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Decision 98-11-026 November 5, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Rulemaking 97-04-011 (Filed April 9, 1997)
Order Instituting Investigation to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Investigation 97-04-012 (Filed April 9, 1997)

OPINION ON APPROPRIATE MONETARY PENALTY TO IMPOSE FOR PACIFIC GAS AND ELECTRIC COMPANY'S VIOLATION OF RULE V.F.1 OF THE AFFILIATE TRANSACTION RULES

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1. Summary

This decision imposes a penalty of $1,680,000 against Pacific Gas and Electric Company (PG&E) for 90 separate violations of Rule V.F.1 of the Affiliate Transaction Rules. This penalty consists of $17,500 for each of the 20 violations associated with the March 16, 1998, "High Voltage" advertisement and $19,000 for each of the 70 violations associated with the remaining advertisements. The factors we consider in determining the amount of the penalty for each violation include the appropriateness of such a penalty to the size of the business, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance after having received notification of the violation.

2. Background

2.1. *Procedural Background*

On April 9, 1998, this Commission issued Decision (D.) 98-04-029, which addressed the Office of Ratepayer Advocates (ORA) and The Utility Reform Network's (TURN) March 27, 1998 Emergency Motion for a Cease and Desist Order and Appropriate Sanctions Against PG&E. In D.98-04-029, we granted ORA and TURN's motion in part and denied it in part. We found that, as a result of a March 23, 1998, advertisement by PG&E Energy Services, which advertisement was the subject of the emergency motion, PG&E violated Rule V. F.1 of the Commission's Affiliate Transaction Rules set forth in D.97-12-088 (Affiliate Transaction Rules). We also gave further guidance on what we mean as "clearly legible" for printed material as set forth in Rule V.F.1.

Because of some mitigating circumstances, we did not impose the injunctive relief requested by ORA and TURN as a result of the March 23 advertisement. These mitigating circumstances include PG&E Corporation's (PG&E Corp.) remedial actions and further assurances regarding its oversight steps to ensure that future problems do not arise. (See D.98-04-029, slip op. at pp. 11-12.) The remedial actions consist of canceling what advertisements it could. (*Id.*, slip op. at p. 5.) The further assurances include the additional review process PG&E Corp. instituted. (*Id.*, slip op. at p.12, note 4.)

In D.98-04-029, we requested more information before we assessed the appropriate monetary penalty. Specifically, we directed PG&E, no later than April 21, 1998, to file a list of each publication in which the March 23, 1998, advertisement or a "nearly identical" advertisement was or will be published, as well as the date or dates of publication, and the California circulation figure for each publication. We also directed PG&E to include in its April filing documentation on the reason for the violation of our Affiliate Transaction Rules (i.e. whether this violation was willful, inadvertent, or occurred for some other reason). We directed interested parties to file comments no later than May 6, 1998, concerning what they believe is the appropriate monetary penalty to be imposed on PG&E in light of the totality of the circumstances in this case, and directed parties to clearly set forth their rationale in arriving at a specific monetary figure. We stated that parties may file reply comments no later than May 18, 1998.

On April 21, 1998, PG&E and PG&E Corp. timely filed a Response to the Order of the Commission for a Supplemental Filing. This filing, and the other specific filings enumerated in this section, are discussed more fully below. On May 6, 1998, the following parties filed comments regarding the proposed penalty applicable to PG&E pursuant to D.98-04-029: (1) The Joint Petitioner Coalition;[1] (2) TURN and ORA; and (3) CAPHCC.

On May 18, 1998, PG&E, which did not file opening comments, filed a reply which responded to the previously filed comments, and also made its own affirmative proposal.

On May 28, 1998, TURN and ORA filed a motion to strike PG&E's reply comments or in the alternative, a request for leave to file a reply brief, with the reply brief attached. TURN and ORA argue that, because PG&E did not file opening comments but instead made its affirmative proposal in its reply comments, PG&E's reply should be stricken, or alternatively, the Commission should permit them to file their reply brief.

On June 3, 1998, PG&E filed an opposition to TURN and ORA's motion. PG&E believes that, since D.98-04-029 directed "interested parties" to file initial comments and directed "parties" to file replies, somehow the Commission excluded PG&E from the requirement of filing initial comments at the same time as the other parties. PG&E so contends because PG&E is a "respondent" in this Rulemaking/Investigation, not an interested party. Also, PG&E argues that the Commission should not accept ORA and TURN's reply comments since D.98-04-029 does not authorize third-round pleadings.

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[1] The members of the Joint Petitioner Coalition joining in the comments include (1) California Association of Plumbing, Heating and Cooling Contractors (CAPHCC); (2) Enron Corp.; (3) New Energy Ventures; (4) AFFECT Coalition (Mock Energy services, Electric & Gas Industries Association, Institute of Heating and Air Conditioning Industries); and (5) School Project for Utility Rate Reduction.

On June 8, 1998, assigned Administrative Law Judge (ALJ) Econome issued a ruling stating that the briefing schedule set forth in D.98-04-029 appears straightforward, i.e., simultaneous opening and reply comments. However, the ALJ ruling stated that, in order to develop a full and complete record, PG&E's only showing regarding the appropriate monetary penalty should not be stricken.

In light of this concern, and because fairness dictates that other parties have the opportunity to respond to affirmative proposals, as contemplated in D.98-04-029, the ALJ ruling denied TURN and ORA's motion to strike PG&E's reply comments, but granted their motion to file the reply comments attached to their motion. The ALJ ruling further permitted all parties to reply to TURN and ORA's reply within 10 days of the ruling. On June 18, 1998, PG&E filed a reply to the TURN and ORA's reply. We affirm the ALJ's June 8, 1998, ruling because it will provide us with a full and fair record on this issue.

2.2. *PG&E's April 21 Filing*

Ordering Paragraph 3 of D.98-04-029 states in relevant part:

> "No later than April 21, 1998, PG&E shall file with this Commission and serve on all parties to this proceeding a list of each publication in which the March 23, 1998, advertisement or a "nearly identical" advertisement was or will be published, as well as the date or dates of publication, and the California circulation figure for each publication. PG&E shall include in its April 21, 1998 filing documentation on the reason for the violation of our affiliate rules, (i.e. whether this violation was willful, inadvertent, or occurred for some other reason)."

PG&E's April 21 filing includes a chart listing each publication which has published or will publish the March 23, 1998, advertisement, or "nearly identical" advertisements. (PG&E refers to these advertisements as

"High Voltage" advertisements.) PG&E's chart also lists the dates or projected dates of publication in each instance, and California circulation figures as provided by McCann-Erickson (ME), the advertising agency retained by PG&E Energy Services which placed the advertisements. A copy of this chart is attached to this decision as Attachment A.

PG&E states that both PG&E and PG&E Corp. conducted an investigation of the events leading up to the publication of the "High Voltage" advertisements. The investigation consisted of interviews with employees of PG&E Energy Services who were involved in designing, preparing for publication and reviewing the advertisements, and examining correspondence and documents related to the publication of the "High Voltage" advertisements. PG&E attached affidavits by the employees involved describing the decisions and actions taken with respect to the disclaimers on the "High Voltage" advertisements.[2]

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[2] PG&E's filing also addresses other promotions that are not directly at issue in this particular decision. First, PG&E advises the Commission that its replacement advertisement for the "High Voltage" advertisement, which is not nearly identical to the "High Voltage" advertisement, did not carry a disclaimer ¾ the size of the type which first displays the name and logo, as required by D.98-04-029, since this replacement advertisement was developed prior to that decision's issuance. PG&E states that 23 of these advertisements were scheduled to run prior to the Commission's issuance of D.98-04-029, and PG&E was able to modify 11 of those publications to be in full compliance. PG&E states that in the remaining 12 publications, the disclaimer is clear, although not the requisite size stated in D.98-04-029, because the advertisement was developed prior to the issuance of that decision.

PG&E also advised the Commission of two other instances where violations of the affiliate rules "did or may have" occurred in the course of PG&E Energy Services marketing activities and the remedial actions PG&E has taken. (See PG&E April 21 filing at p. 3-4.) The first is a radio advertisement which did not include the third part

Footnote continued on next page

PG&E also attached to its filing a letter to the Commission from Chairman CEO and President of PG&E Corp., Robert D. Glynn, Jr., recognizing that the advertisements did not comply, apologizing for the resulting drain on Commission resources and offering assurances of full compliance with the letter and the spirit of the Commission rules.

2.3. Detailed Summary of Declarations In PG&E's April 21 Filing

Because assessing an appropriate penalty hinges upon a review of the particular facts of the case, this opinion presents a detailed summary of the declarations attached to PG&E's April 21 filing. PG&E submitted declarations from the following persons: (1) Eileen Arbues, Senior Vice President-Marketing for PG&E Energy Services; (2) Douglas A. Oglesby, Vice President and General Counsel of PG&E Energy Services Corporation; (3) Justin L. Hafen, currently Director, Marketing Communications for PG&E Energy Services but prior to April 6, 1998, Account Supervisor on the PG&E Energy Services account at ME; and (4) Eric Pressler, Manager of Legal Compliance and Business Ethics for PG&E and PG&E Corp.

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of the disclaimer statement: "you do not have to buy PG&E Energy Services' products in order to continue to receive quality regulated services from the utility." PG&E states that, since the discovery of this omission, PG&E Energy Services has recorded and broadcast a new radio advertisement to the same audience correcting the first advertisement's omission of the "tying" portion of the disclaimer. The second instance is a "green power" direct mailing sent on March 15, 1998, to 195,944 residential electricity consumers in Northern California and 56,204 residential electricity consumers in Southern California. Although the mailing contained disclaimers on two of the three pages enclosed, it did not contain disclaimers on the first page of the cover letter or the envelope. PG&E states that each recipient of the mailing will receive a follow-up including additional disclaimers.

On January 30, 1998, Mr. Worthington, the Senior Vice President and General Counsel of PG&E Corp., issued a letter to all officers of the unregulated affiliates which stressed the importance of complying with the Commission's Affiliate Transaction Rules. A seven-page summary of the Affiliate Transaction Rules was attached to the letter. The summary highlighted that disclaimers are required when the PG&E name or logo is used, and instructed that the disclaimer must be in "plain legible or audible language, on the first page, or at the first point where its name or logo appears."

On February 6, 1998, Mr. Pressler sent a letter to the General Counsel of each affiliate with an attachment which included a "checklist" to highlight several Affiliate Transaction Rules which required immediate attention. The first item in this checklist was "Logo/Name Disclaimers." In his discussion, Mr. Pressler specifically referenced the page and item numbers in Mr. Worthington's January 30 package which discussed disclaimers.

ME designed the "High Voltage" advertisement. Ms. Arbues states that she instructed ME to place the disclaimer in the advertisement so that it would be in plain legible language in compliance with Commission rules. In his role as Account Supervisor at ME, Mr. Hafen worked with the advertisement agency's creative team to develop the "High Voltage" advertisement for PG&E Energy Services which was first published on March 16, 1998. On March 9, Mr. Hafen presented a proof of the advertisement to Ms. Arbus. According to Mr. Hafen, the proof clearly displayed the disclaimer running vertically along the left side of the advertisement. ME originally placed the disclaimer horizontally along the bottom of the photograph, but, because it was illegible in that position, ME decided to run the advertisement vertically to enhance readability.

Mr. Hafen states that "Placement of the disclaimer was consistent with standard industry practice: The disclaimer was designed and placed to be plain and legible, but small enough so as not to distract from the primary message of the advertisement. There was no intent to hide the disclaimer."

Ms. Arbues states that when she reviewed the advertisement proof, the disclaimer, while quite small, was plain and legible, and she approved the advertisement for publication.

On March 16, Mr. Pressler became aware of the March 16 advertisement when both Robert L. Bordon, Deputy General Counsel, and Robert Prickett of Mr. Pressler's office, notified Mr. Pressler about the problems with the disclaimer's legibility. After a meeting, Mr. Pruett, Vice President of Corporate Communications, agreed to take immediate action to correct the situation, and so advised appropriate persons at PG&E Energy Services. Ms. Arbues states that when she saw the "High Voltage" advertisement as printed on March 16, 1998, she realized the disclaimer was not legible. Mr. Oglesby, Vice President and General Counsel of PG&E Energy Services, also states he recognized this problem immediately after viewing the March 16 advertisement and immediately called Ms. Arbues and left her a voice-mail message telling her that the disclaimer was not plain and legible and that its size should be made larger. Ms. Arbues states that she immediately instructed ME to enlarge the disclaimer the next time the advertisement was to be published, and that ME did so. Ms. Arbues approved this advertisement according to what she describes as "industry practice," which is to print disclaimers in a relatively small print size, while ensuring they are readable.

On March 23, the "High Voltage" advertisement was published again. Ms. Arbues was traveling on business and did not see the advertisement.

On March 23, Mr. Oglesby did see the revised advertisement in the newspaper. Although Mr. Oglesby states that the disclaimer was larger than it appeared on March 16 and was legible, it was barely legible and in his opinion still too small to satisfy the Affiliate Transaction Rules. Mr. Oglesby also received a message from Mr. High, Senior Vice President-Administration for PG&E Corp., who stated that he did not believe the disclaimer was sufficiently plain and legible and that it must be corrected. Mr. Oglesby immediately called Ms. Arbues, left several urgent messages, and was able to talk to her directly on March 24. Ms. Arbues stated that she would instruct ME to enlarge the disclaimer if the advertisement was to run again.

On Friday, April 3, 1998, Ms. Arbues stated that she "instructed that the 'High Voltage' advertisement would not run in any regional publications." She instructed ME to ensure that the font size in the "High Voltage" advertisements which were part of PG&E Energy Services' national advertising campaign was significantly larger than the March 23 advertisement. Unfortunately, changes could not be made to four magazines which were already printed. Two other magazines were in the final stages of printing, but it was still possible to relocate the disclaimer horizontally on a solid black field below the graphic and to increase the font size. PG&E Energy Services was successful in replacing the advertisement in four other magazines. Several declarants state that they did not intend, nor were they aware of the intent of any person at PG&E Energy Services, to violate the Affiliate Transaction Rules.

Mr. Pressler states that on March 26, 1998, in response to concern about the adequacy of the PG&E Energy Services disclaimers, he became responsible for approval and pre-clearance of all print and broadcast advertisements for PG&E Energy Services to ensure full compliance with the

Affiliate Transaction Rules. This responsibility was extended to the advertising activities of all affiliates on April 6. Mr. Pressler states that he will not approve any advertisement which in his opinion fails to comply with the letter and spirit of the Affiliate Transaction Rules. On April 21, 1998, the pre-clearance process was expanded to include all marketing communications, including direct mail and publications used for marketing purposes.

3. Discussion

3.1. Appropriate Forum for Addressing this Issue

In a footnote of its May 18, 1998 reply, PG&E requests for the first time that this proceeding be recategorized as either an adjudicatory matter under Article 2.5 of the Commission's Rules of Practice and Procedure, or that it be given a new docket number and categorized as an adjudicatory proceeding.

This request is denied as untimely. PG&E understandably did not make this request in compliance with Article 2.5 when this proceeding was initially categorized in early 1997, because TURN and ORA's motion had not yet been filed. However, since TURN and ORA filed their Emergency Motion on March 27, 1998, the following events occurred: (1) the assigned ALJ granted ORA and TURN's request for a shortening of the response time; (2) PG&E Energy Services and PG&E Corp. filed a response; (3) PG&E chose not to file a response; (4) the Commission issued D.98-04-029 finding PG&E violated the Affiliate Transaction Rules and directing further proceedings which resulted in this decision; (5) PG&E filed its April 21 response to D.98-04-029; and (6) parties had the opportunity to file opening comments on the appropriate amount of the penalty by May 6.

PG&E chose not to respond to TURN and ORA's initial motion which lead to the issuance of D.98-04-029, and in fact, waited to make this request until it filed its May 18 reply brief according to the schedule set forth in D.98-04-029. No party, including PG&E, requested a recategorization of this proceeding prior to the issuance of D.98-04-029, and no party, including PG&E, sought rehearing of D.98-04-029 on this or any other issue. Therefore, PG&E's request is denied as untimely.

3.2. Appropriate Monetary Penalty

3.2.1. Number of Violations

Pubic Utilities (PU) Code § 2107 provides:

> "Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than twenty thousand dollars ($20,000) for each offense."

In order to determine the appropriate penalty pursuant to Section 2107, the Commission must first determine how many violations of Rule V.F.1 took place. PU Code § 2108 provides further clarification on this issue. Under PU Code § 2108, each violation of a Commission rule is considered a separate offense. PU Code § 2108 states:

> "Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

TURN and ORA, the Joint Petitioners Coalition, and the CAPHCC believe that because the purpose of Rule V.F.1 is to prevent customer confusion, the number of violations in this case should be related to the number of readers who saw the advertisement. This could be accomplished by requiring PG&E to present a study or other evidence of reader awareness of the advertisements, or by utilizing the paid California circulation of 3,079,021 for the publications as a reasonable proxy for readership level.[3] TURN and ORA state that paid California circulation would serve as a reasonable proxy, since newspapers have an average readership of 2.16 readers per copy, but not every reader saw the advertisement in question.

These parties also argue that this approach is reasonable, because it would reflect the opportunity for economic gain which resulted from publishing the advertisements. In contrast, basing the number of violations on the number of publications in which the advertisement appeared would not fit the nature of the violation, and would badly state the economic harm caused by the violation.

PG&E believes that the circulation level for each publication in which the "High Voltage" advertisement appeared is not an appropriate methodology for determining the number of violations of PU Code § 2107. PG&E contends that such a methodology would create a penalty of over a billion

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[3] The number 3,079,021 does not include multiple issues of the same publication. For example, the "High Voltage" advertisement appeared in the *San Francisco Chronicle/Examiner* on March 16 and on March 23. If each separate publication of the advertisement is counted, the total circulation of the "High Voltage" advertisement is a little over 6 million.

dollars, and would thus violate both the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the California Constitution, which prohibit excessive fines.

Rather, based on the specific facts of this case, PG&E believes that 18 separate violations of Rule V.F.1 occurred, which is the number of separate publications in which the advertisement appeared. PG&E bases its argument on California case law interpreting Section 17500 of the California Business and Professions Code, which addresses false and misleading advertisements, and which carries civil penalties up to $2,500 for each violation.

PG&E violated Rule V.F.1 of our Affiliate Transaction Rules by allowing the utility name and logo to be used by its affiliate in printed material without a legible disclaimer. The first issue presented is how many violations of Rule V.F.1 occurred under these circumstances.

It is difficult to determine the number of violations based upon this record. We do not agree with PG&E that the circulation level of the newspapers in question is irrelevant. The "High Voltage" advertisements were reprinted in major newspapers and magazines over six million times, and PG&E should have been aware of the circulation level of these newspapers and magazines, or at the least, that its affiliate was mounting a wide-spread advertisement campaign. PG&E allowed the logo to be used inappropriately a little over six million times, and it could logically be argued that PG&E therefore violated Rule V.F.1 six million times, notwithstanding how many people read or were confused by the advertisement.

For instance, if PG&E permitted its affiliate to use the PG&E name or disclaimer on a handbill reprinted and distributed to 100 people, one could logically conclude PG&E violated the rule 100 times, as opposed to only one time, because the advertisement was reprinted.

However, in this case, basing the penalty on six million violations, (or even the three million violations computed by ORA and TURN), and assessing a fine per violation of between $500 and $20,000 would produce an excessive penalty. TURN and ORA alternatively suggest that the Commission direct that PG&E provide a market study showing the number of projected readers for their advertisements in order to determine the size of the targeted audience and therefore, the number of violations. Although we find some appeal to this proposal, any penalty calculated in this manner might still be excessive in this case. In addition, we do not wish to prolong this proceeding further at this point after several declarations and four rounds of briefing.

Based on the record, it is an extremely conservative conclusion to determine that logically, at least five people read each of the 18 advertisements. Therefore, PG&E has violated Rule V.F.1 a total of at least 90 times, based upon the number of publications in which this advertisement appeared (18) multiplied by 5. In determining the number of violations, we exercise our discretion to find that, for purposes of this case, the penalty should be based on 90 violations. Our determination of the number of violations is based on an extremely conservative conclusion, and we put parties on notice that we will not treat the next violation so conservatively.

We recognize the need for a process to develop a more complete showing on this issue in the future. In our penalties rulemaking, R.98-04-009, we will address the issue of what constitutes appropriate information for the utility to provide in the event of a violation of Rule V.F.1 in widely distributed printed material. For example, the utility might be required to provide information about the cost spent on the advertising campaign. If the total amount of violations would result in excessive penalties, the Commission might suspend all but a portion of the penalty, consisting of the amount of the advertising campaign, trebled. Or, the utility might be required to provide the number of editions of each newspaper in which the offending advertisement appeared. These examples are not mandatory, nor exclusive of other proposals, which we instruct be addressed in R.98-04-009.

PG&E cites California cases interpreting California Business and Professions Code § 17500 in order to support its argument that use of a periodical's circulation rate is an inappropriate methodology for determining the correct number of violations. We are not bound by these cases, especially when they interpret a different statute, and we do not believe they are controlling here. However, we briefly discuss them because the parties have addressed them in some detail.

People v. Superior Court (Olson), 96 Cal.App.3d 181, 197 (4th Dist., Div. 2 1979) addressed the issue of what constitutes a single violation of Business and Professions Code (Section 17500 et seq.) for a false and misleading newspaper advertisement. *Olson* stated a reasonable interpretation of the Business and Professions Code statute at issue:

> "a reasonable interpretation of the statute in the context of a newspaper advertisement would be that a single publication constitutes a *minimum* of one violation with as many additional violations as there are persons who read the advertisement or who responded to the advertisement by purchasing the advertised product or service or by making inquiries concerning such product or service." (*Id.* at p. 198.)

Olson does not give specific guidance on how to meet this standard, other than to say it might include expert testimony and circumstantial evidence. However, the *Olson* court notes that an earlier case "does not suggest use of the newspaper circulation as the number of violations for false advertising in a newspaper." (*Id.* at p. 197.) *Olson* reasoned that this measure could result in a potential civil penalty of over $2.5 billion dollars for each newspaper edition, and this statutory interpretation would violate the due process prohibition against unreasonable statutory penalties. (*Id.* at p. 198.)

PG&E relies on cases decided following *Olson* to support its proposition that "to move from the *Olson* minimum to the *Olson* maximum, evidence must be adduced showing that those who read the advertisement, purchased the product, or inquired about the product were confused by the advertisement." We do not agree.

First, PG&E cites *People v. Bestline Products, Inc.*, 61 Cal.App.3d 879 (2nd Dist. Div. 3 1976), which did not involve mass newspaper advertisements, and which was decided prior to *Olson*, and thus could not have modified the *Olson* test. *People v. Toomey*, 157 Cal.App.3d 1 (1st Dist., Div. 1 1984), upheld the trial court's determination of damages based on the number of sales made, when the misrepresentations occurred in newspaper advertising, as well as printed mailers, and telephone solicitations. *Toomey* recognized that what constitutes a single violation is left to the courts to decide on a case-by-case basis. (*Id.*, at p. 22.) In *People v. Morse*, 21 Cal.App.4th 259 (1st Dist., Div. 3 1993), which also did not involve newspaper advertising, but rather a targeted direct mail campaign, the court affirmed an award of damages based on the number of solicitations mailed, rather than the number of people who read or responded to the solicitations. In discussing why *Olson* was inapplicable to its facts, *Morse* recites the *Olson* test quoted above, but does not indicate it was further modified to require proof of actual customer confusion.

What is clear from the case law interpreting the Business and Professions Code is that determining what constitutes a single violation under that statutory scheme is left to the courts to determine on a case-by-case basis. Similarly, in reaching our conclusion in this decision, we do not set forth a single standard for determining the number of occurrences for all violations of Rule V.F.1 by written publication, and note that in other cases, a different measure might apply.

3.2.2. Size of the Fine

3.2.2.1. Summary

Pursuant to PU Code § 2107, we have the discretion to set a penalty of between $500 and $20,000 for each violation or offense. We penalize PG&E in the amount of $1,680,000 which consists of $17,500 for each of the 20 violations of the March 16 "High Voltage" advertisements, and $19,000 for each of the remaining 70 violations.

3.2.2.2. Parties' Positions

TURN, ORA, the Joint Petitioners Coalition, and the CAPHCC recommend a monetary penalty of $10 million. In order to determine the amount of penalty for each violation, TURN and ORA recommend that the Commission take into account: (1) the nature and extent of the harm caused by PG&E's violation of the rules, including both immediate and long-term harm to the market; (2) the size and ability of PG&E to pay significant penalties, given that PG&E Corp. reported over $15 billion in operating revenues in 1997, of which PG&E accounted for $9.5 billion; (3) the large number of violations; and

(4) PG&E's intent, which these parties do not believe should be weighed as a significant factor.

Nonetheless, these parties believe that PG&E's conduct was reckless at best, since PG&E did nothing between the time when the Affiliate Transaction Rules were issued and the first "High Voltage" advertisement was published on March 16 to ensure the affiliates were complying with the rules, other than sending a letter to the General Counsel of PG&E Energy Services to highlight the need to comply with Rule V.F.1. TURN and ORA also note that PG&E did not take any action itself (such as insisting on signing off on the advertisement) to ensure that PG&E Energy Services was complying with the rule after the March 16 advertisement was published, but before the ad ran again on March 23, 1998.

TURN and ORA recognize that application of the statutory minimum of $500 set by PU Code § 2107 per violation to the number of violations they recommend (over 3 million) could result in a penalty in the billions of dollars which, in their opinion, would not be reasonable. TURN and ORA, as well as the Joint Petitioners Coalition and the CAPHCC, urge the Commission to fine PG&E $10 million, based on the factors set forth above, and the large number of violations they argue occurred. Assuming over 3 million violations, their proposed penalty results in about $3 per violation.

Pursuant to the criteria set forth in PU Code § 2104.5, PG&E believes that it should be assessed at the low end of the $500 to $20,000 range per violation. PG&E asserts that it did not perceive the potential of a violation until the "High Voltage" advertisement first ran in the newspaper on March 16. It argues that it immediately and unilaterally took action to achieve compliance and thus demonstrated a good faith. PG&E argues that the violation was not deceptive, was unintentional, and no public injury has been shown. Furthermore, PG&E argues that because the company acknowledged the violation in a forthright manner, took immediate steps to achieve compliance and to remediate the problem, that the Commission suspend all or part of any penalty assessed, subject to continued compliance during a probationary period.

3.2.2.3. Discussion

PG&E is incorrect that PU Code § 2104.5 is directly applicable to this case, because that section is limited to penalties for violations involving safety standards for pipeline facilities or the transportation of gas in California. However, we can look to the factors listed in Section 2104.5 by analogy, in order to determine the appropriate penalty in light of the range set forth by Section 2107. These factors include "the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation." PG&E recommends we utilize these factors, and the factors TURN and ORA urge us to consider also fall under these broader categories.

Moreover, the fact that the utility delegated the responsibility to comply with a Commission order or rule to an employee or agent does not excuse the utility from compliance, since under PU Code § 2109, "the act... of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act...of such public utility."

In addressing the gravity of the violation, we reiterate that our Affiliate Transaction Rules are a critical component of our transition to a competitive marketplace, and we take these Rules very seriously. We view each of the 90 violations to be very serious, because the "High Voltage" advertisements were each published to a vast audience, and thus had the potential to cause substantial harm. PG&E or its affiliates would not have spent substantial amounts of money developing and placing these advertisements in such a wide-spread advertising campaign unless they believed these advertisements would have a large exposure. Rule V.F.1 requires the affiliate to use a disclaimer when it shares the use of the name and logo of the utility, in order to prevent customer confusion and anticompetitive conduct by virtue of the utility's name brand recognition. Although the precise degree of actual harm or confusion, and the commensurate utility gain, may be very difficult to prove here, that does not mean that the potential for confusion and gain is not substantial. For example, the influences of an advertising campaign may be incremental, and a reader of the "High Voltage" advertisements might not act on that advertisement immediately, but might do so at a later time.

Thus, we view each violation of Rule V.F.1 as a very serious matter. Although we do not believe that PG&E purposefully or willfully violated Rule V.F.1, it did not afford adequate education and supervision regarding compliance to ensure that Rule V.F.1 would not be violated to begin with, nor violated yet again after the problems with the March 16 advertisements came to light. Thus, we cannot find these violations were merely inadvertent. (See D.98-04-029, slip op. at Ordering Paragraph 3.) For instance, PG&E did not take action prior to March 16 to ensure compliance with Rule V.F.1, other than to inform the officers of all affiliates by letter of the importance of complying with the rules, which were summarized but not attached verbatim to the letter, and to send a second letter to each affiliate's general counsel with a checklist to highlight several rules which required immediate attention, including Rule V.F.1. PG&E did not establish any preclearance policy at that time, nor did it ensure that the means by which the affiliates informed their employees about the rules were sufficient to ensure compliance.

PG&E delegated its responsibility to comply with the rules without providing adequate education or supervision to ensure compliance. Thus, although PG&E's good faith in attempting to achieve compliance with the rules after notification of a violation is one factor we consider in mitigation of the penalty amount, as discussed below, any good faith effort cannot rectify its failure to comply with the Rule V.F.1 to begin with under the circumstances here.

We also view the gravity of the violations to be greater for the violations associated with the advertisements published after March 16. When the problems of the March 16 advertisements came to light, PG&E only directed that its affiliate correct the problem, but did not take further action to ensure compliance with the rules before the advertisement was published again on March 23 to a far larger audience. In fact, between March 16 and March 23, PG&E relied on the same procedure in place prior to March 16 to ensure compliance with the rules.

A statement made by Mr. Hafen highlights the need of PG&E to provide adequate education and supervision if it plans to delegate compliance with these, or other Commission rules. Mr. Hafen, formerly of ME and now employed by PG&E Energy Services, states that "the disclaimer was designed and placed to be plain and legible, but small enough so as not to detract from the primary message of the advertisement."

We intend that the disclaimer be an integral part of the message of the advertisement, and, as we stated in D.98-04-029, it should be positioned so that the reader will naturally focus on the disclaimer as easily as the "signature". We never intended the disclaimer to be a secondary (or lower) part of the advertisement, or to be anything other than part of the integral message of the advertisement. Moreover, minimizing the disclaimer contradicts not only the letter, but also the spirit of Rule V.F.1 adopted in D. 97-12-088, where we intended that the disclaimer would "provide the customer with more information, not less." (D.97-12-088, slip op. at p. 45.)

In addressing the appropriateness of the penalty to the size of the business, it is beyond dispute that PG&E is a large utility, with approximately 4.2 million customers and over $9 billion of operating revenues for 1997. We consider this information in setting the penalty level for each offense at the high end of the range, under the circumstances of this case.

Finally, we address PG&E's good faith in attempting to achieve compliance with the rules after notification of a violation. In D.98-04-029, we stated that, although we applaud PG&E for taking the additional remedial steps, at this point, this was not a total remedy for its violation of the Affiliate Transaction Rules. (D.98-04-029, slip op. at pp. 9-10.) We noted that PG&E had previously provided similar such assurances. Therefore, in this instance, an apology and the promise of further remedial measures is an insufficient substitute for a penalty.

Also, as stated above, PG&E did not take effective measures to ensure compliance after its discovery of its violations of Rule V.F.1 with the March 16 advertisements, but before the advertisement was widely published again on March 23. Thus, our assessed penalty for the violations associated with the March 16 advertisements is less than the penalty for the violations associated with the remaining 70 advertisements.[4] We take into account PG&E's remedial actions of canceling what advertisements it could after March 23, and the further assurances it has made to ensure future compliance with Rule V.F.1, including the additional review process instituted by PG&E.

However, we do not believe that we should weigh these mitigation measures to significantly reduce the penalty, or to suspend the penalty in its entirety. This is so, given the gravity of the harm and the size of the business. We also do not believe a large adjustment for PG&E's subsequent actions is appropriate here because we have already used these factors to deny ORA and TURN's initial request for injunctive relief in their original motion. (See D.98-04-029, slip op. at pp.11-12.) We also use this, as well as the other factors listed above, to deny ORA and TURN's request for additional corrective advertisements and for PG&E to send additional letters to certain customers who switch to PG&E Energy Services between the time the "High Voltage" advertisements are published and the corrective advertisements are published.[5]

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[4] While a lesser penalty might have been reasonable for the two advertisements published on April 13, where PG&E states it was able to move the disclaimer vertically to the bottom of the page on a black background, and thus improve the disclaimer's legibility, PG&E does not ask for a lesser penalty based on these factors. Nor did PG&E provide us with a copy of this advertisement so we could see whether PG&E in fact cured the problem.

[5] TURN and ORA recommend that the Commission order PG&E to run a corrective advertisement in each of the publications where the "High Voltage" advertisements ran in order to counteract the customer confusion caused by the "High Voltage" advertisements. TURN and ORA also recommend that PG&E send a letter to every customer who switched or who switches to PG&E Energy Services form the time the "High Voltage" advertisements began running until the time that the corrective

Footnote continued on next page

Based on the above discussion, we impose a penalty of $1,680,000 on PG&E. For violation of a Commission order and rule, and pursuant to PU Code §§ 2107 and 2108, PG&E is penalized in the amount of $1,680,000, and is ordered to pay to the State Treasury of California the amount of $1,680,000, plus interest at 7% per year accruing from the date of this order, to the credit of the General Fund pursuant to PU Code § 2104.

3.2.2.4. Comments on Alternate Decision

The alternate Decision was mailed for comment on October 8, 1998. Timely comments were received from PG&E, SCE, the Joint Petitioners Coalition, ORA and TURN, and the CAPHCC. After reviewing the comments, we have decided not to change the alternate decision in any material respect.

4. Findings of Fact

1. In D.98-04-029, we requested more information before we assessed the appropriate monetary penalty against PG&E for its violation of Affiliate Transaction Rule V.F.1.

2. PG&E's April 21, 1998, filing includes a chart, attached to this decision as Appendix A, listing each publication which has published or will publish the March 23, 1998, advertisement, or "nearly identical" advertisements. This chart lists 18 advertisements.

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advertisements are published which would contain the same terms as the corrective advertisements.

3. PG&E's request, made for the first time in a footnote of its May 18, 1998 reply comments, that this proceeding be recategorized as either an adjudicatory matter under Article 2.5 of the Commission's Rules of Practice and Procedure, or that it be given a new docket number and categorized as an adjudicatory proceeding, is untimely.

4. In this case, basing the penalty on six million violations, (or even the three million violations computed by ORA and TURN), and assessing a fine per violation of between $500 and $20,000 would produce an excessive penalty.

5. Based on this record, it is an extremely conservative conclusion to determine that logically, at least five people read each of the 18 advertisements. Therefore, PG&E has violated Rule V.F.1 at least 90 times, based upon the number of publications in which the advertisement appeared (18) multiplied by 5.

6. We recognize the need for a process to develop a more complete showing on the appropriate penalty for a violation of Rule V.F.1 in widely distributed printed material.

7. PG&E recommends we utilize the factors set forth in PU Code § 2104.5 to determine the appropriate penalty, and the factors TURN and ORA urge us to consider also fall under the broad categories set forth in PU Code § 2104.5.

8. Our Affiliate Transaction Rules are a critical component of our transition to a competitive marketplace, and we take these Rules very seriously.

9. The gravity of each of the 90 violations is very serious, in part because the "High Voltage" advertisements were each published to a vast audience, and thus had the potential to cause substantial harm.

10. Although we do not believe that PG&E purposefully or willfully violated Rule V.F.1, it did not afford adequate education and supervision regarding compliance to ensure that Rule V.F.1 would not be violated to begin with, nor violated yet again after the problems with the March 16 advertisements came to light. Thus, we cannot find these violations were merely inadvertent.

11. The gravity of the violations are even greater for the violations associated with the advertisements published after March 16, 1998.

12. The disclaimer discussed in Rule V.F.1 should be an integral part of the message of the advertisement, and, as we stated in D.98-04-029, it should be positioned so that the reader will naturally focus on the disclaimer as easily as the "signature." We never intended the disclaimer to be a secondary (or lower) part of the advertisement, or to be anything other than part of the integral message of the advertisement. Moreover, minimizing the disclaimer contradicts not only the letter, but also the spirit of Rule V.F.1 adopted in D. 97-12-088, where we intended that the disclaimer would "provide the customer with more information, not less." (D.97-12-088, slip op. at p. 45.)

13. PG&E is a large utility, with approximately 4.2 million customers and over $9 billion of operating revenues for 1997.

14. In this instance, an apology and the promise of further remedial measures is an insufficient substitute for a penalty.

5. Conclusions of Law

1. PG&E's request, made for the first time in a footnote of its May 18, 1998 reply comments, that this proceeding be recategorized as either an adjudicatory matter under Article 2.5 of the Commission's Rules of Practice and Procedure, or

that it be given a new docket number and categorized as an adjudicatory proceeding, should be denied.

2. Our penalties rulemaking, R.98-04-009, should address the issue of what constitutes appropriate information for the utility to provide in the event of a violation of Rule V.F.1 in widely distributed printed material.

3. PU Code § 2104.5 is not directly applicable to this case, because that code section is limited to penalties for violations involving safety standards for pipeline facilities or the transportation of gas in California.

4. We can look to the factors listed in PU Code § 2104.5 by analogy, in order to determine the appropriate penalty in light of the range set forth by PU Code § 2107. These factors include "the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation."

5. A large adjustment to the size of the penalty for PG&E's subsequent actions is not appropriate here because we have already used these factors in D.98-04-029, slip op. at pp. 11-12, to deny ORA and TURN's initial request for injunctive relief in their original motion.

6. ORA and TURN's request for additional corrective advertisements and for PG&E to send additional letters to certain customers should be denied.

7. In determining the number of violations, we exercise our discretion to find that, for purposes of this case, the penalty should be based on 90 violations. PG&E should be penalized $17,500 for each of the 20 violations associated with the March 16, 1998, "High Voltage" advertisement and $19,000 for each of the 70 violations associated with the remaining advertisements.

8. For violation of a Commission order and rule, and pursuant to PU Code §§ 2107 and 2108, PG&E should be penalized in the amount of $1,680,000, and should be ordered to pay to the State Treasury of California the amount of $1,680,000, plus interest at 7% per year accruing from the date of this order, to the credit of the General Fund pursuant to PU Code § 2104.

9. Because of the importance of compliance with our Affiliate Transaction Rules, this decision should be effective immediately.

ORDER

IT IS ORDERED that:

1. For violation of a Commission order and rule, and pursuant to Public Utilities (PU) Code Sections 2107 and 2108, Pacific Gas and Electric Company is penalized in the amount of $1,680,000, and is ordered to pay to the State Treasury of California the amount of $1,680,000, plus interest at 7% per year accruing from the date of this order, to the credit of the General Fund pursuant to PU Code Section 2104.

2. The Commission's penalties rulemaking, Rulemaking 98-04-009, shall address the issue of what constitutes appropriate information for the utility to provide in the event of a violation of Affiliate Transaction Rule V.F.1 in widely distributed printed material.

This order is effective today.

Dated November 5, 1998, at San Francisco, California.

RICHARD A. BILAS
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
Commissioners

I dissent.

/s/ P. GREGORY CONLON
Commissioner

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner

APPENDIX A

LIST OF PUBLICATIONS
"HIGH VOLTAGE" ADVERTISEMENT

Periodical	Dates	Font Size	California Circulation of Periodical	Northern and Central California Circulation of Periodical
Business Week	May 18, 1998	4.5*	95,870	49,780
Kiplinger's Personal Finance	May, 1998	4.5*	34,030	15,620
Los Angeles Times	March 16, 1998	5.5	1,029,073	14,442
Los Angeles Times	March 23, 1998	6.5		
Money	May, 1998	4.5*	133,200	63,000
Nation's Business	May, 1998	4.5*	69,450	22,650
Orange County Register	March 16, 1998	5.5	358,010	183
Orange County Register	March 23, 1998	6.5		
San Francisco C[illegible]icle/Examiner	March 16, 1998	5.5	605,948	522,783
S[illegible] rancisco Chronicle/Examiner	March 23, 1998	6.5		
San Jose Mercury News	March 16, 1998	5.5	478,900	367,823
San Jose Mercury News	March 23, 1998	6.5		
Wall Street Journal, Northern California	March 23 & 27, 1998	6.5	113,567	113,567
Wall Street Journal, Southern California	March 23 & 30, 1998	6.5	161,153	0

In the following publications, the disclaimer appeared in larger type and in a horizontal position against a solid black field.

Periodical	Dates	Font Size	California Circulation of Periodical	Northern and Central California Circulation of Periodical
Time Top Management	April 13, 1998	8.75	91,535	41,543
US News and World Report Blue Chip	April 13, 1998	8.75	147,703	59,507

The size of the disclaimer is smaller in magazines than in newspapers, due to the higher print quality and smaller ad size.