

**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)

**OPENING COMMENTS OF
SOUTHERN CALIFORNIA GAS COMPANY (U 904 G)
AND SAN DIEGO GAS & ELECTRIC COMPANY (U 902 M)
ON FINAL DECISION IMPOSING SANCTIONS FOR VIOLATION OF
RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE**

SHARON L. TOMKINS
DEANA MICHELLE NG
JASON W. EGAN

Attorneys for
SOUTHERN CALIFORNIA GAS COMPANY
SAN DIEGO GAS & ELECTRIC COMPANY
555 West Fifth Street, Suite 1400
Los Angeles, California 90013
Telephone: (213) 244-2969
Facsimile: (213) 629-9620
E-mail: JEgan@semprautilities.com

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	DISCUSSION.....	2
	A. The Penalty Calculation in the Proposed Decision Would Discourage Open Communication between Utilities and Commission Staff.	2
	B. Rule 1.1 Violations Require a Finding of Purposeful Intent, Recklessness, or Gross Negligence in Regard to Communications with the Commission.	4
III.	CONCLUSION	6

TABLE OF AUTHORITIES

CALIFORNIA STATUTES

Cal. Pub. Util. Code §1705.....5

CALIFORNIA AGENCY DECISIONS

D.94-11-018, 1994 Cal. PUC LEXIS 1090 (1994).....4

D.01-08-019, 2001 Cal. PUC LEXIS 653 (2001).....5

D.02-08-063, 2002 Cal. PUC LEXIS 533 (2002).....4

D.04-04-065, 2004 Cal. PUC LEXIS 207 (2004).....4, 6

D.06-09-025, 2006 Cal. PUC LEXIS 328 (2006).....4

D.11-06-017, 2011 Cal. PUC LEXIS 324 (2011).....3

RULES

Rule 1.1 of the Commission’s Rules of Practice and Procedure.....1, *passim*

Rule 14.3 of the Commission’s Rules of Practice and Procedure.....1, Appendix A

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Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E) submit the following comments on the October 30, 2013, proposed *Final Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure*, pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure (Rules).

**I.
INTRODUCTION**

As concerned pipeline operators committed to assisting the Commission in its efforts to enhance the safety of California's natural gas pipeline infrastructure, and consistent with our focus on continuous improvement, SoCalGas and SDG&E followed the Commission's prosecution of this matter to identify areas where our own operations might be improved as a result of Commission guidance in this matter. Based on our review, SoCalGas and SDG&E have concerns that the Proposed Decision, as written, could have the unintended consequence of hampering open communication between Commission staff and the utilities that they regulate.

By calculating penalties from the day that a utility informed Commission staff of an error in its pipeline system to the day that the utility submitted a formal filing with the Commission, the Proposed Decision will discourage utilities from communicating openly and candidly about conditions discovered on their systems prior to making formal filings with the Commission. Such a message is inconsistent with the Commission's public safety objectives and, as such, would result in poor public policy, and should not be adopted by the Commission.

Additionally, the Proposed Decision contains insufficient findings relative to its issuance of a Rule 1.1 violation. While SoCalGas and SDG&E take no position on whether penalties are warranted here, a Rule 1.1 violation requires a determination that the Commission was either intentionally misled or misled through reckless or grossly negligent conduct. The Proposed Decision contains no such findings. As written, the Proposed Decision could be read to find an ethical violation, absent a finding of gross negligence, recklessness, or intent to mislead, based on an after-the-fact determination that errors were not timely corrected and the wrong procedural vehicle was used to notify the Commission of those errors. To avoid this possible interpretation, if the Commission determines that a violation of Rule 1.1 has occurred and that penalties are warranted, the Proposed Decision should be modified so as to include a finding that the Commission was either intentionally misled or misled through reckless or grossly negligent conduct.

II. DISCUSSION

A. The Penalty Calculation in the Proposed Decision Would Discourage Open Communication between Utilities and Commission Staff.

While SoCalGas and SDG&E take no position on the facts of this proceeding, the Commission must consider the policy implications of its decision in this Order to Show Cause Hearing. California's utilities often informally communicate with Commission staff in the Energy Division and the Safety and Enforcement Division to discuss utility operations. These communications may result in the filing of a formal document with the Commission, or they may

result in the resolution of concerns or issues absent a formal filing. Either way, encouraging open dialogue *increases* understanding and communication between the utilities and Commission Staff -- avoiding misunderstandings, developing trust, and promoting transparency. Encouraging this communication furthers the Commission's safety objectives; enabling issues to be candidly discussed and next steps to be determined with input from Commission staff who are knowledgeable about the facts and circumstances.

As noted in the Proposed Decision, the Commission has previously emphasized that in order to achieve the Commission's safety objectives, "it is absolutely essential that our regulated utilities display the highest level of candor and honesty."¹ SoCalGas and SDG&E interpret this to mean that the Commission seeks *more* candid and open communication between utilities and Commission Staff. By imposing a penalty upon a utility from the day that the utility informed the Commission's staff about an issue identified in its system, the Proposed Decision could send the opposite message: that a utility should not inform Commission staff of system conditions in advance of a formal Commission filing for fear of a Rule 1.1 violation.

To avoid sending such a message, the Commission should adopt a penalty period calculation methodology that encourages and rewards the discovery and disclosure of pipeline conditions to Commission staff. When calculating a fine, the Commission should allow sufficient time for a utility to determine that a problem exists before the utility is required to inform the Commission. Once the utility has informed the Commission or the Commission staff, and the utility has begun working to resolve the issue, penalties should cease so long as the utility continues to address the issue expeditiously. Instituting this penalty period calculation methodology incentivizes prompt disclosure of, and diligent efforts to resolve, safety issues.

By incentivizing open dialogue between the utilities and their regulators, the Commission can promote transparency and candor; furthering the Commission's public safety objectives. It would also mean that utilities and Commission staff are able to work together to investigate and

¹ Proposed Decision at 6 (*quoting* D.11-06-017).

discuss the pertinent facts, thereby developing a more accurate basis to determine the matters that warrant Commission attention, and minimizing potential misrepresentations to the Commission based on inadequate/incomplete information. As currently written, however, the Proposed Decision will have the opposite effect.

B. Rule 1.1 Violations Require a Finding of Purposeful Intent, Recklessness, or Gross Negligence in Regard to Communications with the Commission.

Although SoCalGas and SDG&E take no position on the applicability of Rule 1.1 to the facts of this proceeding, if the Commission determines that a violation of Rule 1.1 has occurred and that penalties are warranted, the Proposed Decision must be modified to include a determination that the title of the document and date on which the document was submitted to the docket office constituted intentionally misleading, reckless, or grossly negligent conduct.

Rule 1.1 is an ethical obligation used to promote candor and transparency with the Commission by establishing a generic requirement that those who transact business with the Commission must not mislead the Commission or its staff by an artifice or false statement of fact or law. In issuing Rule 1.1 violations the Commission has found that state of mind is an essential element of a violation: “In determining whether a violation of Rule 1 has occurred, one of the steps we must surmount is whether the person who made the statement had the requisite state of mind.”² The Commission previously explained: “Rule 1 violations require purposeful intent, recklessness, or gross negligence in regard to communications with the Commission.”³ As such, a hindsight review of the chosen filing date and procedural vehicle used to correct errors should

² *Investigation of All Facilities-Based Cellular Carriers*, D.94-11-018, 1994 Cal. PUC LEXIS 1090, at *80-81.

³ *In re S. Cal. Edison Co.*, D.04-04-065, mimeo., at 35; *see also Application of New Century Telecom, Inc.*, D.06-09-025, mimeo., at 15-16 (“Under Rule 1, parties as well as practitioners have an obligation to ensure that statements provided to the Commission are not false or misleading. At the very least, the facts discussed above show that NCT had a reckless disregard for the truth when it allowed these false statements to be submitted to the Commission.”); *Application of Pac. Fiber Link, LLC*, D.02-08-063 mimeo., at 20 (“Rule 1 violations require purposeful intent, recklessness, or gross negligence in regard to communications with the Commission.”)

not form the basis for a Rule 1.1 violation absent a finding that the choice of date and procedural vehicle were reckless, grossly negligent, or intended to mislead.⁴

California Public Utilities Code §1705 requires that a Commission “decision contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision.”⁵ In a proceeding adjudicating a Rule 1.1 violation, a material issue is whether or not the party who allegedly misled the Commission acted with the requisite state of mind. Here, the Proposed Decision, in violation of California Public Utilities Code §1705, contains insufficient findings and conclusions relative to PG&E’s state of mind. In fact, the Proposed Decision does not address PG&E’s state of mind other than to note that the Proposed Decision was not required to find specific intent.⁶ While specific intent is not required, a Rule 1.1 violation *does* require a finding of *either* specific intent to mislead the Commission, or recklessness or gross negligence in regard to communications with the Commission. The Proposed Decision contains no such finding.

The Proposed Decision does contain discussion of the conduct giving rise to the Rule 1.1 violation, noting that “known errors” were allowed to persist⁷, a document title was used which “had the effect of concealing from the parties the actual nature of the document”⁸, and PG&E’s behavior exhibited “a lack of candor and appreciation of the public interest.”⁹ In past decisions, the Commission recognized that “situations involving a failure to correctly cite a proposition of law, a lack of candor or withholding information, and a failure to correctly inform and to correct mistaken information are *potential* Rule 1 violations, and clarified that a Rule 1 violation can

⁴ For a procedural vehicle that is filed publicly with the Commission, served on parties, and chosen to inform the Commission of mistakes in a previously filed document the threshold for establishing the requisite state of mind should be high.

⁵ California Public Utilities Code §1705.

⁶ Proposed Decision at 11, fn. 12 (“In its brief, PG&E argues that we must find specific intent to violate Rule 1.1. The Commission addressed that issue in D.01-08-019 and found that intent should be considered as an aggravating factor in determining the range of the fine.”)

⁷ Proposed Decision at 9.

⁸ Proposed Decision at 11.

⁹ Proposed Decision at 14.

result from such conduct *if it is reckless or grossly negligent.*”¹⁰ Therefore, in order to find that PG&E violated Rule 1.1 because it failed to correct mistaken information, utilized an incorrect procedural vehicle, or allegedly exhibited a lack of candor, the Proposed Decision must include a determination as to whether or not PG&E’s conduct was intended to mislead, reckless, or grossly negligent. In so doing, the Proposed Decision will conform to Commission precedent and promote the issuance of Rule 1.1 violations only to culpable parties. Any other application of the law in this context will have a substantial chilling effect on lawyers’ advice (and other matters) requiring professional judgment. A party should not face substantial risk absent true wrongdoing on the party’s part.

III. CONCLUSION

For the foregoing reasons, SoCalGas and SDG&E request that the Commission:

- (1) revise the Proposed Decision to clarify its policy regarding open and candid communication between utilities and Commission staff by adopting a penalty period calculation methodology that does not discourage open and candid communications between utilities and Commission staff assigned to oversee the safe operation of California’s natural gas infrastructure; and
- (2) revise the Proposed Decision to clarify that a violation of Rule 1.1 requires a finding of either specific intent to mislead the Commission, or recklessness or gross negligence in regard to communications with the Commission.

¹⁰ D.04-04-065, mimeo., at 35-36 (emphasis added).

Respectfully submitted,

By: /s/ Jason W. Egan
Jason W. Egan

SHARON L. TOMKINS
DEANA MICHELLE NG
JASON W. EGAN

Attorneys for

SOUTHERN CALIFORNIA GAS COMPANY
SAN DIEGO GAS & ELECTRIC COMPANY
555 West Fifth Street, Suite 1400
Los Angeles, California 90013
Telephone: (213) 244-2969
Facsimile: (213) 629-9620
E-mail: JEgan@semprautilities.com

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Appendix A

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Proposed Modification

SoCalGas and SDG&E take no position on the facts presented in this Order to Show Cause Hearing. To satisfy the requirements of Rule 14.3 of the Commission's Rules of Practice and Procedure, however, SoCalGas and SDG&E submit the following additions or modifications to the Proposed Decision's Findings of Fact and Conclusions of Law.

Findings of Fact

If the Commission determines that a violation of Rule 1.1 has occurred and that penalties are warranted, as discussed in the comments above, the Commission should adopt appropriate underlying factual findings to support that determination:

12. [The Commission should not determine that a violation of Rule 1.1 has occurred unless and until it determines that PG&E acted with purposeful intent, recklessness, or gross negligence in regard to its communications with the Commission.]

Conclusions of Law

4. PG&E should be fined as follows: For delay in filing, [a penalty amount that is calculated in a manner that does not discourage open communication between pipeline operators and Commission Staff] ~~\$50,000 per day for 105 days = \$5,250,000~~. For submitting a misleadingly titled document, \$50,000 per day for 30 days it remained pending at the Commission = \$1,500,000. Total fine= [a total fine consistent with the principles discussed in the comments above.] ~~\$6,750,000~~.