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 to Determine Violations of Public Utilities Code Section 451, General Order 112, and Other Applicable Standards, Law, Rules and Regulations in Connection with the San Bruno Explosion and Fire on September 9, 2010.	I.12-01-007 (Filed January 12, 2012)

REPLY BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES

KAREN PAULL
TRACI BONE
Attorneys for the Division of
Ratepayer Advocates

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 703-2048
Email: tbo@cpuc.ca.gov

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"PG&E deeply regrets the accident of September 9, 2010, and acknowledges its practices could have been better but, at the time, its gas operations were in line with common practice and regulatory requirements."

PG&E Opening Brief, p. 4.

"PG&E accepts responsibility for the Line 132 rupture and is a better company now and forever due to the lessons learned from this accident."

PG&E Opening Brief, p. 9.

"Repetition does not transform a lie into a truth."

Franklin D. Roosevelt

I. INTRODUCTION

While PG&E claims that it takes responsibility for the San Bruno explosion, and that it has learned lessons from the explosion – euphemistically referred to as an "accident" – PG&E's rhetoric is belied by the arguments in its Opening Brief. PG&E does *not*, in fact, take responsibility for the San Bruno explosion, and it has *not*, in fact, learned any lessons from the explosion, or the investigations into its causes, other than, perhaps, that explosions are expensive and bad publicity.

While purporting to "accept" responsibility for the San Bruno explosion and claiming "lessons learned," PG&E simultaneously makes the following arguments in its Opening Brief:

- That Public Utilities Code Section 451,[1] the law that in various forms has required it to operate its system safely since 1909, is not a safety law, that it is unconstitutionally vague, and that it cannot be used as a stand-alone violation. In sum, PG&E argues, contrary to the plan language of the statute and all relevant legal authority, that it may only be fined for violations of specific laws or regulations;[2]
- That, notwithstanding the mountains of evidence in support, the Consumer Protection and Safety Division (CPSD)[3] has "failed to prove that PG&E's integrity management program violated any regulation or law";[4]
- That PG&E's expert witness testimony showed that "the data in PG&E's GIS system is consistent with industry norms and regulatory requirements,"[5] notwithstanding the fact that PG&E's witnesses did not audit PG&E's actual data and so could not have made such a showing;

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[1] Unless otherwise stated, all further sections references are to the California Public Utilities Code.

[2] PG&E Opening Brief (OB), p. 4.

[3] The Consumer Protection and Safety Division was renamed the Safety and Enforcement Division (SED) effective January 1, 2012. However, for clarity and consistency, we refer to SED as CPSD throughout this pleading.

[4] PG&E OB, p. 5.

[5] PG&E OB, p. 5.

- That "CPSD's assertions regarding PG&E's spending on the gas transmission business and its overall safety culture were mistaken and did not withstand scrutiny by PG&E's expert,"[6] notwithstanding *extensive unrebutted* evidence of PG&E's gas transmission spending constraints provided in the Overland Audit and based on PG&E's own documents;
- That notwithstanding National Transportation Safety Board (NTSB) and Independent Review Panel (IRP) Report conclusions to the contrary, "without knowledge of the pups, any reasonable efforts to maintain the safety of the pipeline would not have prevented the accident"[7]
- That notwithstanding the breathtaking claims summarized above, *"PG&E accepts responsibility for the Line 132 rupture and is a better company now and forever due to the lessons learned from this accident."*[8]

Given PG&E's blatant mischaracterizations of both the law and the facts, PG&E's conclusion that it "accepts responsibility for the Line 132 rupture and is a *better company now and forever* due to the lessons learned from this accident"[9] begs credibility.

The Commission should recognize PG&E's rhetoric for what it is and focus on the voluminous and solid body of evidence demonstrating PG&E's failures over many decades to operate its gas transmission system safely. PG&E's desperate arguments made in both this and the other San Bruno-related proceedings are inconsistent with PG&E's claims. They demonstrate that PG&E does *not* take responsibility for the San Bruno explosion and has *not* learned any important lessons from it. Real change within PG&E will only be achieved when this Commission takes a strong regulatory stand against PG&E's mismanagement of its gas transmission system, including extensive fines commensurate with the decades of PG&E's unsafe operation and maintenance of its system, refunds to ratepayers for *all* of PG&E's remedial work, and employment of a

[6] PG&E OB, p. 7.

[7] PG&E OB, p. 8.

[8] PG&E OB, p. 9 (*emphases added*).

[9] PG&E OB, p. 9 (*emphases added*).

qualified independent third party monitor to oversee all of PG&E's work to ensure the safety of its system. In sum, PG&E will only get the message when the Commission starts sending one.

II. BACKGROUND (PROCEDURE/ FACTS)

III. LEGAL ISSUES OF GENERAL APPLICABILITY (TO THE SB OII)

A. PG&E's Due Process Arguments Regarding § 451 Have No Merit - § 451 Does Not Violate PG&E's Due Process and Is Enforceable As A Stand-Alone Offense

PG&E's misrepresentations of law reach their zenith (or perhaps their nadir) when it argues that § 451 "is a ratemaking provision" and that CPSD's reliance on § 451 as a "free-floating safety law runs afoul of the due process clause of the California Constitution."[10] Notwithstanding the plain language of the statute that requires utilities to operate safely, Commission decisions using § 451 as a "free floating" safety statute when regulations or laws fail to address specific unsafe practices by the utilities,[11] and an appellate court decision upholding the Commission's application of the statute, PG&E complains that § 451 does not provide it "fair notice of the conduct that CPSD now claims violates the law," and that it is "too vague to provide a lawful foundation for civil penalties."[12] PG&E is wrong on all of these points and it fundamentally misconstrues the multiple decisions that it marshals in an attempt to support its baseless arguments.

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[10] PG&E OB, p. 4.

[11] *See, e.g., Carey v. Pacific Gas & Elec.,* D.99-04-029, 85 CPUC2d 682 (1999) (*Carey Rehearing Order*) discussed in Section III.A below; Order Instituting Investigation, Notice Of Opportunity For Hearing, And Order To Show Cause Why The Commission Should Not Impose Appropriate Fines And Sanctions, I.05-03-011 ("*Section 451 requires a public utility to maintain its equipment and facilities in a safe and reliable manner. We hereby place PG&E on notice and provide an opportunity for PG&E to be heard on the issue of whether it violated section 451, and whether penalties should be imposed.*" *Emphases added*.); Investigation on the Commission's own motion into the causes of recent derailments of Southern Pacific Transportation Company trains, D.94-12-001 (*replacing* 94-11-069), Conclusion of Law 17 ("By failing to obtain an MSDS for metam sodium or otherwise disclose its hazardous properties to the ERAs for a period in excess of three hours after the accident; by failing for over one hour to disclose to the ERAs the release of metam sodium into the Sacramento River; and by failing to assist the ERAs in promptly developing mitigating measures for the release of metam sodium into the Sacramento River, SP violated PU Code § 451.").

[12] PG&E OB, p. 4.

1. Application Of The *Cingular* And *Carey* Decisions

The language of § 451 is broadly written, but is both constitutional and enforceable as a "stand-alone" statute. The Commission has held,[13] and the *Cingular Appeal* affirms, that to sanction a utility for violating § 451 does not violate due process and that a violation of § 451 is a separate offense for which a fine may be imposed, regardless of whether the conduct in question also violates a more specific regulatory requirement.[14]

In the underlying *Cingular Investigation* which was the basis for the *Cingular Appeal*, the Commission succinctly rejected similar due process arguments made by Cingular in that case:

> Cingular and the aligned amici curiae base their primary challenge on the POD's allegedly unprecedented reliance upon § 451 as a basis for levying penalties and ordering reparations. Cingular and these amici contend that § 451's just and reasonable service mandate is constitutionally too vague to support such remedies or reparations unless linked to violation of other, more specific law, whether statute, rule or tariff. … They also argue that Cingular had no notice, actual or constructive, that its behavior might run afoul of § 451.[15]

The *Cingular Investigation* decision notes that "the void for vagueness argument appears to conflict with the position Cingular and other wireless carriers have advanced in … the pending Consumer Bill of Rights and Consumer Protection Rules proceeding. *In that rulemaking, they have opposed the adoption of detailed consumer protection rules, arguing that existing general rules provide sufficient regulatory control, in conjunction with market forces and voluntary efforts by the wireless industry.*"[16]

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[13] *See, e.g., Carey Rehearing Order,* D.99-04-029.

[14] *Pacific Bell Wireless, LLC v. Public Utilities Commission,* 140 Cal. App. 4th 718, 741-742 (2006) (*Cingular Appeal*). The parties' recommendations for fines and other penalties are to be addressed in separate briefs. Accordingly, regarding fines, DRA limits its comments here to the point that the Commission may impose fines for violations of § 451.

[15] *Cingular Investigation*, D.04-09-062, pp. 72-73.

[16] *Cingular Investigation*, D.04-09-062, p. 73 (*emphases added*).

PG&E and other gas utilities made similar arguments against the Commission's adoption of General Order 112 – the prescriptive gas safety regulations that PG&E now claims are the only rules that apply. PG&E argued that adoption of General Order 112 was unnecessary because it voluntarily complied with industry standards,[17] standards that PG&E now claims cannot form the basis of a violation. PG&E cannot have it both ways – it cannot argue for general regulations, or no regulation at all, and then claim that it can only be fined for violations of prescriptive rules.

The Commission in the *Cingular Investigation* found Cingular's "void for vagueness" challenge "without merit."[18] The Commission explained that the rational it adopted in *Carey,* a previous Commission decision, was applicable to the *Cingular Investigation*:

> The Commission rejected a similar challenge in *Carey*... In that case, a complaint filed after an explosion at a multi-unit apartment building, the Commission found the utility had violated § 451's *safe service obligation* by following an internal company policy of authorizing fumigation contractors, rather than trained utility employees, to terminate natural gas service as part of building fumigation projects. The Commission's rationale in *Carey* is apt here and we quote it in pertinent part:
>
> > Section 451's mandate that a utility provide "reasonable service, instrumentalities, equipment and facilities" *as necessary to promote the public safety* is constitutional and not violative of due process. … [19]

The Commission's *Cingular Investigation* decision continued to quote heavily from *Carey,* explaining that while there were no court cases addressing the constitutionality of

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[17] D.61269, issued December 28, 1960 and effective July 1, 1961, p. 4 ("Respondents Pacific Gas and Electric Company, Southwest Gas Corporation, San Diego Gas & Electric Company and the Pacific Lighting group assert that no general order on this subject is necessary. They claim that there is no evidence to show that public health or safety has suffered from the lack of a general order; … and that the gas utilities in California voluntarily follow the American Standards Association (ASA) code for gas transmission and distribution piping systems.").

[18] *Cingular Investigation*, D.04-09-062, p. 73.

[19] *Cingular Investigation*, D.04-09-062, p. 73, *quoting Carey Rehearing Order,* D.99-04-029 (*emphases added*).

§ 451, California courts "have found similar terms under comparable statutory schemes constitutional."[20]

Based on the Carey Rehearing Order, which denied rehearing of a gas safety decision, the Commission in the *Cingular Investigation* accurately observed that it would be "virtually impossible to draft Section 451 to specifically set forth every conceivable service, instrumentality and facility which might be defined as 'reasonable' and necessary to promote the public safety."[21] It concluded that just because "the terms are incapable of precise definition … does not make Section 451 void for vagueness, either on its face or [as applied]."[22] The *Cingular Investigation* decision noted with approval the *Carey Rehearing Order's* recognition that "[t]he terms 'reasonable service, instrumentalities, equipment and facilities' are not without a definition, standard or common understanding among utilities."[23]

On rehearing of the *Cingular Investigation,* the Commission reconsidered Cingular's argument that § 451 was unconstitutionally vague. The Commission analyzed the cases cited by Cingular and found that they supported the Commission's determination that § 451 was *not* unconstitutionally vague and that "reasonable certainty is all that is required" and a statute is not vague if "any reasonable and practical construction can be given to its language." The Commission explained:

> … These cases [cited by Cingular] stand for the general, and uncontroversial, proposition that statutes must be definite and specific enough to provide an intelligible standard of conduct for activities that are required or proscribed by law. In *Valiyee* … the court found that the statute in question "easily" passed constitutional muster. The court noted that "[r]easonable certainty is all that is required," and stated that a statute is not vague if "any reasonable and practical construction can be given to its language." [*Valiyee v.*

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[20] *Cingular Investigation*, D.04-09-062, p. 73, *quoting Carey Rehearing Order,* D.99-04-029.

[21] *Cingular Investigation*, D.04-09-062, p. 74, *quoting Carey Rehearing Order,* D.99-04-029.

[22] *Cingular Investigation*, D.04-09-062, p. 74, *quoting Carey Rehearing Order,* D.99-04-029.

[23] *Cingular Investigation*, D.04-09-062, p. 74, *quoting Carey Rehearing Order,* D.99-04-029.

> *Department of Motor Vehicles* (1999) 74 Cal.App.4th 1026, 1032 (citations omitted)] …[24]

Cingular appealed this determination and the Appellate Court upheld the Commission's decisions, finding that they did not violate Cingular's constitutional right to due process. Attempting to distinguish these highly relevant decisions, PG&E argues that they do not support CPSD's position because "*Cingular* had nothing to do with safety."[25] PG&E is wrong. While the Cingular investigation was not a safety case, the *Cingular* decisions relied heavily on *Carey*, which was a gas safety case involving PG&E, and the logic of the *Cingular* decisions – which acknowledged that § 451 requires the provision of just and reasonable *service* – applies equally to the provision of *safe* service and the obligation to maintain *safe* facilities. Applying the logic of that decision here irrefutably demonstrates that PG&E was *on notice* that the Commission has interpreted § 451 in the past to fine utilities for failures to safely maintain and operate their facilities and that its right to due process has not been violated.

The Appellate Court addressing Cingular's claim that it had no notice that it could be fined under § 451 for its marketing practices found that Cingular's conduct did not need to be expressly prohibited by statute or regulation. The Appellate Court applied common sense to find that Cingular's marketing conduct was "unreasonable" and therefore a violation of § 451's "just and reasonable service" requirement:

> Even in the absence of a specific statute, rule, or order … Cingular can be charged with knowing its actions violated section 451's requirement that it provide "adequate, efficient, just, and reasonable service" to its customers.[26]

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[24] *Cingular Rehearing Order,* D.04-12-058, p. 13.

[25] PG&E OB, p. 34.

[26] *Cingular Appeal*, p. 740.

Applying common sense again, the Appellate Court found Cingular's lack of notice argument unreasonable:

> 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 [early termination fee] 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.*[27]

The court recognized that the statutes and Commission order that Cingular was found to have violated were "broadly written" but that "[t]he Commission's interpretation of the reach of section[] 451 …. as well as of its own earlier order, must be given presumptive value."[28]

The court also noted that *even in the absence of a specific statute or order*, Cingular was nevertheless *on notice that its conduct was "unreasonable"* given multiple Commission decisions finding violations of § 451 for similar "unreasonable" business practices:

> If no statute or order of the Commission specifically prohibits the conduct for which Cingular was fined, how could it have notice that this conduct would violate section 451? First, Cingular could reasonably discern from the Commission's interpretations of section 451 that its conduct in this instance would also violate that statute.[29]

The court then summarized eight Commission decisions identifying unfair business practices that the Commission found violated § 451.[30] The court noted that

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[27] *Cingular Appeal*, p. 740 (*emphases added*).

[28] *Cingular Appeal*, pp. 740-741 *citing Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.

[29] *Cingular Appeal*, p. 741.

[30] *Cingular Appeal*, pp. 741-742.

"[t]hese cases deal with a variety of different acts and omissions by many types of public utilities."[31] Nevertheless, the court found that these Commission decisions put Cingular on notice that *its conduct violated § 451*.

The court also found that "the marketplace" put Cingular on notice that "the totality of its acts and omissions was not just and reasonable" because of the high number of complaints it received regarding its various marketing practices.[32] Finally, the court found that Cingular was on notice that *its conduct* violated the law because its conduct was similar to "garden variety fraud" prohibited by the Civil Code.[33] The court noted that those statutes similarly failed to define "deceitful" or "material" misrepresentations, but were nevertheless constitutional. In those cases, like here, a trier of fact is left to decide violations based on the facts of a particular case.[34]

The Appellate Court rejected Cingular's claim that § 451 could only be applied in conjunction with another "more specific source of law."[35] It noted that while the Commission usually relies upon 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 there has been a punishable violation of section 451."[36]

The conclusions in the various *Cingular* decisions apply here. Just as Cingular was on notice that its unfair marketing conduct would be found "unreasonable" under § 451, It is easily understood both within the gas industry and in common usage that unsafe practices can result in the provision of "unreasonable service" under § 451. As explained in D.12-12-030:

> We require our natural gas transmission system operators to exercise initiative and responsible safety engineering in *all* aspects of pipeline

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[31] *Cingular Appeal*, p. 742.

[32] *Cingular Appeal*, p. 742.

[33] *Cingular Appeal*, pp. 742-743.

[34] *Cingular Appeal*, p. 743.

[35] *Cingular Appeal*, p. 743.

[36] *Cingular Appeal*, p. 743 (*emphasis in original*).

> management. Simply because a regulation would not prohibit particular conduct does not excuse a natural gas system operator from recognizing that such conduct is not appropriate or safe under certain circumstances.[37]

As in the *Cingular* situation, *whether* PG&E's conduct was unsafe under § 451 will be determined based on the specific facts of the case, including, for example, whether PG&E's conduct met industry standards, good engineering practices, "responsible safety engineering" as articulated by D.12-12-030, or any other reasonable standards that provide guidance regarding safe conduct, including common sense.

2. PG&E Had Notice That Its Conduct Was Unsafe And That It Could Be Fined Under § 451

Just as Cingular was on notice that its marketing practices were unfair, many factors, including Commission decisions, Commission safety investigations, and internal PG&E assessments, put PG&E on notice that its gas recordkeeping and integrity management practices were unsafe and that it could be fined under § 451 for those unsafe practices.

In 1981, the NTSB investigated a gas pipeline leak in San Francisco where PG&E took 9 hours and 10 minutes to stop the flow of gas because it could not locate one emergency valve due to inaccurate records.[38] As described in DRA's Opening Brief, Bechtel advised PG&E in 1986 of the risk to its integrity management program caused by missing pipeline data, and the need for additional research to resolve these "uncertainties."[39] The NTSB reports on the incidents in San Francisco in 1981 and the 2008 Rancho Cordova gas explosion both put PG&E on notice that many of its practices were deficient, unsafe, and needed to be modified.[40] The NTSB goes so far as to suggest that San Bruno might have been avoided if PG&E had changed its ways:

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[37] D.12-12-030, p. 95 (*emphases added*).

[38] Ex. CPSD-9, NTSB Report, p. 81.

[39] DRA OB, pp. 15-17.

[40] Ex. CPSD-9, NTSB Report, pp.117-118 (*footnotes omitted*).

> [M]any of the organizational deficiencies were known to PG&E, as a result of the previous pipeline accidents in San Francisco in 1981, and in Rancho Cordova, California, in 2008. As a lesson from those accidents, PG&E should have critically examined all components of its pipeline installation to identify and manage the hazardous risks, as well as to prepare its emergency response procedures. If this recommended approach had been applied within the PG&E organization after the San Francisco and Rancho Cordova accidents, the San Bruno accident might have been prevented.[41]

And a 2009 PG&E-commissioned audit of its integrity management risk algorithm put PG&E on notice that its risk assessment methodology suffered from "significant weaknesses"[42] causing the safety of its system to be compromised. Finally, the decision that adopted General Order 112 – the gas safety regulations – put California gas utilities on notice that nothing in those "precautionary safety rules" removed or minimized their "primary obligation and responsibility … to provide safe service and facilities in their gas operations."[43] The Order stated: "Officers and employees of the [gas utilities] must continue to be ever conscious of the importance of safe operating practices and facilities and of their obligation to the public in that respect."[44]

In addition to the decision adopting General Order 112, several other Commission decisions put PG&E on notice that it could be fined for unsafe conditions or conduct pursuant to § 451. In 1998 the Commission's *Carey* decisions, discussed above, applied § 451 to fine PG&E $800 per day for 1,221 days (for a total of $976,800) for continuing to delegate to others gas shut-off services after a 1994 explosion put PG&E on notice that the practice was unsafe.[45] That practice was not expressly prohibited by a specific law or regulation. The Commission found: "We conclude that Pacific Gas and Electric Company (PG&E) engaged in unsafe practices which violated Public Utilities Code §

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[41] Ex. CPSD-9, NTSB Report, pp. 117-118.

[42] Ex. Joint-48, Review of Pipeline IMP Documents, Oct. 20, 2009, by WKMC, LLC, pp. 3-4.

[43] D. 61269, p. 12, Finding and Conclusion Number 8.

[44] D. 61269, p. 12, Finding and Conclusion Number 8

[45] *Carey,* D.98-12-076, 84 CPUC2d 196, 198 (1998).

451 for a period of 1,221 days by not revising its fumigation termination policy in 1994 after adverse events affecting public safety."[46] These two forms of notice – through the decision adopting General Order 112 and the Commission's *Carey* decision – are sufficient to establish that PG&E has been on notice for decades that it may be fined for general safety violations pursuant to § 451. However, there is more. In 2005 the Commission opened an investigation against PG&E based solely on electrical safety violations under § 451. The Order Instituting the Investigation stated: "Section 451 requires a public utility to maintain its equipment and facilities in a safe and reliable manner. We hereby place PG&E on notice and provide an opportunity for PG&E to be heard on the issue of whether it violated section 451, and whether penalties should be imposed."[47]

Further, in 1994 the Commission opened an investigation into the causes of derailments involving Southern Pacific. The Commission applied § 451 as a stand-alone safety statute and found Southern Pacific violated § 451 for "failing to assist" in "promptly developing mitigation measures" for chemicals that the railroad utility dumped into the Sacramento River.[48]

In sum, the Commission has applied § 451 as a stand-alone safety statute on at least three occasions, two involving PG&E, and it put PG&E and other gas utilities on notice when it adopted General Order 112 that they were still liable for their "primary obligation and responsibility … to provide safe service and facilities in their gas

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[46] *Carey,* D.98-12-076, 84 CPUC2d 196, pp. 209-210, Ordering Paragraph 1 (1998).

[47] Order Instituting Investigation, Notice Of Opportunity For Hearing, And Order To Show Cause Why The Commission Should Not Impose Appropriate Fines And Sanctions, I.05-03-011, p. 10.

[48] Investigation on the Commission's own motion into the causes of recent derailments of Southern Pacific Transportation Company trains, D.94-12-001 (*replacing* 94-11-069), Conclusion of Law 17 ("By failing to obtain an MSDS for metam sodium or otherwise disclose its hazardous properties to the ERAs for a period in excess of three hours after the accident; by failing for over one hour to disclose to the ERAs the release of metam sodium into the Sacramento River; and by failing to assist the ERAs in promptly developing mitigating measures for the release of metam sodium into the Sacramento River, SP violated PU Code § 451.").

operations."[49] PG&E has been on notice for several decades that its operation and maintenance of its gas transmission system was potentially unsafe. Any reasonable person would know this. And any reasonable person would understand from prior Commission decisions applying § 451 that PG&E could be fined for its unsafe practices pursuant to § 451. PG&E's current claims to the contrary are disingenuous, especially given that PG&E *was the utility* involved in *two* of the earlier Commission investigations seeking sanctions pursuant to § 451.

3. Section 451 Expressly Requires Utilities To Operate Safely

PG&E wastes many pages of its Opening Briefing purporting to apply rules of statutory construction to support its conclusion that § 451 is a ratemaking provision and cannot be used as a safety provision.[50] As an initial matter, PG&E overlooks the legal principle that rules of statutory construction are not applied unless the plain language of the statute is not clear.[51] Here, the language of the statute is clear that "[e]very public utility shall furnish and maintain" their "facilities … to promote the safety, health, comfort, and convenience of … the public."

The safety requirement is clear. No statutory construction is necessary, and the analysis should end there. But PG&E persists with its statutory analysis to the point that it *actually claims* that the Commission's reading of § 451 as a safety statute "would impermissibly render superfluous entire provisions of the Public Utilities Code and every Commission regulation that requires any safety measure of any kind."[52] This is evidently an outcome the court in the *Cingular Appeal* overlooked when it upheld the

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[49] D. 61269, p. 12, Finding and Conclusion Number 8.

[50] PG&E OB, pp. 28-31.

[51] *West Covina Hospital v. Superior Court,* 41 Cal.3d 846, 850 (1986) *("*We give effect to statutes according to the usual, ordinary import of the language employed in framing them. When statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it." *Citing to People* v. *Belleci* (1979) 24 Cal.3d 879, 884; *Palos Verdes Faculty Assn.* v. *Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658; *Solberg* v. *Superior Court* (1977) 19 Cal.3d 182, 198.)

[52] PG&E OB, p. 30.

Commission's application of § 451 in both the *Carey* and *Cingular* decisions. It is also ironic in light of PG&E's insistence that § 451 is a ratemaking provision, that the court in the *Cingular Appeal* rejected Cingular's argument that the Commission was preempted because its actions in that case were ratemaking:

> Cingular first argues the Commission's decisions are preempted by federal law. We disagree. While the Commission is preempted from regulating either rates or the entry of a wireless provider into the market, it is not preempted from regulating other terms and conditions of wireless telephone service. We conclude the imposition of fines and the requirement that Cingular refund early termination fees paid by its customers *were neither regulation of rates nor regulation of market entry.*[53]

PG&E's attempt to rewrite the safety provision out of § 451 and to limit it to ratemaking functions using inapplicable rules of statutory construction has already been rejected by the California Court of Appeals. Rather, the words "to promote the safety, health, comfort, and convenience of … the public" mean that the quality of service must be reasonable, as well as the rates. And quality of service includes safety.

Faced with Commission and court decisions contrary to its other arguments – such as its claim that it did not have notice that § 451 could be applied as a stand-alone safety statute – PG&E claims those cases do not apply. For example, PG&E claims that *Carey*, described above, "undermines CPSD's position rather than supporting it."[54] It is unclear from PG&E's discussion whether it believes *Carey* was properly decided or not. PG&E appears to argue that while the term "dishonest dealing" – referred to in *Carey* – is something that is commonly understood, a general obligation for a gas utility operating a high pressure gas pipeline system to "act in a safe manner" is "too vague to enforce."[55]

These arguments do not help PG&E's case. The Commission issued the original *Carey* decision in 1998 in response to a complaint that PG&E *had continued for three*

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[53] *Cingular Appeal,* p. 723.

[54] PG&E OB, pp. 32-33.

[55] PG&E OB, pp. 32-33.

years the unsafe practices that contributed to a 1994 gas explosion in a multi-unit apartment building.[56] The Commission applied § 451 in that proceeding to fine PG&E $800 per day for 1,221 days (for a total of $976,800) for continuing to delegate to others gas shut-off services after the 1994 explosion put PG&E on notice that the practice was unsafe.[57] The Commission found: "We conclude that Pacific Gas and Electric Company (PG&E) engaged in unsafe practices which violated Public Utilities Code § 451 for a period of 1,221 days by not revising its fumigation termination policy in 1994 after adverse events affecting public safety."[58]

PG&E attempts to re-frame *Carey* as a "reasonable service" case, but it makes a distinction without a difference. It is perfectly clear from the plain language of the Commission's decision that *Carey* was about PG&E's "unsafe operations," and that it was fined pursuant to § 451 for those "unsafe operations."[59] In addition to the first Ordering Paragraph, the opening sentence of *Carey* clearly stands for this proposition: "ORDER finding that a gas and electric utility had engaged in *unsafe operations* for a period of over three years by allowing pest control contractors to turn off gas service during fumigation."[60] PG&E misses the point that *Carey* is about PG&E's "reasonable service" obligation and that the obligation includes providing "safe service."

PG&E similarly attempts to distinguish the *Cingular Appeal* because it "had nothing to do with safety."[61] PG&E explains how Cingular had notice that its conduct would violate § 451, but that PG&E had no notice because "[t]he Commission has never applied Section 451 to punish a utility for what CPSD claims to have been general

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[56] Notably, similar to the facts revealed in both this proceeding and the San Bruno Investigation (I.12-01-007), both the *Carey* decision and the Mission Substation Fires Investigation OII, discussed below, recognize PG&E's failure to change unsafe practices that it was previously on notice about.

[57] *Carey,* D.98-12-076, 84 CPUC2d 196, 198 (1998).

[58] *Carey,* D.98-12-076, 84 CPUC2d 196, Ordering Paragraph 1 (1998).

[59] *Carey,* D.98-12-076, 84 CPUC2d 196, Ordering Paragraph 1 (1998).

[60] *Carey,* D.98-12-076, 84 CPUC2d 196. 196 (*emphases added*).

[61] PG&E OB, p. 34.

across-the-board shoddy gas operations."[62] In other words, PG&E appears to argue that *Carey* only put it on notice that it could be fined for *certain* unsafe gas operations not specifically prohibited by laws or regulations, but not "general across-the-board shoddy gas operations." Again, PG&E makes a distinction without a difference. And PG&E does not even address the Commission's 2005 investigation regarding its Mission substation fires – an investigation that put PG&E on notice that it could be fined for general across-the-board shoddy *electric* operations.

Finally, PG&E's citation to two U.S. Supreme Court decisions to support its lack of notice argument are perplexing.[63] The only relevant proposition PG&E's cases stand for is the uncontroversial proposition that "laws regulating persons or entities must give fair notice of what conduct is required or proscribed."[64] And *FCC v. Fox,* the only one of the two cases that articulates the rule, explains that the notice standard is whether the statute would provide "a person of ordinary intelligence fair notice of what is prohibited."[65]

The cases are otherwise inapposite in almost every respect. In *FCC v. Fox,* the FCC made its indecency rule more specific *after* the offending Fox program aired, and the court found that Fox had no notice *prior* to the program airing that its actions would be "indecent" because: (1) the FCC could only point to an "isolated and ambiguous statement from a 1960 Commission decision" as providing notice to Fox; and (2) the FCC had previously sanctioned another broadcaster but declined to find the types of violations alleged against Fox actionably indecent.[66]

Martin provides more legal support for CPSD than for PG&E. PG&E evidently cites *Martin* for the proposition that using a citation "as the initial means for announcing

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[62] PG&E OB, p. 34.

[63] PG&E OB, p. 36.

[64] *F.C.C. v. Fox Television,* 132 S.Ct. 2307, 2317 (2012) "*FCC v. Fox*"; *see, e.g., Martin v. Occupational Safety & Health Rev. Comm'n,* 499 U.S. 144, 158 (1991), *"Martin"*.

[65] *F.C.C. v. Fox*, 2318.

[66] *F.C.C. v. Fox,* 2319.

a particular interpretation may bear on the adequacy of notice to regulated parties."[67] However, PG&E fails to acknowledge that *this* proceeding is not the first time CPSD has "announced" that a utility may be fined under § 451 for general safety violations. Thus, it is hard to understand how or why *Martin* is "applicable" or "analogous" here.[68] In fact, the primary holding in *Martin* is that courts defer to agency interpretations of their laws and regulations. *Martin* explains: "It is well established that an agency's construction of its own regulations is entitled to substantial deference. … In situations in which 'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable,' … that is, so long as the interpretation 'sensibly conforms to the purpose and wording of the regulations'."[69] Thus, *Martin* is potentially applicable here to the extent it mandates judicial deference to the Commission's interpretation of § 451. This is the same principle articulated in the *Cingular Appeal,* upholding the Commission's interpretation of § 451 in both the *Cingular Investigation* and *Carey*.

Ultimately, the question is not whether the constitutional rule regarding fair notice applies. Everyone agrees that it does. The question is whether PG&E *had sufficient notice* that the Commission might assess it for failure to maintain a safe gas transmission system pursuant to § 451. As discussed above, it is clear, given the same analysis applied by the California Court of Appeals in the *Cingular Appeal,* that PG&E had more than ample notice that it could be fined for § 451 safety violations. Unlike *FCC v. Fox,* and the concern expressed in *Martin* regarding notice initially provided by citation, PG&E has been on notice for decades that it could be fined for gas safety violations under § 451 – it was fined for such violations in the 1999 *Carey* decision and it was subject to investigation and the possibility of such fines for electric safety violations in the 2005 Mission Substation Fires investigation. Thus, the cases cited by PG&E to show lack of

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[67] *Martin,* 499 U.S. 144, 158 (1991).

[68] PG&E OB, p. 36.

[69] *Martin*, 150-151 (*citations omitted*).

notice are wholly inapposite. Yet PG&E insists both cases are "analogous" and "equally applicable" here.[70]

PG&E's constitutional due process argument is a swiss cheese with more holes than substance. While PG&E is entitled to a zealous defense, its arguments regarding § 451 cross the line, harm the regulatory process, and waste the Commission's and other intervenors' limited resources.

IV. OTHER ISSUES OF GENERAL APPLICABILITY (TO THE SB OII)

A. It Is Appropriate For The Commission To Consider PG&E's Remedial Actions As Evidence of Violations

PG&E complains that "CPSD and the intervening parties have attempted to use PG&E's improvement initiatives against it by asserting that PG&E's actions to improve demonstrate prior deficiencies and legal violations."[71] PG&E claims that it has made safety improvements "in response to post-San Bruno expectations and standards" and that they have "no legitimate relation to establishing alleged violations."[72] PG&E argues: "Alleging violations based on hindsight and changed expectations is not appropriate, and the Commission should not find violations on that basis."[73]

PG&E further asserts that it is *unlawful* for the Commission to consider subsequent improvements as proof "that a party was negligent or otherwise culpable" and it cites to California Evidence Code § 1151 and two judicial decisions in support.[74]

PG&E protesteth too much.

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[70] PG&E OB, p. 36.

[71] PG&E OB, p. 40.

[72] PG&E OB, p. 40. *See also* PG&E OB, p. 46 ("PG&E's numerous actions to enhance the safety of its gas operations following the San Bruno accident are a combination of, among other things, remedial actions to improve identified shortcomings, new initiatives to respond to changed expectations and safety standards, good-faith response to directives by the Commission, recommendations by the NTSB and the IRP, and internally-identified programs focused on top to bottom improvement in PG&E's gas operations. That PG&E is undertaking all these actions is not evidence of prior violations of law.").

[73] PG&E OB, p. 40.

[74] PG&E OB, p. 46.

It is uncontroversial that Evidence Code § 1151 codifies well-settled law and specifically provides that remedial measures are not admissible "to prove negligence or culpable conduct in connection with the event." However, such evidence *may be used for other purposes*. Indeed, one of the two cases cited by PG&E explains: "This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."[75]

Specific to this case, evidence of subsequent remedial measures can be used to show that a negligent condition previously existed, and to show the possibility or feasibility of eliminating the cause of the incident.[76] And "such evidence may be admitted to impeach the testimony of a witness who has testified that the condition prior to the accident was not a dangerous one."[77]

Therefore, where parties have cited to PG&E's subsequent remedial action, it may be for a variety of permissible reasons, and should be considered in this light. For example, such evidence is likely offered for impeachment of PG&E's expert witnesses, who claim PG&E met all requirements before the San Bruno explosion. PG&E unequivocally asserts: "Expert after expert has testified in this proceeding that the violations CPSD has alleged are not supported by the facts or the applicable regulations and standards."[78] The fact of PG&E's massive remedial efforts belies this assertion and can be considered by this Commission.[79]

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[75] *Alcaraz v. Vece,* 14 Cal 4th 1149, 1169 (1997).

[76] *Love v. Wolf*, 249 Cal. App. 2d 822, 831 (1967), *citing multiple sources in support.*

[77] *Love v. Wolf*, 249 Cal. App. 2d 822, 831 (1967), *citing multiple sources in support.*

[78] PG&E OB, p. 46.

[79] *See, e.g.,* D.12-12-030, p. 3 ("We approve PG&E's cost forecasts for pressure testing and replacement, but require that PG&E's shareholders bear the risk of cost overruns because PG&E's past management decisions led to the need to undertake this massive project on an expedited schedule.") and p. 86 ("The Implementation Plan represents a massive investment program funded largely by PG&E's ratepayers. Although PG&E has presented sufficient detail of its specific projects currently expected to be performed, substantial amounts of new data on in-service pipeline will be brought to light by the unprecedented number of pressure tests and pipeline replacement construction that will be performed in the upcoming years.").

Further, it is appropriate for the Commission to consider the scope of PG&E's remedial actions in light of the fact that the NTSB ordered the remedial actions. It is appropriate for the Commission to consider whether PG&E was likely in violation of requirements given the scope of the work required to comply with the NTSB order. Further, as the NTSB asserts in several instances, had PG&E performed much of the remedial work previously, the explosion might have been avoided.[80] All of these examples fit squarely within those circumstances where evidence of subsequent remedial actions may be considered.

In sum, the Commission should consider *the whole of the evidence* and reach its conclusions regarding PG&E violations on that basis. There is no basis to preclude consideration of PG&E's remedial actions.

V. CPSD ALLEGATIONS

A. Construction of Segment 180

B. PG&E's Integrity Management Program

1. The Evidence Clearly Demonstrates That PG&E's Integrity Management Program Was Deficient And Threatened The Safety Of PG&E's Gas Transmission System

PG&E boldly asserts that "CPSD failed to prove that PG&E's integrity management program violated any regulation or law."[81] In making this assertion, PG&E continues to ignore the overwhelming evidence that its integrity management program was dysfunctional, and instead pursues a corporate strategy designed to evade responsibility for its errors and omissions. As described in DRA's Opening Brief, PG&E focuses on the fact that its experts found that its *written* policies and procedures complied

[80] *See, e.g.,* Ex. CPSD-9, NTSB Report, pp. 117-118 and text accompanying footnote 41, above.

[81] PG&E OB, p. 5.

with the regulations – and PG&E stops there.[82] PG&E did not provide a credible witness to rebut the evidence that PG&E was not actually *complying* with its own policies.[83]

Recall that every report on the San Bruno explosion found PG&E's integrity management program seriously deficient.[84] Yet PG&E refuses to admit that its integrity management program was dysfunctional, that its pipeline database was filled with inaccurate data, and that PG&E failed to perform the data collection and integration its experts all said was necessary for a program to meet regulatory requirements.[85] Thus, it is without question that PG&E's integrity management program was deficient in violation of multiple regulations and laws, and led to operation and maintenance of an unsafe gas transmission system in violation of § 451. While PG&E may choose to ignore the evidence, the Commission should not.

2. PG&E's Use of ECDA As An Integrity Management Tool Was Unsafe

PG&E also claims that CPSD failed to show that its use of external corrosion direct assessment (ECDA) for assessing the integrity of Line 132, Segment 180 violated any statute, code or regulatory guidance.[86] PG&E focuses on whether it had any reason to test Line 132 for specific defects that would have necessitated an in-line inspection or hydro test and finds that it did not. Specifically, PG&E states: "Even the most comprehensive and thorough integrity management data gathering process would not have turned up a record describing a defective pup – no such record would have been created because, had the defect been known, PG&E would not have installed the pipe."[87]

PG&E makes much of what it didn't know about Line 132 in its defense, and it refuses to acknowledge that what it didn't know when the pups were installed is not the

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[82] DRA OB, pp. 12-26.

[83] DRA OB, pp. 17-26.

[84] DRA OB, pp. 12-15.

[85] DRA OB, pp. 17-26

[86] PG&E OB, p. 6.

[87] PG&E OB, p. 6.

point of an integrity management program. Among other things, the point of an integrity management program is to gather information on, and test or replace old or defective pipelines as we learn more about them, because we do not know everything about the pipes in the ground. The IRP Report agrees that this information gathering process is critical: "… [H]ad the records been more complete and the characterization been part of a more refined threat identification process, then the tragedy might have been avoided."[88] It explains:

> Without a quality assurance program embedded in the integrity management process– and a feedback loop when anomalies are uncovered or pipelines do fail, mistakes happen. Unheeded lapses in the end-to-end process of pipeline integrity can lead to accidents like San Bruno.[89]

The IRP Report identifies a number of specific threats to Line 132 and explains that if those threats to Line 132 had been properly identified by PG&E, the line would likely have been scheduled for additional assessment or replacement before the explosion:

> As a practical matter, the portion of Line 132 that failed was installed across a ravine using very short segments ("pups") to deal with fitting up the welds across the terrain. This configuration is highly relevant for considering the riskiness of the segment. Three other threats should have been noted and evaluated: (1) the potential for one or more of the short pup segments (which were likely selected from pre-1950 vintage shop-welded inventory) to lack the quality of the more recently fabricated full-length, factory welded, and tested segments; (2) the potential for soil movement of the ravine fill from subsidence, seismic motion or other effects; and (3) the potential for third-party activity since the segment was in the city streets. Even without precise knowledge of the defective double submerged arc weld, such a combination of threats should have raised concerns about threat interaction and multiplicative increases in risk.

[88] Ex. CPSD-10, IRP Report, p. 72.

[89] Ex. CPSD-10, IRP Report, p. 72.

> Had all of this information been integrated and analyzed to determine the cumulative threat, this segment should have been identified for additional assessment or for replacement sooner than 2012 when it was actually scheduled to be replaced by PG&E.[90]

The NTSB Report also identified threats Line 132 that should have been red flags to PG&E. It explains that a segment on Line 132 experienced a longitudinal seam leak in October 1988. PG&E's GIS "listed the cause of the leak as 'unknown.' However, as a result of records discovered during a PG&E postaccident records search, information was added to indicate that 12 feet of Line 132 had been replaced 'due to a longitudinal defect'."[91] The NTSB Report further explains that such a defect would be classified as a "material failure":

> A leak survey inspection and repair report dated October 27, 1988, classified the cause of the leak as a "material failure" and indicated that a material failure report was prepared, but PG&E could not locate any such report. Records showed that the replacement work had started on November 1 and been completed on November 4, 1988. No further information was available regarding the cause of the leak.[92]

Had the information on Line 132 identified by both the IRP and NTSB been added to PG&E's integrity management program, both reports believe PG&E would have done something different regarding Line 132.

PG&E's admits that it knew nothing about Line 132 when it was installed, and argues that it can only be punished for that. However, PG&E refuses to acknowledge that it had an ability and an obligation to learn as much as it could about Line 132 after it was installed. The fact is that PG&E knew nothing about Line 132 after the faulty installation because there was no functional and systematic process in place to ensure new information was added to the database.

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[90] Ex. CPSD-10, IRP Report, pp. 8-9.

[91] Ex. CPSD-9, NTSB Report, p. 38 (*citations* omitted).

[92] Ex. CPSD-9, NTSB Report, p. 38.

Had PG&E acted as a safe and prudent operator by properly maintaining its integrity management program, it is highly likely Line 132 would have been replaced before the explosion. It's that simple.

And PG&E's use of ECDA instead of ILI contributed to the explosion. The unrebutted evidence shows that PG&E knew it should have been using in-line inspections (ILI) rather than ECDA, to assess the condition of a majority of its high consequence area pipelines, but that it chose not to.[93] The unrebutted evidence shows that PG&E was well behind the industry standard in its use of ILI, and PG&E policies and its gas engineers preferred ILI.[94] The unrebutted evidence also shows that ILI would have provided PG&E with significantly more information than ECDA to populate its prescriptive integrity management program that was missing significant amounts of information when it was created.[95] Nevertheless, the unrebutted evidence from the Overland Audit is that PG&E chose ECDA over ILI to save money, and that it then moved several of the remaining projects scheduled for ILI to ECDA to save even more money.[96] In no instance is there any evidence that ECDA was pursued because it was superior to ILI for engineering, information, or safety reasons. All the evidence shows that PG&E chose ECDA to assess the condition of its gas pipelines because it was the least expensive option available for conducting inspections required by federal regulations.

C. Recordkeeping Violations

D. PG&E's SCADA System and the Milpitas Terminal

E. PG&E's Emergency Response

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[93] DRA OB, pp. 40-44.

[94] DRA OB, pp. 40-43.

[95] DRA OB, pp. 19-21.

[96] DRA OB, pp. 43-58.

F. PG&E's Safety Culture and Financial Priorities

1. The Evidence Clearly Establishes That PG&E Had A Culture Of Profits Over Safety And That This Culture Compromised The Safety Of PG&E's Gas Transmission System

PG&E claims that "CPSD's assertions regarding PG&E's spending on the gas transmission business and its overall safety culture were mistaken and did not withstand scrutiny by PG&E's expert, Matthew O'Loughlin."[97] PG&E continues: "CPSD has made sweeping statements about how PG&E allegedly prioritized financial performance over safety. But it has failed to offer any concrete evidence to back up those assertions."[98] One can only wonder what alternative universe PG&E inhabits. First, all the experts agree that PG&E's gas transmission and storage operations were "highly profitable" between 1999 and 2010, generating more than $460 million in profits above PG&E's Commission-authorized rate of return.[99] Second, Mr. O'Loughlin only addresses the Overland Report's imputation analysis, which had virtually nothing to do with PG&E's actual gas transmission spending or its safety culture. As such, PG&E's expert testimony on these matters is irrelevant.

As discussed in DRA's Opening Brief, every investigation into the San Bruno explosion has found, based on specific examples, that PG&E's culture of profits over safety contributed to the San Bruno explosion.[100] The unrebutted evidence in the Overland Report – evidence Mr. O'Loughlin expressly stated he was not addressing[101] – painstakingly outlines PG&E's commitment to profits over safety for three years of its gas transmission business.[102] During those years, PG&E's own internal documents

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[97] PG&E OB, p. 7.

[98] PG&E OB, p. 144.

[99] DRA OB, pp. 30-31.

[100] DRA OB, pp. 27-30.

[101] DRA OB, p. 32, note 105.

[102] DRA OB, pp 27-57. Contrary to PG&E's assertion at OB, p. 145, the analysis in this portion of the Overland Report has nothing to do with the imputation analysis in Chapters 3, 4, and 5.

describe in stark language how PG&E cut costs at every opportunity, starving both gas transmission maintenance and the integrity management program against the advice of its gas transmission engineers. The evidence contained in the Overland Report is damning and unrebutted. There is no question that PG&E had, and continues to have, a culture of profits over safety, which the Commission must take aggressive measures to correct.

VI. OTHER ALLEGATIONS RAISED BY TESTIMONY OF TURN

VII. OTHER ALLEGATIONS RAISED BY TESTIMONY OF CCSF

VIII. OTHER ALLEGATIONS RAISED BY TESTIMONY OF CITY OF SAN BRUNO

IX. CONCLUSION

For all the reasons set forth herein, PG&E's arguments in its Opening Brief have no merit. The decision in this matter should adopt the proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs contained in Appendix A to DRA's Opening Brief.

Respectfully submitted,

KAREN PAULL
TRACI BONE

/s/ TRACI BONE

TRACI BONE

Attorneys for the Division of
Ratepayer Advocates

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 703-2048
Email: tbo@cpuc.ca.gov

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