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**MAIL DATE**
**4/5/99**

Decision 99-04-029 April 1, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Joanne Carey,<br>Complainant,<br><br>vs.<br><br>Pacific Gas and Electric Company,<br>a California Corporation, et al.,<br><br>Defendants. | Case 97-11-014<br>(Filed November 6, 1997) |

# ORDER MODIFYING AND DENYING REHEARING OF DECISION 98-12-076

## I. SUMMARY

Decision (D.) 98-12-076 arises from an explosion and fire which occurred at a multi-unit apartment complex, located at 2862 Homestead Road, Santa Clara. In D. 98-12-076, the Commission fined Pacific Gas & Electric Company (PG&E) $976,800 pursuant to Pub. Util. Code § 2107 and 2108. The Commission found that PG&E had violated Pub. Util. Code § 451, which requires every utility to "furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities . . . as are necessary" to the promote the public safety.

## II. BACKGROUND

As more fully set forth in D.98-12-076, the complainant is a tenant at the apartment complex. The apartment complex received gas service from PG&E. On January 26, 1996, PG&E received a service call concerning a gas odor near the apartment complex. The apartment complex was undergoing a tented fumigation, and the fumigation contractor had terminated the gas service. PG&E immediately evacuated the area. Less than one hour later, the apartment complex

exploded and burned. There were no fatalities or serious injuries, but the apartment complex was destroyed and surrounding property damaged.

The fumigator was allowed to terminate the gas service pursuant to an August 1994 Agreement between PG&E and the Pest Control Operators of California (PCOC). Under the terms of the Agreement, PCOC members were to be trained by PG&E to terminate and reestablish gas service for fumigations. PG&E also agreed to provide assistance to fumigators upon request. The Agreement rescinded a formal policy PG&E had instituted in 1968 which prohibited fumigators from terminating or reestablishing gas service. That policy (known as the Fumigation Lock Policy) also required PG&E service personnel to follow various safety protocols, including turning off the meters before fumigation, checking for gas leaks, ensuring gas is vented outside the fumigation tent and locking the main riser valve on the meter. PG&E had formulated its Fumigation Lock Policy in response to a 1968 gas explosion during a tented fumigation.[1] In October 1994, PG&E formally rescinded its Fumigation Lock Policy and safety protocols to permit fumigators to terminate and reestablish gas service. One month later, on November 12, 1994, a fire occurred at a Pleasanton residence undergoing a tented fumigation. Eighteen months later, the subject 1996 Homestead fire occurred.

On November 6, 1997, the instant Complaint was filed. PG&E thereafter voluntarily reinstated its Fumigation Lock Policy on March 18, 1998. An evidentiary hearing took place on August 11-13, 1998. The Presiding Officer's Decision was issued on September 22, 1998. Both CSD and PG&E filed appeals. Commissioner Neeper also filed a request for review. On December 17, 1998, the Commission issued Decision (D.) 98-12-076. The Commission concluded that PG&E had acted unreasonably following the 1994 Pleasanton fire.

[1] Over the next 26 years, from 1968 until November 1994, there were no further explosions during tented fumigations.

We found that PG&E had failed to investigate compliance with the Agreement and to modify the Agreement to require gas shut-off training for fumigators, thereby violating Pub. Util. Code § 451. We determined that "[i]t 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." (D.98-12-076, p. 2.) Pursuant to Pub. Util. Code § 2107 and 2108, we fined PG&E $800 per day for 1,221 days or $976,800 total. The fine covered the time from the November 12, 1994 Pleasanton fire until PG&E reinstated its Fumigation Lock Policy on March 18, 1998.

An Application for Rehearing of D.98-12-076 was timely filed by PG&E on January 21, 1999. PG&E alleges the following legal errors: (1) there is no evidence to support the Commission's conclusion that PG&E acted unreasonably following the 1994 Pleasanton fire; (2) there is no evidence that PG&E caused the 1996 Homestead fire; (3) the Commission erred in imposing a fine under Pub. Util. Code § 451; (4) the Commission erred in imposing a nondelegable duty under Pub. Util. Code § 451; and (5) the Commission erred by not applying a one-year statute of limitations in the fine calculation. A Response in Opposition to the Application was filed by both the complainant, Joanne Carey, and the Consumer Services Division (CSD).

## III. DISCUSSION

We have reviewed the arguments raised by PG&E in its Application for Rehearing of D.98-12-076 as well as the arguments in the Responses in Opposition filed by Ms. Carey and CSD. As discussed below, we modify D.98-12-076 to eliminate ambiguities in the Decision. We clarify Conclusion of Law No. 4 and cite additional violations which provide further support for the imposition of the fine. We conclude that sufficient grounds for rehearing have not

been shown. PG&E has failed to demonstrate legal error, as required by Pub. Util. Code § 1732.

First, PG&E alleges that there is no credible evidence to support the Commission's conclusion that PG&E acted unreasonably following the 1994 Pleasanton fire. PG&E claims that the Agreement was in compliance with the gas and fumigation industry standards that a licensed fumigator terminate and reestablish gas service. PG&E adds that both it and the PCOC investigated the 1994 Pleasanton fire and determined it was an "aberration." The PG&E/PCOC investigation concluded that the fire resulted from a faulty gas valve. Moreover, the PCOC concluded that the 1994 Pleasanton fire would have occurred regardless of whether PG&E or a licensed fumigator terminated the gas service. PG&E emphasizes that the Commission itself did not recommend changes to the Agreement until after the Homestead fire in June 1996. Even then, the Commission did not recommend that PG&E take back the fumigation gas termination service work.

PG&E also asserts that it not only complied with but exceeded the Commission's recommendations. Following the 1996 fire, PG&E again reassessed the Agreement after conducting its own investigation. PG&E, in conjunction with the Commission, proposed modifying the Agreement to require training and certification for fumigators. The PCOC rejected the modification, however. PG&E, nonetheless, sought and received accreditation for a voluntary gas safety training program for fumigators. PG&E claims the evidence actually shows that it did "more than any other California utility to ensure that fumigators terminating or reinstituting gas service . . . did so safely." (PG&E Rehearing Application 7:14-16.) PG&E thus concludes that the complainants failed to meet their burden to show unreasonable conduct. *See* Re: Pacific Bell (1987) 27 CPUC2d 1, 22.

Related to the first allegation, PG&E's second allegation is that there is no evidence establishing its responsibility for the 1996 Homestead fire. PG&E contends that it should not be held responsible unless its alleged unreasonable conduct actually caused the 1996 Homestead fire. *See, e.g.*, Donnelley Corporation v. Pacific Bell (1991) 39 CPUC2d 209; Cal. Jury Instructions, Civ. (8th ed. 1994) BAJI Nos. 3.00 and 3.45. PG&E argues that the Commission failed to identify any action which PG&E should have taken (and did not take) to avoid the 1996 Homestead fire. PG&E attributes the 1996 Homestead fire to error on the part of the fumigator, Allied Fumigation.[2] PG&E argues the evidence showed that the 1996 Homestead fire would not have occurred but for Allied Fumigation's failure to follow both its own policies and PG&E's training. PG&E bases its contention on the following evidence: Allied Fumigation received PG&E' training in October, 1994 and was informed that gas should be turned off at the main valve. (Exh. 20, Fuhrman decl. 7:4-6) It was also the policy of Allied Fumigation that the gas should be turned off at the main valve by a licensed crew member. (Exh. 30, Steffenson Depo. 44-46, 91, 93; Young Depo. 22, 25.) Allied Fumigation, nevertheless, allowed a new and non-licensed crew member to turn off the gas at the individual meter valves and not the main valve.

Responding to PG&E's first and second allegations, CSD contends that there is substantial evidence to support the Commission's conclusions. CSD argues the evidence shows that PG&E's rescission of the Fumigation Lock Policy and safety protocols was unreasonable and did not promote public safety, thereby violating Pub. Util. Code[3] § 451. The Commission, however, did "not conclude that the only reasonable action was to discontinue this policy." (D.98-12-076, p. 1.) The Commission concluded that PG&E's failure to investigate compliance

[2] The Commission agreed that the 1996 Homestead fire was "caused by an untrained fumigation contractor employee." (D.98-12-076, p. 1.) The Commission also found that the 1996 Homestead fire had a second independent cause, a faulty non-IRV regulator. *Id.* at p. 20.

[3] Unless otherwise indicated, all statutory references are to the Public Utilities Code.

with the Agreement and to require training for fumigators was unreasonable. (D.98-12-076, Conclusion of Law No. 2.) CSD suggests that the Decision's analysis is flawed in this respect. CSD reasons that it is "[il]logical. . . to not hold PG&E responsible for its section 451 safety mandate. . .from 1968 up until it entered into the agreement in 1994, while conceding at the same time that the 1994 and 1996 events were foreseeable." (CSD Response, p. 12.) CSD cites the following undisputed facts: The 1968 explosion during a tented fumigation prompted PG&E to institute its Fumigation Lock Policy. While PG&E's Fumigation Lock Policy was in place from 1968 until November 1994, there were no further incidents. One month following the rescission of PG&E's Fumigation Lock Policy, the 1994 Pleasanton fire occurred. The 1996 Homestead fire occurred eighteen months later. Ms. Carey adds that PG&E's failure to maintain its equipment, along with the improper delegation of its duties to the fumigators, "set off a predictable chain of events" which culminated in the 1996 Homestead fire. (Carey Response, p. 2.)

PG&E's first allegation of error is belied by the record. There is credible evidence to support our conclusion that PG&E acted unreasonably after the 1994 Pleasanton fire by not investigating compliance with the Agreement and modifying the Agreement to require gas shut-off training for fumigators. (D.98-12-076, Conclusion of Law No. 2.) The following facts in PG&E's possession are sufficient to charge PG&E with the duty to make inquiry regarding compliance with the Agreement and modifications to the Agreement. To begin with, PG&E characterized its Fumigation Lock Policy and safety protocols as an "overreaction of a conservative management team." (Exh. 11, Ideas in Action Memo Attachment.) This was despite the fact that a 1968 fire originally prompted PG&E to institute its Fumigation Lock Policy and safety protocols, and there were no further incidents while the Fumigation Lock Policy was in place. PG&E then went on to conclude that "even if we should receive a claim for damages the

annual savings [from rescinding the Fumigation Lock Policy and safety protocols] would more than pay for it." (Exh. 11, Ideas in Action Form Attachment.)

Following the rescission of the Fumigation Lock Policy, fumigation contractors expressed concern directly to PG&E over the adequacy of training. For example, in an October 24, 1994 letter to PG&E and the PCOC, a fumigation contractor complained that the public would not be served by having "individuals who are not familiar with many types of gas appliances attempt to place these appliances back in service." (Exh. F, 10/24/94 Knight Fumigation letter.) The fumigation contractor requested that the Agreement be undone or modified. *Id.* The PCOC also conveyed similar complaints from other fumigation contractors to PG&E concerning the adequacy of the gas safety training:

> I probably, in essence, had a dozen phone calls with PG&E expressing various problems and challenges with the overall arrangement and problems that the industry was having . . . *The main complaint I was receiving was lack of training* as to the different types of meters the fumigators were encountering. (Exh. 11, E. Paulsen Depo. 71:12-72:1.)(Emphasis added.)

One month after the rescission of PG&E's Fumigation Lock Policy, the 1994 Pleasanton fire occurred. The 1994 Pleasanton fire, like the 1968 fire, involved a residence which was undergoing a tented fumigation. Both fires resulted from human error caused by inadequate gas safety training. Following the November 1994 Pleasanton fire, the same fumigator contractor wrote another letter to PG&E and the PCOC stating "I TOLD YOU SO!. . . The 'agreement' between <u>your</u> company and the PCOC is a great disservice to the pest control operators and the public." (Exh. F, 11/21/94 Knight Fumigation letter) Again, the fumigation contractor requested that PG&E "undo the 'agreement' or at least get it modified,. . ." *Id.* At the very least, these facts should have put PG&E on notice that the gas shut off training for fumigators was inadequate. Yet "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." (D.98-12-076, Finding of Fact no. 12; *see also* Finding of Fact no. 15.)

PG&E, for example, did not review the adequacy of the one page of gas shut-off instructions it provided to fumigators. (*See* Exh. 24, Gas Meter Procedures.) PG&E also did not evaluate whether mandatory training should be required for fumigators. Instead, PG&E concluded that no change in policy was necessary or appropriate. (PG&E Rehearing Application 7:1-2.) Even after the 1996 Homestead fire, PG&E still concluded that no change in policy was necessary. The PCOC stated in a February 7, 1996 letter that PG&E had "conclu[ded] that it best served the public, the fumigators and PG&E *to leave the policy as it currently stands*." (Exh. 27, 2/7/96 PCOC letter.) (Emphasis added.) It was not until September 1996 that PG&E formalized its Fumigation Action Plan. (Exh. 5, 9/11/96 Memo.) This was only *after* the Commission's Utility Safety Branch issued its June 27, 1996 report recommending that PG&E modify the Agreement "to prevent some of them [PCOC members] from performing gas shut off and restoration duties if they either have not had at least one training session with PG&E in the last two years or have a gas related accident due to lack of training."

PG&E's second allegation is also without merit. PG&E alleges that it "cannot be penalized for an incident that it did not cause." (PG&E Rehearing Application 14:10.) In support, PG&E cites civil jury instructions on causation for a negligence cause of action.[4] Yet our inquiry into the reasonableness of PG&E's conduct is not a quest for negligence. More specifically, the Commission is not faced with the question of whether PG&E's conduct was the legal cause of the 1996 Homestead fire. We are not awarding the complainant damages for injuries

[4] PG&E also cites Reuben H. Donnelley Corporation v. Pacific Bell (1991) 39 CPUC 209. PG&E, however, omits a specific page reference to the 52 page Decision. Causation is not addressed in Donnelly's discussion of Section 451. *Id.* at 244.

caused by PG&E. Rather, "the Legislature has vested the [C]ommission with both general and specific powers to ensure that public utilities comply with that [Section 451] mandate." San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 924. The Commission is required to determine whether the service or equipment of a public utility *poses any danger* to public safety, and if so, to prescribe corrective measures. *See* Pub. Util. Code § 761; CAL-AM Water Co. (1979) 1 CPUC2d 587. That the facts of this incident also gave rise to tort litigation does not transform this determination into a tort case. Indeed, we have rejected the application of tort law principles in reviewing utility conduct surrounding accidents. *See* D.85-08-102, fn. 9 (tort standard not applied in reviewing utility's conduct.)

PG&E's third allegation is that the Commission erred in imposing the $976,800 fine. PG&E contends that the language in Section 451 is too general to support the imposition of the fine under Section 2107. PG&E argues that Section 451's mandate that a utility provide "reasonable service" to promote public safety is vague. More specifically, PG&E argues that Section 451 fails to identify what utility action or inaction is "reasonable." For the same reasons, PG&E contends that Section 451 is unconstitutionally vague. PG&E in support cites In Re Newbern (1960) 53 C.2d 786, 792, which held that a statute "'so vague that men of common intelligence must necessarily guess at its meaning'" violates due process. The Newbern court reasoned that a "reasonable degree of certainty in legislation. . .is a well established element of the guarantee of due process of law." *Id.* PG&E thus concludes that it was fined "without the benefit of a constitutionally required clear warning." (PG&E Rehearing Application 20:17-18.)

PG&E makes an analogy to the type of statute required to impose liability for negligence per se (violation of a statute) and breach of a non-delegable duty. For example, Felmlee v. Falcon Cable TV (1995) 36 CA4th 1032,

1038, held that a directive in a Commission General Order to maintain "safe conditions" was too broad to create a nondelegable duty. The Felmlee court explained that a nondelegable duty only arises "when a statute provides specific safeguards or precautions to insure the safety of others." *Id.* at 1038-39. Pierce v. Pacific Gas & Electric Company (1985) 166 CA3d 68, 88, held that Rule 31.1 of the Commission's Rules of Practice and Procedure[5] merely restated the common law duty for general negligence and could not be the basis for a negligence per se. To be consistent, PG&E suggests that the Commission likewise require the same specificity in the statute forming the basis for the Section 2107 fine. PG&E again argues that Section 451 lacks this requisite specificity.

PG&E then cites various Commission decisions where Section 2107 fines were imposed. PG&E claims that every decision arose from the violation of a precisely worded code section, tariff or Commission directive, unlike Section 451. In fact, PG&E contends that we have never imposed a Section 2107 fine based on a violation of Section 451. (PG&E Rehearing Application 18:20-22.) PG&E also claims that in most decisions the utility had some notice or warning before the Section 2107 fine was imposed. *See, e.g.*, Re PagePrompt USA (1994) 53 CPUC2d 134, 139 (even after becoming aware of requirement for Commission approval, carrier continued with unauthorized construction and fine assessed.) PG&E complains that it received no notice from Section 451 or the Commission "that the steps that it took following the 1994 Pleasanton explosion would not be enough." (PG&E Application 20:15.)

PG&E also criticizes the Commission's response to its argument that Section 451 was too general. We responded by analogizing Section 451 to Rule 1. We noted that fines were imposed fines in other cases under Rule 1, even though Rule 1 "does not outline specific obligations or standards." (D.98-12-076, p. 5.) PG&E disputes that the Rule 1 cases are applicable. PG&E argues that Rule 1

[5] Unless otherwise indicate, all rule references are to the Commission's Rules of Practice and Procedure.

"leaves little doubt" about what conduct is sanctionable as opposed to Section 451. PG&E, for example, references the prohibition in Rule 1 against "mislead[ing] the Commission." The Rule 1 cases cited by the Commission all involved sanctions for misleading the Commission.

By contrast, CSD contends that Section 451 specifically informed PG&E that its service, equipment and instrumentalities must promote the public safety. CSD notes that no Court has ever found Section 451's language to be vague or speculative. *See, e.g.*, San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 923-24; TURN v. Public Utilities Com. (1978) 22 Cal.3d 529; Langley v. Pacific Gas & Electric Co. (1953) 41 Cal.2d 655. CSD disputes that Section 451 is so vague "that men of common intelligence must. . . guess at its meaning. . . ." In re Newbern, *supra*, 53 Cal.2d at 792. CSD also disputes that a Section 2107 fine must be premised on a violation of a specific duty as opposed to a general statutory duty. CSD cites TURN v. Pacific Bell (1994) 54 CPUC2d 122, 130, which held that "[a]ll that is required under that section [2107] is a violation of relevant statutes, rules, or decisions by a public utility." CSD adds that any other interpretation of Section 2107 is inconsistent with the Legislature's intent. "Section 2107 commands the [C]ommission to see that the provisions of the constitution affecting public utilities and violations thereof are promptly prosecuted." People v. Western Airlines (1954) 42 Cal.2d 621, 639.

Similarly, CSD disputes that PG&E received no warning or notice of a Section 451 violation. CSD contends that PG&E possessed information sufficient to put a reasonable person on notice that its practices were unsafe and in violation of Section 451. In addition to the 1994 Pleasanton fire, CSD argues that PG&E was obviously aware of the 1968 fire which originally prompted PG&E to establish safety protocols and prohibit fumigators from terminating and reestablishing gas service. The 1968 fire, like 1996 Homestead fire, involved a residence which was undergoing a tented fumigation. CSD also argues that PG&E

was aware that existing unsafe non-IRV regulators on its meters would only be replaced if a PG&E crew shut off service. CSD asserts that in the instant case, for example, a PG&E crew would have performed a leak survey, locked the main riser valve and made sure the meter was covered by the tent. CSD claims that PG&E simply made a conscious decision not to reinstate its policy and safety protocols in order to save money. In fact, CSD claims that PG&E calculated it would save more money from not reinstituting its policy and safety protocols than it would pay out in damage claims. As to the practices of other utilities, CSD objects that PG&E submitted no evidence in support.

Alternatively, CSD contends that there are other violations to support the Section 2107 fine. CSD argues that the evidence also established violations of General Order (G.O.) 58-A, G.O. 112-E and the Pub. Util. Code § 702. Section 702 of the Pub. Util. Code advises a public utility that it must comply with every order of the Commission. G.O. 58-A, in turn, requires gas utilities to maintain and operate all equipment for the regulation and measurement of gas to the outlet of the meter set. G.O. 112-E requires gas utilities to maintain their equipment, facilities and instrumentalities in accordance with Title 49 of the Code of Federal Regulations (CFR).[6] CSD alleges the following CFR Title 49 violations: A non-IRV regulator at the Homestead apartment did not vent outside the structure, contained corroding parts and was incapable of performing in a system failure. CSD requests that the Decision be modified to add these violations.

[6] 49 CFR § 192.353 requires gas meters to be located in a ventilated place not less than 3 feet from any source of ignition or any source of heat. 49 CFR § 192.357(c) mandates "[e]ach regulator that might release gas in its operation must be vented to the outside atmosphere." 49 CFR § 192.355(b) requires service regulator vents and relief vents to terminate outdoors. 49 CFR § 192.195 requires gas systems to have regulators that are capable of meeting the pressure, load and other service conditions in the event of system failure. 49 CFR § 192.199 requires regulators to be constructed of materials that will not impair the operation of the device and to have valves and valve seats that are designed not to stick. 49 CFR § 192.53 requires that the materials used for gas pipe and components maintain the structural integrity of the pipeline.

PG&E's third allegation that the Commission erroneously imposed the fine under Section 451 fails. As an initial matter, PG&E is incorrect in its contention that we have never assessed a Section 2107 fine based on a Section 451 violation. In D.97-05-089, the Commission assessed a Section 2107 fine based on violations of Section 451 and Section 2889.5. The Commission stated that "[t]here is no question of our authority to assess fines under section 2107 for violations of section 451." D.97-10-063, 1997, 1997 Cal.PUC LEXIS 912, *17.

Section 451's mandate that a utility provide "reasonable service, instrumentalities, equipment and facilities" as necessary to promote the public safety is constitutional and not violative of due process.[7] There are no cases directly involving the constitutionality of Section 451, but California courts have found similar terms under comparable statutory schemes constitutional. The instant case is analogous to Chodur v. Edmonds (1995) 174 Cal.App.2d 565. In Chodur, the Court of Appeal held that the term "dishonest dealing" in Bus. & Prof. Code 10177(j) was not unconstitutionally vague. *Id.* at 570. While lacking an exact definition to cover every circumstance, the Court of Appeal explained that the term "dishonest dealing" still possessed "a common understanding." *Id.* The Court of Appeal also noted that "'[i]t would be almost impossible to draft a statute which would specifically set forth every conceivable act which might be defined as being dishonest.'" *Id*; quoting Wayne v. Bureau of Private Investigators and Adjusters (1962) 201 Cal.App.2d 427, 440.

Similarly, it would be virtually impossible to draft Section 451 to specifically set forth every conceivable service, instrumentality and facility which might be defined as "reasonable" and necessary to promote the public safety. That the terms are incapable of precise definition given the variety of circumstances

[7] In passing upon the constitutionality of a statute, California courts give force and effect to the statute unless it is "clearly unconstitutional." Denny v. Watson (1952) 114 Cal.App.2d 491, 495. "All presumptions and intendments are in favor of the constitutionality of a statute, and all doubts are resolved in favor of its validity, not against it." *Id.* The burden of overcoming this presumption is on the party challenging the statute. *Id.*

likewise does not make Section 451 void for vagueness, either on its face or in application to the instant case. The terms "reasonable service, instrumentalities, equipment and facilities" are not without a definition, standard or common understanding among utilities. Commission cases reviewing utility conduct frequently require that the conduct meet a standard of reasonableness. For example, in ratesetting proceedings, the disallowance of utility expenses, whether from contracts, accidents, or other sources are reviewed under a reasonableness standard. *See* Re Southern California Edison Company (1994) 53 CPUC2d 452, 464.

Accordingly, Section 451's mandate that a utility provide "reasonable service, instrumentalities, equipment and facilities" is not an unconstitutionally vague standard with which to assess a fine or penalty. PG&E thus received the benefit of a constitutionally clear warning. In addition, the evidence establishes violations of Section 702, G.O. 58-A and G.O. 112-E which further support the imposition of the Section 2107 fine. For example, a non-IRV regulator at the Homestead apartment complex did not vent outside the structure, contained corroding parts and was incapable of performing in a system failure. (*See* January 29, 1996 Report of the Safety and Enforcement Division, Utilities Safety Branch, p. 4-8.) As set forth below, we modify D.98-12-076 to add these violations.

Fourth, PG&E alleges that a nondelegable duty was erroneously imposed on it to "assure that any third parties terminating service adhere to public safety standards." The Commission concluded that PG&E could "not delegate its duty to provide safe gas service required by PU Code § 451." (D.98-12-076, p. 18.) The Commission explained that although PG&E could delegate the service termination and restoration tasks to third parties, PG&E remained ultimately responsible for assuring the safe performance of the tasks. *Id.* PG&E contends that this is inconsistent with the Commission's other finding that PG&E owes no

duty to terminate gas services for fumigators. (D.98-12-076, Conclusion of Law No. 4.) PG&E argues that, in effect, it is being fined for "acts or omissions that the Commission itself has determined are not public utility duties in the first place." *Id.* at p. 22. PG&E objects that it is being punished for delegating something it had no duty to do in the first place.

Additionally, PG&E argues that Section 451 is too vague to support the imposition of a non-delegable duty for the reasons previously discussed. (*See* Discussion above under Third Allegation.) Assuming, arguendo, Section 451 could support a nondelegable duty, PG&E contends that the duty should not include responsibility for third parties it cannot control. PG&E cites BAJI civil jury instruction No. 3.13, which states that it is not negligence to fail to anticipate an accident which can occur only as a result of another's negligence.

CSD responds that PG&E may not delegate its duty to comply with Commission rules, including general orders concerning safety. CSD cites Synder, *supra*, 44 Cal.2d at 801-802, which held that public utilities have a non-delegable duty to adhere to the Commission's safety rules and general orders. *See also* Felmlee, *supra*, 36 Cal.App.4th at 1036. CSD contends that PG&E improperly delegated its duty to safely terminate and reestablish service in addition to failing to provide adequate safety measures. Moreover, CSD argues that the Decision's discussion of the nondelegable duty issue is *dicta* and somewhat misguided. Conclusion of Law No. 4 states that PG&E owes no duty *to fumigators* to terminate gas service. CSD frames the issue as whether PG&E owes a duty *to the public* to safely terminate and reestablish gas service.

PG&E's fourth allegation also fails. We did not err in imposing a nondelegable duty on PG&E under Section 451. "[T]he statutes and rules of the [C]ommission do impose a direct and positive duty on the operator of a utility." Snyder, *supra*, 44 Cal.2d at 801. The Commission held that "PG&E may not escape by delegation to a third party the duty to provide safe gas service." (D.98-

12-076, p. 2.) PG&E even agrees that it owes a duty to provide safe gas service to the public. (PG&E Rehearing Application 21:3-5.) For the reasons discussed above, Section 451 is not too vague to give rise to a nondelegable duty. Section 702, G.O. 58-A and G.O. 112-E are also precisely worded to give rise to a nondelegable duty.

Nonetheless, the wording of Conclusion of Law No. 4 does suggest the inconsistency of which PG&E complains. Conclusion of Law No. 4 states that PG&E owes no "duty" to terminate gas service for fumigators. However, another part of the Decision refers to the "task" of terminating gas service. (D.98-12-076, p.18.) We therefore modify Conclusion of Law No. 4 to state as follows: "PG&E is not required to terminate gas services for fumigators. That task may be delegated to third parties such as fumigators. However, the duty under Pub. Util. Code § 451 to provide safe gas service may not be delegated by PG&E. 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 safety standards."

Finally, PG&E's fifth allegation is that the Commission erred in not applying the one-year statute of limitations in Code of Civ. Proc. § 340(2) in calculating the fine amount. The Commission calculated the fine by going back almost three years prior to the filing of the instant complaint. This covered the time from the November 12, 1994 Pleasanton fire until PG&E reinstated its gas shut-off policy on March 18, 1998. The Commission fined PG&E $800 per day for 1,221 days or $976,800 total. In calculating the fine amount, PG&E contends that Code of Civ. Proc. § 340(2) prohibits the Commission from going back more than one-year prior to the filing of the instant complaint on November 6, 1997.[8]

[8] Code of Civil Procedure § 340(2) provides that "[a]n action upon a statute for a forfeiture or penalty" shall be commenced "[w]ithin one year."

In brief, PG&E contends that it can only be fined for the period of November 6, 1996 until March 18, 1998. Application of the one-year statute of limitations would result in a $800 day fine for 498 days or $398,400 total. PG&E also contends that the fine should have ended in June 1996, when PG&E approved its five step action plan.

PG&E notes that the Commission applied Section 340's one-year limitation in In re SoPac Transp. Co. (1981) 6 CPUC2d 336. In Strawberry Property Owners Association v. Conlin-Strawberry Water Co., D.97-10-032, the Commission also implied that it would apply Section 340(2) in the appropriate case. Here, the Commission declined to apply Section 340(2) because it "does not apply to discretionary penalties" such as Section 2107. (D.98-12-076, pg. 5-6.) In support, the Commission cited Holland v. Nelson (1970) 5 Cal.App.3d 308, 312-13 and Menefee v. Ostawari (1991) 228 Cal.App.3d 239 among other cases. Menefee held that Section 340(1) was applicable to causes of action for violations of a local rent control ordinance. The Menefee Court stated that "claims based upon statutes for *mandatory* recovery of damages. . . are considered penal in nature, and thus are governed by the one-year statute of limitations period under section 340, subdivision (1)." *Id.* at 243 (Emphasis added.) Similarly, Holland held that a statute giving the trial court discretion to award treble damages was not a statutory action for "penal" damages and thus not subject to the one-year statute of limitations in Section 340(1).

PG&E disputes the applicability of those cases herein. PG&E points out that all the cases involve Section 340(1), not Section 340(2). Further, PG&E argues that the distinction between what is discretionary versus mandatory goes only to the issue of whether a "penalty" is being imposed within the meaning of section 340(1). Menefee, *supra*, 228 CA3d at 244. Because there is no question here that Section 2107 imposes a penalty, PG&E concludes that the distinction is irrelevant and an erroneous basis for declining to apply the statute of limitations.

PG&E emphasizes that Section 2107 expressly refers to the imposition of a "penalty."

In addition, PG&E contends that the fine violates the Excessive Fine Clauses of both the California and United States Constitutions. A fine violates the Excessive Fines Clause of the California Constitution, Art. I, § 17, when it is so disproportionate as to shock the public sentiment. People v. Djekich (1991) 229 CA3d 1213, 1224. PG&E argues that the fine bears no relation to its conduct. For example, PG&E claims that it was fined for conduct conforming to the standard gas utility practice in California.[9] PG&E adds that the Commission itself found that the Agreement allowing fumigators to turn off service was reasonable. PG&E also claims that it saved nothing by not reassessing its policy or ensuring compliance with the Agreement after the 1994 Pleasanton fire. PG&E cites Hale v. Morgan (1978) 22 C.3d 388, 404, which held that a party is entitled to show "factors in extenuation" to defend against a fine. PG&E claims it did not disregard Commission warnings or directives. Rather, PG&E claims that it appropriately reassessed its policy after both the 1994 Pleasanton fire and the 1996 Homestead fire. PG&E argues that the fine does not reflect these extenuating circumstances.

CSD disputes the applicability of Section 340(2) to the Commission's administrative proceedings. CSD cites Little Company of Maryland Hospital v. Belshe (1997) 53 CA4th 325, 329, which held that "statutes of limitations found in the Code of Civil Procedure. . . do not apply to administrative actions." "Instead, they apply to the commencement of civil actions and civil proceedings (*e.g.*, Code of Civ. Proc., §§ 22, 312, 363)." CSD notes that the Commission likewise has concluded the statutes of limitations are

[9]The Commission is not bound by accepted industry practices in assessing the reasonableness of a PG&E's conduct. "Evidence of accepted industry practices will often be relevant to a reasonableness inquiry, but compliance with such practices will not relieve the utility of the burden of showing that its conduct was reasonable." Re Southern California Edison Company, *supra*, at p. 466.

inapplicable. California Alliance for Utility Safety and Education (CAUSE) v. San Diego Gas & Electric Company, D.97-12-117. CSD also disputes that the Commission's proceedings are a statutory action for penal damages or a forfeiture within the meaning of Section 340(2). A "penalty" includes "any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for legal damage to him by the former." People ex rel. Dept. of Conservation v. Triplett, 48 Cal.App.4th 252, citing Miller v. Municipal Court (1943) 22 Cal.2d 818, 837. CSD notes that Section 2107 fines go to the State's General Fund and are not payable to complainants. Alternatively, CSD contends that each violation is a distinct offense with its own separate statute of limitations. "[E]ach day any violation remains uncured constitutes a separate and distinct offense. . .from which any relevant statute of limitations may be measured." Strawberry, *supra*, D.97-10-032.

CSD characterizes the excessive fine allegation as "groundless." CSD contends that PG&E has made no showing that the fine was excessive. Instead, CSD contends that the evidence actually supports a larger fine for 1370 days, much longer than the 1,221 days cited in the Decision. Given that Section 2107 permits a fine from $500 to $20,000 per day, CSD also questions how $800 per day was excessive. For example, PG&E was fined $20,000 per violation in another Commission proceeding. *See* Application of PG&E, D.97-11-83. Ms. Carey states that the manner in which PG&E continues to dispute the fines is "brazen." (Carey Response, p. 2.) Ms. Carey requests that the Commission not financially reward PG&E for its hazardous, slipshod practices.

PG&E's fifth statute of limitations allegation is likewise without merit. CSD is correct that "[s]tatutes of limitations found in the Code of Civil Procedure. . .do not apply to administrative actions." Little Company of Maryland Hospital v. Belshe (1997) 53 CA4th 325, 329, citing Bernd v. Eu (1979) 100 C.A.3d 511, 515. Such statutes of limitations apply only "to the commencement

of civil actions and civil special proceedings (Code of Civ. Proc. §§ 22, 312, 363)." *Id.* The instant proceeding was not a civil action or civil special proceeding. Therefore, the calculation of the Section 2107 fine amount is not governed by the statute of limitations contained in Code of Civ. Proc. § 340(2).

Additionally, we did not violate the Excessive Fines Clauses of the United States and California Constitutions. The $976,800 fine was not "so disproportionate as to shock the public sentiment." *See* People v. Djekich, *supra*, 229 Cal.App.3d at 1224. The cases cited by PG&E do not support its argument that the fine was excessive. The cases all involve monetary sanctions which the courts found excessive in the extreme when considered in the light of the nature of the violation and the degree of harm done. The cases bear no relation to the situation presented here.

Considering the totality of the circumstances, we imposed a fine that bore a "relationship to the unlawful acts" and was "supported by the record." (D.98-12-076, p. 21, 22. ) CSD actually requested a larger fine for 1370 days, much longer than the 1,221 days cited in the Decision. Given that Section 2107 permits a fine from $500 to $20,000 per day, the $800 per day fine was not excessive. The Commission considered numerous factors in deciding the fine amount, including the continuing nature of the offense, the size of the utility, the number of victims, the sophistication of the utility and the economic benefit from the unlawful acts. *Id.* at. p. 20; Hale v. Morgan (1978) 22 Cal.3d 388, 405. For example, PG&E was fined $20,000 per violation in another Commission proceeding. *See* Application of PG&E, D.97-11-83. Contrary to PG&E's argument, the Commission did consider extenuating circumstances in assessing the Section 2107 fine. We stated that "any maximum fine is mitigated by the fact that PG&E did eventually change its fumigation policy this year without Commission order, terminating the greater risk of public harm." (D.98-12-076, p.

21.) The Commission also made clear that it did *not* penalize PG&E for considering cost options in rescinding its Fumigation Lock Policy. *Id.* at 16.

## IV. CONCLUSION

D.98-12-076 is therefore modified, as set forth below. No further discussion is required of PG&E's allegations of error. Accordingly, upon review of each and every allegation of error, we conclude that sufficient grounds for rehearing have not been shown.

**IT IS ORDERED** that:

1. Decision 98-12-076 is modified as follows:

   a. Conclusion of Law No. 4 is modified to read "PG&E is not required to terminate gas services for fumigators. That task may be delegated to third parties such as fumigators. However, the duty under Pub. Util. Code § 451 to provide safe gas service may not be delegated by PG&E. 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 safety standards."

   b. Conclusion of Law No. 5 is added as follows: "PG&E also violated Pub. Util. Code § 702, G.O. 58-A and G.O. 112-E. *See also* 49 CFR §§192.353, 192.357(c), 192.355(b), 192.195, 192.199, 192.53. A non-IRV regulator at the Homestead apartment complex did not vent outside the structure, contained corroding parts and was incapable of performing in a system failure.

   c. The second full paragraph at page 16 of the Decision, under the heading **Other Complainant Arguments**, is modified to read: "Complainant argues that PG&E has violated federal and state pipeline regulations. (*See* CSD Appeal, p. 14-16; G&E Concurrent Reply Brief p. 8, 12-18.) We conclude that PG&E also violated Pub. Util. Code § 702, G.O. 58-A and G.O. 112-E. *See also* 49

CFR §§192.353, 192.357(c), 192.355(b), 192.195, 192.199, 192.53. A non-IRV regulator at the Homestead apartment complex did not vent outside the structure, contained corroding parts and was incapable of performing in a system failure. (*See* January 29, 1996 Report of the Safety and Enforcement Division, Utilities Safety Branch, p. 4-8.)"

2. The Rehearing of Decision 98-12-076 as modified above is denied.

This order is effective today.

Dated April 1, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioner