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, Law, 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)

RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO PACIFIC GAS AND ELECTRIC COMPANY'S MOTION TO REOPEN THE RECORD

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I. INTRODUCTION

Pursuant to Rule 11.1(e) and the Administrative Law Judges' email ruling of July 19, 2013, the Division of Ratepayer Advocates (DRA) files this Response to the July 18, 2013 Motion by Pacific Gas and Electric Company (PG&E) to reopen the evidentiary record for the fines and remedies phase of the above-captioned proceedings (San Bruno Investigations).

PG&E filed the motion after the Commission's Consumer Protection and Safety Division (CPSD) filed an Amended Reply Brief with a revised penalty recommendation. CPSD's revised recommendation includes a minimum fine of $300 million, and clarifies how much shareholders should be credited for shareholder-funded remedial work on PG&E's gas transmission system.

PG&E's Motion is baseless and should be denied. PG&E fails to identify any material changes of fact or law justifying reopening the record. CPSD's Amended Reply Brief does not rely upon *any* new facts or law. It relies on facts and law already in the record and contains nothing that PG&E has not already had the opportunity to respond to. The issues in CPSD's revised proposal that PG&E complains of are not new issues, either. The proposals made by other parties in their Opening Briefs presented the same issues, and PG&E could have addressed them in its Reply Brief.

PG&E also fails to explain why the evidence it wants to add to the record at this late date – mostly to counter the Overland Financial Analsyis – was not previously adduced. The time to introduce evidence regarding the Overland Financial Analysis was when prepared testimony was being served, or during the two days of hearings when Overland's witnesses were available for cross examination. That time has passed.

Further, the scope of the "evidence" PG&E seeks to introduce is nearly boundless. Among other things, PG&E proposes to adduce "evidence" of costs to shareholders related directly, indirectly, and only tangentially, if at all, to gas safety. Costs of operations are reviewed holistically in PG&E's General Rate Cases; that is not the purpose of the San Bruno Investigations. The "evidence" PG&E seeks to introduce into these proceedings would be vigorously challenged by the other parties. They would need to conduct discovery and would be entitled to introduce their own evidence in rebuttal. Hearings on the newly presented evidence might be necessary. None of this is warranted because PG&E has already had a full and fair opportunity to make its case on the issues surrounding how large a penalty the company can

absorb without having its credit rating downgraded or its ability to raise capital impaired. The additional litigation on these issues and the delay it would cause is not in the public interest. It would be unfair to the non-PG&E parties who have litigated these cases, and an unreasonable waste of Commission resources.

Parties have proposed limiting examination of relevant expenditures for purposes of these Investigations to the determinations made in the Pipeline Safety Enhancement Program (PSEP) Rulemaking (R.)11-02-019, which has already been litigated and decided by this Commission in Decision (D.)12-12-030. That approach is consistent with due process and obviates the need for further time-consuming inquiries.

For all of these reasons, PG&E's motion should be denied.

II. DISCUSSION

A. PG&E'S MOTION HAS NO LEGAL BASIS

1. There Are No New Facts or Law In CPSD's Amended Reply Brief

PG&E proposes that it be permitted to introduce "evidence" falling into four broad categories:

1. Information relating to PG&E's actual and forecast spending over and above the PSEP authorized amounts;
2. Information regarding other unrecovered and unrecoverable costs PG&E's shareholders have incurred or will incur;
3. Information relating to PG&E's accrual of $200 million for potential penalties; and
4. Current ratings agencies' reactions to CPSD's new penalty proposal.[1]

PG&E's Motion is based on Rule 13.14(b) of the Commission's Rules of Practice and Procedure (Rules). Rule 13.14(b) provides that a motion to reopen the record to take additional evidence:

> … shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief

[1] PG&E Motion, pp. 5-6.

statement of proposed additional evidence, and explain why such evidence was not previously adduced.

PG&E has failed to identify any "material changes of fact or of law" that "have occurred since the conclusion of the hearing." It has also failed to "explain why such evidence [that it proposes to introduce] was not previously adduced."

PG&E fails to identify any "material changes of fact or of law" because there is *nothing new* in CPSD's Amended Reply Brief. *CPSD's changes to its Amended Reply Brief are changes in policies and arguments to support those policies*, and contain no material changes of fact or law. Further, CPSD's policy changes and new arguments are consistent with proposals *already made* by other parties in their Opening Briefs in this phase of these proceedings. To the extent CPSD relies on facts that it did not reply upon in its original Reply Brief, those facts were already in the record, and were relied upon by other parties in their Opening Briefs. For example, PG&E seeks to introduce "information relating to PG&E's accrual of $200 million for potential penalties," presumably because CPSD now seeks to reduce PG&E's credit for PSEP disallowances by this $200 million.[2] However, the issue of PG&E's accrual of incremental equity to fund San Bruno financial consequences is well established in the existing record. It was raised in the Overland analysis,[3] refined in the Overland rebuttal,[4] and referenced in the Fines and Remedies Opening Briefs of CPSD, The Utility Reform Network (TURN), and DRA.[5] Nevertheless, PG&E chose not to respond to this issue until it was raised in the CPSD Amended Reply Brief. Further, if PG&E objected to Overland's quantification or characterization of the

[2] *See* CPSD Amended Reply Brief, p. 2.

[3] *See* Jt. Ex. 52, Overland Financial Analysis (public version), p. 10.

[4] *See* Jt. Ex. 54, Overland Rebuttal (public version), p. 22 and note 22.

[5] *See* TURN F&R OB, p. 32 ("Overland found that PG&E could issue up to $2.25 billion of new equity, without significantly impairing these key financial metrics. This amount is in addition to the $200 million that PG&E has already included in its 2012 forecasts. Thus, the Overland Financial Analysis found that PG&E could raise equity to pay for up to $2.45 billion in penalties and all other remedies and disallowances."); CPSD F&R OB, p. 52 ("Overland determined that PG&E could raise $2.25 billion in equity to pay fines and remedies. … It is important to note that this is additional equity to the equity already raised by PG&E in 2012."); and DRA F&R OB, p. 19 ("As explained in the Overland Financial Analysis, PG&E can easily afford a total penalty of approximately $2.25 billion, incremental to the $200 million of equity already raised by PG&E.").

$200 million, PG&E could have cross examined Overland during the two days of hearings devoted to such issues, or otherwise introduced evidence *prior* to the closing of the record.

This is not an isolated example of PG&E's failure to introduce evidence when it had the opportunity. As another example, PG&E now seeks to introduce evidence of "unrecovered or unrecoverable costs PG&E's shareholders have incurred or will incur" on the basis that "Overland's estimate of the maximum new equity PG&E can raise includes all unrecovered and unrecoverable costs…"[6] PG&E should have introduced such evidence in its testimony responding to Overland, but it chose not to substantively respond. Instead, it offered the Wells Fargo Report, which was little more than a compendium of guesses, rumors, and gossip about the potential fine among investment analysts; it contained no analysis of how large a penalty PG&E can afford.[7] PG&E now seeks a second bite at the apple to compensate for its failure to substantively address the Overland Financial Analysis when it had the chance.

In sum, PG&E has had ample opportunity to respond to all of the proposals and "facts" it objects to in CPSD's Amended Reply Brief. Although the original briefing schedule did not call for PG&E to respond to CPSD's Reply Brief, PG&E is being given an opportunity to respond to the Amended Reply Brief. PG&E has failed to show that due process requires more. Specifically, it has failed to show any basis for reopening the record to allow the introduction of new, untested evidence.

B. PG&E'S PROPOSAL TO INTRODUCE NEW EVIDENCE IS UNNECESSARY, UNWORKABLE, AND WILL DELAY THESE PROCEEDINGS INDEFINITELY

In response to CPSD's proposal to fine PG&E at least $300 million and require it to fund Phase 1 and 2 PSEP costs for a total financial liability of $2.25 billion,[8] PG&E claims that additional "evidence" is necessary "to demonstrate that CPSD's new disallowance proposal is

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[6] PG&E Motion, p. 5.

[7] The bases for these conclusions regarding the Well Fargo Report are discussed in detail at DRA F&R OB, pp. 27-34.

[8] In addition to the $2.25 billion of financial consequences proposed by CPSD, CPSD also relies upon $200 million in equity raised earlier by PG&E to discount its proposed PSEP Disallowance Credit by $200 million. *See* CPSD Amended Reply Brief, p. 2 and Jt. Ex. 54, Overland Rebuttal (public version), p. 22 and note 22, (discussing $200 million in equity raised by PG&E that was incremental to Overland's $2.25 billion estimate).

inconsistent with the Overland analysis on which CPSD says it is based."[9] PG&E argues that it anticipates liability of over $4 billion in "shareholder costs for its gas transmission operations and related fines," and that it should be able to introduce evidence of these costs to counter CPSD's proposal.[10]

PG&E's request is misguided on many levels and, if granted, will extend these proceedings indefinitely. Such delay is not in the public interest, is unfair to the intervenors, and is a waste of Commission resources.

1. Additional Evidence Is Irrelevant To Determining Which Expenses Should Count As A Credit Towards The Total Financial Consequences To PG&E For Safety Violations Shown in the San Bruno Investigations

PG&E claims that the additional evidence it seeks to introduce is necessary to show that CPSD's revised penalty recommendation is inconsistent with the Overland Financial Analysis.[11] PG&E does not need to introduce *any* evidence to make this argument.

To the extent PG&E believes the CPSD recommendation is inconsistent with the Overland Financial Analysis, it can support its argument by comparing the CPSD proposal to the Overland Financial Analysis and other evidence already in the record. The CPSD proposal speaks for itself and relies entirely on record evidence. If PG&E believes CPSD has misconstrued evidence in the record, PG&E can reply upon the record in support. In addition to the Overland Financial Analysis, the record includes the responsive testimony of PG&E's witness (the Wells Fargo Report), the Overland Rebuttal, and PG&E's cross examination of Overland. This is more than sufficient evidence necessary to demonstrate any inconsistencies.

If PG&E believes that the record to challenge Overland is insufficient, as explained in Section II.A above, and in more detail below, PG&E had the opportunity to challenge Overland's findings in its testimony and through two days of cross examination, but failed to do so. Thus, any insufficiency in the record that PG&E observes is on PG&E's head.

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[9] PG&E Motion, p. 6.

[10] PG&E Motion, pp. 1-2.

[11] The Overland Financial Analysis is in the record as Jt. Ex. 51 (confidential version) and Jt. Ex. 52 (public version). The Overland Rebuttal is in the record as Jt. Ex. 53 (confidential version) and Jt. Ex. 54 (public version).

2. The Commission Can and Should Adopt Specific Criteria To Identify Which Expenses Should Count As A Credit Based On The Existing Record

In DRA's Fines and Remedies Reply Brief, DRA urged the Commission to limit its fines and remedies inquiry to the existing record of these proceedings and the findings of D.12-12-030, and adopt *specific criteria* for the types of costs that would qualify for a credit toward the total financial consequences imposed on PG&E. DRA also proposed general rules regarding how credits should be treated.[12] Among other things, DRA's Reply Brief proposed that:

1. Any specific "credit" calculations should be based on the existing record in these proceedings, and on the findings of D.12-12-030.

2. All "credit" calculations should discourage inefficiency and cost overruns; consequently, no "credits" should be allowed for cost overruns.

3. All PG&E expenditures qualifying as "credits" should be calculated post-tax based upon a 37% tax rate, consistent with the record.

4. PSEP expenditures for projects within the scope of the approved plan but disallowed by D.12-12-030 should count as a credit, with certain adjustments (PSEP Disallowance Credit).

5. All remedial capital expenditures authorized in PSEP Phase 1 by D.12-12-030, and consistent with the cost cap adopted in that decision should count towards the credit.

6. All further credits should be for remedial gas transmission safety-related capital expenditures authorized by future Commission decisions in ratesetting proceedings.

7. Capital expenditures credited towards the total financial consequences shall not be included in rate base.

8. Any PG&E expenditures outside these parameters – such as costs related to PG&E settlements of third party litigation, or expenditures not authorized by the Commission in a ratesetting proceeding, or authorized but already funded through rates – shall not count as a credit.

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[12] DRA F&R RB, pp. 15-17.

The adoption of specific criteria like those outlined above obviates the need to take additional evidence in these proceedings and will ensure that ratepayers get the full benefit of PG&E's "credits" toward its San Bruno financial consequences. Ensuring that ratepayers get the benefit of these credits is critical given that such credits, while large, are a minor offset to the total cost of PG&E's needed overhaul of its gas transmission system – the vast majority of which will be absorbed by ratepayers. Opening the record to additional, highly controversial PG&E cost projections will open the proverbial can of worms and eliminate the cost containment and efficiency incentives embedded in the PSEP Decision.

3. PG&E's Proposed New Evidence Is Beyond The Scope Of What Is Necessary To Resolve These Proceedings

As demonstrated by PG&E's list of proposed evidence set forth in Section II.A above, the "evidence" that PG&E proposes to introduce is well beyond the scope of what is needed to resolve these proceedings and is highly controversial, such that it will trigger the need for additional discovery, testimony, and possibly hearings. PG&E's proposal that parties be allowed to submit their own evidence 21 days after PG&E's submission[13] does not provide parties the opportunity to test PG&E's assertions. Nor does PG&E's representation that "PG&E does not intend to ask the Commission to make any determination at this time about the amount of unrecovered and unrecoverable costs PG&E and will incur"[14] resolve the issue of whether discovery, testimony, and hearings will be necessary. Contrary to PG&E's proposal and implication, it is not standard practice[15] for the Commission to re-open the record of a proceeding to accept controversial evidence without further process to test the accuracy of that evidence.[16]

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[13] PG&E Motion, p. 12.

[14] PG&E Motion, p. 6.

[15] PG&E Motion, p. 3: "The Commission regularly reopens the evidentiary record when the situation warrants it."

[16] PG&E Motion, p. 3, footnote 4, lists three proceedings where the Commission re-opened the record to take additional evidence. Notably, one of the three Commission decisions cited by PG&E in support of its right to introduce new evidence *expressly required* that hearings be held on that evidence; the other two provide for additional process, which could include hearings; and all of them delayed closure of the proceedings for more than the 4-5 weeks proposed by PG&E.

D.04-07-036 at 2004 Cal. PUC LEXIS 337, *11-12 explained: "The application for rehearing has given us the opportunity to reconsider our decision to admit certain evidence into the record without providing

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Consistent with Commission precedent, and the law, PG&E's "evidence" is only relevant if it is accurate, and it must be tested for accuracy through discovery, testimony, and hearings.

a) Rights of Way Encroachment Costs Cannot Be Resolved In These Proceedings

PG&E's proposal to introduce evidence of its rights of way encroachment costs estimated to be $500 million is an excellent example of the litigiousness and questionable accuracy of the "evidence" PG&E seeks to introduce. PG&E suggests that "right of way management costs" count as a credit toward its total financial consequences for the San Bruno Investigations.[17] PG&E first raised the issue of "right of way encroachment" costs when it was cross examining Overland's Mr. Lubow in March of this year.[18] On re-direct, Overland clarified that it seriously questioned whether such right of way costs should count towards the "threshold level" of equity (i.e. a "credit"), and PG&E is well aware of this.[19]

Little is currently known about these "right of way encroachment" costs, or the associated risks to public safety. PG&E estimates its unrecovered costs related to right of way management

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evidentiary hearings. We have carefully reviewed all the arguments raised in the application for rehearing, …. After reconsideration, we agree with applicants that evidentiary hearings are appropriate in this case for the four new items of evidence."

D.09-01-009 at 2009 Cal. PUC LEXIS 36, *16 and 21 expressed the concern that: "[T]he information contained in the two declarations have not been subjected to any discovery or, to cross-examination" and directed the ALJ to "issue a ruling to hold a prehearing conference to discuss the procedural process for addressing the two issues in this proceeding."

D.93-06-035 at 1993 Cal. PUC LEXIS 475, *48-49 reopened the proceeding for rehearing to address limited issues. The process was not limited to simple introduction of evidence into the record.

[17] PG&E Motion, p. 8. In support of the concept that these costs should count as a credit towards its total San Bruno liability, PG&E claims that Overland "did not disagree" with this assessment. This is an intentional misrepresentation of Overland's position, as has already been pointed out in TURN's Reply Brief filed June 7, 2013.

[18] PG&E presented Jt. Ex. 59 to Mr. Lubow, which simply shows "Right of Way Encroachment" as a $400 million line item. 14 Jt. RT 1435, CPSD/Lubow.

[19] As the TURN Fines & Remedies (F&R) Reply Brief (RB), p. 43 explains: "CPSD counsel asked Mr. Lubow on redirect whether he knew about the $500 million of supposedly unrecovered costs for right of way encroachment, and Mr. Lubow responded:

> Did not know. And as we're sitting here today, still do not know enough about it to be able to comment on some future cost that hasn't been really subject to review by this Commission and that I've never seen any documentation of to date." (Quoting from 14 Jt. RT 1435: 15-20).

will be "[r]oughly $500 million" in after tax costs.[20] It appears PG&E has incurred these costs because of its failure to protect its rights of way from improper encroachments, possibly for decades. A record needs to be developed on the safety and cost aspects of the encroachment problems. This will have to be done in a rate case and possibly in a separate investigation as well. It is outside the scope of this proceeding, and the Commission cannot lawfully base its penalty determination in these proceedings on a sliver of untested evidence about a problem that has yet to be investigated.

Introduction of such costs into the record of this proceeding will trigger the need for discovery and hearings to determine, among other things, the reasons for these costs – whether they are a consequence of imprudent management and therefore PG&E should absorb these costs – and whether PG&E's forecast is accurate. Clearly, such an inquiry is beyond the scope of these proceedings and is not necessary to determine the proper remedies for these proceedings.

Finally, PG&E's argument that the Commission must understand the *full range* of possible "unrecoverable" gas transmission costs PG&E may incur in the coming years before the Commission can impose financial consequences consistent with the Overland Financial Analysis is inconsistent with the most basic ratemaking principles. PG&E characterizes any costs above authorized costs as costs that its shareholders will have to cover. This is a fiction. As TURN's Reply Brief explains: "[A]bsent specific ratemaking mechanisms (such as a one-way balancing account), the utility is free to allocate costs in any way it sees fit. In practice this means that a cost overrun in one area does not at all signify a 'shareholder contribution,' if the utility is able to reduce costs elsewhere."[21]

Review of PG&E's fictional "shareholder costs" is not necessary to resolve these proceedings. As explained by DRA previously, all the evidence the Commission requires to bring these investigations to an end is already in the record of these proceedings and in the findings of D.12-12-030, the PSEP Decision.

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[20] Jt. Ex. 59, p. 2.

[21] TURN F&R RB, p. 54.

b) Additional Information Of Credit Ratings Agencies' Reactions To CPSD's New Penalty Proposal Are Similarly Unnecessary, Unworkable, And Will Delay These Proceedings Indefinitely

PG&E proposes to introduce "evidence" of "[c]urrent ratings agencies' reactions to CPSD's new penalty proposal" because "[w]hen considering CPSD's proposed penalty, the Commission also should consider the ratings agencies' assessments of the impact that CPSD's proposed penalty could have on PG&E's financial condition and its ability to raise capital to fund ongoing operations and infrastructure improvements."[22]

Evidence of credit rating agencies' opinions on the impact to PG&E of various levels of penalties is already in the record of these proceedings and does not require further elaboration. The evidence shows that the rating agencies have already anticipated a fine much larger than CPSD's proposed fine of at least $300 million, and overall unrecovered costs that could exceed $2 billion. As a result, the Overland Financial Analysis found: "The threat of a credit rating downgrade as a result of CPUC sanctions is unlikely within a large range of potential penalties … because the company's senior management has committed to issuing equity for these costs."[23] The Overland Financial Analysis then quoted from a December 15, 2011 ratings report by Standard and Poors (S&P) confirming this conclusion:

> "Although the financial profile may sustain additional out-of-pocket costs or fines that are larger than we anticipate, management's commitment to issue equity to pay any future fines backstops the consolidated significant financial profile."[24]

In response to the Wells Fargo Report and its dire predictions regarding the impacts of a large penalty on PG&E's credit rating, the Overland Rebuttal explained that *S&P had already anticipated penalties of at least $1.7 billion and had opined that an upgrade is more likely than a downgrade*.[25] The Overland Rebuttal quoted S&P's December 2012 report:

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[22] PG&E Motion, p. 6.

[23] Jt. Ex. 52, Overland Financial Report (public version), p. 3.

[24] Jt. Ex. 52, Overland Financial Report (public version), p. 3.

[25] Jt. Ex. 54, Overland Rebuttal (public version), p. 7.

> "…we believe there is a high probability that the CPUC will issue a material fine…In total, we assume that the company will incur at least $1.7 billion in out-of-pocket costs and fines not recoverable in customer rates. The company recently estimated that total unrecoverable pipeline safety costs and regulatory penalties related to the San Bruno pipeline explosion could range from $1.5 billion to $2 billion." (emphasis added)[26]

Overland reiterated: "S&P affirmed this rating and outlook assuming that [the PG&E parent company] will '*pay significant penalties and out-of-pocket costs resulting from the San Bruno incident*.' (emphasis added) The S&P report also stated that an upgrade was more likely than a downgrade."[27]

Like most of the other evidence PG&E now seeks to introduce, PG&E had the opportunity to challenge these Overland findings in its testimony and through cross examination, but it did not do so. Instead, PG&E relied on the Wells Fargo Report, which ignored *actual* credit rating agency assessments of PG&E's risk of downgrade as a result of San Bruno-related costs and instead focused on general statements from credit rating agencies regarding the importance of the "regulatory environment" to a utility's credit rating.

While DRA fully appreciates the need for financially sound utilities, and the importance of credit ratings, the evidence already in the record affirms that CPSD's proposal, which is consistent with the Overland Financial Analysis, does not place PG&E's credit rating at risk.

PG&E should not be permitted a second bite at the litigation apple to correct the mistakes it made in failing to comprehensively respond to the Overland Financial Analysis when it had the opportunity. PG&E's Motion should be denied as to every type of new evidence it seeks to introduce.

C. A Ten Page Limit For All Parties Is Appropriate

Given that PG&E evidently seeks to respond to arguments and "facts" either already in the record or raised in Opening Briefs, there is a strong argument that PG&E is not entitled to file *any* response to CPSD's Amended Reply Brief because it already had an opportunity to address these issues in its Response Brief. CPSD and the Intervenors were supposed to have the last word on these issues in their Rebuttal Briefs filed in early June. Consequently, permitting PG&E ten pages to

[26] Jt. Ex. 54, Overland Rebuttal (public version), p. 7.

[27] Jt. Ex. 54, Overland Rebuttal (public version), p. 7.

respond to CPSD's Amended Reply Brief, given that it raises no new issues, affords PG&E more than ample due process.

Consistent with CPSD's July 8 Motion for Procedural Rulings, which resulted in the ten page limit PG&E now complains of, it is appropriate for the Commission to set page limits for the remainder of these proceedings to, among other things, require the parties to "write more concise appeals or responses."[28] Court Rules routinely establish page limits for the same reason, and there is nothing in the Commission's Rules which prevents the Commission from setting such page limits. Indeed, at this juncture in these proceedings, brevity and conciseness are sorely needed.

If the Commission believes ten pages is insufficient, then it should considering raising the page limit, but imposing a limit nonetheless.

III. CONCLUSION

For the reasons set forth herein, the Commission should deny PG&E's July 18, 2013 Motion to Reopen the Evidentiary Record in the San Bruno Investigations. As the Commission considers the new briefing schedule, DRA requests that Rebuttal Briefs to the CPSD and PG&E briefs be due no sooner than Friday, August 16.

Respectfully submitted,

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[28] CPSD July 8, 2013 Motion for Procedural Rulings, p. 5.