

**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  
(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)  
  
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**PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE TO  
JOINT MOTION OF DRA AND TURN TO STRIKE PORTIONS OF  
PG&E'S RESPONSES TO QUESTIONS IN SECTION 4 OF  
ADMINISTRATIVE LAW JUDGES' JULY 30, 2013 RULING  
REQUESTING ADDITIONAL COMMENT**

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Dated: October 7, 2013

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REQUESTING ADDITIONAL COMMENT<sup>1</sup>**

TURN and DRA are not content to keep PG&E from introducing new factual information that should inform the Commission's penalty decision.<sup>2</sup> Now, they go a step

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<sup>1</sup> Pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), PG&E expressly reserves its federal constitutional and any other federal claims and reserves its right to litigate such claims in federal court following any decision by the Commission, if necessary.

<sup>2</sup> For example, TURN and DRA have opposed PG&E's effort to introduce into evidence recent rating agency reports even though they are directly relevant to the Commission's penalty

further and seek to censor the arguments PG&E presents in its briefs. Without citing any authority to support their extraordinary request, TURN and DRA ask the ALJs to strike approximately *two-thirds* of PG&E's entire brief.<sup>3</sup> TURN and DRA want to control what PG&E says and how it says it.

The crux of TURN and DRA's motion is that they do not want PG&E to have an opportunity to say anything about how the Commission should set fines and penalties in these OIIs. Soon after the ALJs' Ruling Re requesting Additional Comment,<sup>4</sup> TURN made clear its opposition to the ALJs' questions by filing a motion seeking to limit the scope of the parties' responses to them.<sup>5</sup> The ALJs, however, disregarded TURN's recommendations (except with regard to the introduction of new evidence), and clarified that they "seek further *briefing* with comments based on the existing record of these proceedings."<sup>6</sup> That is exactly what PG&E has provided. PG&E's Section 4 Responses do not cite any new evidence but rather contain briefing and comments in response to the ALJs' questions. TURN and DRA may not agree with PG&E's responses, but that is not a basis for striking them, particularly as they do not rely on information outside the record. The ALJs should deny TURN and DRA's motion in its entirety.

## **I. PG&E'S SECTION 4 RESPONSES DO NOT INCLUDE NEW FACTS**

TURN and DRA accuse PG&E of trying "to introduce the very same *new* evidence that [PG&E] has repeatedly been ordered to remove from other pleadings."<sup>7</sup>

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determination and were not available at the time of the March 4 and 5 hearings on financial issues. *See* TURN Opposition to PG&E Motion to Reopen the Record at 3 n.3 ("[T]he notion that PG&E should have an opportunity to introduce ratings agency reports that analyze CPSD's revised proposal . . . does violence to the adopted process and schedule . . ."); DRA Response to PG&E Motion to Reopen the Record at 10-11.

<sup>3</sup> Attachment A shows PG&E's Responses to the Questions in Section 4 of Administrative Law Judges' July 30, 2013 Ruling Requesting Additional Comment (PG&E Section 4 Responses) with the portions TURN and DRA seek to strike highlighted.

<sup>4</sup> ALJs' July 30, 2013 Ruling Requesting Additional Comment (Ruling Requesting Additional Comment).

<sup>5</sup> *See* TURN Motion for Clarification or Ruling and Modification of Procedural Schedule, August 12, 2013 (TURN Motion for Clarification).

<sup>6</sup> ALJs' August 13, 2013 Ruling (emphasis in original).

<sup>7</sup> Motion to Strike at 4 (emphasis in original); *see also id.* at 5.

The only purportedly “new evidence” that TURN and DRA identify is the shareholder spending information PG&E discusses in its response to Question 3.<sup>8</sup> In their zeal to try to keep the Commission from considering any information about the costs that PG&E’s shareholders are incurring to improve the gas transmission system,<sup>9</sup> TURN and DRA overlook the important fact that *the evidence they seek to strike is in the record*. The section of PG&E’s response to Question 3 entitled “The Current Penalty Proposals Would Mean a Total Effective Penalty of At Least \$4 Billion” is based on several exhibits in the record, all of which are extensively cited in PG&E’s response.<sup>10</sup>

The fact that TURN and DRA do not want the Commission to consider the costs PG&E is already incurring to improve gas transmission safety is not a basis for striking that information. The information is directly related to the question posed by the ALJs: “[S]hould there be an adjustment to reflect the amount of equity that PG&E would have issued to fund capital expenditures regardless of any disallowance?”<sup>11</sup> TURN and DRA are free to explain in their reply comments why they do not think PG&E’s ongoing shareholder investments in the gas transmission system should affect the Commission’s penalty decision. Indeed, TURN and DRA have already addressed the very same shareholder spending data that they now seek to strike, which PG&E cited and discussed in its response to CPSD’s Amended Reply Brief on Fines and Remedies.<sup>12</sup> In short, there

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<sup>8</sup> Motion to Strike at 5 (citing PG&E Section 4 Responses at 13-14).

<sup>9</sup> See, e.g., TURN Motion for Clarification at 6 (“TURN is concerned that these questions could be construed by PG&E to allow for additional evidence concerning recorded spending and equity issuances.”).

<sup>10</sup> See PG&E Section 4 Responses at 13 -14 & notes 27 -31 (citing San Bruno Ex. PG&E -1A, Chapter 13, Appendix C (PG&E/Yura), Ex. Joint -57, Ex. Joint -58 and Ex. Joint -65). The information the ALJs struck from PG&E’s Coordinated Remedies Brief, on the other hand, was based on more recent shareholder spending information provided in response to a request from the Director of the Safety and Enforcement Division served on all parties but not in the record. See ALJs’ June 3, 2013 Ruling (granting CPSD’s motion to strike “references to *extra-record* evidence of gas transmission -related safety amounts paid by PG&E shareholders”) (emphasis added).

<sup>11</sup> Ruling Requesting Additional Comment at 6.

<sup>12</sup> See PG&E Response to CPSD Amended Reply on Fines and Remedies at 8 & notes 47, 49 -50 (setting forth the amount of shareholder spending and citing San Bruno Ex. PG&E -1A, Chapter 13, Appendix C (PG&E/ Yura), Ex. Joint -57, Ex. Joint -58 and Ex. Joint -65); see also TURN Reply to PG&E Response to CPSD Amended Brief on Fines and Remedies at 7 -8 (discussing

is no basis to strike any portion of PG&E’s Section 4 Responses due to alleged “new evidence.”<sup>13</sup>

**II. THE ALJS SHOULD NOT STRIKE ANY OF THE PORTIONS OF PG&E’S SECTION 4 RESPONSES IDENTIFIED BY TURN AND DRA**

TURN and DRA ask the ALJs to strike all of the portions of PG&E’s Section 4 Responses that purportedly contain “new arguments” or other commentary that TURN and DRA deem “non-responsive.”<sup>14</sup> But they cite no authority for the proposition that a party’s brief must be limited to arguments it made previously<sup>15</sup> or for striking sections of briefs that another party believes do not respond to the issue being briefed. They do not even bother to show how the specific portions of PG&E’s Section 4 Responses they would have stricken are “non-responsive” or include “new arguments.” The bottom line is that TURN and DRA are asking the ALJs to rewrite PG&E’s Section 4 Responses by striking everything they do not like.

TURN has been unhappy with the ALJs’ Ruling Requesting Additional Comment from the very beginning because, in TURN’s words, it provides an “opportunity for new argument and/or new evidence.”<sup>16</sup> TURN filed its Motion for Clarification to try to limit what PG&E could say. In ruling on TURN’s motion, the ALJs clarified that PG&E and the other parties could not introduce new evidence in responding to their questions,<sup>17</sup> but the ALJs failed to endorse any of TURN’s other requests for “clarification” or “simplification.”<sup>18</sup>

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evidence of shareholder spending); DRA Second Rebuttal on Fines and Remedies at 6 & n.25 (same).

<sup>13</sup> Much less for TURN and DRA’s gratuitous reference to an alleged Rule 1.1 violation. See Motion to Strike at 5.

<sup>14</sup> Motion to Strike at 6.

<sup>15</sup> TURN and DRA also complain – inconsistently – that PG&E included arguments that it “made, or could have made, in previous briefs.” See Motion to Strike at 1.

<sup>16</sup> TURN Motion for Clarification at 5; *see generally id.* at 1-10.

<sup>17</sup> ALJs’ August 13, 2013 Ruling.

<sup>18</sup> See TURN Motion for Clarification at 6 (arguing “the ALJs should clarify that these questions pertain **only to a methodology**”) (emphasis in original), 9 -10 (recommending modifications to the tax-related questions to “simplif[y]” them).

In fact, TURN and DRA’s motion is contrary to the questions themselves and the subsequent rulings regarding the scope of the questions. The ALJs’ questions expressly seek “further briefing on the impact that fines and disallowances would have on PG&E’s ability to raise capital and otherwise remain financially viable, including the tax treatment of amounts disallowed.”<sup>19</sup> And, while some of the specific questions are relatively technical,<sup>20</sup> others address broad topics<sup>21</sup> or invite the parties to comment on issues relevant to assessing fines or penalties.<sup>22</sup> The ALJs’ subsequent rulings confirm that they are seeking “*briefing with comments*”<sup>23</sup> and that PG&E and other parties may include argument in responding to the questions.<sup>24</sup> Indeed, that is what briefing is.

The following paragraphs provide further information about why the ALJs should reject each request by TURN and DRA to strike particular portions of PG&E’s Section 4 Responses.

**Introduction**: TURN and DRA move to strike PG&E’s entire introduction,<sup>25</sup> presumably because they deem it “non-responsive” or believe it contains “new arguments.”<sup>26</sup> PG&E’s Section 4 Responses are “briefing.”<sup>27</sup> Briefs typically include an introduction that sets the stage for the more specific information and arguments that follow. That is what PG&E’s introduction to its Section 4 Responses does. It focuses, in

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<sup>19</sup> Ruling Requesting Additional Comment at 4.

<sup>20</sup> See, e.g., Ruling Requesting Additional Comment at 5, Question 1.b (asking about the relevance of the tax normalization rules to potential penalties).

<sup>21</sup> See, e.g., Ruling Requesting Additional Comment at 6, Question 3 (asking whether the Commission should adjust penalties to reflect PG&E’s need for equity in addition to what it would need to finance fines and penalties).

<sup>22</sup> Question 8 allows the other parties to provide “any comments [they] may have on PG&E’s response to Question 5 in Section 3 above.” Ruling Requesting Additional Comment at 7. Question 9 allows PG&E and the other parties to provide “any other comments [they] may have about how the impact of any fines and any disallowances imposed on PG&E should be compared to each other and how they differently affect PG&E’s need for additional capital.” *Id.*

<sup>23</sup> See ALJs’ August 13, 2013 Ruling (emphasis in original).

<sup>24</sup> See ALJs’ Ruling on Joint Motion of DRA and TURN to Strike Portions of PG&E’s August 21, 2013 Response at 4 (noting that PG&E was free to explain the potential impact of the proposed penalties on rates and the reasons for that impact).

<sup>25</sup> Motion to Strike at 6; see also Attachment A at 1-6.

<sup>26</sup> See Motion to Strike at 6.

<sup>27</sup> See Ruling Requesting Additional Comment at 4; ALJs’ August 13, 2013 Ruling.

particular, on the implications of penalizing PG&E up to the maximum amount that would not have dire consequences for PG&E – an issue that underlies all of the ALJs’ questions.<sup>28</sup> Although TURN and DRA’s motion never mentions it, the City of San Bruno addresses the same issue (albeit from a different perspective) in its free-form comments that do not even purport to respond to the ALJs’ individual questions.<sup>29</sup>

**Question 1** : TURN and DRA seek to strike most of PG&E’s response to Question 1.a,<sup>30</sup> which asks, in relevant part, “[w]hat, *if any*, methodology should be used to adjust the amount of any disallowed expenditures to account for tax benefits.”<sup>31</sup> PG&E’s answer starts by stating that PG&E is opposed to any adjustment for purported “tax benefits.” TURN and DRA would strike even that direct response to the ALJs’ question. They also seek to strike most of PG&E’s explanation of *why* it opposes such an adjustment. The ALJs have never indicated that the parties may not explain the basis for their responses. Ironically, TURN itself previously complained that the ALJs’ questions “explicitly seek[] additional argument, and perhaps evidence, concerning issues related to income tax accounting.”<sup>32</sup> In fact, a yes/no or similar response with no explanation is not likely to be helpful to the Commission. PG&E should be allowed to answer the ALJs’ question as it sees fit – including providing an explanation for its answer.<sup>33</sup>

**Question 2** : TURN and DRA seek to strike most of PG&E’s response to Question 2.<sup>34</sup> They offer no explanation other than that the response purportedly contains

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<sup>28</sup> To underscore the arbitrariness of TURN and DRA’s motion, they seek to strike PG&E’s discussion of the broader implications of imposing excessive fines and penalties in the introduction (*see* PG&E Section 4 Responses at 4-5), but not a very similar discussion in PG&E’s response to Question 9 (*see id.* at 26-28).

<sup>29</sup> *See* San Bruno Comments in Response to Questions in Section 4 of ALJs’ July 30, 2013 Ruling Requesting Additional Comment (San Bruno Comments) at 2-4 (discussing PG&E’s ability to absorb the proposed fines and penalties); *see also id.* at 2 (“Rather than address the ALJs’ Questions question by question, San Bruno is respectfully addressing them generally.”).

<sup>30</sup> Motion to Strike at 6; *see also* Attachment A at 7-8.

<sup>31</sup> Ruling Requesting Additional Comment at 5 (emphasis added).

<sup>32</sup> TURN Motion for Clarification at 7.

<sup>33</sup> TURN does not even practice what it preaches. It explains the basis for its answer to Question 3 and does not simply answer the question “no” as it could have done. *See* TURN Response to Questions in Section 4 of the ALJ Ruling (TURN Section 4 Responses) at 7-8.

<sup>34</sup> Motion to Strike at 6; *see also* Attachment A at 10-11.

“repetition of speculation that parties’ proposals would adversely affect PG&E’s ability to raise capital.”<sup>35</sup> PG&E’s explanation for why the Commission should not adjust penalties based on the timing of costs to PG&E responds directly to the ALJs’ question. Once again, TURN and DRA want to censor PG&E’s explanation of its response to the question.

**Question 3**: PG&E’s response to Question 3.a explains why the Commission should adjust any fines and penalties to reflect PG&E’s need for equity for the costs that its shareholders are already bearing and other planned capital expenditures.<sup>36</sup> This discussion is directly responsive to the ALJs’ question. Nonetheless, TURN and DRA move to strike most of PG&E’s response<sup>37</sup> on the grounds that it (1) relies on new evidence<sup>38</sup> and (2) includes “new arguments [] focused on undermining the Overland Report.”<sup>39</sup> Neither claim provides a basis for striking any of PG&E’s brief. First, as discussed above, PG&E’s Section 4 Responses do not seek to introduce new evidence. Second, the fact that a brief contains a “new argument” is not a basis for striking it, particularly as PG&E’s discussion is directly responsive to the ALJs’ question. Moreover, the purpose of PG&E’s response is not to reargue why the Commission should not rely on Overland’s analysis, but rather to explain why, *if the Commission does apply Overland’s approach as CPSD and Intervenors advocate*, it is essential to adjust for the costs that PG&E’s shareholders are already incurring to improve the gas transmission system and also to take into account the additional capital PG&E will need to fund

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<sup>35</sup> Motion to Strike at 2 & n.5 (citing PG&E Section 4 Responses at 10 -11). TURN does not hesitate to repeat arguments when it serves its purpose. For example, in its response to Question 8, TURN rehashes a number of arguments it has made in the past, including its specious assertion that PG&E is trying to “blackmail[]” the Commission with “threats regarding investors’ ‘perception of the regulatory environment in California.’” *See* TURN Section 4 Responses at 12 (citation omitted); *see also* TURN Opening Remedies Brief at 39 (“The Commission should not be blackmailed by this self-serving threat from Wall Street investor analysts.”).

<sup>36</sup> PG&E Section 4 Responses at 12-20.

<sup>37</sup> Motion to Strike at 6; *see also* Attachment A at 12-20.

<sup>38</sup> Motion to Strike at 5 (discussing PG&E Section 4 Responses at 13-14).

<sup>39</sup> Motion to Strike at 4 & n.19 (citing PG&E Section 4 Responses at 12-19).



planned infrastructure improvements. TURN and DRA may not like PG&E's answer, but that is not a basis for striking it.<sup>40</sup>

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CPSD and Intervenors are asking the Commission to impose billions of dollars of fines and penalties on PG&E. PG&E should be permitted to respond to the ALJs' questions with whatever arguments it deems relevant and responsive without being censored by TURN and DRA. The ALJs should deny TURN and DRA's motion in its entirety.

Respectfully submitted,

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<sup>40</sup> TURN and DRA apparently also do not like footnote 61 on page 21 of PG&E's Section 4 Responses. See Motion to Strike at 6. They offer no basis for striking that footnote, which is part of PG&E's discussion of the methodology the Commission could use to adjust for PG&E's shareholder costs and is responsive to the ALJs' Question 3.b.