

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

Order Instituting Investigation on the
Commission's Own Motion into the Operations and
Practices of Pacific Gas and Electric Company's
Natural Gas Transmission Pipeline System in
Locations with Higher Population Density.

I.11-11-009
(Filed November 10, 2011)

PACIFIC GAS AND ELECTRIC COMPANY'S REPLY BRIEF

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I. INTRODUCTION^{1/}

As PG&E said in its Opening Brief, and as recognized by both the Consumer Protection and Safety Division (CPSD) and the City and County of San Francisco (CCSF), PG&E does not dispute the majority of the facts in this proceeding.^{2/} PG&E acknowledges that its patrolling, class location, and continuing surveillance processes failed to maintain complete, up-to-date class locations for its entire gas transmission system. PG&E agrees that its procedures were not consistently followed and, as shown by PG&E's own reports, approximately 140 of PG&E's 5,767 miles of transmission pipelines (approximately 2.4%) were erroneously designated as a lower class location than they should have been, and approximately 9 miles (less than 0.2%) had maximum allowable operating pressures (MAOPs) that were not commensurate with their class location.^{3/}

^{1/} Pursuant to *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964), PG&E expressly reserves its federal constitutional and any other federal claims and reserves its right to litigate such claims in federal court following any decision by the Commission, if necessary.

^{2/} CPSD Opening Brief (OB) at 2; CCSF OB at 1; PG&E OB at 1.

^{3/} CPSD incorrectly states that PG&E agreed that 898 segments operated above the appropriate MAOP established by 49 C.F.R. §§ 192.619 & 192.620. CPSD OB at 5, *citing* PG&E's Second Update (April 2, 2012) at 5. The Second Update at pages 5-6 reports that 898 segments went up in class location over the years, however only 57 segments had MAOPs above the appropriate level. *See* page 6 *infra*; *see also* CCSF OB at 1.

PG&E recognizes that these deficiencies are unacceptable. PG&E does not dispute that a reasonable penalty is appropriate, but the issue of penalties will be briefed separately consistent with the September 25, 2012 Administrative Law Judges' Ruling. Instead, the primary issues that PG&E addresses in this Reply Brief are^{4/}:

- (1) Whether PG&E's acknowledged process failure constitutes the alleged violation, or whether there is some "requirement" that the Commission tally affected segments, add a "layering" of alleged violations, and count "violation days."
- (2) Whether CPSD has carried its burden of proving that PG&E violated 49 C.F.R. § 192.107(b) each time PG&E used a conservative assumed specified minimum yield strength (SMYS) value greater than 24,000 psi.

II. COUNTING ALLEGED VIOLATIONS BY SEGMENT AND "LAYERING" ON DIFFERENT VIOLATIONS IS INAPPROPRIATE; THE COMMISSION IS NOT REQUIRED TO PERFORM A SEGMENT BY SEGMENT, DAY BY DAY, COMPUTATION OF VIOLATIONS.

In its Opening Brief, PG&E explained that its failure -to maintain complete, up-to-date class locations for its entire gas transmission system was, as characterized by CPSD, a process "breakdown." That process failure constitutes the alleged violation – not a tally of affected segments, and certainly not an artificial "layering" of violations to maximize the count of "violation days."

CPSD correctly points out that the federal regulations use the phrase "a segment of pipeline" repeatedly.^{5/} PG&E does not question that the code requirements apply to each segment. That is not the issue, however. The question is whether it is consistent with the law and good policy to find more than 3,000 violations (and over 10,000,000 "violation days")

^{4/} CCSF attaches proposed Findings of Fact and Conclusions of Law to its Opening Brief, but does not cite evidence in the record to support them. Many supposed findings are contrary to the record or simply lack evidentiary support, others are irrelevant to this proceeding, and still others contain proposals that belong in I.11-02-016, the Records OII. PG&E is not responding to these supposed finding and conclusions given CCSF's failure to support its proposed findings with citations to the record.

^{5/} CPSD OB at 3-5.

because what ultimately became 898 segments had too low a class designation due to one overarching process failure.

As explained in PG&E's Opening Brief, the Commission has, in appropriate situations, focused on categories of omissions.^{6/} PG&E cited *Utility Consumers' Action Network v. SBC Communications*, D.08-08-017, 2008 Cal. PUC LEXIS 302 (“UCAN”), where the Commission approached AT&T's ongoing policy or practice as a single course of conduct even though the Commission found AT&T had violated more than one subsection of the Public Utilities Code. *Id.* at **40, 50-51.

CPSD asserts that the regulations “require” a segment by segment review for purposes of calculating penalties.^{7/} Yet CPSD cites no authority for this proposition. Indeed, CPSD does not cite a single California case – or any other law – compelling the Commission, or even suggesting that it is good policy, to determine violations segment by segment in order to layer on as many violations as can be counted.^{8/}

Two of the problems with CPSD's approach are the lack of a fixed definition of “segment” and the risk of double, triple and quadruple, etc. counting.^{9/} CPSD's response does “not dispute” PG&E's methodology,^{10/} but that begs the question of whether counting segments

^{6/} PG&E OB at 5-8.

^{7/} CPSD OB at 8. As noted in the Introduction, these briefs are not the appropriate place to discuss how to calculate penalties.

^{8/} CPSD cites several state cases and one federal case from Pennsylvania, but no other case law. CPSD OB at 9-11. The Pennsylvania Public Utilities Commission recently issued an Initial Decision approving a \$386,000 penalty for a gas explosion that killed five people shortly after San Bruno. See <http://www.puc.state.pa.us/pcdocs/1193739.pdf>; <http://www.puc.state.pa.us/pcdocs/1197175.docx>.

^{9/} PG&E OB at 6-7.

^{10/} CPSD OB at 6. CPSD makes a confusing argument about PG&E's Gas Information System based on a deposition that is not in the record of any of the three investigations. *Id.* In addition, CPSD includes a confusing discussion of a September 27, 2012 letter that PG&E submitted pursuant to Resolution ALJ-274. CPSD OB at 15. This is confusing in three respects. First, like the deposition, this letter is not in the record of any of the three OIIs. Second, instead of the September 27, 2012 letter discussed in its brief, CPSD attached a different letter from PG&E. Third, PG&E sent the September 27, 2012 letter to CPSD pursuant to Res. ALJ-274. That resolution delegated citation authority to CPSD independent of this OII. Accordingly, the September 27, 2012 letter discussed and the

is the appropriate way to evaluate this situation from a policy perspective. Although all segments must be operated in compliance with the federal regulations, that fact does not transform the Commission’s task into one of mindlessly counting segments and code sections.

CPSD is openly double-counting and triple-counting, as explained in its own Report: “PG&E admits that 898 pipeline segments were not accurately classified in violation of federal regulations and, therefore, its own rules for updating and ensuring appropriate class location changes. (See PG&E’s Second Update (April 2, 2012) at p.5.)”^{11/} In other words, CPSD counts each segment that was erroneously in a lower class as a violation of not only 49 C.F.R. §§ 192.603, 192.605, 192.709(c) (Recordkeeping), but also 49 C.F.R. §192.13(c) (Not Following Procedures). Similarly, CPSD “views each and every class location misclassification as a breakdown in PG&E’s continuing surveillance practices.”^{12/} Another example of CPSD’s double-counting involves the 224 segments (part of the 898 segments) above 40% SMYS where PG&E did not conduct an immediate study under 49 C.F.R. § 192.609. CPSD counts these 224 segments as violations of 49 C.F.R. § 192.609 and again as violations of 49 C.F.R. § 192.611 for not confirming or revising the MAOP as “required as a result of a study under § 192.609...”^{13/} In other words, each segment in a lower class than it should have been is counted three times if below 40% SMYS and five times if above 40% SMYS.^{14/}

CPSD’s number-crunching results in the same segments, often very short ones, being counted and recounted, over and over, generating a grossly exaggerated number of alleged

different letter attached by CPSD (apparently by mistake) are outside the record and should be ignored.

^{11/} Ex. CPSD-1 at 55 (May 25, 2012 Report).

^{12/} Ex. CPSD-1 at 53. CPSD does not clearly explain why it lists 898 violations in one, 843 violations in another and 677 violations in a third row in its table of “daily violations”, when the core fact – the segment was misclassified – is the triggering event for all three violations per CPSD’s own Report. *See* CPSD OB at 16; CPSD-1 at 58.

^{13/} 49 C.F.R. § 192.611(d); Ex. CPSD-1 at 49-51; CPSD OB at 16.

^{14/} Although penalties are not at issue at this stage of the briefing, this discussion illustrates how a segment-by-segment, code section-by-code section approach would allow CPSD to effectively double, triple or quintuple the statutory penalty.

violations.^{15/} This is akin to counting each kilowatt hour for a residential customer improperly billed on a commercial rate schedule as a separate tariff violation, when the “violation” is that the customer was placed on the wrong rate. This compounding approach is inappropriate. The problem stems from a single core issue: PG&E’s patrol, class location, and continuing surveillance processes were not effective in maintaining the proper class location designations for 100% of PG&E’s transmission system.^{16/}

III. CPSD’S ARGUMENTS ABOUT RISK OF “A POTENTIAL RUPTURE, EXPLOSION, AND FIRE” ARE MISPLACED.

CPSD argues that the alleged class violations are “substantial” due to “public endangerment.”^{17/} CPSD introduces this discussion by saying it is in response to an admonition from the assigned Administrative Law Judge to “fully support its claims that the alleged violations are substantial.”^{18/}

Preliminarily, PG&E notes that the assigned ALJ’s comments were made prior to the bifurcation of the penalty briefing, and in the context of how to assess penalties:

You’re going to need to specify – specifically state how penalties should be calculated and what the recommendations are. Just saying substantial is really not sufficient.

August 27, 2012 R.T. 40. Accordingly, this issue does not really belong in this round of briefing, but given that CPSD has presented its arguments, PG&E feels compelled to briefly respond.^{19/}

^{15/} CPSD OB at 16; Ex. CPSD-1 at 56-58 (referencing the following Code sections: 49 C.F.R. § 192.609; 49 C.F.R. § 192.611; 49 C.F.R. § 192.613; 49 C.F.R. § 192.619; 49 C.F.R. § 192.705; 49 C.F.R. § 192.709; 49 C.F.R. § 192.13(c); 49 C.F.R. § 192.107 / Pub. Util. Code §451).

^{16/} See PG&E January 17, 2012 Report, at 2; see also Ex. PG&E-1 at 1-2 (Yura).

^{17/} CPSD OB at 8-12.

^{18/} CPSD OB at 8-9; see August 27, 2012 R.T. 40.

^{19/} CPSD introduces this section of its brief with a lengthy quote about the devastation caused by the San Bruno explosion. CPSD OB at 9. There is no nexus between the class issues that are the focus of this proceeding and the San Bruno explosion, and no party has claimed otherwise.

PG&E does not in any way seek to minimize the importance of full compliance with all regulations, including the class location regulations. The deficiencies described in our own reports are not acceptable, and PG&E is committed to and is taking aggressive action to address the situation.^{20/}

CPSD's rote recitation that a failure to comply with virtually each provision "placed the public at risk of a potential rupture, explosion, and fire," however, is superficial at best. A class change requires an operator to confirm or revise its MAOP if more people live nearby. In essence, the greater the population, the larger the required margin of safety.^{21/} But a line that was safe to operate in a Class 1 location is not "unsafe" and does not "place the public at risk of a potential rupture, explosion and fire" when a new house is built and it becomes a Class 2 location. The physical attributes of the line, the strength of the steel in the ground, and its ability to safely operate, do not change when the class location changes.

CPSD erroneously claims that PG&E operated 898 segments above MAOP, citing PG&E's April 2 Second Update. What the April 2 Second Update actually said is: "9.1 miles of pipeline (approximately 0.2% of the 5,767 miles), comprised of 57 segments (approximately 0.2% of the 26,184 segments), had an MAOP that was not appropriate for its current class."^{22/}

The reason for this difference between the 898 segments that went up in class, and the 57 segments, or 9.1 miles, that had an MAOP above the appropriate level, is that the majority of PG&E's transmission system operates at a much lower pressure and percentage of SMYS than the maximum permitted under the Code.^{23/}

^{20/} Ex. PG&E-1 at 1-1, 1-2, and *passim* (Yura).

^{21/} See 49 C.F.R. §§ 192.5, 192.111 & 192.611. See also Ex. CPSD-1 at 44.

^{22/} Second Update at 6.

^{23/} See PG&E's January 17, 2012 Response to OII at 18.

PG&E does not excuse its failure to fully follow its procedures or to have completely accurate class locations. But CPSD's repeated, superficial statements go further than is warranted.^{24/}

IV. CPSD HAS NOT CARRIED ITS BURDEN TO PROVE A VIOLATION OF 49 C.F.R. § 192.107(B) IN PG&E'S USE OF ASSUMED SMYS VALUES.

CPSD identified 133 instances in which PG&E used assumed SMYS values greater than 24,000 psig. It claims each of these is a violation of 49 C.F.R. § 192.107(b), amounting to 1,191,662 violation days.^{25/} 49 C.F.R. § 192.107(a), however expressly authorizes use of other SMYS values.^{26/} And Section 192.107(b) only applies to "pipe that is manufactured in accordance with a specification not listed in section I of appendix B to this part or whose specification or tensile properties are unknown." To establish a violation, CPSD must individually prove that each of the 133 segments contains pipe meeting the description of Section 192.107(b), and that each instance of PG&E's use of higher assumed SMYS was not permitted under Section 192.107(a). CPSD does not even attempt to prove this. Thus, CPSD failed to carry its burden to prove each of its alleged 133 violations. *See In Re Southern California Edison Co.*, D.04-04-065, p. 2, 2004 WL 1150966 (Cal. P.U.C. 2004).

Rather than meet its burden for each individual alleged violation, CPSD relies on general statements and attempts to shift the burden of proof to PG&E to prove it has not violated Section 192.107(b). CPSD claims that PG&E has the "burden of establishing what records were used and on which pipe segments."^{27/} The crux of CPSD's argument is that "PG&E has not

^{24/} Similarly, CPSD argues on the one hand that failing to perform continuing surveillance could lead to "possibilities of explosions" because continuing surveillance is "necessary to prevent against building on pipeline rights-of-ways," yet it also argues that issues of encroachments involving building on PG&E's transmission pipeline rights of way are beyond the scope of this proceeding. *Compare* CPSD OB at 11 *with* CPSD OB at 8. CPSD cannot have it both ways.

^{25/} CPSD OB at 16. CCSF claims that PG&E also violated ASA B.31.1.8 from 1955-1970. CCSF OB at 6. Inasmuch as this is not one of the allegations of CPSD, the "prosecutor" in this enforcement proceeding, PG&E does not respond.

^{26/} *See* PG&E OB at 3-4.

^{27/} CPSD OB at 14.

demonstrated that the quality of its recordkeeping would permit it to safely use any assumed values above the regulations maximum.”^{28/} CPSD’s rhetoric does not permit it to shift the burden of proof to PG&E or relieve CPSD of its obligation to prove every violation it alleges.

A. PG&E’s Use of Conservative Assumed SMYS Values is Appropriate

Neither CPSD nor CCSF appears to contest that an operator may use assumed SMYS values greater than 24,000 psig under appropriate circumstances.^{29/} In its prepared testimony, CPSD agreed that assigning an assumed SMYS value using the fully-researched and most conservative material procurement specification during the time in question would be appropriate.^{30/}

CPSD and CCSF focus on Section 192.107(b). That section only applies to pipe not manufactured in accordance with one of the specifications listed in Appendix B to Part 192 or “whose specification or tensile properties are unknown.”^{31/} Appendix B to Part 192 lists the major pipe specifications, including the API 5L under which PG&E procured most of its pipe.^{32/} For such pipe, 49 C.F.R. § 192.107(a) provides:

For pipe that is manufactured in accordance with a specification listed in section I of appendix B of this part, the yield strength to be used in the design formula in § 192.105 is the SMYS stated in the listed specification, if that value is known.

CPSD has presented no evidence that any one of the 133 segments involves pipe not manufactured in accordance with one of the listed specifications or whose specification or tensile properties are unknown.

^{28/} CPSD OB at 15.

^{29/} See CPSD OB at 14-15; CCSF OB at 6-10; see also Ex. CPSD-4 at 2.

^{30/} See Ex. CPSD-4 at 2.

^{31/} September 24, 2012 R.T. 5-6, 65 (PG&E/Zurcher). On cross-examination of Mr. Zurcher, CPSD pointed to ASME B31.1.8-1955, § 811.27.H, which is similar to 49 C.F.R. § 192.107(b). September 24, 2012 R.T. 9-11 (PG&E/Zurcher). As Mr. Zurcher testified, § 811.1 of the ASME, like 49 C.F.R. § 192.107(a), differentiates pipe that conforms to standards or specifications listed in Appendix A of ASME B31.1.8-1955. September 24, 2012 R.T. 75-78 (PG&E/Zurcher).

^{32/} September 24, 2012 R.T. 63-67 (PG&E/Zurcher).

PG&E has not assigned an assumed SMYS value greater than 24,000 psig for pipe whose specification or tensile properties are unknown. Rather, as discussed in PG&E's opening brief and prepared testimony, when PG&E lacks specific documentation establishing the SMYS for a section of pipe, it has inferred a conservative SMYS value based on reasonable, conservative assumptions about the specifications under which the pipe in question was produced.^{33/} Specifically, where PG&E has lacked SMYS data, it has used the most conservative specifications (e.g., the lowest SMYS value) from Company material procurement specifications for pipeline projects installed during the same time period as the pipe segment in question.^{34/}

As Mr. Zurcher testified, this interpretation of Section 192.107 is consistent with the language of subpart (a) and widely accepted by the industry. Where records support the conservative assumption that a pipe was procured according to one of the specifications listed in Appendix B of Part 192, operators commonly use SMYS values derived from these known historical specifications for purposes of establishing SMYS under Section 192.107.^{35/} CPSD's and CCSF's criticism of this interpretation does not change the fact that is rooted in a plain reading of Section 192.107, as evidenced by its broad acceptance.

CPSD maintains that it was impermissible for PG&E to use assumed SMYS values greater than 24,000 psig "when the pipe segment specifications [were] not accessible with traceable, verifiable and complete specification records or tensile test record."^{36/} This contention pits a practice (using assumed values above 24,000) against criteria ("traceable, verifiable and complete" records) that did not exist during the period of alleged violation.

The "traceable, verifiable and complete" criteria for determining the sufficiency of records used to establish MAOP was first articulated by the NTSB on January 3, 2011. Although PHMSA suggested that its advisory issued in response to the NTSB's recommendations did not

^{33/} See Ex. PG&E-1 at 2-4 to 2-6 (Zurcher).

^{34/} See Ex. CPSD-4 at 2.

^{35/} See Ex. PG&E-1 at 2-4 to 2-6 (Zurcher).

^{36/} See CPSD OB at 12-15.

create any new requirements, it acknowledged that the terms “traceable, verifiable and complete” came from the NTSB’s recommendations.^{37/} PHMSA did not define the terms until it issued an Advisory Bulletin in May 2012.^{38/} PHMSA has also acknowledged that its definition of the terms (which continues to be refined) is not enforceable absent a further rulemaking.^{39/}

Even if “traceable, verifiable and complete” had always been the required standard, CPSD has not attempted to show that any one of the 133 uses of assumed SMYS greater than 24,000 psig – let alone all of them – was not based on records meeting this standard.^{40/}

B. D.11-06-017 Supports PG&E’s Use of Assumed SMYS Values

Contrary to CPSD’s assertion, D.11-06-017 supports PG&E’s use of assumed SMYS values in excess of 24,000 psig based on reasonable, conservative assumptions about the specifications under which the pipe in question was produced. In D.11-06-017, the Commission quotes PG&E’s description of its proposed MAOP validation project:

[W]e are making assumptions about certain components, such as fittings and elbows, based on the material specifications at the time those materials were procured, sound engineering judgment, and conducting excavation and field testing of pipeline systems as appropriate. . . . The information from the document review, engineering analysis and field-testing gets compiled into a document known as a pipeline features list (PFL). . . . The

^{37/} See Ex. PG&E-19 in I.11-02-016 (Joint Meeting of the Technical Pipeline Safety Standards Committee and the Technical Hazardous Liquid Pipeline Safety Standards Committee July 12, 2012), p.67 (“[The advisory] also clarified some terms that were first mention by the NTSB that we also picked up in our initial advisory bulletin”).

^{38/} See *id.*

^{39/} *Id.* at 77 (referring to the May 2012 PHMSA Advisory Bulletin as “guidance as far as intent. It is not enforceable unless we were to incorporate it into our regulations. The terms were initially used by the NTSB. They said that the records must meet these criteria. And we realized quickly we had to tell people what we believe that criterion is.”); see also Ex. PG&E-72 in I.11-02-016 (July 31, 2012 Letter from PHMSA to the American Gas Association).

^{40/} As part of their criticism of PG&E’s use of assumed SMYS values greater than 24,000 psig, CCSF and CPSD address PG&E’s recordkeeping practices. See CCSF OB at 7-8; CPSD OB at 14-15. Aside from the fact that this is the subject of a separate OII, I.11-02-016, such generalized allegations do not supply sufficient proof to establish that any of PG&E’s 133 uses of an assumed SMYS value was based on inappropriate records.

completed PFLs feed directly into the engineering calculation of the MAOP.

D.11-06-017 (June 9, 2011) 2011 Cal. PUC LEXIS 325 at p. **17-19 (emphasis added).

The Commission validated PG&E's proposed MAOP validation methodology in its first ordering paragraph. The Commission ordered:

Pacific Gas and Electric Company must complete its Maximum Allowable Operating Pressure determination based on pipeline features and may use engineering-based assumptions for pipeline components where complete records are not available. Such assumptions must be clearly identified, based on sound engineering principles, and, where ambiguities arise, the assumption allowing the greatest safety margin must be adopted. The calculated values must be used for interim pressure reductions and to prioritize segments for subsequent pressure testing.

Id. at *45.

This use of engineering-based assumptions is the same type of analysis PG&E performed in its use of assumed SMYS values greater than 24,000 psig. CPSD's argument attempts to rewrite D.11-06-017 and would effectively delete Ordering Paragraph 1 by requiring PG&E's MAOP validation team to apply a SMYS of 24,000 psig to all pipelines without "traceable, verifiable, and complete" records. CPSD's argument that "'the greatest safety margin' does not permit the use of assumed SMYS values in excess of 24,000 psig without 'traceable, verifiable, and complete' hydro test records for pipeline segments 'in class 3 and class 4 locations and class I and class 2 high consequence areas'" (*sic*) is contrary to the Commission's order in D.11-06-017 and should be accorded no weight.

V. SECTION 451 CANNOT SUPPORT ALLEGED VIOLATIONS.

CPSD's Opening Brief asserts that PG&E's operation of transmission pipeline segments above MAOP violated Public Utilities Code § 451.^{41/} CPSD's testimony is more explicit that CPSD claims a violation of Section 451 for PG&E's use of MAOPs that "are not above

^{41/} CCSF's opening brief seems to assert that every alleged violation is also a violation of Section 451. *See* CCSF OB at 1-3.

allowable maximums under federal regulations.”^{42/} Thus, CPSD seeks to apply Section 451 to create a violation for conduct expressly allowed by the governing pipeline regulations.

Even if CPSD’s application of Section 451 were not contrary to the express regulations, Section 451 cannot serve as a basis for new safety regulations applied after the fact. Section 451 is part of an Article of the Public Utilities Code entitled “RATES,” not gas pipeline safety. Yet to be explained by CPSD is how Section 451 can serve as a free-floating source of pipeline safety rules without rendering superfluous provisions of the Public Utilities Code addressed to safety regulation. *See, e.g.*, Pub. Util. Code § 761 (authorizing the Commission “after a hearing” to determine that existing rules or practices are “unsafe” and prescribe different rules). Moreover, under Commission decisions, Section 451’s application requires the balancing of several considerations, only one of which CPSD references. *See Corona City Council v. Southern California Gas Co.*, 1992 Cal. PUC LEXIS 563; 28, 45 CPUC2d 301 (interpreting Section 451 as requiring the careful balancing of four statutory factors to determine the proper level of utility service: adequate, just, reasonable and efficient). The one Section 451 consideration CPSD references – the requirement to provide “adequate service” – finds its full expression in the provisions of GO 112-E. *See* GO 112-E §§ 102.1 and 103.1 (specifying that among GO 112-E’s purposes is the purpose to safeguard public welfare and ensure “adequate service,” and specifying further that GO 112-E’s requirements are “adequate” for safety under normal operating conditions).

To apply Section 451 as a free-floating source of pipeline safety compliance requirements would deny PG&E, and the other utilities in this State, due process of law under the California constitution. *See* Cal. Const. Art. 1, § 7. What the U.S. Supreme Court said about the federal due process clause earlier this year in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. ___, 132 S. Ct. 2307, 2317 (2012) (citations omitted) (striking down an FCC indecency finding and

^{42/} Ex. CPSD-1 at 55.

penalty on due process grounds) is equally applicable to CPSD’s attempt to punish PG&E for alleged Section 451 violations:

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.

. . . [T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.

Neither the Commission nor CPSD gave any notice before the submission of the CPSD’s report of what safety requirements they might claim Section 451 carries. In this proceeding, CPSD has not identified any enforceable pipeline safety standard, rule or practice submerged within Section 451. If its confused and contradictory statements in the parallel San Bruno and Records OII proceedings are any guide, any attempt by CPSD to do so here would deprive PG&E of fair notice.^{43/} Fair notice concerns are especially weighty given CPSD’s request for “both a significant penalty and substantial ratepayer relief. . . .”^{44/}

^{43/} Compare PG&E Ex. 2 in I.11-02-016, Julie Halligan’s Revised Testimony at 3 (a redline version of Ms. Halligan’s rebuttal testimony in which CPSD revised its position the night before the hearing from asserting that Section 451 required PG&E to use “good engineering practices” to one in which it claimed that Section 451 required “best engineering practices” (emphasis added)) with CPSD Ex. 5 in I.12-01-007 [Reply Testimony] at 1 (in which, notwithstanding Ms. Halligan’s revised rebuttal testimony, CPSD continues to assert PG&E violated a “good” utility safety practices standard).

^{44/} CPSD OB at 17; See *Fox*, 132 S. Ct. at 2318 (“An isolated and ambiguous statement from a 1960 Commission decision does not suffice for fair notice required when the

VI. CONCLUSION

As articulated in PG&E’s Opening Brief, PG&E had procedures and standards in place that should have resulted in class locations being accurately and timely identified if those procedures and standards were consistently followed. The links among the patrol, class location, and continuing surveillance procedures, as well as the implementation and training surrounding those procedures, did not work as intended, and PG&E did not maintain complete, up-to-date class locations for 100% of its gas transmission system.

Nothing in CPSD’s or CCSF’s briefs support the Commission piling up violations by counting and multiplying pipe segments, code sections and days. Rather, the Commission should view PG&E’s shortcoming in its class location and patrol processes as a single course of conduct and not the millions of days of individual violations counted by CPSD in its Report.

Finally, CPSD failed to prove any violation of 49 C.F.R. § 192.107(b) in PG&E’s use of assumed SMYS values greater than 24,000 psig.

Respectfully submitted,

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By: _____ /s/

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Government intends to impose over a \$1 million fine for allegedly impermissible speech”).