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BY HAND DELIVERY & E-MAIL

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

Re: (1) Opening Comments of Pacific Gas and Electric Company
on Draft Resolution ALJ-277 and (2) Request for Oral Argument

Dear ALJ Clopton:

Pacific Gas and Electric Company (PG&E) urges the Commission to reject Draft Resolution ALJ-277, Affirming Citation No. 2012-01-001 Issued to PG&E for Violations of General Order 112-E. PG&E appealed the \$16.8 million penalty imposed by the Consumer Protection and Safety Division (CPSD) because CPSD arrived at the excessive penalty amount by over-counting the number of "violations." Even if the Commission agrees with CPSD's count of the number of violations, PG&E asked the Commission to exercise the discretion it explicitly reserved to itself in Res. ALJ-274 to reduce the penalty to an amount appropriate for this self-identified and self-corrected violation, and suggested the Commission should direct CPSD to withhold issuing citations for self-reported violations until the Commission fleshes out the policy it wants CPSD to follow in such cases. The Commission should reject the Draft Resolution for the following reasons: (1) it results from a flawed procedure that does not comport with the Commission's Rules of Practice and Procedure or notions of due process for adjudicatory proceedings; (2) the Draft Resolution does not address the principal legal argument PG&E made in its appeal; and (3) the Draft Resolution procedure does not allow the Commission to exercise its reserved discretion to review the penalty imposed by CPSD.

In addition, because this is the first citation and appeal under Res. ALJ-274, PG&E requests the Commission to set this matter for oral argument pursuant to Rule 13.13(a).

(1) The Procedure Used Here Is Flawed

Res. ALJ-274, delegating citation authority to CPSD did not spell out the appeal procedure in any detail. The ALJ Division has, therefore, had to improvise. The result is a procedure that is "below the radar" of both the Commission and the public. First, Res. ALJ-274 declares the citation and appeal to be adjudicatory. Second, unless there is an evidentiary hearing, which one



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would not expect for a self-reported violation like this one, the appeal process is opaque. There is no formal proceeding and nothing is filed with the Docket Office; instead, the pleadings stay among the utility, CPSD and the assigned ALJ. Nothing is even served on the commissioners or their advisors. Third, there 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.

Despite the appeal being an adjudicatory proceeding, the assigned ALJ has ended it with a draft resolution. According to the Commission's Rules of Practice and Procedure, a draft resolution "is a recommended resolution that is proposed by a Commission director." Rule 14.1(c). Not only is the present draft not issued by a director, none of the other areas in which the Commission makes decisions by resolution is comparable to the appeal of a citation issued under Resolution ALJ-274, where potentially enormous fines are at issue. For example, under Rule 14.2(d), a draft resolution is used to dispose of an advice letter, a request for documents in the Commission's possession or a request for motor carrier operating authority. A draft resolution is also used to establish a rule or establish a fee schedule for a class of Commission-regulated entities, neither of which involves adjudication of an individual utility's rights.

In Res. ALJ-274, the Commission disposed of the due process concerns with the delegation of penalty power raised by Southwest Gas, the Sempra Utilities, and Southern California Edison by assuring the utilities that "we [the Commission] retain final discretionary authority in determining the outcome of any appeals that may be submitted." Res. ALJ-274, p. 13 (emphasis added). The cover letter accompanying the Draft Resolution, however, limits PG&E's comments to "the factual, legal, or technical errors in the draft resolution." This does not provide PG&E an opportunity to urge the Commission to exercise its discretion because it is the right thing to do from a policy standpoint. The delegation of penalty authority to CPSD without full and adequate Commission review is tantamount to delegation of a final discretionary decision, contrary to D.09-05-020 at 3, citing D.02-02-049.

(2) The Draft Decision Fails To Address PG&E's Principal Legal Argument

Under Res. ALJ-274 and Public Utilities Code §§ 2107 and 2108, CPSD only had two options if it chose to penalize PG&E for the self-reported violation: (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. CPSD recognized that treating each day as a separate violation and applying the \$20,000 per day maximum, as Res. ALJ-274 requires, would lead to an absurd penalty of more than \$500 million.



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Instead of using the only lawfully available alternative, treating each missed five-year survey as a violation, CPSD declared that each month constitutes a separate “violation.”

The Draft Resolution fails to resolve (or address) PG&E’s argument that CPSD cannot lawfully count violations any way it wants. PG&E argued as follows:¹

PG&E’s self-identified and self-reported violation was the failure to conduct five-year leak surveys required by 49 C.F.R. § 192.723(b)(2). . . . 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

¹ PG&E Reply Brief on Appeal of Citation No. ALJ-274 2012-01-001, pp. 1-2.



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“violation” or “failure to comply” (Pub. Util. Code §§ 2107 & 2108); the Resolution to a “violation.”²

Although the Draft Resolution rejects this legal argument by implication, endorsing CPSD’s application of “one violation per month rather than one violation per day,”³ it reached this conclusion without providing any legal justification for doing so. CPSD’s determination that each month constitutes a “violation” finds no support in the law, and the Draft Decision’s endorsement of this interpretation without analysis or support is legal error.

(3) **The Draft Resolution Procedure Does Not Allow The Commission To Exercise Its Reserved Discretion**

PG&E is restricted in its comments to errors of law or fact, and is not permitted to set forth the policy arguments the Commission should consider in deciding how to exercise its reserved discretion. The absence of an assigned Commissioner means that neither the commissioners nor their advisors have been privy to the issues briefed to the ALJ. As a result, PG&E is effectively denied the opportunity to present its position to the Commission.

(4) **The Commission Should Direct Presentation Of Oral Argument**

As the first self-report, first citation and first penalty assessed by CPSD under Res. ALJ-274, this appeal will set an important precedent for how CPSD addresses utility efforts to transparently comply with gas safety regulations. The way in which CPSD wields the citation power given it by Res. ALJ-274 will add to or detract from the Commission’s intended policy. The Commission should direct presentation of oral argument to fully consider the implications of this precedent-setting case.

Conclusion

The Commission should reject the Draft Resolution. PG&E has not been afforded due process and the Draft Resolution fails to resolve a foundational legal issue regarding CPSD’s authority to

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.”

³ Draft Resolution, p. 4.



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calculate the number of violations on the discretionary basis that it did. CPSD calculated the proposed fine on that basis to reach an end result that it believed to be appropriate: a fine of \$16.8 million, rather than not issuing a citation or assessing an extraordinarily large fine. The means, however, do not justify the end CPSD reached. It must have a solid legal foundation. The Draft Resolution does not provide one.

Very truly yours,

Joseph M. Malkin

JMM/mj

cc: President Michael R. Peevey
Commissioner Timothy Alan Simon
Commissioner Michel Peter Florio
Commissioner Catherine J.K. Sandoval
Commissioner Mark J. Ferron
ALJ Burton Mattson
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Service List