

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Citation of Pacific Gas and
Electric Company for Violations of Gas Safety
Requirements pursuant to Resolution ALJ-274.

U 39 G

Citation No. ALJ-274
2012-01-001
(Citation Date
January 27, 2012)

**PACIFIC GAS AND ELECTRIC COMPANY'S BRIEF ON
APPEAL OF CITATION NO. ALJ-274
2012-01-001**

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On December 30, 2011, PG&E became the first gas utility to report a self-identified and self-corrected violation under Resolution ALJ-274 (Res. ALJ-274). A month later, CPSD issued a citation for this self-reported violation – its first under Res. ALJ-274 – and imposed a \$16.8 million fine. While PG&E does not dispute the violation it self-reported, CPSD's proposed fine is excessive. The amount of the fine threatens to undermine the Commission's policy objective of encouraging gas utilities to identify, report and fix safety issues. CPSD arrived at its proposed fine by over-counting the number of "violations." Even if CPSD were correct about the number of violations, the Commission should reduce the penalty to an appropriate amount, and should direct CPSD to withhold issuing citations for self-reported violations until the Commission provides additional policy guidance.

The self-reported violation involves 49 C.F.R. § 192.723(b)(2). That regulation requires a leak survey with leak detector equipment outside business districts "at least once every 5 calendar years at intervals not to exceed 63 months." As described in PG&E's notice to CPSD, mapping employees in PG&E's Diablo Division discovered on December 20, 2011 that the mains and services on 16 plat maps had not been included in the division's distribution leak survey schedule. As a consequence, some of those facilities had not been surveyed within the five-year time interval required by 49 C.F.R. § 192.723(b)(2). PG&E subsequently confirmed

that the distribution facilities on 13 of the 16 plat maps had not been leak surveyed for at least one five-year leak survey cycle, with the facilities on one map missing three cycles due to the error. In total, PG&E had missed performing 21 five-year leak surveys. PG&E leak surveyed all of the distribution facilities on the identified division plat maps and completed all necessary immediate corrective actions by December 29, 2011. PG&E also took steps to correct the Diablo Division's mapping process going forward and undertook a system-wide evaluation to determine if it had the same issue in any other of its divisions and to implement corrective actions as needed.¹

In an email to all PG&E employees, Nick Stavropoulos, Executive Vice President of Gas Operations, praised the employees who found the violation for their "courageous and swift action to do the right thing." Their actions allowed the Company to quickly address and correct the issue. Mr. Stavropoulos' email encouraged employees to follow the example set by the Diablo Division employees. (*See Attachment A hereto.*)

CPSD confirmed that as of December 29, 2011, PG&E had leak surveyed all distribution facilities on all 16 maps. CPSD also confirmed, "There was no injury or damage resulting from the violation and PG&E has initiated corrective actions in Diablo." Ex. 1, Preliminary Investigation Report at 1.

The issue on this appeal is the appropriate amount of the penalty the Commission should impose for PG&E's leak survey violation. In deciding this issue, the Commission should focus on (1) the number of violations; and (2) PG&E's good faith in self-identifying and self-correcting the violation, and the weight that good faith should be given in assessing the penalty proposed by CPSD. For the reasons detailed below, the Commission should correct CPSD's over-counting of violations and exercise its power to reduce the amount of fine because of PG&E's self-reporting, prompt corrective action, and good faith in this matter. In addition, until

¹ PG&E provided its system-wide update to CPSD on February 1, 2012. The update reported that PG&E had found and corrected 46 additional maps that had not been included in its leak survey schedules.

the Commission can provide further policy guidance to CPSD, the Commission should direct CPSD not to issue additional citations for self-reported violations.

I. CPSD OVER-COUNTED THE NUMBER OF VIOLATIONS

As CPSD noted in its citation, distribution mains and services on 13 of PG&E's plat maps "missed one or more five-year leak surveys as required by 49 C.F.R. § 192.723(b)(2)." Ex. 1, Preliminary Investigation Report at 1; *see also Id.* at 2 ("PG&E missed one or more of the required 5-year distribution leak survey[s] for the distribution mains and services on the remaining 13 plat maps.").

Thus, CPSD tacitly acknowledged the violation lies in missing the five-year leak survey. Nevertheless, the citation imposes penalties as if the requirement were to conduct **monthly** leak surveys. It treats each month after the first missed leak survey as a separate violation. For example, when PG&E missed the December 16, 2010 five-year survey for item 2 on the table on page 4 of Ex. 1, Preliminary Investigation Report, CPSD treated this as 12 violations (one for each month until the December 29, 2011 leak survey). And when PG&E missed the August 10, 2005 leak survey for item 6, CPSD treated it as 76 violations. Using this methodology, CPSD counted 838 separate violations of 49 C.F.R. § 192.723(b)(2) and, as required by Res. ALJ-274, imposed the maximum penalty of \$20,000 for each of those violations.

But, since the requirement is to conduct a leak survey every five years, after missing one leak survey, the next violation could only be missing the next five-year leak survey. The correct treatment of item 2, then, is that it is a single violation; PG&E missed just one five-year survey. Similarly, item 6 constitutes only two violations (a missed survey in 2005 and another missed survey in 2010). If the fines are aligned with the violations and even applying the statutory maximum, as CPSD is required to do, the result is as follows:²

² This table is derived from that Ex. 1, Preliminary Investigation Report at 4.

Item #	Plat Map	Main Operational Date (Earliest)	<u>A</u> 1 st Missed Leak Survey Date	<u>B</u> Leak Survey Date	<u>C</u> # of Missed 5-Year Leak Surveys	<u>D</u> Fine \$20,000 per violation [C x \$20,000]
1	53B10	11/4/1999	12/31/2004	12/29/2011	2	\$40,000
2	53B11	9/16/2005	12/16/2010	12/29/2011	1	\$20,000
3	49A10	5/27/2002	8/27/2007	12/29/2011	1	\$20,000
4	49B11	11/17/1999	12/31/2004	12/29/2011	2	\$40,000
5	51E09	6/17/1993	9/17/1998	12/29/2011	3	\$60,000
6	53E16	5/10/2000	8/10/2005	12/29/2011	2	\$40,000
7	56D09	9/13/2005	12/13/2010	12/29/2011	1	\$20,000
8	58F02	3/23/1998	6/23/2003	12/29/2011	2	\$40,000
9	63F02	5/1/2007	None	12/29/2011	0	\$0
10	59D09	12/5/2001	12/31/2006	12/29/2011	1	\$20,000
11	59E09	6/13/2006	9/13/2011	12/29/2011	1	\$20,000
12	59F12	7/13/2006	10/13/2011	12/29/2011	1	\$20,000
13	64A10	6/20/2008	None	12/29/2011	0	\$0
14	64C07	12/8/1998	12/31/2003	12/29/2011	0 ³	\$0
15	64D06	12/8/1998	12/31/2003	12/29/2011	2	\$40,000
16	64D07	12/8/1998	12/31/2003	12/29/2011	2	\$40,000
TOTAL AMOUNT						\$420,000

II. THE COMMISSION SHOULD EXERCISE ITS DISCRETION TO ADOPT A FINE THAT IS APPROPRIATE TO THE CIRCUMSTANCES.

Having determined to count the violations as it did, CPSD had only two choices under Res. ALJ-274:⁴ (1) impose a fine at the maximum statutory rate of \$20,000 per violation or (2) decline to issue a citation. Even if the Commission agrees with CPSD’s method of counting

³ CPSD did not consider this a violation because part of the distribution main was included in a transmission pipeline leak survey.

⁴ Res. ALJ-274 contains some inconsistent language. On the one hand, it states, “It is reasonable to direct Staff to take account of the factors delineated in Pub. Util. Code § 2104.5 in issuing citations.” (Res. ALJ-274, Finding & Conclusion (F&C) 12.) On the other hand, the discussion of the delegation of authority to Commission staff states, “**Each citation will assess the maximum penalty amount** provided for by § 2107.” (Res. ALJ-274 at 7; emphasis added.) And further, “It is reasonable to assess penalties for each violation **at the maximum amount** set forth in Pub. Util. Code § 2107 . . .” (*Id.*, F&C 11; emphasis added.) In its discussion of self-identified and self-corrected violations, Res. ALJ-274 states that “Staff should consider those facts [that the violation is self-report and self-corrected and where no injury or damage has resulted] **in deciding whether or not to cite a violation.**” (*Id.* at 12; emphasis added.)

violations, it has the discretion to adopt a penalty at any level up to \$20,000 per violation. (Pub. Util. Code § 2107, as in effect through December 31, 2011.) Res. ALJ-274 itself states that “we [the Commission] retain final discretionary authority in determining the outcome of any appeals that may be submitted.” (Res. ALJ-274 at 13, *citing* D.09-05-020.)

Public Utilities Code § 2104.5 mandates the Commission’s consideration of the good faith of the utility in assessing the amount of any penalty. It provides in relevant part:

Any penalty for violation of any provision of this act, or of any rule, regulation, general order, or order of the commission, involving safety standards for pipeline facilities or the transportation of gas in the State of California may be compromised by the commission. In determining the amount of such penalty, or the amount agreed upon in compromise, 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, shall be considered.

Res. ALJ-274 makes clear that one purpose of the citation appeal process is to ensure that the Section 2104.5 factors are properly considered:

If a utility believes that the amount of the fine imposed in any Staff-issued citation is not consistent with the factors set forth in § 2104.5, it may appeal the amount of the fine to the full Commission, which will ensure that those factors are properly considered.

(Res. ALJ-274, F&C 12.)

While CPSD states that it considered the Section 2104.5 factors, its discussion focuses on the inherently dangerous nature of natural gas and the fact that the omission of the facilities on the 16 maps “indicates a failure of PG&E’s Diablo Division to accurately track and maintain its distribution assets.” (Ex. 1, Preliminary Investigation Report at 3.) CPSD does not explicitly discuss PG&E’s good faith, instead stating: “CPSD believes its calculated amount for the fine reasonably considers the prompt action taken by Diablo Division staff upon identification of the

apparent mapping discrepancies and the fact that no injuries or damages are known to have resulted from this discrepancy.” (*Id.*)

It is difficult to reconcile this conclusory statement with CPSD’s imposition of the maximum statutory penalty of \$20,000 for each of 838 monthly violations. Nor is it possible to deduce to what extent CPSD’s action was driven by the mandate in Res. ALJ-274 that it “assess penalties for each violation at **the maximum amount** set forth in Pub. Util. Code § 2107.” (Res. ALJ-274, F&C 11; emphasis added.)

Under the circumstances here, the Commission should exercise its discretion either not to impose a penalty or to do so at less than the statutory maximum. Not only did PG&E’s employees act with an unswerving commitment to safety, the Company quickly investigated the issue, corrected it by performing leak surveys and repairing the leaks found, and voluntarily undertook to review its maps system-wide to identify any other possible missed leak surveys. PG&E’s system-wide evaluation identified an additional 46 plat maps throughout its gas distribution system that were not included in the leak survey schedule and missed five-year leak surveys. Although the self-reported missed leak surveys represent a small percentage of PG&E’s system (the 16 maps in the Diablo Division and the 46 additional maps represent less than 0.3% of PG&E’s approximately 21,600 gas distribution system maps), the improvement in public safety – including the measures PG&E is taking to ensure such a lapse never happens again – is obvious. While PG&E does not in any way minimize the importance of timely performing all leak surveys, it corrected the problem as soon as it was discovered, and took steps to prevent a recurrence.

There is a strong public policy reason for the Commission to encourage self-reporting and prompt corrective action in the initial application of Res. ALJ-274 and not to discourage future reports through a punitive response. The \$16.8 million fine here would be to send a message to PG&E’s employees (and those at other gas utilities) that undermines the safety and compliance message PG&E has been reinforcing. PG&E has told its employees that it expects them to identify shortcomings, safety issues and non-compliances and to bring them to the

attention of their supervisors for corrective action. PG&E's Executive Vice President of Gas Operations has publicly recognized and praised the employees who identified the plat map issue that is the subject of PG&E's self-report and this Citation. No matter how much PG&E's management tries to convey that these employees' conduct was exemplary and that they acted precisely as the Company wanted them to act, because their discovery of the map issue could cost the Company \$16.8 million, it may well cause employees to wonder in the future if they should simply fix problems and not bring them to the attention of management. This is not what PG&E wants and it should not be the message the Commission wants to send to our employees and the employees of the other gas utilities.

PG&E's prompt remedial actions and the absence of any harm or property damage argue for the Commission to exercise its discretion to adopt no penalty or a penalty at less than the maximum amount, as it did in D.04-04-065. Even if the Commission were to agree with CPSD's count of violations, it should penalize each of the claimed 838 violations no more than the statutory minimum of \$500, resulting in a total penalty of \$419,000.

III. THE COMMISSION SHOULD DIRECT CPSD TO WITHHOLD ISSUING CITATIONS FOR SELF-REPORTED VIOLATIONS PENDING FURTHER COMMISSION CONSIDERATION

This is the first self-identified and self-corrected violation since the adoption of Res. ALJ-274. The magnitude of the penalty imposed by CPSD shows that Res. ALJ-274 may have an unintended consequence in its application to self-identified and self-corrected violations. The Commission should carefully consider the policy implications of this action.

Citi Investment Research & Analysis immediately saw the citation as a "negative regulatory precedent." In a January 31, 2012 alert, entitled "Commission Staff Throws A Curveball First Pitch" (Attachment B hereto), Citi said:

In our view, the fine sets a negative regulatory precedent if ultimately adopted as-is by the CPUC. In the 12/1/11 resolution the CPUC agreed Staff should consider waived or reduced fines in

cases of violations that are self-identified and self-corrected (as was the case in this instance). Yet, **the magnitude of the Staff's recommended fine is high (we believe in the top 5 utility penalties in state history)**, and suggests Staff may be overly exuberant in its newfound authority. If the new fast-tracking citation program means record-level fine assessments for each violation, we would likely heavily consider a valuation discount for future gas pipeline infrastructure investment to reflect unforeseen heavy-handed penalties in the future, particularly in a San Bruno-charged environment. [Bold in original; bold and underline added.]

Until the Commission is able to review the policy implications of the way Res. ALJ-274 applies to self-reported violations, PG&E urges the Commission to direct CPSD to withhold issuing citations for self-reported violations. Instead, CPSD should report to the Commission on the self-reported violations it has received from PG&E and the other gas utilities. CPSD should also go ahead with its planned March 27 workshop on the implementation of Res. ALJ-274, and receive the views of the many interested parties. Armed with information about self-reporting and the results of the workshop, the Commission can make an informed decision about how it wants the self-reporting aspect of Res. ALJ-274 to work.

IV. CONCLUSION

The \$16.8 million penalty assessed by CPSD threatens to undermine the important public policy objective of encouraging self-reporting of violations. The Commission should correct CPSD's erroneous calculation of "violations," and exercise its discretion to impose no penalty or, at most, a penalty of \$420,000. Until the Commission can fully consider the correct policy

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for self-identified and self-corrected violations, it should direct CPSD to withhold issuing citations for self-reported violations.

Respectfully submitted,

/s/ Jonathan D. Pendleton

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