

**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 RESPONSE OF THE CONSUMER  
PROTECTION AND SAFETY DIVISION IN OPPOSITION TO  
PG&E'S REQUEST FOR OFFICIAL NOTICE**

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Dated: March 21, 2013

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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. Presiding Administrative Law Judge Wetzell granted permission for this reply by e-mail on March 21, 2013.

\* \* \*

The Commission routinely takes official notice of records in related proceedings.<sup>1</sup> CPSPD's allies in this action, TURN, DRA and the City of San Bruno, collectively cite materials from the Records OII (I.11 -02-016), the Class Location OII (I.11 -11-009), the proceedings in R.11-02-019 on PG&E's Pipeline Safety Enhancement Plan, and materials not in any evidentiary record.<sup>2</sup> Yet, CPSPD calls PG&E's request for official notice of limited material from the

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<sup>1</sup> In *Application of Pacific Gas and Electric Company to Restructure and Establish Natural Gas Rates*, the Commission took official notice of the facts reflected in the exhibits and transcripts admitted into evidence in another proceeding. D.99-011-053, 1999 Cal. PUC LEXIS 843, at \*8 (1999). Similarly, in *Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Sonic Communications*, the Commission took official notice of the record in two related proceedings. D.95-03-016, 59 CPUC2d 30, 1995 Cal. PUC LEXIS 262, at \*16 (1995). Numerous Commission decisions hold the same. See, e.g., *In the Matter of the Application of SCE Corp.*, D.91-05-028, 40 CPUC2d 159, 1991 Cal. PUC LEXIS 253, at \*8 -9 (1991) (noting that official notice was taken of pre-filed testimony, hearing exhibits, and transcripts in the parallel FERC proceeding to the extent they are specifically referred to or relied upon in briefs); *W. Victor v. GTE California Inc.*, D.07-021, 81 CPUC2d 34, 1998 Cal. PUC LEXIS 552, at \*4 (1998) (taking official notice of exhibits and testimony in the cases decided in D.98-01-052).

<sup>2</sup> 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 OIIs, as well as materials outside all the evidentiary records (San Bruno OB at 5 -7, 10, 12, 15, 16-17, 23, 36).

admittedly overlapping Records OII “post-trial by ambush” and unfair. CPSD Opp. at 2 -3. While those phrases have a ring, they lack substantive merit.

CPSD’s response obscures the central, dispositive facts about PG&E’s request: The materials of which PG&E seeks official notice are all in evidence in a parallel Commission enforcement action between the same parties.<sup>3</sup> CPSD does not explain how it can be “ambushed” by use of evidence – including its own witnesses’ testimony – from a proceeding it prosecuted.<sup>4</sup>

Notwithstanding CPSD’s emphasis that the filed pdf was 11 MB in size, the materials are far from voluminous. *See* Malkin Decl., ¶ 7. The 14 exhibits total 204 pages, aside from face pages, indices and page breaks. As we have all experienced, converting even a small document to pdf can cause the file size to balloon. *Id.* In the case of the 11 MB CPSD emphasizes, nearly half the megabytes (5 MB) – and more than half the pages (116 of 204) – is comprised of ASA B31.1.8-1955 (RON Exhibit 5), which CPSD itself cited and concedes should be in the San Bruno OII record. *See* CPSD’s Opp. at 1.

Putting aside the ASA, the remaining 13 exhibits fall into four categories:

- Direct and cross-examination excerpts of CPSD witnesses, a redline showing the changes in the direct testimony, and a data request concerning the testimony (Julie Halligan, Margaret Felts, Chih-Hung Lee (retired PG&E engineer called by CPSD)) (RON Exhibits 1-4, 6, 8-10, 14)<sup>5</sup>

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<sup>3</sup> CPSD complains that it has separate teams of lawyers. CPSD Opp. at 2. That may be true, but the party to both enforcement proceedings – CPSD – is the same, as is the respondent (PG&E) and all the intervenors.

<sup>4</sup> CPSD submitted a declaration by Harvey Morris, apparently intended to support its claim of “ambush.” Mr. Morris’ account of the discussion between CPSD and PG&E about “meshing” the records in the San Bruno and Records OIIs is not accurate, which is not surprising since Mr. Morris was not a participant in the conversation he described. Declaration of Joseph M. Malkin, ¶ 2 (“Malkin Decl.”). Rather, that conversation took place between Travis Foss, Darryl Gruen and Joe Malkin at the end of the day’s hearing where Mr. Malkin had raised an objection to the inclusion in CPSD’s rebuttal testimony of new material from a civil deposition. Mr. Foss observed that at least one of the exhibits to which PG&E objected was also a CPSD exhibit in the Records OII, and that, if he could cite that exhibit, he would not need to oppose PG&E’s motion. In response, Mr. Malkin stated that PG&E had not objected to that exhibit in the Records OII, so he could refer to it in the San Bruno OII. Mr. Malkin then suggested to Mr. Foss and Mr. Gruen that the parties consider “meshing” the evidentiary record in the various OIIs so that all parties could cite to any evidence in any of the proceedings. Contrary to Mr. Morris’ description, both Mr. Foss and Mr. Gruen stated that the suggestion made sense but that they could not agree without “running it up the chain of command.” Malkin Decl., ¶¶ 3 -4. Following that conversation, PG&E did not hear anything on the subject until Mr. Morris’ email of March 7, 2013 (attached to his declaration as Exhibit A), in response to PG&E’s suggestion that the parties agree to official notice of the Records OII evidentiary record. Though not included with Mr. Morris’ Exhibit A, PG&E immediately corrected Mr. Morris’ statements in a responsive email exchange. Malkin Decl., ¶ 5 and Ex. 1.

<sup>5</sup> Deputy Director Halligan’s testimony includes the two iterations of written policy testimony submitted by CPSD, a

- Two pages of testimony on PG&E leak data by PG&E witness Christine Cowser Chapman (RON Exhibit 7)
- One page of CPSD's and its allies cross-examination of each of two PG&E witnesses (Cesar De Leon and Steve Phillips) (RON Exhibits 11-12)
- Testimony of PG&E employee Kerry Cochran called as a witness concerning the Brentwood video at the request of ALJ Yip-Kikugawa (RON Exhibit 13)

Of the 88 pages that CPSD contests, 50 are in the first category of its own witnesses' materials, two are the cross-examination of PG&E witnesses, and two the direct testimony of a PG&E witness. The remaining 34 pages are comprised of the testimony of the PG&E employee ALJ Yip-Kikugawa requested during the evidentiary hearing on the crossover issue of the Brentwood video.

Aside from claiming PG&E's request is "procedurally improper," when it clearly follows Rule 13.9, CPSD mounts three arguments against official notice of this evidence. First, CPSD says ALJ Wetzell cannot judge the witnesses' credibility because he may not have seen them live. CPSD Opp. at 6-7. Second, CPSD asserts PG&E does not "need" the evidence of CPSD's witnesses' testimony. CPSD Opp. at 8-11. Third, CPSD claims it is unfair for PG&E to be able to use this evidence in this proceeding. CPSD Opp. at 11-12. CPSD is wrong on each count.

CPSD's argument that it is improper to take official notice of the testimony from the parallel Records OII amounts to an argument for the exclusion of all prepared testimony where the witness does not appear live. According to CPSD, without the ALJ seeing the witness' demeanor, the ALJ cannot determine the witness' credibility and, therefore, what weight to give the testimony. If that is the case, then the testimony of Mr. Stepanian in this proceeding would have to be disregarded since he never took the witness stand. But that is not the rule, and there is no reason to apply a different rule here.

CPSD's claim that PG&E does not "need" the evidence is not a ground for denying the request for official notice. The Evidence Code does not require a showing of "need." While CPSD now claims that Ms. Halligan's policy testimony about Public Utilities Code Section 451 is not needed because the interpretation of the statute is a "legal issue," that is not the position CPSD took in the Records OII when Mr. Morris put Ms. Halligan on the stand to testify about those very issues. If CPSD wants to argue that Ms. Halligan's and/or Ms. Felts' testimony is not

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redline showing the changes CPSD made to that testimony the night before the hearing, a data request response concerning the testimony, and seven pages from the transcript of PG&E's cross-examination.

probative of the issues for which PG&E cites it, CPSD is free to do so in its reply brief. CPSD's dislike of the way in which PG&E cites the testimony is not a ground to deny official notice of otherwise properly noticeable material.

Finally, CPSD's claim of "unfairness" because of the burden of having to respond to the 86 pages of material is belied by the fact that CPSD uses a portion of its opposition brief to set forth (although without citation) the arguments it would make in its reply brief. CPSD Opp. at 8-10. CPSD has itself demonstrated that it has the ability to muster any relevant evidence to respond to PG&E's brief and use of the officially noticeable material, and it has the ability to do so in its reply brief and its own request for official notice.

The ALJs in this and the Records OII have emphasized how important it is for the Commission to have a complete record. PG&E's Request for Official Notice furthers that goal. It seeks proper notice of a limited amount of relevant evidence from a parallel OII prosecuted by CPSD with the participation of the same active intervenors. It complies with Rule 13.9 and the Evidence Code provisions governing judicial notice. PG&E's request should be granted.

Respectfully submitted,

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