

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

Order Instituting Investigation on the
Commission's Own Motion into the Operations
and Practices of Pacific Gas and Electric
Company with Respect to Facilities Records for
its Natural Gas Transmission System Pipelines.

I.11-02-016
(Filed February 24, 2011)

**PACIFIC GAS AND ELECTRIC COMPANY'S
MOTION FOR RECONSIDERATION OF RULING
ADMITTING DATA RESPONSES AND CIVIL
DEPOSITION TRANSCRIPTS INTO EVIDENCE, OR IN
THE ALTERNATIVE, FOR LEAVE TO SUBMIT
RESPONSIVE TESTIMONY**

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Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, Pacific Gas and Electric Company (PG&E) moves for reconsideration of Administrative Law Judge (ALJ) Yip-Kikugawa's September 18, 2012 and September 19, 2012 rulings admitting into evidence all of PG&E's data responses (775 in total) and about 5,300 pages of deposition transcripts (with thousands of pages of exhibits) from the pending San Bruno civil litigation. R.T. 1623-28, 1915. In the alternative, the ALJ should give PG&E the opportunity to submit testimony to respond to any party's citation in briefs to any of the deposition testimony or exhibits or any data request response that has not been previously cited in any written or oral testimony. This responsive testimony would be submitted within 45 days of the citation to such material.

This motion is made on the grounds that the bulk admission of data responses, deposition transcripts and exhibits after the conclusion of CPSD's presentation of its case, and without any opportunity for PG&E to confront or respond to CPSD's assertions based on them violates the due process requirements applicable to this enforcement proceeding.¹ See Cal. Const. art. I, § 7 (a). As discussed below, this violation can only be cured by the ALJ reconsidering her prior

¹ Pursuant to *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964), PG&E expressly reserves its federal constitutional and any other federal claims and reserves its right to litigate such claims in federal court following any decision by the Commission, if necessary.

rulings and denying admission or, alternatively, providing PG&E with a fair opportunity to respond.

I. BACKGROUND

This is a serious proceeding with potentially serious consequences for PG&E. CPSD is alleging 35 violations, some of which go back 80 years. Ex. CPSD-3 at 10-14; Ex. CPSD-7 at 2-5. In the Order Instituting Investigation (OII) issued on February 24, 2011, the Commission put PG&E on notice that if violations are found to have occurred, the Commission may impose substantial penalties. OII at 11-12.

Following issuance of the OII, the Commission's Legal Division and CPSD issued 775 data requests covering myriad topics within the broad scope of the investigation. Declaration of Jonathan Seager at ¶ 4 ("Seager Decl.") (Exhibit A hereto). Many of the data requests sought information spanning decades. *Id.* PG&E's responses to these requests total over 46,000 individual documents and contain approximately 179 gigabytes of information. *Id.* at ¶ 5.

In total, CPSD's six original, supplemental and rebuttal reports cite to 140 of PG&E's 775 data responses as purported support for the violations alleged. Seager Decl. at ¶ 6. CPSD has not cited any of the 17 deposition transcripts from the pending civil litigation. To date, CPSD used one additional data request response in cross-examination of PG&E witnesses. *See* Ex. CPSD-43.

Close to the end of the scheduled evidentiary hearings, on September 18, 2012, CPSD sought to enter into evidence the entirety of PG&E's 775 data responses. R.T. 1571-75. Staff asserted that its prior reports and testimony in the matter had relied on the "totality" of PG&E's responses. Addressing the question why CPSD's reports and testimony cited to only selected responses (141 out of 775), CPSD stated: "We picked and selected the things that we thought were most critical at the time to place into evidence to make our points. But that does not mean that we didn't consider the other data responses as evidence, as we did." CPSD stated further that it had "neither the time or inclination" to refer to all of PG&E's responses. R.T. 1572. Even as late as September 18th, CPSD refused to commit to decide which of the hundreds of additional

data responses it may seek to marshal as evidence in support of the violations it alleges. In the words of CPSD counsel Robert Cagen, “[W]e can’t pick and select now the ones that among the hundreds of findings of fact that we’re going to seek to point out to you now by data responses.” R.T. 1573-74.

PG&E objected. PG&E pointed out that allowing CPSD to enter into evidence and then cite for the first time in closing briefs several hundred data responses without affording PG&E the opportunity to present testimony in response would violate PG&E’s constitutional right to due process. R.T. 1575-81, 1623-28. CPSD responded that it did not understand the basis for PG&E’s due process concerns. Summing up his view of the protections of law applicable in this proceeding, Mr. Cagen stated: “There’s no due process here.” R.T. 1579.

PG&E requested that it be given the opportunity to submit testimony responding to this new material. The ALJ concluded the discussion of that request with the following statement:

ALJ YIP-KIKUGAWA: I will . . . take into consideration your request. At this point I think it isn't necessary. I may change my mind within the next few days. We have at least until October 2nd, I believe you were saying, for me to make a final decision. But I will consider it, and I will mull it over, okay?

R.T. 1627.

The following day, at CPSD’s request, the ALJ admitted into evidence 17 deposition transcripts from the San Mateo County Superior Court civil proceeding *PG&E “San Bruno Fire” Cases*, totaling approximately 5,300 pages of testimony and thousands of additional pages of exhibits. R.T. 1914. PG&E again objected and those objections were overruled. R.T. 1915.

On September 20, 2012, PG&E renewed its objections to the admission of the data responses and the deposition transcripts in an email to ALJ Yip-Kikugawa, with a copy to all parties. *See Exhibit B (attached)*. The email requested that the ALJ reconsider her prior rulings or, in the alternative, to give PG&E an opportunity to respond to this new material. The ALJ has not responded to PG&E’s September 20, 2012 email or otherwise ruled on PG&E’s request for a fair and full opportunity to respond to any newly-introduced evidence on which any party might

rely in its post-hearing briefing. Evidentiary hearings in this matter were largely completed (with only the cross-examination of a small number of PG&E witnesses remaining) by October 5, 2012, when the hearings were suspended to allow the parties to conduct settlement negotiations.

II. ARGUMENT

A. Commission Enforcement Proceedings Must Comport with the Due Process Requirements of the California Constitution.

The Commission has broad authority over those entities and activities that fall within its regulatory scope. Nonetheless, the Commission and the proceedings conducted under its authority are bound by the protections afforded by the California Constitution. *See Sable Communications of California Inc. v. Pacific Telephone and Telegraph Co.*, 890 F.2d 184, 189 n.9 (9th Cir. 1989) (“The CPUC was created by the California Constitution Art. XII, § 22, and California's police power over public utilities has been vested in it. The CPUC derives all its powers from the state constitution and legislature, and the state Supreme Court has consistently held that CPUC regulations, as state action, must comply with the requirements of the federal constitution.”) (internal citations omitted). The California Supreme Court has invalidated Commission actions that violate due process requirements. *See, e.g., Sokol v. Public Utilities Commission*, 65 Cal. 2d 247, 256 (1966) (annulling a CPUC decision that required telephone utilities to discontinue service to subscribers alleged to be using the service for an unlawful purpose without providing notice or opportunity to challenge the allegation).

The California Constitution prohibits the State from depriving a person of “life, liberty, or property without due process of law.” Cal. Const. art. I, § 7(a). This limitation on governmental action includes procedural protections that benefit the accused and ensure public confidence in the proceeding. Due process protections “are the best insurance for the government itself against those blunders which leave lasting stains on a system of justice.” *Sokol, supra*, 65 Cal. 2d at 256, citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224-225 (1953).

B. Due Process Requires that PG&E Be Given the Opportunity to Confront CPSD's Evidence.

In enforcement proceedings before the Commission, due process requires that before the State may deprive the Company of property it must give PG&E meaningful notice and an effective and fair opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313-14 (1950). The due process requirement is satisfied where a proceeding provides “adequate notice to a party affected and an opportunity to be heard before a valid order can be made.” *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 632 (1954). The “classic statement” of the requirements of due process provides: “All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.” *Mass. Bonding & Ins. Co. v. Indus. Accident Comm'n*, 74 Cal. App. 2d 911, 914 (1946) (internal citation omitted). Withholding evidence and argument until final briefing does not comport with these notions of fair play. *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434, 1446-48 (1991) (“Fair procedure would require disclosure of evidence forming the basis of the charges” in administrative proceeding to revoke physician’s hospital privileges).

CPSD made its request to introduce into evidence hundreds of data requests and thousands of pages of deposition transcripts near the end of evidentiary hearings. By that time, PG&E had already submitted its prepared testimony refuting the purported evidentiary support set forth in CPSD’s direct testimony, and had cross-examined CPSD’s witnesses. Allowing CPSD to make use of voluminous, newly-introduced evidence without any opportunity for PG&E to respond would deprive PG&E of its right to due process.

Prior decisions by the Commission and its ALJs have recognized that the belated introduction of material into the record deprives parties of the opportunity to respond to, refute, contextualize or test the reliability of the evidence. *See Investigation into the Natural Gas Procurement Practices of the Southwest Gas Company*, 2002 Cal. P.U.C. LEXIS 534 at *54-57

(“we agree that introducing this evidence during the reply brief fails to provide the County and ORA an opportunity to either respond or test the reliability or validity of this evidence. Thus, it would be inherently unfair to accept this additional evidence without reopening the record”); *see also In re Application of San Diego Gas & Electric Company*, A.01-03-036 (Administrative Law Judge’s May 2, 2002 Ruling Addressing Motion to Strike) (“by presenting this testimony as rebuttal, rather than opening testimony, other parties are severely prejudiced in their opportunity to respond to SDG&E’s showing. In my judgment, if certain of the testimony is not stricken, due process requires that parties be provided with an opportunity to respond to this testimony.”).

CPSD’s response is to say that PG&E has no need to test the reliability and validity of its own data responses. This argument fails for two reasons. First, it misapprehends the due process concern. It is not that PG&E needs to rebut its own data responses, but that it has a right to present evidence and cross-examine witnesses about the inferences and conclusions that may be drawn or argued from the data responses. This is the point Mr. Malkin made when in the course of the hearing he provided the following example: “It’s like a murder case where after the case has been tried the prosecution introduces testimony that the defendant’s fingerprints were found on the gun and the defendant is given no opportunity to explain, ‘yes, I owned that gun and I sold it to somebody else.’” R.T. 1625-26. It is the need to test both the reliability and validity of the evidence, and the inferences and conclusions that might be drawn from the evidence that animates procedural due process concerns.

Second, the due process issue raised by the bulk admission of data responses and depositions is not simply that the reliability of the evidence will go untested. It is also that PG&E has a constitutional right to be advised what issues are to be addressed so that it can present appropriate responsive evidence. *See San Diego Watercrafts, Inc. v. Wells Fargo Bank*, 102 Cal. App. 4th 308, 316 (2002) (ruling that trial court violated party’s due process rights by considering newly-submitted evidence in summary judgment briefing because “due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail.”). CPSD’s justification for seeking to admit all of the

data responses and deposition transcripts highlights this concern. CPSD explained that it picked what it thought was the best evidence to support its claims, but then asserted that even evidence that it did not include is important for the Commission's consideration. Its justification for not having brought this evidence forward – CPSD had neither the time nor inclination to refer to all of PG&E's responses – values CPSD's convenience above basic due process considerations.²

Whether the data responses CPSD seeks to admit are PG&E's or those of a third party is of little consequence. PG&E must be afforded an opportunity to know what evidence is being marshaled against it, and in support of what claims, so that it can submit responsive testimony and, if appropriate, cross-examine its accusers. CPSD cannot, as it proposes to do, wait until post-hearing briefing to decide how to present its case.

C. The Record Here Demonstrates the Peril of Allowing CPSD to Engage in Unchecked Interpretation of PG&E's Data Responses.

In the course of argument on its request, CPSD stated it would make fair use of PG&E's data responses. It contended that has done and will continue to do

as good a job as we're capable of doing of keeping things in context and not taking isolated statements of PG&E and reforming them in whatever image we think might help our case. We don't do that, and I have no reason to believe that you won't be capable of understanding whether something is fairly asserted or not from the data responses.

R.T. 1626-27.

The constitutional right to due process, however, requires more than one party's pledge to present evidence fairly. As discussed, due process requires that the party against whom evidence is asserted have the opportunity to confront and respond to that evidence. Despite CPSD's assurance, the record demonstrates the hazards of allowing CPSD to draw inferences and conclusions from evidence without a proper adversarial testing through testimony and cross-examination. On numerous occasions in this proceeding, CPSD has erroneously cited to PG&E

² CPSD should not be heard to complain about a lack of resources. PG&E is paying for its consultants and experts, and has not attempted to limit CPSD's spending in any way.

documents or data responses as purported evidence that PG&E has violated a regulatory requirement, and PG&E has needed responsive testimony and cross-examination to correct the record. Among the many instances, four are discussed below.

1. CPSD erroneously relied on PG&E records to claim that pipe originally installed in 1948 was reconditioned and reinstalled in Segment 180.

In rebuttal testimony submitted two weeks prior to the start of evidentiary hearings, CPSD consultant Margaret Felts for the first time asserted that a 90-foot section of pipeline originally installed across the San Bruno Creek canyon in 1948 was likely reused without inspection or reconditioning during the 1956 construction of Segment 180. Ex. CPSD-4 at 3-4. In support of this new claim, Ms. Felts identified records that were made available to CPSD in response to a data request seeking access to PG&E's ECTS system.

As the evidence revealed, however, this section of pipe was in fact abandoned during the 1956 relocation project and remains (out of service) many feet underground. During a pipeline inspection mandated and overseen by the CPSD, PG&E inserted a camera-equipped device into the abandoned line, capturing footage and other data confirming that the pipe was still in the place where it was installed in 1948. On cross-examination, Ms. Felts admitted that her conclusion was "only a guess." R.T. 557. PG&E confronted Ms. Felts with documentation of the 2011 camera inspection (Ex. PG&E-55) showing both the 1956 relocation pipe and the original, abandoned 1948 pipe. R.T. 564-72. Later, PG&E witness David Harrison discussed the significance of Ex. PG&E-55, explaining that the camera inspection proved that the 90-foot span Ms. Felts claimed was possibly removed and reused in the construction of Segment 180 was, in truth, abandoned in place and buried when the San Bruno Creek was filled in 1956. Joint Records/San Bruno OII Hearing Transcript (J.T.) 219-32. Absent these opportunities for PG&E to explain and contextualize the evidence, CPSD's flawed and mistaken allegations would have gone uncontested into the record as the purported basis for the Commission to find a violation of law.

2. CPSD misconstrued a PG&E mapping standard to support its allegation that PG&E intentionally destroyed records showing the location of reconditioned or salvaged pipe.

In her March 16, 2012 Revised Report and Testimony, Ms. Felts claimed that PG&E made “what appears to be an intentional effort to eliminate records that show the use of salvaged pipe.” Ex. CPSD-2 at 45. Ms. Felts based this claim on a superseded standard dating from the 1970s that addressed the creation and maintenance of gas distribution plats, which PG&E provided in response to a document request in the February 24, 2011 OII. Ex. PG&E-61 at 3-34. Ms. Felts asserted that one sentence in this document (which reads in its entirety: “Salvaged and abandoned mains. To be removed from plat sheets”) supported her conclusion that PG&E intentionally eliminated records of salvaged pipe. One can easily imagine CPSD citing in its post-hearing briefing to a statement like this to support an allegation that PG&E purposefully engaged in wrongful conduct.

Only through testimony and cross-examination was PG&E able to show that the conclusion Ms. Felts drew from this one sentence was baseless. Ms. Felts acknowledged on cross-examination that that she had not reviewed earlier versions of this standard and could not identify an earlier drawing of PG&E’s system that identified abandoned or salvaged pipes. R.T. 580-81. Ms. Felts’ inability to substantiate her claims is unsurprising, because this allegation is based on a misreading of PG&E’s standard. As PG&E explained in its June 26, 2012 testimony, this standard was created to instruct mappers to remove abandoned gas mains from plats in order to avoid confusion. Ex. PG&E-61 at 3-34. Again, had PG&E been denied the opportunity to respond to CPSD’s erroneous allegations they would have entered the record as uncontested bases for a purported violation of law.

3. CPSD presented an incomplete record in support of its allegation that PG&E failed to maintain an updated Operations & Maintenance Instruction manual at the Milpitas Terminal.

Ms. Felts claimed that PG&E failed to keep an updated Operations and Maintenance Instruction Manual (“O&MI”) at the Milpitas Terminal and asserted that this violation may have been in existence since 1991. Ex. CPSD-2 at 8. Ms. Felts cited a PG&E data response that

addressed the presence of O&MI manuals at its gas facilities for support of this allegation. *Id.*, citing PG&E Response to Legal Division Request 1, Question 1b, Supplement 02. Ms. Felts included in her report the following quotation from this data response:

PG&E confirmed that each of these facilities contains a hard copy version of the Operating and Maintenance Instructions applicable to that station, although not all 11 contained the most recent revision. It is not possible to ascertain whether the version contained at a station as of July/August 2011 was the exact version that existed on September 9, 2010, and in several instances new revisions of Operating and Maintenance Instructions have been issued since that time. PG&E personnel who operate and maintain unmanned major facilities have access to the Company intranet, where the latest version of the relevant policies and procedures exist.

Id.

Cross-examination revealed that, in the absence of other proof to the contrary, Ms. Felts simply assumed that PG&E never updated the O&MI manual at the Milpitas Terminal between 1991 and 2011:

Mr. Malkin: So it was PG&E's inability sometime in 2011 to state with complete certainty what had been present in Milpitas in September 2010 that led you to conclude that what was present in Milpitas on that date was a 1991 manual. Have I got that straight?

Ms. Felts: Well, you gave me a list. PG&E gave me a list that said that there is one date in 1991 in the inventory on the shelf when PG&E looked after the incident and inventoried the items there. So I know that this manual was there. What I don't know is that there was any manual dated between 1991 and 2011 present there.

Mr. Malkin: Okay. Then under the methodology that you applied, not knowing you assumed a violation; is that right?

Ms. Felts: Yes.

R.T. 293-94.

Ms. Felts maintained this assumption even when presented with a PG&E data response showing at least five revisions to the original 1991 version of the O&MI manual. PG&E

presented Ms. Felts with a PG&E Data Response (Ex. PG&E-30), containing five editions of the Milpitas Terminal manual, including revisions made in 1998 (Rev. 2), 1999 (Rev. 3), 2004 (Rev. 4), 2009 (Rev. 6), and 2011 (Rev. 7). R.T. 294-99. Without the opportunity to confront Ms. Felts' testimony, the record would reflect only her unfounded assumption.

4. CPSD misconstrued the Milpitas Terminal by-pass system and Gas Control SCADA diagram as related to the events of September 9, 2010.

Ms. Felts asserted that the Supervisory Control and Data Acquisition (SCADA) diagram of Milpitas Terminal lacked key information that could have helped Gas System Operators respond to the unintended pressure increase on September 9, 2010. Ms. Felts stated, "On September 9, 2010 the diagram at the Control Room was apparently missing a bypass line outside of the Milpitas Terminal fence line. This appears to be a significant inaccuracy in the diagram because, during the emergency, PG&E personnel were attempting to control high-pressure gas that they thought might be by-passing the Terminal." Ex. CPSD-2 at 9. Based on Ms. Felts' testimony, CPSD alleges a violation of Public Utilities Code Section 451. Ex. CPSD-15 (Violation 7).³

As PG&E demonstrated in its responsive testimony, Ms. Felts confused an alternate Milpitas Terminal by-pass system that is not used in daily operations, was not in use on September 9, 2010, does not have SCADA monitoring or remote control capability (i.e., it has to be operated manually in the field, not remotely by Gas Control), and is located across the highway from Milpitas Terminal, with the in-station by-pass pipeline Gas System Operators can remotely monitor and control and that was in fact depicted on the Milpitas Terminal SCADA diagram on September 9, 2010. See Ex. PG&E-61 at 4-20 to 4-22. Ms. Felts based her assertion on her misunderstanding of a PG&E data response and the Milpitas Terminal operating and SCADA diagrams PG&E provided with it. See Ex. CPSD-2 at 9 nn.39, 41 & 42, citing PG&E's Response to Legal Division Data Request 008-008 and attachments. If PG&E had not had the

³ Exhibit CPSD-15 is a revised table of violations claimed by Ms. Felts. The table of violations originally appeared in Exhibit CPSD-3, where Violation 7 is found on page 11.

opportunity to respond, Ms. Felts' erroneous assertion would have been uncontested and relied on by CPSD for an alleged violation subjecting PG&E to potential penalties.

III. CONCLUSION

The wholesale admission of all data request responses and 5,300 pages of deposition testimony and associated exhibits long after PG&E submitted its testimony in this proceeding denies PG&E of notice and the opportunity to respond in violation of its due process rights. It also denies the Commission the opportunity to have a fair record on which to make a decision. The ALJ should reconsider her September 18 and September 19 rulings admitting this material into evidence and, instead, deny admission. In the alternative, the ALJ should enter an order giving PG&E 45 days after the submission of a brief citing any of these materials to submit responsive testimony.

Respectfully submitted,

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