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)

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

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Pursuant to Rule 11.1(f) of the Rules of Practice and Procedure, PG&E replies to the Response of the Consumer Protection and Safety Division in Opposition to PG&E's Request for Official Notice.[1] Presiding Administrative Law Judge Wetzell granted permission for this reply by _____ on March __, 2013.

* * *

CPSD's opposition to PG&E's motion to strike Appendix C to CPSD's opening brief underscores why basic notions of fairness require that relief.

CPSD's opposition effectively asks the Commission to pretend CPSD did not include Section X, "PG&E'S VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS," in its January 12, 2012 report. While characterizing its new Appendix C, as simply "legal argument" that would have no place in testimony, CPSD Opp. at 3, 13, CPSD does not explain why it included Section X if not to provide PG&E notice of the violations CPSD was alleging. CPSD chose to include in its report a section whose caption would lead any reader to believe it contained a list of the violations CPSD alleged, a list sufficiently specific that PG&E never felt the need to ask a data request to pin down CPSD's allegations. Now, after PG&E submitted its testimony and decided what cross-examination to conduct or not, after the evidentiary hearings

[1] Pursuant to *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964), PG&E expressly reserves its federal constitutional and any other federal claims and reserves its right to litigate such claims in federal court following any decision by the Commission, if necessary. While PG&E cites federal cases, including Supreme Court decisions, they are cited only to the extent that they provide analogous authority for construing the California Constitution and/or California law.

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have been concluded, CPSD says it did not really mean Section X to be a list of "PG&E'S VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS."[2]

Rather than explain or defend its choice to include the list of "PG&E'S VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS," CPSD attempts to shift the burden to PG&E. CPSD argues all the Constitution requires is "adequate notice," a general proposition with which PG&E agrees.[3] CPSD, however, ignores the "misdirection" of its Section X list of violations and asserts that it "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." CPSD Opp. at 3. CPSD claims that "by placing PG&E on notice that Part 192 was violated, ***all of the subparts of Part 192 are included in that notice***." CPSD Opp. at 6-7 (emphasis added).

This is an extraordinary claim in an enforcement proceeding. Part 192 of 49 C.F.R. contains 16 subparts with more than 230 separate sections, four appendices, and it incorporates the 60 pages of ASME B.31.8S. CPSD might as well say it put PG&E on notice that PG&E violated "the law." There is nothing "adequate" or fair about such notice under any

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[2] CPSD now claims that list was simply "[i]n addition" to other violations it says it alleged elsewhere in its report. CPSD Opp. at 7. CPSD could have started Section X by saying, "In addition to the violations alleged on pages x, y and z of this report . . ." and thus provided PG&E notice that its list of violations was not exclusive. But, CPSD chose not to do that.

[3] CPSD accuses PG&E of having "badly misstated" *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678 (1975). CPSD Opp. at 6. CPSD has misread the case, however. There were two separate, related charges, the one CPSD discusses of interference with the attorney-client relationship and another of interference with the operation of the Public Defenders' Office. As PG&E correctly stated in its motion, the latter charge was stricken as "irrelevant" because it was not contained in the original notice:

> 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. Petitioner was charged only with an unlawful interference with the attorney-client relationship, and ***we agree that the conclusion of unwarranted interference with the operation of the public defenders' office, although perhaps factually supported, is not contained within the charged misconduct***. (See *In re Ruffalo* (1968) 390 U.S. 544 [20 L.Ed.2d 117, 88 S.Ct. 1222].)

Cannon, 14 Cal. 3d at 696 (emphasis added).

Further pointing out that most of the cases PG&E cited were not Commission proceedings, CPSD cites D.12-08-046 for what it contends are the appropriate "due process notice requirements." CPSD Opp. at 4. D.12-08-046 is a decision on rehearing in *Application of Pacific Gas and Electric Company to Revise its Electric Marginal Costs, Revenue Allocation, and Rate Design, including Real Time Pricing, to Revise its Customer Energy Statements, and to Seek Recovery of Incremental Expenditures*, a ratesetting proceeding. The requirements of due process and notice in a ratesetting case bear little resemblance to those in an enforcement proceeding.

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circumstances. When juxtaposed to the Section X list of "PG&E'S VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS," CPSD's claim rings hollow.

Nevertheless, CPSD claims PG&E put on a defense to all 55 violations, not just the original 18, and thus the notice must have been sufficient. CPSD Opp. at 10-13. Factually, that claim is not correct. In the emergency response area, for example, CPSD's testimony contained suggestions for improvement that, in CPSD's brief, have now morphed into alleged violations.[4] Even if PG&E had attempted to put on a defense, that does not excuse the constitutional duty to provide adequate notice. The court in *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434 (1991), addressed and disposed of a similar argument:

> Hospital required a painstaking effort by Rosenblit, not only to prepare his defense to the charges, but also to uncover the basis and scope of the allegations he was expected to defend. Either personally or through counsel, Rosenblit wrote six letters pleading for a description of the acts or omissions with which he was charged. Hospital refused twice, insisting he had been provided adequate notice. He asked Hospital to take the guesswork out of the proceedings by setting forth the charge on each case so he could prepare specific responses and to provide him with reviewer comments prepared by Hospital staff. Hospital responded that there were problems in every one of the cases with "diabetic management" and "clinical judgment." Reviewer comments on 14 charts were finally provided after the scheduled hearing was postponed and following this frustrating effort to ascertain what was claimed to be unacceptable treatment of each patient.
>
> Incredibly Hospital now argues that Rosenblit presented a thorough defense to the treatment he prescribed in each of the 30 cases, and therefore, the notice was adequate. Its backward reasoning is disingenuous. Rosenblit obviously prepared a lengthy defense to the broad allegations made by Hospital on his treatment

[4] And CPSD has added violations on topics not even discussed in its testimony. For example, Appendix C to CPSD's opening brief alleges 21 separate violations related to emergency response; CPSD's list of "PG&E'S VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS" had just one specific alleged violation with respect to PG&E's written emergency response procedures (paragraph 6 on page 3 of PG&E's motion) and included PG&E's emergency response in the list of factors that "together constitute an unreasonably safe condition" (paragraph 1 on page 2 of PG&E's motion). CPSD now alleges violations of 49 C.F.R. §§ 192.615(a)(8) & 192.615(c)(4) for "failure to create a mutual assistance agreement with local first responders" and "failure to plan how to engage in mutual assistance." The words "mutual assistance" do not appear anywhere in CPSD's testimony. *See* Ex. CPSD-1 (CPSD/Stepanian); Ex. CPSD-5 (CPSD/Stepanian). Nor is there any mention in CPSD's testimony of the alleged violation of 49 C.F.R. § 192.615(a)(5) for "failure to protect people first then property." *See* Ex. CPSD-1 (CPSD/Stepanian); Ex. CPSD-5 (CPSD/Stepanian).

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> of 30 different patients. He had little choice. His ability to admit his patients to Hospital was threatened. Since Hospital refused to disclose the specific acts or omissions which allegedly harmed his patients, he was forced to prepare a wholesale defense to all possible charges. ***Hospital's duty to provide adequate notice is not excused because Rosenblit managed to present a defense to the charges***. It is impossible to speculate how he might have defended had he been informed of the specific problems with each patient.

231 Cal. App. 3d at 1446 (emphasis added).

Contrary to CPSD's expressed belief, in an enforcement proceeding – especially one of this magnitude – a list of the alleged violations is not simply "legal argument" to be included in post-hearing opening briefs and then addressed in reply briefs. *See* CPSD Opp. at 13. That is the obvious reason why CPSD included its Section X list of "PG&E'S VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS" in its January 12, 2012 report.

Having framed the issues as it chose, CPSD has not provided a justification – let alone a justification consistent with the California Constitution's guarantee of due process – for it to expand its charges in its opening brief. Appendix C to CPSD's opening brief should be stricken.

Respectfully submitted,

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