Pacific Gas and Electric Company ™

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March 18, 2013

BY HAND DELIVERY

Tariff Unit
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Comments of Pacific Gas and Electric Company on Draft Resolution E-4550

Dear Tariff Unit:

I am writing to provide Pacific Gas and Electric Company's ("PG&E") comments on Draft Resolution E-4550, which proposes to authorize California Public Utilities Commission ("CPUC" or "Commission") staff to impose fines on utilities for violations of conditions of Certificates and Public Convenience and Necessity ("CPCN") or Permits to Construct ("PTC") issued under CPUC General Order ("GO") 131-D. PG&E is firmly committed to strict compliance with all environmental laws and permit conditions that govern the construction of its projects. The Company has devoted and will continue to devote tremendous resources to environmental monitoring and compliance for all of its construction projects, regardless of whether they are subject to GO 131-D permit requirements, and is proud of its strong record of compliance on hundreds of electric and gas transmission, substation, and gas storage projects over a period of many years.

In these comments PG&E notes that there is no evidence of intentional or widespread non-compliance with CPCN and PTC conditions that would justify a staff-administered penalty program, and questions whether the proposed program would have any deterrent effect given the utilities' existing strong commitment to environmental compliance and the Commission's current authority to issue stop work orders. PG&E therefore recommends that the Commission not adopt the Draft Resolution and instead continue to rely on existing compliance processes under its Mitigation Monitoring, Reporting, and Compliance Plans ("MMRCP") – which already allow for aggressive enforcement action and the imposition of significant penalties through the OII process, following appropriate due process.

In the alternative, PG&E offers several suggestions for revising the Draft Resolution by making it more consistent with the civil penalty programs in effect under federal and state environmental laws and other CPUC citation programs, and providing for early informal discussion with the utility and an opportunity to cure in recognition of the inherent ambiguity in many of the mitigation measures imposed as conditions of CPCNs and PTCs. Specifically, we propose:

- providing the utility with an opportunity to cure;
- capping the amount of staff-administered fines at $100,000;
- requiring the staff to consider mitigating factors in deciding whether to impose a fine and the amount of the fine; and
- providing an opportunity for the utility to meet and confer with staff prior to any decision to pursue a fine.

Attached hereto is a Subject Index listing PG&E's recommended changes to the Draft Resolution.

I. The staff-administered penalty program proposed in the Draft Resolution is unnecessary and unlikely to drive improved compliance with CPCN and PTC conditions.

Environmental leadership is one of PG&E's core corporate values and the Company has devoted significant time and expense to improving its own internal compliance processes for major construction projects. For example, PG&E has developed and implemented company-wide a highly formalized "release to construction" ("RTC") process. This process forbids the commencement of construction activities until the Land Planner issues a letter stating that all appropriate permits and notices to proceed have been acquired and requiring construction to be conducted in compliance with all permit conditions. All permits (and conditions) are attached to the RTC. The RTC process also triggers the production of a project-specific Environmental Compliance and Management Plan (ECMP). The ECMP clearly spells out how environmental compliance will be managed on the project along with the roles and responsibilities of key members of the compliance team. All field personnel undergo environmental training with key members of the management construction team undergoing more extensive training on permit conditions and the expectations set out in the ECMP. We estimate that, over the last ten years, PG&E has spent over $30 million on training, monitoring, and environmental inspection to ensure all construction activities are completed in compliance with the permit conditions of these major projects.

While the Draft Resolution identifies a handful of examples of non-compliances that have occurred in the field despite these safeguards, it does not put in context how infrequently problems occur in light of the size, scope, and number of projects at issue. (*See* Draft Resolution at 4.) The utilities conduct construction activities at hundreds of sites, subject to equally numerous mitigation measures, each year. Over the past 15 years, PG&E has constructed 20 electric transmission line and substation projects pursuant to CPUC siting permits, totaling

nearly $1 billion in cost and involving construction or modification of more than 200 miles of line. Each of these CPCNs/PTCs included dozens if not hundreds of individual mitigation measures, many of which involved subjective compliance measures such as requiring minimization measures "where possible" or "as determined by the Environmental Monitor," or were otherwise difficult to interpret as applied to changing conditions in the field. In addition to these myriad CPUC permit conditions, most of these projects were also subject to the conditions of several other permits such as those issued by the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the California Department of Fish and Game, and the various California Regional Water Quality Control Boards, among other agencies. On three recent PG&E projects, Hollister, Palermo-East Nicholas, and Atascadero-San Luis Obispo, PG&E performed over 5,000 compliance inspections resulting in only seven internally documented non-compliance events, four of which resulted in no environmental impacts. Based on the PG&E's research to date, it appears there were only a handful of non-compliances on the other 17 projects during the entire fifteen year period – and that none of these projects was the subject of a Notice of Violation from any other permitting agency.

In addition, there is no financial incentive to attempt to circumvent permit requirements, and every incentive to comply. Civil penalties are typically imposed under environmental laws to deter misconduct resulting from a desire to avoid compliance costs, and thereby remove or offset any financial incentive to violate the law. (*See, e.g.,* U.S. Environmental Protection Agency ("EPA"), *Interim Clean Water Act Settlement Penalty Policy* (March 1, 1995), at 2.) There simply is no such incentive here; environmental compliance and mitigation costs for transmission projects, plus a return on equity, are recovered in FERC rates. Non-compliance, on the other hand, already involves significant consequences. Stop work orders due to non-compliance with mitigation measures result in construction delays that can greatly increase project costs and jeopardize timely completion of projects, leading to possible reliability impacts. Environmental NOVs also result in significant internal and external reputational consequences.

The evidence, then, demonstrates that the Commission's existing compliance process works well in the vast majority of cases. The Draft Resolution does not provide an adequate evidentiary basis for its contrary conclusion that there currently exists significant non-compliance that warrants addressing through fines, nor any indication of significant environmental harm resulting from the few examples cited therein. For this reason alone, the Commission should not adopt it.

II. If the Commission determines that a penalty program should be adopted, it should make several modifications to the Draft Resolution to address fairness concerns and maintain the Commission's current focus on cooperative approaches to maximize environmental protection.

A. The Commission should provide utilities with an opportunity to cure prior to levying civil penalties.

Consistent with other citation programs adopted by the Commission, the utilities should, where feasible, be provided an opportunity to cure within a reasonable period of time. No penalties should issue where the violation is corrected in a timely manner. In many situations, an alleged non-compliance can be remedied before any environmental harm results, such as modifying structures that were incorrectly designed, terminating inadvertent use of unauthorized access roads, or correcting deficiencies in required reports. In all such cases the Commission's and the utility's focus should be on promptly taking whatever corrective action is necessary to ensure the protection of environmental resources. If a utility resolves the non-compliance event within the period of time specified, a citation should not be issued. An opportunity to cure would ensure that issues are addressed, properly focus the utility's efforts on improving compliance rather than contesting alleged violations, and reduce the likelihood of future non-compliances given that all parties would be focused on process improvement rather than litigation.

An opportunity to cure also makes sense given that many mitigation measures set forth in Commission MMRCPs are aspirational in nature, lack specificity, and sometimes conflict with measures imposed by another agency. For example, in one recent CPUC-permitted project, the MMRCP required PG&E to avoid impacts to wetlands "wherever possible," minimize ground disturbance "to the greatest degree feasible," restrict work in or near suitable habitat to a particular time period "when possible," restrict construction footprints "to the smallest area possible," and temporarily cover vacated burrows that are determined by the Environmental Monitor to be "[s]uitable." (*Pacific Gas and Electric Company's Hollister 115 kV Power Line Reconductoring Project, Mitigation Monitoring, Reporting, and Compliance Program, CPUC A.09-11-016* (September 2011), at 4-10 (Mitigation Measure ("MM") 3.4-1), 4-12 (MM 3.4-2), 4-13 (MM 3.4-3).)

Yet, despite the admittedly situational nature of such measures, they are an important part of the Commission's and the utilities' mutual efforts to minimize the environmental impact of utility construction projects through innovative, site-specific actions in response to the often fluid dynamics in that occur in the field. As such, these measures should be continued – but they cannot fairly be used to support financial penalties based on after-the-fact interpretations. An opportunity to cure alleged violations of such measures would allow the Commission to continue to impose and enforce necessarily ambiguous or aspirational measures without raising significant due process concerns that could result in invalidation of the entire penalty program proposed in the Draft Resolution.

PG&E's recommendation that the Commission provide an opportunity to cure is entirely consistent with Commission precedent regarding staff-imposed fines. For example:

- RPS Citation Program (2009): In Res. E-4257, the Commission held that it is unreasonable to allow penalties to accrue for errors or omissions without giving a load serving entity ("LSE") time to correct. Instead, the Commission allowed LSEs ten business days from the date of notification of errors or omissions to remedy an incomplete or incorrect report. Under this program, a fine may be levied only if the

errors or omissions identified by staff have not been corrected within ten days, and the LSE may request additional time to remedy errors or omissions by contacting staff. (Res. E-4257, at 6.)

- Water and Sewer Program (2009): In Res. W-4799, the Commission required that, before issuing a citation, staff must issue a written notice that provides an opportunity for the utility to cure the violation. For violations that do not endanger the public's health or safety, the notice must provide at least 30 days for the water or sewer utility to either achieve compliance or informally contest staff's alleged violation or proposed fine amount. For violations that could endanger the public's health or safety, the staff notice must provide three days to comply, or such shorter time as is appropriate under the particular circumstances. For either kind of violation, a utility may request an extension of time to achieve compliance, based on a showing of good cause, and staff is directed to grant such extensions as are reasonable. (Res. W-4799, at 2.)

- Railroad Citation Program (2008): Pursuant to ROSB-002, citations under this program will only issue after a notice of defect or violation has been given to the railroad by the CPUC inspection staff, the railroad has had an opportunity to correct the defect or violation, and the railroad has failed to correct the defect or violation in a timely manner. (ROSB-002, at 2.)

- Propane Gas Distribution Safety (2008): Res. USRB-001 provides that, after an inspection, CPSD staff is to provide the propane system operator with an Inspection Report. If, during the course of the investigation, the inspector discovers violations, the inspector must identify any violations in his/her Inspection Report. The propane system operator then has 30 days to submit a compliance plan detailing how the operator will correct the violations detailed in the Inspection Report, except for violations that may result in an immediate threat to the health and safety of the distribution system's customers, which must be corrected within 24 hours. Only then may fines issue. (USRB-001, at 5.)

As these authorities make clear, an opportunity to cure is a standard feature of CPUC staff-administered penalty programs. There is no reason why utilities seeking to comply with hundreds of complex, often ambiguous environmental mitigation measures on major construction projects should not be afforded the same opportunity to cure.

B. The Commission should cap staff-imposed fines at $100,000.

Staff-imposed penalties should be capped at $100,000 for any single violation, including continuing violations, with any proposed penalty above that amount requiring a vote of the Commissioners through the OII process with its associated due process protections. As proposed, the staff citation program is essentially unbounded and would allow staff discretion to impose substantial penalties for non-compliance even if the alleged violations resulted in little or

no environmental harm and even if there was no intent to evade CPUC permit requirements (e.g., contractor error). For example, at $10,000 per day, a design defect that goes undetected for several months could result in a fine in excess of $1 million. This level of penalty should not be imposed in the absence of a full evidentiary process that fully protects the due process rights of the utility.

The Commission's past decisions support the notion that penalties in excess of $100,000 – which exceeds the amount of fines imposed in the vast majority of cases of environmental law violations, including cases of willful violations that result in significant environmental impacts – should not be addressed through a staff-administered program. For example, the Resource Adequacy ("RA") citation program has always recognized a distinction between infractions that may properly be addressed through a citation versus those that require a full OII. Procurement deficiencies in excess of ten megawatts remedied within five days from the date of notification by Energy Division can be cited at $10,000 per incident, or $20,000 for repeat offenses in a single year. (D.11-06-022, at 24.) If the deficiency is not remedied within five days, the authorized penalties are significantly higher *but need to be sought through an OII.* From 2006 through 2011 the Commission staff issued 22 RA citations totaling $82,500, or $3,750 per violation. An average penalty of $3,750 per violation is consistent with typical penalties under federal and state environmental protection laws and may well be appropriate under a CPUC staff-issued penalty program for violations of GO 131-D permit conditions. However, in its current form, the Draft Resolution proposes to authorize much greater staff-issued fines for violations of MMRCP requirements, which is simply unprecedented under the California Environmental Quality Act ("CEQA").

It is also worth noting that even PG&E's proposed cap of $100,000 is not only unprecedented under CEQA, but is also an extraordinarily high amount for violations of substantive environmental laws and permit conditions generally. Indeed, in PG&E's recent experience, NOVs for alleged violations of federal and state environmental laws tend not to exceed $10,000, and more typically are in the hundreds or thousands of dollars. Many NOVs do not include any financial penalty at all.

Perhaps the closest analog to the Commission's siting process under GO 131-D can be found in the California Energy Commission's ("CEC") licensing process for thermal power plants over 50 MW. Like the CPUC, the CEC engages in an extensive CEQA-equivalent public environmental review of proposed generation projects, and imposes numerous "conditions of certification" not unlike the CPUC's CEQA mitigation measures for transmission and substation projects. Like the CPUC, the CEC rigorously monitors every aspect of construction and has the authority to stop work in the event of non-compliance and to impose significant penalties. However, the CEC has not seen fit to authorize staff to impose such penalties. Rather, the CEC requires filing of a complaint and a full evidentiary process, before the Commission itself, prior to the imposition of such penalties. (Pub. Res. Code § 25534.1.) Moreover, penalties are authorized only in cases of "significant" violations, and the maximum amount of such penalties, even in cases of continuing violations, is $125,000. (Pub. Resources Code § 25534(a)(2), (b).) This

further suggests that a $100,000 cap on staff-imposed penalties for alleged violations of GO 131-D permit conditions is more than adequate.

C. The Commission should require staff to consider relevant factors, such as those typically used by the U.S. Environmental Protection Agency and other environmental regulatory agencies, in determining whether to impose penalties and the amount of any penalties up to the authorized maximum "per violation" amounts.

Virtually every civil penalty provision under federal and state environmental law provides for penalties "up to" or "not to exceed" a maximum amount, rather than setting a mandatory fine once staff has determined a violation has occurred. (*See, e.g.,* Pub. Res. Code § 25534(b) (setting forth maximum penalties for violations of CEC license conditions), 40 C.F.R. § 19.4 (violations of various statues administered by U.S. EPA), Cal. Water Code § 13385 (violations of Porter-Cologne Water Quality Control Act), Cal. Health & Safety Code § 42402 (violations of air quality permit conditions), 18 C.F.R. § 385.1602 (violations of FERC hydro license conditions).) Similarly, most environmental regulatory agencies determine the amount of the proposed penalty based on the seriousness of the violation, the resultant environmental harm, and numerous mitigating or aggravating factors. (*See, e.g.* Pub. Res. Code § 25534.1(e) (CEC), Cal. Water Code § 13385(e) (Regional Water Quality Control Boards), Cal. Health & Safety Code § 42403(b) (air quality management districts), 18 C.F.R. § 385.1505) (FERC).) CPUC citation programs have likewise required staff to consider specific criteria in determining whether to issue a citation and have allowed staff to determine the fine amount up to a maximum. (*See, e.g.,* D.12-01-009 (Jan. 12, 2012) at 2-3 (penalty criteria); Res. W-4799, at App. A (Water and Sewer Citation Program, Fine Schedule) (authorizing staff to impose fines "up to" specified maximum amounts).)

The penalty program proposed under the Draft Resolution should be no different. PG&E recommends that, assuming the Commission wishes to adopt a penalty program for violations of GO 131-D permit conditions, it should require staff to consider, in determining whether to issue a fine and the amount of any fine, the gravity of the harm, extent of deviation from the applicable requirement, history of compliance or non-compliance on the project, intent (degree of willfulness or negligence), good faith efforts to comply, degree of cooperation (including whether the non-compliance was self-reported, and any voluntary corrective action taken by the utility. As noted above, similar criteria are currently used by environmental regulatory agencies and by the Commission itself in determining the proper amount of fines under general provisions related to violation of Commission orders. Given the huge number of applicable mitigation measures and the significant variations in the significance of non-compliance with those measures, it is especially important that the Commission take such factors into consideration in this context.

D. The Commission should provide for adequate "checks and balances" prior to issuing a citation, including a requirement that staff meet and confer with the utility.

As proposed, the Draft Resolution authorizes "staff" to issue penalties for alleged violations of CPCN and PTC requirements. Assuming the Commission decides to go forward with a staff-imposed penalty program, it should ensure that there are appropriate procedures in place prior to issuing a citation. The Commission should adopt a transparent internal process under which the assigned Energy Division Project Manager must conclude that a violation has occurred, and that the Director of Energy Division must approve the citation before it is issued.

In addition, consistent with many federal and state environmental agencies' practice, Energy Division should be required to meet and confer with the utility prior to issuing a citation. The meet-and-confer would allow the utility to present facts to staff concerning the alleged incident, including any evidence that a violation did not occur or information concerning mitigating factors in the event that the utility was out of compliance. Similarly, in the event that the utility was out of compliance, the meet-and-confer process would allow the utility and CPUC staff to thoroughly review the non-compliance and develop practices for avoiding similar violations in the future. An early opportunity to be heard in an informal setting is a basic requirement of numerous environmental enforcement schemes and should be a feature of any penalty policy the Commission might adopt in connection with its GO 131-D siting permit process.

III. CONCLUSION

There is little evidence to support the notion that utility non-compliance with CPUC siting permit conditions is a significant problem, and even less reason to believe that the staff-imposed fines proposed in the Draft Resolution will result in improved compliance. To the contrary, PG&E's record of compliance, especially given the massive scale of its CPUC-regulated construction projects over the last ten years and more, is strong, and PG&E is already devoted to looking for ways to improve upon this record. As such, PG&E does not believe adoption of the Draft Resolution or any similar program is warranted.

Should the Commission find otherwise, PG&E respectfully requests that the Commission consider modifying the Draft Resolution as proposed in these comments. PG&E's recommendations are consistent with existing Commission precedent and the policies of various federal and state environmental protection agencies, would insulate the Commission from potential due process challenges, and would tend to preserve the strong working relationship that the Commission and the utilities currently enjoy concerning our shared commitment to environmental protection. Our recommended changes would achieve all of these goals while still providing for significant staff-issued penalties, and, in truly egregious situations, would not in any way preclude the Commission from imposing extraordinary penalties through the OII process.

We appreciate this opportunity to comment on the Draft Resolution.

Respectfully submitted,

David T. Kraska

DTK/dl

cc: Amy C. Baker
Energy Division

SUBJECT INDEX
PG&E's Recommended Changes to Draft Resolution E-4550

<table>
<tr><td>Location in Draft Resolution</td><td>Recommended Change</td></tr>
<tr><td>Appendix A, Section 2.1 (New)</td><td>2.1 Meet and Confer. After identifying a potential violation, staff shall contact the utility to meet and confer concerning the facts of the potential violation and any mitigating or aggravating factors. Should staff determine that a violation has occurred, where feasible, Staff shall provide the utility with a reasonable time period in which to cure the violation.</td></tr>
<tr><td>Appendix A, Section 2.2 (New)</td><td>2.2 Service of Notice to Meet and Confer. Meet and Confer Notices shall be sent by Commission Staff by first class mail to the Respondent at the address of the agent for service of process, with a copy to the Respondent's project manager for the project at issue.</td></tr>
<tr><td>Appendix A, Section 2.3 (Revised. Originally Section 2.1.)</td><td>2.3 ~~2.1~~ Citations for Specified Violations. ~~After appropriate informal investigation and verification that a~~ After Staff has completed the meet and confer requirement provided in rule 2.1 and has determined either that an opportunity to cure is not feasible for the Specified Violation ~~defined in this Resolution has occurred~~or that the Utility has not cured the Specified Violation within the specified time period, Commission Staff is authorized to issue a citation. In determining whether and in what amount to impose a fine, Commission Staff shall consider the following factors: the gravity of the harm, extent of deviation from the applicable requirement, history of compliance or non-compliance on the project, intent (degree of willfulness or negligence), good faith efforts to comply, degree of cooperation and any voluntary corrective action taken by the utility. The Specified Violations and the corresponding Scheduled Fine that may be levied are described in this Appendix.</td></tr>
<tr><td>Appendix A, Specified Violations and Scheduled Fines</td><td><table><tr><td>SPECIFIED VIOLATION</td><td>SCHEDULED FINE</td></tr><tr><td>Non-compliance with Construction Requirements for natural gas storage facilities, electric generating plants, electric transmission/ power/ distribution line facilities, and substations that does not cause harm</td><td>Up to $500 per day for the first ten days the non-compliance occurred and up to $1,000 for each day thereafter~~.~~, up to a maximum of $100,000 per non-compliance.</td></tr></table></td></tr>
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	to human beings or a resource.	
	Non-compliance with Construction Requirements for natural gas storage facilities, electric generating plants, electric transmission/ power/ distribution line facilities, and substations that does cause harm to human beings or a resource.	Up to $5,000 per day for the first ten days the non-compliance occurred and up to $10,000 for each day thereafter~~.~~, up to a maximum of $100,000 per non-compliance.

SB_GT&S_0320458

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department, 77 Beale Street – B30A, San Francisco, CA 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On the 18th day of March 2013, I caused to be served a true copy of:

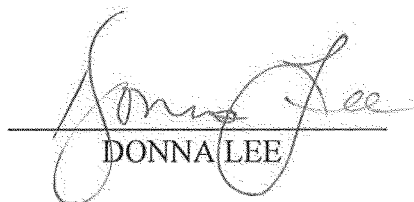
COMMENTS OF PACIFIC GAS AND ELECTRIC COMPANY ON DRAFT RESOLUTION E-4550

[XX] By Electronic Mail – by serving the above document, via e-mail transmission, to each of the parties listed on:

Service list attached to the Draft Resolution E-4550
Tariff Unit, Energy Division – edtariffunit@cpuc.ca.gov
Amy C. Baker, Energy Division – amy.baker@cpuc.ca.gov
President Michael R. Peevey – mp1@cpuc.ca.gov
ALJ Michel Peter Florio – mf1@cpuc.ca.gov
ALJ Catherine J.K. Sandoval – cjs@cpuc.ca.gov
ALJ Mark J. Ferron – fer@cpuc.ca.gov
ALJ Carla J. Peterman – cap@cpuc.ca.gov
Edward Randolph, Director of Energy Division – efr@cpuc.ca.gov
Chief ALJ Karen Clopton – kvc@cpuc.ca.gov
Frank Lindh, General Counsel – frl@cpuc.ca.gov

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 18th day of March 2013 at San Francisco, California.



DONNA LEE