

**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 to Determine Violations of Public Utilities Code Section 451, General Order 112, and Other Applicable Standards, Laws, Rules and Regulations in Connection with the San Bruno Explosion and Fire on September 9, 2010.

I.12-01-007
(Filed January 12, 2012)

**MOTION OF THE UTILITY REFORM NETWORK, THE CITY OF SAN BRUNO, AND
THE DIVISION OF RATEPAYER ADVOCATES TO EXCLUDE THE
LATE-PRESENTED HALL & ASSOCIATES CONCLUSIONS DOCUMENT**

I. INTRODUCTION AND SUMMARY

On January 14, 2013, during re-direct examination of Pacific Gas & Electric Company ("PG&E") witness Jane Yura, counsel for PG&E identified as Exhibit PG&E-43 a four-page, single-spaced document titled "Hall & Associates End of Year Assessment of PG&E Safety Program" (hereinafter "Hall Conclusions"). The document appears to reflect end of 2012 conclusions of consultants retained by PG&E related to steps undertaken by PG&E to improve its safety culture. PG&E introduced the document without notice to any of the other parties, none of whom had ever seen it before.

By this motion, The Utility Reform Network ("TURN"), the City of San Bruno, and the CPUC's Division of Ratepayer Advocates (collectively "Joint Parties") seek an order excluding the Hall Conclusions document from the record for the following reasons: (1) the document is

effectively supplemental testimony that PG&E introduced long after its opportunity to present testimony had passed; (2) the document is outside the scope of the cross examination that PG&E claimed had opened the door to such a late presentation of new evidence; and (3) the prejudice to the parties and the public interest far outweighs the minimal (if any) probative value of the document. By granting this motion, the Commission can avoid subjecting the Commission and the parties to the considerable distraction of additional discovery and additional evidentiary hearings, all for a late-presented array of unsupported conclusions to which the non-PG&E parties will be deprived of an opportunity to effectively respond.¹

II. THE HALL CONCLUSIONS DOCUMENT IS EFFECTIVELY LATE-SUBMITTED SUPPLEMENTAL TESTIMONY BY PG&E'S PAID CONSULTANTS THAT PG&E SHOULD NOT BE ALLOWED TO INTRODUCE INTO THE RECORD AT THE END OF EVIDENTIARY HEARINGS

Pursuant to the schedule in this proceeding, on June 26, 2012, PG&E served its prepared testimony. That testimony afforded PG&E an opportunity to respond to the allegations and testimony in the January 12, 2012 Investigation Report of the CPUC's Consumer Protection and Safety Division ("CPSD"), as well as the testimony submitted by intervenors TURN, the City and County of San Francisco, and the City of San Bruno. One of the allegations in the CPSD Investigation Report, echoing similar conclusions from the Commission's Independent Review Panel ("IRP") Report, was that PG&E's corporate culture was insufficiently focused on safety. In its June 26, 2012 prepared testimony, PG&E responded to that allegation, and many others. In particular, Chapter 13 of PG&E's testimony, sponsored by Jane Yura, is titled "Enhanced Focus on Public Safety and Operational Excellence." Although PG&E's June 26, 2012 testimony offered

¹ In light of the time sensitivity of the issue raised by this motion (the potential hearing date on Ex. PG&E-43 is scheduled for February 25, 2013), Joint Parties request that parties be directed to submit responses to this motion no later than Friday, February 8, 2013.

outside consultant testimony on many issues, PG&E chose not to present any outside consultant evaluation of the safety culture concerns raised in the CPSD or IRP Reports.

Under the schedule for this case, CPSD was afforded almost two months to prepare rebuttal testimony responding to PG&E's testimony, and all parties had approximately three months from the service of PG&E's testimony for discovery and preparation of cross examination before the start of evidentiary hearings.

The Hall Conclusions document is the type of consultant testimony that should have been part of PG&E's June 26, 2012 prepared testimony. If such an assessment had been presented at that time, parties would have had ample time to propound discovery and to prepare for cross examination. In addition, CPSD would have had the opportunity to present rebuttal testimony, including, if it so chose, time to undertake its own independent assessment of PG&E's corporate culture. By presenting the Hall Conclusions document through re-direct examination of the next-to-last witness in the case, PG&E has circumvented the schedule and abridged the procedural rights of the parties.

The fact that the Hall Conclusions document was apparently prepared some time in December 2012 (it is undated) only underscores the inappropriateness of admitting it into the record. Had hearings proceeded to conclusion in October 2012, rather than being put on hold for settlement discussions, the document would not even be available. PG&E should not be allowed to take advantage of the happenstance of the delay in hearings to prepare and present consultant testimony on a topic that it had a full opportunity to address in its June 2012 testimony.

III. THE HALL CONCLUSIONS DOCUMENT IS OUTSIDE THE SCOPE OF THE CROSS EXAMINATION THAT PG&E CLAIMS OPENED THE DOOR TO SUCH SUPPLEMENTAL TESTIMONY

Although PG&E apparently knew about the Hall Conclusions document for weeks

before springing it on parties during re-direct examination of Ms. Yura,² the company chose not to make a motion to introduce such supplemental testimony. That was likely a wise decision, as such a motion would surely have been denied as out of time. Instead, PG&E elected to attempt to get the document into the record on re-direct examination of its own witness. *Thus, the only grounds on which the document can properly be admitted into the record is if it within the scope of the cross examination that PG&E claims invited such testimony.*

Given the fact that hearings were almost concluded at the time of Ms. Yura's re-direct examination, and the fact that the Hall Conclusions document is effectively supplemental testimony, the Commission should employ a tight screen in deciding whether to allow such new evidence to be introduced through re-direct examination. The document should not just generally relate to a broad topic in cross-examination; it should specifically respond to a particular point made on cross-examination and be used to re-habilitate the witness's testimony. For example, if cross examination had tried to make the point that PG&E had not sought any outside assessment of its corporate culture, then it might be appropriate to admit the Hall Conclusions document, but even then, just for the limited purpose of showing that PG&E had sought and obtained such an assessment.

Even at the time of marking the Hall Conclusions document as an exhibit, it was apparent to the non-PG&E parties that the document did not relate to the cross examination that PG&E's counsel used to justify the exhibit – prompting vociferous objections. Now, with the benefit of the hearing transcripts, it is even more evident that the document is not sufficiently related to any cross

² Tr., vol. 11, p. 1036:26 – p. 1037:3 (Testimony by Ms. Yura that she first became aware of the document “several weeks” earlier, in mid-December).

examination to warrant its admission.³

The cross examination that counsel for PG&E claimed opened the door for the Hall Conclusions document was questioning by counsel for the City of San Bruno, Ms. Strottman, regarding the extent to which Ms. Yura's testimony was based on a *retrospective* review of PG&E's actions *leading up to* the San Bruno explosion.⁴ The line of questioning referenced by PG&E counsel went as follows:

Q And have you reviewed all the actions of PG&E *leading up to* the September 9th explosion in San Bruno?

A No.

Q So, then, how are you able to conclude that what you have testified to is improvement *if you haven't reviewed all of PG&E's actions before the September 9th explosion?*

A We basically are looking at the entirety of all of our standards and our procedures from end to end, relooking and benchmarking with external companies in the industry. So those would all be improvements essentially that we are looking for in order to raise the quality of work that we're doing.

Q But if you don't know the past, how can you assert that the future will be safer?

A I think we have an understanding of the past. But we really know what the performance is today. We want to improve the performance from where we are today into something better in the future.⁵

³ The Joint Parties note with interest PG&E counsel's reluctance to discuss at the January 29, 2013 status conference whether PG&E-43 was within the scope of cross-examination, as he claimed he was not given notice that such issue would be discussed and was not prepared to do so. (Tr., vol. 12, p. 1284:1-9). (As a result, Joint Parties were required to present this written motion.) PG&E counsel's lack of notice and opportunity to prepare pales in comparison to the situation experienced by the non-PG&E parties when PG&E sprang a new PG&E-commissioned document on them without notice and forced them into the position of assessing in real time and without the benefit of a transcript whether the document was within the scope of cross examination.

⁴ Transcript (Tr.), vol. 11, pp. 1022: 28 -1023:13 (question from PG&E counsel setting stage for identification of Hall Conclusions document).

⁵ Tr., vol. 11, p. 983: 3-26 (emphasis added).

The clear focus of Ms. Strottman's questions was on exploring whether PG&E's remedial efforts had taken into account an understanding of what the company had done wrong prior to the San Bruno explosion. The Hall Conclusions document in no way responds to such questions, as it contains no analysis or discussion of the extent to which PG&E's current rehabilitation efforts relate to PG&E's pre-San Bruno failings. The document might be germane if, for example, it drew connections between PG&E's recent measures and pre-San Bruno problems, or even if the document directly spoke to the premise of Ms. Strottman's questions and explicitly rejected the view that it was necessary for PG&E to understand its pre-San Bruno problems. The Hall Conclusions document does neither and is not sufficiently related to Ms. Strottman's cross examination to warrant the introduction of belated supplemental testimony into the record.

The absence of any connection between the cross examination and the Hall Conclusions document is underscored by Ms. Yura's own responses. In the above-quoted examination, Ms. Yura was asked two extremely open-ended questions which gave her broad latitude for response. It is telling that Ms. Yura did not consider the Hall Conclusions document responsive when given this broad opportunity. The reason is clear – the document was not within the scope of the cross examination questions.

IV. THE PREJUDICE CAUSED BY THE HALL CONCLUSIONS DOCUMENT OUTWEIGHS ANY PROBATIVE VALUE IT MAY HAVE

It is well-settled that it is appropriate to exclude proffered evidence if its probative value is substantially outweighed by the probability that its admission will create undue

prejudice.⁶ The Hall Conclusions document is precisely such evidence.

The Hall Conclusions document consists of a series of sweeping conclusions without any supporting analysis. It will make for colorful quotes in PG&E's briefs that its lawyers will be sure to highlight, and decision-makers who lack an intimate understanding of the record may find some of the statements eye-catching. But its conclusions should be of no value to the record because there is no discussion of any facts on which the opinions are based.

Moreover, it is puzzling that Ms. Yura, a PG&E vice-president with key responsibilities for PG&E's safety standards who is mentioned in the document, did not receive the Hall Conclusions document in the ordinary course of business. Instead, to obtain the document, she needed to request it *from one of PG&E's lawyers in this case.*⁷ These facts strongly suggest that the document's main purpose was to assist PG&E in this litigation, not to serve an internal business purpose.

The opportunity to do time-limited discovery and cross examination does not erase the prejudice to the non-PG&E parties. Propounding discovery, analyzing responses, and preparing for cross examination require a significant and unanticipated diversion of resources, particularly for a document so lacking in any analytical foundation. As previously noted, if PG&E had retained consultants to prepare such testimony for its June 2012 submission, the non-PG&E parties would have had ample time for discovery and cross examination preparation, and CPSD would have had time to undertake its own independent assessment of PG&E's safety culture. Instead, the non-PG&E parties are forced to scramble to deal with this unexpected supplemental testimony at a time when they expected to be able to focus on brief-

⁶ See, e.g., California Evidence Code Section 352.

⁷ Tr., vol. 11, pp. 1037:4-19, 1038:13 - 1040:5 (indicating that Ms. Yura requested the document from Ms. Wilson because she thought she should see the document as part of her preparation to testify in this case).

writing, as well as their responsibilities in other cases.

In sum, the Hall Conclusions documents is potentially highly prejudicial in that it serves well PG&E's litigation goals of supplying quotable phrases for its briefs and diverting the limited resources of CPSD and the other parties. Particularly at this late stage of the proceeding, it offers little, if any, probative value in that it provides no factual support for its conclusions. Under these circumstances, the Hall Conclusions document should not be permitted into the record of the case.

V. CONCLUSION

Because the Hall Conclusions document is outside the scope of the cross examination and for the other reasons set forth above, the Commission should issue an order forthwith that: (1) determines that the Hall Conclusions document (Ex. PG&E-43) will not be admitted into the record of this proceeding; and (2) strikes, as outside the scope of cross examination, all re-direct (and re-cross) examination relating to the document. In doing so, the Commission can avoid a significant, and unnecessary, distraction to the Commission and parties and prevent undue prejudice to the non-PG&E parties.

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Respectfully submitted,

THOMAS J. LONG
Attorney for THE UTILITY REFORM
NETWORK

By: _____/s/_____
Thomas J. Long
Legal Director

THE UTILITY REFORM NETWORK
115 Sansome Street, Suite 900
San Francisco, CA 94104
Phone: (415) 929-8876
Fax: (415) 929-1132
Email: tlong@turn.org

STEVEN R. MEYERS
BRITT K. STROTTMAN
JESSICA R. MULLAN
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607
Phone: (510) 808-2000
E-mail: bstrottman@meyersnave.com
Attorneys for CITY OF SAN BRUNO

TRACI BONE
KAREN PAULL
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 703-2130
Fax: (415) 703-2262
E-mail: traci.bone@cpuc.ca.gov
Attorneys for the DIVISION OF
RATEPAYER ADVOCATES