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)

REPLY 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 this reply brief 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. As shown below, PG&E's arguments for exonerating the utility are thoroughly unpersuasive. In addition, TURN points out that the brief of the Commission's Safety and Enforcement Division ("SED") incorrectly relies upon Public Utilities Code[2] Section 2112 as the appropriate provision for determining the fine amounts for PG&E's violations. TURN concludes by noting an error in its fine computation that reduces its total recommended fine amount to $12,700,000.

II. PG&E'S EXCUSE FOR NOT SEEKING TO MODIFY D.11-12-048 IS NOT CREDIBLE

PG&E attempts to portray its decision not to seek to modify D.11-12-048 as a "good faith" determination.[3] This assertion is simply not credible. TURN's opening brief explains that the whole point of the process for lifting operating pressure restrictions was for *the Commission* to determine the appropriate maximum allowable operating pressure ("MAOP"). PG&E's erroneous assertion (even after MAOP Validation) that the Line 147 segments were DSAW pipe rendered PG&E's recommended MAOP and the Commission's established MAOP excessive and in need of reduction.[4]

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[1] 16A Reporter's Transcript ("RT") 2415.
[2] All statutory references are to the Public Utilities Code unless otherwise indicated.
[3] PG&E Comments, p. 7.
[4] TURN Opening Brief, pp. 2-3.

PG&E's continued reliance on Ordering Paragraph ("OP") 2 of D.11-12-048 is patently baseless, as OP 1 and OP 2 makes clear:

> 1. Pacific Gas and Electric Company may operate natural gas transmission Lines 101, 132A, and 147, with associated shorts, with a maximum operating pressure of 365 pounds per square inch gauge.
>
> 2. Pacific Gas and Electric Company must operate Lines 101, 132A, and 147 in accord with applicable state and federal law and regulations.[5]

These OPs show that only OP 1 addressed MAOP for the lines in question. Indeed, a review of the entirety of D.11-12-048 shows that OP 1 is the focal point of the entire decision – a *Commission* determination of the appropriate MAOPs for these lines based on the supposedly validated data presented by PG&E. In contrast, OP 2 is essentially a reminder to PG&E of a fact that was already true – that PG&E was required to operate the pipelines in accordance with applicable law. In effect, OP 2 was a truism. If it served any purpose, it was to make a PG&E violation of *federal* law also a violation of a Commission order, which could potentially be relevant in an enforcement action.

PG&E's reliance on OP 2 and its disregard of OP 1 ignore the central purpose of D.11-12-048 and essentially treat the decision as a nullity. PG&E always had to comply with applicable law and OP 2 did not change that obligation. The determination of the MAOPs for each line was the operative element of D.11-12-048 as any reasonable "good faith" reading of that decision makes evident. Once PG&E knew that its errors had caused the Commission to adopt excessive MAOPs, it was incumbent on PG&E both to formally notify the Commission and the parties of the error and to initiate a process to correct the decision. As DRA correctly points out, leaving the errors in the MAOPs set by D.11-12-048 uncorrected would open the door to PG&E at a later point to argue that the CPUC was allowing PG&E to operate the pipelines at

[5] D.11-12-048, p. 11.

the higher pressure.[6] In addition, failing to correct the errors is confusing, if not misleading, to the public with respect to pipelines operating in close proximity to the San Bruno explosion. If PG&E had been acting in good faith, there would have been no other reasonable option than to submit a petition for modification as soon as possible after the discovery of the error.

III. PG&E'S ELECTION TO SUBMIT AN 'ERRATA' RATHER THAN A PETITION TO MODIFY D.11-12-048 VIOLATED RULE 1.1

PG&E wants the Commission to believe that it had no ill intent, and was not even reckless or careless, in choosing to submit an "Errata" rather than a petition for modification. Although a finding of intent is not necessary for a Rule 1.1 violation,[7] the Commission can and should infer an intent to mislead the Commission from the following incontrovertible facts:

- PG&E's errors rendered the MAOPs established in D.11-12-048 incorrect.
- The only applicable procedural vehicle under the Commission's rules for modifying a Commission decision is a petition for modification under Rule 16.4.
- A petition for modification, in contrast to an "errata" submission, would allow a clear procedural opportunity for parties to respond to the submission, and would have established a clear path for the Commission to modify D.11-12-048.
- For these reasons, a petition for modification was much more likely to draw attention to PG&E's errors than an "errata" submission.

In sum, PG&E clearly chose a procedural vehicle that was calculated to draw the least amount of attention possible to the highly embarrassing fact that even PG&E's MAOP Validation efforts had not uncovered fundamental errors regarding seam weld type in PG&E's

[6] DRA Recommendations, p. 12.
[7] *See, e.g.,* D.03-01-079, p. 7. TURN anticipates that other parties will more fully address PG&E's arguments about the requisite mental state for a Rule 1.1 violation.

records. A petition for modification was the obvious and easy choice, and PG&E rejected that option in favor of a device that was calculated to downplay the significance of the errors PG&E had discovered.

The claim by Mr. Malkin that, in retrospect, PG&E should have "conferred with the assigned ALJ to determine the appropriate procedural vehicle"[8] is a smokescreen designed to suggest PG&E was presented with a difficult procedural conundrum. It was not. A petition for modification was the one and only appropriate pleading for PG&E to submit.

IV. PG&E'S ELECTION TO DELAY 253 DAYS BEFORE NOTIFYING THE COMMISSION AND THE PARTIES OF ITS ERRORS WAS A SERIOUS CONTINUING VIOLATION OF RULE 1.1

In a decision cited by PG&E, the Commission has held that withholding information from the Commission, failing to correctly inform the Commission, and failing to correct mistaken information are potential Rule 1.1 violations.[9] By failing to promptly inform the Commission of the significant and material errors in the previous information it had supplied to the Commission regarding Line 147, PG&E violated Rule 1.1 in each of these respects. The Commission can and should infer PG&E's intent to mislead the Commission based on the following incontrovertible facts:

- In November 2011, PG&E's "Responsible Engineer", Mr. Johnson, testified under oath before the Commission that PG&E had validated its pipeline features information for Line 147 and that PG&E's validated information warranted an MAOP of 365 psig for Line 147.[10]

[8] PG&E Comments, p. 2.
[9] D.04-04-065, pp. 35-36.
[10] D.11-12-048, pp 5-8.

- On or about October 24, 2012, Mr. Johnson became aware that the pipeline features information for Line 147 that he had affirmed to the Commission as validated and accurate was in fact incorrect and that certain seam welds for that line were less robust than PG&E had told the Commission.
- Re-calculating the design pressure MAOP for the Line 147 segments in question yielded a reduced MAOP of 330 psig, as compared to the 365 psig MAOP PG&E had recommended and the Commission had adopted in D.11-12-048. Under 49 C.F.R. Section 192.619(a), MAOP may not exceed the MAOP calculated under a variety of methods, including design pressure.
- Disclosing the errors to the Commission required publicly disclosing – including to the litigants in the I.11-02-016 (Recordkeeping) enforcement proceeding that was still in the process of record development -- that PG&E's MAOP Validation efforts had failed to identify correct seam weld information for pipeline segments operating in the vicinity of the San Bruno explosion.

In sum, PG&E knew that it had provided bad information upon which the Commission had relied to its, and the public's, detriment, yet did nothing about it for 253 days. Each day that PG&E chose to withhold its embarrassing errors and the corrected information and MAOP from the public record was a serious continuing violation of Rule 1.1.

V. NON-CREDIBLE ASSERTIONS THAT ITS ATTORNEY HAD NO INTENT TO MISLEAD THE COMMISSION DO NOT ABSOLVE PG&E OF ITS RULE 1.1 VIOLATIONS

The Commission should not find probative Mr. Malkin's denial of any intent to mislead the Commission,[11] for several reasons. First, in the face of all of the incontrovertible facts recounted above, a naked denial of wrongdoing is of little value. PG&E's attorney may have convinced himself that he had no intent to mislead anyone, but such a subjective opinion by an attorney trying to exonerate his client (and perhaps himself and his law firm) is not entitled to any significant evidentiary weight. More probative would be a credible explanation of why PG&E chose not to reveal its errors promptly in a petition for modification, an explanation PG&E has not supplied for the record. Second, even under PG&E's description of the state of mind requirement, recklessness and carelessness also support a Rule 1.1 violation. It is not enough to deny an intent to mislead. Third, even though PG&E chose to call Mr. Malkin as its sole witness, the main issue here is whether *PG&E* violated Rule 1.1, either in its own right or acting through its attorneys. The claim by PG&E's attorney that he had no bad intent does not get the company off the hook, particularly when the company has chosen to assert attorney-client privilege.

In any event, contrary to Mr. Malkin's testimony, the only credible conclusion from the facts is that PG&E manifested an intent to mislead the Commission and the parties by choosing to conceal for 253 days information that was injurious to its interests and then, on day 254, downplaying the significance of its errors by submitting an "errata" rather than a petition for modification.

[11] PG&E Recommendations, p. 4.

If the Commission nevertheless agrees with PG&E that the current record is insufficient to justify a Rule 1.1 violation, the Commission should withhold final judgment until the non-PG&E parties have had an opportunity to develop a more complete record regarding PG&E's conduct based on discovery regarding PG&E's written and oral testimony and cross examination of Mssrs. Johnson and Singh, who are clearly implicated in PG&E's failure to disclose its errors on a timely basis.

VI. THE SED FAILS TO EXPLAIN WHY FINE AMOUNTS SHOULD BE GOVERNED BY PUBLIC UTILITIES CODE SECTION 2112, WHICH RELATES TO NON-UTILITY PARTIES

Like TURN, the Commission's Safety and Enforcement Division ("SED") makes a compelling case for serious Rule 1.1 violations. Yet, in the final "Remedies" section of its brief, SED inexplicably relies on Section 2112 to establish the upper limit of the fines at $1,000 per offense. Section 2112 is a provision that establishes fines for officers, agents or employees of corporations "other than a public utility." As a result, it is not applicable here, as PG&E's officers and attorneys were all acting on behalf of a regulated utility. Instead, with respect to fines against PG&E, a regulated utility, the permissible range of fines is capped at $50,000 per offense. If the Commission wishes to impose sanctions on PG&E's outside attorneys for aiding and abetting a Rule 1.1 violation by a regulated utility, the appropriate provision would be Section 2111, which also has a $50,000 per offense cap.

VII. CONCLUSION

For the reasons set forth above and in TURN's opening brief in this matter, PG&E should be fined: (1) $50,000[12] for failing to submit a petition to modify to seek to correct the errors on

[12] TURN's opening brief incorrectly stated that the fine amount should be $500,000.

which D.11-12-048 was based and (2) $12,650,000 for delaying 253 days before disclosing its errors in a pleading to the Commission. Thus, the total fine amount should be $12,700,000.

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Respectfully submitted,

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