

**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 THE
DIVISION OF RATEPAYER ADVOCATES' SECOND MOTION TO
ENTER EVIDENCE INTO THE RECORD OF THE RULE 1.1. ORDER TO
SHOW CAUSE PROCEEDINGS IN THIS DOCKET**

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Dated: October 16, 2013

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Pacific Gas and Electric Company ("PG&E") submits the following response to the Division of Ratepayer Advocates' Second Motion to Enter Evidence into the Record of the Rule 1.1. Order to Show Cause Proceeding, filed on October 1, 2013 ("DRA 2nd Motion").

I. INTRODUCTION

PG&E opposes DRA's second 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 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 introduce 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 2nd 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 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 expand the scope of the proceeding by addressing operational issues and purported violations not identified in the Rule 1.1 OSC. DRA asks the Commission to admit a data response prepared in connection with the substantive OSC regarding MAOP issues, explaining why PG&E performed a routine leak survey on Line 147 in October 2012.¹⁰ DRA does not attempt to justify the relevance of this material to the issues identified in the Rule 1 OSC, and none exists. This information is not relevant to captioning of Exhibit OSC-1, or to the timing of the filing on "the day before a summer holiday weekend."¹¹

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.

DRA has not explained why it did offer any evidence at the hearing. DRA could have sought to introduce the information contained in the data response by questioning a PG&E witness, allowing PG&E to object on relevance grounds and — if the question were allowed — giving PG&E the opportunity to elicit further evidence that would be responsive to DRA's assertions. The timing of DRA's 2nd Motion deprives 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.

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

¹⁰ DRA 2nd Motion at 2-3 and Attachment A.

¹¹ Rule 1.1 OSC.

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 the Commission’s own procedures and PG&E’s right to due process under the California Constitution.¹² 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.¹³ 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”¹⁴ California courts also 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.

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¹² 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.

¹³ 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”).

¹⁴ *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).

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' Second Motion to Enter Evidence into the Record of the Rule 1.1. Order to Show Cause Proceeding.

Respectfully submitted,

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