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 with Respect to Facilities Records for its Natural Gas Transmission System Pipelines.	Investigation 11-02-016 (Filed February 24, 2011)

REPLY BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO

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I. INTRODUCTION AND SUMMARY

In opening this investigation the Commission noted that while it had not reached any conclusions regarding whether PG&E violated the law with respect to recordkeeping, there was "legitimate cause to be concerned."[1] The OII further stated that PG&E would have "a full opportunity to demonstrate whether our concerns are unfounded."[2] PG&E has had extensive opportunities to demonstrate to the Commission and the public that its operations have been safe and in compliance with the law, but has failed to do so. PG&E could have approached this case in a constructive way that helped the Commission determine where PG&E failed to comply with the law and which failures were most serious. If PG&E had done so, it would have some credibility, and the Commission and the public would have some basis for thinking PG&E was changing its approach to gas pipeline safety. Instead PG&E employed a classic defense strategy of denying virtually everything and blaming someone else—in this case, CPSD.

PG&E takes the position that the law required almost nothing and thus it complied with the law in all but one instance.[3] PG&E's brief provides no indication that the utility takes seriously or even recognizes its obligations to operate safely, much less that good record keeping is part of that obligation. For example, though PG&E admits that it has not been able to locate tens of thousands of pressure test records that it was required to keep, it asserts that this is not a violation because it is still looking for them.[4] This suggests PG&E thinks the purpose of keeping the records is simply to be able to check the box that indicates it has them, rather than to use them for pipeline operations.

Disturbingly, PG&E doesn't rebut CPSD's allegations by claiming that it had the records, but instead claims that it didn't need them, and that the records would have made no difference in the San Bruno explosion.[5] In view of the way PG&E used (or failed to use) the records it did have, this second

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[1] OII at 10-11.

[2] OII at 10-11.

[3] PG&E admits here one violation related to the clearance form for the work at Milpitas in 2010. PG&E Brief at 2, fn. 7.

[4] PG&E Brief at 2, fn. 7.

[5] *See e.g.* PG&E Brief at 3.

claim unfortunately may be true. However, San Francisco testimony, and other record evidence, shows that had PG&E kept required records and appropriately used them, it would have undertaken pipeline maintenance activities that could have and likely would have prevented or reduced the scope of the San Bruno explosion.[6] Moreover, the record shows that PG&E failed to respond prudently to warnings from PG&E's own employees that the utility's gas pipeline recordkeeping was inadequate. [7]

PG&E argues that even if something was necessary for safety, unless the requirement was specified in detail and made mandatory, then PG&E's failure to do it cannot be a violation. PG&E would convert the safety obligation under Section 451 into a requirement utilities can safely ignore since it cannot be the source of violations. PG&E's argument is contrary to law. PG&E also argues that the Commission is precluded from finding many of the asserted violations, especially those that stretched over many years, because the Commission should have raised the violations sooner. It is certainly true that the Commission and federal regulators should have discovered and corrected PG&E's recordkeeping violations sooner, but that does not excuse PG&E's violations.[8]

In this reply brief, the City and County of San Francisco addresses legal arguments raised by PG&E and CPSD.

II. BACKGROUND (PROCEDURE/FACTS)

III. LEGAL ISSUES OF GENERAL APPLICABILITY

A. PG&E Should Not Benefit From Its Failure to Maintain and Provide Records Needed to Prove the Safe Operation of Its Gas Pipelines

CPSD argues the Commission should shift the burden of proof to PG&E or draw adverse evidentiary inferences against PG&E due to PG&E's substantial failure to maintain and produce

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[6] CCSF-4 at 10-12. Independent Review Panel Report, at 4-5.

[7] *See e.g.*, ALJ June 20, 2011 Order Entering Memoranda From Former PG&E Employee into Record, Attachment A (discussed at CCSF Brief at 29). Similarly, PG&E failed to respond prudently to specific records that should have prompted additional investigation, threat assessment, and remediation. *See e.g.,* CCSF-4 at 10-12 (discussed at CCSF Brief at 31-33).

[8] The mere failure to enforce the law, without more, will not estop the government from subsequently enforcing it. *Feduniak v. California Coastal Commission (2007) 148 Cal.App.4th 1346, 1369; City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 496-497.*

required records.[9] Under the circumstances of this case, San Francisco agrees that either of these actions is appropriate. In addition to the authority cited by CPSD, other authorities support shifting the burden to PG&E, or at the very least, drawing adverse evidentiary inferences.

1. The Commission Should Shift the Burden of Proof to PG&E, Because the Missing Records Were in PG&E's Control

Although the CPSD would usually bear the burden of proof in an enforcement proceeding, PG&E's recordkeeping failures demonstrate this case should be an exception to the general rule. In the Comments to California Evidence Code § 500, the Law Revision Commission suggested factors for courts to consider when determining whether to shift the burden of proof:

> . . . the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact.[10]

In this case, each of the cited factors weighs in favor of shifting the burden of proof to PG&E. PG&E admits, for example, there are over 23,000 pipeline segments for which it cannot produce testing or maintenance records.[11] PG&E's inability to provide CPSD with these and other records has impeded the investigation of the San Bruno incident and all Commission proceedings related to it. From PG&E's immediate erroneous identification of the pipe that exploded, to the inability of the Commission to complete its investigations in a timely manner,[12] to PG&E's assertion that it is still looking for records two and one-half years after the explosion,[13] it is clear that PG&E is the party that had the obligation, the knowledge, and the ability to produce the records needed to affirmatively demonstrate that it operated safely and in compliance with the law. Yet, it has failed to do so.

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[9] CPSD Brief at 17-20.

[10] Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 500, at 431. It should be noted that proof that the destruction of the records was willful was not one of the factors cited, so PG&E's protestations regarding its intent or lack of intent in failing to produce the records is of little bearing.

[11] TURN-4, PG&E Response to Joint CPSD-TURN Data Request 01, Question 01, and Attachment Gas Transmission Systems Records OII_DR_Joint_001-Q01ATCH01. *See also* TURN Brief at 23-24, noting that the 23,000 is an underestimate of the actual segments.

There are strong public policy considerations that warrant shifting the burden of proof to PG&E. These include the conservation of ratepayer and other resources and the need for regulatory certainty for PG&E and other utilities. Regarding costs, it is clear that proving a claim in the absence of relevant evidence can "increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both."[14] While PG&E may be paying for most or all of its own and the Commission's costs here, there are costs to other parties to this proceeding that will not be reimbursed by PG&E.[15] All of these were incurred only because PG&E failed to maintain the records needed to safely operate its system.

Regarding regulatory certainty, it is important for the Commission to be clear that utilities cannot benefit from a failure to provide needed documents, whatever the cause of the failure. As noted by the Commission in a common carrier case where the respondent ultimately provided the requested records, "we are concerned about the apparent disregard of the requirements of these code sections and Respondent's failure to produce records on a timely basis, thereby apparently obstructing the legitimate access to those records which our investigative staff must have."[16]

PG&E's admitted loss of and ongoing search for these safety records is a further indication of what little value PG&E placed on them. Even if these records are ultimately found, it is clear that PG&E has never considered them an essential tool for maintaining pipeline safety. Not only is shifting the burden here to PG&E fair and consistent with the law, in doing so the Commission can provide a strong incentive for PG&E to maintain and produce records.

2. At the Very Least, the Commission Should Draw an Adverse Inference Against PG&E Due to the Missing Records

Under well settled law, the Commission should at the very least draw an adverse inference from the absence of a large number of records – not the opposite inference as PG&E has suggested.

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[14] *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 8 (1998) ("*Cedars-Sinai Medical Center*").

[15] Even the costs paid by PG&E impact ratepayers because PG&E wants "credit" for them in assessing any penalty. *See e.g.* Joint-66 at 21.

[16] Investigation 93-09-025, *Order Instituting Investigation Into the Operations and Practices of Orlindo Diaz and Deborah Jean Payne, a Partnership, Doing Business As O & D Trucking*, 1993 Cal. PUC LEXIS 687 (1993), at **2-3.

Under Evidence Code § 413, the trier of fact may draw inferences from the "willful suppression of evidence."[17] "Chief among these is the evidentiary inference that evidence which one party has destroyed or rendered unavailable was unfavorable to that party."[18]

In *Cedars-Sinai Medical Center*, the plaintiff sued the hospital for medical injuries plaintiff sustained due to oxygen deprivation during his birth. During pretrial discovery, the hospital was unable to locate and produce the fetal monitoring strips recording plaintiff's heartbeat during labor. The Court found that evidentiary remedies, in particular the evidentiary inferences provided in Evidence Code § 413 and the remedies available under the Code of Civil Procedure § 2023.30[19] provide "substantial deterrent to acts of spoliation, and substantial protection to the spoliation victim."[20] As with PG&E's missing records here, the documents the defendant could not produce were objective measurements entirely within the defendant's control. By denying plaintiff access to these records, defendant denied plaintiff the ability to reconstruct key events that could have proven defendant's culpability in the case.

The federal courts also recognize the doctrine of spoliation of evidence.[21] They have found that spoliation of evidence raises the "presumption that the evidence a party failed to preserve goes to the merits of the case, and that the evidence was adverse to the party that destroyed it."[22] "Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court must draw the strongest allowable inferences in favor of the aggrieved party."[23] This adverse inference is

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[17] Evid. Code, § 413.

[18] *Cedars-Sinai Medical Center*, *supra*, 18 Cal.4th, at 11. As the Court noted, this evidentiary inference "has a long common law history." *Id.*

[19] At the time of the decision, these remedies were contained in Code of Civil Procedure 2023. The current Section 2023.30 allows the court to " impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process." *Code of Civ. Proc.,* § 2023.030(b).

[20] *Cedars-Sinai Medical Center*, *supra*, 18 Cal.4th at 17.

[21] *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

[22] *See Apple, Inc. v. Samsung Electronics Co., Ltd.,* 888 F.Supp.2d 976, 993 (N.D. Cal. 2012) (quotation marks omitted) ("*Apple*").

[23] *National Association of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D. Cal. 1987) ("*Turnage*").

available even though neither party may have known the contents" of the missing documents.[24] Here, although the Commission did not tell PG&E that it would someday start a proceeding related to a pipeline accident, it was reasonable for the utility to expect the inspection and review of pipeline safety records and that these records would be used to verify compliance and safety in the maintenance of the gas pipelines.[25]

It would be unfair to allow PG&E to benefit from the absence of records that were exclusively under its control.[26] The Commission, therefore, should reject PG&E's arguments, which it has made throughout this proceeding, that even if PG&E had kept good records and data, such records would not have prevented the San Bruno pipeline rupture and fire, or changed PG&E's safety program for any other pipeline.[27] These arguments *assume* the content of records that PG&E cannot produce to support PG&E's claims. They also *assume*, contrary to PG&E's own evidence, that PG&E would not have responded appropriately to those records.[28] Having failed to provide the records, PG&E should be barred from arguing they would not have prevented the San Bruno pipeline rupture. Instead, the inference the Commission should draw from the absence of these records is that they would have adversely affected PG&E's case.

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[24] *Apple*, *supra*, 888 F.Supp.2d at 993.

[25] *See e.g.,* PG&E-4 (D.61269 Adopting GO 112) § 301.1; Pub.Util. Code, § 314.5.

[26] *See Turnage*, *supra*, 115 F.R.D. at 557 (defendant cannot assert any presumption of irrelevance of missing documents).

[27] PG&E maintains that poor recordkeeping did not "cause or contribute to" the San Bruno explosion. PG&E Brief at 3, 66. PG&E assumes that the records that are missing either are not relevant or would have supported PG&E's positions. PG&E Brief at 5. *See also* CCSF Brief at 34 for discussion of Zurcher's view that if a record was missing and consideration of the record was not documented, then the record was not relevant. Joint RT 780:23-781:5.

[28] PG&E argues that if it had accurate records about the actual pipeline materials for segment 180 of Line 132, it would have never installed the pipe, or would have removed it. *See* PG&E Brief at 66 and footnotes 334-36.

B. There Is Clear and Convincing Evidence of PG&E's Violations, But There Is No Legal Basis to Apply that Heightened Evidentiary Standard Here

It "is well settled that the standard of proof in Commission investigation proceedings is by a preponderance of the evidence."[29] As the Commission found in *Qwest*, the Commission's use of a preponderance of the evidence standard is consistent with State law.[30] PG&E acknowledges that the Commission need not apply a "clear and convincing" standard to an investigation even one "involving potentially substantial penalties."[31]

Despite the Commission's "well settled" view of the standard of proof required in a proceeding of this nature, PG&E understandably seeks to make it harder for CPSD and others to prove PG&E's violations. PG&E argues that for three reasons the Commission should use this proceeding to set new precedent by adopting a "clear and convincing" standard. None of these arguments, however, are a lawful basis for the Commission to treat this case any differently from any other Commission investigation.

First, PG&E suggests that this case is of such "exceptional importance" that "'clear and convincing' evidence is constitutionally required."[32] Second, PG&E argues that cases that have required "clear and convincing" evidence to revoke or suspend a professional license are somehow applicable to this case, because of the "high-stakes" involved.[33] Third, PG&E attempts to distinguish *Qwest*, arguing that unlike *Qwest* this case involves "multiple 'continuing' violations."[34]

San Francisco agrees with PG&E that this is a very important case, but the case PG&E relies on to argue that this fact alone supports the use of a clear and convincing evidence standard is entirely

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[29] D.97-05-089, *Investigation on the Commission's Own Motion Into the Operations, Practices, and Conduct of Communication Telesystems International*, 1997 Cal. PUC LEXIS 447, at *35 (1997); *see also* D.03-01-087, *Investigation on the Commission's Own Motion Into the Operations, Practices, and Conduct of Qwest Communications Corp.*, 2003 Cal. PUC LEXIS 67 (2003), at *12, fn.5 ("*Qwest*").

[30] *Id.*, citing *People v. Superior Court* (*Kaufman*) (1974) 12 Cal.3d 421 (a preponderance of the evidence "is the standard usually required for civil penalties generally").

[31] PG&E Brief at 23, *citing Qwest*, *supra*, 2003 Cal. PUC LEXIS 67.

[32] PG&E Brief at 21-22, citing, *In re Angelia P.*, 28 Cal.3d 908, 919 (1981) ("*Angelia P*").

[33] PG&E Brief at 22-23, citing *Hughes v. Bd. of Architectural Examiners*, 17 Cal.4th 763, 789 n.9 (1998) ("*Hughes*"); and *Grubb v. Department of Real Estate*, 194 Cal.App.4th 1494, 1502 (2011) ("*Grubb*").

[34] PG&E Brief at 23-24.

inapt.[35] *Angelia P* concerned the termination of parental rights under a statute that in one subdivision specifies a clear and convincing evidence standard.[36] In finding that this standard should be applied to other subdivisions, the Court was justifiably concerned that "'[p]arenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood.'"[37] PG&E has not argued, nor could it show, that any rights at issue here approach the fundamental parental rights at issue in *Angelia P*.

PG&E's second argument fares no better. Not surprisingly, PG&E has not cited a single case that supports applying the clear and convincing evidence standard that is generally used in professional license revocation/suspension cases to a Commission investigation of public utility safety violations. There is simply no basis for the Commission to rely on those cases. PG&E argues that the potential size of the penalties in this case, and the potential for remedial relief, are grounds for the Commission to require clear and convincing evidence.[38] However, PG&E's argument ignores the reason the courts use a clear and convincing standard in the professional misconduct cases.

In professional license revocation/suspension cases, the courts rely on the fact that, because a "professional license represents the licensee's fulfillment of extensive educational, training and testing requirements, the licensee has an extremely strong interest in retaining the license that he or she has expended so much effort in obtaining."[39] The courts have found that as a result of that training a licensed professional has a "fundamental vested right to continue" to engage in the licensed activity.[40]

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[35] While the safety implications make this case important to the Commission and the general public (*see* PG&E Brief at 22, fn 99), that fact alone is not a basis for the Commission to use a heightened standard in determining whether and to what extent it should impose fines and penalties under Sections 2107 and 2108.

[36] *Id.* at 920.

[37] *Id.* at 916, quoting *In re Carmaleta B.*, 21 Cal.3d 482, 489 (1978). The Supreme Court found that "California appellate decisions addressing the question have almost unanimously held that clear and convincing evidence is required before parental rights may be terminated under any subdivision" of the relevant statute. *Angelia P*, *supra*, 28 Cal.3d at 920.

[38] PG&E Brief at 22-23.

[39] *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894 ("San *Benito Foods*").

[40] *Hughes*, *supra*, 17 Cal.4th at 788-89.

The courts have found, therefore, that it "makes sense to require that a higher standard of proof be met in a proceeding to revoke or suspend such a license."[41]

For these very reasons, the courts have not required clear and convincing evidence to order a licensed contractor to pay civil penalties for violations of state contractor laws.[42] A preponderance of the evidence is all that is required where "the greatest sanction that could be imposed . . . was a fine or penalty."[43] The courts also have not required clear and convincing evidence to suspend or revoke non-professional or occupational licenses.[44] In applying a preponderance of evidence standard to a threatened suspension or revocation of a food processor's license, the court held that a "sharp distinction between professional licenses, on the one hand, and . . . nonprofessional licenses, on the other, supports the distinction in the standards of proof applicable in proceedings to revoke these two different types of licenses."[45]

PG&E attempts to argue that the clear and convincing standards should be applied in this case, because in *Grubb* the court held that the clear and convincing standard applied even though the administrative proceeding against a real estate agent resulted only in a 30-day suspension or a $3,000 fine, whereas in this case penalties could be substantially higher.[46] But the amount of the penalty was not the basis for the clear and convincing evidence standard in *Grubb*. Here, unlike in *Grubb*, the Commission has not threatened PG&E's lawful ability to continue to provide professional services or even PG&E's continued ability to provide natural gas service to its customers throughout the State of California.

The only things at issue are potential penalties and remedial relief, which no doubt could be substantial, but these potential outcomes do not even involve suspending or revoking PG&E's CPCN to provide gas pipeline service in California (which PG&E might argue is, but in fact is not, comparable to a professional license revocation or suspension). Remedial measures requiring PG&E

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[41] *San Benito Foods*, *supra*, 50 Cal.App.4th at 1894.

[42] *Owen v. Sands*, 176 Cal.App.4th 985, 993-94 (2009).

[43] *Id.* at 994.

[44] *San Benito*, *supra*, 50 Cal.App.4th at 1893-94.

[45] *Id.* at 1984.

[46] PG&E Brief at 22-23, citing *Grubb*, *supra*, 194 Cal.App.4th at 1501.

to perform safety work on its pipeline system, correct its deficient records, or otherwise ensure its safe operation of gas pipelines do not transform this case into one requiring a heightened standard of proof. Such remedial actions are squarely within the Commission's authority and duty.[47] PG&E has not cited a single case that supports its argument that these are grounds for the Commission to ignore its own precedents concerning the standard of proof in a Commission investigation and to instead rely on *Grubb* to apply a clear and convincing standard.

Third, PG&E's attempt to distinguish the Commission's rejection of a clear and convincing evidence standard in *Qwest* is also misplaced.[48] In *Qwest*, the Commission found that the clear and convincing evidence standard was not necessary when the Commission is imposing statutory civil penalties under § 2107, which are already limited by the Legislature.[49] PG&E wrongly argues that *Qwest* "supports the application" of a "heightened standard in this case," because Qwest concerned "thousands of discrete violations" as opposed to the "multiple 'continuing' violations" alleged in this case.[50]

There is no basis for the distinction PG&E attempts to make. The Legislative cap constrains the Commission here to the same extent as it did in *Qwest*, because the Legislature also determined that "in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."[51] While the potential fines here certainly exceed the $20 million the Commission fined Qwest, the Commission will still have to calculate and justify the amount of the fines based on

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[47] *See* Investigation 12-04-011, *Order Instituting an Investigation on Whether Great Oaks Water Company's Failure to Inform the Commission and its Staff of its Treatment of Pump Tax Revenues Collected from Customers Violated the Commission's Rule of Practice and Procedure 1.1, the Uniform System of Accounts for Class A Water Companies, the Rate Case Plan, or Public Utilities Code Sections 451 and 794*, 2012 Cal. PUC LEXIS 163, at *21 (2012) (the Commission may require "remedial actions" measures to prevent "future violations" of the Public Utilities Code or Commission decisions and orders.

[48] *See* PG&E Brief at 23-24.

[49] The Commission drew a distinction between punitive damages, which require clear and convincing evidence, and statutory civil penalties, which do not. The Commission noted that among the reasons for the difference is that, unlike juries considering a claim for punitive damages, the Commission cannot exceed the amounts set by the Legislature for each violation. *Qwest*, *supra*, 2003 Cal. PUC LEXIS 67, at *13.

[50] PG&E Brief at 23.

[51] Pub. Util. Code, § 2108.

Sections 2107 and 2108. In every case, the Commission follows the same statutory formula – it considers the number of violations, the length of time for each violation, and the amount of penalty for each violation.[52]

PG&E has presented no good basis for the Commission to apply a different standard of proof in this case than it has applied to other investigations in which a public utility might be subjected to fines, penalties, or remedial measures.

C. Section 451 Requires PG&E to Operate and Maintain its Gas Pipelines Safely, Including Maintaining Adequate Records

PG&E contends that Section 451 is not and cannot be a source of utility pipeline safety obligations, including adequate recordkeeping to support safe operations and effective maintenance. PG&E argues that Section 451 relates to rates, that a utility's service obligations can only be considered under Section 451 with reference to a utility's rates, and that, without including information on rates, CPSD cannot address PG&E's safety obligations under Section 451.[53] PG&E also contends that interpreting Section 451 to require pipeline safety would render superfluous other sections of the Public Utilities Code.[54] PG&E's arguments are contrary to the plain language of Section 451. PG&E's arguments are also contrary to key Commission decisions imposing penalties for a utility failure to comply with the service and safety requirements of Section 451, and a recent California Court of Appeals decision affirming one of these decisions, and citing the other with approval.

1. The Plain Language of Section 451 Creates a Utility Obligation to Maintain its Facilities as Necessary to Promote Public Safety

PG&E argues that Section 451 relates to rates and cannot be a source of a utility safety obligation. PG&E ignores the plain language of Section 451, which provides:

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[52] The Commission fined Qwest only $5,000 for each of 3,851 "slamming" violations and $500 for each of 4,871 "cramming" violation, which did not concern the public health, safety, or welfare. *Qwest*, *supra*, 2003 Cal. PUC LEXIS 67, at *14. Using this formula, the Commission could have imposed much higher penalties for the statutory violations at issue there. Had the Commission imposed the then applicable statutory maximum of $20,000 per violation, the Commission could have fined Qwest nearly $170 million. Yet, the Commission still did not see a need to apply the clear and convincing evidence standard.

[53] PG&E Brief at 25-27.

[54] PG&E Brief at 27-29.

> All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.
>
> *Every public utility shall* furnish and *maintain such* adequate, efficient, just, and *reasonable service, instrumentalities, equipment, and facilities*, including telephone facilities, as defined in Section 54.1 of the Civil Code, *as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public*.
>
> All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.[55]

In a recent case, the California Supreme Court summarized key principles of statutory construction as follows:

> In construing any statute, we first look to its language. Words used in a statute ... should be given the meaning they bear in ordinary use. *If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature....* If the language permits more than one reasonable interpretation, however, the court looks to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. Also, a statute must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. A court may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.[56]

There is no question, and PG&E does not dispute, that Section 451 clearly and unambiguously requires utilities to maintain their facilities in a manner that protects public safety. Since the language is clear, there is no need for further "interpretation." There is certainly no basis to simply ignore the clear language of Section 451 and decline to give it effect, as PG&E proposes. PG&E itself in its opening brief cites *Klein v. United States*, 50 Cal. 4th 68, 80; 235 P.3d 42 (2010) ("*Klein*") for the proposition that "courts must strive to give meaning to every word in a statute and to avoid

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[55] Pub. Util. Code, § 451 (emphasis added).

[56] *Dicampli-Mintz v. County of Santa Clara*, 55 Cal.4th 983, 992 (2012) (emphasis added; citations omitted).

constructions that render words, phrases, or clauses superfluous."[57] PG&E's attempt to nullify the language in Section 451 clearly requiring utilities to maintain facilities in a manner that promotes public safety would result in eliminating the entire second paragraph of Section 451, contrary to the very rules of statutory construction that PG&E cites.

Notwithstanding the clear and unambiguous language of Section 451, PG&E contends that Section 451 cannot create a utility obligation to maintain its facilities in a manner that protects public safety because of the title given to the statutory section in which the relevant language appears. PG&E explains that Section 451 is located within Chapter 3, Article 1 of the Public Utilities Code: Chapter 3 is entitled Rights and Obligations of Public Utilities; Article 1 is entitled Rates. PG&E argues that because Section 451 is within this statutory context, it can relate only to rates and cannot serve as the source of a utility obligation to operate safely.[58]

However, there is nothing odd about including in a section on rates the fundamental utility obligations that provide the basis for rates. As PG&E itself details in its opening brief (and provides ample citation for), establishing rates requires balancing of rates against the proper level of service.[59] On the one hand, utilities may only charge rates that are just and reasonable. On the other hand, as PG&E itself concedes, utilities must provide a basic level of service.[60] Given that the establishment of rates requires this balance, there is nothing anomalous about including in a section on rates the requirements for a basic level of service. Moreover, as the entity charged with utility regulation, the Commission has the jurisdiction and responsibility to enforce both sides of the equation – adequate service at just and reasonable rates.

In support of its argument that Section 451 relates only to rates, PG&E cites to *Smith v. Superior Court*, 39 Cal.4th 77 (2006) ("*Smith*"). However, in *Smith* as in *Klein,* the California Supreme Court stressed that in interpreting a statute Courts must "give 'significance to *every word, phrase, sentence, and part of an act* in pursuance of the legislative purpose,'"[61] whereas the

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[57] *See* PG&E Brief at 27.

[58] *See* PG&E Brief at 25-27.

[59] *See* PG&E Brief at 26-27.

[60] *See* PG&E Brief at 26-27.

[61] *Smith, supra*, 39 Cal.4th at 83(citations omitted; emphasis added.)

interpretation of Section 451 suggested by PG&E would render meaningless the entire middle paragraph of the Section. In *Smith*, the Supreme Court of California sought to determine whether the word "discharges" in one section of a labor statute included the end of a temporary employment, since "discharges" was not defined in the statute. In concluding that it did, the Supreme Court reviewed other related sections in the statute, the legislative history of the section in question, and the public policy advanced by the section in question. Thus, the Court in *Smith* did not rely on a chapter heading to ignore clear language in a section of that chapter. Moreover, *Smith* involves an entirely different statutory scheme than the Public Utilities Code and the Court's conclusion in *Smith* has little bearing on the Commission's interpretation of Section 451. Certainly, there is nothing in *Smith* that would support an interpretation of statutory language that would render it entirely superfluous.

PG&E also attempts to rely on *People v. Hull*, 1 Cal. 4th 266, 272 (1991) ("*Hull*"), where the Supreme Court stated that "chapter and section headings of an act may properly be considered in determining legislative intent."[62] However, *Hull* involved analysis of two apparently contradictory statutory provisions. In attempting to harmonize these, the Supreme Court reviewed the language of the provisions, considered their placement within the statute, and considered the Legislature's intent and the public policy underlying the statutory language. The conclusion in *Hull* does not rest on the chapter and sections headings alone; this was merely one factor considered. Certainly, *Hull* does not stand for the proposition advanced by PG&E that statutory language can be altogether ignored because it appears in a section with a particular heading.

2. The Commission Can Find PG&E Violated its Safety Obligations Under Section 451

PG&E makes the odd claim that because safety is only one of several elements of adequate service, to construe Section 451 to create an utility obligation to safely maintain its facilities, improperly requires the Commission to "extract one consideration (safety) from all those Section 451 requires to be evaluated and balanced in setting just and reasonable rates."[63] PG&E further contends

[62] *Hull, supra,* 1 Cal. 4th at 272 (citations omitted).

[63] PG&E Brief at 26.

that in order to substantiate a violation of level of service under Section 451, CPSD had to present information on the rates in effect at the time the violation occurred, in order to allow for the balancing necessary under Section 451.

PG&E attempts to bolster its argument that Section 451 precludes the Commission from finding violations for safety deficiencies by citing to *Pacific Telephone and Telegraph Company v. Public Utilities Commission of the State of California*, 35 Cal.2d 822(1055) ("*Pac. Tel.*") which provides "the Commission's primary purpose [is] 'insur[ring] the public adequate service at reasonable rates without discrimination.'"[64] However, in *Pac. Tel.*, the California Supreme Court affirmed unequivocally the Commission's broad regulatory authority under the Public Utilities Code, including its authority to "determine the services that must be provided by the utility."[65] Moreover, *Pac. Tel.* did not involve Section 451; instead in *Pac. Tel.*, the California Supreme Court determined that it was beyond the Commission's authority to prescribe the terms of service between a utility and its affiliate.

Importantly, the California Supreme Court itself later questioned its holding limiting Commission jurisdiction in *Pac. Tel.*[66] PG&E must be well aware of the dubious ongoing validity of *Pac. Tel*, since as recently as 2004, the Court of Appeals explained in a case involving PG&E, "[p]erhaps more importantly, the court's reasoning in *Pac. Tel.* has little or no continuing vitality in light of the Supreme Court's subsequent decision *in General Telephone Co. v. Public Utilities Com*. . . ."[67] PG&E's use of this case is yet another instance of PG&E trying to mislead the Commission in violation of Rule 1.

Further, PG&E's reasoning, that in enforcing a utility's obligation under Section 451 to safely maintain its facilities the Commission would ignore the need to balance other factors, makes little sense. By this reasoning, the Commission could never enforce adequate service because in focusing

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[64] PG&E Brief at 26.

[65] *Pac. Tel.*, 34 Cal. 2d at 827 (emphasis added).

[66] *General Telephone Company of California v. Public Utilities Commission*, 34 Cal.3d 817, 824 (1983).

[67] *PG&E Corp. v. Public Utilities Com.*, 118 Cal. App. 4th 1174, 1202 (2004) (citations omitted).

on the aspect of service that is inadequate, the Commission would be acting inconsistent with the statute because the statute lists other aspects of service as well. Utilities must meet all the requirements for providing a basic level of service, and do so at just and reasonable rates. The Commission may focus on one particular aspect of service if, as in this case, a utility failed to meet its obligations as to that aspect. In this case, the Commission is properly focusing on safety because this is the aspect of service in which PG&E was deficient.

PG&E's argument that any Commission penalty for a utility's violation of its service obligation under Section 451 can only be determined in the context of balancing the violations against existing rates is directly contrary to the Court of Appeal's decision in *Pacific Bell Wireless v. Public Utilities Commission* ("*Pacific Bell*").[68] In *Pacific Bell*, the Commission could not consider applicable rates, because under the Federal Communications Act the Commission had preempted from doing so.[69] Nonetheless, in *Pacific Bell,* the Court of Appeals upheld the Commission's determination that Cingular violated its service obligation pursuant to Section 451. Similarly, the Commission's two decisions in *Carey v. PG&E* ("*Carey*" and "*Carey II*")[70] the Commission found violations of the service component of Section 451 without addressing or discussing existing rates.[71]

3. Finding Safety Violations Under Section 451 Does Not Render Superfluous Public Utilities Code Sections Giving the Commission Authority to Prescribe Safety Requirements

PG&E also argues that Section 451 cannot be read to create a utility obligation to maintain its facilities safely because this interpretation would render superfluous "entire provisions of the Code and every Commission regulation that requires any safety measure of any kind."[72] PG&E cites in

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[68] *Pacific Bell Wireless v. Public Utilities Commission*, 140 Cal.App.4th 718, 743 (2006).

[69] *Id.* at 730-35.

[70] D.98-12-076, *Carey v. Pacific Gas and Electric Co.*, 1998 Cal. PUC LEXIS 924; 84 CPUC2d 196 ("*Carey*"); D. 99-04-029, *Carey v. Pacific Gas and Electric Co.*,1999 Cal. PUC LEXIS 215; 85 CPUC2d (1998) ("*Carey II*").

[71] *See also* D.82242 at 153 (1973)("[w]here a public utility is earning a fair return from all of its operations the fact that it may be required to operate one segment at a loss is not an unjust confiscation of its property. Service may be required to be performed even at a loss where public convenience and necessity justify such conclusion.")

[72] *See* PG&E Brief at 27-28.

particular, Section 768, which authorizes the Commission to prescribe safety requirements, and points out that the Commission relied on Section 768 when it adopted GO 112.

Again, PG&E argues contrary to the rules of statutory construction. Section 451 and Section 768 are in no way inconsistent and can easily be read in a manner that is consistent and harmonious and gives effect to all the language in both provisions, as the Commission is required to do.[73] Section 451 sets forth the obligation of utilities to provide an adequate level of service, in return for which utilities may charge just and reasonable rates. Section 768 and other sections like it in Chapter 4, Article 3, give the Commission authority to impose safety and other requirements as it deems necessary. Section 451 imposes a direct obligation on utilities to operate safely irrespective of whether or not the Commission exercises its authority to impose particular requirements. Section 768 clarifies that the Commission need not just evaluate utility service after-the-fact, but may upfront impose requirements. The two sections are thus complementary and entirely consistent.[74]

PG&E points to no language in Section 768 or any other section of the Public Utilities Code that suggests that a utility's obligation to provide a basic level of service is limited to those requirements expressly delineated upfront by the Commission. In fact, Commission decisions are clear that utilities have an independent obligation to act reasonably irrespective of any Commission guidelines.[75]

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[73] *See Russell v Stanford University Hospital*, 15 Cal. 4th 783, 789 (1997); *In re H.E.*, 169 Cal. App 4th 710, 721 (2008).

[74] *See e.g. International Union, United Auto., etc. v. General Dynamics Land*, 815 F.2d 1570 (D.C. Cir. 1987) (Specific OSHA regulations did not preempt and were not inconsistent with an employer general obligation under statute to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees).

[75] The Commission was explicit about this when it adopted GO-112 in D. 61269. PG&E-4 (D.61269 at p.12, finding 8). *See also*, D.90-09-088, *In the Matter of the Application of the Southern California Edison Co.*, 1990 Cal. PUC LEXIS 847, at **22, 37 CPUC2d 488 (1990) (" While this reasonableness standard can be clarified through the adoption of guidelines, the utilities should be aware that guidelines are only advisory in nature and do not relieve the utility of its burden to show that its actions were reasonable in light of circumstances existent at the time."); D.05-08-037 *Application of San Diego Gas & Electric Co. under the Catastrophic Event Memorandum Account for Recovery of Costs Related to the 2003 Southern California Wildfire,* 2005 Cal. PUC LEXIS 562, at **12-16 (2005).

4. The Commission and the California Court of Appeals Have Both Found that Section 451 Creates an Affirmative Utility Obligation to Offer Adequate and Safe Service

PG&E's argument that Section 451 cannot be the source of a utility obligation to maintain its facilities in a manner that promotes safety is contrary to key Commission decisions. In *Carey*, the Commission found that "PG&E engaged in unreasonable practices after the 1994 Pleasanton accident by not investigating the compliance of [Pest Control Operators of California, Inc. (PCOC)] and PG&E with the terms of the Letter Agreement executed by these parties and by failing to revise this agreement."[76] These unreasonable acts resulted in the existence of unsafe service from November 14, 1994 until March 19, 1998, in violation of PU Code § 451."[77] Further, the Commission determined that PG&E's violation of Section 451 justified a penalty pursuant to Sections 2107 and 2108.[78] Upon a PG&E application for rehearing, the Commission affirmed that it had correctly assessed a fine for a violation of Section 451.[79]

The unsafe practices in *Carey* and *Carey II* included "not fully reviewing its fumigation termination policy, to assure compliance by PCOC with all terms, assuring that PG&E was complying with its obligations under the agreement and investigating additional terms, and revision of existing terms or PG&E's termination instructions."[80] In this case, as in *Carey*, PG&E's failure to reasonably undertake an important component of safe maintenance (in this case maintaining accurate records) made it impossible for PG&E to safely maintain its gas pipelines.

PG&E attempts to distinguish *Carey* and *Carey II*, arguing that in *Carey*, unlike in the instant case, "any reasonable service obligation imposed by Section 451 was objectively ascertainable by reference to an existing definition, standard, or common industry understanding."[81] However, PG&E does not explain how *Carey*, and *Carey II* are different from the instant case. In *Carey*, the

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[76] *Carey*, *supra*, 1998 Cal. PUC LEXIS 924, Conclusion of Law 2.

[77] *Id.*

[78] *Id.*, Conclusion of Law 3.

[79] *See Carey II*, *supra*, 1999 Cal. PUC LEXIS 215.

[80] *Carey*, *supra*, 1998 Cal. PUC LEXIS 924, Findings of Fact 15.

[81] PG&E Opening Brief at 30.

Commission evaluated whether the utility acted reasonably, as it must do here.[82] In *Pacific Bell*, the Court of Appeal cited *Carey II* with approval noting "'reasonable service, instrumentalities, equipment and facilities' are not without definition, standard or common understanding among utilities.'"[83] In fact, there are numerous Commission decisions elucidating the Commission's reasonableness standard.[84]

Further, in *Pacific Bell*, the Court of Appeal cited numerous cases in which the Commission determined that a utility violated Section 451 by failing to provide adequate service and stressed that "[w]hile in most of the cases which the parties have cited on appeal, there was another violation of law, we do not infer from this that there *must* be another statute or rule or order of the Commission that has been violated for the Commission to determine that there has been a punishable violation of section 451."[85]

5. PG&E's Had Notice it Was Required to Maintain Safety Under Section 451, Consistent with the Commission's Long-Standing and Well-Understood Reasonableness Standard

PG&E argues that unlike in *Pacific Bell*, PG&E could not have known that its failure to maintain adequate safety records could be a violation of Section 451. In fact, this case is similar to *Pacific Bell* where the Court of Appeal explained:

> Cingular contends it was denied due process because it was punished for actions it could not have known were unjust and unreasonable. Cingular argues that statues and the Commission order it is charged with violating re are so broad that Cingular could not anticipate that its actions were unjust and unreasonable. In analyzing Cingular's argument, we must focus on its conduct of charging and permitting its agents to charge an ETF with no grace period; failing to disclose known, significant network problems; and providing misleading and inaccurate information regarding its coverage and service to its customers. We conclude that given this conduct, Cingular could be charged with knowledge that its actions were unjust and unreasonable under the relevant statues and the Commission order. Even in the absence of a specific statute, rule, or order

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[82] *Carey*, *supra*, 1998 Cal. PUC LEXIS 924, Conclusion of Law 2 ("PG&E engaged in *unreasonable* practices after the 1994 Pleasanton accident . . . ." [Emphasis added].)

[83] *Pacific Bell*, *supra*, 140 Cal.App.4th at 741, fn. 10.

[84] *See e.g.*, D.04-04-065, *Order Instituting Investigation Into Southern California Edison Company's Electric Line Construction, Operation, and Maintenance Practices of Southern California Edison Company*, 2004 Cal. PUC LEXIS 207 (2004), at **15, 62 ("*SCE*"); D.90-09-088, *In the Matter of the Application of the Southern California Edison Company for Authority to Increase Its Energy Adjustment Cost Billing Factors*, 1990 Cal. PUC LEXIS 847, 37 CPUC2d 488, at **22-24.

[85] *Pacific Bell*, *supra*, 140Cal.App.4th at 741.

> barring the imposition of an ETF without a grace period, or barring the specific nondisclosures indentified by the Commission in this case, Cingular can be charged with knowing its actions violated section 451's requirements that it provide "adequate, efficient, just and reasonable service" to its customers.
>
> To accept Cingular's argument would require us to conclude that it is just and reasonable for a wireless provider to charge its customers an ETF to cancel a wireless service contract immediately after activation of the wireless telephone, when the customer has been misled as to the coverage area and level of service, and when the wireless provider admits the best way for the customer to determine whether the service is adequate for his or her needs is to try out the phone for a period of time. This conclusion would be unreasonable.[86]

In this case, PG&E appears to contend that it could not know it was unjust and unreasonable to fail to maintain the records necessary to support safe operations and maintenance of its gas pipelines such that a pipeline ruptured, causing an intense fire that killed 8 people, injured 58 others, destroyed 38 homes, and damaged another 70 homes. As in the case of *Pacific Bell*, this conclusion would be unreasonable. Further, the record shows that PG&E failed to respond prudently to warnings from PG&E's own employees that its gas pipeline recordkeeping was inadequate. [87]

In addition, in cases as early as 1915, the California Railroad Commission (the current Commission's predecessor) stressed that "[a]ny man who has served a big public service corporation as long in an official capacity . . . either did know or oughnt to have known the extreme importance of preserving corporate records."[88] PG&E is also aware that the Commission has interpreted Section 451 to create an obligation on the part of utilities to maintain an adequate level of service, including safety, based on the Commission decision that was the subject of *Pacific Bell* itself and the *Carey* case, and that the Commission will enforce its safety requirements in General Orders such as GO 112.[89]

Further, the record shows that PG&E knew or should have known that industry standards required adequate gas pipeline record keeping since at least 1955.[90] Under ASA B.31.8, operators

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[86] *Id.* at 739-40.

[87] *See e.g.*, ALJ June 20, 2011 Order Entering Memoranda From Former PG&E Employee into Record, Attachment A (discussed at CCSF Brief at 29). Similarly, PG&E failed to respond prudently to specific records that should have prompted additional investigation, threat assessment, and remediation. *See e.g.,* CCSF-4 at 10-12 (discussed at CCSF Brief at 31-33).

[88] *In the Matter of the Los Angeles Railway Corporation and the City Railway Company of los Angeles*, California Railroad Commission, Decision No.l 2193 (1915)(discussing corporate accounting records).

[89] *See e.g.* PG&E-4 (D.61269); *SCE, supra*, 2004 Cal. PUC LEXIS 207.

[90] CCSF Brief at 12-14.

were required to pressure test newly installed transmission lines, and maintain records of those tests for the life of those pipelines. Operators were required to have necessary records to calculate the appropriate MAOP for each pipeline segment based on the lowest of (i) the design pressure of the pipeline calculated using Barlow's equation, or (ii) the pressure obtained by dividing pressures recorded during a pressure test by certain class location factors. After 1955, these requirements were made mandatory and expanded.[91]

Other California cases support the conclusion in *Pacific Bell* that generally worded safety standards provide sufficient notice of the requirements of the law. For example, in *Sunset Amusement Co. v. Board of Police Commissioners of the City of Los Angeles*, ("*Sunset*"), the California Supreme Court rejected the claim by a roller skating ring that a City of Los Angeles local ordinance was unconstitutionally vague where it permitted denial of a permit application if the operation would not comport with "'the peace, health, safety, convenience, good morals and general welfare of the public . . .'" [92] The Supreme Court concluded that the language of the ordinance furnished "adequate standards to guide the Board in licensing matters and [was] not unconstitutionally vague."[93] The Supreme Court explained:

> It should be kept in mind that there are an infinite variety of activities or conduct which could result in potential or actual danger to the "peace, health, safety, convenience, good morals, and general welfare of the public." A municipality cannot reasonably be expected to isolate and specify those precise activities or conduct which are intended to be proscribed. As stated in *Daniel*, quoting from an earlier case, to make a ""statute sufficiently certain to comply with constitutional requirements [of due process of law] it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited."" The fact that an ordinance seems to vest unlimited discretion in the licensing agency does not necessarily invalidate the ordinance, for "the same might be said of almost any licensing board established under the laws of this state; discretion is not uncontrolled and unguided if it calls for exercise of judgment of a high order. [94]

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[91] CCSF Brief at 12-14.

[92] *Sunset*, *supra*, 7 Cal.3d at 71-72.

[93] *Id.* at 73. The Supreme Court noted that the *Sunset* case did not involve activities falling within the ambit of the First Amendment and the heightened standard applicable in First Amendment cases. *Sunset*, 7 Cal.3d at 72-74. This case like *Sunset* does not involve activities falling with the ambit of the First Amendment.

[94] *Sunset, supra*, 7 Cal.3d at 73(citations omitted); *see also SP Star Enterprises, Inc. v. City of Los Angeles,* 173 Cal. App. 4th 459, 473 (2009) (land use ordinances precluding uses detrimental to the general welfare are not unconstitutionally vague).

As in *Sunset*, with respect to Section 451, the Legislature could not reasonably be expected to isolate and specify all the activities required to maintain adequate records to support appropriate gas pipelines maintenance, nor was it required to do so.

PG&E cites to *F.A.Gray, Inc. v. the Occupational Safety and Health Review Commission*, 785 F.2d 23 (1st Cir. 1986) ("*Gray*"), for the view that open ended requirements can be applied only to conduct unacceptable in light of the common understanding and experience of those working in the industry. However, in *Gray*, the First Circuit explained more fully:

> The parties correctly point us to the precedent that controls this appeal, namely, *Cape & Vineyard Division of New Bedford Gas v. OSHRC,* 512 F.2d 1148 (1st Cir. 1975). In *Cape & Vineyard*, this court, concerned about the fairness of assessing penalties under a vaguely worded, open-ended regulation like the one before us, held that such regulations, at least ordinarily, must be "read to penalize only conduct unacceptable in light of the common understanding and experience of those working in the industry." . . . Normally, the standard of conduct would be established by reference to industry custom and practice. Sometimes, however, as *Cape & Vineyard* itself recognizes, OSHA might go further and insist that the industry as a whole improve its safety practices. In that event, OSHA must establish "that a prudent man familiar with [the industry] would have understood that more protective equipment was 'necessary'" and therefore that it was not "unfair to hold [a particular] employer to a standard higher than that of actual practice."[95]

Thus, under *Gray*, the Commission could interpret Section 451 to require recordkeeping by the utilities beyond current industry practice to the extent a prudent man familiar with the industry would have understood such recordkeeping to be necessary to safely maintain a utility's gas pipelines.[96] This standard is very similar to the Commission's long-standing reasonable utility standard.[97] Moreover, in this case, the evidence in the record is clear that prudent operators did keep records and used them to operate and maintain their pipelines.[98]

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[95] *Gray*, 785 F.2d at 24-25 (citations omitted).

[96] PG&E also cites *to S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Commission*, 659 F.2d 1273, 1285 (5th Cir. 1981) an earlier case, questioned in a 1990 Fifth Circuit case, *Spancrete Northeast, Inc. v. Occupational Safety and Health Review Commission*, 905 F.2d 589 (5th Cir. 1990) (Noting that although industry practice is not controlling, evidence of such practice is pertinent on the issue of whether the employer in a particular case determined appropriateness in a reasonable manner and holding that in the case of a general regulation due process requires some reference to *reasonableness* and industry custom before liability is imposed).

[97] *See* footnote 81, *supra.*

[98] *See e.g.*, TURN Brief at pp.5-6, quoting PG&E witness Howe.

Finally, PG&E attempts to distinguish *Carey* and *Pacific Bell* based on the fact that "CPSD has over the course of decades audited PG&E's facilities and records without previously raising the generalized recordkeeping violations now asserted in this enforcement action."[99] However, it is not CPSD's activities that are at issue in this proceeding but PG&E's.[100] The question before the Commission is whether PG&E met its obligation under Section 451 to maintain the safety of its facilities consistent with the law, including the Commission's often articulated standard of reasonableness.

6. Even Before 1961, Section 451 Required PG&E to Act Reasonably to Maintain Pipeline Safety

PG&E devotes several pages of its Brief to arguing that prior to 1961, when the Commission first adopted GO 112, ASA B.31.8 was merely voluntary.[101] However, Section 451 was in effect prior to 1961 and required PG&E to safely maintain its pipeline facilities, including adequately maintaining the records necessary to do so. No one contests that since 1955 ASA B31.8 was a relevant industry guideline. Moreover, in adopting GO 112 in D.61269, the Commission noted the IOUs represented they voluntarily followed ASA B31.8.[102]

Irrespective of whether ASA B31.8 was mandatory or voluntary prior to 1961, at that time, pursuant to Section 451, utilities had an obligation to maintain their facilities in a manner that promotes public safety. In determining whether PG&E reasonably kept the records necessary to maintain pipeline safety before 1961, it is appropriate for the Commission to consider whether it complied with industry guidelines irrespective of whether these were voluntary or mandatory. This is all the more true given that the utilities considered these guidelines so important that the utilities claimed to follow them. Accordingly, PG&E's compliance with ASA B31.8 prior to 1961 is highly relevant to the Commission's assessment of whether PG&E met its obligations under Section 451.

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[99] PG&E Brief at 33.

[100] The mere failure to enforce the law, without more, will not estop the government from subsequently enforcing it. *Feduniak v. California Coastal Commission (2007) 148 Cal.App.4th 1346, 1369; City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 496-497.*

[101] PG&E Brief at 37-39.

[102] PG&E-4 (D.61269 Adopting GO 112 at 4).

7. PG&E Had Fair Notice that Section 451 Requires Utilities to Furnish and Maintain the Equipment Necessary to Promote the Safety of the Public to Satisfy any Due Process Concerns

PG&E argues that CPSD's attempt to use Section 451 as a "free-standing source of pipeline safety rules" violates it rights to due process of law.[103] PG&E makes two arguments in this regard. Neither argument is valid.

First, citing *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991) ("*Martin*"), PG&E argues that due process is implicated where a party first receives actual notice of a proscribed activity through a citation initiating the enforcement action.[104] Nonetheless, *Martin* was not a due process case. Moreover, in *Martin*, the Supreme Court did *not* find that the Secretary of Labor was prohibited from "'use of a citation as an initial means of announcing a particular interpretation.'"[105] The Court only found that this may "bear" on whether the notice was "adequate."[106] In fact, the Supreme Court held in *Martin* that the "Secretary's interpretation [of a regulation] *is not undeserving of deference merely because the Secretary advances it for the first time in an administrative adjudication*."[107]

The *Martin* holding is consistent with long standing Supreme Court precedent. Since 1947 the Supreme Court has held that administrative agencies are not precluded from announcing new principles in adjudicative proceedings:

> [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.[108]

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[103] PG&E Brief at 34.

[104] PG&E Brief at 36.

[105] PG&E Brief at 36, quoting *Martin*, *supra*, 499 U.S. at 158 (emphasis added).

[106] *Martin*, *supra*, 499 U.S. at 158

[107] *Martin*, *supra*, 499 U.S. at 158 (emphasis added).

[108] *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

Second, citing *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) ("*Fox Television*"), PG&E argues that a regulated entity's due process rights are violated if it is not "give[n] fair notice of conduct that is forbidden."[109] San Francisco agrees that notice is an element of due process, but PG&E's reliance on *Fox Television* is misplaced.

In *Fox Television*, the FCC had cited Fox and ABC for violations of 18 U.S.C. § 1464. The FCC cited Fox for broadcasts of two live unscripted award shows during which certain celebrities used one or more expletives. The FCC sanctioned ABC for a brief broadcast of female nudity in an episode of *NYPD Blue*.[110] At the time of those broadcasts, the FCC had not interpreted Section 1446 to apply to isolated use of expletives or nudity that was not "patently offensive."[111] Subsequent to those broadcasts, the FCC issued a decision in which it found that an isolated use of an expletive by a celebrity during an award show was indecent under Section 1464.[112]

It was against this backdrop that the FCC fined ABC Television $1.24 million for the brief nude scene in *NYPD Blue*. The FCC argued that the fine was proper based on a 1960 FCC decision in which the FCC implied that "'televising nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464.'"[113] The Supreme Court noted, however, that the FCC had repeatedly held in other cases that fleeting nudity was not indecent. In finding that ABC did not have "constitutionally sufficient notice prior to being sanctioned," the Supreme Court held that the FCC could "point to nothing that would have given ABC affirmative notice that its broadcast would be considered actionably indecent."[114] Therefore, the Supreme Court set aside the FCC's order because the standards it had applied were "vague."[115]

Those facts are not applicable here. This is not a situation where CPSD has asked the Commission to sanction PG&E based on standards that are vague because they differ from those the

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[109] PG&E Brief at 35.

[110] *Fox Television, supra.*, 132 S.Ct. at 2314.

[111] *Id.* at 2312-13.

[112] *Id.* at 2314.

[113] *Id.* at 2319.

[114] *Id.* at 2319-20.

[115] *Id.* at 2320.

Commission has applied in the past. Here, CPSD has asked the Commission to find that PG&E has violated Section 451 because PG&E's "unsafe and deficient management and recordkeeping of its gas system over a long period of time was one of the primary causes" of the San Bruno incident.[116] To make its case, CPSD has shown that PG&E violated both federal and state laws that "require PG&E to promote safety generally [and] require records to be kept explicitly to promote safety.[117] PG&E had adequate notice that it was required to install and maintain its pipelines safely, that records were important to safe operations, and that the Commission could sanction it for failure to maintain these records in a manner that is required by law and consistent with safe operations.

D. CPSD Properly Alleges that PG&E Should be Subject to Fines and Penalties for "Continuing Violations" under Section 2108

By its plain language, Section 2108 authorizes the Commission to determine that each day of a "continuing violation" is a "separate and distinct offense" under Section 2107. The Commission may impose a fine of up to $5,000 for each such "violation." PG&E's four separate legal arguments fail to support its claim that CPSD has improperly alleged continuing violations under Section 2108. These arguments are that: (i) Section 2108 only applies to conduct that "continues over time;" (ii) Section 2108 must be narrowly construed; (iii) the imposition of fines under Section 2108 requires notice and an opportunity to cure; and (iv) CPSD's construction of Section 2108 could result in penalties that would exceed the Excessive Fines Clause of the California Constitution.[118] None of these arguments, however, provides a basis for the Commission to reject CSPD's allegations of continuing violations under Section 2108.

PG&E's first argument is that Section 2108 only applies to "violative conduct that continues over time" and not to "the continued absence of a record."[119] However, the absence of a record is a continuing violation. While PG&E cannot make a record that never existed suddenly appear, PG&E could have taken steps to ensure that the absence of the record doesn't continue to endanger the public

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[116] CPSD Brief at 2.

[117] CPSD Brief at 5.

[118] *See* PG&E Brief at 39-43.

[119] PG&E Brief at 40, citing *Qwest*, *supra*, 2003 Cal. PUC LEXIS 67, at **20-21.

health, safety, and welfare.[120] That is what PG&E completely failed to do, and is the reason why the Commission should determine that the absence of a necessary record is a continuing violation.

PG&E's reliance in *Qwest* to support its "continues over time" argument is misplaced, because *Qwest* supports CPSD's allegations. In that case, the Commission determined that each instance of cramming or slamming was a separate violation subject to a separate fine.[121] The Commission rejected Qwest's argument on rehearing that it should have been fined on per-day basis, which would have reduced the fines, because it was not a "legal or factual error."[122] In so holding, the Commission implicitly recognized its discretion to determine what fines are appropriate under the circumstances. Indeed, the Commission noted that it has in the past calculated such fines based on violations that "occurred over a period of time."[123] That is exactly what CPSD has asked the Commission to do here.

PG&E then cites *Hale v. Morgan*, 22 Cal.3d 388, 401 (1978) ("*Hale*") to argue that Section 2108, like all statutes that allow for "aggregation of daily penalties," must be narrowly construed.[124] *Hale* concerned the constitutionality of Civ. Code Section 789.3, which allowed a tenant to recover actual damages plus a civil penalty of $100 per day against a landlord who willfully deprived the tenant of utility services for the purpose of evicting him.[125] As the Supreme Court subsequently held, the *Hale* Court narrowly construed Section 789.3 because of its "penal" nature.[126] As the Supreme Court went on to find, "*Hale* did not purport to alter the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose."[127]

Other aspects of *Hale* show that it does not apply to the Commission's authority to impose fines under Sections 2107 and 2108. In addition to the continuing nature of the penalties allowed under Section 789.3, the *Hale* Court was concerned that the penalties were "mandatory in amount."[128]

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[120] Joint RT 710:7-17 (Zurcher).

[121] *Qwest*, *supra*, 2003 Cal. PUC LEXIS 67, at **14-15.

[122] *Id.* at *20.

[123] *Id.* at **20-21.

[124] PG&E Brief at 40.

[125] *Hale*, *supra*, 22 Cal.3d at 392.

[126] *People ex rel. Lungren v. Superior* Court, 14 Cal.4th 296, 313 (1996).

[127] *Id.*

[128] *Hale*, *supra*, 22 Cal.3d at 399.

Section 789.3 did not allow the trier of fact to exercise any "discretion," and instead required that "a uniform penalty . . . be assessed even though the statute applied to a broad spectrum of culpable conduct with an equally divergent range of resulting injury.[129] The *Hale* Court was also concerned that "both landlords and tenants can vary significantly in sophistication and financial strength, and . . . a shrewd tenant could, through inaction, convert the single wrongful act of (the landlord) into a veritable financial bonanza."[130]

None of these concerns are applicable here. No party to this proceeding will financially benefit from the fines. There is no mandatory penalty that must be imposed. Instead, the Commission has broad discretion under Sections 2107 and 2108 to impose fines in amounts that are proportionate to PG&E's wrongdoing.

Hale does not support PG&E's argument. In fact, it makes clear that there is nothing inherently wrong with Section 2108, and that any challenge to the Commission's application of Section 2108 to PG&E's wrongdoing is premature. A court can only determine the validity of any fines of a continuing nature after they are imposed. As the *Hale* court held:

> We cannot conclude . . . that all applications of section 789.3's penalty formula would be unconstitutional. The imposition of the $100 daily penalty over a limited period may indeed, in a given case, be a perfectly legitimate means of encouraging compliance with law. Furthermore, there are doubtless some situations in which very large punitive assessments are both proportioned to the landlord's misconduct and necessary to achieve the penalty's deterrent purposes.
>
> Where, as here, a penal statute may be subject to both constitutional and unconstitutional applications, courts evaluate the propriety of the sanction on a case-by-case basis.131

PG&E's next argument is that daily penalties cannot be imposed unless the violations are "curable."[132] According to PG&E, in the absence of evidence that CPSD gave PG&E "notice and an opportunity to cure" any of the alleged continuing violations, imposing fines based on them could

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[129] *Kinney v. Vaccari*, 27 Cal.3d 348, 352 (1980).

[130] *Id*. at 352-53 (internal quotation marks omitted)

[131] *Hale*, *supra*, 22 Cal.3d at 404.

[132] PG&E Brief at 41, *citing* D.97-10-032, *Strawberry Property Owners Association v. Conlin-Strawberry Water Co., Inc.*, 1997 Cal. PUC LEXIS 954 (1997) ("*Strawberry Property Owners*"); *SCE*, *supra*, 2004 Cal. PUC LEXIS 207.

result in fines that "grossly disproportionate" to PG&E's conduct.[133] Firstly, as noted earlier, any argument that the fines are "grossly disproportionate" is premature. Until an actual amount is proposed, no one can say if the fines are "grossly disproportionate" to the wrongful behavior.

More importantly, the Commission decisions PG&E cites require that the violation remain "uncured"[134] and a utility knows or should know of the violation. There is no requirement that CPSD provide that notice, and including such a requirement here could lead to absurd results.[135] Only PG&E – not CPSD – had any notice that PG&E's recordkeeping was substandard and that the absence of necessary records was jeopardizing the public health, safety, and welfare. There is substantial evidence in the record of events that provided or should have provided notice to PG&E of its deficiencies.[136] If the Commission were to accept PG&E's argument, a utility could conceal violations of the Public Utilities Code that it had actual notice of, but not be subject to any fines for continuing violations, because CPSD did not notify the utility that it must cure these concealed violations or be subject to fines for continuing violations.

Finally, PG&E argues that CPSD's construction of Section 2108 could result in penalties that would exceed the Excessive Fines Clause of the California Constitution.[137] In making this argument, PG&E focuses on whether any fine the Commission might propose in this proceeding would be "'grossly disproportional to the gravity of [the] offense."[138] PG&E fails to consider the law on this issue. There are four things the Commission or a court will look at to determine whether a fine is unconstitutional because it is grossly disproportionate. These are: "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4)

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[133] PG&E Brief at 42.

[134] *Strawberry Property Owners*, *supra*, 1997 Cal. PUC LEXIS 954, at *9.

[135] The Commission has noted as an example that it would not fine a utility if a passerby touched a power line downed by a storm unless the utility had notice of the downed line prior to the incident. *SCE*, *supra*, 2004 Cal. PUC LEXIS 207, at *23. The Commission did not consider it irrelevant how the utility obtained that notice.

[136] Memos from PG&E employee regarding inadequate records. ALJ June 20, 2011 Order Entering Memoranda From Former PG&E Employee into Record, Attachment A.

[137] *See* PGE Brief at 42-43, citing *People v. Urbano*, 128 Cal.App.4th 396, 406 (2005) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("*Bajakajian*"); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 728 (2005) ("*Lockyer*").

[138] PG&E Brief at 42.

the defendant's ability to pay."[139] A court would also look at whether PG&E has acted in bad faith.[140] Again, PG&E's argument is premature since no penalty amount has been proposed.

E. PG&E's Administrative Laches argument has no merit

It is well settled that a party seeking to dismiss an administrative proceeding when it is not diligently prosecuted must show that any delay by the administrative agency was "unreasonable" and resulted in "prejudice."[141] Here, PG&E argues that CPSD's unreasonable delay in asserting that PG&E has failed to keep adequate records for decades is barred by administrative laches.[142] PG&E's argument has no merit in these circumstances.

The lynchpin of administrative laches, is that an agency knows about some wrongdoing, starts taking action to investigate or prosecute that wrongdoing, and then for unexplained reasons delays any further proceedings. Laches can be found when the agency seeks to reinstate those proceedings after a long, unexplained delay. The cases that have relied on the doctrine to find unreasonable delays do not concern the time period between the alleged wrongdoing and the start of the administrative proceeding. Instead, they concern delays between the time that the administrative agency: (i) commenced the proceeding and started the hearing; [143] (ii) learned of the wrongful behavior and started a formal proceeding;[144] or (iii) settled a proceeding and then sought to reopen it.[145] Here, however, PG&E wants the CPUC to apply the doctrine to bar CPSD from asserting violations that might be old[146], even though CPSD had no knowledge of them until quite recently. PG&E has not cited a single case that supports this use of administrative laches.

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[139] *Lockyer*, *supra*, 37 Cal.4th at 728, citing *Bajakajian*, *supra*, 524 U.S. at 337-38.

[140] *Lockyer*, *supra*, 37 Cal.4th at 730-31.

[141] *Robert F. Kennedy Medical Center v. Belsh*, 13 Cal.4th 748, 760, fn. 9 (1996); *see Gates v. Department of Motor Vehicles,* 94 Cal.App.3d 921 (1979) ("*Gates*").

[142] *See* PG&E Brief at 43-48.

[143] *See Steen v. City of Los Angeles*, 31 Cal.2d 542 (1948) ("*Steen*").

[144] *See Gates*, *supra*, 94 Cal.App.3d at 921; *Brown v. State Personnel Bd.*, 166 Cal.App.3d 1151 (1985) ("*Brown*").

[145] *See Fountain Valley Regional Hospital & Medical Center v. Bonta*, 75 Cal.App.4th 316 (1999).

[146] PG&E Brief at 46.

One of the earliest cases to recognize the doctrine of administrative laches was *Steen*. *Steen* concerned allegations that the City of Los Angeles had delayed taken action to discharge a city employee.[147] While the court rejected the plaintiff's laches argument, the court nonetheless held that:

> If we consider the matter of delay in a hearing by the board as analogous to laxity in the prosecution of a civil action-in bringing it to trial, it appears that courts have inherent power independent of statutory provisions to dismiss an action on motion of the defendant where it is not diligently prosecuted.[148]

Steen is inapplicable to the circumstances here where CPSD acted with reasonable diligence once was opened.

PG&E relies on the court's decision in *Gates* to argue that a mere 15-month "pre-accusation delay" is sufficient to show the prejudice required for administrative laches.[149] The facts in *Gates*, however, show that it does not apply here. In *Gates* the delay occurred between the accusation and the hearing.[150] The *Gates* court extended the holding in *Steen* to find that, for laches purposes, the court should also look at any "preaccusation delay by administrative agencies."[151] In this regard, the court was referring to the time between the DMV's completion of its investigation and the time that the DMV commenced the revocation proceeding. The court upheld the trial court's determination that under the circumstances the "totality of the delay" (including the four months after the revocation) was unreasonable.

Once again, this case is not helpful here. There was no "preaccusation delay" other than the time required to conduct an investigation and prepare for hearings, as was the case in *Gates*.[152]

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[147] *Steen*, *supra*, 31 Cal.2d at 543-54.

[148] *Id*. at 546.

[149] PG&E Brief at 47-48.

[150] *Gates*, *supra*, 94 Cal.App.3d at 924. On July 30, 1974, investigators from the Department of Motor Vehicles ("DMV") started an investigation of the petitioner's motor vehicle dismantling business.[150] Less than a month later, the DMV issued a report detailing the allegations that ultimately were included in the DMV's license revocation proceeding. The DMV waited until December 1975 to revoke petitioner's license and until March 1976 to commence the hearing. The DMV could provide no explanation for the 19-month delay.

[151] *Id*. at 924.

[152] *See also Brown*, *supra*, 166 Cal.App.3d at 1151 (four year delay between learning of accusations of sexual misconduct and initiating disciplinary proceedings was unreasonable).

PG&E further argues that the Commission should "borrow" a statute of limitations in order to find that it is too late to find PG&E in violation for decades of malfeasance.[153] The doctrine is inapplicable here and the Commission should reject this argument. Some courts have recognized that it is proper to "borrow" an analogous statute of limitations as a "measure of the outer limit of reasonable delay."[154] Yet, there is no analogous statute of limitations to apply here, so borrowing is inappropriate.[155]

In a previous case, the Commission has already rejected PG&E's argument that the Commission should apply Code of Civil Procedure Sections 340(b)'s one-year statute of limitations for an "action upon a statute for a forfeiture or penalty to the people of this state."[156] In *Carey II*, PG&E argued that the penalties the Commission had imposed under Section 2107 were subject to the Section 340 one-year statute of limitations.[157] In rejecting that argument, the Commission found that Section 340(2) "'does not apply to discretionary penalties'" such as those the Commission may impose under Section 2107."[158] [159]

Even if "borrowing" an existing statute of limitation were appropriate here, "borrowing" does not have the same effect as would a statute of limitations. It does not mean that the administrative agency is barred from proceeding. Instead, it shifts the burden on to the agency to show that the delay "was excusable" and to "rebut the presumption that such delay resulted in prejudice."[160]

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[153] *See* PG&E at 43-44.

[154] *Brown*, *supra*, 166 Cal.App.3d at 1160.

[155] *Brown*, *supra*, 166 Cal.App.3d at 1160; *see also Lam v. Bureau of Security and Investigative Services*, 534 Cal.App.4th 29, 37 (1999).

[156] *See* PG&E Brief at 44; citing Code Civ. Proc., § 340(b).

[157] *Carey II*, *supra*, 1999 Cal. PUC LEXIS 215 at **28-29.

[158] *Id.* at *30, **34-35.

[159] PG&E's suggestion that Civil Code Sections 338(a) and 343 could be considered analogous is also misplaced. Section 338(a) applies to "an action upon a liability created by statute, other than a penalty or forfeiture." Here, the fines CPSD seeks are akin to penalties, so this provision is inapposite. Section 343 is the so-called "catchall" provision, because it applies to any "action for relief not hereinbefore provided." While this provision has some utility for civil suits, because it provides for finality, PG&E has not explained how it is analogous to this proceeding.

[160] *Brown*, *supra*, 166 Cal.App.3d at 1161.

Excusable delay might be shown, for example, where a public agency did not learn of the actionable activities until long after they occurred.[161] The evidence in the record is that CPSD did not know prior to the San Bruno explosion and the subsequent investigations that PG&E's substandard recordkeeping had endangered the public health, safety, and welfare in violation of Section 451, in part because PG&E concealed or ignored its recordkeeping failures. Here, even if there were an applicable statute of limitations to borrow from, CPSD's lack of knowledge would excuse any delay under the doctrine of administrative laches.

The Commission should also reject PG&E's argument that it has been prejudiced by any inaction here. Any prejudice PG&E might have suffered, in terms of lost evidence or failed memories, are a result of its own wrongdoing. Moreover, if PG&E had been keeping records as required, it would have the evidence it needed. The Commission should not allow PG&E to rely on its own wrongdoing to evade responsibility for its long-standing unlawful behavior.

F. Reference to industry standards does not help PG&E

PG&E relies heavily on its claims that its recordkeeping practices were consistent with those of the industry.[162] While industry standards do not relieve PG&E from compliance with specific requirements, such standards do provide guidance about the utility's prudence, or lack thereof.[163] Contrary to PG&E's broad claims, the record does not provide any industry standards that exonerate PG&E. The record demonstrates that the industry standard for decades has included compliance with the ASA/ASME standards.[164] And the record is clear that PG&E's practices fell far short of those standards.[165] Now, to excuse its failure, PG&E argues that those were "voluntary" standards.[166]

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[161] It is axiomatic that statutes of limitations do not start to run until the plaintiff could have discovered that its rights have been violated. *See April Enterprises, Inc. v. KTTV*, 147 Cal.App.3d 805, 826-29 (1983). "[T]he discovery rule reflects concern for the practical needs of plaintiffs. It avoids dismissing suit on grounds of limitation when a plaintiff is blamelessly ignorant of his cause of action." *Id.* at 826-27.

[162] PG&E Brief at 3, FN11

[163] *See, e.g.*, 94-03-048.

[164] *See e.g.*, PG&E-4 (D. 61269) and PG&E-5 (D. 78512).

[165] PG&E Brief at 38.

[166] See discussion of this argument in section III.C.6., above.

To the extent that PG&E's practices were so obviously inconsistent with the standards that even PG&E's witnesses could not defend them, they argue that other operators failed to meet those standards too.[167] But the record contains no evidence of any industry practices comparable to the systemic failure to keep records demonstrated by PG&E. Mr Zurcher's testimony presents generalized statements that many companies had missing records.[168] Again, this does not establish an industry standard that records were not needed or expected to be kept.[169] Mr. Zurcher has "lots of stories" about operators who lost records, but those anecdotes are little more than "stories."[170] This case is not about isolated instances where PG&E lost the records of one project when a car carrying the records crashed and rolled over and the records fell out and were ruined by wind and rain, or where PG&E was missing records on one project.

IV. OTHER ISSUES OF GENERAL APPLICABILITY

V. ALLEGED VIOLATIONS PREDICATED ON THE REPORTS AND TESTIMONY OF MARGARET FELTS

A. Alleged Records Violations relating to Line 132, Segment 180, San Bruno Incident

Violation 1: Salvaged Pipe Records

Violation 2: Construction Records for 1956 Project GM 136471
Violation 3: Pressure Test Records

Violation 4: Underlying Records Related to Maximum Allowable Operating Pressure on Segment 180

Violation 5: Clearance Procedures

Violation 6: Operations and Maintenance Instructions

Violation 7: Drawing and SCADA Diagrams of the Milpitas Terminal

Violation 8: Back-up Software at Milpitas Terminal

Violation 9: Supervisory Control and Data Acquisition System

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[167] *See e.g.*, PG&E-61 at 3-7.

[168] PG&E-61 (Zurcher) at 3-7, 3-8.

[169] In fact, PG&E's experts do admit the prudence and usefulness of keeping records.

[170] Joint RT (Zurcher)706:22-709.

Violation 10: Emergency Response Plans

Violation 11: Incidents of Operating Line 132 in excess of 390 Maximum Allowable Operating Pressure

Violation 12: Preservation of Records Related to Brentwood Video Camera Six

Violation 13: PG&E Data Responses Regarding Brentwood Camera Six Video

Violation 14: PG&E Data Responses Regarding Personnel at Milpitas Terminal on September 9, 2010

Violation 15: **WITHDRAWN**

B. Alleged General Records Violations for all Transmission Lines including Line132

Violation 16: Job Files

Violation 17: Pipeline History Records

Violation 18: Design and Pressure Test Records

Violation 19: Weld Maps and Weld Inspection Records

Violation 20: Operating Pressure Records

Violation 21: Pre-1970 Leak Records

Violation 22: Leak Records from 1970 Forward

Violation 23: Records to Track Salvaged and Reused Pipe

Violation 24: Data in Pipeline Survey Sheets and the Geographic Information System

Violation 25: Data Used in Integrity Management Risk Model

Violation 26: Missing Report for 1988 Weld Failure

Violation 27: Missing Report for 1963 Weld Failure

VI. ALLEGED VIOLATIONS PREDICATED ON THE REPORTS AND TESTIMONY OF DR. PAUL DULLER AND ALISON NORTH

A. Alleged General Records Management Violations

Violation A.1: Gas Transmission Division Records Management Practices

B. Alleged Records Retention Violations

Violation B.1: Leak Survey Maps

Dated: April 24, 2013

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