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Subject: I.11-02-016 (Recordkeeping OII) - Ruling on PG&E's Request for Official Notice
NOTICE TO PARTIES IN I.11-02-016

This ruling addresses PG&E's March 25, 2013 Request for Official Notice. A written ruling confirming
and memorializing this ruling will be issued at a later date.

Amy C. Yip-Kikugawa
Administrative Law Judge

ADMINISTRATIVE LAW JUDGE'S RULING RESOLVING

PACIFIC GAS AND ELECTRIC COMPANY'S

REQUEST FOR OFFICIAL NOTICE

This Administrative Law Judge's (ALJ) Ruling grants in part, and denies in part, the request of Pacific Gas and Electric Company (PG&E) for judicial notice. PG&E shall, on or before April 8, 2013 re-file its opening brief omitting references to the exhibits for which official notice has been denied.

Background

On March 25, 2013, PG&E filed Opening Comments in this proceeding. Concurrently with this filing, PG&E filed a Request for Judicial Notice (PG&E Request), asking that Commission take notice of 11 documents. Six of the documents were from Investigation (I.) 12-01-007:^[1]

1. Ex. CPSD-1 (CPSD Incident Investigation Report, September 9, 2012) (excerpted pages 90-91).
2. Ex. CPSD-5 (Rebuttal Testimony of Raffy Stepanian) (CPSD/Stepanian) (excerpted pages 1-3).
3. Ex. CPSD-9 (NTSB Report on PG&E Natural Gas Transmission Pipeline Rupture and Fire San Bruno, CA September 9, 2010) (excerpted page 9).
4. Ex. CPSD-32 (PG&E's Response to NTSB Data Request 036-004 (SA 534 Exhibit 2M) (p.44); PG&E's Response to NTSB Data Request 049-001).
5. Ex. PG&E-1 (Testimony of Witnesses) (excerpted pages 8-7 to 8-8 [PG&E/Slibsager and Kazimirsky], 9-6 to 9-8 [PG&E/Miesner], 11-28 to 11-29; Appendix B [PG&E/Bull]).
6. Reporter's Transcript Volume 5 (October 1, 2012) (excerpted pages 415-16) (PG&E/Bull).

The remaining documents are:^[2]

7. R.11-02-019, Opening Comments of Pacific Gas and Electric Company on Proposed Decision (filed Nov. 16, 2012) (excerpted page 17).
8. Exhibit No. 3 to Xcel Energy Advice Letter No. 809-Gas, No. 11AL-809G, Col. Pub. Util. Comm'n (October 3, 2011) (rate filing cited in Ex. PG&E-62 at MD-33 & n.64 in the Records OII).
9. *Grubb v. Dep't of Real Estate*, No. RG08 364823 (Cal. Super. May 29, 2009).
10. Two separate NTSB Safety Recommendations – NTSB January 3, 2011 Safety Recommendation P-10-2 and -3 (Urgent) and P-10-4 and NTSB Safety Recommendation P-10-1 (Urgent).
11. Letter from NTSB to Christopher P. Johns, President of Pacific Gas and Electric Company (March 14, 2013).

PG&E states that I.12-01-007 is a “parallel” proceeding and argues that it is appropriate to take notice of these documents pursuant to Evid. Code §§ 451 – 454. PG&E also contends that the Commission “routinely” takes official notice of records in related proceedings.[3]

Discussion

Rule 13.9 of the Commission's Rules of Practice and Procedure 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.” The California Evidence Code separately lists those things subject to mandatory judicial notice (Evid. Code § 451) and those things subject to permissive judicial notice (Evid. Code § 452).

None of the documents identified above fall within the categories of things listed in Evid. Code § 451, so the question becomes may, not must, the Commission take official notice of the documents. Of the categories listed in Evid. Code § 452, PG&E contends that official notice of the above documents is proper under subdivisions (c), (d) or (h).[4] Evid. Code § 452 provides, in relevant part, that judicial notice may be taken of the following matters:

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

...

(h) Facts 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.”

The discretionary language in Evid. Code § 452 is echoed in Rule 13.9, which states that “official notice *may* be taken.” (emphasis added) Although PG&E cites to four Commission decisions where official notice was taken of documents in a related proceeding, this does not mean its request should be automatically granted. Rather, consistent with Evid. Code § 452 and Rule 13.9, official notice must be considered on a case-by-case basis.

As a general matter, by waiting to make its request until the due date for opening briefs, PG&E failed to “[give] each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request.”[5] As such, I have considered whether taking official notice of the requested documents will result in prejudice to CPSD or intervenors.

Based on the guidance above, PG&E’s request for judicial notice is granted in part. Official notice shall be taken of the CPSD Incident Investigation Report (document # 1) and the NTSB Report on the San Bruno incident (document # 3), in their entirety. All parties in the proceeding are familiar with both these reports, and there is no prejudice to CPSD or intervenors in taking notice of them at this late date. Official notice shall also be taken of NTSB January 3, 2011 Safety Recommendation P-10-2 and -3 (Urgent) and P-10-4 (document # 10) All parties are also familiar with this safety recommendation, as it is part of the record in I.11-11-009, the third Commission investigation initiated as a result of the San Bruno accident. Official notice of NTSB Safety Recommendation P-10-1 (Urgent) (document # 10) is not necessary, as that document is already part of the record of this proceeding.[6] Official notice shall be taken of *Grubb v. Dep’t of Real Estate* (document # 9) since it is a record of the Superior Court. Finally, official notice shall be taken of the NTSB’s March 14, 2013 letter to Christopher Johns (document #11) as it relates to NTSB Safety Recommendation P-10-3 (Urgent).

PG&E's request for official notice of all other documents is denied. PG&E seeks judicial notice of portions of testimony and the transcript from I.12-01-007 (documents # 2, 5 and 6). Although I.12-01-007 and this proceeding are interrelated and joint hearings were held with respect to certain common witnesses and issues, the cases have not been consolidated. With the exception of PG&E witnesses Slibsager and Kazimirsky, none of the other witnesses identified in those documents are witnesses to this proceeding. PG&E's request for official notice of selected testimony and cross-examination is effectively an attempt to consolidate portions of the evidentiary records.

Finally, taking official notice of PG&E's comments on a proposed decision in R.11-02-019 (document #7) and Exhibit No. 3 to Xcel Energy Advice Letter No. 809-Gas, No. 11AL-809G, Col. Pub. Util. Comm'n (document # 8) is not appropriate. In addition to not providing sufficient notice as required under Evid. Code § 453(a), these documents relate to facts and propositions that are subject to dispute.

IT IS RULED that:

1. PG&E's request for official notice is granted in part and denied in part as discussed herein.
2. PG&E shall, on or before April 8, 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.

[1] PG&E Request at 1-2

[2] PG&E Request at 2.

[3] PG&E Request at 2 (citing *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).)

[4] PG&E Request at 2-3.

[5] Evid. Code § 453(a).

[6] See Order Instituting Investigation, filed February 24, 2011, Appendix B.