

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)

**THE CONSUMER PROTECTION AND SAFETY DIVISION'S
MOTION FOR CLARIFICATION OF THE ALJ'S RULING DATED
APRIL 2, 2013**

I. Introduction

The Consumer Protection and Safety Division (CPSD) seeks clarification of the ALJ's Ruling dated April 2, 2013 (ALJ Ruling), which requested that CPSD provide additional references in Appendix C of its Opening Brief. The ALJ Ruling granted in part and denied in part a Motion to Strike by Pacific Gas and Electric Company (PG&E). PG&E's Motion to Strike challenged the legal adequacy of the notice provided by CPSD for allegations of violations relating to PG&E's emergency response on September 9, 2010, arguing that CPSD was required to provide notice of the specific subsections of the sections alleged in CPSD's direct testimony.

CPSD opposed the Motion to Strike on three grounds: 1) CPSD provided "adequate notice" of the violations at issue; 2) PG&E had "actual notice" of the emergency response violations, because PG&E's direct testimony actually rebutted all of the emergency response violations; 3) the time for providing legal

arguments showing why PG&E violated the specific subsections is in the legal briefs, not the direct testimony.

The ALJ Ruling did not address any of PG&E's or CPSD's arguments. Instead, the ALJ Ruling found 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." PG&E's Motion challenged the *legal basis*, but not the *factual basis*, for CPSD's emergency response allegations. The ALJ Ruling then ordered CPSD to re-file Appendix C with a third column with the heading "Reference." The ALJ Ruling stated: "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."

On April 8, 2013, CPSD complied with this order. CPSD re-submitted Appendix C with references to where "in the OII or its referenced documents" the allegations at issue in PG&E's Motion to Strike were adequately noticed, because PG&E's Motion to Strike was limited to emergency response violations.

However, on April 9, 2013, the ALJ ordered CPSD to meet and confer with PG&E to develop a procedural plan that "resolves the confusion." However, CPSD is unaware of any confusion and believes that the scope of its response was appropriate. In order to comply with this order, CPSD requests that the following issues be clarified.

1. Must CPSD provide the *specific* factual basis that establishes that PG&E was on notice of the allegations being made against it? Or is it sufficient that CPSD provides a reference adequate to demonstrate that PG&E was placed on notice?
2. Does the ALJ Ruling pertain to *every* violation alleged in CPSD's Opening Brief, even though PG&E does not claim that the notice for the other violations was inadequate? Did the ALJ intend to expand the scope of PG&E's Motion to Strike?

3. Is it necessary to provide a reference to every violation *by April 12, 2013*, in light of the fact that to prepare its Reply Brief PG&E does not question the adequacy of the notice of other violations?
4. Were the references to notice of the allegations of Emergency response, submitted by CPSD on April 8, somehow legally inadequate? If not, what is the basis for the April 9, 2013, email from the ALJ ordering the parties to meet and confer?
5. Does “factual basis” in the “OII or its referenced documents” exclude the documents on CPSD’s website upon which the CPSD Report and NTSB Report were based?
6. Does “factual basis” mean the factual basis for the adequacy of the *notice* of the allegation, or adequacy of *proof* that a violation occurred?

II. Discussion

A. What level of specificity is required?

The ALJ Ruling ordered CPSD to provide the “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.” Does this mean that CPSD must provide the *specific* factual basis that establishes that PG&E was on adequate notice of the allegations being made against it? Or is it sufficient that CPSD provide the reference to the factual basis sufficient to demonstrate that PG&E was adequately placed on notice? For example, must CPSD show that PG&E was placed on notice that the sufficiency of its emergency plans was at issue? Or, as pointed out in the ALJ Ruling, must CPSD show that specific words were used in PG&E’s emergency plans, such as “mutual assistance agreement”?

Commission precedent demonstrates that “adequate notice” means that the Commission must “fairly appraise interested parties of the subjects and issues under consideration in a proceeding.” (D.06-12-044, 2006 Cal. PUC LEXIS 511,

*12.) Thus, CPSD is not required to produce proof that notice was expressly and specifically given for each sub-issue identified in CPSD's Report.

In D.06-12-044, the parties objected that the Commission eliminated "geographic deaveraging", although those words had never been mentioned in the OIR or the Scoping Memo. TURN and DRA argued that neither Appendix A of the OIR nor the August 4, 2005 Scoping Memo "included geographic deaveraging as an issue or sub-issue."

The Commission did not agree with TURN and DRA, holding that the case law "does not stand for the proposition that the Commission can consider only an issue expressly and specifically identified in the scoping memo for a proceeding." The Commission held that the OIR gave "sufficient notice" to the parties so that the issue of geographic deaveraging could be considered in the proceeding.

The Commission found that there was "reasonable notice that the issue of elimination of geographic averaging was properly within the scope of this proceeding." (*Id.*, p. *15.) The Commission reasoned that the OIR "provided broad notice that all pricing regulations were under consideration for revision." (*Ibid.*)

TURN and DRA pointed out that the preliminary Scoping Memo stated: "The scope of this proceeding consists of those issues identified below...Any issue not identified in this Appendix or a subsequent ruling by the assigned Commissioner is outside the scope of this proceeding." (*Ibid.*) TURN and DRA argued that neither Appendix A of the OIR nor the August 4, 2005 Scoping Memo included geographic deaveraging as an issue or sub-issue.

The Commission concluded: "we find that because geographic deaveraging was already within the scope of the issues to be considered in this proceeding, there was no reason to "clarify" or "add" the issue in the August 4, 2005, Scoping Memo." (*Id.*, p. *16.)

Thus, it appears that the ALJ Ruling might perhaps require a level of specificity greater than required by Commission precedent. CPSD requests clarification of this issue.

B. Scope of PG&E’s Motion to Strike

The scope of PG&E’s Motion to Strike was limited to the Emergency response section of CPSD’s allegations of violations. However, the ALJ Ruling ordered CPSD to provide a reference for “each alleged violation”, which includes dozens of other allegations that are not at issue. CPSD interpreted “each alleged violation” to mean only those at issue in PG&E’s Motion to Strike. Did the ALJ intend to broaden the scope of PG&E’s request to include things for which it did not ask? If so, on what basis?

C. No Finding of Inadequate Notice

Did the ALJ find that CPSD’s notice of any violations other than those pertaining to Emergency response was inadequate? Nothing in the ALJ Ruling appears to suggest that notice of violations other than the emergency response ones are at issue in this proceeding. (In fact, CPSD does not agree that the notice for emergency response was inadequate.)

If the notice of violations *other than emergency response* was adequate, CPSD respectfully requests that the ALJ clarify that the Ruling only pertained to the issues raised by PG&E, or clarify the legal basis for ordering to CPSD to do so even though the notice was adequate.

CPSD respectfully requests that the Commission keep in mind that CPSD opposed the ALJ’s briefing schedule on the grounds that there was insufficient time considering the amount of evidence, complexity of the issues, and lack of resources due to illnesses of its staff. Placing additional burdens on CPSD’s resources, without good cause to do so, will prejudice CPSD’s ability to adequately prepare its briefs.

D. Timeline for compliance?

PG&E's Motion to Strike requested an order shortening time to respond, on the grounds that PG&E needs to know which, if any, of CPSD's allegations pertaining to Emergency response are properly noticed and must be responded to, by April 12, 2013, the due date for PG&E's Reply Brief. Thus, CPSD agreed to the request for shortened time and provided its Revised Appendix C, Emergency response, on April 8. Since PG&E is not challenging the adequacy of the notice for all of the other violations, it would appear that it is not necessary for CPSD to provide the references prior to April 12. In light of the fact that CPSD's Reply Brief is due on Friday, April 12, 2013 – only 3 days from today – CPSD requests clarification as to the timeline for compliance with the ALJ's April 9 email ordering CPSD to meet and confer with pge to formulate a procedural plan for compliance.

E. Did the ALJ Ruling intend to exclude CPSD's supporting documents?

When the OII was issued on January 12, 2012, the Commission also released its staff report, CPSD-1. On the same day, CPSD's San Bruno Incident website went live. CPSD's website (<http://www.cpuc.ca.gov/PUC/sanbrunoreport.htm>) was specifically referenced in the OII. (I.12-01-007, FN 3.) The website contains documents that CPSD relied upon in its report, and other additional relevant documents, such as the documents relied upon by the NTSB.

The ALJ Ruling stated that CPSD must provide a specific reference in "the OII or one or more of its referenced documents". This appears to exclude the documents on CPSD's website that support CPSD's Report and the NTSB Report.

The ALJ Ruling also appears to exclude the documents that CPSD provided in its case-in-chief, even though it appears that PG&E's Motion was based on the lack of notice in CPSD's *direct testimony*, not the *OII itself*. For PG&E to have an adequate opportunity to respond, it would appear to be sufficient that the

allegations were made in CPSD's direct testimony, because PG&E had an opportunity to file reply testimony after it received CPSD's direct testimony.

Therefore, in order for CPSD to provide a properly revised Appendix C in compliance with the ALJ Ruling, CPSD requests clarification that the references to notice may also be in CPSD's direct testimony or the documents that were made public by CPSD in support of its staff report.

F. Issues regarding the definition of "factual basis"

The ALJ Ruling ordered CPSD to provide the "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." In this context, the term "factual basis" is vague and ambiguous, and subject to different interpretations. CPSD fears that PG&E will question whether the references provided by CPSD will be subject to a further challenge by PG&E that they do not establish a violation. However, in the revised Appendix C provided on April 8, CPSD did not intend to provide every factual basis for each violation. Therefore, CPSD requests clarification that CPSD is only required to provide the specific references that are sufficient to demonstrate that adequate notice was provided. In other words, CPSD is not required to provide in a revised Appendix C every single factual basis upon which each and every allegation is based.

Respectfully submitted,

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April 9, 2013