

**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

R.11-02-019
(Filed February 24, 2011)

**RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION
OF DIVISION OF RATEPAYER ADVOCATES TO ENTER EVIDENCE
INTO THE RECORD OF THE RULE 1.1. ORDER TO SHOW CAUSE
PROCEEDINGS IN THIS DOCKET**

MARIE L. FIALA
Sidley Austin LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-2400
E-Mail: mfiala@sidley.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: October 15, 2013

**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

R.11-02-019
(Filed February 24, 2011)

**RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION
OF DIVISION OF RATEPAYER ADVOCATES TO ENTER EVIDENCE
INTO THE RECORD OF THE RULE 1.1. ORDER TO SHOW CAUSE
PROCEEDINGS IN THIS DOCKET**

Pacific Gas and Electric Company ("PG&E") submits the following response to the Division of Ratepayer Advocates' Motion to Enter Evidence into the Record of the Rule 1.1. Order to Show Cause Proceeding, filed on September 30, 2013 ("DRA Motion").

I. INTRODUCTION

PG&E opposes DRA's untimely request to introduce new evidence into the record after the evidentiary phase of this proceeding ended. Introducing new evidence into the record after the hearing would deprive the Commission of the benefit of cross-examination, argument, and briefing on these topics. Not only does DRA's proposed evidentiary submission come too late, but the evidence DRA wishes to introduce — which includes materials from a number of other proceedings — has no bearing on the issues defined by the Rule 1.1 OSC. DRA's attempt to submit new evidence after PG&E made its evidentiary showing is contrary to ALJ Bushey's direction regarding "brief recommendations," is inconsistent with the Commission's rules, and violates due process.

II. ARGUMENT

A. The Evidentiary Record in the OSC Proceeding Is Closed.

The Commission's own rules make clear that the evidentiary phase of the OSC proceeding ended on September 6. Rule 13.14 of the Commission's Rules of Practice and Procedure recognizes that the taking of evidence in a contested proceeding occurs prior to

briefing. The Rule states: “A proceeding shall stand submitted for decision “after the taking of evidence, the filing of briefs, and the presentation of oral argument as may have been prescribed.” (emphasis added). Briefing on recommended actions by the Commission is — as the Commission has previously recognized and DRA itself has admitted — post-evidentiary.¹ While Rule 13.10 allows the presiding officer to authorize the receipt of specific documentary evidence “within a fixed time after the hearing is adjourned,” that authority is expressly conditioned upon the agreement of the parties, a circumstance not found here. (emphasis added).

DRA mischaracterizes the assigned ALJ’s remarks at the close of the hearing as allowing additional time to submit evidence into the record.² ALJ Bushey said nothing of the kind. At the end of the September 6 hearing, ALJ Bushey asked PG&E’s counsel if PG&E had “presented every fact and argument that it wishes to present to the Commission on the orders addressed in the OSC ruling,”³ and PG&E’s counsel responded in the affirmative.⁴ ALJ Bushey then asked, “Do any other parties wish to submit anything further?”⁵ Despite having had ample notice of the evidentiary hearing, no party other than PG&E elected to offer any evidence at the hearing. Instead, in response to ALJ Bushey’s question, TURN asked only for the opportunity to “present our recommendations as to what the Commission should do,”⁶ and DRA stood silent. ALJ Bushey ruled, “We’ll have opening recommendations, brief recommendations focused on exactly what the Commission should do . . .”⁷

ALJ Bushey further noted that with the filing of reply briefs, “the matter will be considered submitted to the Commission and the record will be closed on this issue.”⁸ That statement is perfectly consistent with Rule 13.14 — i.e., this matter stands submitted for decision after the taking of evidence at the hearing and after the briefing has closed, as no oral argument has been prescribed. ALJ Bushey’s remarks cannot be contorted to support DRA’s belated motion to shovel massive amounts of irrelevant information into the evidentiary record.

¹ See *Re Assess and Revise the Regulation of Telecommunications Utilities*, D.06-12-044, 2006 Cal. PUC LEXIS 511, at *37 (CPUC Apr. 7, 2005) (“According to TURN and DRA, briefs are post-evidentiary filings . . .”) (emphasis added); *id.* & n. 24 (Commission agrees that briefs are post-evidentiary filings, referencing TURN’s and DRA’s submissions).

² DRA Motion at 2.

³ R.T. 2414.

⁴ R.T. 2414.

⁵ R.T. 2414 (emphasis added).

⁶ R.T. 2414.

⁷ R.T. 2415 (emphasis added).

⁸ R.T. 2415.

B. The Evidence DRA Seeks to Introduce Goes Far Beyond the Scope of the Rule 1.1 OSC and Is Therefore Irrelevant.

The Rule 1.1 OSC defined the scope of this proceeding specifically and narrowly. The only issues raised as potential Rule 1.1 violations in connection with PG&E's submission of Exhibit OSC-1 were: (1) whether PG&E attempted to mislead the Commission by using the word "Errata" in the title of its pleading, thereby creating "an inaccurate impression of a routine correction" to a previously-submitted pressure restoration filing; and (2) whether PG&E attempted to mislead the Commission by "[t]he timing of the filing, the day before a summer holiday weekend." DRA agreed with that description of the limited scope of the issues to be decided.⁹

Rather than submit "brief recommendations," as permitted by ALJ Bushey, DRA seeks to submit evidence that would dramatically expand the scope of the proceeding by addressing a host of purported violations not identified in the Rule 1.1 OSC. DRA asks the Commission to admit, among other things, materials submitted in connection with PG&E's 2011 PSEP Application, the entire transcript from the substantive OSC regarding MAOP issues, and record excerpts from the Fines and Remedies portion of the San Bruno Investigations.¹⁰ None of this information is relevant to the issues identified in the Rule 1.1 OSC, and accordingly PG&E did not present evidence or argument on any of these topics.

DRA's only justifications for the relevance of these materials is that they "provide context for the totality of the circumstances" going to the purported Rule 1.1 violation, and that the documents "have all been relied upon" in DRA's briefing.¹¹ While the entire Commission record accumulated since the San Bruno proceedings began may in some sense provide "context," that attenuated connection is hardly sufficient to demonstrate its relevance to the specific issues being considered here. And DRA's second argument is nothing more than an exercise in bootstrapping irrelevant evidence into the record by pointing out that it supposedly supports equally irrelevant arguments in its brief.

⁹ Opening Brief of the Division of Ratepayer Advocates at 5.

¹⁰ DRA Motion at 3.

¹¹ DRA Motion at 4.

C. Allowing New Evidence to Be Admitted at This Stage of the Proceedings Would Impair the Integrity of These Proceedings and Violate PG&E's Due Process Rights.

The Commission's Rules and previous decisions make clear in a variety of contexts that a party seeking to supplement the record with new evidence after the appropriate time has passed must show good cause why the additional evidence could not have been presented earlier.¹² As the Commission has noted in the rehearing context, "Parties have an obligation to introduce their evidence at an appropriate point in the proceedings. If [the submitting party] wanted the Commission to consider the evidence contained in the [supplemental submission], it should have introduced this testimony when the Commission was receiving evidence"¹³

DRA has not explained why it did offer evidence at the hearing. The timing of DRA's Motion means that PG&E would not have adequate time — indeed, any time — to present other evidence that would be responsive to DRA's materials and assertions. Such an outcome would deprive PG&E, and the record itself, of the procedural process of testimony and cross-examination that are integral to the development of an evidentiary record.

As PG&E explained in its Reply Comments in this matter, the Commission's consideration of the issues that DRA seeks to interject into the Rule 1.1 OSC by its briefing and this attempted introduction of new evidence would violate PG&E's right to due process under the California Constitution.¹⁴ California courts have disapproved the late assertion of new charges in administrative enforcement proceedings as violating "the basic . . . elements" of due process.¹⁵ The same would be true if the Commission were now to entertain the new evidence, going to new issues, tendered by DRA.

¹² Cf. Rule 13.8 (supplemental direct testimony in addition to prepared testimony will not be accepted unless sponsoring party "shows good cause why the additional testimony could not have been served with the prepared testimony or should otherwise be admitted"); Rule 13.14 (b) (motion to reopen record for taking of new evidence shall "explain why such evidence was not previously adduced").

¹³ *In the Matter of the Application of Pacific Bell, a Corporation, for Authority to Increase Certain Intrastate Rates and Charges Applicable to Telephone Services Furnished Within the State of California; and Related Matters*, D.86-11-028, 1987 Cal. PUC LEXIS 714, at *2 (CPUC Apr. 22, 1987) (granting motion to strike declaration appended to application for rehearing).

¹⁴ See Reply Comments of Pacific Gas and Electric Company in Response to Ruling of Chief Administrative Law Judge and Assigned Administrative Law Judge Directing Pacific Gas and Electric Company to Show Cause Why It Should Not Be Sanctioned by the Commission for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure at 4-5 & n.16.

¹⁵ *Smith v. State Bd. of Pharmacy* 37 Cal. App. 4th 229, 242 (1995); see also *In re Ruffalo*, 390 U.S. at 551-52 & n.4; *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678 at 695-96 (1975).

III. CONCLUSION

For the foregoing reasons, PG&E respectfully requests that the Commission deny the Division of Ratepayer Advocates' Motion to Enter Evidence into the Record of the Rule 1.1. Order to Show Cause Proceeding in this Docket and Motion to Shorten Time for Responses.

Respectfully submitted,

/s/ Marie L. Fiala

MARIE L. FIALA

Sidley Austin LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-2400
E-Mail: mfiala@sidley.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: October 15, 2013