

**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.

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

**REPLY BRIEF
OF THE CONSUMER PROTECTION AND SAFETY DIVISION**

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I. INTRODUCTION

The Consumer Protection and Safety Division of the California Public Utilities Commission (CPSD) submits this Reply Brief pursuant to an Administrative Law Judge's Ruling issued on February 10, 2012, in the above-captioned proceeding.

II. DISCUSSION

A. CPSD Has Properly Considered *All* of the Necessary Factors in Establishing the Penalty Amount

PG&E urges in its Opening Brief that in establishing the appropriate amount of the penalty "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."¹ In sum, PG&E would have the Commission consider *only* these factors, and waive or significantly reduce the penalty on that basis.

PG&E fails to identify *all* of the factors that the Commission has considered for more than a decade in establishing the appropriate amount of a penalty, consistent with Decision 98-12-075 and Public Utilities Code § 2104.5:²

1. The severity of the offense;
2. The conduct of the utility, not just during and after the offense, but *before* the offense;
3. The financial resources of the utility;
4. The totality of the circumstances; and
5. Past Commission decisions assessing other penalties.

As explained in its Opening Brief, the penalty amount of \$16,760,000 established by CPSD reflects an appropriate balance of all of these factors. It is a substantial penalty for a very significant offense, and it will encourage PG&E management to take system-wide compliance seriously going forward.

¹ PG&E Opening Brief (PG&E OB) at 2.

² Unless otherwise stated, all further section references are to the California Public Utilities Code.

B. Upholding the Penalty Will Advance the Commission's Policy Objectives

PG&E claims that “[t]he amount of the fine threatens to undermine the Commission’s policy objective of encouraging gas utilities to identify, report and fix safety issues.”³

CPSD does not agree. The policy objectives that PG&E lists will be *enhanced* as a result of the Commission’s enforcement of the fine, not threatened. Further, aggressive enforcement of the type evidenced in this proceeding should result in industry-wide compliance which will ultimately produce safer gas systems.

Resolution ALJ-274 (ALJ-274) was adopted because the Commission’s prior practice of working collaboratively with self-reporting utilities, without citations or fines, produced unsatisfactory results, as demonstrated by the violations at issue here. As outlined in CPSD’s Opening Brief, PG&E had numerous opportunities under the “old regime” (before adoption of ALJ-274) to identify, report, and fix the violations at issue here, but it did not do so, even after two major gas explosions in residential areas resulting in both loss of life and property. While these incidents related to PG&E have shed light on PG&E failures, they raise questions regarding the status of other gas utility infrastructure and practices.

The Commission recognized that change was needed, and it adopted ALJ-274 to effect that change. Had CPSD elected not to cite or fine PG&E here it would have been doing nothing more than what it did before the adoption of ALJ-274 – and this was clearly not the Commission’s intent, and not justified given the severity of the offense. Not every violation, self-reported or not, will result in a citation and fine. However, leak surveys are important; they are the primary industry tool available to detect and correct gas leaks before they become serious. Consider the message the Commission would send to the gas industry if it adopted PG&E’s proposal to significantly reduce or eliminate CPSD’s proposed penalty and/or prohibit CPSD from citing self-reported violations, no matter their severity. The message would be: “You can fail to leak survey your facilities

³ PG&E OB at 1.

for multiple years and if you self-report, you will not face a citation or violation.” Does this create an incentive for every Commission-regulated gas utility to *immediately* review its survey practices and data bases to ensure they are accurate and up to date? Clearly not.

CPSD has properly executed its charge as envisioned by the Commission. As described at length in CPSD’s Opening Brief, the penalty is reasonable in light of the factors traditionally considered by the Commission: the severity of the offense, the conduct of the utility before, during, and after the offense, the financial resources of the utility, the totality of the circumstances, and past Commission decisions assessing other penalties.

C. The New Penalty Regime Will Encourage Needed Reform Throughout the Gas Industry

As the Commission has recognized in numerous penalty cases, penalties can have a deterrent effect. Policy makers adopt enforcement programs like ALJ-274 because they recognize a need to curb violations and/or encourage reform in specific areas. As a consequence, an effective enforcement program may have many citations during its start up period. Notably, those citations will deter not just the wrongdoer who was caught, but other wrongdoers who understand they must now change their behavior. As an industry understands that it needs to take compliance seriously, it will begin to systematically reform, and citations will decrease.⁴

While PG&E may claim that it is already on the path to system-wide reform and that imposition of a penalty in this instance will have no deterrent effect, this is simply not the case. Consider, for example, Attachment A to PG&E’s Opening Brief. Attachment A is an internal PG&E memo commending the PG&E employee who discovered the missed leak surveys at issue here. Attachment A explains how PG&E’s employee “decided—*on his own initiative*—to do a thorough review of the five-year map

⁴ See, e.g. Malcolm Gladwell, *The Tipping Point – How Little Things Can Make a Big Difference*, at Chapter 4, § 3.

survey.”⁵ PG&E evidently fails to see the irony in this admission. While highly commendable to the employee, the fact that he acted “*on his own initiative*,” proves CPSD’s points that (1) PG&E’s Integrity Management Program, which is intended to identify these significant oversights, continues to be ineffective; and (2) PG&E management, even after two devastating explosions in within a two year period, has not proactively directed the types of basic system-wide reviews critical to identifying safety threats to its gas system.

While relying upon and encouraging individual PG&E employees to “do the right thing”⁶ is critical to a properly functioning safety culture, it is only one component of the safety equation.

D. Reevaluation of the ALJ-274 Enforcement Program Is Unwarranted

PG&E makes two policy arguments to justify lowering or reducing the penalty. First it claims that “[t]he \$16.8 million fine here would ... 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.”⁷ Second, it points to a Citibank investment analysis that viewed the citation as a “negative regulatory precedent” and it urges that the Commission “direct CPSD to withhold issuing citations for self-reported violations” “[u]ntil the Commission is able to review the policy implications.” PG&E OB at 7 and 8 and Attachment B.

Both of PG&E’s arguments fail to appreciate the larger, more important, deterrence message CPSD’s proposed penalty sends to the entire gas industry in California. Additionally, with regard to PG&E’s first concern regarding employee perceptions, the outcome is in PG&E’s hands, not CPSD’s. PG&E appears to have begun upon an appropriate path of instilling a safety culture among its gas employees, as evidenced by Attachment A to PG&E’s Opening Brief. CPSD is confident that PG&E has the resources to continue these efforts and to ensure that the proposed penalty will not

⁵ PG&E OB, Attachment A at 1 (emphasis added).

⁶ PG&E OB at 2 and Attachment A at 1.

⁷ PG&E OB at 6 (emphasis in original).

undermine these efforts. Additionally, the Commission has listed, as an issue in its rulemaking proceeding, R.11-02-019, whistle-blower protections for utility employees, which should further protect employees who show such initiative.

PG&E points to investment commentary to bolster its argument that the Commission should direct CPSD to refrain from issuing citations for self-reported violations until it considers the policy implications.⁸ As discussed above, such Commission action would send the wrong signal to the gas utilities the Commission regulates. Further, such a reevaluation of ALJ-274 is not necessary. The Commission made its policy when it adopted ALJ-274. In addressing SCE's proposal that the program "allow a respondent to correct or cure a violation without the imposition of a penalty" ALJ-274 stated:

In this Resolution, we are specifically sending a strong message to gas corporations: safety is our primary concern and we intend to expand Staff's ability to enforce compliance with safety mandates.⁹

ALJ-274 went on to expressly grant CPSD the discretion to cite self-reported violations, or not, but clarified:

Again, we remind the gas corporations that the onus is on them to comply with the laws of this State and to ensure that their systems and facilities are operated safely.¹⁰

It is clear from the language of ALJ-274 that the Commission intended CPSD to take a strong stand regarding safety violations, and it has done so here. As utilities understand their need to comply, and do so, citations will diminish, consistent with the natural cycle of an effective enforcement program.

Finally, as noted in CPSD's Opening Brief, had PG&E objected to citations and penalties for self-reported violations, it should have appealed the Commission's decision adopting ALJ-274. It did not. There is no need to revisit the Commission's clear decisions made in ALJ-274.

⁸ See PG&E OB, Attachment B.

⁹ ALJ-274 at 11.

¹⁰ ALJ-274 at 12.

III. CONCLUSION

As described above and in its Opening Brief, CPSD has exercised its authority consistent with ALJ-274 and the guidance in Decision 08-12-075 and Public Utilities Code § 2104.5. The amount of the citation is appropriate and will support the Commission's policy objectives expressed in adopting ALJ-274. For these reasons, each and every aspect of the PG&E Appeal should be denied and the Commission should uphold the CPSD Citation in its entirety.

Respectfully submitted,

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March 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served a copy of the **REPLY BRIEF OF THE CONSUMER PROTECTION AND SAFETY DIVISION** by either United States mail or electronic mail, to each party named on the attached service list for **Citation No. ALJ-274 2012-01-001**:

I also **hand-delivered** a hard copy to the assigned Administrative Law Judge **Burton W. Mattson**.

Executed on March 9, 2012 at San Francisco, California.

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