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October 21, 2011

Karen V. Clopton
Chief Administrative Law Judge
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Joint Comments of Southern California Gas Company and San Diego Gas & Electric Company on Draft Resolution ALJ-274

Dear Ms. Clopton:

Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E) submit the following Opening Comments on Draft Resolution ALJ-274 issued on October 10, 2011.

The Draft Resolution appears to be an effort to respond to the Independent Review Panel recommendation that the Commission "[r]evise the graduated enforcement framework to provide for the ability of the safety staff to levy civil penalties for violations."[1] SoCalGas and SDG&E support that recommendation. But the Draft Resolution, as discussed below, seeks to implement the recommendation in an unlawful manner[2] by creating an unprecedented Draconian citation program that disregards longstanding Commission policies and guidance and delegates unfettered discretion to Commission Staff. Indeed, it goes so far as to delegate to the Executive Director the power to delegate to any Commission staff the ability to levy fines under the Draft Resolution.[3] And contrary to the Independent Review Panel recommendation, the Draft Resolution actually displaces the Commission's graduated enforcement program, by, among other things, imposing the maximum penalty amount under Public Utilities Code §2107 for any violation of GO 112-E and CFR, Title 49, Parts 190, 191, 192, 193, and 199, no matter how small, and any ongoing violations are separate and distinct offenses, meaning that a new penalty can be issued each day a utility remains out of compliance. The Draft Resolution also does not require Staff[4] to follow any process before issuing citations and fines.

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1 June 9 Report of the IRP, pp. 3, 28.

2 SoCalGas hereby reserve the federal claims raised in these comments for decision by a federal court in accordance with *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

3 Draft Resolution, p. 1, n.1.

4 For purposes of these comments, SDG&E and SoCalGas use the term "Staff" as used in the Draft Resolution. *See Id.*

These problems are compounded by the fact a utility that receives a citation is required to "cure" the violation within seven days of service of the citation[5] and must deposit the entire penalty amount in escrow within that seven-day window simply to exercise its right to "appeal" the citation, a clear violation of the utility's Due Process rights. And while the Draft Resolution states that Staff has the burden to prove a prima facie case supporting its issuance of the citation, the Draft Resolution does not specify the components of that prima facie case or how it is to be met. The burden then shifts to the utility, who can only challenge the citation by showing that the violation did not occur. There is no right for the utility to challenge the amount of the penalty, show any mitigating factors, or even show why the violation could not be corrected within the allotted time.

Rather than adopt this infirm Draft Resolution, SoCalGas and SDG&E urge the Commission to adopt a well-reasoned and lawful approach to expanding CPSD's enforcement powers through careful consideration of the legal and practical implications of such an expansion of powers. Ideally, this should take place through a rulemaking and/or workshop process so that a factual record can be created and stakeholder input can be obtained. That, however, does not appear to be possible due to the apparent haste to have the Draft Resolution adopted (parties were only provided ten days to review and comment and request for an extension by SoCalGas and SDG&E was denied). Accordingly, SoCalGas and SDG&E suggest an alternative approach for enhancing the enforcement authority of CPSD Staff that is modeled after the enforcement programs in place at PHMSA. Key elements of their proposal include: (1) the issuance of a warning letter before a citation; (2) an opportunity to correct before incurring a penalty; and (3) a meaningful opportunity to be heard. The proposal also limits the delegation authority to the Director of CPSD and limits the amount the director can fine under the citation program to $1,000,000 for any related series of events. This better ensures uniformity in the enforcement process and reduces the risk that the Commission has exceeded its delegation authority. The limitation on the Director's fining authority is also consistent with PHMSA.

Such an approach, as discussed in more detail below, is better aligned with the Independent Review Panel's recommendations, avoids many of the legal and practical problems inherent in the Draft Resolution, and will allow the continued cooperation between CPSD and the State's natural gas pipeline operators that is necessary to achieve the common goal of safe and reliable operation of California's natural gas infrastructure. While SoCalGas and SDG&E's proposal may not resolve all legal errors,[6] it represents an approach that would be supported by SoCalGas and SDG&E, if implemented.

The Commission Should Enhance, Rather than Displace, its Graduated Enforcement Process

The Commission has acknowledges that "it is impossible for a utility to keep its distribution system in perfect compliance with the safety GOs, and that at any given time, there will be multiple violations on a utility's system."[7] That is why the Commission previously adopted an approach that incorporated notice and an opportunity to correct a violation before issuing a penalty, incentivizing a utility to engage in a maximally effective preventive maintenance program.[8] It is also why the Commission has taken a graduated approach to enforcing its General Orders. As the Commission has previously explained, the purpose of the Commission's General Orders is:

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[5] This timeframe applies regardless of whether service is effectuated by mail, likely giving the operator less than seven days to act in response to a mailed citation. It is also unclear from the Draft Resolution whether the enforcement process in the Draft Resolution is prospective, or whether Staff is authorized to impose penalties for violations that may have occurred prior to the adoption of the Draft Resolution. Any attempt by Staff to issue retrospective penalties pursuant to the Draft Resolution will raise a separate set of due process issues.

[6] SoCalGas and SDG&E's proposal may still run afoul of the Commission's delegation authority. *See* page 9 below.

[7] D.04-04-065, pp. 2-3.

[8] D.04-04-065, p. 47.

> not to create an enforcement regime where every failure to comply, no matter how minor, no matter what its cause, no matter whether it has been corrected, puts a utility in jeopardy of substantial daily fines. On the contrary, their purpose is to ensure safe, reliable operation of the electrical system. It is within our broad discretion under Public Utilities Code §§ 701 and 702 to establish an enforcement regime that achieves this purpose in a flexible and cost-efficient way, as we have historically done, in cooperation with the utility, and in full recognition that improvements are always possible and fines are sometimes necessary.[9]

The Independent Review Panel supported this approach, noting that it fosters an atmosphere of cooperation and open communication:

> The CPUC operates under a regime of Graduated Enforcement whereby it has a four-step process of increasing severity when it finds safety violations. The four steps are: (1) Staff notice to utility of possible violations; (2) Staff investigation and notice to utility of noncompliance with a set time frame for remediation by the utility; (3) Staff requests Commissioners to vote to open a formal Order Instituting Rulemaking (OII) which could result in fines and penalties; and (4) Staff requests CPUC Commissioners vote to refer the matter for civil or criminal prosecution by the Attorney General or local District Attorney. . . .
>
> Everyone with whom the Panel spoke supported the idea of graduated enforcement because it maintains an atmosphere of cooperation between the regulators and the operators. This atmosphere, in turn, encourages the utilities to self-report any violations.[10]

While the Independent Review Panel was supportive of the graduated enforcement process, it noted that there is room for improvement, and recommended that the Commission consider providing Staff with the flexibility to address "significant violations that do not warrant an OII or judicial process":

> [T]he Staff observed and we agree the levels of graduation may not be well calibrated. In particular, the OII process has rarely been invoked in pipeline safety cases. Because the OII is a formal adjudicatory process that may involve administrative law judges, hearings and pleadings, it is unwieldy for any but the most severe violations. As a result the Staff has little flexibility to address significant violations that do not warrant an OII or judicial process.
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> Meanwhile the Office of the California Fire Marshall (OSFM), which has jurisdiction over liquid petroleum pipelines, has a different scheme of graduated enforcement. The State Fire Marshall staff has the ability to exact penalties of up to $500,000. . . . It is not clear why the two agencies have different enforcement schemes despite regulating pipelines with identical safety mandates.[11]

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[9] D.04-04-065, pp. 19-20.
[10] June 9 Report of the IRP, p. 21.
[11] *Id.*, pp. 21-22.

Based on its findings, the Independent Review Panel recommended that the Commission:

> Revise the graduated enforcement framework to provide for the ability of the safety staff to levy civil penalties for violations. . . .
>
> Examine the pipeline regulatory authority, duties, and capabilities of the Office of the State Fire Marshall (OSFM), and determine, as part of the independent management audit of USRB described above, if and how the enforcement responsibilities of the gas safety group of the USRB could be aligned with OSFM, including consideration of whether a transfer of the CPUC's gas transmission safety function to the OSFM would improve the overall quality of the oversight of gas transmission pipeline safety.[12]

Rather than implement this recommendation, the Draft Resolution ignores prior Commission precedent and policy, opting instead to impose a maximum $20,000 (soon to be $50,000) penalty for any and all violations of GO 112-E regardless of whether the violation compromises the safety or reliability of the utility's system. It also eliminates the graduated enforcement process and does not provide the utility with an opportunity to correct a violation without incurring a penalty. This could result – due to the practical reality that a utility cannot possibly maintain a perfect system at all times – in a natural gas utility being fined millions of dollars at any time, whether or not the utility prudently operates and safely maintain its systems. It could also result in a utility expending significant time and resources to fix minor, technical violations that don't impact the safety of the system. Finally, such a drastic enforcement scheme is likely to lead to an adversarial and distrustful relationship with staff and discourage utilities from self reporting violations. It could even discourage the utilities from adopting internal procedures that exceed federal regulations.

For example, 49 CFR 192.481(a) requires pipeline operators to conduct inspections to monitor atmospheric corrosion on bridges and spans at least every three years, not to exceed 39 months. SoCalGas and SDG&E have implemented more stringent internal procedures that exceed current Federal regulations and direct employees to conduct inspections every 24 months. Because 49 CFR 192.13(c) requires operators to implement and follow their own procedures, SoCalGas and SDG&E could be cited $50,000 per day, per inspection, for failing to adhere to their more stringent 24-month internal standard. So, for example, if dozens of routine inspections were completed during the 25th month (which is still more stringent than Federal regulations require) as a result of a clerical error, each late inspections would result in an individual citation and fine of $50,000 for each day late. This could result, under the Draft Resolution, in millions of dollars in penalties even though SoCalGas and SDG&E's internal procedures far exceed Federal regulations. This would create a perverse disincentive for pipeline operators to adopt internal standards that exceed Federal regulations.

The Commission Should Implement a Graduated Enforcement Process Modeled After PHMSA

As acknowledged in the Draft Resolution, the Independent Review Panel recommended that the Commission "seek to align its enforcement process with that of the State Fire Marshal's by providing the CPSD staff with additional enforcement tools modeled on those of the OSFM [Office of State Fire Marshal] and the best from other states." The Draft Resolution further notes that the OSFM's enforcement process is modeled after that of PHMSA. Despite statements to the contrary, the Draft Resolution does not do this. SoCalGas and SDG&E's enforcement proposal, in contrast, is modeled after the PHMSA enforcement regulations. Their proposal, which is set forth in Attachment 3, contains the following key elements: (1) the issuance of a warning letter prior to citation; (2) an opportunity to

[12] *Id.*, p. 28.

correct the violation before a citation and penalty; and (3) a meaningful opportunity to be heard. It also limits the enforcement authority to the Director of CPSD and limits the amount of the fine under this program to $1,000,000. Below is a brief summary of the enforcement process in the SoCalGas and SDG&E proposal.

Step One: Issuance of a Warning Letter

Consistent with the program in place at PHMSA, SoCalGas and SDG&E's proposed enforcement process begins with the issuance of warning letter by the Director of CPSD, notifying the pipeline operator (Respondent) of a probable violation, specifying the nature of the violation and the GO and/or Code provisions violated, and directing the pipeline operator to correct the probable violations within a specified period of time, not to exceed 30 days. Such an approach, not only aligns the Commission's enforcement mechanism with that of PHMSA, but also maintains the Commission's graduated enforcement process.

Step Two: Opportunity to Correct

Under SoCalGas and SDG&E's proposal, the Respondent is required to respond in writing to the Warning Letter within 14 days, by either (1) advising the Director of CPSD of the steps it intends to take to remedy the probable violation or (2) providing a written explanation, information or other material to show that no probable violation has occurred.

Because it may not always be possible to correct the violation within the allotted time, SoCalGas and SDG&E propose that the Respondent be allowed to request additional time to remedy the violation due to factors outside of the utility's control. For example, during field inspections, an operator may occasionally discover atmospheric corrosion, missing pipeline markers, missing insulation between piping and supports, or missing or damaged supports. These findings all have a relatively low safety impact and approximately 75% can be corrected within a short period of time. Others, however, may require repairs that require environmental permits, and may take months to complete the repair, due to factors outside the control of the operator.

Recognizing that a natural gas pipeline operator needs to show that additional time is required, SoCalGas and SDG&E propose that any request for additional time be accompanied by a written explanation to show why additional time is needed. The Director of the CPSD would grant the request for additional time if Respondent has provided sufficient information to show why the additional time is needed. The Director of CPSD can also impose interim remedial safety measures.

Step Three: Notice of Citation

If the Respondent fails to (1) respond to the Warning Letter; (2) correct the probable violation within the time provided under Step Two; or (3) provide a sufficient written explanation to show that no probable violation has occurred, the Director of CPSD can issue a citation. The citation can include a fine up to $1,000,000 and a compliance order. If the Director of CPSD believes that a higher fine is warranted, the Director can seek a greater fine through the Commission's OII process. The limit on the amount of the fine is consistent with PHMSA and OSFM's enforcement processes.[13]

SoCalGas and SDG&E also urge the Commission to adopt a requirement that the Director of the CPSD consider a number of factors in proposing a penalty amount, including the nature, circumstances and gravity of the violation, the degree of Respondent's culpability, Respondent's history of prior offenses,

[13] PHMSA may issue civil penalties up to a maximum of $1,000,000 for any related series of events, and OSFM may issue civil penalties up to a maximum of $500,000.

and any good faith by Respondent in attempting to achieve compliance.[14] The factors to be consider are identical to those under PHMSA's regulations.[15]

Step Four: Response to the Notice of Citation

The CPSD director, under SoCalGas and SDG&E's proposal, would direct the Respondent to respond to the Notice of Citation within 30 days and provide one of the following responses: (1) pay the proposed civil penalty and/or agree to the compliance order; (2) submit a written explanation, information or other materials in answer to the allegations, in objection to the compliance order or in mitigation of the proposed civil penalty; or (3) request a hearing. Failure of Respondent to respond would constitute a waiver of the right to contest the allegations in the citation and authorize the Director of CPSD, without further notice to the Respondent, to find facts to be as alleged in the Citation, and to issue a final order.

Step Five: Request for Hearing, If Applicable

Although SoCalGas and SDG&E believe that the vast majority of matters identified through the graduated enforcement process will be resolved cooperatively during the first four steps of their proposal, a necessary element for any enforcement proceeding is a meaningful opportunity to be heard. This, as discussed below, is required by the United States and California Constitutions. SoCalGas and SDG&E believe that the hearing procedures set out in Section III of Appendix A in Attachment 3, unlike those in the Draft Resolution, better comport with due process.

The Citation Program Set Forth in the Draft Resolution Violates Due Process

One of the fundamental flaws with the Draft Resolution is that it fails to satisfy due process. In determining whether due process has been met, courts apply a context-specific three part balancing test: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[16] When these factors are applied to the Draft Resolution, it becomes apparent that due process has not been met.

Private Interest Affected

The private interests impacted by the Draft Resolution are substantial. If a utility is found to be in violation of a regulation, the draft resolution requires it to bring itself into compliance within seven days, no matter how burdensome (or even impossible) it may be to do so. The Draft Resolution also mandates the imposition of hefty fines for each violation, which could easily reach excessive levels. Because violations are ongoing offenses, and because the regulatory provisions at issue are so numerous, penalties could quickly add up to the millions of dollars, particularly if Staff and the Commission take the position that they have the authority to issue retrospective fines. This is the case even if the alleged violations are not serious offenses.

[14] These same factors would apply to the Presiding Officer in any hearing on the matter.
[15] 49 CFR 190.225.
[16] *Mathews v. Eldridge*, 424 U.S. 319, at 335 (1976).

Risk of Erroneous Deprivation and Value of Additional Procedural Safeguards

The Draft Resolution allows Staff to issue citations and fines whenever they, in their unfettered discretion, decide that a violation has occurred. Utilities are required to bring themselves into compliance and pay penalties immediately, obtaining review only after the fact. This unfettered discretion becomes even more problematic, because the regulations at issue are largely "performance-based" rather than prescriptive in nature, and therefore, do not precisely state what steps a utility must take to ensure compliance.[17] If Staff errs in determining a violation has occurred, the appeals process does not provide for full Commission review and provides only a partial remedy. While a utility might be able to recoup any fines it has paid, the Draft Resolution provides no mechanism for challenging the imposition of the fine or the amount of the fine. Nor is there a mechanism for compensating a utility for the time and expense of curing a nonexistent regulatory violation, including, among other things, attorneys' fees and interest on the penalties.

As a general matter, the Supreme Court has held that when significant private interests are at stake, guarding against erroneous deprivations requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest."[18] The courts do "tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." [19] No such circumstances exist here. The Supreme Court has approved seizures of personal property without predeprivation notice and a hearing only in limited exigent circumstances. For example, the Court has explained that "preseizure notice and hearing might frustrate the interests served by [forfeiture] statutes, since the property seized… will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given."[20]

The Draft Resolution is not limited to situations in which an exigency requires immediate regulatory compliance to avoid serious harm. Instead, it broadly authorizes the CPSD staff to fine without a hearing. And, it is difficult to imagine a circumstance in which the immediate payment of a fine will satisfy the requirements of due process.

In analogous circumstances, courts have found due process violations. The California Court of Appeals' decision in *Menefee & Son v. Dep't of Food & Agric.*, 199 Cal. App. 3d 774 (1988), is particularly instructive. At issue there was a state statute that allowed the Director of the Food and Agriculture Department to seize and destroy crops treated with unapproved chemicals without providing a predeprivation hearing. The court held that the statute violated the California Constitution's Due Process Clause. The Court observed that "the challenged statute makes no effort to limit its application to emergency situations and instead broadly applies to any misuse of chemicals without regard to whether an emergency appears. The mere fact that summary seizure may be necessary in some instances does not validate a statute that permits ex parte seizure without any attempt to narrowly draw into focus the extraordinary circumstances in which summary seizure may be required."[21] The court added that,

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[17] *Cf. County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179, 195 (2d Cir. 2001) ("Due process requires that before a criminal sanction or significant civil or administrative penalty attaches, an individual must have fair warning of the conduct prohibited by the statute or the regulation that makes such a sanction possible.").

[18] *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

[19] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (internal quotation marks omitted).

[20] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974); *compare James Daniel Good*, 510 U.S. 43 (holding that, absent exigent circumstances, seizure of *real* property pursuant to a civil forfeiture statute must be preceded by notice and a hearing).

[21] *Menefee*, 199 Cal. App. 3d at 782.

"[s]ince a significant property interest is at stake, neither the egregiousness of the alleged misconduct nor the apparent lack of a meritorious defense can obviate the requirement that the plaintiffs be accorded minimal due process protections."[22]

The limited postdeprivation review available under the draft resolution raises additional constitutional concerns.[23] First, a utility is not permitted to seek review of a citation unless the utility first pays the penalty or places the penalty money in escrow within seven days, which as previously stated could be substantial. Courts have expressed concern about procedures that require a party to pay significant sums in a short amount of time simply to be able to obtain review of an adverse administrative order.[24] And courts, in rejecting due process claims, have sometimes emphasized the fact that a penalty does not become final and payable until *after* postdeprivation review has been completed.[25]

Second, at no point during the review process is Staff affirmatively required to prove that a utility has violated an applicable regulation. Instead, it is the utility's burden on appeal to show the absence of a violation, at least after Staff has made out a prima facie case. Courts have recognized that "[i]t is often difficult to prove a negative, and where the pre-termination process has been minimal, the [appellant's] fate may depend entirely upon the post-termination hearing."[26] And in *Menefee*, the California Court of Appeals held that, "if a judicial proceeding is the owner's first and only opportunity to have a hearing on the merits of the seizure, then it is essential that the department be required to bear the burden of proof on all issues."[27]

The Government's Countervailing Interest In Denying Additional Procedures

While the Draft Resolution suggests that it is designed to help preserve Commission resources and provide for more efficient enforcement, it does not show (and indeed could not show) that additional procedural protections would be impractical or unduly burdensome. As the Draft Resolution acknowledges, "[t]o the extent that Staff discovers violations that constitute immediate safety hazards, . . . [it] has existing authority to ensure that those violations are promptly corrected."[28]

The Penalty Provisions of the Draft Resolution Violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution[29]

Because the Draft Resolution imposes the maximum statutory penalty for all violations and precludes Staff from taking into account the gravity of the offense (and further does not allow for a hearing or administrative appeal of the amount of the penalty), it violates the Excessive Fines Clause of the Eighth

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[22] *Id.* at 781; *see also Connecticut v. Doehr*, 501 U.S. 1 (1991) (state statute authorizing prejudgment attachment of real estate without prior notice or hearing and without requiring a showing of exigent circumstances did not satisfy due process).

[23] *See Benavidez v. City of Albuquerque*, 101 F.3d 620, 626 (10th Cir. 1996) ("When the pre-termination process offers little or no opportunity for the employee to present his side of the case, the procedures in the post-termination hearing become much more important.").

[24] *See, e.g.*, *St. Louis Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 64-65 (1919) (due process violation "where no adequate opportunity is afforded. . . for safely testing, in an appropriate judicial proceeding, the validity of the [administrative order]. . . before any liability for the penalty attaches").

[25] *See, e.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) ("Although the Act's civil penalties unquestionably may become onerous if petitioner chooses not to comply, the Secretary's penalty assessments become final and payable only after full review by both the Commission and the appropriate court of appeals.").

[26] *Benavidez*, 101 F.3d at 626.

[27] *Menefee*, 199 Cal. App. 3d at 783.

[28] Draft Resolution, p. 7.

[29] The Excessive Fines Clause of the Eighth Amendment applies to the states through the Fourteenth Amendment. *See Cooper Industries v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 433-34 (2001).

Amendment to the United States Constitution.[30] Retrospective application of this penalty provision would make this violation of the Excessive Fines Clause even more egregious.

The Draft Resolution Unlawfully Delegates Authority to Staff

The Draft Resolution unlawfully delegates authority to Commission Staff that the Public Utilities Code and other State law grant to the Commission. California courts have recognized limits on the ability of agencies to delegate discretionary functions.[31] Generally, powers conferred upon public agencies and officers that involve the exercise of judgment or discretion are in the nature of a public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization.[32] What Public agencies may delegate are the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action,[33] functions relating to the application of standards,[34] and the making of preliminary recommendations and draft orders.[35]

In the context of issuance of a violation and/or fine, the Commission may delegate investigatory duties to Staff but the decision whether and/or what amount of fine is to be imposed would be an "exercise of judgment or discretion" and therefore "cannot be surrendered or delegated to subordinates in the absence of statutory authorization."[36]

The Commission itself has previously acknowledged these limits, although it has taken a narrow view of what constitutes a non-delegable discretionary function.[37] The fact that the Draft Resolution requires the CPSD staff to issue the maximum allowable fine does not rectify the problem. The Staff necessarily must exercise discretion when it comes to deciding what constitutes a violation and whether to issue citations and fines in a given case. As stated, many of the regulations involved are performance based, not prescriptive.

The Draft Resolution also unlawfully delegates the Commission's delegation authority to the Executive Director of the Commission to give any staff the authority to "carry out the particular functions involved" (i.e., citation authority for any and all violations of GO 112-E and the federal regulations).

The Draft Resolution Citation and Review Process Violates the Public Utilities Code

Section 2104.5 of the Public Utilities Code guides the Commission in its assessment of a penalty, and requires that "[i]n determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of the 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 the violation, shall be considered." The Draft Resolution attempts to abdicate the

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[30] "In *United States v. Bajakajian, 524 U.S. 321, 141 L. Ed. 2d 314, 118 S. Ct. 2028 (1998)*, the Supreme Court established the standard for evaluating challenges under the *Excessive Fines Clause*: '[A] punitive forfeiture violates the *Excessive Fines Clause* if it is grossly disproportional to the gravity of a defendant's offense.'" *USA v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (quoting *Bajakajian, at 334)*.

[31] *See, e.g.*, *California School Employees Association v. Personnel Comm'n*, 3 Cal.3d 139, 144 (1970) (holding that agencies may delegate ministerial tasks but not discretionary authority).

[32] *Bagley v. City of Manhattan Beach*, 18 Cal.3d 22, 24 (1976).

[33] *California School Employees, supra*, at p. 144.

[34] *Bagley, supra*, at p. 25.

[35] *Schecter v. County of Los Angeles*, 258 Cal.App.2d 391, 397 (1968).

[36] *Bagley, supra*, at p. 24; *California School Employees, supra*, at p. 144; *Schecter, supra*, at p. 396.

[37] *See, e.g.*, *Union Pacific Railway Co.*, Order Modifying Resolution ROSB-002 and Denying Rehearing of Resolution, as Modified, A.08-12-004, 2009 Cal. PUC LEXIS 250, *5 (May 11, 2009); *cf. Independent Review Panel* June 9 Report, Recommendation 6.7.3.1 at 104 ("The ability of USRB staff to take a greater enforcement role appears limited, but not precluded, by CPUC policy and case law restricting the delegation of Commission authority.").

Commission's obligation to conduct such an analysis and instead, directs Staff to impose the maximum penalty in all cases, and does not allow for review of the amount of the penalty by the Commission. Accordingly, the Draft Resolution violates Section 2104.5 of the Public Utilities Code.

Longstanding Commission precedent also provides that the Commission must take the following factors into account before assessing a penalty: (1) physical harm to people or property; (2) economic harm (with the severity of a violation increasing with the level of costs imposed upon the victims of the violation and the unlawful benefits gained by the Respondent); (3) harm to the regulatory process; (4) the number and scope of the violations; (5) Respondent's actions to prevent a violation; (6) Respondent's actions to detect a violation; (7) Respondent's actions to disclose and rectify a violation; (8) need for deterrence; (9) Constitutional limitations on excessive fines; (10) the degree of wrongdoing; (11) public interest; and (12) the role of precedent.[38] The Draft Resolution impermissibly modifies this longstanding precedent without proper notice to the parties.[39]

Factual Errors

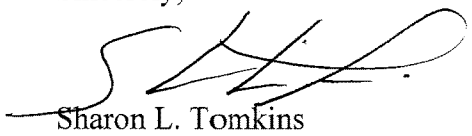
The Draft Resolution includes five factual findings (specifically, Findings 5, 6, 7, 8, and 10) that are not supported by any evidence and must be stricken from the Draft Resolution.

Conclusion

For the reasons stated, SoCalGas and SDG&E urge the Commission to consider the proposed enforcement regime set forth in the Draft Resolution in the Pipeline Safety Rulemaking, or some other forum, that will allow for careful consideration of the legal and practical implications of the proposed regime. At a minimum, the Commission should adopt SoCalGas and SDG&E's proposed alternative.

Thank you for your consideration of these comments.

Sincerely,



Sharon L. Tomkins
Assistant General Counsel, Regulatory
Southern California Gas Company

Attachments: Certificate of Service
Proposed Redline Version of Draft Resolution ALJ-274
Proposed Redline Version of Appendix A of Draft Resolution ALJ-274
Subject Index of Proposed Changes
Table of Authorities

cc: Administrative Law Judge Minkin via e-mail and overnight mail

[38] *See* D.98-12-075

[39] Section 1708 of the Public Utilities Code provides that the "Commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it."