

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 2, 2011)

**RESPONSE OF THE CONSUMER PROTECTION AND SAFETY DIVISION TO
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**

Pursuant to Rule 11.1 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, the Consumer Protection and Safety Division ("CPSD") files this Response to the Pacific Gas and Electric Company' ("PG&E") Motion for Reconsideration of Ruling Admitting Data Responses and Civil Deposition Transcripts into Evidence, or in the Alternative, for Leave to Submit Responsive Testimony. ("Motion") CPSD respectfully requests that the Administrative Law Judge ("ALJ") deny PG&E's motion and affirm the ruling of September 18, 2012 allowing PG&E's data responses into the evidentiary record.

I. INTRODUCTION

On September 18, 2012 the ALJ ruled to allow PG&E's Data Responses into evidence.¹ In the hearing-room discussion leading to that ruling, PG&E argued that such a ruling would violate the company's due process rights.² As PG&E notes in its pending motion, it reminded the ALJ on September 20, via email, of its argument that due process

¹ 09-18-12 Tr. 1622: 4-6; 1627: 4-11.

² For example, see 09-18-12 Tr. 1576: 12-16; 1581: 7-16; 1627: 25-1628: 3.

rights required giving PG&E an opportunity to respond to the data responses. To date, the ALJ has not amended her ruling or granted PG&E the opportunity to respond to its own data responses.³ PG&E's pending motion asks for reconsideration of the September 18 ruling along with a new form of procedural accommodation.

II. PG&E'S EFFORT TO OBTAIN UNPRECEDENTED PROCEDURAL PROTECTION, UNDER THE GUISE OF PROTECTING ITS DUE PROCESS RIGHTS, MUST BE REJECTED

When the admission of the data responses, including the deposition transcripts, was debated before the ALJ in the hearing room on September 18, 2012, PG&E opposed their admission and, in the alternative, appeared to be asking for a different form of relief than what it now seeks. In that debate and also in its follow-up email of September 20, 2012 PG&E asked for the opportunity "to submit testimony responding to this new material."⁴ In its current motion, PG&E asks the ALJ to reconsider her ruling of September 18 and also asks, in the alternative, for additional relief characterized as:

"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."⁵

Thus, while its previous argument was that if the PG&E data responses were admitted into evidence, due process required that PG&E have an opportunity to respond to them, PG&E now appears to argue that due process requires allowing PG&E to submit additional testimony if any exhibit or data response is cited for the first time in a brief. Thus, PG&E's motion argues for an extreme and unprecedented limitation on the parties' opportunity to cite to the record in their briefs or, in the alternative, it seeks to reopen the

³ PG&E Motion, Exhibit B.

⁴ See R.T. 1623 and Exhibit B to PG&E's December 17, 2012 Motion.

⁵ Motion at page 1. Also, see Motion at page 12.

proceeding to permit additional PG&E testimony if a party should cite to an exhibit for the first time in a brief.

As noted above, PG&E's current motion expands the requested relief to include "any of the deposition testimony or exhibits or any data request response that has not been previously cited in any written or oral testimony." Thus, PG&E's procedural request does not appear to be limited to the material that was at issue on September 18. For example, it appears that a cross-examination exhibit that had not been cited in testimony could not be cited in briefs unless PG&E was then allowed additional testimony.

PG&E also appears to seek an additional level of assurance regarding what parties will argue in their briefs. PG&E's motion states:

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.⁶

It is not clear what procedural approach PG&E may be proposing in the above assertion. However, without citing any such requirement in the Commission's Rules of Practice and Procedure, it appears that PG&E wants to require advance notice of citations to the record that any party may ultimately include in briefs, thereby creating a disincentive for parties to cite freely to exhibits and data responses in this proceeding.⁷ Moreover, if PG&E did follow briefing with additional testimony, it is unclear whether PG&E would propose that other parties provide another round of responsive testimony, hearings, and briefs in response to its additional testimony. Of course, giving PG&E the last round of testimony would counter the requirement that CPSD, as staff, open and

⁶ PG&E Motion at p. 7.

⁷ Commission Rule of Practice and Procedure Article 13, Section 13.11 provides the requirements for briefs, and does not require the sort of disclosure or additional testimony PG&E proposes.

close the presentation in this investigation,⁸ and the notion that CPSD should issue the last round of testimony to meet its burden to of proving the alleged violations. The accommodation PG&E suggests would, be an extreme and undesirable departure from accepted Commission practice and procedure.

The type of disclosure that PG&E seems to want has not been provided by PG&E or any other party in this proceeding and is not a requirement of the Commission's Rules of Practice and Procedure. As is typical in Commission practice, PG&E and other parties in this proceeding have identified numerous hearing exhibits without disclosing whether or how they may elect to refer to them in briefing. PG&E cites to no comparable requirement for a party to inform other parties what citations to evidence it may include in its briefing and CPSD is aware of none.

Although the nature of the relief it seeks has taken a different form in its motion, PG&E continues to argue that due process requires granting its request. Contrary to PG&E's arguments for reconsideration of the September ruling, there is no due process problem with admitting PG&E's own data responses into evidence. Further, PG&E provides no precedent for the extreme procedural accommodations it seeks.

III. THERE IS NO DUE PROCESS PROBLEM WITH ADMITTING PG&E'S OWN DATA RESPONSES INTO EVIDENCE.

Contrary to PG&E's assertions, there is no due process problem with the ALJ ruling admitting PG&E's own data responses into evidence during the hearing in this proceeding.

A. The authority PG&E cites does not support its claim that the September ruling violates its due process rights

PG&E claims that admitting its data responses "without any opportunity for PG&E to respond would deprive PG&E of its right to due process."² In its motion PG&E refers to "the belated introduction of material into the record" and challenges the

⁸ Commission Rule of Practice and Procedure Article 13, Section 13.4.

² PG&E Motion, Page 5.

admission of its data responses “near the end of evidentiary hearings” after PG&E had submitted its prepared testimony, and cross-examined CPSD’s witnesses.¹⁰ However, it is not belated to admit exhibits during evidentiary hearings by which time, in most Commission proceedings, parties have already submitted their prepared testimony. In Commission proceedings, exhibits are almost always introduced and admitted to the evidentiary record during hearings. Further, as discussed above, in this proceeding, PG&E marked for identification multiple hearing exhibits, which it had not referenced in testimony.

PG&E cites to certain Commission proceedings in which the Commission or an ALJ did not allow a utility’s arguments or evidence that other parties had disputed.¹¹ In the only cited Commission decision issued in an investigation, the Commission did not allow a utility to reference new evidence during reply briefs.¹² In contrast to the issues considered in those proceedings, here the disputed material is being admitted during hearing. A decision about citing to material that is not in the evidentiary record has no bearing on the issues being considered here.

PG&E also cites an ALJ ruling (not a Commission decision) in an application proceeding where the applicant had changed opening testimony through rebuttal testimony.¹³ That ALJ ruling offers no guidance in this investigation proceeding where evidence is being admitted into the record during hearings. There is no issue here of an applicant changing its position in rebuttal testimony. However, by citing an ALJ ruling as

¹⁰ PG&E Motion, Page 5.

¹¹ See for example, PG&E Motion at Page 6, 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”, p. 2; See also, PG&E Motion at Pages 5 and 6, reference to Investigation into the Natural Gas Procurement Practices of Southwest Gas Company, 2002 Cal. P.U.C. LEXIS 534 at pp. 4 and 54-57.

¹² Id.

¹³ See for example, PG&E Motion at Page 6, “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), pp 2-4.

it has,¹⁴ PG&E illustrates that an ALJ can act to protect parties from unfairness if any should occur.

Moreover, in its motion PG&E cites authority for the “classic statement” of due process requirements.¹⁵ In fact, the cited case also provides that, “The reasonable opportunity to meet and rebut the evidence *produced by his opponent* is one of the essentials of these minimal requirements.”¹⁶ Thus, introduction of data responses that were produced by PG&E, not by an opponent, is not the situation addressed in the authority PG&E cites.

As discussed above, there is no basis for PG&E’s claim that it must receive extraordinary procedural accommodation in order to protect it from a due process violation. The September ALJ ruling and accepted Commission procedures are consistent with due process requirements. PG&E’s request that it be given an opportunity to submit additional testimony if any exhibit is cited for the first time in a brief, or that it should be given advanced notice of anticipated brief citations, is a complete departure from Commission practice and procedure and must be denied.

B. Contrary to PG&E’s assertion, it has been apprised of the violations that CPSD alleges

PG&E claims that it has a constitutional right to be advised what issues are to be addressed so that it can present appropriate responsive evidence.¹⁷ In support, PG&E cites a case in which a party moved for summary judgment and the court concluded in that drastic circumstance, a party must be fully advised of the issues to be addressed and given adequate notice of what facts it must rebut in order to prevail.¹⁸ Of course, PG&E

¹⁴ See for example, PG&E Motion at Pages 5 and 6, reference to Investigation into the Natural Gas Procurement Practices of Southwest Gas Company, 2002 Cal. P.U.C. LEXIS 534 at pp. 4 and 54-57

¹⁵ PG&E Motion, December 17, 2012, Page 5, citing Mass. Bonding & Ins. Co. v. Indus. Accident Comm’n, 74 Cal. App. 2d 911, 914 (1946).

¹⁶ Id. at 913. (Internal citation omitted.)

¹⁷ PG&E Motion, December 17, 2012, Page 6.

¹⁸ PG&E Motion, Page 6, citing San Diego Watercrafts, Inc. v. Wells Fargo Bank, 102 Cal. App. 4th 308, 316 (2002).

is not facing a summary judgment motion here, so the authority it cites is inapposite to the circumstances. Even if this were the applicable standard, contrary to PG&E's claim, CPSD has already provided a list of the violations PG&E faces.¹⁹ ²⁰ Moreover, PG&E has cross-examined CPSD's witnesses about these violations. There is no due process violation here.

C. Granting PG&E's motion might provide an incentive for PG&E and other utilities to provide tardy and inaccurate data responses.

PG&E claims, without citing authority, it has a right to present evidence and cross-examine witnesses about any inferences or conclusions that may be drawn or argued from PG&E's data responses.²¹ However, applying this principle would require endless disclosures and additional testimony to address the content of tardy data responses such as those PG&E has provided in this proceeding.

To illustrate this point, PG&E first told CPSD on August 1, 2012 that it "does not maintain all errors in information listed in GIS . . . in a way that . . . can be readily extracted."²² Then, long after CPSD served rebuttal testimony,²³ PG&E supplemented this data response stating "Changes made to certain data elements in the current GIS database are automatically captured in an audit change log. The changes captured may reflect . . . data discrepancy corrections."²⁴ According to PG&E, this audit change log

¹⁹ See "Records Management within the Gas Transmission Division of Pacific Gas and Electric Company prior to the Natural Gas Transmission Pipeline rupture and Fire, San Bruno, California September 9, 2010. Supplement to March 12th Report, Exhibit 2, PG&E Violations." March 30, 2012. See also "SUPPLEMENTAL to March 16th Report, Exhibit 1, PG&E Violations, Report and Testimony of Margaret Felts." March 30, 2012.

²⁰ These violations were presented based upon information PG&E had presented at the time and should not preclude CPSD from introducing violations based upon information that PG&E has provided after CPSD has produced its testimony.

²¹ PG&E Motion, December 17, 2012, Page 6.

²² PG&E Data Response to CPSD and TURN Joint Data Request 001-02, Sent August 1, 2012.

²³ The August 7th due date for CPSD rebuttal testimony was provided in "Administrative Law Judge's Ruling Granting Motion of the Consumer Protection to File Rebuttal Testimony", May 30, 2012, Page 2.

²⁴ PG&E Supplemental Data Response Page 2, October 3, 2012.

showed changes made dating as far back as 2010.²⁵ Now, seemingly, if PG&E's proposed procedure were adopted, PG&E would have the ALJ require CPSD to provide its response to the log and possibly to anticipate and disclose whether it would cite any aspect of the late-produced log in its brief. Also, for any additional information PG&E might provide after the conclusion of hearings, PG&E would have CPSD prepare a response before the new information could come into evidence.

In short, PG&E controls the information it provides to CPSD and the timing of each disclosure. Adopting PG&E's unwieldy and inappropriate procedural proposal could allow PG&E to impose time-consuming and unnecessary procedural steps related to delayed PG&E data responses.

D. PG&E has a meaningful opportunity to be heard via its briefs

In its motion, PG&E attempts to characterize CPSD as erroneously drawing inferences about PG&E's documents or data responses to assert violations.²⁶ In support, PG&E identifies four items of evidence that CPSD received from PG&E during this investigation, claiming in each case it needed to explain the evidence CPSD has referenced, or confront or respond to CPSD about that evidence.²⁷ In fact, in each of these examples, PG&E has merely provided its interpretation of the evidence CPSD introduced with no evidence of its own to support that interpretation. Briefs will allow PG&E a meaningful opportunity to be heard about what it believes the evidence means, and to respond to other parties views about the evidence as well. These arguments alone, illustrate that contested interpretations of evidence can be addressed in writing and that briefs provide an adequate opportunity to be heard on the issues.

²⁵ PG&E Supplemental Response to TURN/CPSD Joint Data Request 001, Question 02, Dated October 3, 2012.

²⁶ PG&E Motion, December 17, 2012, Pages 7 and 8.

²⁷ PG&E Motion, December 17, 2012, Pages 8-12.

For the record, CPSD stands by its conclusions and views about what each of these four pieces of evidence mean and will use briefs to explain why each piece of evidence supports a violation.

IV. PG&E AND OTHER PARTIES HAVE INTRODUCED NUMEROUS HEARING EXHIBITS WITHOUT DISCLOSING REFERENCES THAT MIGHT SUBSEQUENTLY BE MADE.

As stated above, PG&E does not cite to any precedent or requirement that parties to Commission proceedings shall disclose which aspects of an exhibit they may refer to later in their briefs. If PG&E is proposing such a requirement, the request must be rejected. Such a procedure would be unduly burdensome and would serve to limit certain appropriate and important references that a party may recognize as it prepares its brief. PG&E has not advised the ALJ or the parties of every intended citation into the exhibits it has introduced. Such an exercise has never been a part of Commission practice and would not be a constructive addition to this proceeding.

V. CONCLUSION

For the reasons discussed above, admitting PG&E's data responses into evidence without providing any additional procedural accommodations to PG&E does not violate PG&E's right to due process.

Respectfully submitted,

/s/ DARRYL GRUEN

Darryl Gruen
Staff Counsel

Attorney for Consumer Protection and
Safety Division

California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-1973
Fax: (415) 703-2262
E-mail: djg@cpuc.ca.gov

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