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's Natural Gas Transmission Pipeline System in Locations with Higher Population Density.	I.11-11-009 (Filed November 10, 2011) (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)

RESPONSE OF THE CITY AND COUNTY OF SAN FRANCISCO TO PG&E's MOTION TO REOPEN THE EVIDENTIARY RECORD IN THE COORDINATED PENALTY PHASE; REQUEST FOR ORDER SHORTENING TIME FOR RESPONSE AND VACATING BRIEFING SCHEDULE ESTABLISHED IN JULY 12, 2013 EMAIL RULING

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
AUSTIN M. YANG

Attorneys for:
CITY AND COUNTY OF SAN FRANCISCO
1 Dr. Carlton B. Goodlett Place, Room 234
San Francisco, CA 94102-4682
Telephone: (415) 554-6761
Facsimile: (415) 554-4763
Email: austin.yang@sfgov.org

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I. RESPONSE

Pursuant to Commission Rule of Practice and Procedure 11.1(e) and Administrative Law Judges Wetzell and Yip-Kikugawa's July17, 2013 email ruling, the City and County of San Francisco respectfully submits this response in opposition to PG&E's Motion to Reopen to Evidentiary Record In The Coordinated Penalty Phase; Request For Order Shortening Time For Response And Vacating Briefing Schedule Established In July 12, 2013 Email Ruling (PG&E Motion). In its motion, PG&E asserts that the Commission must reopen the evidentiary record and allow PG&E to submit additional evidence because the penalty proposal contained in CPSD's Amended Reply Brief[1] "relies upon different law and different purported facts than CPSD's prior proposal."[2] As discussed more fully below, PG&E's motion fails to provide good cause to reopen the record. It fails to show both that there are material changes in the facts or law and that PG&E acted with diligence in pursuing the need to submit additional evidence. Further, PG&E will suffer no prejudice if the record is not reopened since the ALJs have already established a briefing schedule that would allow PG&E the opportunity to rebut purportedly new legal arguments, and attempt to show why CPSD's beliefs and assumptions "have no support in the evidentiary record."[3] For these reasons, the Commission must deny PG&E's motion.

A. PG&E Has Failed To Provide Good Cause To Reopen The Evidentiary Record

A party seeking to reopen the record to submit additional evidence must demonstrate both good cause and due diligence.[4] Reopening the record is not a matter of a right but rests upon the sound discretion of the trial court.[5] PG&E acknowledges that as the party seeking to reopen

[1] CPSD's Amended Reply Brief was filed on July 16, 2013 pursuant to an email ruling from ALJs Wetzell and Yip-Kikugawa.

[2] PG&E Motion at pp. 2-3.

[3] PG&E Motion at p. 4.

[4] *Ensher, Alexander & Barsoom, Inc. v. Ensher*, (1964) 225 Cal. App. 2d 318, 326.

[5] *Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793.

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the record, it must show that there are material changes in fact or law that have occurred since the conclusion of the hearing.[6] PG&E identifies only one change in its brief -- that "CPSD has abandoned its original penalty proposal based on the existing evidentiary record in favor of new and unsupported assertions and rationales regarding the amount and form of the penalty."[7] As described below, this is a not a proper basis to reopen the record.

Simply because PG&E disagrees with the characterization of the evidence does not mean that it is entitled to reopen the record to submit contradictory evidence. PG&E claims that it needs to submit new evidence to refute CPSD's recommendations, which are allegedly "based on assumptions, mistaken 'facts,' and a distortion of the conclusions of its own witness."[8] Even if these allegations are true, the proper recourse is to explain, through briefing, why the "assumptions, mistaken facts, and distortions of conclusions" are not supported by the evidence.[9] Assertions and rationales constitute argument and inference drawn upon the existing evidentiary record. Purported "new and unsupported assertions and rationales" do not create a right for PG&E to submit additional evidence.

Likewise, the evidentiary record should already be sufficient for PG&E "to demonstrate that CSPD's new disallowance proposal is inconsistent with the Overland analysis on which CPSD says it is based."[10] The Overland analysis was commissioned by CPSD. Both Overland's opening and rebuttal testimonies are already admitted into the record. If PG&E is simply attempting to show that CPSD's new proposal is not supported by the Overland analysis, PG&E may use to the materials already in the record. If, however, PG&E is attempting to introduce

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[6] PG&E Motion at p. 3; Commission Rule of Practice and Procedure 13.14(b).

[7] PG&E Motion at p. 3.

[8] PG&E Motion at p. 2.

[9] PG&E's motion fails to even allege that CPSD's Amended Reply Brief relies on any new facts that are not already in the evidentiary record, as opposed to allegedly misconstruing facts or drawing incorrect conclusions.

[10] PG&E Motion at p. 6.

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new evidence to contradict the Overland analysis, it has waived that opportunity, as described more fully below.

The Commission has granted PG&E more than sufficient due process by allowing PG&E to file a Response to the Amended Reply Brief. It is axiomatic that the purpose of briefing is to aid the fact finder by directing it to pertinent case law and references to the record supporting findings of fact. If PG&E challenges CPSD's assumptions, or the inferences drawn from the facts contained in CPSD's Amended Reply Brief, PG&E's Response should direct the Commission to the relevant facts in the record that purportedly contradict or disprove those assumptions. Similarly, if PG&E contests CPSD's conclusions, PG&E's Response should explain why those conclusions are not supported in the record. PG&E has failed to demonstrate any good cause to reopen the record and the Commission should deny PG&E's motion.

B. PG&E Has Failed To Provide A Credible Reason Why It Did Not Produce The Proposed Evidence Earlier And PG&E Will Suffer No Prejudice If The Record Remains Closed.

Commission Rule of Practice and Procedure 13.14(b) explicitly requires the moving party "to explain why such evidence was not previously adduced." Good cause to reopen the record is absent where a party makes the tactical decision to not introduce evidence into the record when it has the opportunity to do so and delays in seeking to reopen the record.[11] In its motion, PG&E asserts that it will submit four categories of additional evidence: (1) information related to PG&E's actual and forecast spending in its PSEP, (2) information related to other unrecovered or unrecoverable costs, (3) information related to PG&E's accrual of $200 million for potential penalties, and (4) recent reactions from ratings agencies to CPSD's Amended Reply Brief.[12] The

[11] *Horning v. Schilberg* (2005) 130 Cal.App.4th 197, 209 (motion to reopen evidence properly denied where moving party waited nearly six months before making motion and had made tactical decision to not introduce evidence earlier), See also *Rosenfeld, Meyer & Susman v. Cohen*, (1987) 191 Cal.App.3d 1035, 1052–1053,(denial of motion to reopen not an abuse of discretion where failure to introduce evidence earlier was the product of trial tactics) and *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1222, (motion to reopen is subject to a diligence requirement).

[12] PG&E motion at pp. 5-6.

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first three categories of information were clearly available to PG&E before the close of the evidentiary record, and the fourth category is information that would never have been introduced into the record in the first instance.

PG&E clearly had the opportunity to and did introduce evidence on all four categories of information, including analysis from ratings agencies. During the March 4, 2013 hearings, PG&E asked the Overland witnesses whether their analysis included amounts of PSEP costs that PG&E shareholders were required to pay,[13] clarified that Overland's analysis contemplated PG&E paying either or both a fine and disallowance in rates,[14] and PG&E even introduced exhibits specifically addressing costs PG&E believed were unrecovered or unrecoverable.[15] The rebuttal analysis also addressed the $200 million PG&E had accrued for potential penalties,[16] meaning that PG&E had the opportunity to question Overland on that issue during cross-examination. Indeed, although PG&E alleges that on rebuttal "Overland clarified for the first time, that it meant that $2.25 billion was the maximum amount of new equity PG&E could raise to fund a fine and all other unrecovered and unrecoverable costs,"[17] PG&E admits, that "*some evidence of those costs came in during cross-examination of Overland.*"[18]

In addition, there is no need for additional reports from the reporting agencies. PG&E's financial testimony is already replete with statements from various reporting agencies regarding the analysis contained in the Overland Report, and potential penalties as a result of these proceedings.[19] If PG&E wanted to further develop the record by probing Overland's statements on any of these issues, it could have done so during the hearings. Furthermore, there is no right to introduce ratings agencies' reports responsive to penalty recommendations. As part of the

[13] Joint RT at p. 1370:17-1371:9 (Overland/CPSD).

[14] Joint RT at 1373:4-12 (CPSD/Overland).

[15] Joint RT at 1390:7-17 (CPSD/Overland).

[16] Joint Exhibit 53 at p. 22.

[17] PG&E Motion at p. 3 (emphasis in original).

[18] PG&E Motion at p. 3 (emphasis added).

[19] Joint Exhibit 66.

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original briefing schedule, the most recent statements from the ratings agencies would never have been admitted into the record. If the Commission followed PG&E's logic, the Commission would need to reopen the record every time there is a new ratings agency report addressing PG&E's financial viability. This would yield a preposterous result and is unnecessary because the record already reflects statements from the ratings agencies. None of the new proposed evidence is necessary for the Commission's resolution of these proceedings.

PG&E is simply to trying to supplement the record with self-serving evidence to compensate for the fact that it is unhappy with its prior litigation strategy. If PG&E truly felt prejudiced by the Overland rebuttal testimony then it could have sought to file responsive testimony at that time. Instead, PG&E has waited nearly six months since the "clarifying" statements were served before claiming that it now needs to submit responsive testimony on these issues. Not only has PG&E had the opportunity to question Overland on these issues, but it has unnecessarily delayed seeking relief to submit additional evidence. The Commission should deny PG&E's motion.

C. PG&E Will Suffer No Prejudice If the Commission Denies This Motion.

Finally, PG&E will not be prejudiced if the Commission does not allow the proposed additional evidence. As discussed above, PG&E had the opportunity to introduce additional evidence on cross-examination or seek to introduce additional testimony. The other parties to this case all recommended a combination of fines and penalties of varying degrees,[20] and PG&E had the opportunity to respond to those proposals. PG&E saw no need to reopen the evidentiary record following the original round of briefing. PG&E has not acted with diligence and will not suffer any prejudice if the Commission denies this motion.

[20] CCSF Opening Brief on Fines and Remedies at pp. 1-2; DRA Opening Brief on Fines and Remedies at p. 19; TURN Opening Brief on Fines and Remedies at pp. 2-3; and San Bruno Opening Brief on Fines and Remedies at pp. 7-8.

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D. There Is No Need For Additional Pages In The Supplemental Briefs.

All subsequent briefs should follow the 10-page limit set forth in the July 12, 2013 ALJ rulings, and respond to *only the new issues* presented in CPSD's Amended Reply Brief. CPSD's Amended Reply Brief was limited to 10-pages with the understanding that the subsequent brief would follow a similar page length. There is no need to grant additional pages.

Dated: July 26, 2013

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
AUSTIN M. YANG
Deputy City Attorney

By: /S/
AUSTIN M. YANG

Attorneys for
CITY AND COUNTY OF SAN FRANCISCO

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CERTIFICATE OF SERVICE

I, KIANA V. DAVIS, declare that:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is City Attorney's Office, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102; telephone (415) 554-4700.

On July 26, 2013 I served:

RESPONSE OF THE CITY AND COUNTY OF SAN FRANCISCO TO PG&E's MOTION TO REOPEN THE EVIDENTIARY RECORD IN THE COORDINATED PENALTY PHASE; REQUEST FOR ORDER SHORTENING TIME FOR RESPONSE AND VACATING BRIEFING SCHEDULE ESTABLISHED IN JULY 12, 2013 EMAIL RULING

by electronic mail on all parties in CPUC Proceeding No. I.12-01-007, I.11-11-009 and I.11-02-016 on the attached service lists.

The following addresses without an email address were served:

☒ BY UNITED STATES MAIL: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

LAURA DOLL PACIFIC GAS & ELECTRIC COMPANY 77 BEALE STREET, RM. 1075 SAN FRANCISCO, CA 94105	ATTN.: AGENT FOR SERVICE OF PROCESS PACIFIC GAS & ELECTRIC COMPANY 77 BEALE ST., STE. 100 SAN FRANCISCO, CA 94105

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 26, 2013, at San Francisco, California.

/S/
KIANA V. DAVIS

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Email Service List I.12-01-007

jmalkin@orrick.com
theresa.mueller@sfgov.org
hym@cpuc.ca.gov
tbo@cpuc.ca.gov
tlong@turn.org
bstrottman@meyersnave.com
ESelmon@Jemzar.com
BTS1@pge.com
julien.dumoulin-smith@ubs.com
kkonolige@bgcpartners.com
kxhy@pge.com
lauren.duke@db.com
mchediak@bloomberg.net
wmc@a-klaw.com
ppatterson2@nyc.rr.com
pbattaglia@bcgpartners.com
thnxvm@gmail.com
rajeev.lalwani@morganstanley.com
SRRD@pge.com
dvanhoogstraten@stinson.com
mfallon@taloncap.com
anjani.vedula@db.com
jonathan.arnold@db.com
kfallon@sirfunds.com
jdangelo@catapult-llc.com
mgoldenberg@luminusmgmt.com
sunny.kwak@macquarie.com
ted@pointstate.com
bnaeve@levincap.com
Jheckler@levincap.com
NStein@LevinCap.com
John.Apgar@baml.com
stephen.byrd@morganstanley.com
Gregory.Reiss@mlp.com
NKhumawala@WolfeTrahan.com
randall@nexusamllc.com
christopher.turnure@morgan.com
nazia.x.sheikh@jmorgan.com
andrew.greenberg@cwt.com
ken.irvin@cwt.com
terence.healey@cwt.com
kdaly@stinson.com
catherine.mazzeo@swgas.com
dng@semprautilities.com
jlsalazar@semprautilities.com
stomkins@semprautilities.com
SHruby@SempraUtilities.com
MFranco@SempraUtilities.com
RPrince@SempraUtilities.com
npedersen@hanmor.com
angelica.morales@sce.com
case.admin@sce.com

Email Service List I.12-01-007

douglas.porter@sce.com
Francis.McNulty@sce.com
gloria.ing@sce.com
maguirre@amslawyers.com
khelmuth@cityofmadera.com
cjackson@ci.sanbruno.ca.us
mdjoseph@adamsbroadwell.com
rkoss@adamsbroadwell.com
chh@cpuc.ca.gov
djg@cpuc.ca.gov
ttf@cpuc.ca.gov
austin.yang@sfgov.org
marcel@turn.org
filings@a-klaw.com
mlw3@pge.com
nes@a-klaw.com
sgs@dcbsf.com
teb3@pge.com
gburke@ap.org
BCragg@GoodinMacbride.com
cem@newsdata.com
regrelcpuccases@pge.com
chris_king@siemens.com
dng6@pge.com
jmullan@meyersnave.com
smeyers@meyersnave.com
deborah.slon@doj.ca.gov
dmarcus2@sbcglobal.net
service@cforat.org
henrypielage@comcast.net
berlin@susieberlinlaw.com
abb@eslawfirm.com
William.Westfield@smud.org
ATrowbridge@DayCarterMurphy.com
DBP@cpuc.ca.gov
kpp@cpuc.ca.gov
tony.marino@sen.ca.gov
rst@cpuc.ca.gov
ako@cpuc.ca.gov
crs@cpuc.ca.gov
edd@cpuc.ca.gov
frl@cpuc.ca.gov
jzr@cpuc.ca.gov
jmh@cpuc.ca.gov
kcl@cpuc.ca.gov
kab@cpuc.ca.gov
map@cpuc.ca.gov
msw@cpuc.ca.gov
mlc@cpuc.ca.gov
nb2@cpuc.ca.gov
ram@cpuc.ca.gov
rcc@cpuc.ca.gov
tdp@cpuc.ca.gov

Email Service List I.11-11-009

cjackson@ci.sanbruno.ca.us
theresa.mueller@sfgov.org
hym@cpuc.ca.gov
tbo@cpuc.ca.gov
tlong@tum.org
JMalkin@orrick.com
ESelmon@Jemzar.com
RegRelCPUCCases@pge.com
mchediak@bloomberg.net
wmc@a-klaw.com
ray.welch@navigantconsulting.com
mrw@mrwassoc.com
dvanhoogstraten@stinson.com
mfallon@taloncap.com
anjani.vedula@db.com
jonathan.amold@db.com
lauren.duke@db.com
kfallon@sirfunds.com
ted@PointState.com
jdangelo@catapult-llc.com
mgoldenberg@luminusmgmt.com
bnaeve@levincap.com
Jheckler@levincap.com
Gregory.Reiss@mlp.com
scott.senchak@decade-llc.com
randall@nexusamllc.com
andrew.greenberg@cwt.com
ken.irvin@cwt.com
terence.healey@cwt.com
kdaly@stinson.com
catherine.mazzeo@swgas.com
dng@semprautilities.com
JLSalazar@SempraUtilities.com
stomkins@semprautilities.com
SHruby@SempraUtilities.com
MFranco@SempraUtilities.com
RPrince@SempraUtilities.com
npedersen@hanmor.com
angelica.morales@sce.com
douglas.porter@sce.com
Francis.McNulty@sce.com
mdjoseph@adamsbroadwell.com
rkoss@adamsbroadwell.com
chh@cpuc.ca.gov
psb@cpuc.ca.gov
austin.yang@sfgov.org
marcel@tum.org
nsuetake@tum.org
axvu@pge.com
j1pc@pge.com
LKL1@pge.com
nes@a-klaw.com
sgs@dcbsf.com

Email Service List I.11-11-009

slg0@pge.com
teb3@pge.com
gburke@ap.org
BCragg@GoodinMacbride.com
cem@newsdata.com
bkc7@pge.com
grant.kolling@cityofpaloalto.org
chris_king@siemens.com
bstrottman@meyersnave.com
jmullan@meyersnave.com
smeyers@meyersnave.com
dmarcus2@sbcglobal.net
service@cforat.org
henrypielage@comcast.net
berlin@susieberlinlaw.com
abb@eslawfirm.com
wwester@smud.org
Mark.Gall@smud.org
atrowbridge@daycartermurphy.com
dweber.nwngs@nwnatural.com
kpp@cpuc.ca.gov
ayk@cpuc.ca.gov
ako@cpuc.ca.gov
dbp@cpuc.ca.gov
edd@cpuc.ca.gov
kcl@cpuc.ca.gov
kab@cpuc.ca.gov
mk1@cpuc.ca.gov
nb2@cpuc.ca.gov
ram@cpuc.ca.gov
skh@cpuc.ca.gov
ttf@cpuc.ca.gov

Email Service List I.11-02-016

hym@cpuc.ca.gov
tbo@cpuc.ca.gov
theresa.mueller@sfgov.org
tlong@tum.org
JMalkin@Orrick.com
smeyers@meyersnave.com
bmcc@mccarthylaw.com
berlin@susieberlinlaw.com
martinhomec@gmail.com
ESelmon@Jemzar.com
RegRelCPUCCases@pge.com
cassandra.sweet@dowjones.com
enriqueg@greenlining.org
Gregory.Reiss@mlp.com
jheckler@levincap.com
j7se@pge.com
julien.dumoulin-smith@ubs.com
lauren.duke@db.com
mchediak@bloomberg.net
wmc@a-klaw.com
p.duller@btintemet.com
thnxvm@gmail.com
StephanieC@greenlining.org
dvanhoogstraten@stinson.com
scott.senchak@decade-llc.com
mfallon@taloncap.com
anjani.vedula@db.com
kfallon@sirfunds.com
ted@PointState.com
jdangelo@catapult-llc.com
mgoldenberg@luminusmgmt.com
sunny.kwak@macquarie.com
bnaeve@levincap.com
NStein@LevinCap.com
randall@nexusamllc.com
andrew.greenberg@cwt.com
ken.irvin@cwt.com
terence.healey@cwt.com
kdaly@stinson.com
naaz.khumawala@baml.com
catherine.mazzeo@swgas.com
dng@SempraUtilities.com
JLsalazar@SempraUtilities.com
SHruby@SempraUtilities.com
MFranco@SempraUtilities.com
RPrince@SempraUtilities.com
npedersen@hanmor.com
angelica.morales@sce.com
douglas.porter@sce.com
Francis.McNulty@sce.com
gcaldwell@sanbruno.ca.gov
kfabry@sanbruno.ca.gov

Email Service List I.11-02-016

cjackson@ci.sanbruno.ca.us
rkoss@adamsbroadwell.com
mdjoseph@adamsbroadwell.com
chh@cpuc.ca.gov
rcc@cpuc.ca.gov
austin.yang@sfgov.org
nsuetake@tum.org
BKC7@pge.com
bts1@pge.com
cpj2@pge.com
filings@a-klaw.com
lhj2@pge.com
nes@a-klaw.com
sgs@dcbsf.com
teb3@pge.com
gburke@ap.org
BCragg@GoodinMacbride.com
cem@newsdata.com
grant.kolling@cityofpaloalto.org
chris_king@siemens.com
bstrottman@meyersnave.com
jmullan@meyersnave.com
service@cforat.org
pucservice@dralegal.org
margaret@mfelts.com
abb@eslawfirm.com
wwester@smud.org
atrowbridge@daycartermurphy.com
dbp@cpuc.ca.gov
kpp@cpuc.ca.gov
michael.colvin@cpuc.ca.gov
kwt@cpuc.ca.gov
ayk@cpuc.ca.gov
ako@cpuc.ca.gov
caj@cpuc.ca.gov
djg@cpuc.ca.gov
edd@cpuc.ca.gov
cpe@cpuc.ca.gov
jmh@cpuc.ca.gov
kcl@cpuc.ca.gov
kab@cpuc.ca.gov
mwt@cpuc.ca.gov
mlc@cpuc.ca.gov
nb2@cpuc.ca.gov
ram@cpuc.ca.gov
tdp@cpuc.ca.gov
tcr@cpuc.ca.gov
ttf@cpuc.ca.gov