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) (Not Consolidated)
Order Instituting Investigation on the Commission's Own Motion into the 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) (Not Consolidated)
Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company's Natural Gas Transmission Pipeline System in Locations with Higher Population Density.	I.11-11-009 (Filed November 10, 2011) (Not Consolidated)

MOTION OF THE CONSUMER PROTECTION AND SAFETY DIVISION TO STRIKE REFERENCES IN PACIFIC GAS AND ELECTRIC COMPANY'S COORDINATED REMEDIES BRIEF TO ALLEGED FACTS OUTSIDE OF THE RECORD

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I. Introduction

Pursuant to Rule 11.1(a) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rules), the Consumer Protection and Safety Division (CPSD)[1] hereby submits its motion to strike references in Pacific Gas and Electric Company's (PG&E) Coordinated Remedies Brief (dated May 24, 2013) (hereinafter "PG&E's CRB") to alleged evidence of transmission-related safety amounts paid for by PG&E shareholders (hereinafter "PG&E shareholder amounts"), which is outside the record. The references to PG&E shareholder amounts include, but are not limited to, the references in PG&E's May 16, 2013 data response to the CPSD Director Hagan's data requests (PG&E's May 16, 2013 Data Response). These references are mostly concentrated in PG&E's CRB, pp. 12-18, and PG&E's CRB, Appendix A, but appear sporadically in other parts of PG&E's CRB, including in the Executive Summary, p. 1 and elsewhere in the brief, such as pp. 8, 10, 82-83 and 103.

PG&E first sent the summaries of PG&E shareholder amounts in PG&E's May 16, 2013 Data Response to CPSD. One week later, on May 24, 2013, PG&E refers to these amounts in its Appendix A, attached to PG&E's CRB, and refers throughout its brief to these amounts as if they were in the record all along. However, these amounts have no basis in the record in this proceeding. The one exception is a one-sentence reference to PG&E's rough estimate of $500 million of unrecovered costs for "Right of Way Encroachment" for 2013-2017, which, as discussed in more detail below, lacked foundation and PG&E inappropriately used it as a cross-examination exhibit (i.e., Ex. Joint-57) on May 4, 2013, the second to last day of the hearing. Therefore, no party, including CPSD, has ever had a chance in which to conduct specific discovery prior to or

[1] On January 1, 2013, CPSD officially changed its name to the Safety and Enforcement Division (SED). However, in light of all of the references to CPSD in the previous rulings by the Commission and the Administrative Law Judges (ALJs), pleadings, exhibits, testimony and cross-examination of witnesses and corresponding transcript references, to avoid confusion we will continue to refer to SED as "CPSD" in this brief and through the remainder of this proceeding.

during the hearing, prepare its own witness or have an opportunity to cross-examine a PG&E witness on any of these PG&E shareholder amounts.

In addition, in PG&E's CRB, p. 14, fn. 26 and p. 44 and fns. 174 and 175, PG&E attempts to rely upon its Pipeline Safety Enhancement Program (PSEP) Compliance Report dated April 30, 2013, which also constitutes untested evidence outside the record.

The grounds for CPSD's motion to strike are as follows: (1) PG&E's failure to give parties notice and an opportunity to be heard violates the due process rights of the non-PG&E parties, because such evidence is outside the record in this proceeding; and (2) PG&E has not and could not request the Commission take official notice of all these matters under Rule 13.9 of the Commission's Rules.

II. PG&E's Use of Evidence Outside the Record Violates the Due Process Rights of the Parties

A. The Commission Must Rely Only Upon The Record Evidence in these Adjudicatory Proceedings

In *English v. City of Long Beach* (1950) 35 Cal. 2d 155, 158, the California Supreme Court declared:

> Administrative tribunals which are required to make a determination after a hearing can not act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. . . .A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties. A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced.

In *English,* the Supreme Court found that because the board had relied upon information taken outside the hearing, which English had no opportunity to refute, the trial court properly concluded the he was denied a fair hearing. *Id.*

B. PG&E's CRB Improperly Relies Upon Evidence Outside The Adjudicatory Proceedings

In PG&E's CRB, p. 11, PG&E points out: "Because these are adjudicatory proceedings, the Commission must act in a judicial capacity and determine - based solely on the evidence in the records before it - first, whether CPSD has proven the violations it alleges, and then, what is an appropriate penalty." Of course, PG&E omits mentioning that in the three above- captioned Orders Instituting Investigation (OII or OIIs), the Commission also invited and encouraged the active participation by intervenors in these proceedings.

After reminding the Commission that it must rely upon records before it in the adjudicatory proceedings, PG&E thereafter states that when the Commission determines an appropriate penalty, it should apply the amount that PG&E shareholders have paid and are forecast to pay for gas transmission safety without recovery from customers. However, in PG&E's CRB, pp. 12-18, PG&E goes into great detail describing the PG&E shareholder amounts without citing any support in the record before the Commission in the adjudicatory proceedings, what these particular PG&E shareholder amounts are, let alone the dollar amounts associated with them. The one exception is the one sentence involving encroachment costs on pp. 13 and 16 in footnotes, 22 and 27, respectively. In fact, the only exhibit in the record for its 2010-2012 PG&E shareholder amounts for its Pipeline Safety Enhancement Program, San Bruno OII Ex. PG&E-1a, Chapter 13, Appendix C (PG&E/Yura), is cited but challenged by PG&E as insufficient. PG&E's CRB, p. 13, fn. 23.

Therefore, PG&E does not rely upon any cite to any exhibit in the record for the PG&E shareholder amounts for its PSEP costs through 2012 or forecast through 2014, for the costs incurred by PG&E shareholders above the amounts in PG&E's Gas Accord V settlement, or for PG&E's forecast amounts of costs which its shareholders may absorb in 2013 or 2014 above and beyond the costs recovered from its ratepayers in PG&E's Gas Accord V settlement. This is because there is no exhibit in the record referring to any of

these amounts, except for the Yura Exhibit in the San Bruno OII (i.e., Ex. PG&E-1a, Chapter 13, Appendix C), which PG&E no longer supports.

In addition, in PG&E's CRB, p. 14, fn. 26 and p. 44 and fns. 174 and 175, PG&E attempts to rely upon its PSEP Compliance Report dated April 30, 2013, which also constitutes untested evidence outside the record. PG&E's PSEP Compliance Report consists purely of PG&E's own unaudited numbers and records. It has not been subject to discovery or cross examination in any proceeding -- most importantly not in these OII proceedings, but also not even in the PSEP rulemaking docket.

In the present case, although the evidentiary hearings have been over since March 5, 2013, PG&E's CRB has attempted to refer to evidence outside the record, based upon PG&E's own untested summaries of PG&E shareholder amounts in PG&E's May 16 Data Response and PG&E's recently filed and untested PSEP Compliance Filing. If the Commission were to rely upon this untested data, it would be fundamentally unfair and violate the due process rights of parties.

C. The Encroachment Issue Lacks Foundation And Is Improperly Before The Commission

Although CPSD has claimed more than one hundred safety violations in the three above-captioned OIIs, CPSD never addressed the encroachment issue in any of the OIIs. PG&E's CRB, p. 8, implies that the encroachment issue was part of the Class Location OII (i.e., I.11-11-009). This issue was not referenced in the Assigned Commissioner's Scoping Memo and Ruling, p.2, which referred to CPSD's preliminary finding of violations related to PG&E's review and classification of its natural gas transmission pipelines in light of PG&E's June 30, 2011 CPUC Class Location study. Indeed, in CPSD's Opening Brief (dated November 20, 2012), p. 8 in the Class Location OII under Subheading **C. Issues Beyond the Scope of This Proceeding**, CPSD explicitly stated:

> In June of 2012, PG&E brought to the attention of CPSD encroachment issues by private landowners on PG&E's transmission pipeline rights-of-way. PG&E has begun a pilot study to determine the number and location of these problems. These encroachment issues were raised recently

and are specifically outside the scope of this Class Location proceeding.

Accordingly, if the Commission were to rule on this issue it would be beyond the scope of these proceedings. Therefore, the Court of Appeal could annul the Commission's Decision as being contrary to the law. *Southern California Edison Company v. PUC* (2006) 140 Cal.App.4th 1085, 1107.

The only exhibit in the record (*i.e.,* Ex. Joint -57 at 13) which PG&E cites related to the encroachment issue is in the joint remedy phase of the evidentiary hearings. *See* PG&E's CRB, p. 13, fn. 22 and p. 16, fn. 27. This exhibit was used by PG&E during cross-examination of CPSD's witness Lubow. It was a PG&E-created exhibit from slides that were presented as part of PG&E's February 21, 2013 earnings call, less than two weeks before the hearing on March 4, 2013. During PG&E's counsel's cross-examination of CPSD's witness, PG&E's counsel referred to the slide on page 13 of PG&E's Ex. Joint-57, and claimed that it discloses to investors that PG&E anticipates during the period 2013 to 2017, "roughly $500 million of unrecovered costs for right of way encroachment."[2] During cross-examination, PG&E's counsel then referred to why Ex. Joint-57 on p. 8 had estimated that approximately $100 million of the encroachment costs would be incurred in 2013, which is why in a different exhibit, Joint-59, the $500 million for encroachment costs were reduced to $400 million. And then counsel explained to CPSD's witness, that there would be a 37% tax adjustment to these costs.[3] The only questions during cross-examination, which PG&E's counsel asked of CPSD's witness Lubow about these exhibits, after PG&E's counsel read from them or explained PG&E's slides to the witness, were essentially "Do you see that?" And Mr. Lubow confirmed that he saw that was in the exhibit.[4] However, Mr. Lubow subsequently explained that he had never seen these estimates, that he did not have a basis to rely upon

[2] Joint RT 1392:16-28.

[3] Joint RT 1393:1-1394:10.

[4] Joint RT 1392:8-16; 1392:17-1393: 1; 1393:2-12; 1393: 13-20; 1394:1-11.

them, and the $500 million item for encroachments was based upon a timeframe of future costs that PG&E is going to incur or may incur, but he does not know where the number came from.[5]

In view of the above, there is no foundation for this exhibit, because Mr. Lubow had no knowledge of the basis for the exhibit, and he was the only witness questioned about the exhibit. Moreover, this type of exhibit has no probative value whatsoever and cannot be used against parties, without violating their due process rights, because PG&E did not sponsor this exhibit with a witness. Therefore, PG&E did not provide parties an opportunity for discovery about the exhibit, did not allow parties an opportunity to cross-examine a witness about this exhibit, or prepare their own testimony to use against PG&E on this matter. It was simply another case of PG&E's trial by ambush, where PG&E creates an exhibit less than two weeks before the hearing is over, uses the exhibit to cross-examine a witness for CPSD who knows nothing about the exhibit. Essentially this exhibit is testimony of PG&E's counsel who had to explain what the exhibit meant and merely asked the CPSD witness if he sees in the exhibit what PG&E's counsel had just explained.

Under these circumstances, the Commission cannot give any weight to this exhibit or rely upon it in any way, without violating the due process rights of the parties in these proceedings.

III. PG&E Did Not and Could Not Request Official Notice for the Above-Mentioned Evidence

Under Rule 13.9 of the Commission Rules of Practice and Procedure, the Commission may take official notice of matters that may be judicially noticed pursuant to sections 450 *et seq.* of the California Evidence Code. Indeed, accompanying PG&E's CRB, PG&E requests that the Commission take official notice of 12 exhibits. Significantly, PG&E did not request and could not request that the Commission take official notice of the PG&E shareholder amounts or of PG&E's PSEP Compliance Filing,

[5] Joint RT 1427:23-1428:5.

because PG&E knew that these items were subject to dispute and they were offered for the truth of the contents therein. Therefore, they could not qualify for official notice, because they could not qualify for judicial notice. Under Section 452(g) and (h) of the California Evidence Code, judicial notice may be taken of facts that are of such common knowledge that they cannot reasonably be the subject of dispute. In *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, the California Supreme Court stated: "The truth of the content of the articles is not a proper matter for judicial notice." Because this purported evidence and amounts include therein are subject to dispute that could not qualify for official or judicial notice.

What makes PG&E think that it can simply rely in its brief upon these post-hearing, disputable facts that are not in the record? The short answer is that PG&E cannot legally do so, whether PG&E puts these disputable facts in an appendix or any other way it wants to package them.

IV. CONCLUSION

For the above-mentioned reasons, CPSD respectfully submits that PG&E's references to the PG&E shareholder amounts and PSEP Compliance Filings should be stricken from PG&E's Brief.

Respectfully submitted,

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