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.	R.11-02-019 (Filed February 24, 2011)

OPENING COMMENTS OF SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) AND SAN DIEGO GAS & ELECTRIC COMPANY (U 902 M) ON PROPOSED DECISION IN COMPLIANCE WITH PUBLIC UTILITIES CODE SECTIONS 961 AND 963, AND AMENDING GENERAL ORDER 112-E TO ADD WHISTLEBLOWER PROTECTIONS

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December 10, 2012

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Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E) submit the following Opening Comments on the Proposed Decision in Compliance with Public Utilities Code Sections 961 and 963, and Amending General Order 112-E to Add Whistleblower Protections (Proposed Decision) pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission (the Commission).

I. INTRODUCTION AND PROCEDURAL HISTORY

A. SB 705 and the California Natural Gas Corporations' Safety Plans.

On October 7, 2011, Governor Brown signed SB 705 into law. Among other things, SB 705, codified in section 961 and 963 of the Public Utilities Code, directs each California natural gas corporation to develop a plan for the safe and reliable operation of its Commission-regulated gas pipeline facilities.[1] In developing their proposed plans, the gas corporations are to "provide meaningful, substantial, and ongoing participation by the gas corporation workforce in the

[1] Cal. Pub. Util. Code § 961(b)(1).

development and implementation of the plan."[2] The Commission is required to accept, modify, or reject the plan for each gas corporation by December 31, 2012.[3] The bill further requires that the plans be periodically reviewed and updated.[4]

Eleven California gas corporations, including SoCalGas and SDG&E, submitted proposed SB 705 Safety Plans for Commission consideration on or about June 29, 2012. On July 20, 2012, the Assigned Commissioner, in response to a letter from California Assembly Member Jerry Hill, directed the utilities that employ in-line inspection tools to assess for metal loss to amend their Safety Plans to address the issue of coordination and supervision of in-line inspection contractors. In response to this ruling, ten California gas corporations filed amended SB 705 Safety Plans on August 24, 2012.

The Consumer Protection and Safety Division (CPSD) reviewed the SB 705 Safety Plans for compliance with Public Utilities Code sections 961 and 963 and submitted a report to the Commission on or about November 16, 2012. In the Report, CPSD identifies "deficiencies" with all eleven proposed SB 705 Safety Plans but nevertheless recommended approval of the plans as submitted, with suggested corrections and revisions to remedy the identified deficiencies by June 30, 2013.

The Proposed Decision adopts the recommendations in the CPSD Report, approves the proposed plans, and directs each operator to file and serve, by June 30, 2013, a compliance statement showing that any identified deficiencies in its safety plan have been cured. In the comments that follow, SoCalGas and SDG&E support this outcome in the Proposed Decision and suggest two clarifications so that the description of SoCalGas and SDG&E's SB 705 Safety Plan is accurate and the language in the Proposed Decision aligns with the statutory language set forth in sections 961 and 963.

B. Amendment to GO 112-E to Include Whistleblower Protections.

The order instituting the instant rulemaking included within its scope the issues of whether (1) the Commission should "adopt rules to protect utility employees from management retaliation for bringing information to the Commission regarding unreported utility public safety

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2 Cal. Pub. Util. Code § 961(e).
3 Cal. Pub. Util. Code § 961(b)(2).
4 Cal. Pub. Util. Code § 961(b)(4).

issues," and (2) "such rules [are] necessary or practical."[5] To develop the record on these issues, the Assigned Commission directed on March 14, 2012, that each Respondent file and serve "a description of its existing internal employee reporting protocols for unethical, unsafe, or illegal activities, which includes the information in the Appendix attached to this ruling."[6] The Appendix required information about current processes for receiving and processing employee reports of "unethical, unsafe or illegal activities" and data regarding formal reports of such activities tracked by the utilities within the last five years.

The March 14th Ruling also scheduled a workshop to take place on June 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 Ruling directed Commission staff to file a report and recommendations by July 20, 2012.[7]

The June 14th workshop was not well attended. Only representatives from the Commission's Legal Division, CPSD, SoCalGas, SDG&E, Pacific Gas and Electric Company (PG&E) and The Utility Reform Network (TURN) attended. There were no union representatives or representatives from the Coalition of California Utility Employees present.

At the Workshop, the workshop facilitator laid out an assumption that utility employees are intimidated from reporting unsafe conditions. This assumption was based on the fact that the Commission receives few, if any, calls to its hotline from utility employees seeking to report safety concerns, the utilities' records reflect that they receive few formal employee reports of safety concerns as well, and callers elect to remain anonymous for about half of calls placed to the utilities' anonymous helplines. Underlying the facilitator's overall assumption were underlying assumptions that: (1) If a small number of employees use the Commission's hotline, employees must fear retaliation; (2) If a small number of employees make formal reports internally, employees must fear retaliation; and (3) If employees submit hotline complaints anonymously, they must fear of retaliation from their supervisors.

In the question and answer period that followed, the facilitator attempted to validate this assumption, and the Workshop participants explained why this assumption was flawed. Among other things, they explained that the information they provided earlier in connection with the

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5 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 at 14-15.

6 March 14 Ruling at 7.

7 March 14 Ruling at 7.

March 14th Ruling showed that the utilities have effective programs in place to encourage employees to voice safety concerns and that many options are available for employees to address a safety or retaliation concern, both internally and externally.

The evidence presented at the Workshop by knowledgeable utility employees was not reflected in the Workshop Report submitted by Staff on July 23, 2012, even though the Proposed Decision acknowledges that "[t]he purpose of the workshop was 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."[8]

In the Workshop Report, staff recommended that the Commission adopt two whistleblower protection provisions to GO 112-E (Subpart G). The first provision would require natural gas utilities to post information about whistleblower protections and the Commission's whistleblower hotline (Section 301) and the second would prohibit natural gas utilities from retaliating against an employee who reports, in good faith, unsafe conditions to the Commission (Section 302).

Only those present at the Workshop (SoCalGas, SDG&E, PG&E and TURN), filed opening comments on the Workshop Report. In their Opening Comments, SoCalGas and SDG&E stated that they fully supported the first of the two regulations but had serious concerns with the second. In its place, SoCalGas and SDG&E proposed an alternative regulation that avoids those concerns while still achieving the Commission's objectives to encourage utility whistleblowers to come to the Commission to raise safety concerns that they believe are not being adequately addressed by the utility.

The Proposed Decision adopts both of Staff's proposed regulations, without setting forth any findings of fact or conclusions of law for doing so, and without considering the concerns and suggestions offered by SoCalGas and SDG&E to the second proposed regulation. To the extent the page limitation applicable to the instant comments will allow, SoCalGas and SDG&E summarize below their suggested revision, and the concerns that drive that proposed revision.

SoCalGas and SDG&E believe that their alternative regulation is superior to that proposed by Commission staff and hope the Commission adopts this alternative. If, however,

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8 Proposed Decision at 24-25.

the Commission determines to move forward with Section 302 as proposed by Commission staff, the Commission should not do so until essential processes and guidelines for implementation of the GO are also developed.[9]

II. DISCUSSION

A. With Respect to Approval of the SB 705 Safety Plans, the Proposed Decision Should Be Adopted with Two Clarifications.

The Proposed Decision explains that CPSD's determination that a "deficiency" exists with respect to an SB 705 Safety Plan means "that the safety plan as presented did not meet CPSD's newly developed criteria implementing PU Code §§ 961 and 963."[10] The Proposed Decision further states that "CPSD expressed confidence that it could work with the operators to address and resolve most, if not all, of the identified deficiencies."[11] SoCalGas and SDG&E share CPSD's confidence and look forward to working with CPSD to resolve any deficiencies identified by CPSD.

SoCalGas and SDG&E request two clarifications in the Proposed Decision. In the CPSD report summary provided as Attachment A to the Proposed Decision, CPSD describes its first "applied criterion" as "[t]he Safety Plan must include a high level policy statement, reviewed, approved, and signed by an Officer of the gas corporation (Operator), that the Operator will implement its approved Safety Plan."[12] The proposed Safety Plans submitted by SoCalGas and SDG&E each began with a high level policy statement in the executive summary emphasizing our "longstanding commitment to safety," and each Safety Plan was signed by <u>every officer</u> of both utilities, subject to Rule 1 of the Commission's Rules of Practice and Procedure. Because each SB 705 Safety Plan includes a high level policy statement affirming our longstanding commitment to safety signed by every officer of each respective utility, SoCalGas and SDG&E

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9 Because the Proposed Decision addressed both the natural gas utilities' SB 705 Safety Plans and Commission staff's proposed revisions to GO 112-E to include whistleblower protection provisions, and because SB 705 requires the Commission to issue a decision pertaining to the SB 705 plans by December 31, 2012, the Commission may need to bifurcate the Proposed Decision to provide sufficient time to address critical implementation issues prior to adopting Staff's proposed revisions to GO 112-E. If the alternative language proposed by SoCalGas and SDG&E is adopted, the Commission could approve the Proposed Decision by year-end and avoid having to bifurcate the two issues for separate consideration.

10 Proposed Decision at 22-23.

11 *Id.* at 23.

12 *Id.*, Att. A *Report of CPSD on its Review of Gas Safety Plans Filed by Gas Corporations in Response to Decision 12-04-010 Amending Scope of Rulemaking 11-02-019* (CPSD Report), at 6.

request that the Proposed Decision be clarified to reflect this, so as to accurately describe SoCalGas' and SDG&E's SB 705 Safety Plans and longstanding commitments to safety.

The last "applied criterion" set forth in Attachment A also requires clarification. Public Utilities Code section 961(e) requires, in pertinent part, that "[t]he commission and gas corporation shall provide opportunities for meaningful, substantial and ongoing participation by the gas corporation workforce in the development of the implementation of the plan." CPSD's applied criterion for assessing compliance with this provision states, "The Operators Safety Plan must include information on what processes and/or procedures the Operator has in place that . . . provide opportunities for its workforce, including individual employees and employee organizations, to become aware of and be able to participate in, the development and review of application provisions of its Safety Plan."[13] Workforce is defined under the statute as "employees of a gas corporation and employees of an independent contractor of the gas corporation working under contract with the gas corporation."[14] In contrast, the phrase "employee organizations," is vague, undefined and not included anywhere in the provisions of SB 705. To the extent CPSD intends to require SoCalGas and SDG&E to incorporate input from members of its workforce that are also members of employee organizations, this provision is redundant. If, on the other hand, the intent is to require the gas corporations to solicit and incorporate feedback from members of employee organizations that are not employees of the gas corporation, this provision is overly-broad, vague, unworkable and would violate the First Amendment rights of the gas corporation if adopted by the Commission.[15] The phrase "and employee organizations" must therefore be stricken from Attachment A, so that the language remains clear, constitutional and consistent with SB 705.

B. SoCalGas and SDG&E Support Efforts to Encourage Employees to Raise Safety Concerns at any Level, Both Internally and Externally.

Both SoCalGas and SDG&E promote an environment where any employee can raise safety concerns at any level, in multiple forums, anonymously or not, without fear of retaliation.

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13 *Id.*, Att. A, CPSD Report, at 12.

14 Cal. Pub. Util. Code § 961(a).

15 The protections of the First Amendment are not limited to restrictions on what individuals and corporations are allowed to say. The First Amendment also protects their freedom "to not speak publicly." *Harper & Row Publishers, Inc.* v. *Nation Enterprises,* 471 U.S. 539, 559 (1985). "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *PG&E v. PUC*, 475 U.S. 1, 16; 106 S. Ct. 903; 89 L. Ed. 2d 1.

As reflected in the record, SoCalGas and SDG&E offered evidence that a recent survey of 400 union employees working on the companies' pipelines confirms that our employees feel free to raise safety concerns, big or small. Tellingly, not one survey respondent reported a fear of retaliation – something any employee could have done anonymously on the survey forms. Similarly, none of the unions representing the roughly 8,000 unionized workers at SoCalGas and SDG&E raised a single example of either real or perceived retaliation for reporting safety concerns. Zero union grievances on this issue exist, and no employees have filed retaliation claims with the Attorney General's office.

Although SoCalGas and SDG&E believe their culture of safety encourages employees to raise safety concerns immediately, so that those concerns can be quickly and effectively addressed, SoCalGas and SDG&E support the Commission's efforts to promote the utilities' safety cultures by adding whistleblower protections to existing provisions of GO 112-E. The revisions to GO 112-E proposed by Commission staff can achieve this goal, efficiently and effectively, with one important revision. The last sentence in Staff's proposed GO (in section 302.1), which provides that the Commission retains options to impose penalties and any other remedies, should be modified to provide that the Commission will refer any claims of retaliation to the California Attorney General for investigation, rather than undertaking to investigate claims of retaliation, which as discussed below are complex and specialized claims, itself.

Specifically, the Commission should adopt the following general rule as 302.1, instead of the language proposed by Commission staff:

> All utilities regulated by the California Public Utilities Commission are prohibited from retaliating against any employee who makes a good faith report of unsafe conditions to the Commission and the Commission shall refer all claims of retaliation in violation of this rule to the California Attorney General's whistleblower hotline for investigation and enforcement. The Commission may impose penalties for substantiated safety violations.

With this language, the Commission would retain the authority to impose penalties and any other remedies provided by law, but would defer the investigation of the claims to an agency that has the resources and expertise necessary to conduct an investigation of the alleged claim.

This approach is similar to the approach taken by Federal agencies, like the Nuclear Regulatory Commission ("NRC"), that support whistleblower protections by adopting

regulations prohibiting retaliation, without deciding the retaliation claims themselves.[16] The statute places the investigation, determination, and enforcement of the retaliation issue in the hands of the Department of Labor, which has the necessary expertise and ability to award appropriate remedies, like reinstatement. This allows the NRC to focus on the underlying safety complaint, rather than on the employment dispute.

1. Staff's Proposed Revisions to GO 112-E Cannot Be Effectively Implemented Absent Adoption of a New Investigatory Scheme.

Although it might appear that Staff's proposed revisions to GO 112-E narrowly proscribe retaliation, in actuality, these revisions impose upon the Commission an obligation to engage in fact-finding – *i.e.*, investigations into alleged retaliation claims. The only way for the Commission to "*find*" that a utility has violated its new non-retaliation rule under Staff's proposed section 302.1 would be for the Commission to investigate retaliation claims, which are unique employment claims with a well-developed and complicated set of established principles. As noted by the California Supreme Court:

> Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.[17]

In a typical retaliation case, an employee suffers an adverse employment action at some point in time and alleges that the action was not for good cause, but actually in retaliation for

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[16] Section 210(a) of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851(a), makes it unlawful for an employer in the nuclear industry to "discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee. . .

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding . . . or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended."

[17] *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1052 (2005).

some prior protected activity. "To establish a *prima facie* case of retaliation, a plaintiff must show that [1] he engaged in a protected activity, [2] that he was subjected to adverse employment action by his employer, and [3] that there was a causal link between the two."[18] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, non-retaliatory reason for the adverse employment action.[19] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation drops out of the picture, and the burden shifts back to the employee to prove intentional retaliation."[20] What is or is not considered a "protected activity" is often the subject of litigation.

2. Staff's Proposed Revisions to GO 112-E Raise Numerous Unanswered Questions that Should Be Addressed Prior to its Adoption.

In light of the complex legal framework necessary to analyze retaliation claims, the revised GO suffers from a lack of specificity. In earlier comments, SoCalGas and SDG&E raised several critical questions that are not addressed or even mentioned in the Proposed Decision. They asked:

- What is the statute of limitations for bringing a retaliation claim to the Commission?
- How will an anonymous reporter be treated if an employee raises a later claim of retaliation? The employer, after all, must be given a chance to respond to that employee's claim by proving its adverse employment action was legitimate and non-retaliatory.
- Will the Commission take affidavits of alleged retaliation victims and when and how will those be provided to the employer?
- Will an alleged victim of retaliation be placed under oath when making her claim?
- Will an alleged victim of retaliation be entitled to her own counsel during the investigation? What about non-party representatives, like a shop steward from a union?
- Will the Commission award attorneys' fees to prevailing parties? What will the Commission deem a "prevailing party"?

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18 *Sada v. Robert F. Kennedy Medical Center*, 56 Cal. App.4th 138 (1997).
19 *Yanowitz,* 36 Cal. 4th at 1042.
20 *Id.*

- What are the time frames for a retaliation investigation? How long for the initial investigation of the employee's claim? How long will the employer have to respond to the allegations?
- Will the employer be permitted to submit a position statement? Will employer witnesses be required to provide affidavits?
- How much information will be provided to the employer in order to allow it to defend against the allegation? Obvious due process considerations abound if the Commission withholds information about the complainant and her evidence.
- Typically, agencies that investigate employee claims have both an enforcement division (the prosecutors) and an adjudicatory division (the judges). These two divisions are separate and independent to ensure impartiality. Will the Commission's own staff be the enforcement side? Will a separate division of administrative law judges be established to hear the evidence? There are significant impartiality problems should the Commission be the adjudicator when its own staff is the prosecutor.
- What appeals process will exist? Typically, agencies use neutral administrative law judges and appeals are to neutral boards, then to an appellate court.
- What happens if the Commission's decision conflicts with another court, agency, or arbitrator's decision regarding the same issue of retaliation (which clearly can be brought in multiple forums)? For example, if a court finds an employee was terminated for a legitimate, non-retaliatory basis, but the Commission found the opposite. Would the utility have any recourse with the Commission, including recoupment of any imposed penalty?
- What "penalties and other remedies" will the Commission impose if it finds a violation? Generally, courts, arbitrators, and agencies have been granted the authority to address retaliation through "make-whole" remedies, like back pay, front pay, and/or reinstatement. Does the Commission believe it has the authority to grant this type of relief? If not and only fines against the utility exist, the employee cannot be made whole for retaliation and will therefore be required to use other avenues for redress. Thus, the Commission will be a less attractive avenue for employee claims of retaliation. Indeed, any good attorney

representing an employee would steer the employee away from the Commission as an option to address her retaliation claims if the Commission could only partially address the claim or only penalize the employer with a fine.

These questions demonstrate enormous gaps in the revised GO. Without addressing these gaps, the regulation will remain too vague to be implemented and its own uncertainty will breed a host of new problems for the Commission.

3. The Proposed Revisions to GO 112-E Proscribe Conduct that is Already Unlawful in California.

The Commission is required to ensure that the regulated utilities operate safely and in compliance with the law. Focusing efforts to advise utility employees about the Commission's hotline (which also permits anonymous reporting) would further that objective. Jumping into the realm of employment retaliation claims without considering how best to do so, would not.

For one, who would handle workplace retaliation investigations at the Commission since no one there currently has the expertise needed to handle employment claims? The Commission does not currently employ labor and employment specialists. As pointed out at the workshop, a claim of retaliation is distinct from the underlying claim that serves as the basis for the claim of retaliation. For example, in a sexual harassment case, if an employee alleges sexual harassment and an investigation by the Equal Employment Opportunity Commission reveals no harassment occurred, a later act of retaliation against the employee for making the initial complaint is still unlawful. If this were not the case, employees would be discouraged from complaining of harassment because if they could not prove their harassment case, they could be victims of retaliation without any available remedy.

Another concern raised is one of funds; how will the Commission fund this proposed new program, hire the required new staff, and provide necessary training to ensure the Commission Staff can properly handle employee retaliation claims that would otherwise be handled by the Attorney General's office?

The Commission need not adopt the wide-reaching regulatory scheme set forth in the proposed revisions to GO 112-E in order to ensure that utility employees who report suspected safety violations may do so free from retaliation. The California Attorney General already does what the Commission Staff now proposes. The California Whistleblower Act, enforced by the Attorney General, provides that:

> (a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
>
> (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.[21]

Pursuant to the Whistleblower Act, the California Attorney General must maintain a whistleblower hotline to receive calls from aggrieved persons. All calls received by the Attorney General must be referred to the appropriate government authority for review and investigation.[22] Employers must post a notice regarding "employees' rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline described in Section 1102.7."[23]

Deferring retaliation issues to the Attorney General while focusing on utility safety complaints, and any necessary follow-up, makes sense. The proposed revisions to GO 112-E ignore the fact that State agencies have different competencies. The Commission should focus on its core mission to "serve[] the public interest by protecting consumers and ensuring the provision of safe, reliable utility service and infrastructure at reasonable rates … ."[24] Duplicating the efforts of other agencies, such as the Attorney General, is unlikely to enhance this mission. Rather, it is likely to distract the Commission and dilute its resources.

4. Staff's Proposed Revisions are Based on Flawed Assumptions.

The proposed revisions to GO 112-E adopted in the Proposed Decision are based on flawed assumptions that ignore the evidence offered in this matter. These unfounded assumptions include: (1) If a small number of employees make formal reports internally, employees must fear retaliation; (2) If a small number of employees use the Commission's

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21 Cal. Lab. Code § 1102.5 (a)-(b) (emphasis added).
22 Cal. Lab. Code § 1102.7.
23 Cal. Lab. Code § 1102.8.
24 CPUC Mission Statement. http://www.cpuc.ca.gov/PUC/aboutus/pucmission.htm.

hotline, employees must fear retaliation; and (3) If employees submit hotline complaints anonymously, they must fear of retaliation.

California's natural gas utilities each submitted evidence documenting the formal reports received by employees internally over a several year period. SoCalGas and SDG&E advised the Commission in May 2012 that employees could make "formal" reports of unsafe conditions to "the Ethics and Compliance Mailbox/Chief Ethics Officer, the Ethics Hotline and/or, if the employee's employment is subject to the terms of a [Collective Bargaining Agreement (CBA)], the union grievance process in the CBA."[25] The number of formal reports to these sources was low, there being only twelve such reports between 2007 and 2011.[26] SoCalGas and SDG&E explained the reason for the low number of formal reports of safety concerns:

> "[T]he majority of safety and ethical concerns are raised directly with supervisors and addressed expeditiously."[27]

Considering all the ways in which employees can raise safety concerns internally, one would expect that calling a hotline would occur rarely. As SoCalGas and SDG&E pointed out in their May 2012 report to the Commission, employees can raise safety concerns in any of the following venues: (i) the Ethics Helpline; (ii) safety meetings; (iii) labor/management safety committees; (iv) employee town halls; (v) to safety services staff; (vi) to the Senior Pipeline Safety Advisor; (vii) through the companies' Injury and Illness Prevention Plan; (viii) to Corporate Compliance; (ix) to the Chief Ethics Officers; or (x) to their union.[28] With ten different internal options in addition to direct reports to a supervisor or local management, the only logical assumption on low internal formal reports would be that most employee concerns regarding safety are addressed through less formal means.

The proposed revision to GO 112-E ignores this likely reason for the low number of formalized safety complaints and instead adopts the unfounded assumption that it must be due to a fear of retaliation. There are a number of reasons why there is simply no basis to reach such a conclusion.

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25 SoCalGas/SDG&E Response, dated May 11, 2012, at 11. This same statement was discussed during the workshop and no one presented any counter evidence that this assumption was anything other than correct.

26 *Id.* at 12.

27 *Id.* at 11.

28 SoCalGas/SDG&E Response, dated May 11, 2012, at 4-9.

First, the assumption that a low number of internal safety reports is caused by a fear of retaliation ignores the obvious— there are not a large number of safety issues and the safety issues that arise are efficiently resolved by employees and in-line management.

The low number of formalized reports of safety concerns is more likely the result of SoCalGas and SDG&E employees and management addressing concerns when they arise and employees are satisfied with their resolution. After all, this is the model – the culture – at SoCalGas and SDG&E: If possible, all problems should be addressed at the local level. Any assumption failing to consider this ethos of addressing problems locally first, is unsound.

Second, employees may not be aware of the existence of the Commission's hotline. Other agencies with hotlines, such as the California Attorney General and the California Labor Commissioner, require a poster containing their contact information be posted in company facilities. That is why SoCalGas and SDG&E proposed at the workshop that such notices be posted for the Commission's hotline. It is also why SoCalGas and SDG&E support the proposed Section 301 to General Order 112 that requires natural gas corporations to notify their employees of the existence of the Commission's hotline.

Third, the assumption that anonymous reporters must fear retaliation is baseless. Regardless of what is being reported, when given the choice to remain anonymous, people often do. People choose to be anonymous under different circumstances for different reasons. For many, it may be easier to be fully honest when anonymous, especially when discussing a topic that is personal or difficult. On the flip side, studies also show that people are more likely to engage in dishonest acts when their identity is disguised.[29] We have learned that not all hotline calls are made in good faith; sometimes employees simply want to get another employee into trouble by making a false accusation and, to do so, the caller remains anonymous. Studies tend to find higher response rates when reporting anonymously is an option.[30]

The reasons people choose to report anonymously are likely individual and varied. The more important point is that having anonymity as an option in internal (and external) reporting

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[29] One psychology study designed to understand the effect of anonymity with human behavior looked at children trick-or-treating and the prevalence of children taking more candy when masked than when not. The study concluded that it is simply easier to act in a bad or unsocial way when one feels anonymous. Diener, E., Fraser, S., Beaman, A., & Kelem, R. (1976). "Effects of deindividuation variables on stealing among Halloween trick-or-treaters. Journal of Personality and Social Psychology," 33, 178-183.

[30] Christopher H. Warner, MD; et al. (2011). "Importance of Anonymity to Encourage Honest Reporting in Mental Health Screening After Combat Deployment." Archives of General Psychiatry, 2011; 68(10):1065-1071.

processes likely yields additional and better results. That is why every caller who calls into SoCalGas and SDG&E's employee hotline is given the option to remain anonymous at the start of the call.[31] The Workshop Report however, draws a negative inference from this fact – one not supported by science or study – that employees took advantage of the option to remain anonymous out of fear.

The Commission should not rely upon these unfounded assumptions as the sole grounds for adopting wide-sweeping regulatory changes, the ramifications of which, as discussed below, have yet to be discussed or addressed.

III. CONCLUSION

For the reasons set forth above, SoCalGas and SDG&E request that the Commission adopt the Proposed Decision, with SoCalGas and SDG&E's requested clarifications to the CSPD Report on the SB 705 Safety plans and proposed modification to section 302.1 of Staff's proposed GO 112-E whistleblower protection provisions.

Respectfully submitted,

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December 10, 2012

[31] On average, SoCalGas and SDG&E receive about 130 to 150 employee hotline calls annually, ranging from simple complaints about a coworker's strong perfume to an allegation of theft. In approximately half of all calls, the employee declines to provide his or her name and we label it as "anonymous." Every caller is provided this option at the start of the call.

Appendix A
Proposed Revisions to Conclusions of Law and Ordering Paragraphs

Proposed Conclusions of Law

11. The following should be added to GO 112-E to ensure that employees who report safety violates do not suffer from employer retaliation:

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 of 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 All utilities regulated by the California Public Utilities Commission are prohibited from retaliating against any employee who makes a good faith report of unsafe conditions to the Commission and the Commission shall refer all claims of retaliation in violation of this rule to the California Attorney General's whistleblower hotline for investigation and enforcement. The

Commission may impose penalties for substantiated safety violations. ~~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.~~

Ordering Paragraphs

4. The following section is added to General Order 112-E:

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 of 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.

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