



## **SOUTHWEST GAS CORPORATION**

Kyle O. Stephens, Senior Counsel/Legal Affairs

October 21, 2011

Administrative Law Judge Angela Minkin  
California Public Utilities Commission  
505 Van Ness Avenue  
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**SUBJECT:** DRAFT RESOLUTION ALJ-274. Establishes Citation Procedures for the Enforcement of Safety Regulations by the Consumer Protection and Safety Division Staff for Violations by Gas Corporations of General Order 112-E and Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199.

### **OPENING COMMENTS OF SOUTHWEST GAS CORPORATION**

#### **I. Introduction**

On October 10, 2011, the Administrative Law Judge Division of the California Public Utilities Commission ("Commission") issued Draft Resolution ALJ-274 which proposes to, among other things, establish citation and appellate procedures for the enforcement of safety regulations by the Consumer Protection and Safety Division Staff ("CPSD") for violations by gas corporations of General Order 112-E and Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199 ("Resolution"). Parties were requested to file opening comments on or before October 21, 2011. Southwest Gas Corporation ("Southwest Gas" or "Company") submits these Opening Comments concerning the issues contained in the draft Resolution.

Southwest Gas supports the intent of the draft Resolution, which is to increase the effectiveness of the CPSD's enforcement authority. However, Southwest Gas does not agree with the provisions in the draft Resolution. Southwest Gas believes that utilization of the enforcement and appellate provisions in 49 CFR Part 190, which are already adopted in California General Order 112-E (GO-112), provides the effectiveness in enforcement authority sought by the draft Resolution. As such, Southwest Gas respectfully requests that the Commission not approve the draft Resolution and instead initiate a rulemaking to amend its prior adoption of 49 CFR Part 190 in order to substitute the names of the federal agencies, agency subdivisions, and job titles in those regulations with the corresponding names of the state agencies, agency subdivisions, and job titles.

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Consistent with the October 10, 2011 notice, attached as Exhibit A is a subject index listing the recommended changes to the draft Resolution. Attached as Exhibit B is a table of authorities. Attached as Exhibit C is an appendix setting forth the proposed findings and ordering paragraphs.

## **II. Delegation of Citation Authority to CPSD Staff Inspectors**

Southwest Gas understands the intent of the draft Resolution is to delegate the authority to issue citations to each CPSD Staff Inspector. Southwest Gas is concerned that under such application, the issuance of a citation (and therefore penalties) can be applied unevenly based upon a particular inspector's experience, knowledge or interpretation of the law because the decision of whether to issue a citation will be based largely upon the subjective determination by each CPSD Staff Inspector. Southwest Gas instead, believes that the citation authority should be delegated solely to the Director of the CPSD to promote consistency and uniform interpretation of the law.

## **III. Response to Citation - Timing**

Southwest Gas believes that many of the timing requirements in the draft Resolution are unreasonably restrictive. The provisions regarding the cure period (I.C.1, I.C.1.a, and II.A.2) do not account for the possibilities that 1) some pipeline safety violations cannot be cured within the time restraints afforded by the proposed resolution, which currently prohibit any cure period longer than 14 days, and 2) no cure will be necessary because the purported violation was ultimately determined to not exist. Rather than applying such a rigid timeline, Southwest Gas proposes that the CPSD be afforded the discretion to ascribe a cure period in the citation, and further to allow the CPSD the authority to agree to modify the cure period.

Indeed, the draft Resolution references General Order 112-E which incorporates 49 CFR Part 190 and cites the objective of aligning the Commission's pipeline enforcement authority with that of the Office of the State Fire Marshal. A review of 49 CFR Part 190 and 19 CCR §§ 2070-2075 demonstrates that the Pipeline and Hazardous Materials Safety Administration's (PHMSA) regulations and the State Fire Marshal's regulations have adopted a more reasonable 30 day period to respond to a notice of probable violation of these very same pipeline safety regulations.<sup>1</sup>

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<sup>1</sup> See 49 CFR § 190.209 ("Within 30 days of a notice of probable violation, the respondent shall respond to the Regional Director who issued the notice ...."); 19 CCR § 2071 ("Within 30 days of the receipt of a notice of probable violation the respondent shall respond to the Division who issued the Notice...").



Another issue with respect to the timing requirements for the response to a citation is that a request for an extension must be made within three days of the date of service of a citation. Southwest Gas has multiple concerns with this provision. First, three days is often not enough time to fully investigate a citation and explore the possible remedies and the necessary timeframe to accomplish those remedies. Second, the draft Resolution does not extend the period to respond to account for delays in mailing. The draft Resolution dictates that, even if sent via first class mail, service of a citation is effective the date the citation is mailed. First class mail is not immediate service and in many circumstances, if the citation is sent via first class mail, the period of time in which a utility may request an extension, as currently contemplated by the draft Resolution, may expire prior to the gas corporation actually receiving notice of the violation. In contrast, Code of Civil Procedure § 1013(a), which applies to the courts, provides for extensions when documents are mailed.<sup>2</sup>

Southwest Gas believes that all gas pipeline operators should be afforded the same response options as are provided to companies and to municipalities in 49 CFR Part 190. Southwest Gas requests the Commission consider an initial 30 day period from the service of the notice to respond to a citation, and further requests that the gas corporation either be given the option of electing to receive electronic service over service by mail or that an additional five calendar days be added to the response period if the CPSD elects to serve notices by mail. If circumstances dictate a more immediate response, then the draft Resolution can provide for an expedited schedule based upon the exigency of the circumstances and an order by the Commission.

Also, Southwest Gas does not believe that extensions to cure should be limited to seven days. Instead, Southwest Gas proposes that if an extension is sought, then the CPSD should be given the discretion to agree to an extension of a period that is mutually acceptable to the gas corporation and the CPSD. If the CPSD and the gas corporation cannot agree, then the gas corporation should be allowed to petition to an Administrative Law Judge and at that time be required to demonstrate good cause for the extension based upon the circumstances.

Finally, the CPSD should be afforded the discretion to impose a cure date and also the discretion to modify that date. As drafted, the Resolution does not appear to give the CPSD or even the ALJ the ability to modify a cure date even if all parties and the ALJ agree that curing the violation within the seven to fourteen day period is physically impossible or, if possible, would result in economic waste. Southwest Gas believes that such a policy might actually *reduce* the effectiveness of the CPSD as it deprives the CPSD of the discretionary power that is usually afforded to enforcement

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<sup>2</sup> Civ. Pro. § 1013(a) provides that the period for a response, “shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States....”



units, which is to recommend the cure period appropriate to the circumstances and to include such periods within their citations.

#### IV. Response to Citation – Inability of CPSD to Negotiate a Different Penalty

Southwest Gas understands the intent of the draft Resolution is to assess the maximum penalty amount provided for by Pub. Util. Code § 2107 for each and every violation. As such, the draft Resolution appears to be in direct conflict with Pub. Util. Code § 2104.5, which requires that the amount of the penalty can only be determined after considering “the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation.” Indeed, as drafted, the draft Resolution appears to mandate the imposition of penalties in a manner that likely violates the Due Process Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution and in an amount that violates the 8<sup>th</sup> Amendment of the U.S. Constitution.<sup>3</sup> See e.g. *U.S. v. Bajakajian*, 524 U.S. 321, 344, 118 S.Ct. 2028, 2041, 141 L.Ed.2d 314 (1998) (finding that a punitive fine violated the Excessive Fines Clause because it was grossly disproportional to the gravity of the offense).

Southwest Gas believes that the structure of the draft Resolution as it pertains to the CPSD’s ability to negotiate a different penalty, or withdraw a citation after issuing such a citation when the circumstances warrant, unreasonably restricts the CPSD’s and the gas corporation’s ability to negotiate a resolution short of a contest. As drafted, the gas corporation can either accept the CPSD’s finding of a pipeline safety violation and accept the CPSD’s commensurate penalty determinations, or the gas corporation may contest these determinations in an administrative proceeding. As drafted, no negotiation is possible once a citation is issued. Southwest Gas is concerned this will result in unnecessary contests as it is likely that there will be occasions when the CPSD and the gas corporation will, after an exchange of information, choose to agree to a compromise that will obviate the need for a contest. Indeed, the CPSD may learn of facts that will cause the CPSD to reconsider the citation in its entirety. However, as drafted, it appears that no compromise is possible once the citation is issued. Pub. Util. Code § 2104.5 implies that *someone* must be able to compromise a penalty on behalf of the Commission, but the draft Resolution forecloses the CPSD from achieving a compromise and the draft Resolution fails to identify who can authorize such a compromise.

Southwest Gas believes the draft Resolution might actually reduce the effectiveness of the CPSD as it deprives the CPSD of the discretionary power to recommend a penalty amount appropriate to the circumstances and within the range allowed by law. Southwest Gas believes the CPSD should be given the ability to

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<sup>3</sup> Southwest Gas hereby reserves the federal claims raised in this Comment for decision by a federal court in accordance with *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).



compromise a citation, including, but not limited to, withdrawing a citation, before the gas corporation files an appeal. Once the appeal is filed, then a compromise should be allowed upon the approval of an ALJ.

## V.

### **Response to Citation - Taking Property without Just Compensation**

The draft Resolution's requirement that the gas corporation must deposit the full amount of the penalty in order to appeal a citation likely gives rise to potential constitutional challenges if the gas corporation is not paid interest on these amounts in the event the gas corporation is successful in reducing or eliminating the penalty after those funds are deposited. Quite simply, if the government takes possession of a person's money, and if the government does not pay interest on that money for the period while the money is in the state's custody, the 5<sup>th</sup> Amendment to the U.S. Constitution requires the state to pay the person interest on that money. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Here, the gas corporation would be deprived of the loss of interest or other beneficial use of the funds while those funds are held by the Commission.

## VI.

### **Automatic Assessment of Maximum Penalty**

The draft Resolution acknowledges that the delegation to the CPSD of the authority to assess penalties stems from Pub. Util. Code § 2107. The draft Resolution provides that "[e]ach citation will assess the maximum penalty amount provided for by § 2107." Southwest Gas believes that such a strict application (one without a hearing or case by case determination) of Pub. Util. Code § 2107 violates a gas corporation's due process rights and is contrary to the legislative intent of Pub. Util. Code § 2107. A review of Pub. Util. Code § 2107, as recently amended, reveals that the legislature provided a range "of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense." By providing a range of penalties, coupled with the provisions of Pub. Util. Code § 2104.5 discussed above, the legislature was necessarily requiring an individual assessment of the severity or egregiousness of each offense before a penalty is imposed. In other words, if the legislature intended that a singular amount apply to each violation, then the legislature would not have provided a range or factors with which the Commission must consider before assessing the penalty. The draft Resolution's automatic assessment of the maximum penalty provided in Pub. Util. Code § 2107 without consideration of the severity or egregiousness of the conduct ignores the legislative intent of Pub. Util. Code §§ 2104.5 and 2107.



## **VII. Response to Citation – Sole Option of Appeal**

Southwest Gas is concerned that the structure of the draft Resolution as it pertains to a gas corporation's options to respond to a citation is too limited. The draft Resolution only allows for an appeal of the citation, and even if appealed, the alleged violation must be still be cured within the requirements of the draft Resolution (Section I.C.1. - seven day period to cure violation). As such, it appears that the gas corporation is foreclosed from appealing the cure period. When the draft Resolution is compared to the response options provided under 49 CFR Part 190, it demonstrates that the draft Resolution has severely restricted the gas corporation's options. Under 49 CFR § 190.209, a respondent can (1) pay the penalty and remediate the violation; (2) submit written explanations to respond to the allegations; or (3) request a hearing. Under the proposed terms of the draft Resolution, a gas corporation only has two options: (1) pay the penalty and remedy the alleged violation or (2) pay the penalty, remedy the alleged violation and appeal. Southwest Gas believes that the draft Resolution should provide for options similar to what is currently being utilized by PHMSA.

## **VIII. Order to Cure – Constitutional Concerns**

Section I.A.3. of the draft Resolution proposes that a citation will contain a statement that a respondent "shall cure the violation" and pay the fine. Section II.A.2. states that submitting a Notice of Appeal "does not excuse the Respondent from curing the violation described in the citation." Thus, the draft Resolution does not provide a gas corporation with due process - an opportunity for a hearing or an appeal on the order to cure the violation. The draft Resolution only contemplates an appeal of the fine. Such a structure may violate the gas corporation's due process rights under the 14<sup>th</sup> Amendment to the U.S. Constitution inasmuch as it eliminates the opportunity for genuine issues of dispute to be resolved in a fair process. Instead, as currently drafted, once the citation is issued, the gas corporation must cure the violation even if there is a genuine dispute as to the violation itself or a dispute on the means or timing necessary to cure the violation. *Compare with* Calif. OSHA Reg. Title 8, Section 333 (providing an employer an opportunity for a hearing to appeal "abatement periods" and "the reasonableness of the changes required by the division").

Southwest Gas understands that Due Process requires the gas corporation to be afforded an opportunity to appeal the cure period. If the draft Resolution does not account for such an appeal, then the gas corporation may be forced to seek such relief in the courts each and every time the gas corporation believes the cure period is inappropriate to the circumstances.



**IX.  
Order to Cure – Conflict with Other Law**

In addition to the issues raised above and in Section VII. Response to Citation – Sole Option of Appeal, the draft Resolution’s limited recourse appears to be in conflict with 49 CFR § 190.217, which has previously been adopted by the Commission. The order to cure an alleged violation is in fact a compliance order issued pursuant to 49 CFR Part 190. Pursuant to 49 CFR § 190.217, a hearing is conducted “to determine the nature and extent of the violations and to issue an order directing compliance.” Here, the draft Resolution establishes a process that automatically issues an order directing compliance without a hearing. Such a process contradicts 49 CFR § 190.217 and is in derogation of 49 USC §§ 60117(l) and 60118, which is part of the federal pipeline safety statutes that the Commission derives its authority from. Southwest Gas believes that gas corporations should be afforded an opportunity to a hearing before being required to cure the alleged violation. An opportunity for a hearing is fair and is consistent with the regulations that currently govern gas corporations.

**X.  
Request for Extension – Affidavit Requirement**

In addition to the issues discussed above regarding the timeframe to request an extension and the length of an extension to remedy a citation, Southwest Gas believes that requiring a gas corporation’s Chief Executive Officer to sign an affidavit requesting an extension to remedy a violation is not necessary. As noted above, Southwest Gas does believe that a request for an extension should include an explanation about why an extension is necessary, however, in the majority of circumstances, the Chief Executive Officer is not going to be the person with the knowledge or information to best explain why an extension is necessary. Indeed, even the draft Resolution recognizes this conundrum when the draft Resolution requires the Chief Executive Officer’s affidavit to include “[t]he name of the person and the person’s position that the Chief Executive Officer relied upon for this declaration.” See Section I.C.b.1. Moreover, considering the limited timeframe within which to request an extension (3 days), a Chief Executive Officer may not be available to sign an affidavit. Southwest Gas believes that a request for an extension should be supported by evidence (documentary and/or testimonial) that best supports the explanation of why an extension is necessary.



## XI. Conclusion

As set forth above, Southwest Gas respectfully requests the Commission not accept the proposed Resolution and instead open a rulemaking to impose slight modifications to its previous adoption of 49 CFR Part 190. Southwest Gas believes that a rulemaking will allow for gas corporations to participate and contribute in developing a procedure that accomplishes the intent of the draft Resolution. Southwest Gas appreciates the opportunity to provide comments and looks forward to actively working with the Commission and the other utilities to address the issues posed in this draft Resolution.

SOUTHWEST GAS CORPORATION

A handwritten signature in black ink, appearing to read "K. Stephens", written over a horizontal line.

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## **Exhibit A**

### **Subject Index Listing the Recommended Changes to the Draft Resolution**

Southwest Gas urges the Commission to reject the draft Resolution and, instead, initiate a rulemaking to amend its prior adoption of 49 CFR Part 190. Such a rulemaking would substitute the names of the federal agencies, agency subdivisions, and job titles in those regulations with the corresponding names of the state agencies, agency subdivisions, and job titles.

## **Exhibit B**

## Table of Authorities

### **Cases**

<i>England v. Louisiana State Bd. of Medical Examiners</i> , 375 U.S. 411 (1964) .....	4
<i>U.S. v. Bajakjian</i> , 524 U.S. 321, 344, 118 S.Ct. 2028, 2041, 141 L.Ed.2d 314 (1998) .....	4
<i>Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City</i> , 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).....	5

### **Statutes**

19 CCR § 2071 .....	2
19 CCR §§ 2070-2075.....	2
49 CFR § 190.209 .....	6
49 CFR § 190.217 .....	7
49 CFR Part 190.....	passim
49 USC §§ 60117(l) and 60118 .....	7
Civ. Pro. § 1013(a) .....	3
Code of Civil Procedure § 1013(a) .....	3
Pub. Util. Code § 2104.5 .....	4, 5
Pub. Util. Code § 2107 .....	4, 5

### **Other Authorities**

Calif. OSHA Reg. Title 8, Section 333 .....	6
California General Order 112-E .....	1

## **Exhibit C**

### **Appendix Setting Forth the Proposed Findings and Ordering Paragraphs**

Southwest Gas urges the Commission to reject the draft Resolution and, instead, initiate a rulemaking to amend its prior adoption of 49 CFR Part 190. Such a rulemaking would substitute the names of the federal agencies, agency subdivisions, and job titles in those regulations with the corresponding names of the state agencies, agency subdivisions, and job titles.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing **OPENING COMMENTS OF SOUTHWEST GAS CORPORATION (U905G)** upon the individuals on the established service list in proceedings A.10-12-005, A.10-12-006, A.09-09-013, and R.11-02-019 by electronic mail (email) service. Those individuals without an email address were served by regular, first-class mail.

Dated this 21<sup>st</sup> day of October, 2011 at Las Vegas, Nevada.

*/s/ Kristien M. Tary*

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