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Subject: I.12-01-007 - San Bruno Investigation - Ruling on Motion of PG&E to Strike
Appendix C

NOTICE TO PARTIES IN I.12-01-007

The following ruling addresses PG&E's motion to strike Appendix C to CPSD's opening brief. A written ruling confirming and memorializing this ruling will be issued at a later date.

ALJ Mark S. Wetzell

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.

Investigation 12-01-007

(Filed January 12, 2012)

ADMINISTRATIVE LAW JUDGE'S RULING ON PACIFIC GAS AND ELECTRIC COMPANY'S MOTION TO STRIKE APPENDIX C TO THE OPENING BRIEF OF THE CONSUMER PROTECTION AND SAFETY DIVISION

1. Summary

On March 18, 2013 Pacific Gas and Electric (PG&E) filed a motion to strike Appendix C to the March 11, 2013 opening brief of the Consumer Protection and Safety Division (CPSD). CPSD and the City of San Bruno (CSB) filed responses in opposition to PG&E's motion on March 25, 2013. PG&E filed a reply to CPSD's response on March 26, 2013. This ruling resolves PG&E's motion to strike.

2. Background

The January 12, 2012 Order Instituting Investigations (OII) referred to accident investigation reports by the National Transportation Safety Board (NTSB), an Independent Review Panel (IRP) established by the Commission, and CPSD.^[1] Section X of the CPSD Report, entitled "PG&E's Violations of Applicable Laws and Regulations," is a two page discussion (pp 162-163) by CPSD of alleged actions or failures by PG&E that constitute violations of the Public

Utilities Code, Commission orders, industry standards, and federal regulations.

Appendix C to CPSD's opening brief is a "Table of Violations" consisting of 55 rows and two columns.^[2] The first column is headed "Violations" and the second column is headed "Duration." Each entry in the violations column shows a particular statute or regulation that CPSD alleges PG&E violated along with a brief statement of the alleged action or failure of PG&E constituting the violation. Each entry in the duration column shows the date or range of dates on which the alleged violation occurred. The table groups the alleged violations under subheadings for violations relating to (1) PG&E's fabrication and construction of Segment 180 of Line 132 (13 violations), (2) PG&E's Integrity Management Program (15 violations), (3) PG&E's SCADA System and the Milpitas Terminal (5 violations), (4) PG&E's Emergency Response (21 violations), and (5) PG&E's Safety Culture (1 violation).

3. PG&E's Motion

PG&E's 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 violations in Section X of the CPSD Report. PG&E contends that Section X serves as the "charging document" in this enforcement proceeding. By PG&E's calculation, CPSD originally charged 18 violations in Section X and is now asserting 55, including 37 "continuing" violations where previously it had identified but one.

PG&E claims that 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. According to PG&E, its June 26, 2012 written testimony responded to CPSD's charges, addressing both the facts and the legal violations asserted by CPSD in Section X of the CPSD report. PG&E also states that it prepared its defense at the evidentiary hearings based on Section X, including its decisions about relevant evidence and testimony and its overall presentation of its defense, including whether to cross-examine CPSD's witnesses and on what subjects.

4. Discussion

I do not find that the Commission intended Section X of the CPSD Report to be the exclusive charging document in this investigation. On the contrary, if a statement of alleged facts constituting a violation is set forth in the OII or in its referenced documents, then PG&E had adequate notice prior to evidentiary hearings of the factual allegations that it needed to defend against.

Moreover, I do not find that it was necessary for the Commission, in the OII, or CPSD, in the CPSD Report, to set forth the legal basis for its alleged violations. As CPSD notes in its response to PG&E's motion, opening briefs are the time for CPSD and intervenors to make their legal arguments. CPSD has not violated PG&E's right to due process by putting forward its legal arguments in its opening brief. PG&E has an opportunity to respond to the legal arguments in its reply brief.

However, PG&E suggests that at least in some cases, the factual basis for an alleged violation is not adequately set forth in the OII and its referenced documents. For example, CPSD alleges violations of 49 C.F.R. §§ 192.615(a)(8) & 192.615(c)(4) for “failure to create a mutual assistance agreement with local first responders” and “failure to plan how to engage in mutual assistance,” yet, PG&E notes, the words “mutual assistance” do not appear anywhere in CPSD’s testimony. Similarly, according to PG&E, there no mention in CPSD’s testimony of the alleged violation of 49 C.F.R. § 192.615(a)(5) for “failure to protect people first then property.”

I find that it is necessary for CPSD to provide additional information to confirm that PG&E was given timely and adequate notice of the factual bases for each of CPSD’s alleged violations. Specifically, CPSD should re-issue Appendix C to its Opening Brief to add a third column with the heading “Reference.”^[3] For each alleged violation, CPSD should provide in this column specific reference to where the OII or one or more of its referenced documents provides PG&E with notice of the factual basis for the allegation. To the extent, if any, that no reference can be identified for any particular alleged violation, CPSD should delete that alleged violation. To the extent, if any, that PG&E takes issue with CPSD’s factual references in Revised Appendix C, PG&E should address such issues in its reply brief.

IT IS RULED that

1. The motion of Pacific Gas and Electric Company (PG&E) to strike Appendix C of Consumer Protection and Safety Division’s (CPSD) opening brief is granted in part and denied in part as set forth in the foregoing discussion and in the following ordering paragraph.
2. Appendix C to CPSD’s Opening Brief is stricken. CPSD is authorized to re-issue Appendix C to its Opening Brief to add a third column with the heading “Reference.” For each alleged violation, CPSD should provide in this column specific reference to where the OII or one or more of its referenced documents provides PG&E with notice of the factual basis for the allegation. To the extent, if any, that no such reference can be identified for any particular alleged violation, CPSD should delete that alleged violation. CPSD should file and serve its revised Appendix C on or before April 8, 2013.

Dated April 2, 2013, at San Francisco, California.

Mark S. Wetzell
Mark S. Wetzell Administrative Law
Judge

[1] As used herein, “referenced documents” means the NTSB, IRP, and CPSD reports.

[2] Appendix C appears to be responsive to the Administrative Law Judge’s (ALJ’s) request to CPSD to produce a summary table of violations with its opening brief. In addition to addressing PG&E’s request for an order shortening time for responses to the motion to strike, a March 18, 2013 e-mail from the ALJ stated:

“As requested by CPSD [in a March 18, 2013 e-mail to the ALJ], I confirm that during the recent hearings, I requested that CPSD produce with its opening brief a summary table of allegations of violations in this proceeding. I pointed to the table set forth at page 16 of CPSD’s November 20, 2012 opening brief in I.11-11-009 as an example of an acceptable and useful format for the requested table. The request was made from the dais in the hearing room but may have been off the record.”

[3] CPSD may file revised Appendix C only. Consistent with PG&E’s observation in Footnote 2 of its motion to strike, it is not necessary for CPSD to re-file its entire opening brief.