

**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)

**PACIFIC GAS AND ELECTRIC COMPANY'S
REQUEST FOR OFFICIAL NOTICE**

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Dated: May 24, 2013

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**PACIFIC GAS AND ELECTRIC COMPANY'S REQUEST
FOR OFFICIAL NOTICE**

Pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure, PG&E requests that the Commission take official notice of the following documents. Official notice is sought, not to establish a material fact relevant to the merits of the alleged violations in these proceedings, but, in the case of Exhibits 1 through 11, to show the circumstances of other penalty proceedings and, in the case of Exhibit 12, because it is an auditing standard relevant to one of CPSD's proposed remedies. True and correct copies of the documents for which PG&E requests official notice are attached.

- Exhibit 1: NTSB, Pipeline Accident Report: Natural Gas Pipeline Rupture and Fire Near Carlsbad, New Mexico, August 19, 2000 (Feb. 11, 2003).
- Exhibit 2: NTSB, Pipeline Accident Brief No. DCA90FP001 (Aug. 6, 1991).
- Exhibit 3: NTSB, Safety Recommendations to UGI Corp. (June 8, 1977).

- Exhibit 4: California Office of the State Fire Marshal, Pipeline Failure Investigation Report (June 20, 2005).
- Exhibit 5: Joint Settlement Petition, *Pa. Pub. Util. Comm'n, Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (Oct. 3, 2012).
- Exhibit 6: Opinion and Order, *Pa. Pub. Util. Comm'n, Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (Jan. 24, 2013).
- Exhibit 7: Joint Motion of Chairman Robert F. Powelson and Vice Chairman John F. Coleman, Jr., *Pa. Pub. Util. Comm'n, Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (Jan. 24, 2013).
- Exhibit 8: Formal Complaint, *Pa. Pub. Util. Comm'n, Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (June 11, 2012).
- Exhibit 9: Complaint, *United States v. El Paso Natural Gas Co.* , No. Civ. 07 -715 (D. N.M. July 26, 2007).
- Exhibit 10: Kinder Morgan Energy Partners, L.P., Quarterly Report (Form 10 -Q) (Nov. 7, 2007).
- Exhibit 11: Kinder Morgan, Inc., Annual Report (Form 10-K) (Mar. 1, 2007).
- Exhibit 12: U.S. Government Accountability Office, Government Auditing Standards: 2011 Revision (Dec. 2011).

Rule 13.9 provides that the Commission may take official notice of “such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq.”

In determining whether it may properly take judicial notice of facts, a court may resort to “[a]ny source of pertinent information.” Evid. Code § 454. Section 452 provides that it is appropriate for a court to take judicial notice of official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. Evid. Code § 452(c). It is also proper to take judicial notice of records of any court of this state, the United States, or any other states, as well as “[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.” Evid. Code § 452(d) & (h). Section 453 provides that granting a request under Section 452 is mandatory, where the requesting party: (1) gives sufficient notice to adverse parties, through the pleadings or otherwise; and (2) includes sufficient information to enable the court to take judicial notice. Evid. Code § 453.

A. Official Notice Of The Requested Documents Is Proper

Exhibits 1, 2, and 3 are NTSB accident reports and safety recommendations. They contain pertinent factual background to other gas pipeline accidents.¹ In determining the constitutionality of any penalty in this proceeding under the Excessive Fines and Due Process Clauses, the Commission is required to assess whether the penalty is proportional to penalties imposed in similar cases.² Accordingly, these NTSB documents are relevant.

They are also proper sources of judicial notice. NTSB reports are judicially noticeable as official acts under Evid. Code § 452(c). They are also noticeable under Section 452(h). *See Bethman v. City of Ukiah*, 216 Cal. App. 3d 1395, 1399 n.5 (1989) (taking judicial notice of an NTSB accident report pursuant to Section 452(h)). In *Bethman*, the court of appeal held that it is proper for a court to take judicial notice of the contents of an NTSB report that consist of “factual material or a statement of the factual circumstances surrounding or leading to the accident.” *Id.* (quoting *Murphy v. Colorado. Aviation, Inc.*, 588 P.2d 877, 881-82 (1978)).³ The Commission has previously taken official notice of NTSB reports. *See, e.g., Investigation of S. Pac. Transp. Co.*, D.94-12-001, 1994 Cal. PUC LEXIS 1099, at *57.⁴

Exhibit 4 is an investigative report of the State Fire Marshal. Like the NTSB reports, it contains factual background to a similar pipeline accident that is pertinent to the constitutional proportionality limits on the Commission’s authority to impose a penalty in this case. Official notice is proper for the same reasons as the NTSB reports. The facts for which PG&E cites the report – the circumstances leading up to the explosion and its consequences – are not reasonably subject to dispute, Evid. Code § 452(h), and courts and the Commission routinely take judicial

¹ The admission of these reports would not prejudice any party because the Commission has already received testimony about different accident comparisons in these proceedings. In its opening remedies brief, CPSD discussed the BP oil spill – an accident not mentioned in the record and outside the Commission’s jurisdiction – relying on a Wikipedia entry and without seeking official notice. CPSD Remedies OB at 57 n.30.

² *See* PG&E Remedies Br. at Section III; *see also Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001) (in determining whether a penalty satisfies the constitutional proportionality requirement “the sanctions imposed in other cases for comparable misconduct” must be considered).

³ *Bethman* did not take judicial notice of “the NTSB’s opinions or conclusions in such report as to possible causes of [the] accident or negligence” because a federal statute barred it from doing so. *Bethman*, 216 Cal. App. 3d at 1399 n.5. That statute applied, however, only because *Bethman* was an “action for damages growing out of ... matter mentioned in such report.” 49 U.S.C. app. § 1441(e) (1988) (current version at 49 U.S.C. § 1154(b)). In this case, by contrast, federal law is no barrier to taking official notice of the NTSB reports in their entirety.

⁴ ALJ Yip-Kikugawa has previously taken official notice of NTSB documents in this proceeding and other parties to the proceeding have liberally cited NTSB accident reports. *See* Administrative Law Judge’s Ruling Resolving Pacific Gas and Electric Company’s Request for Official Notice, dated March 28, 2013.

notice of similar documents. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1135 n.1 (2001) (taking judicial notice of a report by the State Bar Access to Justice Working Group); *W. States Petroleum Ass'n v. Dep't of Health Servs.*, 99 Cal. App. 4th 999, 1002 n.1 (2002) (taking judicial notice of policy statements and resolutions of the Department of Health Resources and the State Water Resources Control Board).

Exhibit 5 is the Joint Settlement Petition of a utility and the enforcement staff of the Pennsylvania Public Utilities Commission in an enforcement action arising out of another pipeline accident (the "Allentown case"). It too bears on the constitutional proportionality limits on the Commission's penalty authority in this case. The facts for which PG&E cites the settlement petition are not reasonably subject to dispute and were agreed to by the adverse parties to the settlement. *See* Evid. Code § 452(h). In the Records OII, ALJ Yip -Kikugawa has taken official notice of several consent decrees cited by DRA.⁵ The Allentown settlement petition is also a proper subject of official notice under judicial and Commission precedent under these circumstances. *See, e.g., Performance Plastering v. Richmond Am. Homes of Cal., Inc.*, 153 Cal. App. 4th 659, 666 n.2 (2007); *Ezra Charitable Trust v. Tyco Int'l, Ltd.*, 466 F.3d 1, 9 n.7 (1st Cir. 2006) (taking judicial notice of a consent decree and the final judgment entered against defendant); *Rulemaking and Investigation Into Open Access and Network Architecture Development of Dominant Carrier Networks*, D.02-09-050, 2002 Cal. PUC LEXIS 619, at *389 n.388 (taking official notice of consent decree to establish penalty amount and factual background); *Application of Pac. Gas & Elec. Co.*, D.94-06-051, 1994 Cal. PUC LEXIS 430, at *5 (FERC-approved settlement).

Exhibits 6 and 7 are records of official acts of the Pennsylvania Public Utilities Commission. The Opinion and Order (Exhibit 6) approved, as modified, the proposed settlement in the Allentown case (Exhibit 5). One of the modifications was to increase the statutory penalty from \$386,000 to \$500,000, a fact that bears directly on the constitutional proportionality analysis. The Joint Motion of the Chairman and Vice Chairman (Exhibit 7) explains the reasons for the motion increasing the size of the penalty. Judicial notice is proper under Section 452(c) and Section 452(h) because the documents reflect official acts and are cited for facts and propositions that are not reasonably subject to dispute.

⁵ Administrative Law Judge's Ruling on PG&E's Motion for Reconsideration or, in the Alternative, Directing Other Parties to Delete Reference to Materials Not in the Record, dated April 15, 2013.

Exhibits 8 and 9 are the complaints filed by enforcement staff in the Allentown case and the United States in the Carlsbad case. They contain relevant background to those cases. Because they only consist of unproven allegations, PG&E does not cite them for the truth of any matter asserted, but only to show the similarity between the allegations in those cases and here, which is relevant to the constitutional proportionality analysis. They are proper subjects of judicial notice for this limited purpose because it cannot reasonably be disputed that the enforcement staff in the Allentown case, or the United States in the Carlsbad case, in fact made the allegations contained therein. *See* Evid. Code § 452(h); *see also* *Ezra Charitable Trust*, 466 F.3d at 9 n.7 (taking judicial notice of a complaint filed by the SEC).

Exhibits 10 and 11 are SEC filings that show the amount in penalties paid by a gas company following a pipeline accident. They are relevant because the amount of penalty paid in comparable cases must be considered when assessing the constitutionality of any penalty here. SEC filings are proper subjects of judicial notice. *See, e.g., Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008) (explaining that “SEC filings [are] subject to judicial notice”).

Exhibit 12 is the 2011 Revision of the Government Auditing Standards, issued by the U.S. Government Accountability Office. These standards are relevant because they contain protocols appropriate for conducting recordkeeping audits of the kind contemplated by one of CPSD’s proposed remedies. Official notice is proper because these standards represent official government acts, Evid. Code § 452(c), because their contents are not reasonably subject to dispute, Evid. Code § 452(h), and because courts routinely take notice of similar government reports. *See, e.g., Ketchum*, 24 Cal. 4th at 1135 n.1; *W. States Petroleum Ass’n*, 99 Cal. App. 4th at 1002 n.1; *Bethman*, 216 Cal. App. 3d at 1399 n.5.

Because each of these documents is relevant and the proper subject of official notice, and the other preconditions of Section 453 are met, official notice is warranted. This request and the attached exhibits include sufficient information to enable the Commission to take official notice. Evid. Code § 453(b). By filing this request concurrently with its remedies brief, PG&E has provided sufficient notice to the adverse parties, who have at least ten days – until reply briefs are due – “to prepare to meet the request.” Evid. Code § 453(a). That is more notice than PG&E had to respond to DRA’s request for official notice in the Records OII, which was granted five days later.⁶

Finally, granting official notice is particularly appropriate here because all but one of these documents go to PG&E’s argument that CPSD’s proposed penalty is unconstitutionally excessive.

⁶ Compare Division of Ratepayer Advocates’ Response to PG&E Motion Regarding the Citation of Materials Outside the Record, dated April 10, 2013, at 2 (“DRA requests that the Commission take official notice of the Judicial Orders [consent decrees] . . . cited in DRA’s Opening Brief, at notes 89, 90, and 91”) with Administrative Law Judge’s Ruling on PG&E’s Motion for Reconsideration or, in the Alternative, Directing Other Parties to Delete Reference to Materials Not in the Record, dated April 15, 2013 (taking official notice of the consent decrees cited by DRA).

CPSD and the Intervenors have cited extra-record material, without seeking official notice, on numerous occasions during post-hearing briefing. *E.g.*, CPSD San Bruno OII OB at 58 n.23 (IEEE Standards Definition, Specification, and Analysis of Systems Used for SCADA, Standard 37.1 -1994); *id.* at 59 n.24 (NPFA Electrical Standard for Industrial Machinery); CPSD Remedies OB at 57 n.30 (Wikipedia hyperlink); DRA San Bruno OII OB at 5 n.12 (*The Wizard of Oz*); *id.* at 12 n.24 (NTSB Safety Recommendation Letters); *id.* at 16 n.40 (1984 Bechtel Transmission Line Risk Analysis); *id.* at 30 n.100 and at 58 n.208 (Reporter’s Transcript of proceeding R.11 -02-019); TURN San Bruno OII OB at 6 n.11 (TURN Reply Brief in R.11-02-019); City of San Bruno San Bruno OII OB at 2 n.5 and 33 n.208 (August 25, 1981 pipeline puncture NTSB Accident Report); *id.* at 5-8 nn.15-51, at 15 nn.85-86, 88, and at 40 n.245 (San Francisco Chronicle, San Mateo Times, San Jose Mercury News, Los Angeles Times and KGO News articles); *id.* at 9 n.63 (San Bruno -related civil litigation); *id.* at 10 nn.65 -67 (San Bruno neighborhood reconstruction plans and meeting materials); *id.* at 12 n.71 (2011 statement of PHMSA Administrator); *id.* at 12 n.72 (2008 CPUC Natural Gas Certification); *id.* at 17 n.101 and 33 n.209 (NTSB Rancho Cordova Accident Brief); *id.* at 17 n.104 (NTSB Notice of Public Hearing); *id.* at 23 nn.137 & 138, 24 nn.152 & 155, 25 nn.157 & 159 (NTSB San Bruno Docket exhibits); *id.* at 26 n.163 (Transcript of Examination Under Oath of Gas Crew Foreman); *id.* at 26 nn.164 -167 (NTSB San Bruno Docket exhibits); *id.* at 35 nn.224 -25 (1986 Annual Report); *id.* at 36 nn.235 -37 (PG&E 2012 Annual Meeting Joint Proxy Statement); City of San Bruno San Bruno OII Reply Brief at 4 n.16, at 25 nn.113 -14 (San Francisco Chronicle and San Francisco Business Times articles); *id.* at 21 n.100 (NTSB Rancho Cordova Accident Brief); *id.* at 32 n.136 (Challenger Space Shuttle Accident Report).

Respectfully submitted,

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