

Decision 98-12-076 December 17, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joanne Carey,

Complainant,

vs.

Pacific Gas and Electric Company, a California
corporation, et al.,

Defendants.

ORIGINAL

Case 97-11-014

(Filed November 6, 1997)

Joanne Carey, representing herself, complainant.
Steven Wright, and Jovita P. Tomar, Attorney at Law,
Intervenor for Tenants Valenzuela, et al.
Barbara Clement, for defendant.
Eleanor M. Youngsmith, Attorney at Law, and
Julian Ajello, Consumer Services Division.

O P I N I O N

Summary

The complaint in this adjudicatory proceeding is granted in part. We find that Pacific Gas and Electric Company (PG&E) did not take sufficient actions in 1994 after an explosion caused by an untrained fumigation contractor employee occurred under PG&E's policy to allow fumigation contractors to terminate gas service. However, we do not conclude that the only reasonable action was to discontinue this policy, as complainant contends. At a minimum and without Commission prompting, PG&E should have investigated the adequacy of its agreement with the Pest Control Operators of California, Inc. (PCOC) as well as

the adequacy of PCOC and PG&E performance of their respective obligations under the agreement. PG&E did not take such action until 18 months after the accident in 1996 and after a subsequent Commission investigation of the accident recommending these actions. It was unreasonable to allow conditions to remain unchanged after the 1994 accident put the utility on notice that untrained, unlicensed fumigation employees were performing gas terminations in violation of the PG&E/PCOC agreement. Since PG&E took none of these actions in 1994, we conclude that continuing to delegate this act to outside contractors, which if improperly performed was hazardous, without review or monitoring the contractors' performance was unreasonable. We agree that PG&E may not escape by delegation to a third party the duty to provide safe gas service. However, this principle does not preclude PG&E from delegating to a third party certain tasks involved in providing service and does not preclude the Commission from considering unbundling of gas services in future gas restructuring proceedings, once SB 1602's time constraints have elapsed. Where such delegated tasks may endanger the public and third party safety as in this proceeding, PG&E has an obligation to train the third party to perform these tasks safely and monitor the performance of the task in order to comply with the requirement in Public Utilities Code (PU) Code § 451 to provide safe service and facilities.

Because PG&E reversed its disputed policy in March 1998 and filed an advice letter during this proceeding to amend this new policy, the issue of whether we should order PG&E to change the 1994 policy is moot. However, we order PG&E to supplement the recent Advice Letter (AL) 2089-G to describe all internal policies which accompanied the prior 1968 termination policy, including leak survey, lock-up procedure and outside venting of internal relief valve (IRV) regulators prior to fumigation.

We deny the requests of complainant and intervenor to impose a \$100 million penalty for unreasonably instituting and retaining a dangerous gas termination policy that was alleged to be motivated by cost savings and not safety concerns. The amount has no relationship to the unlawful acts we find and the amount is not supported by the record. However, we do conclude that a fine is warranted. Based upon the record, we assess a fine of \$800 per day for 1,221 days, or \$976,800.

Procedural Background

The complaint in this proceeding was filed on November 6, 1997. No prehearing conference (PHC) was held prior to the implementation of Senate Bill (SB) 960 rules January 1, 1998. Therefore, on February 3, 1998, pursuant to Rule 4(b)(2), it was ruled that an evidentiary hearing was to be held and that SB 960 rules of procedure would apply.

PHCs were held on March 31 and June 3, 1998 to discuss the issues, schedule and scope of this proceeding.

Steven Wright, representing a group of tenants, was permitted to intervene to supplement the record with relevant evidence obtained from his investigation and analysis of data obtained from PG&E during the numerous lawsuits filed as a result of the 1996 explosion and fire.

On July 22, 1998 in a Scoping Memo, Assigned Commissioner, Richard A. Bilas determined the presiding officer, category, scope of issues, and schedule for this proceeding. The issues to be resolved in this proceeding are:

1. Did PG&E commit unreasonable and/or unsafe acts in 1996 by allowing a pest control fumigation contractor to terminate gas service at complainant's home?
2. If an unsafe gas practice exists, should changes be made to PG&E's gas termination or other gas procedures? If so, what changes?

3. Should PG&E be fined \$100 million for any proven unsafe practices or imprudent gas termination or other gas procedures followed during the 1996 explosion?

Based upon the allegations and request for relief in the complaint, the Assigned Commissioner's Scoping Memo also ruled that parties might place relevant evidence in the record directing the Consumer Services Division (CSD) to consider two future proceedings, an Order Instituting Investigation (OII) into PG&E's gas termination and other gas practices, and an Order Instituting Rulemaking (OIR) into all gas utility procedures for terminating gas during fumigations.

An evidentiary hearing was held on August 11-13, 1998. Opening briefs were filed on September 2, 1998 by the complainant, defendant and intervenor, and the matter was considered submitted on September 9, 1998 upon the filing of closing briefs by the same parties.

Pursuant to SB 1322, judicial review of Commission decisions is governed by Part 1, Chapter 9, Article 3 of the PU Code. Thus, effective January 1, 1998 the appropriate court for judicial review is dependent on the nature of the proceeding. Since this complaint case does not challenge the reasonableness of rates or charges and this decision is issued in an adjudicatory proceeding as defined in § 1757.1, it is subject to judicial review in the court of appeal. (See PU Code § 1756(b).)

Request For Review

On October 15, 1998, pursuant to Rule 8.2(d), Commissioner Josiah L. Neepfer filed a request for review of the Presiding Officer's Decision to assess whether additional sanctions should be imposed in order to require a more rigorous fumigator training and monitoring program under PG&E's policy to allow fumigator shutoffs.

In addition, while Commissioner Neepser agreed that a penalty was appropriate in this proceeding, he believed that one based upon the avoided costs of the failure to investigate, monitor and provide training, rather than one based upon cost savings to implement the fumigation policy, would be more appropriate.

This Modified Presiding Officer's Decision adopts these recommended additional sanctions and clarifies the rationale for the penalty as weighing all criteria equally. Therefore, the penalty is unchanged.

Minor corrections of inadvertent errors are also made in this modified decision.

Appeals

PG&E and CSD filed timely appeals. PG&E's appeal raises the following alleged factual errors: (1) PG&E responded properly to the 1994 Pleasanton fire; (2) the fine is too high in light of PG&E corrective action in 1996, and (3) the fine is excessive. These arguments go to the sufficiency and weight of the evidence and are without merit.

PG&E's legal argument that violation of § 451 is not justification for a fine because this statute is vague is without merit. PG&E relies on dated criminal and inapplicable civil caselaw for this argument and ignores Commission cases which impose fines under the Commission's Rule 1, which also does not outline specific obligations or standards. (D.90-12-038 and D.96-09-083).

PG&E's legal argument that § 340 of the Code of Civil Procedure (CCP) bars the collection of penalties for violations that exceed one year prior to the enforcement action is also without merit. PG&E cites no caselaw in support of its conclusion. Even giving PG&E the benefit of the doubt, and assuming that CCP statutes of limitations are applicable to Commission proceedings, § 340 applies only if the penalty is mandatory. The one year statute of limitations does not

apply to discretionary penalties. (Prudential Home Mortgage v. Superior Court, 66 Cal.App.4th 1236, 1242 (1998); Jensen v. BMW of North America, Inc., 35 Cal.App.4th 112, 132-33 (1995); Menefee v. Ostawari, 228 Cal.App.3rd 239, 242-44 (1991); Holland v. Nelson, 5 Cal.App.3rd 308, 312-13 (1970).) PU Code § 2104 gives the Commission discretion "to set an appropriate penalty or to compromise an action for collection of the penalty." (D.94-04-057.)

In its Appeal, CSD alleges that error is made in factual conclusions reached regarding the Gas Regulator Replacement Program and the penalty imposed. These allegations go to the weight of the evidence and are without merit. However, certain minor clarifications in the facts are made.

In its Appeal, CSD alleges that legal error is made by relying on the case cited by PG&E for the proposition that PG&E may delegate its duty to provide safe service. (Lowenschuss v. Southern California Gas Company (1992) 11 Cal.App. 4th 496.) CSD provides two cases which are more comparable to the facts in this case. (Felmlee v. Falcon Cable TV (1995) 36 Cal.App 4th 1032 and Snyder v. Southern California Edison Co., (1955) 44 Cal.2d 793.) Under the more comparable caselaw, it is clear that the duty to provide safe service may not be delegated. Therefore, the language regarding the delegation of duty to provide safe service is clarified to distinguish the nondelegable duty to provide safe service from the delegable tasks of terminating and restoring gas service.

We also clarify language regarding the discussion of the Commission's jurisdiction over Federal and State Pipeline regulations.

The Complaint

On January 29, 1996 at 10:48 p.m., PG&E received a service call regarding an odor of gas near 2868 Homestead Road in Santa Clara. PG&E immediately responded, evacuating the area. Less than an hour later, at 11:24 p.m., the apartment building exploded and burned. Because of the timely evacuation, no

one was killed or seriously injured. However, complainant's apartment complex was destroyed and surrounding property was damaged.

The apartment complex was being fumigated by a PCOC contractor and the buildings were tented. The fumigation company supervisor admitted that although trained to do so, he did not personally turn off service or inspect the termination. Service was terminated by an unlicensed, untrained, new employee. Instead of turning off gas service at the common main riser valve, the employee shutoff each of 15 individual gas meters.

PG&E admits that this alone would not cause an explosion. Upon inspection of the site after the accident, a PG&E investigator discovered that the non-IRV regulator attached to the main riser valve had leaked gas into the tent. After later testing of the valve, PG&E concluded that the valve had failed to lock-up to completely shut off gas flow, and that gas pressure built in the valve until the internal diaphragm tore in two places. Thus, PG&E estimated that a slow creep of gas escaped from the valve into the fumigation tent for a period of more than 10 hours.

Inspection of the valve revealed a disk which, under existing PG&E maintenance policy, had been flipped to the other side. This practice was authorized when PG&E's maintenance crew did not have a new disk on hand to replace a worn one. Also, based upon incomplete records, PG&E's best estimate was that the faulty regulator was in service 30+ years, but had no recommended service life or replacement time.

Several civil suits for personal injury and property damage ensued. The complainant and tenant intervenors were all plaintiffs in these suits. Prior to trial in complainant's civil suit, complainant filed the complaint in this proceeding. However, her civil suit was settled before a hearing in this proceeding.

In this proceeding, complainant alleges that PG&E's policy allowing a fumigator to terminate gas service caused the Homestead accident. She requests that PG&E be immediately ordered to cease this practice, fearing that until the policy is changed, other persons will be injured in similar accidents.

Complainant attached to her complaint a copy of the 1996 Commission staff report and letter correcting the report, both of which were issued after its investigation of the accident at complainant's home. The report concluded that lack of training caused the fumigator to make the hazardous mistake. Staff recommended that PG&E modify its contract with PCOC to add provisions to prevent termination of service if the PCOC employee had not had at least one training session with PG&E in the prior two years or if the employee had a gas-related accident due to lack of training. Staff later corrected its report to withdraw an allegation that PG&E violated an internal maintenance policy to replace regulators such as the non-IRV regulator that failed in 1996.

The other tenants of the same apartment complex on Homestead who intervened in this proceeding allege that PG&E fraudulently terminated the Gas Regulator Replacement Program in 1988 and that, had this program continued, the faulty regulator that malfunctioned in 1996 would not have been in service.

PG&E's Answer To The Complaint

PG&E alleges that a 1994 PG&E/PCOC agreement allowing fumigation contractors to terminate gas service during fumigation brought its fumigation termination practices into alignment with a statewide practice. PG&E contends that the 1994 Pleasanton accident (described below) was caused by an unsupervised, unlicensed fumigator who broke the main gas turn-off valve. PG&E contends that the 1996 Homestead accident was caused by an unsupervised, unlicensed fumigator who did not turn off the gas at the main gas valve as PG&E's training requires. PG&E describes the 1996 Commission

investigation which recommended modifying its letter of agreement by adding provisions to prevent fumigators from terminating gas if they had no training or had a gas-related accident due to no training. PG&E admitted that there have been a number of follow-up steps since the 1996 accident, including a proposal to the Structural Pest Control Board to sponsor legislation or adopt rules and procedures to prohibit fumigation personnel from performing fumigation without proper training, as well as the filing of a complaint against the 1996 fumigator to revoke company registration and institute sanctions against the responsible individuals.

History of The Fumigation Lock Policy

The evidence in this proceeding shows that between 1968 and 1994, PG&E did not allow fumigation contractors to terminate gas service. This prohibition stemmed from an accident in 1968 involving the explosion at a house undergoing fumigation.

As a result of this 1968 accident, a total of seven lawsuits were filed against PG&E and the City of San Jose claiming personal injury and property damage.

Institution of Fumigation Lock Policy

After this accident in 1968, PG&E instituted a policy the parties in this proceeding describe as "conservative," whereby only PG&E service representatives could terminate and restore gas service during fumigations. In addition, PG&E instituted additional internal safety measures prior to terminating service at a fumigation site, including a leak survey, locking the main riser valve, and venting to outside the tent any internal relief valve.

Impact of Policy 1968-1994

This policy stayed in effect during 1968-1994. While this policy was in effect, there were no gas explosions. In fact, there were only three gas explosions during 1968-1996 in California and the three surrounding states. Two of these accidents occurred after fumigators were allowed to terminate gas service and all of the accidents occurred in PG&E's service territory.

Review of 1968 Fumigation Lock Policy

During 1992-1994, PCOC members periodically complained to PG&E about having to wait for a PG&E serviceman before they could perform fumigation. PCOC pointed out that its members often terminated or restored service instead of waiting for PG&E personnel. PG&E also required a waiting period ranging from 24 hours up to eight days before restoration of service, the length of this period being determined by the fumigation chemical used. This PCOC dissatisfaction with the termination policy led to numerous PG&E/PCOC discussions to change the Fumigation Lock Policy. PCOC representatives discussed the change in policy with its Board of Directors and Fumigation and Industry Standards Committees.

In addition, in 1994, a PG&E employee through an Ideas In Action Program recommended that the Fumigation Lock Policy be reversed to allow fumigation contractors to turn off and restore gas service. This suggestion was initially rejected. When a second PG&E employee made the same recommendation, the first suggestion was reevaluated, adopted and implemented. After implementation, as promised in the program, the first employee was issued a \$25,000 award based upon the estimated annual savings of \$264,400 by terminating the policy.

Reversal of 1968 Fumigation Lock Policy

In 1994 after its extensive discussion with PCOC, PG&E proposed entering into a contract whereby PCOC members would be trained by PG&E to terminate and restore gas service during fumigations. PG&E would standby to provide assistance for problem shutoffs upon request. PCOC's members unanimously agreed that the contract should be executed and the letter of agreement establishing the new policy was signed in August 1994, to be effective October 1, 1994.

Agreement Terms

This is the content of the letter of agreement:

"For the past few months PG&E and the Pest Control Operators of California, Inc. have been meeting to discuss current fumigation procedures within the PG&E service area. Most pesticide operators have expressed a desire that PG&E align its procedures with those of other major California utilities. Specifically, operators have requested they be allowed to terminate and re-establish service without PG&E's involvement to avoid scheduling concerns and/or having their customers vacate their premises for an unnecessary length of time.

"We are pleased to announce that an agreement has been made between the Pest Control Operators of California, Inc. and PG&E to better serve our mutual customers. Attached are the specifics of the new procedures and recommendations for terminating service. PG&E will still be available to respond if difficulties are encountered.

"We are certain that you will find this agreement of mutual benefit to the utility, pesticide operators, and our customers." (Exh. 22.)

The first attachment to the Letter of Agreement was a letter to pest control operators giving more specific instructions regarding the termination procedures within PG&E's service area:

"Effective October 1, 1994, PG&E will no longer terminate and re-establish gas service on a routine basis for the purpose of fumigating. This modification will allow pesticide operators to streamline their fumigation process and eliminate scheduling delays.

"Current pesticide procedures already require that all pilot light and main burner flames be extinguished prior to fumigating. Therefore, it is recommended that the attached procedures be utilized to ensure all flames are extinguished and that gas service to the structure has been terminated. These procedures are currently being utilized by operators in several areas outside of the PG&E territory. Upon request, PG&E will be available to provide local training to operators on terminating gas service.

"While these changes are of mutual benefit, the safety of our customers and our employees is still the number one priority of PG&E. To maintain the highest level of safety and service, PG&E will be available to assist operators upon request.

"If the odor of gas is detected by the operator or the customer, fumigation procedures should be halted and PG&E notified immediately. We will make this service request a top priority and respond as soon as possible.

"PG&E will also respond to requests for terminating and establishing service when difficulties are encountered. The structure must be properly ventilated, tested for fumigants, and posted prior to our serviceman entering the premises to re-establish service..."
(Exh. 23, Fumigation Procedures Within PG&E Service Area.)

The second attachment to the Letter of Agreement contained a diagram of a gas meter main valve with the following written shut-off and restoration of service procedures:

"(When the valve is parallel to the flow of the pipe, the valve is open and gas is flowing. When the valve is perpendicular to the pipe, the valve is closed and gas flow should be stopped.)"

"PRIOR TO FUMIGATION:

The gas meter main valve shall be shut down (turned off) by the licensee. Turn the gas meter main valve off by turning the valve perpendicular to the flow of the pipe. (See diagram above.) Bleed the line by pulling the plug. Verify that the gas line has been bled by attempting to ignite one pilot light inside, and visually inspecting ALL possible sources of pilot light including furnaces, hot water heaters, gas ranges, ovens, broilers, gas refrigerators, etc.

"If there are problems (such as evidence of gas leaks) that cannot be readily solved, call PG&E or your local gas company.

"AFTER FUMIGATION

After fumigation, the gas meter main valve will be turned on by the licensee. After turning the gas meter main valve on, enter structure and re-light all pilot lights." (Exh. 24, Gas Meter Main Valve Procedures.)

Events Subsequent To PG&E/PCOC Agreement

One of the main issues in this complaint is whether an accident in 1994 and other information PG&E received in 1994 placed PG&E on notice that dangerous conditions were occurring under the 1994 policy warranting its abandonment. Complainant and intervenor argue that this is the case.

PG&E disagrees and argues that the following events which occurred in 1994 did not warrant a policy reversal.

Knigh Fumigation Company Complaints

After this policy change was effective in 1994, Knight Fumigation Company began and continued to complain to PCOC that the members had no notice or input into the policy before it was implemented and that PG&E did not respond to fumigator problem calls as promised in the contract.

PCOC's director, Eric Paulsen, responded in writing outlining the lengthy history of negotiations during 1992-1994 before the contract was executed. He

indicated that no PCOC member voiced any objections at any PCOC meeting where the contract and progress of negotiations were discussed.

Knight's complaints, letters from other members with similar complaints, and numerous complaining telephone calls were subsequently received.

1994 Pleasanton Explosion

On November 12, 1994, an employee of Mission City Fumigation Company entered the crawlspace under a residence in Pleasanton to shut off gas prior to fumigation. The untrained, unlicensed, new fumigation employee mistakenly turned the nut that held the shut off valve in place instead of the "stop" on the valve itself. By doing so, he broke the shank of the nut which caused the "core" to drop out of the valve. Natural gas at 50 pounds per square inch escaped into the crawlspace. The gas exploded destroying the residence and injuring two fumigation company employees.

PG&E Internal Observations

In 1994 PG&E appointed an employee task force to determine how many non-IRV regulators remained to be replaced after termination in 1988 of the 1984 Gas Regulator Replacement Program. On February 1, 1995, in response to an inquiry from a PG&E employee, another employee responded in an e-mail note as follows:

"Heard you were looking for K-reg information. Very timely as we have been experiencing an (sic) number of overpressuring incidents in Mission Division. None have been serious, to date, but I am concerned that its going to get away from us soon."

Complainant described one overpressure incident in the Mission District in 1995 where a fire and explosion were averted.

Was Retaining the PCOC Termination Policy After 1994-1995 Events Reasonable?

Complainant argues that PG&E exhibited a total disregard for public safety by implementing the fumigator termination policy and by retaining it after a fumigator-caused accident shortly after the PCOC agreement was effective.

The PG&E/PCOC contract dictated that fumigation employees who terminated and restored gas service during fumigations would follow PG&E instructions, call for problem shutoffs and be trained by PG&E upon request to perform this task. It was understood by the parties that employees who terminated service would be licensed by the California Pest Control Board. PG&E and PCOC admit that the fumigation employee terminating gas service in 1994 was not trained, experienced or licensed. We must question whether the fumigation employee read these instructions and, if so, whether they were adequate. We also question whether or not he called PG&E for assistance. It was reasonable after this accident also to inquire whether training of fumigation employees should be mandatory, with penalties for noncompliance, to assure safe operations. It was unreasonable for PG&E not to investigate these matters.

PG&E testified that after "discussions" with PCOC, it concluded that such an incident would not recur and the contract as it existed should remain in place. However, we have no evidence that PG&E performed the obviously reasonable steps in 1994 of investigating whether its instructions needed modifying or mandatory training should be required. At a minimum, inexperienced employees should have been trained and the PGE/PCOC contract should have reflected this requirement. In fact, in the Commission 1996 staff report, staff ultimately made the same reasonable recommendations, with an amendment of the contract to prevent gas termination by a fumigation employee with no training or a history of accidents.

While we find arguments unpersuasive that only PG&E can perform gas terminations during fumigation and that the 1994 policy was unreasonable, the initial PG&E/PCOC agreement assumed full PCOC compliance. However, shortly after the policy was implemented, fumigation employees were injured by acts of an unlicensed fumigation employee. The future personal injury of fumigation employees, customers or bystanders was a serious possibility if another accident occurred. A full investigation of this policy after this 1994 accident was warranted.

Other Complainant Arguments

Complainant argues that PG&E has violated federal and state pipeline regulations without, as PG&E points out, citing the regulations in question. Complainant's argument is vague without citing the regulations it contends are violated. Therefore, we can reach no conclusion on this issue.

Complainant argues that there were no accidents when the Fumigation Lock Policy was in effect and under this policy the 1996 accident would not have occurred. This is speculation. The failure to lock-up could have happened and been unnoticed even if a PG&E employee terminated service.

While we must agree that safety is of high priority, we cannot disallow management from considering cost options in establishing safe policy.

Complainant argues that PG&E had notice of the regulator malfunction before 1996 because it had flipped the disk inside the regulator. However, PG&E points out that although the disk was flipped in the faulty valve, the flipping of the disk is not a conclusive indication that it had malfunctioned before that time. It means a serviceman determined that the equipment needed replacing and did not have a spare part to do so. Nor is there evidence of the date that the disk was flipped or that it was during a period when PG&E's policy was to replace the regulator. We agree that it is speculation to presume PG&E had notice of the

malfunction in the regulator. We also agree that, contrary to complainant's arguments and based upon numerous letters and documents, the 1 ½ inch regulator at her residence would not have been replaced under the Gas Regulator Replacement Program, which replaced only ¾ inch regulators.

Complainant also alleges that to terminate the Gas Regulator Replacement Program or retain the PG&E/PCOC agreement strictly due to cost savings is somehow a safety violation. While we must agree that safety is of high priority, we cannot disallow management to consider cost options in establishing safe policy. Moreover, there is inadequate evidence to show that cost was the only factor considered in executing the PG&E/PCOC agreement. The agreement itself describes the dissatisfaction of the fumigation industry with the 1968 policy and reasons for this attitude. At best, we can conclude that PG&E had the difficult job of balancing all of these interests.

Complainant argues that prior service calls warranted that the regulator at her residence be changed. PG&E's records of service calls do not support this contention. At no time prior to the 1996 accident was the main riser valve turned, which would activate PG&E's standard practice of changing the regulator.

PG&E Arguments

As noted above, it is speculation, as PG&E argues in its brief, that the 1994 accident would not have happened if PG&E personnel had performed the service termination. Obviously, PG&E personnel are adequately trained and experienced to identify the proper shutoff valve and avoid breaking it during the shutoff. But, even if a trained PG&E serviceman had broken the valve, he or she would arguably be or have access to those who were better equipped to immediately handle this emergency than an untrained, inexperienced fumigation employee. Assuring the training of fumigation employees in 1994 may also have avoided the 1996 accident.

PG&E also argues that this is only *one* accident in thousands of service terminations. The problem was that this fumigation employee did not have the benefit of *any* experience or training and this accident may have easily been avoided by training or the assistance of experienced PG&E personnel if a problem at the site had been reported to PG&E. After November 13, 1994, it was clear that the fumigation contract terms or lack of compliance with them did not adequately assure public safety.

PG&E also contends that it believed the policy would be adequate because it was successfully implemented by other utilities in the state. However, we cannot agree with this conclusion without an analysis to ascertain whether PG&E and the other utilities have the same agreements or the same facilities and equipment of comparable age and condition, or similar maintenance programs. Without such comparisons, we cannot be sure that PG&E will succeed in providing safe gas service using the same policy as other utilities.

Intervenor Arguments

Intervenors argue that PG&E may not delegate its duty to provide safe gas service required by PU Code § 451. We agree that the utility may not delegate this duty, based upon caselaw.¹ However, these cases do not prohibit delegation of acts involved in providing service, such as termination and restoration of service, as in this proceeding. The utility retains the obligation to provide safe service and facilities even when it delegates the act of termination and restoration of service. We stress that where such delegation involves acts which, if performed improperly, directly endanger the public, the utility must assure that

¹ Felmler v. Falcon Cable T.V. (1995) 36 Cal.App.4th 1032 and Snyder v. Southern California Edison Co. (1955) 44 Cal.2d 793.

adequate measures are taken to protect this most important interest, such as specific contract terms, monitoring, supervision and training.

Conclusion

In summary, we conclude that PG&E acted unreasonably after the 1994 accident which created unsafe conditions in violation of § 451.

Should PG&E Be Ordered To Reverse Its PCOC Agreement?

Complainant requests that PG&E be ordered to immediately halt the practice of allowing fumigator termination of gas service. However, on March 19, 1998, PG&E changed its fumigation termination policy to perform service terminations solely by PG&E personnel. During this proceeding, in June 1998, PG&E filed an Advice Letter (AL 2089-G) and in September 1998 filed a supplement to it, requesting further revisions to this policy. However, PG&E has not indicated whether it also reinstated the practices of performing the leak survey, venting and lock procedures that accompanied this policy in 1968 when it was last in effect. Carey, the complainant in this proceeding, protested the advice letter, suggesting additional language that refers to the additional safety measures that accompanied the 1968 policy.

Supplement To AL 2089-G

We take official notice that AL 2089- G, with its September 1998 supplement, is still pending. We will order PG&E to further supplement this advice letter to describe any additional practices instituted when the fumigation policy was changed in 1998, if any, and to discuss whether the additional internal safety practices in 1968 of conducting a leak survey, and performing venting and lock procedures should also be reinstated, if they have not been already.

Should A Penalty For Unreasonable Practices Be Imposed?

While we conclude that PG&E was unreasonable in not revising its agreement after the 1994 accident, we do not conclude that reversing the policy in 1994, as complainant contends, was the only reasonable action to take at that time. This would not have assured that no accidents would occur in 1996 because we recognize that the 1996 accident had a second independent cause, a faulty regulator. The valve failure may have occurred even if PG&E personnel properly terminated service instead of the fumigation company employee. And, as PG&E points out, if it terminated service under the applicable standard practice to change the valve, it likely would have been changed after the fumigation and before restoration of service.

The \$100 million requested fine is based upon the cost savings of allowing fumigators to terminate service and the estimated cost of the Gas Regulator Replacement Program for a period of seven years. However, we do not herein conclude that the failure or termination of this program caused or contributed to the violations we find, and the record indicates PG&E saved \$264,400 per year by changing the fumigation policy. Therefore, a \$100 million fine has little relationship to the conclusion we reach and the magnitude of the amount is not supported by the record.

We do conclude, however, that a penalty is warranted for the unreasonable risk and unsafe service PG&E subjected the public to during the period after the 1994 accident until the policy was changed this year. The purpose of a penalty is to deter such wrongful behavior in the future.

The Commission considers numerous factors in deciding the amount of a penalty, such as the sophistication, experience, and size of the utility (Hale v. Morgan (1978) 22 C3d 388, 405); the number of victims and economic benefit received from the unlawful acts (People v. Toomey (1985) 157 CA3d 1, Kwik-

Communications (1994) 53 CPUC2d 145; Re PagePrompt USA (1994) 53 CPUC2d 135); and the continuing nature of the offense (Kwik-Communications, supra.) All of these factors are relevant in this proceeding and are used to determine the amount of a penalty.

PG&E is certainly a large, sophisticated utility with at least 30 years' experience in termination of gas service during fumigations, according to the record in this proceeding, and many more years of experience in gas terminations, in general. Although PG&E witnesses considered gas termination a simple process, they did not deny that termination of gas service must be properly performed during fumigations and any leaking gas can cause an explosion or fire creating personal injury and property damage. Thus, PG&E should have known that in implementing a fumigation termination policy allowing non-PG&E employees to terminate service, there was a high risk of harm to the public should gas leaks occur during this process. Because of the known high risk of immeasurable harm if unlawful acts occurred, the amount of a penalty cannot be the minimum amount. It must be comparable with the risk created by the unlawful acts.

While it was not necessarily the sole motivating reason for its action, PG&E did receive economic benefit from changing its fumigation termination policy to allow non-employee termination. A PG&E employee calculates the annual savings of making this change to be roughly \$264,400 per year. This amount was verified by PG&E management as being a reasonable estimate of cost savings.

We believe that any maximum fine is mitigated by the fact that PG&E did eventually change its fumigation termination policy this year without Commission order, terminating the greater risk of public harm. However, the policy was in effect after the 1994 accident from November 13, 1994 until

March 19, 1998, a period of 1,221 days. The penalty should be assessed for the period of unsafe services.

PU Code §§ 2107 and 2108 give the Commission discretion in deciding a penalty within the range of \$500 to \$20,000 per day per offense. We choose to exercise this discretion on a case-by-case basis considering the totality of circumstances presented by the facts of each case. In this proceeding, we weigh the following factors in deriving the amount of the penalty: the length of experience PG&E has with gas termination and termination by fumigation contractors; the risk of harm to the public by allowing fumigators to terminate gas service; the cause of two accidents being inadequate knowledge of termination in violation of the PG&E/PCOC agreement; the existence of some economic benefit from continuing the fumigation policy in effect in 1996; and, the fact that the policy continued for nearly four years after a serious accident in which two persons were injured under the policy. Balancing these factors with the purpose of deterring any such future unlawful conduct, we conclude that a fine of \$800 per day for 1,221 days is reasonable.

Future Proceedings

During the Gas Regulator Replacement Program during 1984-1988, PG&E aggressively replaced ¾ inch non-IRV gas regulators with those with internal relief. The seven-year program was ended after five years and replaced by a standard maintenance practice of replacing any size non-IRV gas regulator with an IRV gas regulator whenever it was necessary to turn the main service valve at any customer's premise. Complainant and intervenor argue that PG&E misled and, in fact, lied to the Commission in order to terminate this program.

In the Scoping Memo issued prior to the hearing, we ruled that the matter of fraudulent conduct and setting rules for all utilities to follow during fumigation were outside the scope of the complaint proceeding and more

appropriately decided in future proceedings, should staff at a later date recommend the institution of such proceedings. During the hearing, while we denied PG&E's motion to strike testimony of unethical conduct and misrepresentation to terminate the Gas Regulator Replacement Program, we admitted such testimony for the limited purpose of permitting the parties to complete the evidence of their position on the allowable issues and to develop a record on the need for a future investigation into these allegations. Such relevant evidence was allowed under the Assigned Commissioner Scoping Memo.

Now that we have heard this evidence and admitted certain relevant documents, the staff will be able to review this and any other evidence to determine whether an investigation of these and further issues should be opened. The mailing list of any proposed OII or OIR will include the name and address of the complainant and intervenor in this proceeding.

Findings of Fact

1. Complainant alleges that defendant violated its obligation to provide safe facilities and services by instituting a policy in 1994 whereby fumigation contractors were allowed to terminate and restore gas service during fumigation procedures.

2. Complainant requests that a fine of \$100 million be imposed for PG&E's unsafe conditions. This fine is based upon the estimated cost of PG&E's 1984-1988 Gas Regulator Replacement Program and savings in implementing a fumigation policy whereby fumigation employees terminate gas service during fumigations.

3. From 1968 to 1994 PG&E terminated and restored gas service during fumigations. In any fumigation during this period, PG&E also performed a leak survey, locked the gas valve and vented internal relief valves to a space outside the fumigation tent.

4. From 1992-1994 PG&E discussed a change in the fumigation termination policy due to dissatisfaction of members of the PCOC with waiting for PG&E to terminate and restore service. Members indicated they often performed these services rather than waiting. They also complained about PG&E's policy requiring them to wait before restoring service for a period of from 24 hours to eight days depending on the chemical used.

5. In August 1994, PG&E entered into an agreement with the PCOC which was effective October 1, 1994.

6. Under the terms of a PG&E/PCOC Letter of Agreement, fumigation employees were to follow PG&E instructions in performing terminations, and might call PG&E for training and help with specific problems during terminations. Any fumigation employee terminating gas service during fumigation was required to be licensed by the California Branch of Pest Control.

7. PG&E did not engage in unreasonable, unsafe acts by executing the 1994 PG&E/PCOC agreement.

8. PG&E awarded \$25,000 to one of its employees who suggested the resultant 1994 change in policy after the policy was implemented. The change in policy would save PG&E approximately \$264,400 per year.

9. After the 1994 agreement was executed, Knight Fumigation Company complained that the agreement was not properly presented to PCOC members and that PG&E often did not respond to problem calls.

10. On November 13, 1994, a house in Pleasanton exploded after an untrained and unlicensed fumigation employee broke the nut on the regulator causing it to rupture. The cause of this accident was fumigator employee error in breaking the valve.

11. After the 1994 accident, PG&E had discussions with PCOC regarding the untrained, unlicensed employee whose error caused the Pleasanton accident and personal injury.

12. PG&E took no measures after the 1994 accident to investigate fumigator employees or PG&E's compliance with the 1994 PG&E/PCOC Letter of Agreement or explore whether PG&E termination instructions needed revisions or that training of fumigation employees should be required.

13. At least one recorded overpressure problem occurred in the Mission Division in 1995 and was discovered in time to avert a fire or explosion.

14. In 1995, a PG&E employee indicated in an e-mail note concern for a number of overpressure incidents in this division and that they may become uncontrollable soon.

15. PG&E acted unreasonably and created hazardous conditions commencing November 14, 1994 after the 1994 accident of which it had knowledge by not fully reviewing its fumigation termination policy, to assure compliance by PCOC with all terms, assuring that PG&E was complying with its obligations under the agreement and investigating additional terms, and revision of existing terms or PG&E's termination instructions. These hazardous conditions continued for 1,221 days, or until the policy was changed March 19, 1998.

16. Service at complainant's building was terminated on January 29, 1996 by an untrained and unlicensed fumigation employee and the supervisor did not check the service termination before fumigation was performed.

17. The fumigation employee terminated gas service at each individual meter instead of the main riser valve on January 29, 1996.

18. On January 29, 1996, after gas service was terminated at the individual meters that morning, the main regulator valve failed to lock-up and completely shutoff the flow of gas. Subsequently, gas escaped inside the valve until the

diaphragm separating the two chambers tore in two places releasing gas under pressure. On January 29, 1996 at 11:24 p.m. complainant's apartment building in Santa Clara exploded and burned during fumigation procedures.

19. In 1996, terminating service at the individual meters was a fumigation contractor function.

20. After the 1996 accident, PG&E's contractors inspected the valve and discovered a flipped disk and two tears in the diaphragm. It was the maintenance practice for PG&E servicemen to flip the disk inside the regulator to the smooth side if the surface in contact with the orifice showed signs of wear. The smooth surface of a disk provides greater likelihood that the regulator valve will lock as intended.

21. One cause of the explosion on January 29, 1996 was the failure of the regulator to lock-up to cease all flow of gas.

22. PG&E's Gas Regulator Replacement Program replaced only $\frac{3}{4}$ inch regulators; the regulator which malfunctioned in 1996 was 1 $\frac{1}{2}$ inches.

23. PG&E's standard maintenance practice after termination of the Gas Regulator Replacement Program was to replace any valve if the main riser valve was turned.

24. PG&E records do not indicate that service calls to complainant's address prior to 1996 would require replacement of the main riser valve.

25. It is speculation to presume the faulty valve which caused the 1996 accident would have been replaced if PG&E continued its Gas Regulator Replacement Program or that the 1996 accident would not have occurred if PG&E employees performed the gas termination.

26. After the 1996 accident PG&E filed an enforcement action at the California Pest Control Board against the fumigation contractor whose company terminated service in 1996 and the responsible individuals to decertify the company and the individuals.

27. PG&E's unsafe practices ceased when it reversed its policy on March 19, 1998 to provide that only PG&E employees may terminate gas service during fumigations. It is unclear whether PG&E now conducts a leak survey or vents IRV regulators to the outside prior to the tenting for fumigation.

28. It is reasonable to impose a penalty of \$800 for each of the 1,221 days that PG&E engaged in unsafe practices and to require that PG&E assure safe procedures are followed if it returns to the policy in the future of allowing fumigator termination and restoration of service.

Conclusions of Law

1. This is a complaint case not challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1.

2. PG&E engaged in unreasonable practices after the 1994 Pleasanton accident by not investigating the compliance of PCOC and PG&E with the terms of the Letter of Agreement executed by these parties and by failing to revise this agreement. These unreasonable acts resulted in the existence of unsafe service from November 14, 1994 until March 19, 1998, in violation of PU Code § 451.

3. A penalty authorized under PU Code §§ 2107 and 2108 in the amount of \$800 per day should be imposed upon PG&E for its continuing unsafe service from November 14, 1994 to March 19, 1998 (1,221 days), the total payable within 12 months, and 7% interest per annum 12 months after the effective date of this order.

4. PG&E has no duty to terminate gas services for fumigators. Should PG&E reverse its current policy to again allow fumigation contractors to terminate gas service during fumigation, PG&E should assure that fumigators comply with terms of any agreement and that any third parties terminating service adhere to public safety standards.

O R D E R

IT IS ORDERED that:

1. The complaint in this proceeding is granted in part. We conclude that Pacific Gas and Electric Company (PG&E) engaged in unsafe practices which violated Public Utilities Code § 451 for a period of 1,221 days by not revising its fumigation termination policy in 1994 after adverse events affecting public safety.

2. Should PG&E reverse its current policy to again allow fumigation contractors to terminate gas service during fumigation, PG&E shall assure that fumigators comply with terms of any agreement and that any third parties terminating service adhere to public safety standards.

3. A penalty in the amount of \$976,800 is assessed against PG&E for continuing unsafe practices for 1,221 days.

4. PG&E is ordered to pay to the State Treasury of California the amount of \$976,800. The penalty herein assessed is payable to the credit of the General Fund within 12 months after the effective date of this order, plus interest at 7% per annum after the effective date of this order.

5. The Consumer Services Division (CSD) will advise the Commission if an order instituting an investigation is needed to determine whether PG&E engaged in fraudulent conduct to terminate its Gas Regulator Replacement Program and whether this program should be continued. CSD will also determine whether a

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rulemaking proceeding to establish gas termination policies during fumigation for all gas utilities should be instituted. CSD will make any recommendations to the Commission regarding these matters under the normal procedures. Should CSD recommend the institution of future proceedings, CSD will place the complainant and intervenor in this proceeding on the mailing list of any Commission order instituting such proceedings.

6. This proceeding is closed.

This order is effective today.

Dated December 17, 1998, at San Francisco, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners