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 ALTERNATE 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 Alternate Proposed Decision (Alternate PD) of Commissioner Ferron, which 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 reply comments respond to PG&E's claim that the Alternate PD contains factual and legal errors.

PG&E makes several due process arguments based on its assertion that the Alternate PD relies on evidence outside the record.[1] The Alternate PD is clearly supported by the existing record. However, if the Alternate PD refers to evidence deemed outside the record, the error, if any, is harmless. Furthermore, the Commission can render these arguments moot by granting ORA's September 30 "Motion to Enter Evidence Into the Record of The Rule 1.1 Order To Show Cause Proceeding" (Motion). That Motion sought clarification that certain documents, such as Mr. Johnson's August 30, 2013 Verified Statement, were part of the Rule 1.1 Order To Show Cause (OSC) record because they were in the record of the Gas Safety Rulemaking (R.11-02-019) in which the OSC was issued.[2] To the extent certain key documents were not deemed to be in the record for purposes of the Rule 1.1 OSC, ORA's Motion sought to introduce them. Those documents included Mr. Johnson's Verified Statement,[3] the afternoon OSC transcript,[4] and a PG&E e-mail message demonstrating that PG&E's high-level management knew of the Line 147 data errors no later than November 16, 2012. [5]

PG&E's comments on the Alternate PD raise two other due process arguments: (1) that fining PG&E for failure to timely notify the Commission of a material finding was a "new

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[1] PG&E Alternate PD Comments, pp. 3-6.

[2] ORA Motion, p. 4.

[3] ORA Motion, p. 3.

[4] ORA Motion, p. 3. The afternoon hearing focused on the companion OSC, which directed PG&E to show cause why the Commission's 2011 pressure restoration orders should not be stayed. However, because the two OSCs stem from the same set of circumstances and therefore involve a great deal of overlapping evidence, it is reasonable and appropriate for the Commission to consider the evidence adduced in both the morning and the afternoon hearings as part of the record for purposes of both OSCs. It should be noted that the Commission could have issued one OSC rather than two.

[5] ORA Motion, p. 3. This e-mail was Attachment B to ORA's September 26, 2013 Opening Brief in this matter.

allegation" outside the scope of the Rule 1.1 Order to Show Cause issued on August 19, 2013;[6] and (2) that the Commission has improperly placed the burden of proof on PG&E in the Rule 1.1. OSC.[7] These due process arguments have no merit. PG&E raised these same arguments in its Comments on the PD, and ORA responded to them in its Reply Comments on the PD. Consequently, ORA refers the reader to those Reply Comments, filed November 25, 2013, and only supplements those responses here, where necessary.[8]

II. THE RECORD FOR THIS PROCEEDING SHOULD BE CLARIFIED

A. ORA's Motion Should Be Granted

At the conclusion of the September 6, 2013 hearing on the Rule 1.1 OSC[9] the Administrative Law Judge (ALJ) left the record open until the filing of reply briefs. She stated: "With the filing of the replies, the matter will be considered submitted to the Commission and the record will be closed on this issue."[10] This ruling was appropriate because parties had not had a meaningful opportunity to prepare evidence to offer into the record during the hearing. Parties did not know in advance of the hearing who would be testifying for PG&E, or what PG&E's witness(es) would say. Therefore, the record was left open for a limited time after the September 6 hearing, affording the parties an opportunity to submit evidence into the record.

After reviewing PG&E's testimony in both of the OSCs issued on August 19 and preparing its Recommendations on the Rule 1.1 violations, which ORA filed on September 26, 2013, ORA sought to enter certain documents into the record of the Rule 1.1 OSC. Those documents included PG&E's Verified Statement, the afternoon OSC transcript, and a PG&E data response. The data response, which was partially responsive to questions asked by Commissioner Ferron at the afternoon OSC hearing, showed that PG&E witness Sumeet Singh

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[6] PG&E Alternate PD Comments, pp. 1-3.

[7] PG&E Alternate PD Comments, pp. 6-7.

[8] The parties, including ORA, have briefed the issue of the constitutionality of fines in their Rebuttal Briefs filed June 7, 2013, in the combined "Fines and Remedies" portion of the San Bruno Investigations, I.11-02-016, I.12-01-007, and I.11-11-009.

[9] The "Rule 1.1 OSC" issued August 19, 2013 in this docket, 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."

[10] 16A RT 2415: 21-24.

notified PG&E executives Nick Stavropoulos and Jesus Soto of the discovery of the Line 147 data errors on November 16, 2012.

Because it was possible that the ALJ considered PG&E's Verified Statement and the transcript of the afternoon OSC hearing to be in the record of the Rule 1.1 OSC – since they are all part of the same proceeding, R.11-02-019 – ORA's Motion sought clarification to determine if that was the case. ORA's Motion, which was filed before the record closed, explained:

> …[I]t is not clear whether the Verified Statement has been entered into the record of either this Rule 1.1 OSC, or the companion OSC. It is highly likely it was intended to be part of the record of both OSCs. … [I]t would be helpful for an ALJ ruling to clarify:
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> 1. That all documents in the record of this docket (R.11-02-019), including the records and transcripts from the afternoon MAOP OSC, are considered to be in the record of this Rule 1.1 Proceeding….[11]

The Motion was never ruled upon. In the absence of a ruling, ORA assumes these documents are part of the record of the Rule 1.1 OSC, while PG&E assumes the opposite. In any event, PG&E's assumption is inconsistent with the testimony of its witness in the Rule 1.1 OSC hearing. There, Mr. Malkin repeatedly deferred questions to Mr. Johnson's Verified Statement and to the testimony that would be given by other witnesses in the afternoon hearing.[12] Having relied heavily on the Verified Statement and on testimony in the afternoon OSC hearing, PG&E cannot now claim that evidence does not belong in the record of the Rule 1.1 OSC.

PG&E now attempts to spin these questions about what is in the record of the Rule 1.1 OSC into due process arguments against the Alternate PD. One way to resolve these questions is simply to grant ORA's Motion to clarify what is in the record. As noted earlier, ORA's Motion was filed before the record in this proceeding closed and was never acted upon.

III. PG&E WAS ON NOTICE THAT IT COULD BE SANCTIONED FOR FAILURE TO TIMELY NOTIFY THE COMMISSION OF THELINE 147 ERRORS

PG&E claims that it had no notice that it could be sanctioned for failure to timely notify the Commission of the Line 147 errors, that this constituted a "new allegation," for which there is "no evidence," and that PG&E "relied" on the inadequate notice in the OSC so that it

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[11] ORA Motion, p. 4.

[12] See, e.g., 16A RT 2361-2365: 11-25; 16A RT 2373-2374: 17-22; 16A RT 2382-2383: 18-17; and 16A RT 2387-2388: 3-23 (Malkin/PG&E).

"therefore did not respond with respect to [this] issue."[13] ORA responded to this argument in its Reply Comments on the PD.[14] However, it bears repeating - PG&E's claims are baseless.

Contrary to PG&E's representations here, PG&E was on notice from the language of the Rule 1.1 OSC that the timing of its attempted errata filing was troubling to the Commission. As PG&E well understands, the OSC could only identify this issue in general terms because PG&E's errata failed to disclose how long PG&E had waited to notify the Commission of the Line 147 errors.[15] Also contrary to PG&E's representations here, there is ample evidence in the existing record that PG&E knew about the Line 147 data errors as early as mid-October.[16] As stated in the Alternate PD, PG&E had a responsibility to correct the pipeline information it had given the Commission in the 2011 pressure restoration proceedings as soon as PG&E discovered the information was inaccurate. Thus, fines could be imposed from the date of discovery.

Also contrary to PG&E's representations here, the company had ample opportunity to address the reasons for its delay in notifying the Commission of its Line 147 errors when it testified on September 6, but it chose instead to be evasive. On direct examination, Mr. Malkin explained that PG&E waited until July 3 to attempt to file the errata because it needed to conclude its own internal investigation.[17] However, Mr. Malkin never explained why this investigation had to be completed before it notified the Commission – or why the company thought such a delay was permissible.[18]

Both The Utility Reform Network (TURN) and the City of San Bruno attempted to cross-examine Mr. Malkin regarding PG&E's reason for insisting that it had to complete its own internal investigation before notifying the Commission. Both parties raised the issue of the Recordkeeping Investigation, which was still being litigated when PG&E discovered the records

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[13] PG&E Alternate PD Comments, pp. 1-2.

[14] ORA PD Reply Comments, pp. 1-3.

[15] The Commission first learned about the timing of PG&E's discovery of the Line 147 data errors in PG&E's August 30, 2013 Verified Statement, which was ordered by the companion OSC issued the same day as the Rule 1.1 OSC. That 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."

[16] 16A RT 2361-2365:11-25 and 16A RT 2379-2380: 19-19 (Malkin/PG&E).

[17] *See, e.g.*, 16A RT 2352: 1-27 (PG&E filed "as quickly as we could" after the investigation was concluded).

[18] There is a legitimate question regarding why the investigation took so long given PG&E's testimony in the related-OSC that it routinely updates its database with field information. *See, e.g.*, 16B RT 2445-2446: 25-13; and 16B RT 2488: 25-28. Presumably, discovery of database errors as a result of field work is a routine event that should have standard procedures associated with investigation and correction.

discrepancies for Line 147, and suggested that perhaps PG&E feared disclosure of the Line 147 error would impact that investigation. Mr. Malkin avoided answering these questions, asserting attorney/client privilege.[19]

When TURN asked why PG&E did not disclose in the "errata" that the error had been discovered eight months earlier, PG&E's attorney said that this fact seemed to be "way too much information."[20] When San Bruno asked Mr. Malkin to explain why PG&E waited until July to attempt to file its errata, he refused to answer, claiming attorney/client privilege.[21]

PG&E was on notice that it could be sanctioned for failure to timely notify the Commission of the Line 147 data errors – not just through the OSC, but through the Commission's prior application of Rule 1.1. The Commission has sanctioned other utilities for withholding information.[22] Here, it could not be any clearer that PG&E misled the Commission by withholding information: PG&E gave the Commission incorrect information in sworn testimony in the first instance, then deliberately withheld the corrected information for approximately eight months. The parties' questions at the hearing also put PG&E on notice of the issue of delayed notification and gave PG&E an opportunity to respond. PG&E chose not to take it.[23] In sum, PG&E made a calculated decision to remain silent on the issue because it had no defense. Its claim that it had no notice that it could be penalized for withholding this information from the Commission for many months is utterly without merit.

IV. CONCLUSION

For the reasons set forth herein, PG&E's legal arguments have no merit.

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[19] For the TURN cross exam see 16A RT 2365-2368: 13-14 (PG&E/Malkin) and especially 2366:2-21; for the San Bruno cross exam, see 16A RT 2390:6-20 (PG&E/Malkin).

[20] 16A RT 2361-2362: 23-3 (PG&E/Malkin).

[21] 16A RT 2381-2382: 25-15 (PG&E/Malkin) ("… to the extent your question is attempting to ask me in essence about what I knew and when I knew it, that -- all of that information, other than -- well, all of that, that information, what I knew and when I knew it, is all derived from attorney-client communications"). See also 16A RT 2389-2390: 12-2.

[22] See, e.g., Sprint PCS, D.01-08-019; mimeo at 14 ("Without true and complete responses to the data request, the staff's ability to properly assess and act upon Sprint PCS' request for codes was undermined."). In that case, even if staff could have found the information through other means, and even if the outcome of the matter would not have been resolved differently, the Commission fined Sprint PCS $200,000 because the violation undermined the regulatory process. *Id.* at 16-17.

[23] *See, e.g.*, Hinrichs v. County of Orange, 125 Cal. App. 4th 921, 928 (2004) ([T]he initial question posed to [the defendant] was self-explanatory … [that] initial question should have adequately put [the defendant] on notice that she was being investigated ….").

Respectfully submitted,

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