

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RESOLUTION ALJ-277
Affirming Citation no. 2012-01-001 Issued to
Pacific Gas and Electric Company for
Violations of General Order 112-E.

Resolution ALJ-277

**REPLY COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO
ON DRAFT RESOLUTION ALJ-277**

Pursuant to the Commission's Rule of Practice and Procedure 14.5, the City and County of San Francisco (San Francisco or City) respectfully submits these reply comments on Draft Resolution ALJ-277, issued on March 19, 2012 (the Draft Resolution). The Draft Resolution imposes a \$16.8 million penalty on Pacific Gas and Electric Company (PG&E) for its failure to include 16 plat maps containing approximately 13.83 miles of gas distribution mains and 1,242 services in its leak survey schedule during an eighteen year period between 1993 and 2011. As a result, leak surveys on these facilities were not completed every five years as required and some of these facilities were not surveyed at all during this 18-year period.

In its opening comments, PG&E states that the \$16.8 million penalty is "excessive" and asks the Commission to exercise its discretion to reduce the penalty for "this self-identified and self-corrected" violation. PG&E further asks the Commission to suspend the citation process for self-reported violations until the Commission further considers this matter.¹ PG&E also seeks an opportunity to present oral argument. San Francisco urges the Commission to reject these requests. Far from being excessive, the \$16.8 million penalty is a tiny percentage of the more than \$500 million that PG&E could have been fined here under the Public Utilities Code.² In seeking to avoid any penalty, PG&E fails to acknowledge the serious risk of harm its ongoing failure imposed on its customers each and every day. PG&E has not established that oral argument is necessary or appropriate here, but if the Commission holds an oral argument, San Francisco requests the opportunity to participate because this matter concerns important issues of public safety.

¹ PG&E Comments at 1.

² All further statutory references are to the Public Utilities Code unless otherwise specified.

PG&E raises three legal challenges to the Draft Resolution: 1) the procedure used was flawed; 2) the Draft Resolution could not lawfully conclude that 838 rather than 21 violations occurred; and 3) the Draft Resolution does not allow the Commission to exercise its reserved discretion. PG&E's contentions are spurious. The Draft Resolution sets forth a careful review and analysis of the facts, circumstances, and policy, and properly concludes that a penalty of at least \$16.8 million is justified in this case.

1. The Process Afforded PG&E Ample Notice and Opportunity to be Heard.

PG&E complains that the process in this first proceeding imposing a penalty pursuant to Resolution ALJ-274, is "opaque." PG&E complains that there is "no formal proceeding and nothing is filed with the Docket Office, instead pleadings stay among the utility, CPSD and the assigned ALJ. Nothing is even served on the commissioners or their advisors. [T]here is no assigned Commissioner, meaning that the first any commissioner hears of the appeal is the draft resolution – in this case denying the appeal in its entirety."³

While the process here could be modified to provide greater transparency for the benefit of the public and interested third parties,⁴ PG&E has not identified any harm it suffered from the "opaque" process it complains of. Resolution ALJ-274 sets forth in detail the citation process, including the process for an appeal.⁵ PG&E received adequate notice of the violation and proposed penalty in the citation provided to PG&E, dated January 27, 2012 (the Citation), which sets forth the violation, the regulation violated, and the facts and findings supporting the violation. Further, an appended CPSD Preliminary Investigation Report set forth the rationale for the proposed penalty.

In addition, the Citation includes detailed directions for submission of an appeal, consistent with Resolution ALJ-274. PG&E had the opportunity to and did, on February 1, 2012, file a detailed Notice of Appeal. PG&E was given the opportunity, which it declined, to participate in an evidentiary hearing where PG&E could choose to be represented by an attorney, request a transcript, request services of an interpreter, bring documents to offer in evidence

³ Opening Comments of PG&E at 2.

⁴ The City has received notice of a Workshop for Refinement of Citation Procedures, on April 24, 2012, where the Commission can consider such modifications.

⁵ Appendix A, Citation Procedures and Appeals Process.

and/or call witnesses.⁶ PG&E was allowed to enter documents into the record and to file opening and reply briefs before the ALJ.⁷ PG&E had the opportunity to and did file opening comments on the Draft Resolution and has the opportunity to file reply comments. PG&E will have the opportunity to seek rehearing of a final Commission order, and judicial review.⁸ Throughout this process, an impartial, knowledgeable ALJ has presided over the proceedings, and the final determination will be made by the full Commission. The detailed process set forth in Resolution ALJ-274, Appendix A, was followed here. Moreover, PG&E has known about that process since December 2011, when Resolution ALJ-274 was adopted by the Commission.

There is no legal basis for PG&E's complaint that it was deprived of adequate process here. Due process requires no more than "adequate notice of the administrative action proposed or taken by the group or institution and a reasonable opportunity to be heard." [Citation.]" *Ohton v. Board of Trustees of California State University*, 148 Cal.App.4th 749, 768 (2007) *disapproved on other grounds*, *Runyon v. Board of Trustees of California State University*, 48 Cal.4th 760 (2010). PG&E had many opportunities to participate in the process here, and did so. It is worth noting, moreover, that "[i]n assessing what due process is due in an administrative proceeding, [a court] must give substantial deference to the good faith judgment of the agency that its procedures afford fair consideration of a party's claims. [Citation.]" *California Consumer Health Care Council, Inc. v. California Dept. of Managed Health Care*, 161 Cal.App.4th 684, 692 (2008). PG&E has had more than a fair opportunity to present its arguments.

Finally, PG&E's complaint that there was no assigned Commissioner does not add any strength to its arguments. The proceedings were presided over by a knowledgeable and impartial ALJ and the Draft Resolution must be considered and approved by the full Commission.⁹ PG&E provides no citation to any authority requiring the assignment of a Commissioner to a proceeding prior to consideration of a matter by the full Commission.

2. A Penalty of At Least \$16.8 Million is Justified in this Matter.

The Draft Resolution accepts the CPSD's determination that 838 violations occurred, one for each month in which the 5-year survey was missed. Using the \$20,000 per violation penalty

⁶ Citation, Attachment A, Directions for Submitting an Appeal to a Citation Issued Pursuant to Resolution ALJ-274.

⁷ Draft Resolution at 3.

⁸ Resolution ALJ-274, Appendix A, at 6.

⁹ See Resolution ALJ-274 Appendix A at 5-6.

set forth in Resolution ALJ-274, this results in the \$16.8 million penalty imposed by the Citation. PG&E contends that the Draft Resolution must either accept PG&E's contention that only 21 violations occurred, one for each 5-year survey missed, or find that each day was a separate violation under 2108, resulting in about 25,140 violations and a penalty of over \$500 million.¹⁰ The Commission should reject this argument.

There is no basis for PG&E's claim that "CPSD had only two options" for counting the number of violations.¹¹ The two "options" identified by PG&E are two obvious measures of the number of violations, but they are not specified by the law, nor is the monthly measure disallowed, so long as it is reasonable. While the Commission explicitly constrained CPSD's discretion with regard to the amount of a penalty (requiring the maximum penalty to be applied), it did not constrain CPSD's discretion with regard to the manner of determining the number of violations.¹²

The Draft Resolution sets forth ample justification for a penalty of at least \$16.8 million, balancing a variety of factors, including those set forth in Section 2104.5: number of days of the violation; the potential harm to the public; PG&E's history of overlooking the violations, and failure to detect and correct the violations in multiple opportunities to do so; PG&E's failure to regularly check its operations; PG&E's large size; PG&E's detection and self-report of the violations after years of neglect; PG&E's acts to correct the violations when they were found; and comparable cases.¹³

PG&E is wrong that the CPSD must choose between no penalty, a paltry penalty, or a penalty of over \$500 million. The Draft Resolution demonstrates that the penalty itself is clearly within the range allowed by the statute, although at its extreme lower end.

3. The Commission Will Have A Full Opportunity to Exercise its Reserved Discretion.

PG&E contends that the Commission has limited discretion in acting on the Draft Resolution because PG&E's comments on the Draft Resolution are restricted by the Commission's Rules to identifying "factual, legal, or technical errors in the draft resolution."

¹⁰ See Draft Resolution at 4.

¹¹ In fact, a very strong argument can be made that PG&E's preferred option (other than no penalty at all)—one violation for each missed five-year leak survey—is not lawful under Section 2108, which states that "in case of a continuing violation each day's continuance thereof *shall be* a separate and distinct offense." (*emphasis added*) There can be no doubt that PG&E's failure increased the risk of harm to its customers each and every day.

¹² See Resolution ALJ-274 at 7.

¹³ Draft Resolution at 17-19.

PG&E argues that this restriction, which prevents PG&E from addressing policy issues in its comments, precludes "full and adequate" Commission review and "is tantamount to delegation of a final discretionary decision."¹⁴ This argument has no merit.

PG&E had the opportunity to set forth any issues it deemed relevant, including policy issues, in its appeal and in the briefs it submitted in this case. Pursuant to Resolution ALJ-274, the Draft Resolution is subject to approval by the full Commission like any other proposed decision. While there are limits to what parties can set forth in comments and reply comments on a proposed decision, or in this case on the Draft Resolution, there are no limits on the ability of the Commission to consider the entire record in acting on any proposed decision, including the Draft Resolution. PG&E had ample opportunities to make its arguments prior to issuance of the Draft Resolution, and Commissioners may review the entire record, including briefs, in coming to a decision on this matter.

April 16, 2012

Respectfully submitted,

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¹⁴ PG&E Comments at 2.