BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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| 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 COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON PROPOSED DECISION IMPOSING SANCTIONS ON PACIFIC GAS AND ELECTRIC COMPANY FOR VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

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## I. OVERVIEW

Pursuant to Rule 14.3(d) of the Commission's Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) files these Reply Comments on the Proposed Decision (PD) of Administrative Law Judge (ALJ) Bushey. The PD imposes sanctions on Pacific Gas and Electric Company (PG&E) for violation of Rule 1.1 of the Commission's Rules of Practice and Procedure (Rule 1.1).

These comments identify factual and legal errors in PG&E's comments on the PD, as required by Rule 14.3(d). In sum, PG&E makes two due process arguments in its comments on the PD: (1) that fining PG&E for failure to timely notify the Commission of a material finding was not within the scope of the Rule 1.1 Order to Show Cause issued on August 19, 2013,[1] and therefore violates PG&E's due process rights; and (2) that the Commission has improperly placed the burden of proof on PG&E in the Rule 1.1. OSC, which also violates PG&E's due process rights.[2]

PG&E is correct when it argues that the PD contains multiple errors of law and fact. Those errors are identified in ORA's comments on the PD, filed November 19. However, the due process errors PG&E identifies in its comments on the PD have no merit.

## II. PG&E'S DUE PROCESS ARGUMENTS HAVE NO MERIT

### A. Scope of Proceeding

PG&E claims that the PD finds "violations based on issues not noticed in the Rule 1 OSC" and that sanctioning it for failure to provide timely notice of the Line 147 errors to the Commission is a "new charge."[3]

PG&E admits that the Rule 1.1 OSC put it on notice that it could be sanctioned for Rule 1.1. violations arising out of two issues: "(1) whether PG&E attempted to mislead the Commission by using the word "Errata" in the title of its July 3, 2013 pleading (Ex. OSC-1), thereby creating 'an inaccurate impression of a routine correction' to a previously-submitted

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[1] The Rule 1.1 OSC is entitled "Ruling Of Chief Administrative Law Jude 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."

[2] PG&E PD Comments, p. 2 ("the PD violates due process by impermissibly shifting the burden of proof to PG&E and by finding violations based on issues not notice in the Rule 1 OSC.").

[3] PG&E Comments on the PD, pp. 2 and 4.

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.'"[4]

However, PG&E now argues that this OSC language, which it relied upon in hearing, did not put it on notice that it could be sanctioned for waiting nearly nine months to notify the Commission of the Line 147 data error and that this sanction for its delay is a "new charge." PG&E's argument is absurd. The language of the OSC notified PG&E that it could be sanctioned for irregularities related to both the date of the attempted filing (July 3 – before a four day holiday weekend), and the form of the attempted filing (fashioned as an *errata*). And that is exactly what the PD has done by concluding that PG&E should have filed something *sooner* to notify the Commission and the parties of the data error, and that the filing should have been entitled something other than "errata."

PG&E's claim that it "relied" upon the language in the OSC in its belief that it would not be sanctioned for failure to timely notify the Commission of the Line 147 data errors is similarly absurd. PG&E was repeatedly offered the opportunity during the September 6, 2013, hearing on the Rule 1.1 OSC to explain the reasons for its delay in providing material information to the Commission.[5] PG&E would only state that it withheld this material information from the Commission until it determined that its internal "investigation" was complete, just days before PG&E attempted to file the *errata* on July 3, 2013.[6]

To the extent that the Commission believes that the Rule 1.1 OSC did not provide PG&E's adequate notice, such a failure constitutes harmless error because the result would have been the same if the Commission had formally rescoped the Rule 1.1 OSC to expressly notify PG&E that it could be sanctioned for failure to timely notify the Commission of material facts. The only facts in issue are uncontested – PG&E attempted to notify the Commission of the Line 147 error through an errata filing nearly nine months after it discovered the error. The proposed sanctions are based on these facts, and PG&E had an opportunity to be heard on all of the matters it is now being sanctioned for.

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[4] PG&E Comments on the PD, p. 3 *quoting from* the OSC.

[5] *See, e.g.,* 16A RT 2360-2364 (PG&E/Malkin).

[6] 16A RT 2351-2352 (PG&E/Malkin).

Case law holds that procedural due process violations are subject to harmless error,[7] and failure to notify a party of the charges against it must be misleading in order for it to be considered prejudicial and thus a due process violation (i.e., the notice of the charges must seem to be something different than the final penalty).[8] Here, the notice was not misleading, and PG&E was not prejudiced. It should have been obvious to PG&E that the Commission would assess penalties based on its delay because the Rule 1.1 OSC concerned PG&E's "timing of the filing" and the hearings also focused on this issue.

**B. The Commission Satisfied Its Burden of Proof**

PG&E asserts that the Commission has the burden of proof in this proceeding, and that it impermissibly shifted that burden to PG&E. This argument has no merit because, regardless of who bore the burden of proof and when, the Commission's finding of Rule 1.1 violations rests on undisputed facts, which it has determined constitute Rule 1.1 violations as a matter of law.

The Rule 1.1 OSC was issued on August 19, 2013, based on the following undisputed facts – that PG&E attempted to file an *errata* to change a significant substantive error that Decision 11-12-048 relied upon, and that PG&E attempted to make that filing on July 3, 2013 – before a four day holiday weekend. These undisputed facts led the Commission to reasonably conclude that it was possible that Rule 1.1 had been violated, and it issued the Rule 1.1 OSC on August 19, 2013. Then, on August 30, 2013, the Commission learned for the first time that PG&E had discovered the Line 147 data error discussed in the *errata* nearly nine months before PG&E attempted to file the *errata.*[9] The evidence of a Rule 1.1 violation was overwhelming at that point - based on the undisputed fact that PG&E withheld material information from the Commission for nearly nine months. Sanctions could have been ordered, but for the need to

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[7] Hinrichs v. County of Orange, 125 Cal. App. 4th 921, 928 (2004). *See also,* Leal v. Gourley, 100 Cal. App. 4th 963, 968-69 (2001).

[8] Hinrichs v. County of Orange, 125 Cal. App. 4th 921, 928 (2004).

[9] A companion OSC issued the same day as the Rule 1.1 OSC ordered PG&E to file and serve a Verified Statement "setting forth the exact events, with dates, which revealed PG&E's errors, and PG&E's subsequent actions." Ruling Of Assigned Commissioner And Assigned Administrative Law Judge Directing Pacific Gas And Electric Company To Appear And Show Cause Why All Commission Decisions Authorizing Increased Operating Pressure Should Not Be Stayed Pending Demonstration That Records Are Reliable (MAOP OSC), p. 8. PG&E's August 30, 2013, Verified Statement revealed, for the first time, that PG&E learned on or about October 18, 2012, of the Line 147 data errors. Verified Statement, p. 7, ¶¶ 27-29.

provide PG&E the due process to address these facts and show why the facts did not constitute a Rule 1.1 violation, which PG&E could not do.

Assuming that the Commission has the burden of proof in this case, it has met that burden. It did not improperly shift that burden to PG&E, as PG&E suggests. Rather, finding several undisputed facts in support of a finding of Rule 1.1 violations, the Commission gave PG&E the opportunity to be heard and rebut those facts, but PG&E's response only further supported the Rule 1.1 violations. The Commission determined, as a matter of law, that those facts added up to a Rule 1.1 violation. As set forth in ORA's Reply Brief, the Commission was not required to determine PG&E's intent;[10] it may look solely at the facts, as it did here. None of this constitutes legal error.

### C. The PD and Alternate PD Properly Find That PG&E Had An Obligation To Notify the Commission And The Parties Regarding The Line 147 Data Errors

PG&E claims that the PD improperly expands Rule 1.1 by requiring that it notify the Commission and parties of the Line 147 data errors.[11] There are at least two problems with this argument. First, as the Alternate PD recognizes, it is not clear from the record what kind of notice PG&E provided to SED staff in March 2013. The Alternate PD considered the record on this issue and concluded: "PG&E has not established that the March 20, 2013 conference call provided adequate notice to the Commission or our staff regarding the errors in Line 147 specifications and the need to modify D.11-12-048."[12] It is evident PG&E discussed some data problems with SED staff, but those problems appear focused on PG&E's interpretation of 49 CFR 192.611. There is no material evidence that any of PG&E's discussions with SED staff included disclosure of the Line 147 data errors.

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[10] ORA Reply Brief, pp. 5-7.

[11] PG&E PD Comments, p. 5.

[12] Alternate PD, p. 9, footnote 8: "PG&E's Lead Counsel testified, with reference to the Verified Statement, that PG&E had a conference call with a member of Safety and Enforcement Division staff on March 20, 2013 (Transcript at 2356). During that call, application of a one-class-out analysis to Lines 147 and 101, and corrected pipe specifications for Line 147 were discussed, among other topics. However, perusal of the two-page handout for that call (attached to the Verified Statement) contains only one cryptic phrase that might refer to record discrepancies for Line 147: '2 sections of newly discovered pipe specifications less than expected.' PG&E has not established that the March 20, 2013 conference call provided adequate notice to the Commission or our staff regarding the errors in Line 147 specifications and the need to modify D.11-12-048." *See also,* Alternate PD, p. 19, Conclusions of Law 10 and 11.

Second, as both the PD and Alternate PD recognize, discovery of PG&E's Line 147 data errors triggered the need to modify a Commission decision.[13] Decision 11-12-048 relied upon sworn statements by PG&E regarding the attributes of Line 147 to set the MAOP,[14] and those statements were wrong, and led to adoption of an inappropriate MAOP for Line 147. Whether intended or not, PG&E misled the Commission regarding the status of Line 147's MOAP, from the time it discovered the error until it took action to formally notify the Commission of the need to modify the MAOP of Line 147. PG&E had an obligation to take action to bring those errors to the Commission's attention through some means other than the questionable notice it claims was provided to staff in March 2013.

## III. CONCLUSION

For the reasons set forth herein, PG&E's legal arguments have no merit and both the Proposed Decision and Alternate Proposed Decision properly conclude that PG&E has violated Rule 1.1.

Respectfully submitted,

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[13] PD, pp. 8-9; Alternate PD, pp. 12-14.

[14] Decision 11-12-048 warned that "PG&E must be fully accountable for the pressure test and the assertion that the line can be safely operated at the increased maximum operating pressure." D.11-12-048, p. 6. PG&E made its original assertion of safe operations based on its presentation of "adequate supporting documents including pipeline features lists and pressure test results supporting its assertion that [Line 147] … can be safely operated with a maximum operating pressure of 365 psig." D.11-12-048, pp. 7-8. Since PG&E knew as early as October 17, 2012 that the pipeline features were inaccurate, yet failed to inform the Commission for nine months of the discovery, PG&E misled the Commission for that entire nine months that the authorization was based on reliable information.