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Sent: 6/5/2014 4:54:57 PM

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Bcc:

Subject: Recordkeeping OII, I.11-02-016 - Explanation to parties as to why SED is not re-filing its rejected Motion to Compel and Re-Open the Record

TO ALJ YIP-KIKUGAWA AND ALL PARTIES OF RECORD:

On May 30, 2014, the Safety and Enforcement Division (SED), formerly known as the Consumer Protection and Safety Division (CPSD) had served ALJ Yip-Kikugawa and the parties with a copy of CPSD's motion to compel and re-open the record ("May 30 Motion"). (Throughout this proceeding, SED continued to use its former name "CPSD" even after it had change its name to SED. Therefore, hereinafter, all references herein to SED or CPSD will use the acronym "CPSD" for the sake of continuity). CPSD requested that the Commission compel PG&E to produce an update to the status of its efforts to find strength test pressure records that it indicated it lacked on more than 23,000 transmission pipeline segments, and re-open the record for the specific purpose of adding PG&E's response to the evidentiary record. CPSD was informed today that its motion was rejected by the Commission's Docket Office for failing to have a proposed ruling attached. An email showing the rejection is provided below. CPSD has decided against re-filing a motion and proposed ruling for the reasons discussed below.

The first reason that CPSD has chosen not to re-file its motion is CPSD never intended to further delay the issuance of the Presiding Officer's Decisions ("PODs"). CPSD's May 30 Motion had not contemplated a need for any witness or additional evidentiary hearing, outside of adding the compelled documents to the record. However, upon learning of PG&E's position that a witness would be necessary to accompany the data response, and, therefore a hearing would be inevitable because the parties would want to cross-examine such a witness, CPSD has decided not to re-file its May 30 Motion.

The second reason that CPSD has chosen not to re-file its motion is that CPSD sufficiently addressed this issue in its briefs, as shown below. Thus, CPSD is not backtracking on its positions in its briefs that PG&E's recordkeeping practices were so poor, as to make the operations of its system unsafe. As CPSD specifically stated in its March 25, 2013 Opening Brief regarding PG&E's defense about the missing 23,761 strength test pressure records, pp. 17-18:

Generally, in an enforcement proceeding, CPSD bears the burden of proving a violation. However, CPSD should not bear the burden in this proceeding. PG&E cannot find records, determine if or when it lost them, or whether PG&E did a test or other action required by law at all on each pipeline segment. As an example, PG&E has identified over 23,000 segments in populated areas for which it does not possess records for testing or maintenance of its pipeline as required by state and federal law. Given the magnitude and duration of PG&E's recordkeeping failure, the Commission

must shift the burden of proof to PG&E, or draw an adverse inference that the missing evidence is unfavorable to PG&E. This result is compelled by the doctrine of spoliation of evidence, which is based on the fundamental legal principle that no party should benefit from its own wrongdoing. See *Galanek v. Wimas* (1999) 68 Cal.App.4th 1417, 1428. Spoliation of evidence covers a relatively broad range of misconduct. “Spoliation” is the destruction, alteration or failure to preserve evidence for another’s use in pending or future litigation. *Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223. The remedies for spoliation of evidence include shifting the burden of proof or imposition of a discretionary inference against the spoliator that the missing evidence was unfavorable to it. *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11-13 (“*Cedars-Sinai*”); see also California Evidence Code §§ 412, 413 (adverse evidentiary inference, that the evidence submitted should be viewed with distrust or the destroyed evidence was unfavorable, may arise based on failure to produce more satisfactory evidence or willful suppression of evidence). These remedies are appropriate because fairness and justness are impaired: missing evidence increases the risks of an erroneous decision on the merits and increases the costs of litigation as parties attempt to reconstruct the evidence or to develop other evidence, which “may be less accessible, less persuasive or both.” *Cedars-Sinai*, supra, 18 Cal.4th 1, 8.

The Commission need not determine that PG&E failed to preserve evidence with the intention to violate state and federal law. Knowing spoliation of evidence, even without intent to violate a statute requiring its retention, may form the basis for imposition of an adverse evidentiary inference. *Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 681-682; *Williams v. Russ*, supra, 167 Cal.App.4th at 1223. This is particularly true where a party, like PG&E here, has a duty to preserve evidence. See *Reeves v. MV Transportation, Inc.*, supra, 86 Cal.App.4th at 682 (statutory obligation to preserve employment applications gives rise to duty to preserve evidence). Given: (1) PG&E’s mandatory and unambiguous duties to conduct pipeline testing and to create and maintain records necessary to ensure the safe operation of its pipeline; and (2) the scope and scale of PG&E’s inability to produce records, the only reasonable conclusion is that PG&E’s failure to produce this evidence is a knowing failure. PG&E’s overwhelming failure to have in its possession records of manufacture, construction, testing, and maintenance cannot be viewed as an isolated instance, or as negligent oversight.

Furthermore, CPSD’s April 24, 2013 Reply Brief (p. 86) quotes a footnote in the introduction of PG&E’s Opening Brief (p. 2),

‘The evidence also shows that PG&E has not located a number of pressure test records that, by regulation, it should have. Ex. TURN-4. As David Harrison [a PG&E employee and witness] testified, PG&E has not given up looking for these records and still hopes to find them....Thus, the evidence falls short of proving that PG&E has failed to retain any particular pressure test record it is required by law to have.’

CPSD’s reply brief (pp. 86-87) responded to PG&E’s arguments, stating,

PG&E confuses 'hope' with 'evidence.' About 1500 PG&E employees expended a total of 30 man years of effort during PG&E's massive MAOP validation in 2011 to try to locate the hydrotest test records. Two years after that exercise, thousands of test records of HCA pipe segments installed between 1956 and 2010 remain missing.

For the above-mentioned reasons, although CPSD has chosen not to re-submit its Motion to Compel and Re-open the Record, CPSD has not changed its position from its briefs in the Recordkeeping OII, I.11-02-016, or any of the other related OIIs.

Respectfully,

/s/ HARVEY Y. MORRIS

Harvey Y. Morris

Attorney for the Safety and Enforcement Division

From: CPUC Electronic Filing System [<mailto:CPUCElectronicFiling@cpuc.ca.gov>]

Sent: Thursday, June 05, 2014 1:33 PM

To: Salyer, Nanci

Subject: 0000075287 - California Public Utilities Commission Rejection of Filing - I1102016

Your filing, submitted on 6/5/2014 with confirmation number 0000075287, has been rejected by the California Public Utilities Commission for the following reasons:

I.11-02-016. MOTION TO COMPEL.

1. Proposed ruling on the discovery motion is not provided. (Rule 11.3(a)) PLEASE ATTACH A PROPOSED RULING.

2. Please make the corrections and re-file the document(s) as soon as you are able. If the document deficiencies are cured within seven days, please re-submit the entire filing.

3. When you re-file, check the box on Tab 1 labeled Resubmission, and enter the receipt number of the original filing.

4. When you re-submit the document(s), do not change any dates on the document(s).

5. Please Re-submit the document(s) on the Service List with the recommended changes. The date of the document(s) is the date of the service.

Thank you. George Lau, Docket Office. Tel: (415) 703-4722. Dated: 6/5/2014.

If you have questions about this rejection, please contact the CPUC Docket Office at the address listed below.

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California Public Utilities Commission

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