

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)

**OPPOSITION OF THE CONSUMER PROTECTION AND
SAFETY DIVISION TO PG&E'S MOTION TO STRIKE
APPENDIX C TO CPSD'S OPENING BRIEF**

I. INTRODUCTION

The Consumer Protection and Safety Division's (CPSD) hereby responds to Pacific Gas and Electric Company's (PG&E's) motion to strike portions of Appendix C¹ of CPSD's Opening Brief relating to violations. PG&E claims that it did not receive advance notice of the violations alleged in Appendix C, and therefore its due process has been violated. However, every single law or regulation in Appendix C appears in either the OII² or CPSD's Report. For example, 49 CFR³ Parts 192.605 and 192.615 are specifically referenced in CPSD's Report, which, at page 4, states: "PG&E violated Parts 192.605 and 192.615 and Public Utilities Code Section 451 for inadequately responding

¹ CPSD created Appendix C in response to a request from ALJ Wetzell. It should be noted that Appendix C is merely a summary table of violations that are described in detail in CPSD's Opening Brief. The violations are also described in Appendix B, CPSD's proposed Conclusions of Law.

² Order Instituting Investigation, I.12-01-007, hereinafter "OII".

³ 49 Code of Federal Regulations Part 192 *et seq.*, hereinafter referred to as "Part 192".

to a major incident and jeopardizing public safety.”⁴ PG&E claims it did not receive “notice” of these allegations. Neither the Commission (in the OII) nor CPSD (in its Accident Report) failed to provide adequate notice of the charges against PG&E.⁵

Not only did CPSD put PG&E on notice of the charges against it, but PG&E’s testimony *contains its defenses* to each of the subsections it now claims it was unaware of. Examples of this are replete in PG&E’s lengthy testimony. For example, PG&E’s testimony in Chapters 10, 11, and 13, discussed the sufficiency of its emergency plans, and its actions to address concerns in those areas.

PG&E also mischaracterizes the level of notice required for Commission proceedings, which is discussed below. To satisfy due process, the Commission must provide “adequate notice” and opportunity to be heard, which it has done. PG&E essentially is claiming that it was not on notice of the subsections within the sections of federal law referenced by CPSD.

Taken together, the Commission’s OII, CPSD’s Report, the NTSB Report, the IRP Report, and the Overland Consulting Report, provide adequate notice of the charges against PG&E in this case.⁶

II. PG&E MISCHARACTERIZES THE APPLICABLE CASE LAW

Due process requires “adequate notice” and an opportunity to be heard. (*People v. Western Air Lines, Inc.* (1954) 42 Cal. 2d 621, 632; 1954 Cal. LEXIS 193.) PG&E has been given both. The OII puts PG&E on notice of the charges against it, and PG&E has had an ample opportunity to fully participate in the proceeding, by serving testimony,

⁴ The same sentence also appears on page 103 of CPSD’s Report. On page 162, CPSD also states: “By failing to adequately maintain written procedures for conducting operations and maintenance activities and for emergency response, PG&E violated Parts 192.605(c) and 192.615.” All of the citations at issue in the Motion to Strike relate to PG&E’s emergency plans and response, i.e., Parts 192.605 and 615.

⁵ For purposes of its Motion to Strike, PG&E treats the notice in CPSD’s Report as equal to the notice provided in OII. (PG&E Motion to Strike, p. 1.) PG&E does not appear to claim that the OII alone must contain all of the violations.

⁶ All of these reports are part of CPSD’s direct testimony and are part of the record: CPSD-1, CPSD-9, CPSD-10, CPSD-168.

cross examining witnesses, filing opening briefs, and the opportunity to file reply briefs. In no sense has PG&E been deprived of the opportunity to defend itself in this proceeding.

PG&E's motion is flawed in that it apparently expects CPSD to put PG&E on notice of every single legal argument in advance of the briefing. However, the express purpose of the opening briefs is to make legal arguments that apply the laws to the facts.

Essentially, PG&E would have CPSD make legal arguments in the testimony. Testimony should consist of either percipient witness testimony, or expert opinion testimony. PG&E provided not one single legal expert in its case, nor did CPSD. While CPSD staff is generally aware of the laws that apply to gas safety, they are not lawyers and they did not provide any legal arguments. Nor did PG&E provide testimony from any lawyers. The time for legal arguments is in the briefs, after the evidentiary hearings have established the factual record.

CPSD cannot be expected to allege, in advance of evidentiary hearings, every single violation of every subsection of every law that the record will ultimately support. Such a requirement would obviate the need for evidentiary hearings, which are designed to create an evidentiary record on which to base the parties' legal arguments regarding whether violations occurred. That is why it makes logical sense to place PG&E generally on notice of the charges against, by citing the applicable laws in both the OII and the Staff Report.

Moreover, it is not reasonable to expect the Commission to state every single subsection of every law that PG&E has violated at the time of issuing the OII and CPSD's Report. Such a requirement would obviate the need for an investigation, which is clearly the point of an "order instituting investigation".

PG&E overstates the legal requirements for due process, essentially arguing that PG&E must be told in advance every single legal argument CPSD intends to make in advance of the briefings. There is no such requirement. The Commission is required to give respondents "adequate notice" of the nature of the allegations, which it did. No

argument can be made that the OII did not place PG&E on notice of the applicable federal and state laws that are at issue in this proceeding.

PG&E ignores the controlling California Supreme Court case in this area, *People v. Western Airlines*, which states: “Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made.” (*People v. Western Airlines, Inc.* (1954) 42 Cal. 2d 621, 632; 1954 Cal. LEXIS 193.) The Commission has used the phrase “adequate notice” so often that the Commission often no longer cites to anything – the standard is essentially ingrained in Commission procedure. Yet PG&E is careful to omit any reference whatsoever to word “adequate” from the phrase “adequate notice”.

In a recent decision, the Commission described the due process notice requirements as follows:

Constitutional due process protections require this Commission, in broad terms, to give parties adequate notice and an opportunity to be heard. (*People v. Western Airlines, Inc.* (1954) 42 Cal.2d 621, 632.) Parties are normally entitled to know the subject matter of a proceeding, to know what information this Commission will consider when it addresses those subjects, and to have an opportunity to present their views to us. (D.12-08-046.)

PG&E cites *Salkin v. Cal. Dental Ass'n*, 176 Cal. App. 3d 1118 (1986), for due process notice requirements. CPSD does not disagree with *Salkin*; however, it is interesting to note that in *Salkin*, the Court said: “Adequate notice of charges and a reasonable opportunity to respond are basic to both due process and fair procedure.” (*Salkin*, at p. 1121.) PG&E’s motion artfully redacts the word “adequate” from its quotation of *Salkin*.⁷ In any event, the controlling case is *People v. Western Airlines*,

⁷ PG&E says that *Salkin* states: “Among the “basic” requirements of due process are notice of the charges and a reasonable opportunity to respond.” PG&E omits the word “adequate”, although *Salkin* includes it. (PG&E Motion to Strike, p. 7.)

which states that due process requires “adequate notice” and “an opportunity to be heard”, which is no different than *Salkin*.

PG&E cites *Pinsker v. Pac. Coast Soc’y of Orthodontists*, 12 Cal. 3d 541 (1974), for the proposition that an “individual must have the opportunity to present a defense.”⁸ In *Pinsker*, the plaintiff was a dentist whose application to be an orthodontist was denied without a hearing, and he was not told the reason why it was rejected. In other words, Mr. Pinsker’s application was “summarily denied” and he had “no opportunity to be heard”. (*Pinsker*, at p. 549.) However, the *Pinsker* case has no application here, where PG&E has been afforded notice of the specific sections of federal law at issue, and was afforded a lengthy hearing.

PG&E cites *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434 (1991), because the accused in that case “was kept in the dark about the specific charges made against him”. However, PG&E has not been kept in the dark here. All of the applicable laws and regulations were described in the OII and in the CPSD Report.

PG&E cites *Smith v. State Board of Pharmacy*, 37 Cal. App. 4th 229 (1995), for the proposition that the board’s mid-hearing change of legal theories was violative of “the basic . . . elements” of due process because the respondent was “misled by the [initial] accusation” as to what charges he would have to defend against. However, CPSD has had no such mid-hearing change of legal theories. CPSD has consistently argued that Part 192 and Section 451 are applicable. CPSD has simply referenced subsections of the sections already in its Report, and in no sense has PG&E been misled.

Similarly, PG&E cites *In re Ruffalo*, 390 U.S. 544 (1968), where the court found a due process violation where a county bar association added a new charge midway through a disbarment proceeding. There are no new charges in CPSD’s Opening Brief – every section has been disclosed in the OII and CPSD’s Report.

⁸ PG&E Motion to Strike, p. 7.

PG&E cites *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678 (1975), for the proposition that “a charge not contained in the formal notice of proceedings had to be stricken as irrelevant.”⁹ However, in *Cannon*, the petitioner was a judge who had been charged with, among other things, “unlawful interference by [petitioner] with the attorney-client relationship”. The Court stated: “Petitioner first contends that the conclusion regarding an ‘unwarranted interference in the operation of the Public Defenders’ Office’ should be stricken as irrelevant since no charge of such interference was contained in the formal notice.” It the *petitioner* who made that claim, not the *Court*, as stated by PG&E. The Court later states: “our conclusion as to subparagraph B-1 is as follows: The change of deputy public defenders in each of the foregoing cases and the substitution of private counsel in *People v. Moore* (the Putnam-Pine matter) amounted to unlawful interference by petitioner with the attorney-client relationship.” Thus, the Court did *not* strike the charge of unlawful interference, and at no time did the Court state that that was the appropriate remedy. PG&E has badly misstated *Cannon v. Commission on Judicial Qualifications*, and it is not instructive here.

III. THE OII AND THE CPSD STAFF REPORT PROVIDE ADEQUATE NOTICE OF THE CHARGES AGAINST PG&E

The Commission did give PG&E adequate notice of the charges against it in I.12-01-007, pages 6 – 7, where the Commission lists all of the state and federal laws applicable to natural gas safety. In addition to the OII, CPSD’s Report also puts PG&E on notice of the applicable federal and state laws.¹⁰ While CPSD concedes that its Report did not contain a citation to every subsection that is listed in CPSD’s Opening Brief,¹¹ PG&E can provide no case law that places such a burden on CPSD (or the Commission) to do so. It can safely be said that by placing PG&E on notice that Part 192

⁹ PG&E Motion to Strike, p. 8.

¹⁰ CPSD Report, pp. 5-6.

¹¹ For example, CPSD concedes that while it specifically referenced Part 192.615 on page 4, and Part 192.615(a)(3) on page 107, the other subsections of Part 192.615(a) (i.e., (a)(1) through (a)(8)) were not specifically referenced in its Report, although the factual bases were discussed.

was violated, all of the subparts of Part 192 are included in that notice. In addition, CPSD went beyond “adequate notice” and provide quite specific notice, specifically referencing sections such as Part 192.616 and Part 192.917.

At page 4 of its Staff Report CPSD placed PG&E on notice that:

1. PG&E did not follow the accepted industry standards specified in ASA B31.1.8-1955 when it installed Segment 180 in 1956 and therefore violated the Public Utilities Code, Section 451.

2. PG&E violated Code of Federal Regulations (CFR) 49, Part 192, Subpart O, for its failure to comply with the integrity management requirements.

3. PG&E failed to keep adequate records for Segment 180 and failed comply with the industry standards specified in ASA B31.1.8-1955 and therefore violated the Public Utilities Code, Section 451.

4. PG&E violated 49 CFR Parts 192.605(c) and 192.13(c) for its failure to establish adequate procedures for recognizing abnormal operating conditions at the Milpitas Terminal and for not following its own procedures.

5. PG&E failed to timely test employees at the Milpitas Terminal for alcohol and therefore violated Part 199.225.

6. PG&E violated the Public Utilities Code, Section 451 for allowing deficiencies to exist in its SCADA system which interfered with its ability to detect and respond to the emergency.

7. PG&E violated Parts 192.605 and 192.615 and Public Utilities Code Section 451 for inadequately responding to a major incident and jeopardizing public safety.

In addition, CPSD described the following violations on page 163 of its Report:

- By failing to follow its internal Work Procedures for the Milpitas Terminal work, PG&E violated Part 192.13(c), which creates a mandatory obligation for utilities to follow the procedures required to be adopted as part of the Integrity Management rules (Part 192, Subpart O).

- By failing to adequately maintain written procedures for conducting operations and maintenance activities and for emergency response, PG&E violated Parts 192.605(c) and 192.615.
- By failing to conduct adequate data gathering and integration to evaluate potential threats to pipeline safety, PG&E violated Part 192.917(b).
- By failing to adequately consider cyclic fatigue in its threat analysis, PG&E violated Part 192.917(e)(2).
- By failing to identify Segment 181 and other similar segments as having a potentially unstable manufacturing threat, PG&E violated Part 192.917(e)(3).
- By failing to assess the integrity of Segments 180 and 181 (and other similar segments) using an appropriate assessment technology, PG&E violated Part 192.921(a).
- PG&E failed to conduct prompt alcohol testing of the operators doing the Milpitas work in violation of Part 199.225.

CPSD disagrees strongly with the mischaracterization that if construed broadly¹², these add up to only 18 violations. If interpreted broadly, these sections include their subsections and thus amount to far more than 18 violations, as described in CPSD’s Opening Brief. For example, CPSD placed PG&E on notice that PG&E violated Part 192.615. Construed broadly, Part 192.615 contains many different requirements for PG&E’s emergency planning.

If adopted, PG&E’s motion would lead to nonsensical results. For example, PG&E argues that CPSD alleges only “one” violation of Part 192.615.¹³ How then, can CPSD explain that Part 192.615 mandates that operators’ emergency plans provide for “receiving, identifying, and classifying notices of events” as well as “emergency

¹² PG&E Motion to Strike, p. 4.

¹³ PG&E Motion to Strike, p. 5.

shutdown and pressure reduction” in an emergency situation? These requirements are in two different subsections, but PG&E would have CPSD to confusingly allege only one violation, without referencing the different subsections, although there are clearly distinct requirements. Should CPSD simply not mention that Part 192.615 has multiple requirements contained within it? This would appear to do exactly what PG&E fears – it would prevent CPSD from describing its legal arguments with specificity, thus depriving PG&E of its due process right to know the charges against it.

PG&E’s Motion makes much of the statement by CPSD that it “listed in its Report every violation found during its investigation.”¹⁴ It should go without saying that the statement was true as of the day it was written. However, after additional discovery, issuing direct and rebuttal testimony, and evidentiary hearings, CPSD has described the violations with greater specificity. So, where CPSD previously alleged Parts 192.615 and 605, CPSD’s Brief now points to the specific subsections of those sections.

With regards to certain particular subsections, it is simply not credible that PG&E was not on notice. For example, PG&E faults CPSD for citing Part 192.605(c) but not the subsections, (c)(1)-(4).¹⁵ It is difficult to understand how PG&E could fail to see that a reference to Part 192.605(c) includes subsections (1)-(4), because 605(c) states:

Abnormal operation. For transmission lines, the manual required by paragraph (a) of this section *must include procedures for the following* to provide safety when operating design limits have been exceeded: [Emphasis added]

- (1) Responding to, investigating, and correcting the cause of:
 - (i) Unintended closure of valves or shutdowns;
 - (ii) Increase or decrease in pressure or flow rate outside normal operating limits;
 - (iii) Loss of communications;
 - (iv) Operation of any safety device; and

¹⁴ PG&E Motion to Strike, p. 6.

¹⁵ PG&E Motion To Strike, p. 6.

- (v) Any other foreseeable malfunction of a component, deviation from normal operation, or personnel error, which may result in a hazard to persons or property.
- (2) Checking variations from normal operation after abnormal operation has ended at sufficient critical locations in the system to determine continued integrity and safe operation.
- (3) Notifying responsible operator personnel when notice of an abnormal operation is received.
- (4) Periodically reviewing the response of operator personnel to determine the effectiveness of the procedures controlling abnormal operation and taking corrective action where deficiencies are found.

Subsection (c) is incomplete if one excludes the list that follows in the numbered subsections. The subsections are necessarily included in the section. For CPSD to provide a specific reference to a subsection of Part 192.605(c) is in no way a “new” legal theory. PG&E’s claim that it was not on notice of Part 192.605(c)(1)-(4) is not believable. In no sense can the reference to Part 192.605(c) be considered inadequate to place PG&E on notice of the subparts of that section, which are *necessarily* included in that section.

It should be emphasized that the factual allegations have not changed. Every single fact discussed in CPSD’s Opening Brief was disclosed to PG&E in advance of the hearings. It is only the legal arguments made in CPSD’s Brief of which PG&E was not aware.

IV. PG&E DID IN FACT PRESENT A DEFENSE TO CPSD’S CASE-IN-CHIEF, BELYING ITS CLAIM THAT IT HAS BEEN DENIED THE OPPORTUNITY TO DO SO

PG&E claims that it might have raised other defenses had it known of the charges against it.¹⁶ However, PG&E’s testimony demonstrates that PG&E *was* aware of the violations alleged by CPSD, and *did* raise defenses.

¹⁶ PG&E Motion To Strike, p.8.

Chapters 10 and 11 of PG&E’s testimony contain PG&E’s defenses to the alleged violations of the laws regulating emergency response and plans. PG&E cannot now argue that had it known, “PG&E could and would have confronted each of these allegations”.¹⁷ PG&E did “confront” them.

PG&E’s Chapter 11 is too long to reprint in its entirety here. But a review of that chapter specifically shows how PG&E did provide its factual arguments as to why PG&E’s emergency plans were legally sufficient. On page 5 of Chapter 11, PG&E states that “PG&E had a written, comprehensive plan in effect that met the requirements of §192.615.” PG&E then goes on to describe how its plans met all of the requirements, including the subsections, of Part 192.615.

Chapter 11 is not merely a rebuttal to general allegations¹⁸ that its emergency plans were deficient, but to specific subsections of Part 192.615(a). For example, Part 192.615(a)(1) (“receiving, identifying, and classifying notices of events”) is rebutted on pages 14 and 15 of Chapter 11. Part 192.615(a)(8) (“notifying appropriate fire, police, and other public officials”) is rebutted on pages 15 and 16. Part 192.615(b)(2) (“failure to properly train personnel”) is rebutted on pages 14, 15, 17, and 20.

PG&E’s motion claims that it was unaware of allegations that it violated Part 192.615(a)(1) through (a)(8).¹⁹ Belying this claim is the fact that PG&E *specifically reprinted those sections in its testimony*. At pages 3 – 5 of Chapter 11 of its testimony, PG&E reprinted the entirety of Part 192.615, including every subsection of (a)(1) through (a)(8), (b)(1) to (b)(4), and (c)(1) to (c)(4). If PG&E was truly unaware that Part 192.615 and its subsections were at issue, it would not have done so.

Part 192.615(a)(3) relates to “prompt and effective” responses to emergencies. The text of (a)(3) is reprinted on page 11-3. On page 11-12, PG&E explains that its emergency plans call for its personnel to “gather critical information to promptly initiate

¹⁷ PG&E Motion To Strike, p.7.

¹⁸ PG&E-1, p. 11-11.

¹⁹ PG&E Motion To Strike, pp. 5-6.

the operator's response efforts", and cites to Part 192.615(a). In Attachment C to Chapter 11, PG&E includes copies of its emergency plans, which contain the following:

Section §192.615(a)(3)(i) allows operators latitude in responding to notices of gas odor inside buildings. As long as an operator's response is "prompt" and is "effective" in minimizing the hazard, there would be little reason, if any, to challenge the appropriateness of the operator's procedures.²⁰

In addition, PG&E's testimony reprinted Part 192.605(a) on page 9 of Chapter 11. It also includes many references to Part 192.605(c) in Chapter 10.

Not only does Part 192.605(c) necessarily include Part 192.605(c)(1)-(4), PG&E in fact presented a defense to a violation of subsection (c)(4) (albeit a weak one), demonstrating actual notice. Part 192.605(c)(4) relates to reviewing personnel responses during "abnormal operations" to determine the effectiveness of the emergency procedures. At pages 26 and 27 of Chapter 11 PG&E discusses how its mechanics must be trained in recognizing abnormal operating conditions (emergencies), and discusses how its Basic Plan provides for an Annual Review of its employees recognition and reaction to abnormal conditions.

In yet another example, PG&E claims CPSD failed to put PG&E on notice of Part 192.616(d), which requires PG&E to "educate the public" on excavation activities. PG&E addressed public awareness and education in Chapter 10 on pages 9 and 10, and Chapter 13 on page 9. With regards to Part 192.616(d), CPSD recommended a specific remedy to address this concern, which is addressed by PG&E on page 13A-8.

And on and on. Each of the subsections that were alleged in CPSD's Opening Brief were in some way rebutted or acknowledged by PG&E in its testimony. It appears that PG&E not only *should* have been on notice, but it *was*.

When PG&E reprints entire code sections in its testimony, and provides explanations as to why it complied with those code sections, or provides updates on its efforts going forward to address those concerns, it is simply not credible for PG&E to

²⁰ See page 71 of PG&E's Emergency Plans, PG&E-1, Chapter 11.

now claim, *after the hearings*, that it was somehow unfairly surprised that CPSD alleged violations of the very code sections that PG&E reprinted and discussed in its testimony. PG&E’s own testimony shows that it was already aware of the allegations in CPSD’s Opening Brief, belying what it now states in its Motion to Strike.

A. PG&E Confuses Its Opportunity To Present Its Version Of The Facts In Its Testimony With The Opportunity To Present Legal Analysis Of The Facts In Its Briefs

PG&E misunderstands the fundamental structure of enforcement cases at the Commission, where the opening brief is the time for the complainants (CPSD and the intervenors) to make their legal arguments, and the respondent is then given the opportunity to respond. The prepared written testimony is where facts are alleged, not legal arguments. PG&E has yet to file its reply to CPSD’s Opening Brief – and when it does so, it will have an opportunity to respond to the allegations against it. Due process requires notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” (*United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, ___, 130 S. Ct. 1367, 1378 (2010).) By placing its legal arguments in its briefs rather than its testimony, CPSD has not violated PG&E’s due process.

PG&E’s motion relies on a mischaracterization that it has not been provided an opportunity to respond to the legal allegations against it. In fact, PG&E has the opportunity to respond – on April 12, 2013, when it will respond to CPSD’s legal allegations of violations. Thus, PG&E will have the opportunity to respond to CPSD’s legal allegations. To suggest that PG&E has been deprived of the opportunity simply ignores the fact that PG&E has yet to file reply briefs. PG&E’s lawyers argue that PG&E has “already made its defense”²¹, implying that it did not defend itself from the allegations made in CPSD’s Opening Brief, but they are wrong, as discussed above. PG&E’s *legal* defenses will (and should be) made in its reply briefs. Much the same as a

²¹ PG&E Motion to Strike, p.7.

lawyer in front of a jury in civil court makes his or her closing argument, PG&E has heard CPSD's argument, and now PG&E has the opportunity to make its own arguments in response.

PG&E's argument that it is now "impossible to present a defense"²² is a distortion. PG&E has been given CPSD's factual allegations well in advance, and had an opportunity to present a factual defense, which it did. This included specific references to the sections of federal law violations at issue here. However, PG&E has not had advance notice of CPSD's *legal arguments*, nor should it have. CPSD should not be required to make every legal argument prior to the hearings. The only issue, then, is whether the charges in the OII and Staff Report give PG&E adequate notice. Both the OII and CPSD's Report do so.

PG&E's time to make its legal arguments is now, in the reply briefs. The cases cited by PG&E all involved situations where the defendant was not adequately apprised of the charges against it, and thus were unable to present a defense. In this case, PG&E has the opportunity to present a legal defense to all of the charges against it.

V. PG&E HAS RECEIVED ADEQUATE NOTICE OF THE CHARGES AGAINST IT; THEREFORE, CPSD IS NOT REQUIRED TO AMEND THE ALLEGATIONS

As in most Commission enforcement cases, the Commission understands that the investigation often continues after the OII has issued. With this in mind, the Commission expressly permits parties to add additional allegations as the facts warrant. The Commission actually encourages staff to do so: "We expect Staff to bring additional evidence discovered in the course of its ongoing investigation of any new alleged violations by Respondents to our attention." However, CPSD does not believe it is necessary to add additional violations, because the OII and CPSD Report adequately place PG&E on notice of the applicable laws and regulations, and PG&E as a regulated utility is expected to be fully aware of all of the applicable laws and regulations. CPSD

²² PG&E Motion to Strike, p.8.

does not agree that these are “new” allegations – the allegations at issue are merely references to sections that have already been referenced.²³

However, if the Commission believes that references to the specific subsections of Part 192 fall entirely outside scope of the OII and CPSD Report, CPSD will make a motion to amend the scope of this proceeding to allow PG&E to present a legal defense to these “new” allegations (which they are not). To do so would be unnecessary, however, because PG&E may provide its legal defenses in its reply brief. And to do so would ignore the fact that PG&E already made arguments in defense of those subsections in its testimony. Additionally, there is no need for PG&E to amend its testimony because CPSD has not alleged any new facts. CPSD strongly urges the Commission not to adopt this course of action, however, because such a ruling would in effect create a rule that (1) parties must make all of their legal arguments in their testimony, even if the witnesses are not lawyers; and (2) parties must know all of their legal arguments prior to the establishment of the evidentiary record, even if the record contains evidence not known at the time of preparing direct testimony.

If PG&E’s motion is granted, CPSD would be prevented from making arguments regarding facts and laws that are specifically referenced in the record, which would inhibit CPSD’s (in effect, the people’s) ability to enforce the law.

VI. OTHER ISSUES

CPSD strongly disagrees with PG&E Footnote 11²⁴, which somewhat arbitrarily claims that facts in CPSD’s proposed Findings of Fact cannot support violations that were not alleged in the CPSD Report. Facts alleged in the testimony can of course be used to prove violations alleged in the briefs. In any event, PG&E ignores the fact that CPSD’s Report contained references to every section cited in its Opening Brief.

²³ Again, every single section that PG&E complains about is a subsection of a section that has been explicitly referenced in the CPSD Report. For example, on page 123 of CPSD’s Report there is a 2 page discussion of Part 192.616. Yet PG&E takes issue with CPSD alleging a violation of Part 192.616(d) because it is not mentioned on page 164 of CPSD’s Report.

²⁴ PG&E Motion to Strike, p. 9.

CPSD also strongly disagrees with PG&E's Footnote 12²⁵, which surprisingly claims that CPSD never mentioned Part 192.917(c) in its violations in the CPSD Report. However, on page 24, CPSD's Report states: "PG&E violated Part 192.917(c) and the requirements of AMSE B31.8S, Section 5, which is incorporated into Part 192.917(c) by reference." The text of Part 192.917(c) is spelled out on page 54 of the CPSD Report. PG&E was put on notice of that allegation and given a chance to respond.

PG&E mischaracterizes CPSD's Footnote 16 on page 33 of its Opening Brief.²⁶ Footnote 16 did not acknowledge that there are new violations in the Opening Brief. The sentence the footnote is appended to was intended to point out that the specific bases for the violations in the Opening Brief are the CPSD Report, the Overland Consulting Report, and the evidence introduced at the evidentiary hearings, which are not contained in the *OII*. The sentence on page 33 was also not intended to be all inclusive – for example, the *OII* clearly incorporated by reference the NTSB Report and the IRP Report as well, which contain additional allegations. (Ordering Paragraphs 10, 11, and 12, I.12-01-007.) CPSD also did not state that the allegations of violations in the Opening Brief were not contained in *CPSD's Report*. The next sentence on page 33 makes it clear that CPSD believes the CPSD Report, the Overland Report, and the *OII* (and here CPSD probably should have included the NTSB Report and the IRP Report as well), taken together provide adequate notice of all the violations alleged in CPSD's Opening Brief. In any event, PG&E does not appear to be claiming that the *OII* by itself must contain notice of all of the violations. If it had, CPSD would have pointed out that the *OII* by itself contained adequate notice, because it incorporates by reference the other reports.

²⁵ *Ibid.*

²⁶ PG&E Motion to Strike, p. 6.

VII. CONCLUSION

Taken together, the Commission's OII, CPSD's Report, the NTSB Report, the IRP Report, and the Overland Consulting Report, provide adequate notice of the charges against PG&E in this case.

PG&E's claim that the alleged lack of notice prevented it from making a complete defense is belied by the fact that *it did in fact defend itself* against each violation listed in CPSD's Opening Brief. This fact demonstrates that PG&E was given adequate notice of the allegations. While CPSD acknowledges that it did not reference every subsection of every applicable regulation in its testimony, nothing requires CPSD to do so. CPSD did in fact reference in its Report every single *section* cited in its Opening Brief, but not every *subsection* (for example, Part 192.605(c) but not (c)(4)). PG&E apparently anticipated this and provided testimony in response.

PG&E essentially wants all of CPSD's legal arguments to be disclosed in its testimony, in advance of briefs. But to place such a requirement on CPSD would essentially mean that CPSD would have to hire lawyers to testify, because while CPSD staff is generally aware of the applicable laws, they do not make legal arguments in their testimony, because they are engineers. The same is true for PG&E, which did not have any lawyers testify in this proceeding. The time for presenting legal arguments is in the briefs, not in the testimony.

CPSD respectfully suggests that the sensible outcome in this instance is that PG&E is deemed to be on notice of the subsections of the federal laws cited by CPSD, which were cited by their section number in CPSD's Report, and supported by the facts in CPSD's testimony. The fact that PG&E reprinted and discussed those subsections in its testimony shows that it had actual notice, and supports this outcome. CPSD should be allowed to reference subsections of the applicable laws in its legal arguments, because PG&E received adequate notice of the applicable federal laws at issue.

Respectfully submitted,

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