

**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)

**PACIFIC GAS AND ELECTRIC COMPANY'S MOTION TO  
STRIKE APPENDIX C TO OPENING BRIEF OF THE  
CONSUMER PROTECTION AND SAFETY DIVISION  
AND REQUEST FOR ORDER SHORTENING TIME FOR  
RESPONSE**

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Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, Pacific Gas and Electric Company (PG&E) moves to strike Appendix C to the March 11, 2013 opening brief of the Consumer Protection and Safety Division (CPSD).

This motion is made on the grounds that, in Appendix C, CPSD alleges new violations of law that CPSD did not include in its original specification of "PG&E's VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS." CPSD originally charged 18 violations and is now asserting 55. CPSD now asserts 37 "continuing" violations where previously it had identified but one, thus expanding the scope of potential penalties by more than a billion dollars. CPSD's assertion of new violations or recharacterization of existing allegations after the close of evidence violates PG&E's due process rights to notice of the charges against it and an opportunity to prepare and present a defense against those charges.<sup>1</sup> See Cal. Const. art. I, § 7(a). The Administrative Law Judge should strike Appendix C.<sup>2</sup>

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<sup>1</sup> 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 a analogous authority for construing the California Constitution and/or California law.

<sup>2</sup> The associated text of the brief asserting new alleged violations would then become moot and PG&E and the Commission could ignore it.

Because reply briefs are currently due on April 12, the ALJ should also enter an order shortening time to respond to this motion to Friday, March 22, 2013.

## I. BACKGROUND

On January 12, 2012, CPSD issued a report containing its factual findings from its investigation of the San Bruno accident and setting forth the violations of law it alleged against PG&E.<sup>3</sup> Section X (pp. 162 -63), entitled “PG& E’s VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS,” listed the violations of law CPSD alleged. As intended, the violations explicitly alleged in the January 12, 2012 report served as the charging document in this enforcement proceeding. They provided notice to PG&E of the alleged violations of law on which CPSD sought fines, penalties and other remedial relief.

On June 26, 2012, PG&E responded to CPSD’s charges with written testimony addressing both the facts and the legal violations CPSD asserted in the January 12, 2012 report. PG&E also prepared the defense it presented at the evidentiary hearings based on the violations CPSD asserted in Section X of the January 12, 2012 report. PG&E grounded its decisions about the relevant evidence and testimony, and the overall presentation of its defense, including whether to cross-examine CPSD’s witnesses and on what subjects, on CPSD’s statement of alleged violations in the January 12, 2012 report.

In Section X, CPSD stated PG&E’s alleged violations in substantial detail, provided in its entirety below:

[1.] As discussed throughout this report, PG&E did not maintain a safe condition on Segment 180 of Line 132 in San Bruno, California. Many factors contributed to the unsafe condition, including the installation of substandard pipe, failing to follow accepted industry standards during construction, failing to perform adequate inspections, failing to keep adequate safety records, failing to comply with the integrity management rules, failing to operate safely at the Milpitas Terminal, failing to promptly and safely respond to the incident, and management failing to foster a culture that valued safety over profits at PG&E. These factors all contributed to the explosion and fire at San Bruno on September 9, 2010, and ***together constitute an unreasonably unsafe condition***

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<sup>3</sup> Ex. CPSD -1 (CPSD/Stepanian). The January 12, 2012 report became CPSD’s principal testimony in the evidentiary hearing. CPSD continues to rely heavily on the report. See CPSD OB, Proposed Findings of Fact, Appendix [A] (citing to Ex. CPSD-1).

***on Segment 180 that lasted from 1956 to 2010, in violation of Public Utilities Code Section 451.*** (Emphasis added.)

[2.] During construction of Segment 180 PG&E did not comply with the then -current industry standards for construction of its pipelines in violation of ASA B31.1.8 standards, creating an unsafe condition in violation of Section 451. Specifically, PG&E did not follow the established detailed requirements in ASA B31.1.8 -1955 on yield strengths in pipe materials (Section 805.54 of B31.1.8), welding (Section 811.27), fabrication ( API 5LX), testing (Section 841.411), records of testing (Section 841.417), and establishing MAOP (Section 845.22).

[3.] PG&E violated various requirements of 49 C.F.R. Part 192, Subpart O, in its implementation of the Integrity Management process, including incomplete data gathering and integration, flawed threat identification, flawed risk assessment and using an incorrect assessment methodology. This allowed an unsafe condition to persist in violation of Section 451.

[4.] By erasing a digital video recording made during the incident at its Brentwood control room, PG&E destroyed potentially relevant information in violation of Commission Resolution L -403 which specifically ordered PG&E to preserve any potential evidence.

To date, CPSD's investigation has discovered the following specific violations of 49 C.F.R. Parts 192 and 199 (CPSD's investigation is ongoing):

- [5.] 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).
- [6.] 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.
- [7.] By failing to conduct adequate data gathering and integration to evaluate potential threats to pipeline safety, PG&E violated Part 192.917(b).
- [8.] By failing to adequately consider cyclic fatigue in its threat analysis, PG&E violated Part 192.917(e)(2).

- [9.] 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).
- [10.] 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).
- [11.] PG&E failed to conduct prompt alcohol testing of the operators doing the Milpitas work in violation of Part 199.225.

Construed broadly, Section X alleged 18 violations.<sup>4</sup> These were the only alleged violations for which PG&E had notice when it: (1) submitted its June 26, 2012 written testimony responding to CPSD’s factual and legal allegations; and (2) made decisions about the nature and extent of cross-examination it would conduct of CPSD’s witnesses and the defense it would present overall.

In its March 11, 2013 opening brief, CPSD expands its prior alleged violations from 18 to 55. CPSD also contends for the first time that 37 of the 55 violations are so-called “continuing” violations, 13 alleged to have arisen in 1956 and continued each day thereafter through September 9, 2010. This too varies significantly from CPSD’s initial charges. In its January 12, 2012 report, CPSD explicitly stated only one continuing violation (highlighted in Paragraph 1 from the CPSD report above).<sup>5</sup> CPSD’s belated assertion of numerous continuing violations increases the potential scope of penalties by more than a billion dollars.

An example highlights the problem PG&E confronts. In its January 12, 2012 report, CPSD alleged that PG&E “violated Parts 192.605(c) and 192.615” for “failing to adequately

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<sup>4</sup> Section X contains 11 charging paragraphs, numbered in brackets above. Construed in CPSD’s favor, they set forth a total of 18 alleged violations, though several are clearly duplicative. Paragraph 1 alleged one violation (Section 451), continuing from 1956 to 2010. Paragraph 2 alleged 7 violations (Section 451, five sub-sections of ASA B31.1.8-1955, and API -5LX). Paragraph 3 alleged one violation (Section 451). Paragraph 4 alleged one violation (Resolution L -403). Paragraph 5 alleged one violation (Section 192.13(c)). Paragraph 6 alleged two violations (Sections 192.605(c) and 192.615). Paragraph 7 alleged one violation (192.917(b)). Paragraph 8 alleged one violation (192.917(e)(2)). Paragraph 9 alleged one violation (192.917(e)(3)). Paragraph 10 alleged one violation (192.921(a)). Paragraph 11 alleged one violation (199.225). Ex. CPSD-1 at 162-63 (CPSD/Stepanian).

<sup>5</sup> CPSD’s imprecision and ambiguous language renders some of its contentions susceptible to interpretation as alleging a continuing violation, though without a stated beginning or ending date. *See, e.g.*, Ex. CPSD -1 at 162 (CPSD/Stepanian) (“This allowed an unsafe condition to persist in violation of Section 451.”) As discussed below, consistent with due process, PG&E cannot be required to decipher from CPSD’s inexact statements what particular violations of law are at issue and whether they are alleged as “continuing” violations. As the prosecutor in an enforcement proceeding, CPSD was required to explicitly and clearly articulate alleged violations of law prior to the evidentiary hearing. To all appearances it did so in Section X of its January 12, 2012 report.

maintain written procedures for . . . emergency response.”<sup>6</sup> CPSD also included PG&E’s alleged “fail[ure] to promptly and safely respond to the incident” as one in a list of things CPSD contends “*together* constitute an unreasonably unsafe condition” in violation of Section 451.<sup>7</sup> Liberally construing these statements, CPSD’s January 12, 2012 report alleged a total of three violations against PG&E related to emergency plans and emergency response, only two of which were tied to specific legal requirements and none of which was identified as a so-called “continuing” violation.

In Appendix C to its opening brief, CPSD expands its allegations related to PG&E’s emergency plans and emergency response to 19 distinct violations of law, seven of which are continuing violations dating from August 31, 2009 through September 9, 2010. Prior to the evidentiary hearing, CPSD asserted only two emergency response violations linked to a legal standard or requirement – generally asserting that PG&E “violated Parts 192.605(c) and 192.615” without elaborating or specifying particular sub-sections within those regulations. Now, CPSD alleges PG&E violated:

- 49 C.F.R. § 192.615(a)(3) – failure to have a prompt and effective response due to inconsistent emergency plans
- 49 C.F.R. § 192.615(a)(8) – failure to create a mutual assistance agreement with local first responders
- 49 C.F.R. § 192.615(c)(4) – failure to plan how to engage in mutual assistance
- 49 C.F.R. § 192.615(a)(3) – failure to have a prompt and effective response due to a slow and uncoordinated response
- 49 C.F.R. § 192.615(a)(1) – failure to adequately receive, identify and classify emergency notices
- 49 C.F.R. § 192.615(a)(4) – failure to provide for proper personnel and resources at the emergency scene
- 49 C.F.R. § 192.615(a)(6) – failure to adequately minimize hazards to life and property
- 49 C.F.R. 192.615(a)(7) – failure to make safe any actual or potential hazards to life and property
- 49 C.F.R. § 192.615(a)(8) – failure to notify local first responders

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<sup>6</sup> Ex. CPSD-1 at 163 (CPSD/Stepanian).

<sup>7</sup> Ex. CPSD-1 at 162 (CPSD/Stepanian) (emphasis added).

- 49 C.F.R. § 192.605(c)(1) and (3) – failure to have emergency manual that required the appropriate actions;<sup>8</sup>
- 49 C.F.R. 192.615(a)(2) – failure to establish and maintain communications with local first responders
- 49 C.F.R. § 192.615(a)(5) – failure to protect people first then property
- 49 C.F.R. § 192.615(c)(4) – failure to establish and maintain a liaison with local first responders
- 49 C.F.R. § 192.615(a)(3) – failure to properly train personnel to recognize incidents;
- 49 C.F.R. § 192.615(b)(2) – failure to properly train personnel and ensure they are knowledgeable about procedures
- 49 C.F.R. § 192.615(b)(3) – failure to determine if training is effective
- 49 C.F.R. § 192.605(c)(4) – failure to periodically review its emergency response
- 49 C.F.R. § 192.616(d) – failure to properly education the public and local officials

In an apparent attempt to justify its post-hearing addition of new charges, CPSD drops a footnote stating, “The OII, p. 10, permits CPSD to ‘assert additional violations beyond those described herein and in CPSD’s Report.’” (CPSD OB at 33 n. 16.) What the Commission actually said in the OII is:

If staff later believes it has ***good cause to assert additional violations*** beyond those described herein and in CPSD’s report, ***staff may bring the matter to the Commission’s attention*** in this docket, and ***request that it be included in this investigation . . .***<sup>9</sup>

Contrary to CPSD’s suggestion that the OII authorized it to assert its new violations after the close of evidentiary hearings, the OII specified a procedure if CPSD believed it had “good cause” to assert additional charges.

CPSD never brought additional alleged violations to the Commission’s attention, never attempted to make a showing of “good cause,” and did not request that any additional violations be included in the OII prior to the evidentiary hearings. Rather, in its August 20, 2012 rebuttal testimony, CPSD stated unequivocally:

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<sup>8</sup> CPSD alleges violation of two separate sub-sections here.

<sup>9</sup> I.12-02-007 at 10 (emphasis added).

Regardless of whether the violation was a direct contributing cause of the explosion, ***CPSD has listed in its Report every violation found during its investigation.***<sup>10</sup>

CPSD's unilateral attempt to add new allegations in its post-hearing brief is contrary to the OII's direction and violates PG&E's due process rights.

Had CPSD raised these allegations before PG&E submitted its written testimony, and prepared and presented its case and evidence at the evidentiary hearings, PG&E could and would have confronted each of these allegations. PG&E was not afforded that opportunity, however, and the denial of that opportunity would violate due process. Accordingly, the ALJ should strike Appendix C in its entirety and direct that the only appropriately alleged violations in this proceeding are those stated in Section X of CPSD's January 12, 2012 report.

## **II. ALLOWING CPSD TO ASSERT NEW VIOLATIONS CONTRAVENES BASIC DUE PROCESS REQUIREMENTS**

Commission enforcement proceedings must comport with due process. Cal. Const. art I, § 7(a); *see also Sokol v. Pub. Util. Comm'n*, 65 Cal. 2d 247, 256 (1966) (annulling a Commission decision that violated due process by requiring discontinuance of telephone service without providing notice and an opportunity to defend against the allegations of unlawful activity). The strictures of due process "are not for the sole benefit of an accused" but are also "the best insurance for the government itself against those blunders which leave lasting stains on a system of justice." *Sokol*, 65 Cal. 2d at 255.

Among the "basic" requirements of due process are notice of the charges and a reasonable opportunity to respond. *Salkin v. Cal. Dental Ass'n*, 176 Cal. App. 3d 1118, 1121 (1986) (quoting *Applebaum v. Bd. of Dirs.*, 104 Cal. App. 3d 648, 657 (1980)). These "basic ingredient[s]" of fair procedure are essential safeguards of the "fundamental principle of justice" that no party may be "prejudiced in [its] rights without an opportunity to make [its] defense." *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 555 (1974); *see also Salkin*, 176 Cal. App. 3d at 1122 ("The individual must have the opportunity to present a defense." (citing *Pinsker*, 12 Cal. 3d at 555)). A severe violation of these basic guarantees occurs where, as CPSD has done here, new charges are introduced after the accused has already made its defense.

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<sup>10</sup> Ex. CPSD-5 at 4 (CPSD/Stepanian) (emphasis added).



It is all but impossible “to present a defense” after the close of evidence. *Salkin*, 176 Cal. App. 3d at 1122.

California courts have condemned the late assertion of new charges in administrative enforcement proceedings. In *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434 (1991), for example, the court of appeal decried disciplinary proceedings in which the accused “was kept in the dark about the specific charges made against him” as being “a charade” and “offen[sive]” to “even an elementary sense of fairness.” *Id.* 1447-48. In *Smith v. State Bd. of Pharmacy*, 37 Cal. App. 4th 229 (1995), the court denounced the board’s mid-hearing change of legal theories as 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. *Id.* at 242. “[F]undamental fairness,” the court concluded, “requires notice of the statutory theory in the accusation.” *Id.* at 243. And in *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678 (1975), the California Supreme Court held that a charge not “contained in the formal notice” of proceedings had to “be stricken as irrelevant.” *Id.* at 695-96. In so holding, the Court relied on *In re Ruffalo*, 390 U.S. 544 (1968), which found a due process violation where a county bar association added a new charge midway through a disbarment proceeding. *Id.* at 552. The *Ruffalo* Court found that procedure unconstitutional due to the “absence of fair notice as to . . . the precise nature of the charges,” *id.*, and emphasized that this deficiency “serious[ly] prejudice[d]” the respondent’s right to mount a defense, saying: “How the charge would have been met had it been originally included in those leveled against [the respondent] no one knows.” *Id.* at 511 & n.4; *see also Rosenblit*, 231 Cal. App. 3d at 1446 (“It is impossible to speculate how [the respondent] might have defended had he been informed of the specific [charges].”). In each of these cases the reviewing court granted relief.

As these cases demonstrate, the constitutionally required remedy is that all of CPSD’s newly alleged violations “be stricken as irrelevant.” *Cannon*, 14 Cal. 3d at 696. The violation of PG&E’s due process rights here is even more severe than in cases such as *Rosenblit*, where the court of appeal found a due process violation. There, the hospital eventually revealed its specific allegations at the hearing, when there was still an opportunity to present evidence, and the physician “presented an extensive defense, personally testifying to refute the charges and introducing expert opinion and medical journals and treatises.” 231 Cal. App. 3d at 1440. The severity of the due process violations in *Smith* and *Ruffalo* more closely approach this case. In

those cases, the new theory of violation was not introduced until closing argument, *Smith*, 37 Cal. App. 4th at 241, or until “after [the proceedings were] underway” and the respondent had already testified, *Ruffalo*, 390 U.S. at 550 -51. PG&E cannot constitutionally be held liable for CPSD’s newly alleged violations because it has been deprived of its fundamental right to “an opportunity to make [its] defense” against those allegations. *Pinsker*, 12 Cal. 3d at 555.

Through voluminous written testimony and documentary evidence, and during the course of evidentiary hearings over several weeks, PG&E answered the 18 violations asserted by CPSD in its January 12, 2012 report. Now, after the close of evidence, CPSD has spawned 37 new and recharacterized violations, most of which it also contends are so -called continuing violations. For example, CPSD did not allege in Section X of its January 12, 2012 report any of the numerous emergency response violations it now asserts based on individual sub -sections under 49 C.F.R. §§ 192.605(c) and 192.615. Had CPSD stated these newly alleged violations before PG&E submitted its June 26, 2012 written testimony, or even before the several weeks of evidentiary hearings, PG&E could and would have responded to each alleged violation with testimony and evidence, and directly challenged whatever evidentiary basis CPSD claimed supported each violation.<sup>11</sup> PG&E did not have that opportunity, and to sanction that denial would violate due process.

CPSD may argue the alleged violations listed in Appendix C were somewhere contained in its January 12, 2012 report, even if not included in CPSD’s list of charged violations.<sup>12</sup> CPSD itself set out Section X of its report entitled, “PG&E’S VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS.”<sup>13</sup> CPSD cannot at this late date pull from scattered statements in the body of its January 12, 2012 report and claim it actually alleged a violation not identified in Section X but now included in Appendix C. Even if CPSD may have described an alleged violation somewhere in its 170 -page report, reliance on that now is not consistent with due process.

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<sup>11</sup> Even at this late juncture, CPSD fails to identify evidentiary support for each of these alleged violations. CPSD’s proposed Findings of Fact in large part merely reiterate statements from its January 12, 2012 report, which, of course, cannot provide legitimate evidentiary support for violations CPSD did not allege in that report.

<sup>12</sup> CPSD may contend, for example, that it alleged in the January 12, 2012 report that PG&E violated 49 C.F.R. § 192.917(c), even though that charge was not stated in Section X. See Ex. CPSD-1 at 26 (CPSD/Stepanian) (“A number of deficiencies in PG&E’s risk ranking algorithm likely resulted in a flawed risk ranking. PG&E violated Part 192.917(c) and requirements of AMSE B31.8S, Section 5, which is incorporated into Part 192.917(c).”).

<sup>13</sup> Ex. CPSD-1 at 162 (CPSD/Stepanian).

Due process not only requires that CPSD provide notice of the charges but that it provide clear and effective notice. *See, e.g., Ruffalo*, 390 U.S. at 552 (due process requires fair notice of “the precise nature of the charges”); *Rosenblit*, 231 Cal. App. 3d at 1446 (due process requires notice of “the specific acts or omissions” against which the respondent is expected to defend itself). As the prosecutor in this enforcement proceeding, CPSD’s responsibility was to allege violations PG&E could understand and have the opportunity to respond to. As the respondent, PG&E cannot be required to search for, decipher and distill from CPSD’s investigation report alleged violations CPSD may have intended to make but did not include in its list of “PG&E’S VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS.” *See Rosenblit*, 231 Cal. App. 3d at 1446 (finding a due process violation where respondent had to undertake “a painstaking effort . . . to uncover the basis and scope of the allegations”). CPSD listed its alleged violations in Section X of its original report and emphasized in its rebuttal testimony that it had “listed in its Report every violation found during its investigation.”<sup>14</sup> After the close of evidence, CPSD cannot expand or revise the charges, regardless of why CPSD failed to include them in its list of alleged violations in the first place.

If Appendix C to CPSD’s opening brief is not stricken, due process requires that the evidence and evidentiary hearing be reopened to provide PG&E a fair opportunity to respond to the new allegations.

### **III. TIME TO RESPOND TO THIS MOTION SHOULD BE SHORTENED**

PG&E’s reply brief is due on April 12, 2013. A prompt resolution of this motion is necessary for PG&E to know what allegations it has to respond to. Accordingly, the ALJ should shorten the time to respond to this motion to Friday, March 22, 2013.

### **IV. CONCLUSION**

CPSD failed to charge the 37 new violations in its January 12, 2012 report and only revealed them after the close of evidence. Had CPSD included the 55 charges in Appendix C of its brief in its list of “PG&E’S VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS,” PG&E would have defended itself against each of them. Now, it is too late for PG&E to exercise its fundamental due process right to prepare and present a defense against CPSD’s tardy charges. Appendix C to CPSD’s March 11, 2013 opening brief should be stricken,

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<sup>14</sup> Ex. CPSD-5 at 4 (CPSD/Stepanian).

and the proceeding decided based on the alleged violations contained in Section X of CPSD's January 12, 2012 report.

Respectfully submitted,

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