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)

RESPONSE OF THE CONSUMER PROTECTION AND SAFETY DIVISION IN OPPOSITION TO PACIFIC GAS AND ELECTRIC COMPANY'S REQUEST FOR OFFICIAL NOTICE

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Pursuant to Rule 11.1(e) of the California Public Utilities Commission (Commission) Rules of Practice and Procedure (Rules), the Consumer Protection and Safety Division (CPSD) hereby submits its response in opposition to the request of Pacific Gas and Electric Company (PG&E) for official notice (RJN), which was filed on March 11, 2013 contemporaneously with its opening brief in this proceeding. As a sole exception, CPSD does not object to PG&E's request to take judicial notice of the document entitled "ASA B31.1.8—1955", which is part of PG&E's RJN, Exhibit 5, because these industry standards (the "ASME standards") are properly judicially noticeable in that they are subject to verification and not subject to dispute. In addition, they come the closest to the matters which must be judicially noticed pursuant to section 451 of the California Evidence Code, especially after the Commission had adopted those standards as part of its General Order No. 112. None of the other exhibits attached to PG&E's RJN come close to matters which must be judicially noticed.

I. INTRODUCTION

Due to its unlimited resources, PG&E has an enormous advantage over all other parties in this case. In its RJN, PG&E demonstrated this advantage with its attachment of exhibits (broken into 4 e-mails) from the Commission's Recordkeeping Order Instituting Investigation (OII) in I.11-02-016. Many of these exhibits are just excerpts from exhibits, testimony or transcripts of cross-examination, yet they still totaled 11 MB. Therefore, for parties to have to respond in the present proceeding to explain how PG&E has taken evidence out of context, we would likewise have to do the following: (1) supply much of the other evidence in the other proceeding, and (2) explain how PG&E's RJN has taken matters out of context. Moreover, PG&E has also usurped the Presiding Administrative Law Judge's (ALJ) authority by presumptively granting its own request. Thus, PG&E has already provided throughout its opening brief filed herein references to the exhibits that are the subject of its RJN, before parties have had a chance to respond to the RJN.

In addition, this is the first of four briefs to be filed in these two OIIs on PG&E's violations, which are pending before two ALJs.[1] Under PG&E's approach, unless the ALJ denies PG&E's present RJN (with the one exception which CPSD does not oppose), PG&E and its army of (in-house and outside) attorneys could continue to selectively pick and choose whatever evidence from whichever proceeding it wants to and repeat this exercise three more times. PG&E faces such large amounts of fines from the three OII proceedings (including the Class Location OII in I.11-11-009), that there has to be a special proceeding on total penalties to ensure that PG&E maintains its creditworthiness. Consequently, there is virtually no limit to the amount of money that PG&E can afford to pay (whether it is ratepayers paying or its shareholders paying) for its attorneys' fees.

In sharp contrast, there are severe limits on the time of and resources available to the attorneys that represent CPSD and the intervenors. CPSD had separate teams of attorneys in the OIIs, so CPSD would be at a severe disadvantage if PG&E's RJN were granted. *See* Declaration of Harvey Y. Morris (Morris Decl.), pp. 1 - 3, which accompanies this response. The Division of Ratepayer Advocates (DRA) and the intervenors, although parties to each of these two proceedings, also have extreme limits on their resources. *See* Morris Decl., p. 2. For this reason, CPSD and DRA informed PG&E last week, that we opposed PG&E's request. PG&E merely notes in its RJN, p. 3, fn 3, that CPSD and DRA opposed PG&E's request. *See* Morris Decl., p. 3.

Among the reasons, which CPSD's counsel had provided to PG&E as to why CPSD opposed PG&E's request, was the following:

> [I]t is fundamentally unfair, less than one week prior to the time our initial brief is due in the San Bruno OII, for PG&E to bring up the idea of seeking to rely upon any of the record evidence in any other proceeding.
>
> Obviously, CPSD has been preparing its San Bruno brief solely on the evidence in that proceeding, and we think PG&E should be limited to the San Bruno record, as well.

[1] According to PG&E's service list accompanying this RJN, it has not served the parties or the ALJ or Assigned Commissioner in the Recordkeeping OII with this RJN of evidence from that proceeding.

> Therefore, with the exception of exhibits designated as joint exhibits, CPSD is opposed to your request.

See Morris Decl., p. 3 and Exhibit A.

PG&E ignored CPSD's and DRA's opposition, and PG&E just went ahead and filed its RJN with its 11 MB of exhibits and its opening brief with extensive references to these exhibits. Presumably, PG&E had been including these references for many weeks as it was preparing its draft of its opening brief. But PG&E waited until after 3:00 p.m. on March 5, 2013, less than one week before the deadline for opening briefs (i.e., March 11, 2013) just to suggest that the parties request that ALJ Wetzell take official notice of the records in the Recordkeeping OII, the Class Location OII and Safety Rulemaking in R.11-02-019.[2] This late suggestion by PG&E made it nearly impossible for CPSD to consider including in its opening brief evidence, which CPSD could have relied upon from the Recordkeeping OII proceeding. This is because the CPSD attorneys in the two OII proceedings were different and time was running too close to the deadline. In addition, PG&E never disclosed what exhibits in the Recordkeeping OII, which PG&E intended to rely upon in its RJN in advance of the time in which it filed its opening brief, let alone how many exhibits. *See* Morris Decl., p. 4.

Although in other cases, certain litigants have been characterized as having engaged in "trial by ambush" tactics, PG&E's RJN and opening brief are the first time that CPSD's counsel has encountered such "post-trial by ambush" tactics. Thus, except for the ASME standards exhibit, CPSD respectfully requests that PG&E's RJN be denied and PG&E be ordered to remedy its premature inclusion of the remaining exhibits in its brief by substituting a new opening brief without the other exhibits.

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[2] As discussed in greater detail below, a few months earlier, PG&E had previously brought up the idea of meshing together the records from all the proceedings combined, but CPSD had indicated its opposition to this idea. It was not until PG&E's March 5, 2013 e-mail that parties were first informed that PG&E still intended to pursue its official notice idea. *See* Morris Decl., pp. 2 - 3.

II. PG&E's RJN IS PROCEDURALLY IMPROPER

Under Rule 13.9 of the Commission Rules of Practice and Procedure, the Commission may take official notice of matters that may be judicially noticed pursuant to section 450 of the California Evidence Code. In PG&E's RJN, PG&E relies upon section 452(d) and (h) of the California Evidence Code, to support its argument that records in one Commission proceeding should be judicially noticeable in another Commission proceeding. However, PG&E did not provide adverse parties sufficient notice of PG&E's RJN, as required by section 453(a) of the California Evidence Code, nor did P&E provide ALJ Wetzell with sufficient information to take judicial notice, as required by section 453(b) of the California Evidence Code.

Instead, PG&E took certain statements out of excerpts of testimony or from transcripts, and left out other statements of these witnesses for CPSD and PG&E. In contrast, ALJ Yip-Kikugawa has the entire context and content of the cross-examination and redirect examination of the witnesses in her Recordkeeping OII.

In fact, PG&E's justification in its RJN, p. 4, for using certain excerpts from the Recordkeeping OII, because of the overlapping issues, demonstrates the problem of PG&E cherry-picking excerpts of record. PG&E referred to statements by Mr. Foss, CPSD's attorney, at the joint hearing, to justify why the Commission should have coordinated briefing on fines and remedies (Joint R.T. 1202-1203). PG&E alleged that this supports the idea of PG&E's freedom to pick and choose evidence from the two hearings as if there is one record and why there should be a coordinated decision on violations, as well. *See* RJN, p. 4. However, notwithstanding Mr. Foss' statement regarding the need for coordinated briefing on fines and remedies, Mr. Foss argued against one consolidated brief on violations, because it would be too "unwieldly" and "difficult." (Joint R.T. 1224:6- 1225:8). At that point in time, Mr. Malkin, PG&E's attorney, maintained that he "wasn't suggesting that the briefs be consolidated into one. As I mention, I know CPSD has three different litigation teams." (Joint R.T. 1225:10-12.) But, in effect, through its RJN, PG&E has borrowed any evidence that it wanted from

either proceeding, and wrote one brief, even though PG&E knew how difficult it would be for CPSD to respond.

For CPSD to respond to every selected excerpt with its own RJN, to show how PG&E has taken matters out of context, would mean that CPSD would have to file and serve at least 11 MB of excerpts from testimony or transcripts ourselves just to get before ALJ Wetzell a more complete picture than PG&E has presented. This would be completely unnecessary, because *all* of the Recordkeeping OII evidence is already before ALJ Yip-Kikugawa.

In PG&E's opening brief filed herein, p. 24, PG&E states that there is no question that CPSD bears the burden of proof for every violation it asserts in this proceeding. However, if CPSD has the burden of proof, then CPSD is supposed to have the right to submit rebuttal evidence as the last prepared written testimony in this proceeding, and CPSD is supposed to cross-examine PG&E's witnesses last so that through cross-examination, CPSD has the opportunity to submit the last evidence as a cross-examination exhibit. Therefore, how is it consistent with PG&E's position, that CPSD has the burden of proof, if PG&E is allowed to file its RJN to try to insert additional evidence in this proceeding? PG&E's picking and choosing evidence from one proceeding to the next gives itself the right to present additional evidence after CPSD has submitted rebuttal.

PG&E's RJN also makes a mockery of the care both ALJs, the parties and the court reporters went through in differentiating the transcripts by the separate OII proceedings or the Joint OII proceeding in which the hearing had taken place. In addition, PG&E's RJN is a collateral attack on each ALJ's separate ruling on which evidence he or she received into evidence and the conditions upon which some of the evidence was received, as well as the joint ruling concerning the joint testimony.

Finally is the unfairness of PG&E's "post-trial by ambush" approach. After PG&E previously brought up months ago the idea of meshing the records of each proceeding, and CPSD indicated that it was against the idea, we had not heard anything about PG&E proposing such an approach again until March 5, 2013 after 3:00 p.m., less

than one week before the filing deadline for opening briefs. This suggestion by PG&E was much too late for CPSD's San Bruno OII team to make use of the record in the Recordkeeping OII. *See* Morris Decl., p. 3. But PG&E was presumably drafting its brief for many weeks with this purpose in mind. In any event, the CPSD San Bruno OII team could not, at the last minute, make any substantive changes. *See* Morris Decl., pp. 3 - 4 .

In view of the above, it would be prejudicial to CPSD and other intervenors herein to allow PG&E to get away with this one record approach at this late juncture, when, except for the joint hearings, these proceedings have always been treated as separate proceedings. In this way, PG&E alone gets the advantage of picking and choosing which evidence it wants to use in either proceeding. Moreover, PG&E did not give each adverse party sufficient advanced notice as required by Section 453 of the California Evidence Code, so that they could oppose PG&E's request prior to PG&E referencing the evidence (from the Recordkeeping OII) throughout its brief in the present proceeding.

III. THE RJN BY PG&E IGNORES THE FACT THAT THE PRESIDING ALJ CAN BEST RESOLVE DISPUTES OF MATERIAL FACT BY DETERMINING THE WITNESSES' CREDIBILITY AND REVIEWING THEIR DEMEANOR

PG&E's RJN would merge at PG&E's convenience the records of both proceedings without recognizing that determining witnesses' credibility (e.g., by observing their demeanor) is important in both the San Bruno OII proceeding and in the Recordkeeping OII proceeding (I.11-02-016). Witness credibility represents one of the primary reasons for the Commission to hold live evidentiary hearings and depend upon ALJs to resolve factual disputes in rate cases and especially in adjudicatory proceedings, such as in this OII and the Recordkeeping OII. In both investigations, PG&E and CPSD dispute a number of alleged facts, and inferences and implications to be drawn from the facts. The Commission may ultimately decide the violations in these OIIs and may modify decisions subject to further appellate court review, but the Commission is more like a reviewing court, because it was not the original factfinder reviewing the witnesses under cross-examination. That is why under Rules 14.1 and 14.4 of the Commission's Rules of Practice Procedure, in adjudicatory proceedings, the presiding ALJ first writes

the Presiding Officer's Decision (POD), and parties may appeal the POD or a Commissioner may request review of the POD.

CPSD fully respects ALJ Wetzell, who has been present and presided at all the days of hearings held in I.12-01-007, including at joint hearings with I.11-02-016, the Recordkeeping OII. He has not been present, to CPSD's knowledge, during most of the live testimony in I.11-02-016. Except for the joint hearings, ALJ Wetzell has not had an opportunity to judge the credibility of the testimony the witnesses sponsored in the Recordkeeping OII. Only ALJ Yip-Kikugawa, who has been present and presided at all the days of hearings in I.11-02-016, can fully assess the credibility of witnesses in that proceeding.

In *Wilson v State Personnel Bd.* (1976) 58 C.A. 3rd 865, 878, *citing Meiner v Ford Motor Co.* (1971) 17 Cal.App. 3rd 127, 140, the Court explained the importance of observation for credibility of witnesses considered by the factfinder:

> Credibility, or lack thereof, is for the factfinder, not the reviewing court, to determine…..On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted – but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears, and observes him may be convinced of his honesty, his integrity, his reliability.

For these reasons, CPSD respectfully submits that ALJ Wetzell should determine the disputes of fact in the San Bruno OII and ALJ Yip-Kikugawa should determine the disputes of fact in the Recordkeeping OII. Under PG&E's approach, it would not matter if the Presiding ALJ resolves material disputes of facts. Therefore, PG&E's approach would be contrary to the due process rights of the parties, section 1701.2(a) of the California Public Utilities Code (governing presiding officer provisions) and violate Rules 14.1 and 14.4 of the Commission's Rules.

IV. PG&E's RJN LACKS MERIT

A. PG&E's Attempt to Use CPSD's Deputy Director Halligan's and PG&E's Witness De Leon's Testimony to Support PG&E on Legal Issues Is Baseless

PG&E explains that its Exhibits 1, 3, 4, 6 and 8 attached to its RJN are documents in the Recordkeeping OII involving testimony by CPSD's Deputy Director, Julie Halligan, as to how the Commission has used California Public Utilities Code Section 451 as a "legal basis" for alleged violations against PG&E. RJN, pp. 5 ,6 , 7. PG&E also explains that Exhibit 11 is an excerpt of testimony from CPSD's cross-examination of PG&E witness Cesar De Leon that relates to CPSD's interpretation of Section 451. RJN, p. 7. PG&E's Exhibit 12 is an exhibit of a question posed by CPSD counsel, rather than any testimony, that PG&E submits is relevant to the CPSD's interpretation of Section 451. RJN, p. 7.

PG&E has based its RJN on these exhibits, not due to evidence therein, but due to the legal basis for CPSD's interpretation of Section 451. Since by PG&E's own characterization the portions of the exhibits that PG&E wants to use address legal issues, which the CPSD and other parties are briefing herein, PG&E has failed to justify why it needs these "exhibits" as evidence to be judicially noticed.

PG&E wants to refer to Ms. Halligan's words to purportedly contrast them with Mr. Stepanian's words in the San Bruno OII ("best engineering practices" or "good utility safety practices") to somehow argue that Section 451 is void for vagueness. Significantly, PG&E's reference to semantics ignores the substance of what both Ms. Halligan and Mr. Stepanian were saying, which had the identical result. They both concluded that prior to the Commission's adoption of pertinent safety standards, the general duty of PG&E under Section 451 of the California Public Utilities Code to provide services and facilities so that they promote the safety of the public, required at least its compliance with the industry standards, which were the ASME Standards.[3]

[3] *See* Exhibit CPSD-1(Stepanian), p. 162 in San Bruno OII and proffered RJN Exhibit 1, Exhibit CPSD-1 (Halligan), p. 6 in the recordkeeping OII.

As a matter of law, there is no question that Section 451 of the California Public Utilities Code, by itself, imposes a general duty on PG&E to provide natural gas service and maintain its facilities in a way that avoids unreasonable risks of harm to the public. Section 451 alone establishes PG&E's duty to act reasonably – to perform necessary testing and maintenance, and to maintain the necessary records for the safe operation of its natural gas pipelines. *See Langley v. Pacific Gas and Electric Co.* (1953) 41 Cal.2d 655, 660-661.

The Commission has previously explained that it need not enumerate each and every conceivable application of PG&E's duty under section 451:

> [I]t would be virtually impossible to draft Section 451 to specifically set forth every conceivable service, instrumentality and facility which might be "reasonable" and necessary to promote the public safety. That the terms are incapable of precise definition given the variety of circumstances likewise does not make section 451 void for vagueness, either on its face or in application to the instant case.

Carey v. Pacific Gas and Electric Co. (1999) 85 Cal. P.U.C. 2d 682, 689. In *PacBell Wireless*, the California Court of Appeal quoted with approval the Commission's decision in *Carey*, and confirmed that section 451 does not violate due process or fail to provide sufficient notice to the utility of what conduct is prescribed. *PacBell Wireless v. P.U. C.* (2006) 140 Cal.App.4th 718, 742-743. The Court of Appeal rejected the argument that the utility could not be fined because there was no statute or Commission order specifically prohibiting the practices alleged to be violations of section 451. *See id; see also Donovan v. Royal Logging Co.* (9th Cir. 1981) 645 F.2d 822, 829 (General duty clause upheld under Occupational Health and Safety Act, because sufficient notice that preventing a hazard in the workplace takes into account the industry standard of knowledge.)

In view of the above, this is purely a matter of law, so there is no need to try to create vagueness where none exists. If, however, the testimony of CPSD Deputy Director Halligan and PG&E's witness, former U.S. Department of Transportation

official De Leon, were relevant to this purely legal issue, it presents the classic case where the ALJ, who observed how these witnesses were able to defend their positions under cross-examination, was in the best position to resolve this matter. Observing CPSD Deputy Director Halligan answer the questions made her position totally supportable and credible. On the other hand, seeing PG&E witness De Leon defend his position would reveal that he lacks credibility and did not even know, let alone understand, key parts of his own testimony. Moreover, contrary to California Evidence Code Section 453(b) PG&E did not provide ALJ Wetzell with all the information to reveal how strong a witness CPSD Deputy Director Halligan was and how weak the PG&E's witness De Leon was in this proceeding. Of course, PG&E might disagree with CPSD's position in this regard, but that is precisely why the Presiding ALJ needs to decide this dispute.

In view of the above, these exhibits are totally unnecessary in this proceeding. Moreover, it would consume an undue amount of time to ensure that ALJ Wetzell has all the evidence, rather that PG&E selected excerpts, to decide this matter.

B. PG&E Does Not Need CPSD Witness Felts' Testimony to Claim that There Is Duplication with the Recordkeeping OII

PG&E claims that it needs RJN Exhibit 2, CPSD witness Felts' supplemental testimony in the Recordkeeping OII, in order to show the duplication of the Rule 1.1 issue and destruction of records issue in both OII proceedings. PG&E states that CPSD must stand behind Ms. Felts' testimony, since CPSD proffered her as an expert witness. CPSD does stand behind her testimony. However, there is no need for ALJ Wetzell to take judicial notice of any duplication, because CPSD already resolved the duplication issue as acknowledged in CPSD's Opening Brief, where CPSD deferred mostly to Ms. Felts' testimony in the Recordkeeping OII on this issue. Indeed, CPSD's rebuttal testimony in the San Bruno OII proceeding no longer addressed this issue, leaving it to the Recordkeeping OII. Although, Ms. Felts also addressed other issues, such as integrity management issues, it was from a totally different perspective (i.e., from an inadequate

recordkeeping perspective) and therefore was not duplicative of the San Bruno OII proceeding.

C. PG&E's Request for Judicial Notice Cannot Be Used to Establish the Truth of the Contents Therein

PG&E's RJN, Exhibits 9 and 10 (involving CPSD witness Felts) and Exhibits 7, 13 and 14 (involving PG&E's witnesses Cowsert, Cochran and Lee) should also be denied. These exhibits are offered for the truth of the contents therein. However, under Section 452(g) and (h) of the California Evidence Code, judicial notice may be taken of facts that are of such common knowledge that they cannot reasonably be the subject of dispute. In *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, the Court stated: "The truth of the content of the articles is not a proper matter for judicial notice."

Of course, CPSD stands by its expert witness Felts, but PG&E's RJN Exhibits 9 and 10 are excerpts of one or two pages of the court reporter's transcripts of PG&E's cross-examination of her testimony, which allows PG&E to take her testimony out of context. This does not provide sufficient information to support its RJN, which violates Section 453 of the California Evidence Code. For example, on the emergency response issue, PG&E includes only one page (i.e., p. 443) of its cross-examination of Ms. Felts' testimony, which allows PG&E to take out of context her testimony that PG&E's written manual complied with the regulation. They left off the part of her testimony that stated that at the Milpitas plant, it was an outdated emergency plan, and the control rooms lacked sufficient maps or diagrams to know where to shut off the gas.

PG&E's RJN Exhibits 7, 13 and 14 (involving PG&E's witnesses Cowsert, Cochran and Lee) are improper and late attempts to put in the San Bruno record disputed evidence of its own witnesses in the Recordkeeping OII proceeding. If this was so critical to its case, PG&E could have put this evidence as part of its responding case in the San Bruno OII proceeding, CPSD would have had an opportunity to submit rebuttal thereto and parties could have cross-examined PG&E's witnesses therein.

PG&E's approach gives it two bites at the apple, and the second opportunity is completely unfair and prejudicial to CPSD and other intervenors by depriving parties of

an opportunity to respond. This was never the purpose of judicial notice. PG&E's RJN is an abuse of the judicial notice requirements under the California Evidence Code which only allows judges to take judicial notice of facts that are not reasonably subject to dispute.

V. CONCLUSION

For the above-mentioned reasons, except for the ASME standards exhibit, CPSD respectfully requests that PG&E's RJN be denied and PG&E be ordered to remedy its premature inclusion of the remaining exhibits in its brief by substituting a new opening brief without the other exhibits.

Respectfully submitted,

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