

**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
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 UTILITY REFORM NETWORK
FOR CLARIFICATION OR RULING AND MODIFICATION OF
PROCEDURAL SCHEDULE**



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**MOTION OF THE UTILITY REFORM NETWORK
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Pursuant to Rule 11.1 of the CPUC Rules of Practice and Procedure, the Utility Reform Network (“TURN”) respectfully submits this Motion requesting certain clarification of the scope and modification of the schedule as provided in the “Administrative Law Judges’ Ruling Requesting Additional Comment,” issued on July 30, 2013 in these three proceedings.

1. Introduction and Summary of Requested Relief

On July 30, 2013 the two Assigned Administrative Law Judges (“ALJs”) issued a “Ruling Requesting Additional Comment” (hereafter “Ruling Requesting Comment” or “Ruling”) specifying a number of questions to be answered by PG&E and other parties, broadly related to the calculation of tax benefits due to disallowed expenditures, the timing of tax benefits, and the impact on PG&E’s financial condition. Additionally, on July 31, 2013, the Administrative Law Judges issued a “Ruling Addressing July 18, 2013 Motion of PG&E,” denying PG&E’s motion to reopen the record (hereinafter “Ruling Denying PG&E Motion”).

The ALJ Ruling Requesting Additional Comment asks a number of complex questions based on the goal of obtaining “further briefing” on the impact of various fines and disallowances on PG&E’s financial condition. TURN requests that the Ruling be clarified to specify that: 1) parties may not introduce new evidence that would circumvent the Ruling Denying PG&E’s Motion to reopen the record; and 2) *if new*

evidence is being sought by the ALJs concerning other disputed issues, the procedural schedule be modified to allow parties an opportunity to test any new evidence.

The Ruling orders PG&E to respond to question in Section 3 on August 14, 2013, and requests that “all parties” submit comments to Section 4 questions on September 13, 2013, and reply comments on September 23, 2013. TURN requests that the schedule to be modified so that PG&E responds to all the questions first, and *other parties* submit reply comments to PG&E at least fifteen business days later. TURN proposes one possible schedule that would not delay the proceeding at all and would preserve the due process rights of parties.

Given that the current schedule calls for PG&E to submit responses to questions in Section 3 on August 14, TURN requests the ALJ’s temporarily suspend this schedule and require responses to this motion by noon on August 14.¹ However, even if PG&E submits responses to Section 3 on August 14, the ALJs can still grant the procedural relief requested in this Motion.

2. Modification of Schedule in Order To Preserve Due Process Rights

The Ruling Requesting Comment orders PG&E to provide responses to the five questions in Section 3 by August 14.² Other parties have an opportunity to respond to the questions in Section 4 “based on PG&E’s comments submitted in response to the questions in Section 3 above.”³ Ordering Paragraph number 2 of the Ruling authorizes

¹ TURN had hoped to file this motion last week. However, one of TURN’s attorneys had commitments in the hearing room in PG&E’s general rate case through Wednesday and was taken sick on Thursday and Friday, and the other attorney had long-standing vacation plans. Based on this fact, TURN provides two alternative procedural recommendations below.

² When referring to specific questions, TURN identifies the questions first by the Section Number, then by the Question Number.

³ Ruling Requesting Comment, p. 4.

“all parties” to file comments to the questions in Section 4 by September 13, and all parties to submit reply comments by September 23, 2013.

There are two problems with the procedural schedule established in the Ruling. First, the CPSD and intervenors should have the final opportunity to respond to PG&E concerning the questions in Section 4. The issues addressed in these Ruling relate directly to PG&E’s financial ability to pay. CPSD and intervenors have the burden of proof on issues relating to the appropriate financial consequences. Just as CPSD and intervenors had the opportunity to reply to PG&E’s brief on fines and penalties, so in this case CPSD and intervenors should have the opportunity to reply to PG&E’s responses to the questions.

The simplest method to safeguard this due process concern is to require PG&E to answer all questions first, and allow other parties to provide comments after PG&E.⁴ If there are factual issues in dispute, those should be resolved through the normal process of discovery and hearings. TURN is not opposed to providing PG&E more time to answer all the questions than presently authorized for Section 3.

Having PG&E answer all the questions first also provides a more efficient use of resources. Even though the Ruling Requesting Comment carefully attempts to separate only those questions that must first be answered by PG&E depending on its corporate policies and purposes, some of the responses to Section 4 questions (for example, Question 4-1b) involve complex tax issues, and the need and extent of any necessary answers depend at least partly on PG&E’s responses.

⁴ However, even if the ALJs seek answers from PG&E to Section 3 Questions on August 14, the schedule should still be modified to require PG&E to answer Section 4 Questions prior to other parties submitting their answers.

Second, there should be significantly more time between PG&E's response to all the questions and the ability of other parties to respond. The current ten calendar days between comments and reply comments, which result in only six business days and two weekends, would not allow parties to evaluate and address all of the questions posed in Section 4. TURN recommends that the ALJs modify the schedule to allow at least fifteen business days between comments and reply comments.

One possible schedule that will in no way delay resolution of these issues is to have PG&E submit responses to all of the questions on August 26, with other parties submitting reply comments to PG&E on all the questions on September 20, 2013.

TURN thus requests that the ALJs suspend the August 14 due date for PG&E responses and require responses to this Motion by noon on August 14. However, even if the ALJs prefer that PG&E submit responses to Section 3 questions on August 14, the proposed schedule could be adopted, with PG&E submitting answers to Section 4 questions on August 26, and other parties submitting answers to all questions on September 20, 2013.

TURN likewise recommends that parties should submit any motion for evidentiary hearings on September 23, identifying any material factual issues in dispute.

3. Clarification of Scope

On July 30th, just one day after the Ruling Requesting Comment, the ALJs issued a Joint Ruling Denying PG&E's Motion to reopen the record of these proceedings. The Ruling Denying PG&E's Motion explained that the revised penalty proposal from the CPSD did not rely on any extra-record evidence, and that PG&E already had an opportunity to respond to substantially similar penalty proposals made by several intervenors.

The Ruling Requesting Comment seeks answers to fourteen questions (with more subparts), some of which provide some opportunity for new argument and/or new evidence. Some of the questions are narrowly tailored to obtain information from PG&E regarding income tax accounting for regulatory and tax purposes, and PG&E's intentions for financing penalties and disallowances. Other questions more broadly explore the impact of timing differences between penalties and the potential tax benefits stemming from deductions for disallowed expenditures. And some questions even explore PG&E's hypothetical needs for equity to fund capital expenditures and the impact of additional equity on capital structure and rates.⁵

The Ruling Requesting Comment twice states that its purpose is to solicit “*further briefing* on the impact that fines and disallowances would have on PG&E's ability to raise capital and otherwise remain financial viable.”⁶ However, the answers to some of these questions may include new argument or evidence that is not in the records of these proceedings. TURN certainly appreciates and respects the ALJs' decision to obtain additional briefing on important issues. However, the Ruling should be clarified to ensure that any “briefing” relies on record evidence, and especially that any briefing does not circumvent the Ruling Denying PG&E's Motion, issued on the very next day.

TURN recommends that the Ruling be clarified to prescribe that no party can submit new evidence *of the type* rejected in the July 30th Ruling Denying PG&E's Motion to Reopen. Furthermore, TURN requests that the Ruling be clarified to explain whether the ALJs require any new evidence on tax issues. If such is the case, TURN requests that the procedural schedule be modified to provide parties an opportunity to

⁵ For example, Questions 3-5 and 4-3a.

⁶ Ruling Requesting Additional Comment, p. 4 and 3 (emphasis added).

conduct discovery and potentially cross-examine witnesses regarding any disputed material issues of fact. Not allowing such minimal due process protections would thwart the process that has been carefully scheduled over the past two years.

a. The Ruling Should Clarify That PG&E Cannot Introduce Evidence of the Type Rejected in the Ruling Denying Motion to Reopen

Some of the questions relate generally to “the amount of equity that PG&E would have issued to fund capital expenditures regardless of any disallowance.”⁷ For example, Question 4-2a asks for a methodology to determine “the actual impact on PG&E, and/or on the amount of capital that PG&E would need to raise ... ii. of capital expenditures or other expenses that have already been made.” Likewise, Question 4-3a asks whether there should be an “adjustment to reflect the amount of equity that PG&E would have issued to fund capital expenditures regardless of any disallowance.”

It appears that the ALJs seek information concerning the impacts of timing differences between expenditures that are disallowed and potential tax benefits. However, the ALJs should clarify that these questions pertain **only to a methodology** relevant to a disallowances of either past or future expenditures. TURN is concerned that these questions could be construed by PG&E to allow for additional evidence concerning recorded spending and equity issuances. PG&E already testified at length concerning their incremental equity needs to fund planned capital expenditures.⁸

TURN presumes that the ALJs did not intend the additional briefing to circumvent their Ruling Denying PG&E’s Motion to reopen the record. TURN thus recommends that the Ruling Requesting Comments be clarified to specify that *neither*

⁷ Ruling, p. 4.

⁸ Indeed, one of PG&E’s principal defenses was its contention that it will need to issue large amounts of new equity to fund capital expenditures in 2014-2016. See, for example, Ex. Jt. 66, p. 16-17 (Fornell/PG&E).

PG&E, nor any other party, can introduce new factual evidence concerning the matters addressed in PG&E's Motion to Reopen, but that the comments and briefing should rely entirely on the existing record. In no way should these questions be interpreted to allow quantification of amounts of past expenditures allegedly funded by shareholders.

b. The Ruling Should Clarify Whether Any New Facts Are Requested on Other Issues, and If the Ruling Requests New Evidence, the Schedule Should Provide Parties and Opportunity to Test the Evidence

Perhaps even more critical is the fact that the Ruling Requesting Comment explicitly seeks additional argument, and perhaps evidence, concerning issues related to income tax accounting. Many of the questions in both Sections 3 and 4 attempt to elicit information and evidence to determine what the “real impact” on PG&E will be of the potential tax deductibility of disallowed expenditures, especially given that a penalty will require an immediate one-time payment to the General Fund, while the tax benefits of a disallowance will accrue over some time period depending on PG&E's actual income tax statements and income tax accounting.

TURN appreciates that this is an important issue for purposes of evaluating the exact impact of proposed financial consequences on PG&E's finances, and TURN believes that these questions could be answered based on the existing record evidence. As explained in the Ruling Requesting Comment, the issue of tax impacts was raised directly in Overland's Initial Report,⁹ and PG&E chose not to address the issue in its rebuttal testimony. During cross examination the experts from both Overland and PG&E agreed

⁹ Ruling, p. 2 and fn. 3. Citing to Ex. Joint-52 at 6 and 13.

that the tax impacts of disallowed expenditures resulted in a benefit equal to 37% of the expenditures.¹⁰

Indeed, TURN calculated a penalty corresponding to tax benefits in our Opening Brief on Penalties using different tax benefits for expense and capital components of the PSEP spending.¹¹ However, based on a review of the Overland testimony and the cross examination of PG&E's witness, TURN explained in our Reply Brief that the use of a 37% tax benefit based on expense deduction was more accurate.¹²

However, it is unclear whether the Ruling is requesting only briefing based on the existing record. For example Question 4-1 requests information regarding how to calculate tax benefits of disallowed expenditures, and whether any such methodology should treat capital differently from expenses. TURN had assumed that the record on this issues was already complete, based on the Overland Report and PG&E's agreement during cross examination.

TURN thus requests that the Ruling be clarified to explain whether the responses are limited to the factual evidence on the record, or whether parties can introduce new evidence on these tax issues. To the extent PG&E is allowed to submit new factual evidence concerning the calculation of tax benefits, the Commission should modify the schedule to allow for proper discovery and opportunity to cross examine and respond to the new evidence.

¹⁰ See, for example, 14 Jt. RT 1491:2-17 (Fornell/PG&E) (Tax consequence of capital expenditure is "about 37 percent of the cost.")

¹¹ TURN Opening Brief on Fines and Remedies, May 6, 2013, p. 9 and fn. 25.

¹² TURN Reply Brief, June 7, 2013, p. 57 and fn. 141.

c. Recommendation for Simplification

The Ruling Requesting Comment asks a number of very specific questions concerning tax accounting, both for regulatory and income tax purposes. The Ruling does not provide much explanation for the need for this additional evidence, aside from the statement that further briefing is needed “in order to fully consider the proposals.”¹³

TURN appreciates the goal of the ALJs to more fully evaluate the various proposals by CPSD and intervenors that include both a monetary penalty and a disallowance of expenditures. Without additional discussion, however, it is somewhat difficult for TURN to understand the importance of the many detailed questions. The underlying purpose of the information is especially important given the relatively limited amount of time, and the complicated nature of tax questions, which would require the hiring of tax accountants with expertise in both regulatory and income tax accounting.

It is possible, however, that some of the detailed questions could be simplified. The ALJ Ruling Requesting Comments notes at the outset that “the Overland Report also states that PG&E plans to fund any fines and disallowed capital expenditures by issuing equity and writing off the disallowed capital expenditures.”¹⁴ Some of the detailed questions hinge on whether PG&E agrees with Overland’s statement that the company “plans to write these capital expenditures [disallowed PSEP costs] off to expense and issue additional equity to fill the equity gap.”¹⁵ If PG&E agrees with this statement, then

¹³ Ruling Requesting Comments, July 30, 2013, p. 3.

¹⁴ Ruling, p. 2.

¹⁵ Ruling Requesting Comments, Question 4-3 (quoting from Overland Report, Ex. Joint 52 at 13).

many of the detailed questions in Section 3 may not be necessary.¹⁶ If PG&E disagrees with this statement, then it should explain its plans as best as it can at this point in time. Indeed, this statement from Overland formed the basis of TURN and DRA's financial calculation of tax consequences, which were **never challenged** by PG&E.

In either case, the responses to the questions in Sections 3 and 4 are not strictly separable. Most importantly, as discussed above, the Ruling Requesting Comment should be modified to order PG&E to respond first to all the questions, prior to other parties submitting their responses. However, especially if PG&E does not disagree with Overland, PG&E could provide an explanation of its income tax accounting that is somewhat less prescriptive than required in Section 3.

4. Conclusion

The ALJ Ruling Requesting Additional Comment asks a number of complex questions based on the goal of obtaining "further briefing" on the impact of various fines and disallowances on PG&E's financial condition. TURN requests that the Ruling be clarified that 1) parties may not introduce new evidence to circumvent the Ruling Denying PG&E's Motion to reopen the record, and 2) whether new evidence is being sought concerning tax issues. If the Ruling does seek any new evidence, TURN requests that the procedural schedule be modified to allow an opportunity to test any new evidence.

In any case, TURN requests that the schedule to be modified so that PG&E responds to all the questions prior to responses from other parties. Such a change would not delay the schedule and would preserve the due process rights of parties.

¹⁶ TURN reiterates that PG&E never disagreed with this conclusion in the initial Overland Report, which was based on the statement of PG&E's CFO, either in written testimony or during oral cross-examination.

