

**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
REGARDING THE CITATION OF MATERIALS
OUTSIDE THE RECORD OF THIS PROCEEDING;
REQUEST FOR ORDER SHORTENING TIME FOR
RESPONSE**

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Pursuant to Rule 1.1.1 of the Commission's Rules of Practice and Procedure, PG&E moves for an order clarifying the appropriate citation of materials outside the evidentiary record of this proceeding.¹ Because reply briefs are currently due on April 12, 2013, the ALJ should also enter an order shortening time to respond to this motion to Friday, April 5, 2013.

Four parties – PG&E, DRA, TURN, and the City of San Bruno – cited materials not in the evidentiary record in this proceeding in their opening briefs. Alone among them, PG&E sought official notice of those materials, not to establish indisputable facts, but as evidence for the Commission to consider in reaching a decision on the merits. Believing, as the ALJs stated so many times in the course of this and the Records OII (I.11-02-016), the Commission wants as full a record as possible, PG&E did not object to any of the extra-record citations by the other parties even though they had failed to seek official notice of the materials here.

By email ruling of March 27, 2013, ALJ Wetzell denied PG&E's request for official notice except with regard to ASA B31.8.1-1955, to which CPSD did not object. The stated basis for the ruling is as follows:

¹ 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.

- (1) The request to take official notice of materials from the records OII amounted to an attempt to “mesh certain selected portions of the evidentiary records” despite the fact that this OII and the Records OII have not been consolidated.
- (2) By making the request the day opening briefs were due, PG&E did not provide sufficient notice to the other parties, as required by Evidence Code § 453(a).²
- (3) “[A]s 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)).”

The ruling directed PG&E to refile its opening brief omitting references to the exhibits for which official notice was denied.

Even though the other parties did not request official notice, the reasoning of the ALJ’s March 23rd ruling – if not modified – applies with equal force to their citations of material outside the evidentiary record of this proceeding. First, DRA’s and TURN’s citations attempt to “mesh” the evidentiary records of two other proceedings – the Records OII and the proceedings on PG&E’s Pipe line Safety Enhancement Plan (PSEP Proceeding) (R.11 -02-019) – with the record here when those proceedings have not been consolidated. Second, none of these parties gave PG&E notice prior to including the citations in their opening briefs. Third, none of the cited materials meet the test of being facts that are beyond dispute within the meaning of Evidence Code § 452(g).

1. To Be Consistent, The ALJ Should Order TURN And DRA To Refile Their Opening Briefs Omitting References To Extra-Record Materials.

The City of San Bruno’s opening brief cites newspaper and television stories about the Line 132 rupture and explosion as well as the City’s website describing the efforts and progress rebuilding the Crestmoor neighborhood.³ While none of this is evidence in this proceeding, PG&E agrees with the City that the human dimension of this tragic accident should never be forgotten even as the Commission’s OII focuses on the narrower issue of legal compliance.

² As the ALJ’s ruling itself recognizes, PG&E informed CPSD and the other parties of its proposal on March 5th, six days before the March 11th due date for the opening briefs.

³ San Bruno OB at 5-8, 10, 15, 40.

Therefore, PG&E does not ask the ALJ to direct the City to refile its opening brief without these citations.

The materials cited by DRA and TURN, however, are the same type as those for which official notice was denied PG&E and should receive the same treatment.

DRA cites testimony from the PSEP Proceeding and an exhibit from the Records OII that is not in evidence in this proceeding:

- a Bechtel report that is Exhibit CPSD -55 in the Records OII and also happens to be posted on the Commission’s website⁴ (DRA OB at 16 & n.40);
- testimony from a PG&E executive in the PSEP Proceeding (DRA OB at 30 n.100 and 58 n.208);
- DRA’s own testimony in the PSEP Proceeding (DRA OB at 60-61 & n.211);
- documents related to other pipeline incidents from various websites (DRA OB at 65 & n.225, n.226, n.227).

DRA provided no notice to PG&E that it would rely on extra-record materials and did not seek official notice for these materials. They would mesh portions the evidentiary records in the PSEP Proceeding and records OII with the record here. And, none of them meet the “not reasonably subject to dispute” standard applied in the ruling denying PG&E’s request for official notice.⁵

TURN also cites material from the PSEP Proceeding and the Records OII:

- TURN’s own reply brief in R.11-02-019 (TURN OB at 6);
- written testimony from PG&E’s witness Harrison in the Records OII (TURN OB at 11).

TURN provided no notice to PG&E before citing these materials and did not seek official notice for them. Like DRA’s materials, they would mesh portions the evidentiary records in the PSEP Proceeding and records OII with the record here. And, they do not meet the “not reasonably subject to dispute” standard applied in the ruling denying PG&E’s request for official notice.

⁴ DRA cited the document from the CPUC website, presumably because DRA was not aware it was an exhibit in the Records OII.

⁵ As the ALJ’s ruling also noted, to correct the characterization of the materials DRA relies on, PG&E would be required to provide “additional context . . . to respond to the selected portions[.]”

In its March 27, 2013 email to the ALJ, TURN attempted to explain why its reliance on extra-record materials was proper (even though PG&E's was not). TURN stated that the citation on page 6 of its opening brief was to a "cost estimate that PG&E itself provided" and defended its use in TURN's opening brief by stating "PG&E cannot dispute that it gave this estimate." In actuality, the citation is to TURN's reply brief in the PSEP Proceeding. The statement in that reply brief to which TURN apparently refers cites TURN's direct testimony in that proceeding. No doubt a PG&E "cost estimate" somewhere underlies TURN's reply brief argument and direct testimony, but characterizing this citation as referring to a PG&E cost estimate is far from precise.

More importantly here, while PG&E would not dispute its own cost estimate, it disputes how TURN used that cost estimate in its briefing and direct testimony in the PSEP Proceeding. TURN's PSEP Proceeding reply brief and direct testimony are not "of reasonably indisputable accuracy" and TURN reliance on these extra-record materials does not pass muster under the ALJ's March 27th email ruling.

TURN's attempt to distinguish its citation of Mr. Harrison's written testimony from the Records OII (TURN OB at 11) also fails. With the ALJs' concurrence, the parties to the Records and San Bruno OIIs agreed that Mr. Harrison would be cross-examined in a joint hearing. Being joint, the cross-examination is part of the record in both OIIs. There was no agreement among the parties or ruling by the ALJs that Mr. Harrison's *written* testimony from the Records OII would be admitted in the San Bruno OII or vice versa.⁶ Records R.T. 1749-51.

2. Alternatively, The ALJ Should Reconsider His Email Ruling And Allow All The Citations To Materials Outside The Record Of This OII.

TURN's arguments for the propriety of its citations to its brief in the PSEP Proceeding and the written Records OII testimony of Mr. Harrison support PG&E's original request for official notice. If, as TURN argues, the standard is whether the party would dispute its own testimony, then, just as PG&E would not dispute its own PSEP cost estimate, CPSD could not

⁶ Where written testimony was intended to be admitted across both the Records and San Bruno OIIs, the ALJs and the parties made that explicit. They did not do so with Mr. Harrison's written Records OII testimony. Similarly, no party appears to contend that Mr. Slibsager's and Mr. Kazimirsky's written Records OII testimony is part of the San Bruno OII record, yet they also testified in a joint hearing. Like Mr. Harrison, they testified in a joint hearing for scheduling convenience, not because their written testimony was admitted across both proceedings. On the other hand, the ALJs and parties confirmed on the record that both Ms. Keas' and Mr. Zurcher's written testimony from the Records OII would be admitted into the San Bruno OII. *See* Joint R.T. 623-25; San Bruno R.T. 527-28.

dispute that Ms. Halligan and Ms. Felts testified as they did in the Records OII (PG&E RON Exs. 1-4, 8-10), or that it responded as it did to PG&E's data request (PG&E RON Ex. 6). Nor would PG&E dispute that Mr. Harrison, as cited by TURN, testified as he did in the Records OII or that its other witnesses there testified as they did (PG&E RON Exs. 7, 10-14).

The same standard should be applied to all parties. PG&E believes that the Commission should consider all of this material in assessing the briefs and facts in this case. The Commission routinely considers evidence from other proceedings by taking official notice. There is no basis on which to distinguish the material cited by DRA and TURN, except the fact that they did not even request official notice. The ALJ should either direct that DRA and TURN also refile their opening briefs omitting references to the materials outside the record of this proceeding or he should reconsider his March 27th email ruling and grant PG&E's request for official notice.

Respectfully submitted,

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