

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Investigation on the
Commission's Own Motion into Operations
and Practices of Pacific Gas and Electric
Company with Respect to Facilities Records
for its Natural Gas Transmission System
Pipelines

I.11-02-016
(Filed February 24, 2011)

**PACIFIC GAS AND ELECTRIC COMPANY'S MOTION
FOR RECONSIDERATION OF ALJ'S MARCH 28 RULING
DENYING IN PART REQUEST FOR OFFICIAL NOTICE
OR, IN THE ALTERNATIVE, DIRECTING OTHER
PARTIES TO REFILE THEIR OPENING BRIEFS
DELETING REFERENCE TO MATERIALS NOT IN THE
RECORD OF THIS PROCEEDING; REQUEST FOR
ORDER SHORTENING TIME FOR RESPONSE**

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Dated: April 5, 2013

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Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, PG&E moves for reconsideration of the ALJ's March 28, 2013 ruling denying in part PG&E's Request for Official Notice.¹ This motion is made on the grounds that, under the Commission's usual practice and the standard applied in the ALJ's April 4, 2013 ruling granting CPSD's motion for official notice, the ALJ should grant PG&E's request in full.

In the alternative, PG&E moves for an order directing the other parties to refile their opening briefs deleting references to materials outside the evidentiary record of this proceeding.

Because reply briefs are currently due on April 19, 2013, the ALJ should also enter an order shortening time to respond to this motion to Wednesday, April 11, 2013.

1. The ALJ Should Reconsider The Denial Of Official Notice

By email ruling on March 28, 2013, ALJ Yip -Kikugawa denied in part PG&E's request for official notice. PG&E filed its request on March 25th, concurrent with its opening brief. The

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.

ALJ's denial of the request to take official notice was based primarily on the perceived failure of PG&E to give other parties sufficient notice of its request:

As a general matter, by waiting to make its request until the due date for opening briefs, PG&E failed to "[give] each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request." [Citing Evid. Code § 4 53(a).] As such, I have considered whether taking official notice of the requested documents will result in prejudice to CPSD or intervenors.

"Based on the guidance above," and viewing PG&E's request as "effectively an attempt to consolidate portions of the evidentiary records" in the San Bruno and Records OII, the ruling denied PG&E's request as to all material from the San Bruno OII, except CPSD's report (San Bruno Ex. CPSD-1) and the NTSB report (San Bruno Ex. CPSD -9).² With respect to these two San Bruno OII exhibits, the ALJ's ruling took official notice of the entirety of the documents rather than the excerpts for which PG&E had requested official notice.³

On April 4, 2013, the ALJ issued another email ruling granting CPSD's motion for official notice filed two days earlier. In granting CPSD's motion, the ALJ addressed the notice - prejudice issue that led to the denial of PG&E's motion:

CPSD's motion provides sufficient notice so that PG&E may respond to the documents in the reply briefs due on April 19, 2013.

Applying the standard used in granting CPSD's motion, PG&E's request provided sufficient notice. The ALJ's April 4th ruling held that CPSD's April 2nd motion provides sufficient notice (17 days) for PG&E to respond in its April 19th reply brief. PG&E's March 25th request

² The ALJ's March 28th Ruling denied PG&E's request for official notice of the following materials from the San Bruno OII record: (1) Ex. CPSD-5 (Rebuttal Testimony of Raffy Stepanian) (CPSD/Stepanian) (excerpted pages 1 -3); (2) Ex. CPSD-32 (PG&E's Response to NTSB Data Request 036-004 (SA 534 Exhibit 2M) (p. 44); PG&E's Response to NTSB Data Request 049 -001); (3) Ex. PG&E-1 (Testimony of Witnesses) (excerpted pages 8 -7 to 8 -8 [PG&E/Slibsager and Kazimirsky], 9 -6 to 9 -8 [PG&E/Miesner], 11-28 to 11 -29; Appendix B [PG&E/Bull]); and (4) Reporter's Transcript Volume 5 (October 1, 2012) (excerpted pages 415-16) (PG&E/Bull).

³ The ruling also denied PG&E's request as to two other documents – one of which was a filing from the proceedings on PG&E's Pipeline Safety Enhancement Plan (R.11 -02-019) – on the ground that they relate to facts and propositions that are subject to dispute. The documents are: (1) R.11 -02-019, Opening Comments of Pacific Gas and Electric Company on Proposed Decision (filed Nov. 16, 2012) (excerpted page 17); and (2) Exhibit No. 3 to Xcel Energy Advice Letter No. 809-Gas, No. 11AL-809G, Col. Pub. Util. Comm'n (October 3, 2011) (rate filing cited in Ex. PG&E -62 at MD -33 & n.64 in the Records OII).

provided eight days more notice (25 days), and thus must be sufficient for parties to respond in their April 19th reply briefs.

The fact that the small amount of material PG&E sought official notice for came from another, overlapping Commission proceeding does not provide a basis on which to deny notice while granting it to documents that are part of no Commission docket. On the contrary, given that the Commission routinely takes official notice of evidence and pleadings from its own proceedings,⁴ if that distinction has any merit, it weighs in favor of PG&E's request. The material for which both PG&E and CPSD sought official notice has the same status in this proceeding. It is proffered as evidence for the ALJ and Commission to consider in weighing the facts before them. Neither PG&E nor CPSD claimed that the material is the indisputable sort of evidence covered by Evidence Code §§ 451(f) or 452(g) or (h).

Given her ruling on CPSD's motion for official notice, the ALJ should reconsider the partial denial of PG&E's request and grant it.

2. If She Does Not Reconsider, To Be Consistent, The ALJ Should Order CPSD, DRA, TURN, And CCSF To Refile Their Opening Briefs Omitting References To Extra-Record Materials

Five parties – PG&E, CPSD, DRA, TURN, and CCSF – 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. Believing, as the ALJs stated so many times in the course of this and the San Bruno OII, 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

⁴ At the outset of the San Bruno-related proceedings, the Commission stated it would “take official notice of the record in other proceedings, including the investigation of PG&E's record-keeping, in our ratemaking determination.” *Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms*, R.11-02-019 at 12n.6. 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.98-07-021, 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).

official notice of the materials.

Although the other parties did not request official notice, the reasoning of the ALJ's March 28th ruling – if not modified – applies with equal force to their citations of material outside the evidentiary record of this proceeding. The other parties' citations to evidence from the record of the San Bruno OII would "effectively . . . consolidate portions of the evidentiary records." 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(h).

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

CPSD cites an interview conducted by the NTSB that is an exhibit in the San Bruno OII,⁵ but not in evidence in this proceeding, and to a handbook that it is not in either evidentiary record:

- NTSB Record #455567, Sept. 17, 2010 (National Transportation Safety Board investigation. Pacific Gas and Electric Company Natural Gas Transmission Pipeline Rupture and Fire, San Bruno, California, September 9, 2010.) : Interview of M. Hickey, 16 Sep 2010 (CPSD OB at 69 & n.188).
- Pipeline Rules of Thumb Handbook, 7th Edition, 2009 (CPSD OB at 159 & nn.514-16).

CPSD provided no notice to PG&E and did not seek official notice for these materials. They would consolidate portions of the evidentiary record in the San Bruno OII with the record here. And, they do not meet the "not reasonably subject to dispute" standard.

The Pipeline Rules of Thumb Handbook is indistinguishable from one of the documents the ALJ denied official notice – the exhibit to an advice letter to the Colorado Public Utilities Commission. *See* ALJ's March 28th Ruling (document #8). Maura Dunn referred to and cited the letter in her testimony, although she did not make it an exhibit. *See* Ex. PG&E-62 at MD-33. Similarly, the handbook cited in CPSD's Opening Brief was referenced (though not made an exhibit) in Ms. Felts' testimony.

DRA cites written testimony from the San Bruno OII, materials not in either evidentiary

⁵ *See* San Bruno Ex. CPSD-96. CPSD does not cite directly to its San Bruno exhibit.

record, and the IRP Report, which is in the record of the San Bruno OII but not this proceeding⁶:

- Independent Review Panel Report (DRA OB at 1 & n.2; 2 -3 & nn.10-14; and 22-23 & nn.83-87).
- British Petroleum’s consent decree with the U.S. Environmental Protection Agency (DRA OB at 24 & n.89).
- <http://www.epa.gov/compliance/resources/cases/civil/cwa/olympicshell.html> (DRA OB at 24 & n.90).
- Consent Decree in *US v El Paso Natural Gas Co.* (Dist. Ct. New Mexico) (DRA OB at 24 & n.91).
- San Bruno OII Ex. PGE -1, Zurcher Testimony (DRA OB at 31 & nn. 117 -18; and 37 & n.146).
- San Bruno OII Ex. PGE-1, Keas Testimony (DRA OB at 35-36 & n.140).

DRA provided no notice to PG &E and did not seek official notice for these materials. They would consolidate portions of the evidentiary record in the San Bruno OII with the record here. And, they do not meet the “not reasonably subject to dispute” standard.

Although DRA argues that Mr. Zurcher’s and Ms. Keas’ testimony was admitted into the record by virtue of the cross-examination in the Joint Evidentiary Hearings, it points to no record citation admitting their *written* testimony from the San Bruno OII into the record of this proceeding. *See* DRA OB at 31 n.117; *id.* at 35 -36 n.140. Their written testimony from the Records OII was admitted into the San Bruno OII, but not vice versa. *See* Joint R.T. 623-25; San Bruno R.T. 527-28. Absent an explicit statement on the record, Mr. Zurcher’s and Ms. Keas’ written testimony cannot be deemed to be in the record of this proceeding.

If DRA is correct that Mr. Zurcher’s and Ms. Keas’ written testimony from the San Bruno OII is within the record by virtue of their cross -examination in the joint hearings, then Mr. Slibsager’s and Mr. Kazimirsky’s written testimony is also within the record under the same reasoning and the ALJ’s March 28th Ruling denying PG&E’s request to take official notice of Mr. Slibsager’s and Mr. Kazimirsky’s written testimony should be modified.

TURN cites written testimony from the San Bruno OII: Ex. PG&E -1 (Harrison). *See* TURN OB at 20 & n.61.

⁶ The IRP Report is San Bruno Ex. CPSD -10. *See also* I.12-01-007 at 13 (taking official notice of the IRP Report for purposes of the San Bruno OII).

TURN provided no notice to PG&E and did not seek official notice for this material. It would consolidate portions of the evidentiary record in the San Bruno OII with the record here. And, it does not meet the “not reasonably subject to dispute” standard.

As with Mr. Zurcher’s and Ms. Keas’ San Bruno testimony, Mr. Harrison’s written San Bruno OII testimony was not explicitly admitted into the record here. Regardless of the outcome, Mr. Harrison’s testimony from the San Bruno OII should be treated the same as Mr. Slibsager’s and Mr. Kazimirsky’s, for which the ALJ denied official notice in the March 28th Ruling. Accordingly, taking official notice of Mr. Harrison’s San Bruno testimony in favor of TURN should also result in official notice of Mr. Slibsager’s and Mr. Kazimirsky’s San Bruno testimony as previously requested by PG&E.

CCSF cites the IRP Report, which is in the record of the San Bruno OII but not this proceeding. *See* CCSF OB at 5 n.3. CCSF provided no notice to PG&E and did not seek official notice for this material. It would consolidate portions of the evidentiary record in the San Bruno OII with the record here. And, it does not meet the “not reasonably subject to dispute” standard.

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

The same standard should be applied to all parties. PG&E believes that the Commission should consider all of the cited 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 materials cited by CPSD, DRA, TURN, and CCSF, except the fact that those parties did not request official notice.

The ALJ should reconsider her ruling denying official notice to material cited by PG&E in light of her ruling granting official notice to CPSD. That latter ruling establishes that the notice period is sufficient not to prejudice any party and there is no substantive distinction that would make the material CPSD tendered properly noticeable and PG&E’s evidence from the parallel Commission proceeding not.

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If the ALJ does not reconsider her March 28th email ruling, she should direct CPSD, DRA, TURN, and CCSF to refile their opening briefs omitting references to the materials outside the record of this proceeding and serve redline versions showing all changes.

Respectfully submitted,

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