

**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)

**DECLARATION OF JOSEPH M. MALKIN IN REPLY TO
RESPONSE OF THE CONSUMER PROTECTION AND SAFETY
DIVISION IN OPPOSITION TO PG&E'S REQUEST FOR
OFFICIAL NOTICE**

I, JOSEPH M. MALKIN, declare as follows:

1. I am lead counsel for PG&E in the three pending OIIs (I.12 -01-007, I.11-02-016, and I.11 -11-009). I submit this declaration in response to the declaration of Harvey Morris in support of CPSD's opposition to PG&E's request for official notice. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify truthfully thereto.

2. Mr. Morris' account of the discussion about "meshing" the evidentiary records in the OIIs is not accurate.

3. The conversation took place between Travis Foss, Darryl Gruen and myself at the end of the day's hearing where I had raised the objection to the inclusion in CPSD's rebuttal testimony of new material from the civil deposition of Charles Tateosian. Mr. Foss observed that at least one of the exhibits CPSD had used in this proceeding was also a CPSD exhibit in the Records OII. He observed that, if he could cite that, he would not need to oppose PG&E's motion. In response to that comment, I said that we had not objected to that exhibit in the Records OII, so he could refer to it. I then suggested to Mr. Foss and Mr. Gruen that we consider "meshing" the evidentiary record in the various OIIs so that all parties could cite to any evidence in any of the proceedings.

4. Contrary to Mr. Morris' statement, their reaction was positive. Both Mr. Foss and Mr. Gruen stated that the suggestion made sense. They said, however, that they could not agree

without “running it up the chain of command.” Mr. Morris did not participate in that conversation and was not present at the time.

5. After that conversation, I did not hear anything on the subject until Mr. Morris’ email of March 7, 2013, which he attaches to his declaration as Exhibit A. While Mr. Morris characterizes his Exhibit A as a “true and correct copy of the email exchange,” it does not include the complete email exchange of that morning. I responded to Mr. Morris, correcting his statements, and we exchanged another round of emails after that. I attach hereto as Exhibit 1 as true and correct copy of my reply to Mr. Morris’ email and the subsequent exchange in which I made clear that Mr. Morris’ statements were not correct.

6. Given the conversation I had with Mr. Foss and Mr. Gruen, I was surprised both by Mr. Morris’ statements and by CPSD’s opposition to the use of its own evidence in this proceeding.

7. Mr. Morris’ comment in paragraph 9 about the request for official notice being 11 MB may suggest that we are seeking official notice of a substantial portion of the evidence in the Records OII. I have observed that converting a document to a pdf often causes the file size to balloon. In this case, nearly half the size of the file (5 MB) is consumed by a single exhibit, ASA B31.1.8-1955, which CPSD cited in its own opening brief and to which CPSD does not object. The balance of the request totals only 88 pages, the bulk of it testimony by CPSD’s witnesses or CPSD’s and its allies’ cross-examination of PG&E witnesses. One exception – and the largest single exhibit of which we seek official notice – is the complete examination of PG&E employee Kerry Cochran. Mr. Cochran appeared as a witness at the request of ALJ Yip - Kikugawa made during the evidentiary hearing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 21st day of March, 2013.

/s/ Joseph M. Malkin

Joseph M. Malkin

Exhibit 1

Malkin, Joseph M.

From: Malkin, Joseph M.
Sent: Thursday, March 07, 2013 9:39 AM
To: Morris, Harvey Y.
Cc: Weed, Michael C.; Foss, Travis; Reiger, J. Jason; Austin.Yang@sfgov.org; Theresa Mueller; Britt Strottman (bstrottman@meyersnave.com); smeyers@meyersnave.com; Bone, Traci; Paull, Karen P.; Tom Long; Marcel Hawiger; Wilson, Michelle (Law); PGE Jordan, Lise; Linn, Courtney J.; Berdge, Patrick S.; Cagen, Robert; Gruen, Darryl
Subject: Re: PG&E Request for Official Notice

Harvey,

If we had been told CPSD opposed this, Mike wouldn't have sent the email.

Let's just leave that we have different recollections.

Joe

On Mar 7, 2013, at 9:34 AM, "Morris, Harvey Y." <harvey.morris@cpuc.ca.gov> wrote:

Joe,

To set the record straight, Darryl has never indicated that he was favorably disposed and Travis would not had to have resisted your motion to strike evidence he had already filed in the San Bruno hearing (which he won), if he could have just relied upon evidence from a different proceeding.

Harvey

From: Malkin, Joseph M. [mailto:jmalkin@orrick.com]
Sent: Thursday, March 07, 2013 9:15 AM
To: Morris, Harvey Y.
Cc: Weed, Michael C.; Foss, Travis; Reiger, J. Jason; Austin.Yang@sfgov.org; Theresa Mueller; Britt Strottman (bstrottman@meyersnave.com); smeyers@meyersnave.com; Bone, Traci; Paull, Karen P.; Tom Long; Marcel Hawiger; Wilson, Michelle (Law); PGE Jordan, Lise; Linn, Courtney J.; Morris, Harvey Y.; Berdge, Patrick S.; Cagen, Robert; Gruen, Darryl
Subject: Re: PG&E Request for Official Notice

Harvey,

It's fine if you don't want to agree at this point, but the earlier conversation was not as you recount. Travis and Darryl were favorably disposed but said they had to run it by others. I didn't hear anything further until your email.

Joe

On Mar 7, 2013, at 9:06 AM, "Morris, Harvey Y." <harvey.morris@cpuc.ca.gov> wrote:

Mr. Weed,

This was an issue brought up earlier in these proceedings by Joe Malkin, when he discussed the idea of "meshing" all of the record exhibits into one record. At that time, CPSD had indicated our opposition to it. Your example of jointly designated evidence presents a totally different situation, when parties were given advance notice that hearings are jointly being conducted and both ALJs were present to judge the demeanor of the witnesses. In this latter situation, we have no opposition to testimony or exhibits being used in those joint hearings being referred to in briefs in those

proceedings. Indeed, the care the ALJs took in allowing evidence in the record as Joint exhibits or exhibits in individual proceedings is contrary to your view that the ALJs would support your motion. In addition, unless the Commission has made a finding in its decision in the Safety Rulemaking, which the decision itself can be cited by any party, CPSD objects to evidence being used in the San Bruno brief from that proceeding. Moreover, it is fundamentally unfair, less than one week prior to the time our initial brief is due in the San Bruno OII, for PG&E to bring up the idea of seeking to rely upon any of the record evidence in any other proceeding. Obviously, CPSD has been preparing its San Bruno brief solely on the evidence in that proceeding, and we think PG&E should be limited to the San Bruno record as well. Therefore, with the exception of exhibits designated as joint exhibits, CPSD is opposed to your request.
Harvey Y. Morris
Attorney for CPSD

From: Weed, Michael C. [mailto:mweed@orrick.com]
Sent: Tuesday, March 05, 2013 3:13 PM
To: Foss, Travis; Reiger, J. Jason; Morris, Harvey Y.; Austin.Yang@sfgov.org; Theresa Mueller; bstrottman@meyersnave.com; smeyers@meyersnave.com; Bone, Traci; Paull, Karen P.; Tom Long; Marcel Hawiger
Cc: Wilson, Michelle (Law); Malkin, Joseph M.; PGE Jordan, Lise; Linn, Courtney J.
Subject: PG&E Request for Official Notice

All,

Given the relation and overlap among the various proceedings the Commission initiated following the Line 132 rupture, PG&E suggests that the parties request that ALJ Wetzel take official notice of the records in the related proceedings, namely, the Records OII (I.11-012-016), the Class Location OII (11-11-009) and the Safety Rulemaking (R.11-02-019). Taking official notice of these records will permit the parties to refer to any relevant documents in their briefing and provide the ALJ and the Commission a comprehensive record. Much of the testimony and numerous exhibits received in the San Bruno OII are already jointly designated with the Records OII and/or Class OII, so we expect that ALJ Wetzel will be inclined to grant the request.

PG&E is preparing a Request for Official Notice to be filed with its opening brief in the San Bruno OII. The Request will ask the ALJ to take official notice of all pleadings, testimony and exhibits received in each of the related proceedings noted above. Please let us know at your earliest convenience if you will support the Request. Thanks.

Mike Weed

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