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.	I.12-01-007 (Filed January 12, 2012) (Not Consolidated)
Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Transmission System Pipelines.	I.11-02-016 (Filed February 24, 2011) (Not Consolidated)
Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas & Electric Company's Natural Gas Transmission System in Locations with Higher Population Density.	I.11-11-009 (Issued November 10, 2011) (Not Consolidated)

REPLY BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO ON PENALTIES

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I. INTRODUCTION AND SUMMARY

The Commission has both a large factual record and strong legal support to impose significant financial consequences on PG&E for the violations identified in the record of these cases. The record supports financial consequences of at least $2.25 billion, consisting of a large fine and substantial remedial measures. PG&E has raised no legal or factual arguments that should prevent the Commission from adopting this recommendation.

II. THE COMMISSION SHOULD IMPOSE A LARGE FINE AND REQUIRE PG&E SHAREHOLDERS TO FUND SUBSTANTIAL REMEDIAL MEASURES

The active parties here generally agree that the Commission has broad authority to order fines, penalties, and other remedies, and their opening briefs provide a thorough summary of the statutes, cases, and Commission decisions which set forth that authority.[1] The parties other than PG&E also agree that the total financial consequences to PG&E in this proceeding should be the full amount that PG&E can reasonably afford to pay given its size, financial obligations, and financial health. The Overland testimony in this proceeding provides the only estimate of that amount—at least $2.25 billion.

The record here sets forth the need for substantial remedial measures, which San Francisco strongly supports. But it is also important for the Commission to impose a significant fine, one that is substantially larger than any fine imposed by the Commission in the past. The Commission, as well courts and other entities, typically sanction unlawful and imprudent conduct through fines, and the failure to do so in this case would set a bad precedent and send the wrong message to PG&E, other utilities, and the public.

For legal and policy reasons, the Commission should impose a financial sanction of at least $2.25 billion in these cases, consisting of a large fine payable to the State's general fund, as specified in the Public Utilities Code, and a substantial package of remedial measures. This remedial work

[1] *See, e.g.*, PG&E Remedies Brief, pp. 18-21, CPSD Remedies Brief, pp. 36-38, DRA Remedies Brief, pp. 8, 14-16, and CCSF Remedies Brief, pp. 2-3.

should include measures approved by the Commission D.12-12-030[2] and funded by ratepayers, subject to refund.[3]

A. The Financial Consequences Proposed Here Are Dramatically Smaller Than The Law Allows, Considering PG&E's Conduct

PG&E complains that the proposed penalty of at least $2.25 billion is disproportionate to the harm. San Francisco almost agrees. The $2.25 billion penalty is disproportionately small given the harm PG&E caused. A penalty in proportion to the harm and violations would be much larger. PG&E's reckless failure to follow laws, rules, and standards for decades has caused substantial and irreparable harm and placed millions of people at risk of death or serious injury. PG&E attempts to narrow the scope of the harm by disregarding all consequences of its wrongful behavior, except actual deaths, serious injuries, and substantial property damage.[4] PG&E has created its own rule that a violation that caused no physical harm is not severe. This is antithetical to providing incentives for utilities to operate safely and not consistent with the law or precedent. The Commission cannot ignore the risk PG&E's conduct created. Those living near its pipelines were lucky that many more serious incidents did not occur. This does not equate to a conclusion that the violations were not severe or that they do not merit significant penalties.

PG&E further complains that the Commission should not set a penalty "entirely on the basis of a consultant's analysis of PG&E's 'ability to pay.'"[5] No one in this proceeding has made such a proposal. All of the penalty proposals are based on California statutes, dozens of Commission decisions and court cases, and the substantial record in three proceedings. The Overland analysis that PG&E repeatedly distorts, presents a means of mitigating the financial consequences to PG&E of its violations. The $2.25 billion penalty is arbitrary only in that a penalty based on California law could be in the hundreds of billions of dollars.[6] Reducing that penalty to an amount PG&E can reasonably

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[2] D.12-12-030, *Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms* (2012) 2012 Cal. PUC LEXIS 600 ("*Natural Gas Pipelines*").

[3] CCSF supports the analysis in the opening briefs of TURN and DRA regarding these costs.

[4] *See* PG&E Remedies Brief, pp. 36-38.

[5] PG&E Remedies Brief, p. 2.

[6] *See, e.g.*, CPSD Remedies Brief, p. 5, TURN Remedies Brief, pp. 10-23; DRA Remedies Brief at 16-18, CCSF Remedies Brief, p. 8.

pay could result in an "arbitrary" penalty amount.[7] CPSD and all intervenors proposed a similar "arbitrary" penalty in the interest of maintaining PG&E's financial health. If PG&E wants a penalty consistent with the letter of the law, then the number should be many times higher.

B. An Independent Monitor Is Important To Ensure Safety, Financial Prudence, And Public Accountability

PG&E's brief, like its six prior briefs in these cases, raises substantial doubt about whether PG&E will improve its conduct related to its gas transmission business. PG&E's blatant disregard for the record and the law in the hundreds of pages it has submitted do not reflect a company that is committed to following the law. PG&E continues to rely exclusively on its own testimony, which PG&E created in furtherance of the fiction that PG&E did nothing wrong that was of any consequence.[8] At the very least, this supports the appointment of an independent monitor who will report to the Commission and the public about PG&E's progress in implementing the measures needed to make PG&E a safe gas pipeline operator.[9] An independent monitor is essential to ensure both safety and financial accountability.

PG&E's argument that such a monitor would "usurp" CPSD's authority should be given no credence.[10] Having questioned CPSD's competence and integrity throughout these investigations and in its opening brief, PG&E cannot now attempt to cloak its opposition to this sensible remedial measure with noble motives. It is well known that CPSD's resources are not sufficient to carry out the Commission's obligations under its PHMSA certification, much less to oversee the substantial, multi-year remedial program that is required for PG&E.[11] PG&E's opposition to this proposal reflects its desire to avoid oversight. This is not surprising from PG&E. However, the assignment of an independent monitor is important for safety, financial prudence, and public accountability.

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[7] The record contains no proposal for a different penalty amount.

[8] *See, e.g.*, PG&E Remedies Brief, p. 5, where PG&E continues to tout its experts. See also CCSF SB Opening Brief at 9-13 (and briefs of other parties) demonstrating the lack of credibility of these witnesses.

[9] See *Natural Gas Pipelines,* 2012 Cal. PUC LEXIS 600, at p. *26 ("This decision requires Pacific Gas & Electric Company to continue its work toward becoming a safe natural gas transmission system operator.").

[10] *See* PG&E Remedies Brief, pp. 11, 95-96.

[11] *See, e.g.*, PG&E Remedies Brief, p. 43, where PG&E complains that earlier audits did not identify all of the violations alleged here by CPSD. PG&E made similar arguments in the other cases.

C. PG&E'S Extreme Views Of The Appropriate Penalty Are Not Supported By Precedent

The penalty proposals in the record are moderate, reflecting an enormous reduction in what could have been the penalty under California law.[12] To the extent the Commission finds, as PG&E argues, that PG&E's good faith efforts or other factors provide a basis for mitigating the penalty amount, the penalty has been mitigated already.[13] PG&E's attempt to paint the intervenors and CPSD as "extreme" is not convincing in view of the record and the law. PG&E is the party with an extreme proposal here. For example, in PG&E's view, any methodology that results in a large penalty must be flawed—that means that no matter what a utility did, a high penalty could never be assessed because a high penalty, in and of itself, indicates a flawed methodology.[14] This means that the worse the conduct, the more suspect the penalty.

No party, including PG&E, has cited a penalty case that compares to this one in terms of the number, severity, or duration of the violations at issue. The violations at issue in the penalty cases cited by PG&E equate to one small piece of any one of the three investigations that this penalty will cover.

D. PG&E's Failure To Appropriately Respond To Repeated Warnings Supports A Large Penalty

PG&E continues to argue, as it has done throughout these proceedings, that it did almost nothing wrong.[15] PG&E's brief states that intervenors and CPSD are wrong to suggest that PG&E "intentionally ignored the flashing lights and exclamation points that CPSD and Intervenors' hindsight approach finds to be obvious." [16] Nonetheless, the record shows that some of the signs to PG&E over the years indeed should have been flashing lights and exclamation points to a prudent pipeline operator. During the hearings, experts paid by PG&E attempted to minimize the signs PG&E had of problems with its pipelines. However, PG&E cannot change history by paying experts to look back at

[12] *See, e.g.*, CPSD Remedies Brief, p. 5, TURN Brief Remedies, pp. 10-23; DRA Remedies Brief , pp. 16-18, CCSF Remedies Brief, p. 8 (illustrations of the large penalty amounts at issue).

[13] PG&E Remedies Brief, pp, 42-2, where PG&E discusses PG&E's good faith efforts and other factors that PG&E argues should mitigate the financial consequences imposed on the company.

[14] PG&E Remedies Brief, p. 41.

[15] *See* PG&E Remedies Brief, pp. 84-88.

[16] PG&E Remedies Brief, p. 36.

PG&E's conduct in "hindsight" and justify it in order to avoid the consequences of its action or inaction.[17] Over many years, employees at PG&E and others knowledgeable in the industry recognized problems and gave warnings that PG&E was responding appropriately. Had it done so, the harm created and the financial consequences proposed here would be much less.

For example, the record contains memoranda written in 1992 by a PG&E employee warning the company that it was not been keeping or creating all relevant pipeline records.[18] In these memoranda, the employee described how recent reorganizations at PG&E led to pipeline records being undervalued and discarded.[19] The memoranda specifically mentions that pipeline history files, strength test and pressure reports, mapping functions and pipeline plat sheets as being no longer kept current "due to the extensive backlog and the perceived lack of importance of the data reflected in the drawings."[20] The memoranda warns that "failure to maintain the data formally on the Plat sheets and the decision not to generate Plat sheets for new work may be costly to PG&E in the future and it may be difficult to defend the non-existence of the data."[21] The as-builts would have contained "a compendium of hydrotests, land ownership and right-of-way documents, construction details for crossing and plan and profile data."[22] These as-builts probably contained much of the relevant information PG&E is now seeking to recreate through its MAOP validation efforts.[23]

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[17] *See, e.g.*, PG&E Remedies Brief, p. 5. CCSF, among other parties, addressed the credibility of these witnesses in its SB Opening Brief, pp. 9-13.

[18] Records Case ALJ June 20, 2011 Order Entering Memoranda From Former PG&E Employee into Record, Attachment A; also discussed in CCSF Opening Brief in I.11-02-016, p. 29.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] The PG&E employee who worked on MAOP validation in 1975 confirmed that the company was "required to have the records under GO-112-A and B, yes, prior to GO 112-C." Records case RT at 1071:16-18 (Phillips). This statement was simply acknowledging an obligation obvious within the industry. (Records PGE-4 (D.61269 Adopting GO 112.) This statement would not be remarkable except for PG&E's continued denial of its obligation to keep records. GO 112 required the utility to "maintain necessary records to establish compliance with the general order" and make such records "available for inspection at all times by the Commission or the Commission staff. GO112 at 301.1. See CCSF Records Opening Brief, pp. 6-28.

The record contains additional examples of warnings that PG&E did not appropriately heed. For instance, in 1948, 1965, 1975, 1989, 1996 the company's employees produced documents that identified problems that should have prompted corrective actions.[24] These documents should also have been reviewed and analyzed as part of PG&E's Transmission Integrity Management Program (TIMP) and should have resulted in the assessment and remediation of threats to pipeline integrity.[25] Despite PG&E's repeated claims that nothing it did after the installation of segment 180 could have prevented the San Bruno explosion, the record indicates that the appropriate assessment and remediation of manufacturing and construction defects and other threats to its pipelines would have provided PG&E with additional information that it could have used to ensure the integrity of its pipelines.[26] That information, used appropriately by a prudent operator, could have led PG&E to take actions that would have prevented or at least reduced the magnitude of the San Bruno explosion, and the severity of injuries and property damage resulting from the explosion.[27] At the very least, the financial consequences at issue here would be less had PG&E properly used the information available to it to operate and maintain its pipelines.

The inadequacies of PG&E's TIMP have not materialized as a result of "hindsight." They existed and were noticed a long time before the San Bruno explosion. In addition to the documents referenced above, in 2009 PG&E's consultant identified PG&E's risk assessment methodology as a "weakness."[28] Yet, PG&E failed to strengthen its risk assessment and failed to properly identify and assess potential threats. Had it done so, the violations at issue here would be fewer and PG&E might have avoided serious harm to the public.

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[24] CCSF SB Brief, pp. 18-21 (1948 and 1989 documents) and pp. 21-23 (1965, 1975, and 1996 documents). See also CCSF-1 at 5-13 and attached Exhibits 2, 3, 6-10.

[25] SB case CCSF-1 (Gawronski) at 5-8, 12-13. The 1989 memo addressed 1988 weld defect reports on Line 132.

[26] *Id.*

[27] PG&E's witness confirmed that the 1989 memorandum concerned a pipe with the same specifications as the pipe that exploded in San Bruno. Joint RT 567:23-27 (Harrison).

[28] SB case Joint 48 (October 20, 2009 WKMC Review of Pipeline IMP Documents) at p. 3; CCSF Remedies Brief, pp. 26-27.

PG&E also failed to properly consider and apply warnings from industry reports that identified concerns about the safety of DSAW pipe based on its age. The INGAA Report notes that failure in DSAW pipe is related to age and specifically mentions pipe around the same vintage as PG&E's 1948 DSAW pipe.[29] Further information in the INGAA Report noted that the SSAW and DSAW pipe made from steel produced by Kaiser Company had the most incidents reported.[30] Steel from Kaiser was used to produce pipe for PG&E.[31] There is no credible explanation for PG&E's failure to use this information to evaluate the integrity of its pipelines, as required by law.[32]

III. THE LARGE FINANCIAL CONSEQUENCES PG&E SOUGHT BY CPSD AND OTHER PARTIES ARE NOT UNCONSTITUTIONAL

The parties, including PG&E, generally agree that in determining appropriate sanctions in this case, the Commission should consider the factors it enumerated in D.98-12-075: 1) the severity of the offense; 2) the conduct of the utility to prevent, detect, and disclose and rectify the violation (PG&E refers to this factor as "utility good faith"); 3) the financial resources of the utility; 4) the totality of the circumstances; 5) role of precedent.[33] PG&E states that in addition, pursuant to the California Constitution, any sanctions must comport with the principle of proportionality.[34] PG&E argues that "[i]n conducting this proportionality inquiry, courts examine three general criteria; (1) the defendant's culpability; (2) the relationship between the penalty and the harm; and (3) 'the sanctions imposed in other cases for comparable misconduct.'"[35]

PG&E concedes however, as the City noted in its opening brief,[36] that a constitutional proportionality inquiry reviews criteria that are similar to the factors the Commission already

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[29] Joint 49 (Integrity Characteristics of Vintage Pipelines) at E-6.

[30] *Id.* at E-6 and Table E-6.

[31] SB case PG&E-7 (Tab 4-20: July 19, 1949 Moody's Report) at 2.

[32] See CCSF SB Brief at 28-30.

[33] D.98-12-075, *Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Adopted by the Commission in Decision 97-12-88* (1998) 1998 Cal. PUC LEXIS 1016, at *9; *see* PG&E Remedies Brief, p. 33.

[34] PG&E Remedies Brief, p. 24.

[35] PG&E Remedies Brief, p. 24.

[36] CCSF Remedies Brief, p, 8, fn 33.

considers in determining the size of a sanction.[37] Moreover, PG&E ignores important factors that weigh in favor of a large penalty. Finally, any proportionality assessment must consider the extent to which financial consequences to PG&E are remedial in nature rather than punitive.

PG&E argues that other parties have misapplied the last factor in the proportionality inquiry, "sanctions imposed in other cases for comparable misconduct." PG&E contends, inaccurately, that parties have called for an unduly narrow focus on cases decided by the Commission.[38] PG&E then purports to present the universe of analogous cases, and argues that these cases constrain the Commission from imposing sanctions as large as the financial consequences to PG&E sought by CPSD and the other parties here. PG&E's arguments are misplaced. First, a constitutionality assessment requires an assessment of the extent to which a sanction is punitive in nature, and "whether a penalty is grossly disproportional to the gravity of a defendant's offense," rather than PG&E's narrow focus on penalties assessed in other cases. Second and importantly, this case is not "merely" about a deadly gas explosion accident; serious as the explosion itself was, the case involves a long-standing and systematic failure by PG&E to safely maintain its natural gas system and associated recordkeeping, placing millions of people at risk for decades. This case is indeed unprecedented.

Further, PG&E argues that CPSD inappropriately alleged duplicative and overlapping violations.[39] However, PG&E's claim overlooks the myriad requirements PG&E violated by a systematic pattern of inadequate maintenance and recordkeeping.[40] In this case, CPSD proved that PG&E violated multiple requirements, many of them thousands of times over a long period of time.

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[37] PG&E Remedies Brief, p, 24.

[38] *See* PG&E Remedies Brief, p. 25; *but see* CPSD Remedies Brief, p. 57 citing the case of British Petroleum; City of San Bruno OB at 40, explaining that other gas explosion cases are not determinative, not because they involved cases outside the Commission's jurisdiction but because PG&E's own witness agreed they involved very different circumstances, usually involving much smaller pipelines, pipelines located away from densely populated residential areas, and significantly smaller utilities.

[39] PG&E CPSD Remedies Brief, p. 39.

[40] Taken to its absurd ultimate conclusion, by PG&E's analysis, a utility is better off undertaking a far-ranging systematic pattern of wrongdoing, than randomly violating several discrete requirements. This is because in the first case, the far ranging pattern should be considered one violation arising from one pattern of conduct, whereas the several discrete violations could each be penalized as a separate violation.

It is the breadth and duration of PG&E's wrongdoing, not CPSD's presentation of the case, which give rise to the extensive exposure to penalties faced by PG&E.

A. Important Factors Weigh In Favor Of Large Financial Consequence

Several important factors merit consideration in undertaking an assessment of the constitutionality of assessing very large financial consequences for PG&E in this case. Such inquiry extends far beyond PG&E's limited focus on fines and penalties assessed in the case of other substantially different gas explosions.

In reviewing a civil assessment pursuant to the constitutional strictures against excessive fines, it is necessary to determine first whether the assessment is punitive or remedial in nature, and then, whether a payment that is punitive is grossly disproportional to the offense. As stated by the Ninth Circuit, "[a] fine is unconstitutionally excessive if (1) the payment to the government constitutes punishment for an offense, and (2) the payment is grossly disproportionate to the gravity of the defendant's offense."[41] The Ninth Circuit has noted that there is no rigid set of factors that must be considered in reviewing a punitive civil sanction; but relevant factors include the severity of the offense, the statutory maximum penalty available, and the harm caused by the offense.[42] A number of important factors, ignored in PG&E's brief, weigh in favor of a very large penalty in this case.

The Ninth Circuit has stressed that in determining whether a penalty is grossly disproportionate to an offense, a court must respect that "'judgments about the appropriate punishment for an offense belong in the first instance to the legislature.'"[43] Thus, the penalties available under the statute in question provide a guide to an offender's level of culpability. In other words, if the sanction available for an offense is high, a court may conclude that the legislature views the harm to be punished as severe and must take this into account when it undertakes its excessive fines assessment.[44] Here the Legislature clearly views violations of the Public Utilities Code and the Commission's orders as

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[41] *U.S. v Mackby* (9th Cir. 2001) 261 F.3d 821, 829 ("*Mackby I*").

[42] *Horne v. United States Department of Agriculture* (9th Cir. 2011) 673 F.3d 1071, 1081, *cert. granted*, 133 S. Ct. 638 ("*Horne*").

[43] *Belice v. U.S. Department of Agriculture* (9th Cir. 2000) 203 F.3d 684, 699.

[44] *U.S. v Mackby* (9th Cir. 2003) 339 F.3d 1013, 1017-18 ("[t]he fact . . . that Congress provided for treble damages and an automatic civil monetary penalty per false claims shows that Congress believed that making a false claim to the government is a serious offense.")

significant as it has provided for significant penalties, deemed each day of a continuing violation to be a separate offense, and established no cap on overall penalties.

Further, the Ninth Circuit has explained that a substantial difference between the actual penalty imposed on an offender, and the maximum available penalties under the law, "weighs against a finding of gross disproportionality."[45] Given that PG&E's finances significantly constrain the amount of penalties that can be imposed in the case, any sanction imposed will necessarily be significantly less than the maximum penalty prescribed by the legislature. This factor weighs against a finding of a disproportionate penalty in this case.

In addition, the Commission must consider that a very large penalty in this case would result from the large number of violations over a long period of time, factors that were within PG&E's control. As the California Court of Appeals noted in a case involving a penalty for violations of the California Coastal Act of 1976, "[w]hile the fines total over $9.5 million, the amount is large only because Ojavan Investors violated the Coastal Act 73 times and refused to remedy the violation. In view of the record, we conclude the fines were proportional to the number of violations and appellants' flagrant disregard of the ... [p]rogram restrictions."[46] Similarly in this case, the total amount of the financial consequences legitimately applicable to PG&E, are substantial because of the very large number of violations.

Finally, the Commission should consider PG&E's very significant size. In *Sainez*, the California Court of Appeals upheld a penalty of $663,000 which represented 28.4 percent of the net worth of the defendants.[47] The court held "substantive due process protection against civil penalties under the rationale of *Hale* and *Kinney* allows inquiry into a defendant's full net worth, not just the value of the particular property at issue in the case."[48] The court explained that to limit itself to considering the property in question, "could pose problems seriously at odds with the policy goal of

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[45] *Id.*

[46] *Ojavan Investors, Inc. v. California Coastal Commission* (1997) 54 Cal.App.4th 373, 398 ("*Ojavan*"); see also, *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1316 ("*Sainez*") (defendants could not complain about a large fine that mounted over the course of some two years "when they had control over this time period yet allowed the penalties to accumulate).

[47] *Sainez*, 77 Cal.App.4th, at p. 1317.

[48] *Id.*, at p. 1319.

deterrence."[49] This penalty was imposed after defendants failed to maintain apartments during a two year period placing the public safety at risk (even though there were no illnesses or fatalities alleged). The court further explained

> Both parties acknowledge the City's legitimate police power goals of ensuring the health and safety of its residents and preserving its housing stock. . . . Served also is the legitimate police power device of "securing obedience" to the code requirements through penalties. . . . This requires more than compensation of tenant losses, a penalty that might achieve little or no compliance. "[C]ivil penalties may have a punitive or deterrent aspect, [but] their primary purpose is to secure obedience to statutes and regulations impose to assure important public policy objectives."[50]

The court also stressed that "[d]efendants had it within their control first to prevent and then to stop the accumulation of penalties."[51]

This case similarly relates to PG&E's long, standing and systematic failure to adhere to gas safety regulations. This case, however, is much more severe. The violations extended over decades and placed millions of PG&E's customers at risk. PG&E' wrongdoing here is orders of magnitude larger than that of the defendants in *Sainez*. Moreover, in this case the violations resulted in tragic deaths and significant property damage, whereas in *Sainez*, tenants were merely significantly inconvenienced. This case is also similar to *Sainez* in that PG&E here had repeated opportunities to make changes to its practices that could have reduced the harm or at least would have reduced the number of violations.

B. A Significant Portion Of An Assessment Levied On PG&E May Be Remedial Rather Than Punitive In Nature

While a very high punitive sanction is justified in this case, there is a high probability that the financial consequences imposed by the Commission on PG&E will involve a significant remedial component. The Commission can consider this in undertaking a proportionality assessment pursuant to the State and Federal Constitutions.

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[49] *Id.*

[50] *Id.*, at p. 1315 (citations omitted).

[51] *Id.*, at p. 1316.

CPSD has requested that the Commission assess against PG&E a total of $2.25 billion, and that the Commission should utilize its equitable powers to order PG&E to apply this amount to its Pipeline Safety Enhancement Program.[52] PG&E itself maintains that any "penalty" assessed in this matter should be directed to paying for gas safety projects and activities. San Francisco, however, urges the Commission to impose a fine and also require PG&E to pay for some of the extensive investments that are necessary to correct the violations identified in these cases. A balanced approach is needed to reduce the impact on ratepayers of the significant adverse financial consequences of PG&E's failure to maintain its gas system and records over a long period time. This failure has resulted in the need for extensive remedial measures now, some of which are necessary only because PG&E failed to maintain adequate records, and others of which are more expensive now than they would have been had they been timely undertaken by PG&E.[53]

Thus, the financial consequences the parties ask the Commission to impose on PG&E do not all serve the same purpose. Some portion is sought for remediation, while another portion is primarily punitive. While the Commission's decision in this matter is not yet known, given the position of various parties in this case, it is likely that the package of financial consequences the Commission will impose on PG&E will in part serve for deterrent purposes and in part as remediation.

The Ninth Circuit has explained "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."[54] Punitive civil sanctions are subject to review under the constitutional strictures against excessive fines. In the context of a combined punitive/remedial assessment, courts have taken two different approaches in undertaking an excessive fines analysis, which ultimately amount to the same thing. In some cases where it is possible to clearly identify the component of an

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[52] CPSD Remedies Brief, p. 70; other parties also argue for remedial measures in addition to penalties, see TURN Remedies Brief, pp. 2-3; DRA Remedies Brief, p.3.

[53] See e.g., *Natural Gas Pipelines,* 2012 Cal. PUC LEXIS 600, at p. *28 ("We . . . 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.'); at p. *113 ("absent PG&E's poor document management, ratepayers would not have been required to pay for retesting the 1956 to 1961 pipeline); CCSF-4 (Gawronski Testimony) in I.11-02-016 at 10-11 (finding that certain costs were caused by PG&E's failures); TURN Remedies Brief, pp. 7-8.

[54] *Mackby I*, 261 F.3d, at 830.

assessment that constitutes remediation, and the component that is punitive, courts have subjected only the punitive component to an excessive fines review.[55] In other cases, in undertaking an excessive fines assessment of a combined punitive/remediation assessment, the courts have considered the degree to which a sanction is intended to serve as remediation.[56] In either case, if sanctions are to a significant degree for remediation rather than punishment, this factor should weigh heavily against a finding of excessive fines.

The Commission may under Section 701 of the Public Utilities Code require that PG&E bear the financial consequences caused by its inadequate maintenance and record keeping rather than allowing PG&E to pass on these costs to ratepayers. Such remediation must be considered in assessing whether a penalty is constitutionally disproportionate to a fine or sanction.

IV. THIS CASE IS NOT LIKE THE SINGLE ACCIDENT CASES CITED BY PG&E

As other parties have noted, PG&E's case is unprecedented. It is not merely an investigation of the most serious gas explosion in California's history. After San Bruno the Commission undertook three separate investigations into: 1) PG&E's operations and practices and potential violations in connection with the San Bruno explosion; 2) PG&E's recordkeeping practices for its natural gas transmission system pipelines, and 3) PG&E's natural gas system operations and practices in locations with higher population density. In all three investigations, CPSD presented evidence of more than 50 years of systematically inadequate maintenance, and associated recordkeeping, with respect to a very large gas system, with particular shortcomings in high population density areas.[57] Thus, unlike cases cited by PG&E, this case involves a broad review of PG&E's maintenance and recordkeeping

[55] See *Horne,* 673 F.3d, at 1081.

[56] See e.g. *Ojavan*, 54 Cal.App.4th, at 373 (trial court permanent injunction requiring rescission of lot transfers was not punishment but equitable relief.); *Horne*, 673 F.3d, at 1081 (where a raisin producer and handler was required to pay nearly $700,000 after failing to comply with a requirement to maintain a raisin reserve, the court only reviewed the $202,600 civil fine component of the assessment pursuant to the excessive fines clause, because the remainder of the assessment was remedial in nature).

[57] CPSD Remedies Brief, pp. 6-36 detailing the large number of violations identified by CPSD in each OIR including not only the specific violations that resulted in the San Bruno explosion, but also practices that placed the entire system at risk; TURN Remedies Brief, pp. 14-23.

operations, revealing long-standing, serious, and systematic failures in the context of a very large and sophisticated utility.[58]

This failure placed millions of people at risk for decades. As DRA explained in its opening brief:

> Nothing compares to the extent or level of utility malfeasance the Commission faces in these proceedings, including evidence of thousands of violations, many committed over a fifty year time frame. In short, we are faced with an unrepentant utility that is responsible for the most destructive utility accident in California history. Further, when investigators scratched only the surface, it became immediately evident that the utility did not know where its gas pipelines were located, how they were constructed, or what condition they were in. These deficiencies necessitated a massive effort to identify accurate records for every pipeline and to test and/or replace over 950 miles of pipeline for which records could not be found.[59]

PG&E concedes that, consistent with the recommendation of the National Transportation Safety Board and the Commission's direction, in January 2011 it validated the maximum allowable operating pressure for all 6,750 miles of its pipelines, and hydro-tested an unprecedented number of transmission pipeline miles.[60] PG&E fails to mention (or even acknowledge) that this unprecedented effort was required to correct decades of inadequate maintenance and recordkeeping.

PG&E also purports to demonstrate that the financial consequences recommended by parties in this case are excessive referring to thirteen cases, while conceding that "the facts of the various cases have differing levels of comparability to the current proceedings."[61] PG&E itself suggests that the most relevant cases are Rancho Cordova, Carlsbad and Allentown. These cases, while distinguishable in key aspects as discussed above, at least relate to a negligent utility and a natural gas pipeline explosion. A fourth case, the 1999 Olympic accident, actually supports a very high penalty in this case. It is hard to see how any of the other nine cases have any particular relevance to this case.

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[58] See, e.g., *Natural Gas Pipelines,* 2012 Cal. PUC LEXIS 600; NTSB Report at xi and throughout; Independent Panel Report at pp. 5-15.

[59] DRA Remedies Brief, p. 35.

[60] PG&E Remedies Brief, p. 5.

[61] PG&E Remedies Brief, p. 89.

Other parties have argued that since other gas explosion cases involve significantly less severe circumstances, they cannot constrain the Commission's ability to apply an appropriate fine now.[62] Relying on the Commission's investigation of Southern California Edison Company's failure to comply with GO 95 and GO 128, PG&E argues that "the Commission should look primarily to other cases involving fatal natural gas pipeline accidents because they provide 'reasonably comparable factual circumstances.'"[63] In fact, in the *Edison* case the Commission stated that it will consider: "(1) previous decisions that involve reasonably comparable factual circumstances and (2) any substantial differences in outcome."[64] In a context where "[n]either party identified prior decisions with reasonably comparable facts," the Commission rejected Edison's argument that the Commission could not therefore penalize Edison.[65] In other words, *Edison* stands for the proposition that the fact that there is no analogous case does not constrain the Commission from imposing appropriate penalties.

A. In Rancho Cordova The Commission Did Not Investigate or Identify Long-Standing, Systemic Inadequate Maintenance and Record-Keeping

In its opening brief, PG&E notes that the *Rancho Cordova* case illustrates that the penalty sought in this case is excessive, as *Rancho Cordova* involved a gas explosion which resulted in a loss of life.[66] However, *Rancho Cordova* is a very different case. PG&E itself notes that PG&E faced a penalty of $97 million or more, assuming that all of CPSD's alleged violations were proven and the maximum continuing penalty amount of $20,000 per day was imposed.[67] In this case, given the breadth of the investigations, and the very large number of violations found, PG&E faces financial consequences in the hundreds of billions of dollars.[68] *Rancho Cordova* focused fairly narrowly on the

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[62] CPSD Remedies Brief, pp. 56-58; DRA Remedies Brief, pp. 35-36, citing D.04-04-065, *Order Instituting Investigation Into Southern California Edison's Electric Line Construction, Operation, and Maintenance Practices* (2004) 2004 Cal. PUC LEXIS 207, at pp. **64-65 ("Edison").

[63] PG&E Remedies Brief, p. 26.

[64] *Edison*, 2004 Cal. PUC LEXIS 207, at pp. **64-65.

[65] *Id.*, at p. *65.

[66] PG&E Remedies Brief, p. 25.

[67] D.11-11-001, *Investigation into the Gas Explosion and Fire in Rancho Cordova* (2011) 2011 Cal. PUC LEXIS 531, at p. *68 (Appendix A) ("*Rancho Cordova*").

[68] *See, e.g.*, CPSD Remedies Brief, p. 5, TURN Remedies Brief, pp. 10-23; DRA Remedies Brief, pp. 16-18, CCSF Remedies Brief, p. 8.

particular circumstances and violations that gave rise to the explosion in that case. In hindsight, the Commission should have initiated a broader investigation of PG&E's maintenance and recordkeeping practices after that terrible accident, but it did not. Now that CPSD has conducted a broad investigation, it has uncovered long-standing, serious and systematic violations. Thus, Rancho Cordova is not an analogous case. Moreover, the fact that the Commission was slow to act in the prior case cannot constrain it from ordering now the considerable remedial measures required to remedy the large number of violations found, or from imposing a penalty commensurate with the significantly inadequate maintenance and recordkeeping that has now been demonstrated.

PG&E also contends that in *Rancho Cordova*, the Commission determined that the risk of a $97 million penalty was a sufficient deterrent for a utility of PG&E's size.[69] However, the Commission stated that this exposure would serve as a significant deterrent to ensure that *similar incidents* do not occur in the future.[70] Thus, in *Rancho Cordova*, where the Commission did not have before it yet the results of a broad investigation into PG&E's systematic maintenance and recordkeeping practices, the Commission's focus was on deterring particular incidents. Here, having identified a systemic problem, the Commission must establish penalties adequate to fundamentally change a corporate culture.[71]

B. The Accident in Carlsbad Did Not Occur in An Urban Residential Area, There Was No Deficient Emergency Response or Pervasive Inadequate Recordkeeping

PG&E sets forth a list of "comparable" cases and argues that the ability of the Commission to impose large financial consequences on PG&E are constrained by those imposed in these cases.[72]

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[69] See PG&E Remedies Brief, pp. 93-94.

[70] *Rancho Cordova,* 2011 Cal. PUC LEXIS 531, at p. *69 (Appendix A).

[71] As DRA notes, "Given these extreme circumstances, the greatest challenge facing the Commission in these cases is to determine what remedies will be *effective* to make PG&E operate safely." DRA Remedies Brief, p. 3.

[72] PG&E further attempts to limit financial consequences the Commission can impose by making the new point that "[t]he federal Pipeline Safety Act (PSA) . . . itself acts as a constraint on the Commission's exercise of its authority to enforce gas safety standards through injunctive relief and civil penalties. PG&E Remedies Brief, p. 31, fn 97. The PSA provides, among other things, that states shall certify that they enforce safety standards 'under the law of the State by injunctive relief and civil penalties *substantially the same* as provided [in the PSA].' 49 U.S.C. §60105(b)(7)(emphasis added)." PG&E OB at 31, footnote 97. This suggestion, made by PG&E in a footnote only, in its last brief, after an extensive three-year litigation process, takes the language in question out of context to

PG&E's own witness admitted that these cases involve "very different circumstances."[73] In fact, the cases cited by PG&E are distinguishable.

PG&E stresses, in particular, purported similarities between the San Bruno accident and an accident in Carlsbad, New Mexico, involving El Paso Natural Gas ("El Paso).[74] PG&E is correct that the Carlsbad incident and the explosion at San Bruno have some facts in common. A 30 inch pipe installed in 1950 ruptured; 12 people died; the NTSB found that El Paso's gas safety program was inadequate; lax regulatory oversight contributed to the accident.[75] However, there are important distinctions that make PG&E's case much more severe. Before delving into these, it is worth pointing out that the lax regulatory oversight in both cases is tragic but irrelevant for purposes of determining whether the Carlsbad incident and San Bruno are similar. This case is about PG&E's wrongdoing. Neither the Commission nor New Mexico federal inspectors are under investigation here.

There are three key distinctions that justify significantly greater financial consequences in the case of PG&E. First, the PG&E accident happened in an urban residential area and the resulting damage was orders of magnitude more severe than the damage in the Carlsbad explosion. Second, whereas El Paso's response to Carlsbad explosion was reasonable, PG&E's response to the explosion in San Bruno exacerbated the damage. Third, while the Carlsbad accident revealed that El Paso's practices for prevention and detection of internal corrosion within high-pressure, interstate gas

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give it an unsupportable connotation. Section 60105 is the section that gives States the option to prescribe and enforce safety standards and practices for intrastate pipelines, provided that the States adopt the standards set forth in the PSA. States wishing to prescribe and enforce safety standards and practices for intrastate pipelines must be certified under Section 60105, and must show that they meet certain minimum requirements, including having adopted each of the standards in 49 U.S.C. Chapter 601 on Safety, and provided that they have authority to enforce these standards by injunctive relief and civil penalties like those available to the federal government under 49 U.S.C. §§ 60120 and 60122. 49 U.S.C. § 60104(c) makes it clear that States certified to prescribe and enforce safety standards for intrastate pipelines may also adopt more stringent standards provided that these are compatible with the minimum standards of the PSA. Thus, the most reasonable interpretation of the language in 49 U.S.C. §60105(b)(7) is that States may also adopt more stringent enforcement mechanisms than those available to the federal government, and may certainly adopt enforcement mechanisms including penalties for failures to comply with more stringent State requirements. It is of no use to be able to adopt more stringent standards if these cannot be enforced. The PSA evidences no intent to constrain the penalties states may impose under state law.

[73] Evidentiary Hearing Transcript (PG&E/Fornell) at p.1584: 23-28, and p. 1585: 1-4.

[74] PG&E Remedies Brief, pp. 26-29.

[75] PG&E Remedies Brief, pp. 27-28.

transmission pipelines were inadequate, that case did not also identify widespread defective recordkeeping practices, a disregard for maintaining safety in high consequence areas, and inadequate emergency response practices, as has been the case here.

The Carlsbad accident occurred in a sparsely populated rural area.[76] The accident site itself was on private property with numerous warnings about the presence of a high pressure gas line.[77] The high mortality rate resulted from the presence of a large family camping 675 feet from the crater, between the crater and the Pecos River.[78] Because the area was so remote, the NTSB estimated that the total property damages and losses were $998,296.[79]

In contrast, the San Bruno accident happened in a densely populated urban area.[80] Eight people were killed, and 58 injured, 10 of them seriously.[81] 38 homes were destroyed, 17 suffered severe to moderate damage, and 53 additional homes were affected.[82] 74 vehicles were damaged or destroyed and the area included a park and a playground.[83]

Further, notwithstanding the rural setting, the response of El Paso to the accident was significantly more effective than PG&E's. The NTSB found that El Paso employees were at the scene within nineteen minutes of the rupture and "worked quickly and effectively to stop the flow of natural gas from the ruptured pipeline and extinguish the fire."[84] Less than an hour had elapsed from the time of the explosion and recovery efforts began on site.[85]

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[76] PG&E's Request for Official Notice, Ex. 1 at 3-4 (NTSB, Pipeline Accident Report: Natural Gas Pipeline Rupture and Fire Near Carlsbad, New Mexico, August 19, 2000 (Feb. 11, 2003) ("Carlsbad, NTSB Report").

[77] Carlsbad, NTSB Report at 1.

[78] Carlsbad, NTSB Report at 3 and 9.

[79] Carlsbad, NTSB Report at 1.

[80] San Bruno Ex. CPSD-9 (NTSB Report) ("San Bruno, NTSB Report") at 1.

[81] San Bruno, NTSB Report at 18.

[82] San Bruno, NTSB Report at 19.

[83] San Bruno, NTSB Report at 19.

[84] Carlsbad, NTSB Report at 39.

[85] Carlsbad, NTSB Report at 8.

In contrast, notwithstanding the sensitive urban nature of the accident site, PG&E did not close the valves and isolate the area of the rupture until ninety-five minutes after the explosion.[86] PG&E employees failed to notify first responders that an accident involving its pipeline had occurred, even after they deduced this to be the case.[87] The fires were not declared 75% contained until 4:24 a.m. on September 10, 2010, about 10 hours and 13 minutes after the rupture.[88] The NTSB concluded:

> PG&E took 95 minutes to stop the flow of gas and to isolate the rupture site – a response time that was excessively long and contributed to the extent and severity of property damage and increase the life-threatening risks to the residents and emergency responders. The National Transportation Safety Board found that PG&E lacks a detailed and comprehensive procedure for responding to large scale emergencies such as a transmission pipeline break, including a defined command structure that clearly assigns a single point of leadership and allocates specific duties to supervisory control and data acquisition staff and other involved employees. PG&E's supervisory control and data acquisition system limitations caused delays in pinpointing the location of the break.[89]

The Consent Decree in Carlsbad does suggest that the Carlsbad accident was related to systematic inadequacies in El Paso's practices. The Consent Decree notes that after the rupture, El Paso "committed to develop and implement a program of best practices concerning the prevention and detection of internal corrosion within high-pressure, interstate natural gas transmission pipelines."[90] This case however, involves in addition to a systematically inadequate risk analysis and integrity management program,[91] pervasively deficient record keeping,[92] violations of requirements designed to ensure the safety of high consequence areas,[93] and deficient emergency response practices.

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[86] San Bruno, NTSB Report at 124.

[87] San Bruno, NTSB Report at 100.

[88] San Bruno, NTSB Report at 18.

[89] San Bruno, NTSB Report at x.

[90] Consent Decree, *United States v. El Paso Natural Gas Co.,* No. Civ. 07-715 (D.N.M. Oct. 5, 2007 ("Carlsbad Consent Decree") at 2, *available at* http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420011004/ 420011004_Final%20Consent%20Decree_10052007.pdf.

[91] CPSD Remedies Brief, pp. 8-14.

[92] CPSD Remedies Brief, pp. 14-33; *see also* San Bruno, NTSB Report at 75-76.

[93] CPSD Remedies Brief, pp. 34-36; *see also* San Bruno, NTSB Report at 76.

C. There Are Significant Differences Between San Bruno and Allentown

PG&E notes that there are some similarities between San Bruno and the explosion at Allentown, Pennsylvania.[94] The explosion and fire in that case killed five people, seriously injured three others, and destroyed eight homes in a residential neighborhood. The explosion occurred when a 12-inch cast-iron natural gas main circumferentially fractured.[95]

There are four significant differences between Allentown and San Bruno that the Commission should consider in its proportionality analysis. First, is the cause of the occurrence. It does not appear that there was any evidence of a systematic failure by the utility to inspect and maintain its facilities. In addition to having old cast-iron pipes, it appears that the only fault ascribed to the utility was the failure to have sufficient safety testing and odorant monitoring.[96] Second, is the fewer number of people seriously injured and the fewer number of properties that were damaged or destroyed. Third, is that Pennsylvania law at the time limited the potential penalties and fines to $500,000 per accident.[97] The presence of the cap makes it impossible to compare the two penalties. Fourth, the Allentown penalty was a result of a settlement between the parties. Settlements always involve some sort of compromise. There is no way to know what penalty would have been imposed had the matter gone to a hearing. Fourth, is that the utility involved in that incident is significantly smaller than PG&E.[98]

D. The 1999 Olympic Accident Case Supports Imposition of Large Penalties Here

The 1999 Olympic Pipeline Company accident in Bellingham, Washington (1999 Olympic Accident) is cited by PG&E to support an insignificant penalty. In fact, the case lends support to a very large penalty here. The investigations followed the accident identified failings by Olympic

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[94] PG&E Remedies Brief, p. 30.

[95] *See* PGE Remedies Brief, p. 30 (citing PG&E's Request for Official Notice, Ex. 5 at 3-4 (Joint Settlement Petition, Pa. Pub. Util. Comm'n, Bureau of Investigation & Enforcement v. UGI Utils., Inc. (Oct. 3, 2012), pp. 6-8.

[96] *See* PG&E's Request for Official Notice, Ex. 5 at 3-4 (Joint Settlement Petition, Pa. Pub. Util. Comm'n, Bureau of Investigation & Enforcement v. UGI Utils., Inc. (Oct. 3, 2012)

[97] *See* PG&E Remedies Brief, p. 31.

[98] The UGI Companies at issue in that proceeding serve only 585,000 customers. *See* PG&E's Request for Official Notice, Ex. 5 (Joint Statement in Support of UGI Utils., Inc. (Oct. 1, 2012) at p. 8. PG&E serves some 15 million customers.

Pipeline Company that contributed to the accident and killed three boys at the site. The utility failures identified were neither as long-standing nor pervasive as those shown here. Nonetheless, the penalties for the 1999 Olympic Accident were $112 million (about four times higher than reported by PG&E in its brief) and included convictions for a felony and two misdemeanors. This was more than a decade ago, and in the case of a company that is significantly smaller than PG&E.[99] Here, the Commission is not pursuing criminal convictions, but rather only penalties and remediation.

Key facts of the 1999 Olympic Accident are as follows.[100] On June 10, 1999, in Bellingham, Washington a 16-inch fuel line owned by the Olympic Pipe Line Company ruptured in spilling 277,200 gallons of gasoline into Hanna and Whatcom creeks. The subsequent explosion killed three boys. The NTSB investigators found that the Olympic pipeline explosion was caused by a cascading series of events rather than a single catastrophic failure of the fuel pipe. The NTSB cited as causes for the accident: damage caused in 1994 by IMCO General Construction Company while conducting excavation work at nearby Whatcom Falls Water Treatment Plant; the failure of the Olympic Pipe Line Company to identify or repair the damage; a faulty computer system which failed to respond to repeated indications that pressure was building up inside the pipeline; a faulty pressure relief valve; and failure to adequately train its employees.

A criminal investigation by the Environmental Protection Agency resulted in a seven-count indictment by a federal grand jury in Seattle in September 2001. The indictment charged Olympic Pipe Line, and Equilon Pipeline, which had run the Olympic in 1999, with five felony violations of the Hazardous Liquid Pipeline Safety Act and two misdemeanor violations of the Clean Water Act. Included in the indictment were three Olympic employees, a vice-president/manager, a supervisor, and the controller at the time of the accident. On December 11, 2002, Olympic Pipe Line pleaded guilty in

[99] The company's website indicates that Olympic Pipeline Company operates a 400-mile pipeline system. Whereas BP now operates the system, this was not the case in 1999 at the time of the accident. See http://www.olympicpipeline.com/history.html

[100] NTSB Report on Bellingham, WA - NTSB/PAR – 02/02.

U. S. District Court, Seattle, to one felony count under the Hazardous Liquid Pipeline Safety Act and two Clean Water Act misdemeanors. Equilon Pipeline entered no-contest pleas to the same violations. Under the plea agreement, the companies agreed to pay a record $112 million to settle all federal criminal fines and most civil claims against them. According to U. S. Attorney John McKay, the pleas marked the first time a pipeline company had been convicted under the 1979 Hazardous Liquid Pipeline Safety Act. Two Olympic Executives were sentenced to jail and one was placed on probation for one year.[101]

E. The Other Incidents Cited By PG&E Have Little To No Relevance To This Case

As discussed in more detail below, the remaining incidents identified for comparison purposes by PG&E all have facts completely dissimilar from this case. Moreover, four cases took place in New Jersey and Pennsylvania, jurisdictions where penalties are capped by statute; to very low amounts.[102] The only CPUC cases cited by PG&E that involve any kind accident are the San Diego Gas and Electric fire cases, which again have very different facts. The other CPUC cases are primarily consumer fraud cases against telecommunications companies and do not involve any damage to property or fatalities. Thus, they are entirely irrelevant and are not discussed further below.

- Kinder Morgan Energy Partners, Walnut Creek, CA (November 9, 2004): This case did not involve violations of the PSA. Rather, the case involved an explosion at a construction site in Walnut Creek California that killed five workers. The investigation by OSHA found that the disaster was triggered by a backhoe operator digging a trench for a water line. He nicked a high-pressure petroleum line owned by Kinder Morgan, and it exploded. KMGP Services Co., a subsidiary of Kinder Morgan Energy Partners, was charged by Contra Costa County with six willful violations of Labor Code § 6425(a) and Construction Safety Orders § 1511(b), for failing to make a thorough survey of site conditions to determine predictable hazards. KMGP pleaded no contest to six felony counts of violating the state Labor Code and Title 8. As part of the plea, KMGP agreed to pay $10 million in fines in the criminal case and another $5 million to resolve a civil case. [103]

[101] U.S. Department of Transportation Investigation Summary dated June 19, 2003.

[102] N.J.A.C. 14:7-2.7; PA 66 Section 3301(c)*; see also* PA Public Utilities Commission, Jt. Motion of Chairman Robert F. Powelson and Vice Chairman John F. Coleman, Jr. Docket No. C-2012-2308997, at fn 4, ("We note that the Legislature recently increased the allowable civil penalties the Commission can impose under Section 3301(c), to $2,000,000. However, the Commission is bound by the maximum allowed civil penalty at the time of the explosion, which is $500,000.")

[103] OSHA Accident Report No. 201510251 – Report ID. 0950651.

- Public Service Enterprise Group, Bergenfield, New Jersey (December 13, 2005): This case involved a natural gas explosion at an apartment building that killed three people. The NTSB found the probable cause of the explosion was work done by a contractor not related to the utility. The utility settled the case with the Public Utilities Commission and paid a $250,000 fine without admitting any wrongdoing. [104] At the time, the penalty cap in the state was $100,000 for each violation up to $1,000,000.

- Dominion Peoples Natural Gas Company, Plum Borough, Pennsylvania (March 5, 2008): This case involved a pipeline rupture and explosion that killed one person, seriously injured another, destroyed three houses and damaged eleven others. However, NTSB investigators found that the utility was not at fault. Moreover, this accident took place in Pennsylvania, where as stated above, penalties are capped at a very low level. The NTSB investigators determined that the probable cause of the explosion was excavation damage by a third party contractor to Dominion Peoples' two-inch distribution line. Notwithstanding not being at fault, in order to settle the claim made by the Pennsylvania Public Utilities Commission, and without admitting any wrongdoing, the utility paid $80,000.[105]

- Kleen Energy Plant, Middleton, Connecticut (February 9, 2010) This case involves an explosion at a construction site of a Kleen Energy power plant that killed six workers. The U.S. Chemical Safety and Hazard Investigation Board conducted an investigation and determined the cause of the explosion was planned work activity at the site that led to large releases of flammable natural gas in the presence of workers and ignition sources. The explosion occurred during the planned cleaning of fuel gas piping, part of the commissioning and startup phase of the Kleen Energy project. While tragic, this case was at a power plant, presumably away from residential areas. It did not involve harm to the general public. It did not involve a gas pipeline. It did not systemic and longstanding failures on the part of the utility to maintain its facilities and associated recordkeeping deficiencies.[106]

- San Diego Gas and Electric Company (SDG&E), Southern California (2007). In the wake of severe fires in Witch Creek, Guejito and Rice, CPSD conducted an investigation of SDG&E and its potential role in the fires. CPSD's report alleged that that SDG&E violated conductor clearance and tree trimming requirements, and that SDG&E failed to cooperate with the investigation. [107] The case was ultimately settled. SDG&E did not admit any safety violations although it acknowledged its failure to cooperate with CPSD.[108] SDG&E agreed to pay a fine of $14,350,000 to general fund and to undertake remedial measures to prevent future incidents.[109] While the damage from the fires was significant, unlike in this case, the

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[104] NJ Board of Public Utilities, Order Adopting Settlement, Docket No. GO07050327 and GO07050326 at p. 2.

[105] NTSB Report on Plum Borough, PA - NTSB/PAR – 08/01.

[106] CSB/U.S. Chemical Safety Board Report 06/28/2010.

[107] Order Instituting Investigation, at pp. 2-4, I. 08-11-006 (11-12-2008).

[108] D.10-04-047, *Investigation on the Commission's Own Motion into the Operations and Practices of San Diego Gas & Electric Company Regarding the Utility Facilities linked to the Witch and Rice Fires of October 2007*(2010) 2010 Cal. PUC LEXIS 142, at p. *3.

[109] *Id.*, at *7.

Commission's decision adopting the settlement does not give any indication of long-standing and systemic violations of safety standards by SDG&E.

V. THE COMMISSION HAS RECOGNIZED THAT VIOLATIONS OF REQUIREMENTS RELATED TO PIPELINE SAFELY AND MAINTENANCE ARE SEVERE.

In addition to the actual physical harm caused by the San Bruno explosion, PG&E's failure to adequately maintain its pipelines or the associated records threatened actual physical harm to millions of people and their property. The Commission has stated that "[v]iolations which cause actual physical harm to people or property are generally considered the most severe, *with violations that threaten such harm closely following*."[110]

In Resolution ALJ-277, the Commission considered violations of leak survey requirements, related to 13.83 miles of gas distribution mains and 1,242 services.[111] Because 16 plat maps were not included in PG&E's leak survey schedule, the distribution mains and services were not surveyed during two decades even though federal regulations require such surveys every five years.[112]

Even though these violations did not result in an accident, and were self-reported by PG&E, the Commission stressed that they were very severe. The Commission stated:

> Gas, electric and other utilities provide services using inherently hazardous materials which require safe operating practices and facilities. Safety for the public and utility employees is essential. We have repeatedly stressed that the Commission's primary concern is safety. For example, in our original adoption of GO 112 we stated that the safety rules contained in the General Order, no matter how carefully and well prepared, could not and did not:
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> . . . remove or minimize the primary obligation and responsibility of responds [gas utilities] to provide safe service and facilities in their gas operations. Officers and employees of the respondents must continue to be ever conscious of the importance of safe operating practices and facilities of their obligation to the public in that respect. . . .
>
> We have continuously and consistently emphasized safety. This was underscored recently when we said the "duty to furnish and maintain safe equipment and facilities is paramount for all California public utilities."[113]

[110] Resolution ALJ-277 Affirming Citation No. ALJ-274 2012-01-001 Issued to Pacific Gas and Electric Company for Violation of General Order 112-E (2012) ("Resolution ALJ-277") at 7.

[111] Resolution ALJ-277 at 2.

[112] Resolution ALJ-277 at 2-3.

[113] Resolution ALJ-277 at 5.

The Commission explained further: "PG&E's offenses were severe. Leak surveys are the primary industry tool available to detect and correct gas leaks before they become serious. Moreover, leak survey data provides critical information that operators must consider in determining the need and schedule for necessary maintenance or replacement. . . . The potential public harm from these violations was great. The violations were significant, with the capacity for serious injury to persons and property . . . ."[114]

Here, there are many more violations, extending over a longer period of time, and involving many more miles of gas pipeline.[115] In the case of Resolution ALJ-277, application of the most severe penalty for each possible day of each violation could have resulted in a penalty of over $500 million dollars.[116] In this case application of the more severe penalty for each possible day of each violation would result in a penalty of hundreds of billions of dollars. In Resolution ALJ-277, the Commission opted for a penalty that was a little over 3% of the total possible penalty. Here financial consequences of $2.5 billion dollars are far less than 3% of the total possible penalty of hundreds of billions of dollars.

VI. CPSD HAS NOT IMPROPERLY ALLEGED DUPLICATIVE OR OVERLAPPING VIOLATIONS

PG&E argues that CPSD has improperly inflated the number of violations subject to penalties by "alleging numerous duplicative violations both within and across" the three proceedings at issue here and by "transform[ing] single categories and courses of conduct into numerous individual alleged single violations."[117] Citing scant and misleading evidence of overlap and duplication, PG&E argues that the Commission should reject many of CPSD's alleged violations because "they do not constitute

[114] Resolution ALJ-277 at 6-7.

[115] *See, e.g.*, CPSD Remedies Brief, p. 5 ("CPSD has proven more than one hundred violations that continued for years, some as long as 54 years"), pp. 7-36.

[116] Resolution ALJ-277 at 4, fn 6.

[117] PG&E Remedies Brief, p. 39.

separate offenses."[118] Instead, PG&E argues that the Commission should "group [CPSD's] alleged violations by category."[119]

PG&E's argument ignores the fact that the penalties here concern three separate proceedings, each with a huge record investigating fundamental short comings in PG&E's pipeline maintenance and record keeping practices over decades, and demonstrating thousands of individual violations. Where, as here, the facts and the law support multiple violations, there is no basis for the Commission to either reject those individual violations or to group them into categories simply to reduce the number of violations. The Commission should instead determine whether CPSD has met its burden of proof. Moreover, imposing financial consequences on PG&E for each of its individual violations does not violate PG&E's due process rights.[120]

A. As A Factual Matter, CPSD Has Properly Alleged That Certain PG&E Conduct Can Be A Basis For Multiple Violations

A review of some of PG&E's claims of overlap and duplication demonstrates how PG&E's claims are misplaced. For example, PG&E has argued that there is overlap between violations alleged in the San Bruno and Records proceedings.[121] One of those concerns standards for conducting and document hydrostatic testing on Segment 180.[122] In this regard, in the San Bruno proceeding CPSD claims that: "4. PG&E violated Section 841.412(c) by not conducting a hydrostatic test on Segment 180 post-installation, creating an unsafe system in violation of Section 451." In the Records proceeding, CPSD alleges that: "3. PG&E violated Cal. Public Utilities Code Section 451, ASME Standards Section B31.8, General Orders 112, 112A, and 112B Section 107 for failure to retain

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[118] PG&E Remedies Brief, p. 39.

[119] PG&E Remedies Brief, p. 42. PG&E has not provided the Commission with any assistance or advice has to how those alleged violations could be grouped.

[120] While PG&E has claimed that the fines purposed by CPSD and interveners are excessive under Article I section 7(a) of the California Constitution, PG&E wants to somehow preserve its claim that the proposed fines somehow would deprive PG&E of its right to due process of law. (*See* PG&E Remedies Brief, p. 24, fn 56.) Yet, PG&E admits that the analysis of the two claims "is the same" and freely cites due process cases to support its excessive fines claim. (*See* PG&E Remedies Brief, pp. 24-25 and fn 56.) For these reasons, a determination that the proposed fine was not excessive would likely bar PG&E from separately litigating the issue of whether the fines also were violative of its right to due process of law.

[121] PG&E Remedies Brief, p. 39.

[122] PG&E Remedies Brief, p. 39.

pressure test records for Line-132, Segment 180." There is nothing duplicative about these allegations. There is a difference between failing to properly conduct required tests and failing to maintain records.

PG&E also claims overlapping of violations within the different proceedings. PG&E claims for example that in the San Bruno proceeding CPSD has improperly turned the alleged deficiency in girth welds that CPSD noted in its January 2012 report into two separate violations.[123] Yet, PG&E has not shown there is anything improper about those allegations. CPSD has properly claimed that these deficient welds violate two different pipeline safety requirements: (i) Section 811.27(E) of ASME B31.1.8-1955, which concerns the weldability of the pipes and requires test welding; and (ii) Section 1.7 of API standard 1104, which concerns standards of acceptability and describes certain types of defects such as incomplete fusion.[124] Section 811.27(E) concerns PG&E's duty to determine whether the pipe is acceptable, while Section 1.7 establishes the acceptability standards. For this reason, there is nothing duplicative about those violations.

PG&E's overlap and duplication arguments in the Recordkeeping proceeding are similarly deficient. For example, PG&E claims that CPSD has alleged that PG&E's "failure to maintain pipeline history files" are separate from its failures to "retain design and pressure test records, leak records, and complete and accurate job files."[125] The best way to understand this argument is to look at the CPSD violations PG&E is referring to. They are as follows:

- "17. PG&E violated Cal. Public Utilities Code Section 451, and ASME Standards Section B31.8, for Pipeline History Records Missing."[126]
- "18. PG&E violated Cal. Public Utilities Code Section 451, California Public Utilities Act Article II Section 13(b), ASME Standards Section B31.8, General Orders 112, 112A, and 112B Section 107 for Design and Pressure Test Records Missing." [127]
- "21. PG&E violated Cal. Public Utilities Code Section 451, California Public Utilities Act Article II Section 13(b), ASME Standards Section B31.8, General Orders 112,

[123] PG&E Remedies Brief, p. 40, fns 148-49.

[124] *See* CPSD Remedies Brief, 9 (SB Violations 9 and 10).

[125] PG&E Remedies Brief, p. 41 (footnotes omitted).

[126] PG&E Remedies Brief, p. 41, fn 159.

[127] *See* PG&E Remedies Brief, p. 41, fn 160.

112A, and 112B Section 107 for Pre-1970 Leak Records missing, incomplete and inaccessible." [128]

- "22. PG&E violated Cal. Public Utilities Code Section 451, ASME Standards Section B31.8, General Orders 112, 112A, and 112B Section 107 for Post 1970 Leak Records incomplete and inaccessible repair records." [129]
- "16. PG&E violated Cal. Public Utilities Code Section 451, ASME Standards Section B31.8, for Job Files Missing and Disorganized." [130]

In its brief, CPSD doesn't just simply identify the violations quoted above. Following most of these violations are detailed discussions of the wrongful acts supporting the violations. When these discussions are considered, it becomes clear how different requirements give rise to separate violations.

For example, Violation 17 relates to missing Pipeline History Files, and concerns PG&E's decision to stop using those files sometime as early as 1987.[131] Violation 18, on the other hand, concerns PG&E's failure since 1955 to conduct strength tests on its pipelines and to maintain records of those strength tests.[132] Violations 21 and 22 concern PG&E's failure to maintain records of any pipeline leaks both before and after 1970.[133] Violation 16 concerns among other things PG&E's failure to index millions of pages of data or to keep records in any manner in which they could be accessed.[134] Each of these violations thus relate to a separate and distinct recordkeeping obligation that PG&E was required to comply with and did not and are accordingly separate and distinct.

These examples illustrate that CPSD has properly identified numerous violations of these different legal requirements for which the Commission can impose fines and penalties. The Commission should adopt CPSD's proposal that the Commission impose separate fines and penalties for each of the stated violations.

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[128] *See* PG&E Remedies Brief, p. 41, fn 161.

[129] *See* PG&E Remedies Brief, p. 41, fn 161.

[130] *See* PG&E Remedies Brief, p. 41, fn 162.

[131] *See* CPSD Remedies Brief, pp. 22-23.

[132] *See* CPSD Remedies Brief, pp. 23-24.

[133] *See* CPSD Remedies Brief, p. 25.

[134] *See* CPSD Remedies Brief, p. 22.

B. The Manner In Which CPSD Has Presented The Violations Is Consistent With The Commission's Past Treatment Of Multiple Violations Related To the Same Wrongful Conduct

PG&E argues that Commission "precedent" somehow requires the Commission to ignore the numerous and separately supported violations and instead to "focus[ ] on categories of omissions, or courses of conduct."[135] While the Commission decisions cited by PG&E support the argument that the Commission has the authority to group violations, those decisions do not require the Commission to do so. In other cases, the Commission has found that it can impose fines or penalties for multiple violations related to the same general body of wrongful conduct.

Where the record supports a large number of distinct violations, the Commission has penalized public utilities for thousands of violations.[136] In one case, the Commission fined Qwest Communications Corp. $20,340,000 for 8,362 separately established slamming and cramming offenses perpetrated on utility customers ($5000 for each slamming offense and $500 for each cramming offense).[137] On rehearing, the Commission had no trouble finding that it was appropriate to fine Qwest for thousands of violations involving just two types of wrongful conduct:

> The Commission has considerable discretion, once it has established a violation, to weigh competing factors and select a point within that range. All of the appropriate criteria were considered and are discussed in the Decision, and the fine in this case is at the low end of the statutory range. *The main reason the fine is so large is because the number of violations established is large.*[138]

In another proceeding, the Commission adopted the parties' proposed settlement, which included a penalty of $27 million for an estimated 30,000 to 70,000 offenses related to DSL billing

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[135] PG&E ROB, p. 41, citing D.08-08-017, *Utility Consumers' Action Network v. SBC Communications* (2008) 2008 Cal. PUC LEXIS 302 ("*SBC*"). Once again, PG&E makes no effort to categorize the alleged omissions or courses of conduct.

[136] The courts have acknowledged an administrative agency's authority to impose penalties for thousands of separate violations. See *U.S. v. Reader's Digest Association, Inc.* (3d Cir. 1981) 662 F.2d 955, 967; see also *People v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 1023 (upholding trial court determination that defendants were guilty of 14,000 separate charges of false advertising and the imposition of civil penalties for each charge); *People ex rel. Van de Kamp v. Cappuccio, Inc.* (1988) 204 Cal.App.3d 750 (upholding civil penalties based on 592 violations of the Fish and Game and Business and Professions Codes).

[137] D.03-01-087, *Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Qwest Communications Corporation* (2003) 2003 Cal. PUC LEXIS 67 ("*Qwest*").

[138] *Id.*, at p. *15 (emphasis added).

and reporting errors.[139] The Commission noted that the settlement "would equate to 54,000 offenses" which, at $500 per offense, was "well within the range indicated."[140]

While citing *Qwest*, PG&E has ignored the Commission's clear view of its authority to impose fines and penalties for multiple separate violations in its remedies brief. The cases PG&E cites simply demonstrate the Commission's discretion to group violations stemming from a general course of conduct when to do so would be appropriate. They don't stand for the proposition that the Commission does not have the authority to focus on individual violations.

In *SBC* for example, which is cited by PG&E, the Commission found that SBC had violated two different subsections of Public Utilities Code § 2883, which required a telephone corporation to: (a) provide 911 emergency services even to persons who had not established an account; and (b) notify subscribers of the availability of this service (called "warm line").[141] In reviewing the record, the Commission determined that SBC had "pursued essentially one course of conduct: a failure to comply with the warm line policies enacted by the legislature"[142] and assessed penalties on this basis.

Nowhere in that decision, however, did the Commission suggest or imply that it had no other choice but to group the violation of the two different subsections of Section 2883. Instead, the Commission simply found that doing so was consistent with the evidence, which showed that SBC "was guilty of a policy of willful misconduct concerning an important statutory purpose (911 access), a violation that would have been more serious had we received evidence of personal injury or property damage as a consequence of this policy."[143]

In *Utility Consumers' Action Network v. Pacific Bell*, which PG&E also cites, the Commission found that Pacific Bell had failed to inform its customers about certain call blocking options and inside wire maintenance plans, and had generally marketed its services in descending price order without any

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[139] D.02-10-073, *Utility Consumers' Action Network v. Pacific Bell Telephone Company*, 2002 Cal. PUC LEXIS 729, at pp. **21-22.

[140] *Id.*, at p. *22.

[141] *SBC*, 2008 Cal. PUC LEXIS 302, at p. *6, *39.

[142] *Id.*, at p. *40.

[143] *Id.*, at p. *49.

notice to its customers.[144] In determining the appropriate penalty, the Commission distilled the various allegations into "two distinct offenses which occurred daily over a period of two years" for which the Commission fined Pacific Bell $35,000 per day.[145] Again, while choosing to impose penalties in this manner, the Commission did not find that it was compelled to have done so.

PG&E also cites the Commission's decision in *Application of Pacific Gas and Electric Co*.[146] In that case, the Commission addressed PG&E's response to customers seeking information about filing outage-related claims against PG&E following severe wind and rainstorms in 1995. The Commission found that PG&E had acted unreasonably in processing claims from its customers in three different ways and fined PG&E $20,000 for each violation.[147] Notably, the Commission recognized that it could have opted to penalize PG&E for the way PG&E's wrongful actions affected thousands of its customers, and that it was only the absence of a record that prevented the Commission from doing so:

> For each of these three categories of unreasonable acts in the claims handling process, we assess PG&E a fine of $ 20,000 under Pub. Util. Code § 2107. *Within each category of unreasonable act, PG&E likely committed thousands of individual acts for which it could be fined under Pub. Util. Code §§ 2107 and 2108*. Further, we note that each event could qualify as a continuing violation under Pub. Util. Code § 2108, permitting the assessment of additional fines. However, since the record does not permit us to quantify the extent and duration of individual acts, we have chosen to levy the maximum one-time fine per category.[148]

These Commission decisions show that the Commission has broad authority to impose fines and penalties as justified by the evidence of wrong doing in the record, and in a manner that best serves the Commission's policy to deter wrongful behavior by public utilities and that is best-suited to the evidence of wrongdoing that is in the record. Indeed, the courts recognize that "the propriety of a penalty imposed by an administrative agency is a matter of discretion for the agency and its decision

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[144] D.01-09-058, *Utility Consumers' Action Network v. Pacific Bell* (2001) 2001 Cal. PUC LEXIS 914, at pp. **1-2.

[145] *Id.*, at p. *130.

[146] D.99-06-080, *Application of Pacific Gas and Electric Co*. (1999)1999 Cal. PUC LEXIS 430.

[147] *Id.*, at p. *127.

[148] *Id.*, at pp. **127-28 (emphasis added).

will not be disturbed unless there has been a clear abuse of discretion."[149] Here, CPSD has presented evidence supporting its claim of multiple violations. PG&E has not shown that Commission cannot follow CPSD's proposal and impose fines and penalties for each of those violations.

C. The Commission Could Impose Fines And Penalties For Multiple Violations Without Violating PG&E's Right To Due Process Of Law

PG&E argues that "'due process prohibits double penalties for the same conduct.'"[150] However, the cases cited by PG&E to support that statement relate to imposition of both civil and criminal penalties for the same violation, and are entirely inapt. They do not require the Commission to reject CPSD's proposal to impose fines and penalties for many separate violations. Contrary to PG&E's contention, the separate violations here stem from different PG&E conduct. For example, as discussed above, a violation of a legal requirement to maintain one type of record is conduct separate from a violation of a second and different legal requirement to maintain a second and different type of record.[151]

De Anza Santa Cruz concerned an action by a mobile home homeowners association against the owners of the mobile home park for violation of Section 798.41 of the Civil Code, which provides a means for mobile home park owners to bill their tenants for utility services separately from rent. The statute further provides that a mobile home park owner who begins billing utilities separately must at the same time reduce the rent by an amount equal to the separate charges. Under Civil Code Section 798.86, a court may impose for a penalty for a willful violation of Section 798.41 "in addition to damages afforded by law."

The issue before the court was whether the plaintiffs could obtain *both* a civil penalty under Section 798.41 and punitive damages under Section 3294 of the Civil Code. The court found that an

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[149] *Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 287, 291.

[150] PG&E Remedies Brief, p. 42, quoting *De Anza Santa Cruz Mobile Estates Homeowners Association* v. *De Anza Santa Cruz Mobile Estates* (2001) 94 Cal. App. 4th 890, 912 ("*De Anza Santa Cruz*"); see also *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 227 ("*Troensegaard*").

[151] There is nothing inherently wrong with an administrative agency charging multiple violations related to the same conduct. See, e.g., *Meade v. State Collection Agency Board* (1960) 181 Cal.App.2d 774 (agency did not abuse its discretion by charging petitioner with nine violations of laws and rules relating to collection agencies, including several such charges related to the same business transaction).

interpretation of Section 798.86 that would allow a court to impose both a civil penalty and punitive damages would violate due process, because of "the possibility of double penalties for the same conduct."[152]

The court reached a similar result in *Troensegaard*, which PG&E also cites. In that case, the court simply held that it would violate due process to allow the plaintiff to obtain "a double recovery of punitive and penal damages for the same willful, oppressive, malicious, and oppressive acts."[153]

VII. CONCLUSION

As set forth in San Francisco's opening brief and herein, the Commission should impose significant financial consequences of at least $2.25 billion, consisting of a large fine and substantial remedial measures.

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Respectfully submitted,

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[152] *Id.*, quoting *Troensegaard,* 175 Cal.App.3d, at p. 227.

[153] *Troensegaard,* 175 Cal.App.3d, at p. 228.