominent location where the employees were likely to see it, and that employees could report unsafe conditions anonymously to the Commission. Although the utilities pointed out that existing laws protect the employees from retaliation, and other agencies have free numbers to call, they did not dispute the CPSD staff's point that since the Commission has safety jurisdiction over the utilities, the employees of the utilities could provide critical information to the CPSD, which otherwise CPSD may never realize. Therefore, the utilities did not state much opposition to this proposal. Indeed, in their own reports prior to the workshop, the utilities alleged that they do not impose obstacles to employees

reporting safety violations to the Commission, because they recognize it would be unlawful. *See* Attachment C, pp. 6-8 and *See* Attachment D, pp. 14-18.

On the other hand, PG&E and SoCalGas vigorously opposed a staff proposal to make it a violation of the Commission's regulation for the utilities to retaliate against an employee for reporting an unsafe condition to the CPSD. The utilities stated that the California Attorney General and other agencies already have the responsibility to protect whistleblowers, and that the Commission's efforts would be duplicative of these other agencies' efforts. But, even with the existing protections, the number of calls by whistleblowers to the Commission has been relatively small. Moreover, according to CPSD staff, it is out of fear of retaliation that employees are reluctant to give their names to the CPSD. Therefore, since the Commission's CPSD staff are in a position to know whether an employee's claim can be verified as legitimate, or at least is stated in good faith, it makes sense for the Commission to have concurrent jurisdiction with its sister agencies over claims of retaliation by natural gas utilities.

IV. LEGAL BASIS FOR PROPOSED REGULATION

As the California Supreme Court declared in *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 914-15:

The commission is a state agency of constitutional origin with far-reaching duties, functions and powers. ... The commission's powers, however, are not restricted to those expressly mentioned in the Constitution: "The Legislature has plenary power, unlimited by other provisions of this Constitution ... to confer additional authority and jurisdiction upon the commission." ...

Pursuant to this constitutional provision the Legislature enacted, inter alia, the Public Utilities Act. ... That law vests the commission with broad authority to "supervise and regulate every public utility in the State" (§ 701) and grants the commission numerous specific powers for the purpose. (Internal citations omitted).

Consequently, if the Commission lacked substantive authority to adopt whistleblower regulations, it would be only be due to some specific statutory limit placed

on the Commission. *See, Southern California Edison Co. v. Peevey* (2003) 31 Cal. 4th 781, 792. However, the utilities do not cite statutory authority limiting the Commission's safety jurisdiction or ability to exercise its supervisory power. Nor could they.

Instead, SoCalGas argues that that the existence of other whistleblower statutes makes it unnecessary for the Commission to adopt its own whistleblower regulation. However, the two Assigned Commissioner Rulings, which granted UWUA's motion on an interim basis, rejected this argument. *See* Attachment A, pp. 6-7; Attachment B, pp. 5-6. Indeed, in Commissioner Florio's OIR ACR, pp.5-6, citing California Public Utilities Code §§ 701, 702, 761, 768, he stated:

The duty to furnish and maintain safe equipment and facilities is paramount for all California public utilities, and the Commission has the supervisory authority over the utilities to make sure they fulfill their safety obligation.

Although the Commission would generally not get involved in employer-employee relations, the present circumstances require that the Commission staff be informed immediately of where and why safety problems are occurring, and what can be done to prevent further problems with regards to the utilities' natural gas facilities. The natural gas public utility employees may be critical to our comprehensive understanding of the safety issues at hand.

...

It will serve the public interest for all California natural gas public utility employees to be able to provide the Commission or its staff with information concerning unsafe conditions without fearing employment retaliation from the utility. Gas utility employees are invaluable sources of information regarding the safety and reliability of the gas systems. If these same employees face job actions or a threat of such actions by their employer for disclosing safety and reliability issues to the agency with regulatory authority over the gas utilities, this will discourage employees from disclosing such information.

(Footnotes omitted).

Moreover, if anything, there has been added support for the Commission's safety jurisdiction over natural gas matters and input by the utilities' employees in this regard.

The California Legislature passed SB 705 (sponsored by Senator Leno), which added §§ 961 and 963 to the California Public Utilities Code. This legislation included § 961(e), which recognizes the importance and knowledge of the utilities’ employees and independent contractors’ employees in safety matters and their vital part of the culture of change, and § 963(b)(3), which makes it clear that safety of natural gas utilities should be their highest priority and the Commission’s highest priority in the Commission’s regulation of their pipelines. *See* California Public Utilities Code § 961(e) and § 963(b)(3).

V. PROPOSED REGULATIONS

A new “**Subpart G - Whistleblower Protections**” is proposed to be added to General Order 112-E. This new regulation would be in addition to any California natural gas utility’s existing programs for employees to report to management unsafe conditions, facilities, or services of the natural gas utility, which the employees in good faith believe threatens the employees or the public at large. Although the utilities are free to encourage employees to report any safety problem to the utility before reporting it to the California Public Utilities Commission (Commission), this shall not be a prerequisite for reporting the unsafe conditions, facilities or services to the Commission.

The proposed text of the regulation is as follows:

Subpart G - Whistleblower Protections

301 General

301.1 Each operator shall post in a prominent physical location, as well as an electronic notice on its website where its employees are likely to see it, a notice containing the following information:

“Under sections 451 of the California Public Utilities Code, every public utility shall furnish and maintain such service, instrumentalities, equipment, and facilities, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees and the public. Further, under section 963(b)(3) of the California Public Utilities Code, it is the policy of this State that California natural gas utilities and the Commission’s regulation of

natural gas utilities place safety of the public and the natural gas utilities' employees as the top priority consistent with the principle of just and reasonable cost-based rates. In addition, under section 961(e) of the California Public Utilities Code, the Commission and natural gas utilities must provide meaningful and ongoing opportunities for the utilities' workforce to participate in the utilities' development of a plan for the safe and reliable operations of their pipeline facilities and to contribute to developing an industrywide culture of safety.

In view of the above, any employee of the natural gas utility or of an independent contractor working under contract with a natural gas utility, who in good faith, believes that unsafe conditions, services or facilities of the utility threaten the health or safety of its patrons, the employees or the public, has a right to report the conditions to the California Public Utilities Commission. The employee can report the conditions by calling the Commission's Whistleblower Hotline at 1(800) 649-7570, either anonymously or by giving the employee's name, or by sending an e-mail with the pertinent facts and/or documentation to fraudhotline@cpuc.ca.gov.

This requirement shall be in addition to any right the employee has to contact any other State or Federal agency, if the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.”

302 The Utility Has No Right to Retaliate Against an Employee For Notifying the California Public Utilities Commission

302.1 In addition to other statutes, which provide remedies for retaliation against Whistleblowers (e.g., the California Whistleblower Act, California Labor Code § 1102.5), or any other remedy an employee may have in a court, the Commission prohibits California natural gas utilities from retaliating against any employee, who reports, in good faith, unsafe conditions to the Commission. For purposes of this regulation, the Commission retains the option to impose penalties and any other remedies provided under the California Public Utilities Code for any natural gas utility, which the Commission finds violates this regulation.

VI. CONCLUSION

For the foregoing reasons, the Commission should adopt the proposed Whistleblower Protection regulations.

Respectfully submitted,

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