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, Laws, Rules and Regulations in Connection with the San Bruno Explosion and Fire on September 9, 2010.	Investigation 12-01-007 (Filed January 12, 2012)

REPLY BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes and Codes

CPUC Decisions

Other References

I. INTRODUCTION AND SUMMARY

After causing the largest and most deadly utility disaster in California history, PG&E argues in its opening brief, as it has done throughout this case, that its operation of its gas pipelines was consistent with the law in virtually all respects.[1] Even for the acts PG&E admits, such as "unknowingly installing" Segment 180 of Line 132 in violation of standards,[2] it argues that there is no violation.[3] The evidence in this proceeding does not support these claims. PG&E's Opening Brief, like its testimony, demonstrates more than anything else the company's utter lack of credibility. Rather than presenting an Opening Brief that reflects the record and owns up to the alleged violations where there is no reasonable dispute based on the evidence, PG&E has simply repeated the mantra that the company complied with the law. In so doing, PG&E has failed to "provide complete and non-misleading answers to the Commission and its staff."[4]

The arguments in PG&E's Opening Brief starkly contrast the utility's public pronouncements about its renewed commitment to safety. Here PG&E argues that it violated only two specific rules, it has no general obligation to operate safely, or if it does have such an obligation, it is not an obligation that can be violated. The Commission must rely on the evidence in this proceeding, which presents a very different story than the one PG&E tells.

PG&E argues that prior to 1961 it had no enforceable obligation to operate its gas pipelines safely because there were no specific federal or state regulations governing pipeline safety. [5] But this ignores that the requirements of Public Utilities Code § 451[6] have existed since 1909, prior to the adoption of any specific regulations governing utility operations. Section 451 requires utilities to operate safely. PG&E's argument here—that violations cannot result from breaches of Section 451—

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[1] PG&E admits to two of the violations, related to clearances for work at Milpitas and alcohol testing for certain employees. PG&E Brief at 5.

[2] "In 1956, PG&E unknowingly installed six 4-foot pieces of pipe (so-called "pups") in Line 132 that should never have been put into service." PG&E Brief at 1.

[3] Brief at 5.

[4] See Order Instituting Investigation 12-01-007 ("OII") at 11, and Rule 1.1 of the Commission Rules of Practice and Procedure.

[5] PG&E Brief at 16.

[6] Subsequent statutory references are to the California Public Utilities Code, unless otherwise stated.

would convert that obligation into a meaningless statement that utilities can safely ignore since a violation would carry no sanction. PG&E's position has been rejected previously by the Commission and the Courts, as discussed at length below.[7]

In this Reply Brief, the City and County of San Francisco (San Francisco) responds to PG&E's legal arguments regarding its safety obligations and its claims that its integrity management program complies with the law.

II. BACKGROUND (PROCEDURE/ FACTS)

III. LEGAL ISSUES OF GENERAL APPLICABILITY

A. 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."[8] As the Commission found in *Qwest*, the Commission's use of a preponderance of the evidence standard is consistent with State law.[9] PG&E acknowledges that the Commission need not apply a "clear and convincing" standard to an investigation even one "involving potentially substantial penalties."[10]

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

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[7] See section III of this brief.

[8] 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*").

[9] *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").

[10] PG&E Brief at 26, *citing Qwest*, *supra*, 2003 Cal. PUC LEXIS 67.

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."[11] 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.[12] Third, PG&E attempts to distinguish *Qwest*, arguing that unlike *Qwest* this case involves "multiple 'continuing' violations."[13]

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 inapt. *Angelia P* concerned the termination of parental rights under a statute that in one subdivision specifies a clear and convincing evidence standard.[14] 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.'"[15] 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

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[11] PG&E Brief at 24, citing, *In re Angelia P.*, 28 Cal.3d 908, 919 (1981) ("*Angelia P*").

[12] PG&E Brief at 25, 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*").

[13] PG&E Brief at 26-27.

[14] *Angelia P*, *supra*, 28 Cal.3d at 920

[15] *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.

Commission to require clear and convincing evidence.[16] 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."[17] 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.[18] 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."[19]

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.[20] A preponderance of the evidence is all that is required where "the greatest sanction that could be imposed . . . was a fine or penalty."[21] The courts also have not required clear and convincing evidence to suspend or revoke non-professional or occupational licenses.[22] 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."[23]

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

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[16] PG&E Brief at 25-26.

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

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

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

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

[21] *Id.* at 994.

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

[23] *Id.* at 1984.

fine, whereas in this case penalties could be substantially higher.[24] 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 does not involve suspending or revoking PG&E's CPCN to provide gas pipeline service in California, which PG&E might argue is comparable to a professional license revocation or suspension. Remedial measures requiring PG&E 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.[25] 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.[26] 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.[27] PG&E wrongly argues that

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[24] PG&E Brief at 25, citing *Grubb*, *supra*, 194 Cal.App.4th at 1501.

[25] *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.

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

[27] 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.

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.[28]

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."[29] 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 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.[30]

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.

B. Section 451 Requires PG&E to Operate and Maintain its Gas Pipelines Safely

PG&E contends that Section 451 is not and cannot be a source of utility pipeline safety obligations. PG&E argues that Section 451 relates only to rates and that interpreting Section 451 to require pipeline safety would render superfluous other sections of the Public Utilities Code.[31] PG&E's argument is contrary to the plain language of Section 451. PG&E's argument is also contrary to key Commission decisions imposing penalties for a utility failure to comply with the service and safety

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[28] PG&E Brief at 27.

[29] Pub. Util. Code, § 2108.

[30] 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.

[31] PG&E Brief at 30.

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:

> 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.[32]

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.[33]

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

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

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

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. PG&E itself in its opening brief cites *Klein v. United States*, 50 Cal. 4th 68, 80; 235 P.3d 42 (2010) for the proposition that "courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous."[34] PG&E's attempt to nullify the language in Section 451 clearly requiring utilities to maintain the 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.[35]

In support of this argument, 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,'"[36] whereas the 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.

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[34] *See* PG&E Brief at 30.

[35] *See* PG&E Brief at 28-29 .

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

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."[37] 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.

Moreover, in this case, 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.[38] 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.[39] 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.

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

[38] *See* PG&E Brief at 29; one case cited by PG&E is *Pacific Telephone and Telegraph Co. v. Public Util. Comm'n*, 34 Cal. 2d 822 (1950), a case that PG&E must be well aware is of the dubious ongoing validity, 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. of California v. Public Utilities Commission,* 34 Cal.3d 817 (1983)." *PG&E Corp. v. Public Utilities Com.*, 118 Cal. App. 4th 1174, 1202 (2004) (citations omitted).

[39] *Id.*

2. The Commission Can Find that 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, enforcement by the Commission of this element would result in a failure "to read Section 451 as a whole or in context."[40] By this reasoning, the Commission could never enforce adequate service because in focusing on the aspect of service that is inadequate, the Commission would be violating the statute which lists other aspects of service as well. This argument is nonsensical. Utilities must meet all the requirements for providing a basic level of service, and 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.

Moreover, PG&E suggests 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 rates.[41] This suggestion is directly contrary to the Court of Appeal's decision in *Pacific Bell Wireless v. Public Utilities Commission* ("*Pacific Bell*").[42] In *Pacific Bell*, the Commission could not consider applicable rates, because under the Federal Communications Act the Commission had preempted from doing so.[43] 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*")[44] the Commission found violations of the service component of Section 451 without addressing or discussing existing rates.[45]

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[40] PG&E Brief at 30.

[41] *Id.*

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

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

[44] 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*").

[45] *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.")

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 Public Utilities Code and every Commission regulation that requires any safety measure of any kind."[46] PG&E cites in 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.[47] 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 impose requirements upfront. The two sections are thus complementary and entirely consistent.[48]

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

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[46] *See* PG&E Brief at 30.

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

[48] *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).

clear that utilities have an independent obligation to act reasonably irrespective of any Commission guidelines.[49]

4. The Commission and the California Court of Appeals Have Both Found that Section 451 Creates An Affirmative Utility Obligation to Offer Adequate 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."[50] These unreasonable acts resulted in the existence of unsafe service from November 14, 1994 until March 19, 1998, in violation of PU Code § 451."[51] Further, the Commission determined that PG&E's violation of Section 451 justified a penalty pursuant to Sections 2107 and 2108.[52] Upon a PG&E application for rehearing, the Commission affirmed that it had correctly assessed a fine for a violation of Section 451.[53]

PG&E attempts to distinguish *Carey* and *Carey II*, but focuses on the issue of whether Section 451 is unconstitutionally vague.[54] PG&E does not dispute that in *Carey*, and *Carey II*, the Commission found that PG&E's unsafe practices violated Section 451.[55]

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[49] 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).

[50] D.98-12-076, *Carey*, 1998 Cal. PUC LEXIS 924, Conclusion of Law 2; 84 CPUC2d 196 ("*Carey*").

[51] *Id.*

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

[53] D. 99-04-029, *Carey II*, 1999 Cal. PUC LEXIS 215; 85 CPUC2d (1998).

[54] The question of the constitutionality of Section 451 is discussed below.

[55] See also, D.04-04-065, *Investigation of Southern California Edison Company's Electric Line Construction, Operation and Maintenance Practices*, 2004 Cal. PUC LEXIS 207, at *16 (2004)("Utilities are required to provide reasonable service, equipment, and facilities as necessary to

Further, the Court of Appeal cited *Carey II* with approval when it upheld the Commission's authority to impose penalties for a violation of a utility's basic service obligations under Section 451.[56] In *Pacific Bell*, the Court of Appeals upheld a Commission penalty for a utility failure to provide adequate cell service under Section 451.[57] The Court of Appeal cited numerous cases in which the Commission determined that a utility violated Section 451 for a failure 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."[58]

PG&E seeks to distinguish *Pacific Bell* arguing that the case did not involve a safety violation.[59] While this is true, *Pacific Bell* involved a violation of the obligation to provide adequate service under Section 451, refuting PG&E's contention that Section 451 relates exclusively to rates.[60] Moreover, as stated earlier, *Pacific Bell* explicitly cites to the Commission decision in *Carey II* with approval and *Carey II* is undoubtedly a safety case.

5. Any Delay in CPSD's Discovery of PG&E's Failure to Properly Install and Maintain the San Bruno Pipeline Cannot Prevent CPSD and the Commission from Enforcing the Requirements of Section 451

PG&E's attempts to distinguish *Carey* and *Pacific Bell* rest in part on the fact that "CPSD has over many years audited PG&E's facilities and records without raising the alleged violations now asserted in this enforcement action. In fact, PG&E had understood that in the past CPSD approved of many aspects of PG&E's risk mitigation and integrity management programs."[61] However, it is not

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promote the safety, health, comfort, and convenience of their patrons, employees, and the public. See Pub. Util. Code § 451.")

[56] See *Pacific Bell*, 140 Cal.App.4th at 743.

[57] *Id.* at 741-43.

[58] *Id.* at 743.

[59] *See* PG&E Brief at 34.

[60] *Pacific Bell*, *supra*, 140 Cal.App.4th at 740.

[61] PG&E Brief at 34-35.

CPSD's activities that are at issue in this proceeding but PG&E's. 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 Commission's often articulated standard of reasonableness. San Francisco's opening brief, like the briefing of other parties, explains in detail that the answer to this question is no because:

- PG&E failed to act proactively to ensure the safe and reliable operations of its pipelines, by failing to comply with state and federal law or prudent utility practice.
- Prior to the accident and in the face of increasing uncertainty about the safety of its pipelines, PG&E failed to respond appropriately to all potential threats to its pipelines.
- PG&E exacerbated this disregard for the potential threats to its pipelines by spiking the pressures on its pipelines, in some cases repeatedly.[62]

In essence, PG&E would estop CPSD, and this Commission, from enforcing the law. It is well settled, however, that "estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public.'"[63] In the "vast majority of cases" the courts have found that a governmental entity cannot be "estopped from enforcing the law.[64] Here, the laws CPSD seeks to enforce are intended to protect the public health, safety, and welfare. Any inaction on the part of CPSD or the Commission, therefore, would not be a lawful basis for the Commission to refuse to find that PG&E has violated Section 451.

The court applied these principles in *Feduniak v. California Coastal Commission*, 148 Cal.App.4th 1346 (2007) ("*Feduniak*"). In 1983, the Pebble Beach Company authorized the construction of a three-hole golf course on property under the jurisdiction of the California Coastal Commission. Because the property was located in an "'environmentally sensitive habitat area,'" the Coastal Commission had previously issued an easement to construct a home on only 14 percent of the property and prohibited development of the remainder of the property. The golf course was constructed without Coastal Commission approval.[65]

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[62] *See* City Brief at 1, 17-44.

[63] *City of Long Beach v. Mansell*, 3 Cal.3d 462, 493 (1970); *City of South San Francisco v. Cypress Lawn Cemetery Assn*, 11 Cal.App.4th 916, 923 (1992).

[64] *Smith v. County of Santa Barbara*, 7 Cal.App.4th 770, 776 (1992) (citing cases).

[65] *Feduniak*, *supra*, 148 Cal.App.4th at 1368-70.

In 2002, after the property had been transferred to new owners, the Commission learned about the golf course and notified the new owners that the golf course violated the terms and conditions of the easement. The Commission ordered the owners to remove the golf course and restore the property. The new owners argued that the Commission should be estopped the Commission from taking this action. In rejecting their estoppel argument, the court held "regulatory inaction" was not sufficient to estop the Commission.[66] As the court further held:

> Moreover, we observe that if it were reasonable for the Feduniaks to think that the restrictions would never be enforced because they had not been enforced for many years, then more generally, one could argue against the enforcement of a law that had not been enforced for many years and seek estoppel on that ground. However, courts have never accepted such reasoning. On the contrary, the mere failure to enforce the law, without more, will not estop the government from subsequently enforcing it. [Citations.][67]

Likewise here, any "regulatory inaction" by CPSD or the Commission has no relevance to the Commission's lawful authority to enforce PG&E's violations of Section 451.

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

In its Opening Brief, PG&E devotes a whole page to arguing that prior to 1961, when the Commission first adopted GO 112, ASA B.31.8 was merely voluntary.[68] However, Section 451 was in effect prior to 1961 and required PG&E to safely maintain its pipeline facilities. 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.[69]

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 acted reasonably to maintain pipeline safety before 1961, it is appropriate for the Commission to consider whether it complied with industry guidelines whether these were voluntary or mandatory. This all the more true given that the utilities

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[66] *Id.* at 1371.

[67] *Id.* at 1369.

[68] PG&E Brief at 69.

[69] PG&E-4 (D.61269, *Investigation Into the Need of a General Order Governing Design, Construction, Testing, Maintenance, and Operation of Gas Transmission Pipeline Systems* (1960), at 4.)

considered these guidelines so important that the utilities claimed to follow them. Accordingly, PG&E's compliance with ASA B31.8 is highly relevant to the Commission's assessment of whether PG&E met its obligations under Section 451 prior to 1961.

C. The Utility Safety Obligation in Section 451 is Not Unconstitutional.

PG&E claims that even if Section 451 creates an obligation on the part of utilities to safely maintain their facilities, such an interpretation would be unconstitutional because Section 451 is unconstitutionally vague and because PG&E did not have adequate notice of its obligations under the statute.[70] While these arguments are essentially the same, PG&E treats them in two different sections and so they will be addressed one at a time below.

1. Section 451 is not Unconstitutionally Vague.

PG&E's claim that Section 451 is unconstitutionally vague is directly contrary to *Pacific Bell*, *Carey* and *Carey II* and other California cases. This case is very similar to *Pacific Bell* where the Court of Appeal upheld a violation of Section 451. The Court 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 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

[70] *See* PG&E Brief at 31-33, 36-38.

> 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.[71]

In this case, PG&E appears to contend that it could not know it was unjust and unreasonable to fail to safely maintain its gas pipelines such that a pipeline ruptured, causing an intense fire which 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, PG&E is aware 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.[72]

In addition, the Commission found in *Carey II* that "[s]ection 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."[73] The Commission explained that a constitutional challenge on the grounds that a statute is unduly vague cannot be sustained merely because a statue lacks an exact definition to cover every circumstance.[74] The question is whether the statutory language is possessed of a definition, standard or common understanding among utilities. "The terms 'reasonable service, instrumentalities, equipment and facilities' are not without a definition, standard or common understanding among utilities. Commission cases reviewing utility conduct frequently require that the conduct meet a standard of reasonableness. For example, in ratesetting proceedings, the disallowance of utility expenses, whether from contracts, accidents, or other sources are reviewed under a reasonableness standards."[75] In fact, over the years, the Commission has developed a well articulated and often repeated standard of reasonableness.[76]

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[71] *Pacific Bell, supra*, 140 Cal.App.4th at 739-40.

[72] *See* e.g. PG&E-4 (D.61269); 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)("*SCE*").

[73] *Carey II, supra*, 1999 Cal. PUC LEXIS 215, at *22.

[74] *Id.* at **22-24.

[75] *Id.* at *24.

[76] See e.g. D.04-04-065 at 16, 40, 56; D.90-09-088 at 21-24.

The Commission's determination in *Carey* is consistent with California law. For example, in *Sunset Amusement Co. v. Board of Police Commissioners of the City of Los Angeles*, 7 Cal.3d 64 (1972) ("*Sunset*"), the California Supreme Court rejected the claim by the operator of a roller skating rink that a 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 . . . .'"[77] 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."[78] 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.[79]

As in *Sunset*, with respect to Section 451, the Legislature could not reasonably be expected to isolate and specify all the activities required to safely maintain gas pipelines, nor was it required to do so to pass constitutional muster. In fact, this is not a close case. There is a common understanding that a gas utility's responsibility to maintain its facilities safely includes reasonably maintaining gas pipelines in a manner that precludes deadly explosions. This does not mean that anytime a gas pipeline explodes there is an automatic violation of Section 451, if for example the explosion occurred,

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[77] *Sunset*, *supra*, 7 Cal.3d at 81.

[78] *Id.* 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. Id. at 73. This case like *Sunset* does not involve activities falling with the ambit of the First Amendment.

[79] *Id.* 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).

for reasons unrelated to, or notwithstanding, a utility's reasonable efforts to maintain pipeline safety. However, in this case, there is a significant body of evidence demonstrating that over a long period of time, PG&E systematically failed to comply with industry guidelines and regulatory requirements for gas pipeline maintenance and that this systematic failure resulted in the San Bruno explosion.

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."[80]

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.[81] This standard is very similar to the Commission's long-standing reasonable utility standard.[82]

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

[81] 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).

[82] *See e.g.* D.04-04-065 at 16, 40, 56; D.90-09-088 at 21-24.

2. 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 its rights to due process of law.[83] 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.[84] But *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.'"[85] The Court only found that this may "bear" on whether the notice was "adequate."[86] 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*."[87]

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.[88]

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[83] PG&E Brief at 35.

[84] PG&E Brief at 36.

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

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

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

[88] *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."[89] 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*.[90] 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."[91] 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.[92]

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.'"[93] 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."[94] Therefore, the Supreme Court set aside the FCC's order because the standards it had applied were "vague."[95]

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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[89] PG&E Brief at 36.

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

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

[92] *Id.* at 2314.

[93] *Id.* at 2319.

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

[95] *Id.* at 2320.

Commission has applied in the past. Here, CPSD has asked the Commission to find that PG&E has violated Section 451 by installing and operating its natural gas system in an unsafe manner. To make its case, CPSD has relied on PG&E's affirmative duty to maintain its facilities in a manner that promotes public safety, PG&E's violation of industry safety standards, and a culture at PG&E that put profits over safety. PG&E had adequate notice that the Commission could sanction it for failure to properly install and maintain its natural gas pipelines.

D. PG&E's Post-Accident Improvement Efforts Should be Considered

PG&E contends that any reliance by the parties on PG&E's post-accident improvement efforts violates Evidence Code Section 1151.[96] PG&E's contention ignores the narrow construction given to Evidence Code Section 1151 by the courts, and the fact that the Commission is not required to follow technical rules of evidence.

Evidence Code Section 1151 provides:

> When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

First, even where applicable, the courts have narrowly construed Section 1151, because it can result in suppression of highly relevant evidence.[97] Section 1151 does not preclude using evidence of

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[96] PG&E Brief at 46.

[97] See *Rutter Group*, *California Practice Guide: Civil Trials and Evidence*, Chapter 8: Evidence, D: Other Public Policy Exclusions, Section 7, b and d (2013); *Baldwin Contracting Co. v. Winston Steel Works, Inc.*, 236 Cal.App.2d 565, 573, 46 Cal.Rptr. 421 (1965) ("*Baldwin*")(citations omitted) ("While public policy precludes the court from considering the construction of the barricade after the accident on the issue of liability, such evidence is relevant and admissible as indicative of Baldwin's duty on the job and also on the possibility or feasibility of eliminating the cause of the accident."); *Alcaraz v Vece*, 14 Cal.4th 1149, 1169 (1997) (emphasis and citations omitted) ("While evidence that Taubman's carpenters installed handrails at the point where Morehouse fell following his injury was not admissible to provide negligence of Taubman, it was properly limited and received by the court, on the issue of control of the premises, and as to whose duty it was under the contract to take such safety measures."); *Alpert v. Villa Romano Homeowners Association*, 81 Cal. App.4th 1320, 1340-42 (2000) (citations and emphasis omitted) ("Section 1151 by its own terms excludes evidence of subsequent remedial or precautionary measures only when such evidence is offered to prove negligence or culpable conduct. . . . This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose . . . .")

PG&E's remedial conduct after the San Bruno accident to show the scope of PG&E's duty as a gas utility and the feasibility of better practices.[98] This case is not unlike *Baldwin* where the court held that evidence that a contractor's carpenters installed a wooden barrier after an accident occurred was relevant and admissible as indicative of Baldwin's duty on the job and also the possibility or feasibility of eliminating the cause of the accident. *Id.* Here, even under Section 1151, evidence of PG&E's remedial conduct after San Bruno can be relied on to rebut PG&E's contentions that GO 112, and ASA B.31.8 did not require it to undertake the maintenance that CPSD and other parties contend was required under the law.

Moreover, the technical rules of evidence do not apply in Commission proceedings.[99] Instead of mechanically applying the rules of evidence, Commission evidentiary rulings must preserve substantial rights of the parties.[100] Evidence Code Section 1151 is based on "a public policy consideration that the exclusion of such evidence encourages persons to take subsequent precaution for the purpose of promoting and encouraging safety, without fear of having such conduct used to establish liability;"[101] it is not intended to protect any substantial right of the person undertaking remedial measures. Moreover, in this case, the public policy behind Evidence Code Section 1151 is outweighed by other considerations. Here PG&E has minimized its responsibility under the law to maintain safety. In this context, it is imperative that the Commission reiterate clearly the fundamental obligation of PG&E and other gas utilities to maintain safety, and hold PG&E accountable for its failure to do so, in order to prevent an accident like San Bruno from occurring again. To the extent

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[98] *Baldwin*, *supra*, 236 Cal.App.2d at 573.

[99] Public Utilities Code Section 1701; Commission Rules of Practice and Procedure, Rule 13.6(a).

[100] Commission Rules of Practice and Procedure, Rule 13.6(a);

[101] *Hilliard v. A. H. Robins Co.*, 148 Cal.App.3d 374, 401 (1983) (citing Law Revision Committee Comment, Evid.Code, § 1151; Jefferson, California Evidence Benchbook (2d ed.), Evidence of Subsequent Repairs or the Subsequent Remedial Comment, § 34.2.)

considering evidence of PG&E's remedial measures supports these outcomes, parties should be allowed to rely on it.

E. Reports by PG&E's Experts and Random Books Are Not "Authorities."

In its Table of Authorities, along with the Federal Regulations and Federal Rules of Evidence, PG&E includes two reports by its witness John Kiefner and one book.[102] The reports by PG&E's expert are exhibits in the proceeding and appropriate for citing and discussion.[103] But they are not "authorities" on par with statutes, cases, and regulations and should not be afforded that weight. The book, likewise, is not an authority and does not belong in the Table of Authorities. To San Francisco's knowledge, it has not been introduced into evidence.

II. OTHER ISSUES OF GENERAL APPLICABILITY

A. The Commission Should Adopt DRA's Proposal for an Independent Monitor

San Francisco strongly supports DRA's proposal that the Commission appoint an Independent Monitor to oversee the improvements required in PG&E's gas operations.[104] DRA has shown that the Commission has inadequate staff to undertake the task of overseeing the substantial remedial work necessary on PG&E's system, because that same staff is also responsible for the day-to-day integrity management audits and other work required for the Commission to meet its obligations under its PHMSA certification. San Francisco intends to further address this issue in the briefing on fines and remedies.

III. CPSD ALLEGATIONS

A. Construction of Segment 180

B. PG&E's Integrity Management Program

CPSD has presented substantial evidence of PG&E's failure to comply with the integrity management requirements. In its Opening Brief, PG&E continues to demonstrate that it has not

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[102] PG&E Brief, at x.

[103] See PG&E-7, Tab 4-23 (2004 study) and Tab 4-21 (2007 study).

[104] DRA Brief at 61-66.

complied with either the letter or the spirit of the integrity management rules. In particular, PG&E's responses to the evidence regarding its Data Gathering and Integration and Threat Identification and Assessment should give the Commission and the public concern that not only did PG&E's past program violate the law, but the company still fails to understand the purpose of integrity management. PG&E is only speculating when it asserts that nothing could have prevented the San Bruno explosion once it installed the six pups in Segment 180.[105] PG&E refuses to acknowledge that a proper integrity management program likely would have prevented or reduced the scope of the San Bruno disaster, because it would have enabled PG&E to discover and mitigate flaws and anomalies in its pipeline system.[106]

1. PG&E Continues to Mislead the Commission and Place the Public at Risk Due to Its Failure to Properly Assess the Risk of Pipeline Failure from Cyclic Fatigue

Just as it did in its testimony and in the hearings, PG&E continues to hide the ball regarding its failure to properly assess its pipelines for cyclic fatigue. Not only did PG&E violate the law in the past, as alleged by CPSD, PG&E continues to place the public at risk by its ongoing failure to identify, assess, and remediate this threat. PG&E relies on studies produced by its witness Kiefner, who PG&E says is "widely regarded as the pre-eminent expert regarding cyclic fatigue in pipelines."[107]

Mr. Kiefner may be such an expert, but in this proceeding he is PG&E's paid advocate, and his testimony demonstrates that he is willing to say whatever PG&E wants, even at the expense of his own credibility.[108] Mr. Kiefner relies on two general studies of cyclic fatigue, published in 2004 and 2007 to support the view that cyclic fatigue was not widely regarded as a threat.[109] He fails to mention, and PG&E still fails to address, the cyclic fatigue study he performed of PG&E's pipelines in March 2012.[110] That study shows that some PG&E pipelines in densely populated areas are at risk of failure

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[105] See, e.g., PG&E Brief at 8.

[106] See, e.g., CCSF Brief at 13-44, CCSF-1 at 2-3; CPSD-10 (Independent Panel Report) at 4, 64-67.

[107] PG&E Brief at 74.

[108] See discussion in CCSF Brief at 11-12.

[109] See PG&E-7, Tab 4-23 and Tab 4-21, respectively and PG&E Brief at 75-76.

[110] CCSF-5 (KAI Report), discussed in CCSF Brief at 33-39.

due to cyclic fatigue, and some are well beyond the time when they would be expected to fail.[111] Mr. Kiefner's attempt to minimize these facts during the hearings, by distinguishing between the requirements of the law and the "real evidence," highlights PG&E's lawlessness regarding these requirements.[112] The real evidence, according to PG&E, is that cyclic fatigue was only a problem one time—on September 9, 2010 in San Bruno.

If PG&E deigns to address this issue in its reply brief, it probably will say that the 2012 study is "hindsight," but it is not. Based on the evidence of what PG&E knew or should have known about the characteristics of its pipelines well before September 9, 2010, PG&E should have performed such a study many years ago.[113]

C. Recordkeeping Violations

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

E. PG&E's Emergency Response

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

IV. ALLEGATIONS RAISED BY TESTIMONY OF TURN

V. ALLEGATIONS RAISED BY TESTIMONY OF CCSF

VI. ALLEGATIONS RAISED BY TESTIMONY OF CITY OF SAN BRUNO

VII. CONCLUSION

[111] Id.

[112] RT 802:26-803:3.

[113] CCSF-5 (KAI Report) at 2.

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