

**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 REPLY
BRIEF ON APPEAL OF CITATION NO. ALJ-274
2012-01-001**

MICHELLE L. WILSON
JONATHAN D. PENDLETON
Pacific Gas and Electric Company
Law Department
77 Beale Street, B30A
San Francisco, CA 94105
Telephone: (415) 973-2916
Facsimile: (415) 973-5520
E-Mail: JIPC@pge.com

JOSEPH M. MALKIN
Orrick, Herrington, & Sutcliffe LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105
Telephone: (415) 773-5505
Facsimile: (415) 773-5759
Email: jmalkin@orrick.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

March 9, 2012

**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 REPLY
BRIEF ON APPEAL OF CITATION NO. ALJ-274
2012-01-001**

In defense of its \$16.8 million penalty, CPSD points out it could have fined PG&E more than \$500 million.^{1/} \$500 million would be an absurd penalty for this self-identified and self-reported violation and, to its credit, CPSD recognized that fact. Instead, CPSD says, it “mitigated” the fine amount by exercising what it claims to be its “discretion” to define an “incident” subject to penalty any way it wants. CPSD’s argument underscores why the Commission needs to exercise its oversight to adopt an appropriate penalty. CPSD had only three options: (1) it could fine PG&E on a daily basis (more than \$500 million); (2) it could fine PG&E at the statutory maximum for each violation (\$420,000); or (3) it could not fine in light of the fact that PG&E self-identified and self-corrected the violation. Contrary to CPSD’s expressed view, however, neither the Public Utilities Code nor Res. ALJ-274 give CPSD the power to penalize an “incident,” thereby defining a violation any way it chooses to reach what it considers to be an acceptable result.

I. CPSD FAILED TO JUSTIFY COUNTING VIOLATIONS ANY WAY IT WANTS.

PG&E’s self-identified and self-reported violation was the failure to conduct five-year

^{1/} Calling it “[i]ronic in light of PG&E’s goal to *lower* the penalty,” CPSD notes that it could have imposed a daily penalty. (CPSD Op. Br. at 4.) Since CPSD arrived at the \$16.8 million penalty on a monthly basis, a daily fine would have been 30 times as high, or more than \$500 million.

leak surveys required by 49 C.F.R. § 192.723(b)(2). Under Public Utilities Code §§ 2107 and 2108, CPSD only had two options if it chose to penalize PG&E: (1) It could treat each missed five-year survey as a violation or (2) it could claim that each was a continuing violation from the date the leak survey was first missed, treating each day as a separate violation under section 2108. What CPSD could not do is what it did here. CPSD could not decide to declare something other than the missed five-year leak survey or every day after the first survey was missed be to an “incident” that would be subject to a penalty. In this case, CPSD chose to treat each month as a separate “incident” subject to a penalty; in other cases, it could choose to treat each week or each quarter as a separate “incident.” Thus, for identical code violations CPSD says it can choose different methods to calculate the number of violations and arrive at different fine amounts. The Public Utilities Code does not give CPSD license to do that.

PG&E appreciates CPSD’s recognition that a daily penalty – amounting to more than \$500 million – is disproportionate to the self-identified and self-corrected violation. But the method CPSD chose is not permissible. Having decided a daily penalty was inappropriate, CPSD’s only option was to penalize PG&E the maximum statutory amount, as required by Res. ALJ-274, for each of 21 missed five-year leak surveys – \$420,000. (*See* PG&E Op. Br. at 4.)

The linchpin of CPSD’s argument is its claim that “[u]nder ALJ-274, CPSD has discretion to determine what constitutes an ‘incident’ or ‘offense’ that is subject to a ‘fine’ or ‘penalty.’” (CPSD Op. Br. at 4.) CPSD untethers its determination of an “incident” from what constitutes a violation, claiming, “CPSD may count ‘incidents’ using its discretion and relying upon the factors it may consider in setting a fine.” (*Id.* at 5.) Neither the Public Utilities Code nor Res. ALJ-274 authorizes such an approach or uses the term “incident.” The Public Utilities Code refers to a “violation” or “failure to comply” (Pub. Util. Code §§ 2107 & 2108); the Resolution to a “violation.”^{2/}

^{2/} Pub. Util. Code § 2107 states in relevant part: “Any public utility that violates or fails to comply with any provision . . . is subject to a penalty . . . for each offense.” CPSD argues that its term, “incident,” is equivalent to the last word, “offense,” and apparently can, at CPSD’s discretion, mean something other than a violation. Sections 2107 and 2108 both make clear that an “offense” is a violation, not some amorphous “incident.”

II. CPSD FAILED TO ESTABLISH THAT THE COMMISSION SHOULD NOT ADOPT A FINE THAT IS APPROPRIATE TO THE CIRCUMSTANCES.

CPSD acknowledges that “PG&E’s conduct in discovering, self-reporting, and correcting the violations appears to have been in good faith,” and that PG&E took “quick action to address the violations.” (CPSD Op. Br. at 8-9.) Further, “PG&E appears to have embraced the gravity of the situation and continues to identify, self-report and address” similar violations elsewhere in its service territory. (CPSD Op. Br. at 8 n. 23.)

Under Res. ALJ-274, once it determined to count the violations as it did, CPSD only had two options: (1) impose a fine at the maximum statutory rate of \$20,000 per violation or (2) decline to issue a citation. (PG&E Op. Br. at 4.) CPSD apparently did not consider the option of not issuing a citation and does not discuss that possibility in its brief. But, CPSD does agree that, in issuing a citation, it had no choice under Res. ALJ-274, but to impose the maximum statutory penalty. (CPSD Op. Br. at 3-4.)

Notwithstanding its concession that it had no discretion to adopt a lesser penalty amount, CPSD argues against the Commission’s exercise of that discretion. CPSD cites four Commission decisions to support its contention that the proposed fine amount is appropriate and consistent with Commission precedent.^{3/} (CPSD Op. Br. at 9-10.) Each of those cases involved widespread financial irregularities at customer expense where the Commission concluded that restitution alone was not sufficient to deter future violations. Of greater relevance is D.04-04-065, a case involving a large number of safety violations. In D.04-04-065, the Commission rejected CPSD’s recommended fine of approximately \$97 million and instead fined Southern California Edison \$656,000: (1) \$20,000 for each of 30 violations of GO 95 and GO 128,

^{3/} CPSD also observes that “PG&E is a large utility with significant financial resources,” and points to PG&E’s 2010 operating revenues of \$13.481 billion. CPSD reasons: “Given these substantial resources, the fine imposed must be significant if the Commission wishes to influence the utility’s behavior.” (CPSD Op. Br. at 9.) The argument proves too much. Not only are the majority of the operating revenues passed-through commodity costs, PG&E – like the Sempra Utilities and Southern California Edison – will always be large and this can always be used to justify otherwise disproportionate penalties.

specifying the requirements for the construction, operation, and maintenance of overhead and underground electric utility systems, because Edison either knew or should have known of the violations and failed to timely cure them, and (2) \$1,000 for each of 56 violations of GO 165 for failure to identify unsafe conditions. The Commission did not fine Edison for 4,721 GO violations it remedied promptly after CPSD brought them to Edison's attention.

The present case is an opportunity for the Commission to reinforce the safety message PG&E's management has sent its employees (*see* PG&E Op. Br. at 2, 6-7), by taking account of PG&E's good faith in identifying, correcting and reporting the violation, and reducing the fine to no more than \$420,000.

III. CPSD DOES NOT PROVIDE A GOOD REASON FOR CPSD TO CONTINUE ISSUING CITATIONS FOR SELF-REPORTED VIOLATIONS BEFORE THE COMMISSION CONSIDERS THE ISSUE FURTHER.

PG&E's Opening Brief discussed the important, negative policy implications of CPSD's \$16.8 million fine for this self-reported violation. (PG&E Op. Br. at 7-8.) CPSD does not claim that there are not important policy implications. Instead, it asserts that PG&E's position amounts to an improper collateral attack on Res. ALJ-274. (CPSD Op. Br. at 10.)

Res. ALJ-274 gave CPSD a choice not to impose a penalty for self-identified and self-corrected violations. CPSD chose not to exercise that option. PG&E is not attacking the Resolution, but is questioning whether the way CPSD has chosen to carry it out is really what the Commission wants. Rather than having to deal with a potential stream of appeals from self-report citations, the Commission should call a "time out" while it assesses the results of CPSD's March 27, 2012 workshop and considers the policy it wants CPSD to follow in addressing self-reported violations.

IV. CONCLUSION

As detailed in PG&E's Opening Brief, the \$16.8 million penalty assessed by CPSD starts with an erroneous counting of "violations" and undermines the important public policy objective

of encouraging self-reporting of violations. CPSD's Opening Brief shows that the erroneous count resulted from CPSD's belief that it can penalize whatever it deems to be an "incident" rather than a violation. The Commission should correct CPSD's error and exercise its discretion to impose no penalty or, at most, a penalty of \$420,000. Until the Commission can fully consider the appropriate policy for CPSD to follow 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

/s/ Joseph M. Malkin

MICHELLE L. WILSON
JONATHAN D. PENDLETON

JOSEPH M. MALKIN

Pacific Gas and Electric Company
Law Department
77 Beale Street
San Francisco, CA 94105
Telephone: (415) 973-2916
Facsimile: (415) 973-5520
E-Mail: JIPC@pge.com

Orrick, Herrington, & Sutcliffe LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105
Telephone: (415) 773-5505
Facsimile: (415) 773-5759
Email: jmalkin@orrick.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

March 9, 2012