

**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 & Electric Company's Natural Gas Transmission System in Locations with Higher Population Density.

I.11-11-009
(Issued November 10, 2011)
(Not Consolidated)

MOTION OF THE CITY AND COUNTY OF SAN FRANCISCO FOR OFFICIAL NOTICE

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
AUSTIN M. YANG

Attorneys for:
CITY AND COUNTY OF SAN FRANCISCO
1 Dr. Carlton B. Goodlett Place, Room 234
San Francisco, CA 94102-4682
Telephone: (415) 554-6761
Facsimile: (415) 554-4763
Email: austin.yang@sfgov.org

I. INTRODUCTION

Pursuant to Commission Rules of Practice and Procedure 11.1 and 13.9, the City and County of San Francisco (San Francisco) submits this motion for official notice.¹ San Francisco requests that the Commission take official notice of the documents referred to as the “41 violations” in footnote 7 of the Motion of the City of San Bruno Seeking the Recusal of Assigned Commissioner Peevey and footnote 5 of the Motion of the City of San Bruno for an Order to Show Cause Why Pacific Gas and Electric Company Should Not Be Held in Violation of Commission Rule of Practice and Procedure 8.3(b) and for Sanctions and Fees.² Each of the records included as the “41 violations” is an official document of the Commission that was produced in response to a request for official documents and is appropriate for official notice.

II. MOTION

Commission Rule of Practice and Procedure 13.9 states that the Commission may take official notice “of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq.”³ California Evidence Code Section 452, provides that judicial notice is appropriate for:

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States;

and

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.⁴

Judicial notice “is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without

¹ This request is made in connection with the San Francisco’s Response in to the motions filed by the City of San Bruno.

² Both footnotes reference a complete “list of violations and PG&E/Peevey ex parte communications correspondence” at <https://meyersnave.sharefiled.com/r/r4fda59c12df4f2e8>. San Bruno later corrected the link to be: <https://meyersnave.sharefile.com/d/s911293af60143399>. The documents in this links are identified with bates stamps “CPUC 01415 to CPUC 02021.”

³ Commission Rule of Practice and Procedure 13.9.

⁴ Cal. Evid. Code § 452.

requiring formal proof of the matter.”⁵ Judicial notice is appropriate for facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.⁶

Evidence Code Section 453 states that the court shall take judicial notice of any matter specified in Section 452, if a party requests it and (a) gives the adverse party notice of the request and (b) furnishes the court with sufficient information to take judicial notice of the matter.⁷

A. The Commission Should Take Official Notice of the Emails Between PG&E and Commissioner Peevey.

The Commission should take official notice of the exhibits identified by San Bruno because they are official acts of the Commission the existence of which are not reasonably subject to dispute and capable of immediate and accurate determination. Under Evidence Code Section 452, it is appropriate to take official notice of official acts of government agencies. Official acts of government agencies includes documents created and published by state agencies.⁸ In particular, it is appropriate to take official notice of the files and records of the Commission.⁹

Here, the emails and attached reports identified by the City of San Bruno are public records pertaining to the conduct of the public business prepared, owned, used, or retained by a state agency, and produced by the Commission in response to a request for official records.¹⁰ The documents are official acts of the Commission and therefore appropriate for official notice. In addition to being official records of the Commission, the existence of these records, including the parties, timing and the

⁵ *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117 (internal quotes omitted).

⁶ *Wietschner v. Monterey Pasta Co.*, 294 F.Supp. 2d 1117, 1109 (N.D. Cal. 2003). *See Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 753 fn 2 (discussing similarity between Fed. Rule of Evid. 201(b) and Cal. Evid. Code § 452(h)).

⁷ Cal. Evid. Code § 453.

⁸ *Wolfe v. State Farm Cas. & Ins. Co.* (1996) 46 Cal.App.4th 554, 567 fn 16; *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750 (“Evidence Code section 452, subdivision (c) permits the trial court to take judicial notice of the records and files of a state administrative board.”).

⁹ Cal. Evid. Code § 452(c); *Pratt v. Coast Trucking* (1964) 288 Cal.App.2d 139, 143 (“court below had a duty to take judicial notice of the files and the order of the [California Public Utilities] commission.”).

¹⁰ Cal. Govt. Code § 6252(e). The Public Records Act defines writing to include email. Cal. Govt. Code § 6252(g).

fact that many of the emails contained financial reports relating to the fines and penalties to be issued in the natural gas pipeline investigations are facts not reasonably subject to dispute.¹¹

1. The Commission May Not Accept the Truth of the Statements Contained In the Records

“When a court is asked to take judicial notice of a document, the propriety of the court’s action depends upon the nature of the facts of which the court takes notice from the document.”¹² Because some facts, such as the parties, the timing and the subject matter of the communication are not reasonably subject to dispute, the Commission may accept the truth of those facts.¹³ “The taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts.”¹⁴ Thus, it is appropriate to take judicial notice of the existence of communications between PG&E and Commissioner Peevey’s office, including when they occurred, and the fact that many of the emails contained commentary and analysis on the appropriate fine and penalty in the natural gas pipeline investigations.

The Commission may not, however, accept the truth of the assertions contained in these records, especially the financial analysis attached to many of the ex parte communications.¹⁵ Many of the statements in these emails relate to a contested substantive issue in the natural gas pipeline investigations. In *Ragland*, the Court refused to take judicial notice of the truth of statements made in an audit report by the Department of Inspector General’s Office of the U.S. Department of Treasury relating to an entity’s financial condition.¹⁶ The Court articulated the principle succinctly that “while we may take judicial notice of the existence of the audit report... we may not accept their contents as true.”¹⁷ Thus, the Commission may not accept the truth of the statements contained in the emails.

¹¹ Cal. Evid. Code § 452(h);

¹² *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 755.

¹³ *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 194.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

2. The Communications Are Relevant

The “41 violations” prove the existence of unlawful communications between PG&E, the respondent in the natural gas pipeline investigations, and Commissioner Peevey and his advisor, decision makers at the Commission. The records also prove that these ex parte communications concerned substantive issues in a pending adjudicatory proceeding. In other words, the records are proof of illegal ex parte communications. The communications expose PG&E’s efforts to circumvent the Commission’s own rules regarding due process and also show impropriety and potential bias by Commissioner Peevey. Therefore, the records are directly relevant to the City of San Bruno’s pending motion for recusal of Commissioner Peevey and the motion seeking an order to show cause regarding additional sanctions are warranted for violation of Commission orders.

B. PG&E Will Suffer No Prejudice If the Commission Grants This Motion.

There is good cause for the Commission to take official notice of the requested exhibits, and PG&E will suffer no prejudice if the Commission grants this motion. PG&E will have the opportunity to argue the weight and relevance of these documents should the Commission issue an Order to Show Cause. As discussed in the accompanying responses to motions of the City of San Bruno, the public is entitled to know whether the Commission is conducting its business in a manner required by law.

III. CONCLUSION

For the foregoing reasons, the Commission should take official notice of the requested exhibits.

Dated: August 12, 2014

Respectfully submitted,

DENNIS J. HERRERA

City Attorney

THERESA L. MUELLER

Chief Energy And Telecommunications Deputy

AUSTIN M. YANG

Deputy City Attorney

By: _____ /s/_____
AUSTIN M. YANG

Attorneys for

CITY AND COUNTY OF SAN FRANCISCO