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Sent: 3/28/2013 9:10:07 AM
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Bcc:

Subject: Re: I.12-01-007 - San Bruno Investigation - Ruling on PG&E's Request for Official Notice

Mr. Malkin,

PG&E should file a motion to delete references in other parties's briefs.

ALJ Wetzell

From: Malkin, Joseph M. [jmalkin@orrick.com]

Sent: Wednesday, March 27, 2013 6:34 PM

To: Wetzell, Mark S.

Cc: kdaly@stinson.com; catherine.mazzeo@swgas.com; theresa.mueller@sfgov.org; Bone, Traci; Foss,

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Subject: Re: I.12-01-007 - San Bruno Investigation - Ruling on PG&E's Request for Official Notice

Dear ALJ Wetzell,

In light of your ruling, will you be issuing a ruling directing the other parties who cited materials outside the record in this proceeding to similarly delete those references or would you prefer us to file a motion. The material in question, as set forth in footnote 2 to our reply brief, is as follows:TURN cites documents from the Records OII and the PSEP proceeding (TURN OB at 4, 6, 11); DRA cites testimony from the PSEP proceeding (DRA OB at 30, 58, 60-61); and the City of San Bruno cites material from the Records and Class Location OII's, as well as materials outside all the evidentiary records (San Bruno OB at 5-7, 10, 12, 15, 16-17, 23, 36).

Sincerely yours,

Joe Malkin

On Mar 27, 2013, at 4:23 PM, "Wetzell, Mark S." <mark.wetzell@cpuc.ca.gov> wrote:

NOTICE TO PARTIES IN I.12-01-007

The following ruling addresses PG&E's request for official notice of portions of the record of I.11-02-016. A written ruling confirming and memorializing this ruling will be

issued at a later date. Also, I plan to issue next week a ruling on PG&E's motion to strike Appendix C of CPSD's opening brief.

ALJ Mark S. Wetzell

ADMINISTRATIVE LAW JUDGE'S RULING ON PG&E'S REQUEST FOR OFFICIAL NOTICE

1. Summary

On March 11, 2013, the same day that opening briefs were due, Pacific Gas and Electric (PG&E) filed a request for official notice of certain documents from Investigation (I.) 11-02-016 (Records OII). The Consumer Protection and Safety Division (CPSD) filed a response in opposition to official notice of all but one of the documents on March 20, 2013, and PG&E filed a reply on March 21, 2013. This ruling resolves PG&E's request.

2. PG&E's Request

PG&E requests that official notice be taken of 14 documents comprising written testimony, transcripts, and exhibits admitted into evidence in the Records OII. The documents are attached to PG&E's request as Exhibits 1-14.

In support of its request, PG&E cites Rule 13.9 of the Rules of Practice and Procedure (Rules), which provides that

“[o]fficial notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq.” PG&E also notes that the Commission has “routinely” taken official notice of related proceedings, that the Records OII is closely related to and overlaps this proceeding, and that certain testimony from the Records OII has already been taken into this proceeding.

3. CPSD’s Position

CPSD opposes PG&E’s request except with respect to the document entitled “ASA B31.1.8 – 1955”, which is part of Exhibit 5 of PG&E’s request. That document, CPSD notes, sets forth industry standards that are subject to verification and are not subject to dispute. With respect to the remaining portions of PG&E’s request, CPSD’s grounds for its opposition can be summarized as follows:

1. CPSD contends that many of the documents are taken out of context, and if PG&E’s request is granted CPSD will be forced to supply additional evidence from the Records OII to provide necessary context.
2. Opening briefs in this proceeding represent the first of four sets of briefs to be filed in the Records OII and this proceeding. If PG&E’s request is granted, CPSD is concerned that PG&E could repeat this exercise three more times. CPSD contends that it (as well as other parties) would be at a severe disadvantage since they have far fewer resources than PG&E.
3. PG&E did not inform CPSD of its proposal for official

notice until March 5, 2013, less than one week prior to the date for filing opening briefs. CPSD argues this made it nearly impossible to consider evidence from the Records OII that it might rely on. CPSD informed PG&E of its position that it was unfair at that late date to bring up the idea of relying on the record of any other proceeding.

4. CPSD contends that PG&E did not provide sufficient notice of its request as required by section 453(a) of the Evidence Code and did not provide sufficient information as required by section 453(b) of the Evidence Code.

5. The Administrative Law Judge (ALJ) in this proceeding was not present for hearings in the Records OII (other than the joint hearings on a common record). CPSD is concerned that the ALJ did not observe the demeanor of the Records OII witnesses and is not in a position to assess their credibility.

6. CPSD contends that there is no need for official notice with respect to the testimony of witnesses Halligan and Felts.

7. With respect to Exhibits 7, 9, 10, 13, and 14 of PG&E's request, CPSD maintains that official notice is improper because the exhibits are offered for the truth of the contents.

3. Discussion

PG&E cites four Commission decisions from the 1990's to support the proposition that the Commission "routinely" takes official notice of the testimony, transcripts, and exhibits of other proceedings.^[1] In *Application of Pacific Gas and Electric Company*, the Commission took official notice of the record of another proceeding in a proceeding

where the facts were not in dispute. 3 CPUC 3rd 623, 632 fn 5. In *Sonic*, the Commission took official notice of a Federal District Court’s denial of Sonic’s request for a temporary restraining order and a California Superior Court’s preliminary injunction against Sonic. 59 CPUC 2d 34. In *Application of SCE Corp.*, various requests for official notice were initially made prior to the commencement of hearings. 40 CPUC 2d 288, fn5. In *Victor*, a motion for official notice was granted as a pre-trial matter. 81 CPUC 2d 36. Taken together, these cases do not suggest the Commission will automatically take into one proceeding the evidence of another proceeding when the facts are disputed and the request for official notice is first made following hearing, at the same time briefs are due. Consistent with Rule 13.9 (“[o]fficial notice *may* be taken”), official notice is a discretionary matter to be considered on a case-by-case basis.

Notwithstanding the interrelated nature of the Records OII and this proceeding (including the fact that the respective assigned ALJs determined it was appropriate to conduct joint hearings with respect to certain witnesses and issues), the two cases have not been consolidated. In effect, PG&E’s request for official notice attempts to mesh certain selected portions of the evidentiary records despite this fact. Moreover, by waiting to make its request until the due date for opening briefs, PG&E did not provide sufficient notice to other parties as required by Evidence Code section 453(a). Particularly given CPSD’s contention that additional context would be required to respond to the selected portions of the Records OII evidence that PG&E seeks to bring into this OII, CPSD is entitled to sufficient notice.

Finally, as applicable here, official notice should be limited to “[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute” (Evidence Code section 452(g)) and “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evidence Code section 452(g)). I do not find that the disputed portions of the Records OII record that PG&E seeks to bring in to this proceeding meet this standard. Therefore, with the exception of the 1955 ASME standards, PG&E’s request addresses matters for which official notice is not appropriate.

IT IS RULED that

1. The request of Pacific Gas and Electric Company (PG&E) for official notice is denied except with respect to the document entitled “ASA B31.1.8 – 1955”, which is part of Exhibit 5 of PG&E’s request.
2. PG&E shall, on or before April 3, 2013, re-file its opening brief omitting references to the exhibits for which official notice has been denied. PG&E shall also concurrently serve on all active parties a redline version of the opening brief clearly showing all changes made as a result of this ruling.

Dated March 27, 2013, at San Francisco, California.

Mark S. Wetzell
Mark S. Wetzell
Administrative Law Judge

[1] *Application of Pacific Gas and Electric Company to Restructure and Establish Natural Gas Rates*, D.99-11-053, 3 CPUC 3rd 622 (1999); *Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Sonic Communications*, D.95-03-016, 59 CPUC 2d 30 (1995); *In the Matter of the Application of SCE Corp.*, D.91-05-028, 40 CPUC 2d 159 (1991); and *W. Victor v. GTE California Inc.*, D.98-07-021, 81 CPUC 2d 34 (1998).

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