BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms.	Rulemaking 11-02-019 (Filed February 24, 2011)

OPENING BRIEF OF THE UTILITY REFORM NETWORK IN RESPONSE TO THE ORDER TO SHOW CAUSE WHY PACIFIC GAS AND ELECTRIC COMPANY SHOULD NOT BE SANCTIONED FOR VIOLATIONS OF RULE 1.1

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I. INTRODUCTION

In accordance with the direction of Administrative Law Judge ("ALJ") Bushey at the conclusion of the September 6, 2013 morning hearing on this matter,[1] The Utility Reform Network ("TURN") submits these recommendations regarding sanctions against Pacific Gas and Electric Company ("PG&E") for violations of Rule 1.1 of the Commission's Rules of Practice and Procedure.

TURN recommends that the Commission adopt the following findings and orders:

(1) PG&E violated Rule 1.1 by failing to submit to the Commission and parties an appropriate pleading alerting the Commission that PG&E-furnished information upon which the Commission had relied in Decision (D.) 11-12-048 was incorrect and that the Decision needed to be modified to reduce the Maximum Allowable Operating Pressure ("MAOP") for Lines 147 and 101 from 365 pounds per square inch gauge ("psig") to 330. For this violation, PG&E should be required to pay a fine to the State Treasury of $500,000.

(2) PG&E violated Rule 1.1 by delaying 253 days (from October 24, 2012 to July 3, 2013) in submitting *any* pleading notifying the Commission and the parties that information regarding the seam welds on certain Line 147 segments was incorrect and that, as a result, the MAOP specified in D.11-12-048 for that line should be reduced from 365 to 330. Because this was a continuing violation, each day that PG&E delayed in submitting such pleading constitutes a separate violation. For these 253 violations, PG&E should be fined $12,650,000.

II. PG&E SHOULD HAVE REALIZED THAT THE ERRORS REQUIRED A SIGNIFICANT CHANGE TO D.11-12-048

As a foundational matter, it is necessary to address the claim advanced by PG&E at the September 6, 2013 hearing that the errors it identified in its July 3, 2013 "errata" pleading do not

[1] 16A Reporter's Transcript ("RT") 2415.

require any modification to D.11-12-048. It is disturbing that PG&E would advance such a patently baseless claim.

The whole point of D.11-12-048 was for *the Commission* to determine the MAOP for Lines 101, 132A and 147. This is evident from the very first sentence in the decision and from Ordering Paragraph ("OP") 1, which state that PG&E is authorized to operate these lines at 365 psig.[2] In fixing the MAOP at 365, the Commission relied on the data submitted by PG&E, including pipeline features information derived from PG&E's records to calculate the design pressure.[3]

PG&E now admits that it provided incorrect information to the Commission regarding the MAOP for Lines 147 and 101 and that, based on the corrected information, the MAOP for both lines should be reduced from 365 to 330 psig.[4] Nevertheless, PG&E's witness at the Order to Show Cause ("OSC") hearing, Mr. Malkin, contended that there is no need to modify D.11-12-048 because OP 2 of the decision requires PG&E to operate the pipelines in accordance with state and federal regulations and that these regulations establish an MAOP of 330.[5]

This argument has absolutely no merit, as PG&E should well know. Mr. Malkin admitted that, if PG&E had originally provided the correct data, the Commission would have established

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[2] D.11-12-048, pp. 1, 11.

[3] D.11-12-048, pp. 7, 8. Under 49 C.F.R. Section 192.619(a), MAOP is to be determined by the *lowest* MAOP calculated under a variety of methods. One of those methods is the design pressure based on pipeline features.

[4] Ex. OSC-1, pp. 2, 4. TURN recognizes that the nature of the errors differs for Lines 147 and 101. For Line 147, the error was incorrect records that indicated the seam welds for certain segments had a joint efficiency of 1.0 when in reality the segments had inferior seam welds with a joint efficiency factor of 0.8. (Ex. OSC-1, pp. 1-2). For Line 101, PG&E reports that the applicable federal regulations do not allow PG&E to rely on a post-1974 pressure test to operate the line "one class out" and that, as a result, the MAOP for this line should be reduced from 365 to 330. (*Id.*, pp. 2-4).

[5] 16A RT 2349-2350 (PG&E/Malkin).

an MAOP of 330, instead of the 365 MAOP it adopted.[6] If the decision would have been different in December 2011 if PG&E had provided the correct data, then the decision clearly needs to be changed now to reflect the corrected information. PG&E cannot dispute that OP 1 is based on erroneous data, specifies an incorrect MAOP, and needs to be modified.

Moreover, PG&E's argument belittles the Commission's role in regulating PG&E. The Commission made clear that it, not PG&E, will be the final arbiter of MAOP for these lines. PG&E's argument would arrogate to itself the final decision-making role, in clear contravention of the Commission's orders establishing the process for increasing the MAOP of these lines.[7]

Given the fact that the decision's adoption of an MAOP of 365 is indisputably incorrect, it is simply not credible for PG&E to claim that D.11-12-048 does not need to be modified.

III. PG&E'S FAILURE TO SUBMIT AN APPROPRIATE PLEADING SEEKING TO CORRECT THE ERRONEOUS COMMISSION DECISION VIOLATES COMMISSION RULE 1.1

It was extremely misleading for PG&E to use a pleading characterized as "errata" to identify its highly material errors on which the Commission relied and that rendered D.11-12-048 erroneous.

First, the term "errata" profoundly understates the import of the information that PG&E provided in its July 3, 2013 submission. The errors that needed to be corrected struck at the very heart of the decision, the sole purpose of which was to establish the proper MAOP for the lines in question.

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[6] 16A RT 2370-2371.

[7] D.11-09-006, p. 7 (ruling that the Commission, not the Executive Director, must make the decision whether to lift the operating pressure restrictions, in part because of the "intense" public interest in PG&E's gas operations.")

Second, PG&E chose a pleading title that conferred on the parties no opportunity for submitting a responsive pleading. For this reason and because of the insignificance conveyed by the word "errata", TURN, like the City of San Bruno,[8] did not review the pleading when it was served, and did not calendar it for action as there was no apparent action to take in response to such a submission – particularly in relation to a decision that had already been issued.

Third and most important, PG&E misled the Commission and the parties by not calling out the need to modify the erroneous decision. As the Chief ALJ suggested at the OSC hearing,[9] the obvious correct vehicle to correct a decision would have been a petition for modification under Rule 16.4, which "asks the Commission to make changes to an issued decision." Another virtue of such a pleading would have been to give parties a clear procedural opportunity to respond and the Commission a clear path to follow in issuing a corrected decision.

For these reasons, PG&E's use of a pleading styled as "errata" to inform the Commission of serious PG&E errors that infected D.11-12-048 was misleading, both to the Commission and the parties, in violation of Rule 1.1.[10] In addition, the pleading tendered by PG&E was "an artifice" clearly designed to limit attention to the highly embarrassing fact that the MAOP Validation program that PG&E had claimed was ensuring the accuracy of PG&E's pipeline records had failed with respect to a pipeline just miles away from the San Bruno calamity.

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[8] 16A RT 2339 (Statement of City of San Bruno).
[9] 16A RT 2335 (Statement of Chief ALJ Clopton).
[10] Rule 1.1 provides as follows: "Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

The Commission should levy the maximum $500,000 fine under Section 2107[11] for this Rule 1.1 violation. This is a serious offense that put PG&E's interests ahead of the Commission's interests and the public interest. The severity of the offense is aggravated by the fact that PG&E does not admit that it did anything wrong. It is particularly disturbing that PG&E's July 3, 2013 submission did not call out the need to correct the fundamental PG&E-caused errors in D.11-12-048 and that, even after the issuance of the OSC Ruling, PG&E's witness still claimed that the decision does not need to be modified. The maximum fine is necessary to impress upon PG&E that it committed a significant violation and that the Commission strongly disapproves of its non-credible, hyper-technical arguments to deny any wrongdoing.

IV. PG&E'S 253-DAY DELAY IN BRINGING THESE IMPORTANT ERRORS TO THE ATTENTION OF THE COMMISSION AND THE PARTIES IS A SERIOUS CONTINUING VIOLATION OF RULE 1.1

PG&E has committed an even more serious Rule 1.1 violation – delaying more than eight months before formally notifying the Commission and the parties of the significant errors it discovered regarding the Line 147 seam welds. By failing to correct this information – which caused the Commission's MAOP determination in D.11-12-048 to be erroneous, PG&E effectively misled the Commission and the parties into believing that the pipeline features information it had submitted to the Commission was fully accurate, when PG&E knew the contrary to be true. This was an extremely serious, continuing violation of Rule 1.1.

[11] All statutory references are to the Public Utilities Code, unless otherwise indicated.

A. PG&E Delayed 253 Days Before Attempting to Correct the Important Errors in the Record on Which the Commission Had Relied

PG&E admits that it had "an absolute obligation" to inform the Commission and the parties of the errors.[12] However, PG&E chose to refrain from carrying out this "absolute obligation" until July 3, 2013.

The record shows that PG&E knew about the errors in the information it had provided to the Commission more than eight months before it submitted its July 3, 2013 pleading. Specifically, a PG&E pipeline engineer became aware that PG&E's Line 147 records were incorrect on October 18, 2012.[13] On October 24, 2012, PG&E confirmed that the pipe in the segments at issue was AO Smith pipe with seam welds that were inferior to the DSAW seam welds reflected in PG&E's records and reported to the Commission in PG&E's October 31, 2011 filing in this proceeding. Mr. Johnson, a PG&E Vice President who was PG&E's main witness in the proceedings seeking to increase MAOP for the lines in question, testified in the OSC hearing that he believes he was notified at about that time.[14] Thus, it is fair to conclude that a responsible PG&E officer had knowledge of the errors on October 24, 2012. In fact, not only was Mr. Johnson a responsible officer, *he had testified under oath* that PG&E had validated the information it had provided to the Commission through records review.[15] The Commission explicitly relied on Mr. Johnson's testimony in D.11-12-048, in a section of the decision captioned "Responsible Engineer's Review."[16]

In light of the fact that this new information contradicted the features information on which the 365 psig MAOP established in D.11-12-048 was based, and in fact contradicted the

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[12] 16A RT 2357 (PG&E/Malkin).
[13] Verified Statement of Kirk Johnson, August 30, 2013, ("Johnson Declaration"), par. 27.
[14] 16B RT 2474 (PG&E/Johnson).
[15] D.11-12-048, p. 8.
[16] *Id.*

sworn testimony provided by Mr. Johnson, it was incumbent on PG&E to formally notify the Commission and the parties of the errors immediately.[17]

B. PG&E Provides No Good Reason for Its Lengthy Delay

PG&E provides no good reason for its delay in submitting a formal pleading to correct the significant, substantive errors in its previous pleading and testimony. The only reason PG&E gives is that it chose to wait until it had resolved its internal interpretation of rules relating to operation of pipelines "one class out." According to Mr. Malkin, this did not happen until July 2, 2013.[18] This excuse fails for several reasons.

First, the one-class-out rules do not justify increasing an MAOP above design pressure. Section 192.619(a) of the federal regulations is clear that MAOP may not exceed the lowest of various measures of MAOP, including design pressure. The corrected seam factors for the Line 147 segments caused a reduction in the design pressure, which became the controlling limit on MAOP. PG&E does not and cannot explain why the one-class-out issue had anything to do with the reduced MAOP for Line 147 that was mandated under Section 619(a).

Second, even if the one class out rule had some bearing on the MAOP for the Line 147 segments, PG&E does not explain why it took more than eight months to clarify its interpretation of those rules. The Commission cannot allow this excuse to stand as it is an invitation to allow

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[17] PG&E informal notification to someone in the CPUC's Safety and Enforcement Division ("SED") was neither timely nor adequate. PG&E waited at least four months to contact someone in SED in February 2012, and it appears that PG&E did not reveal the errors to anyone in SED until a month later. Johnson Declaration, pars. 65, 66. In any event, informal SED notification was not sufficient to correct the formal record, which included a pleading filed and served on October 31, 2011 and sworn testimony by Mr. Johnson at an evidentiary hearing. A private meeting with SED also served PG&E's interest in keeping more embarrassing information about the quality of its records – information of significant public interest – away from the attention of the parties and the media.

[18] 16A RT 2352.

operators to delay reporting important information while the operator takes its time conducting an internal debate.

Third, PG&E has failed to show why any internal debate was necessary. As PG&E acknowledges, the original rule required hydrotests to validate pre-1971 pipelines that were operating one-class out to be completed by the end of 1974. PG&E did not do that in the case of the Line 147 and 101 segments at issue. Consequently, any such pre-1971 pipelines were not validly operating one class out.

In sum, once PG&E knew about the incorrect seam weld information it had provided to the CPUC and on which the Commission had relied, it knew or should have known that, because of the impact of the error on design pressure, the MAOP had to be reduced. PG&E has failed to supply any valid reason for not formally making this critical information known to the Commission and the parties immediately.

C. PG&E's Failure to Timely Correct the Record Was a Continuing Violation of Rule 1.1 that Calls for the Maximum Fine

PG&E's failure to correct the important errors in the Line 147 features and MAOP on which the Commission relied misled the Commission. Even though PG&E knew or should have known that the MAOP approved in D.11-12-048 was based on incorrect information, PG&E did not correct it. Failing to correct such highly material facts is the equivalent of perpetuating a false statement of facts, which Rule 1.1 specifically prohibits. Under Section 2108, this was a continuing violation each day that PG&E knew about the errors and failed to formally correct them, and each day's continuance of the violation was a "separate and distinct offense."

These violations are extremely serious and warrant the maximum fine. By not correcting the record, the Commission allowed the Commission to continue to believe that it had

established the MAOP for Line 147 at the correct level when PG&E knew that the MAOP needed to be reduced. It is deeply disturbing that PG&E's first instinct was not to notify the Commission of the errors and allow the Commission to take the necessary steps to correct its erroneous decision. Instead, PG&E kept its knowledge of the errors to itself.

The Commission should consider it an aggravating factor that PG&E is not in any way repentant about its lengthy delay. In fact, Mr. Malkin testified at the OSC hearing that including in its July 2, 2013 pleading information about when PG&E learned about the error would have been "way too much information."[19] The suggestion that the timing of PG&E's discovery of the error was irrelevant to the Commission's consideration of this issue is absurd on its face. Instead, it is obvious that PG&E intentionally omitted that important fact precisely to avoid having to answer for its indefensible delay in correcting the record.

Accordingly, PG&E should be required to pay the maximum $50,000 fine for each day of its Rule 1.1 violation. A continuing violation from October 24, 2012 to July 3, 2013, a total of 253 days, multiplied by the maximum $50,000 per violation yields a fine of $12,650,000.

V. TURN DOES NOT TAKE A POSITION ON WHETHER THE UTILITY OR ITS ATTORNEYS SHOULD PAY THE FINES

Because PG&E chose to invoke the attorney-client privilege,[20] the record does not clearly establish whether PG&E or its attorneys bear ultimate responsibility for the Rule 1.1 violations. In particular, it is entirely unclear who made the decision to delay notifying the Commission and parties of the Line 147 errors for 253 days.

[19] 16A RT 2361-2362 (PG&E/Malkin).
[20] It is well settled that the client is the holder of the attorney-client privilege. Cal. Evid. Code Section 954.

Accordingly, TURN recommends that the sanctions be imposed on PG&E, the regulated entity and the party asserting the privilege. If PG&E believes that the advice of counsel is responsible for all or any part of the fine amounts, PG&E can pursue a claim against its attorneys.

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Respectfully submitted,

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