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 and Electric Company's Natural Gas Transmission Pipeline System in Locations with Higher Population Density.	I.11-11-009 (Filed November 10, 2011) (Not Consolidated)

PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE TO CONSUMER PROTECTION AND SAFETY DIVISION'S AMENDED REPLY BRIEF ON FINES AND REMEDIES

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I. INTRODUCTION[1]

"The present case is an extraordinary one where the usual remedy of imposing penalties, which would go to the General Fund, does not make sense." So said CPSD on May 6th.[2] Now, CPSD says its prior position is illegal: Any penalty must go to the General Fund. Thus, CPSD recommends a $300 million penalty to be paid to the State.[3] Based on CPSD's "corrected" legal position, that is the only penalty the Commission may lawfully impose.[4]

Nonetheless, CPSD proposes an additional $1.950 billion "disallowance" of PG&E's Pipeline Safety Enhancement Plan (PSEP) costs "[f]or PG&E's unreasonable and imprudent conduct in neglecting to repair and replace its aging infrastructure."[5] But CPSD fails to identify a valid legal basis for this "disallowance." Given CPSD's position on penalties, the disallowance cannot be a penalty imposed under Public Utilities Code Sections 701 and 2100 *et seq.* because it would have to go to the General Fund.[6] Nor do the prudence and reasonableness standards on which CPSD relies provide legal support for its proposed disallowance. Prudence and reasonableness are ratemaking standards that, appropriately, CPSD did not allege or litigate in these enforcement proceedings. CPSD cannot import and rely on them now.

Prudence and reasonableness were litigated in R.11-02-019, where the Commission disallowed rate recovery for over $1 billion of PG&E's forecast PSEP Phase 1 costs. The Commission ordered those disallowances because it found those costs resulted from past imprudent and unreasonable conduct.[7] In the same decision, however, the Commission unanimously approved other PG&E PSEP costs because it found they were not caused by prior imprudent and unreasonable conduct.[8] Until its Amended Reply Brief, CPSD did not allege, let alone attempt to prove, that PG&E's Commission-approved PSEP Phase 1 costs should be disallowed due to "unreasonable and imprudent conduct." Consistent with the purpose of these

[1] As ordered in the August 1 ALJs' Ruling, PG&E limits its response to 10 pages. PG&E continues to believe this page limit is unjustified and arbitrary and has unduly constrained PG&E's ability to respond in contravention of its right to due process under the California Constitution. Pursuant to *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964), PG&E expressly reserves its federal constitutional and any other federal claims and reserves its right to litigate such claims in federal court following any decision by the Commission, if necessary.
[2] CPSD Opening Brief on Fines and Remedies at 5.
[3] CPSD Amended Reply Brief on Fines and Remedies (ARB) at 2.
[4] CPSD would also include the "relatively low" cost of any remedies the Commission adopts. CPSD ARB at 2 n.2.
[5] CPSD ARB at 2 (emphasis added).
[6] "[T]he penalties assessed under these provisions [§§ 701, 2107] must be deposited in the General Fund." CPSD ARB at 6-7 (quotation omitted; bracketed code sections 701 and 2107 inserted by CPSD).
[7] *See* D.12-12-030 at *26-27, 105-88, 205-17.
[8] *See* D.12.12-030 at *26-27, 105-88, 205-17.

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enforcement proceedings, CPSD charged and prosecuted alleged legal violations of statute (Public Utilities Code § 451), regulations (49 C.F.R., Part 192) and General Order 112. The blanket ratemaking dis allowance CPSD now advocates has no legal basis in these OIIs, and amounts to a backdoor attempt to modify the PSEP decision and disallow costs a unanimous Commission found reasonable just eight months ago.

CPSD's new recommendation is not supported by the facts either. CPSD disregards the foundational premise of its own consultant's report – that the incremental equity Overland said PG&E could raise, the "threshold level," would cover any penalty imposed and all other unrecovered and unrecoverable costs.[9] As Overland put it, the "threshold level" would pay all costs "that would be the shareholder responsibility as opposed to any ratepayer responsibility."[10] CPSD now ignores most costs PG&E's shareholders have already and will incur, resulting in an actual proposed penalty and "disallowance" totaling over $4 billion. CPSD's proposal far exceeds the $2.25 billion it claims to recommend, puts in jeopardy the very creditworthiness it means to preserve,[11] and magnifies the violation of the Excessive Fines Clause of the California Constitution.[12]

II. UNDER CPSD'S VIEW OF THE LAW, THE ONLY VALID PENALTY CPSD PROPOSES IS $300 MILLION TO BE PAID TO THE GENERAL FUND

A. CPSD Contends "Penalties" Must Go To The General Fund

CPSD's new recommendation contains three elements: "1) $435 million to pay for the remaining disallowances for shareholders from D.12-12-030; 2) $300 million as the fine to the General Fund; and 3) $1.515 billion should pay for the ratepayers' share of PSEP Phase I costs with any remaining amounts helping pay for the ratepayers' share of PSEP Phase II costs."[13] In short, CPSD proposes a $300 million penalty payable to the General Fund, and a $1.950 billion "disallowance" of PG&E's PSEP costs.

Regarding the $300 million penalty, CPSD states: "As a matter of law, all PG&E fines and remedies derived from California Public Utilities Code §§ 2100, *et seq.*, must be paid

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[9] PG&E refers to Overland Consulting, Howard Lubow and Professor Malko, individually and collectively, as "Overland."

[10] Joint R.T. 1370 (CPSD/Overland). *See* CPSD ARB at 3; Ex. Joint-53 at 27 (CPSD/Overland); Joint R.T. 1367-71 (CPSD/Overland).

[11] CPSD ARB at 3; *see id*. at 8-9 ("Indeed, the entire reason that CPSD retained Overland Consulting was to consider the maximum PG&E could afford without affecting its creditworthiness . . .").

[12] Cal. Const. art. I, § 17.

[13] CPSD ARB at 4.

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directly to California's General Fund. The plain language of written statutes and case law requires this result."[14] CPSD includes the Commission's authority under Section 701: "[T]he penalties assessed under these provisions [§§ 701, 2107] must be deposited in the General Fund."[15] Given CPSD's legal position, the only lawful element of its new recommendation is the $300 million "penalty" directed to the General Fund. The balance of its recommendation, the $1.950 billion "disallowance," lacks legal support.

B. CPSD's Proposed $1.950 Billion "Disallowance" Lacks A Legal Foundation

CPSD brings its new proposal up to the $2.25 billion "maximum" Overland says PG&E can finance by adding a $1.950 billion PSEP "disallowance"[16] to its proposed $300 million penalty.[17] CPSD claims PG&E's "unreasonable and imprudent conduct" justifies that disallowance:

> For PG&E's unreasonable and imprudent conduct in neglecting to repair and replace its aging infrastructure, CPSD also submits that it is unreasonable to expect PG&E's ratepayers to pay for all of the testing, repairs and replacements of PG&E's transmission system as ordered by the Commission in D.12-12-030. . . . The remaining $1.950 billion should be used to pay for the disallowed costs of shareholders in D.12-12-030 and to decrease the burden on ratepayers from paying for any of PG&E's PSEP costs in Phase I, as well as the specific remedies CPSD's expert witnesses have recommended for approval. Any amount remaining thereafter should be used for ratepayer relief for future Phase II costs.[18]

The prudence and reasonableness standards CPSD invokes to support its proposed $1.950 billion disallowance are not applicable in these enforcement proceedings. Those standards apply in ratemaking proceedings, where the Commission disallows as unreasonable recovery of costs resulting from past imprudent or unreasonable conduct.[19] "Disallowances are denials of rate recovery for unreasonable costs, whether those costs are ordinary expenses, capital costs, or costs

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[14] CPSD ARB at 5 (emphasis added).

[15] CPSD ARB at 6-7 (quoting *Assembly v. Public Utilities Commission* (1995) 12 Cal.4th 87, 103 n.10 (bracketed references to Section 701 and 2107 added by CPSD).

[16] In its ARB, CPSD also calls the $1.950 billion a "refund," a "credit" and "ratepayer relief," among other variations. CPSD ARB at 2, 3, 9, 10. CPSD confirmed that it intends the $1.950 billion to be a shareholder disallowance, and not a penalty, in opposing PG&E's motion to reopen the penalty phase record. *See* CPSD Response in Opposition to PG&E's Motion to Reopen Evidentiary Record at 1 (describing CPSD's new proposal as "CPSD's corrected legal position for the appropriate statutory penalties and shareholder disallowances . . .") (emphasis added).

[17] As discussed in the next sections, the real cost to PG&E's shareholders of CPSD's new proposal is $4 billion, a figure that is both staggering and unconstitutionally disproportionate in violation of the California Constitution.

[18] CPSD ARB at 2-3 (emphasis added).

[19] *See* D.12-12-030 at *84-85, 102. These ratemaking terms of art are well-known to the Commission. *See id.* at *84 ("The Commission requires that the public utility demonstrate with admissible evidence that the costs which it seeks to include in revenue requirement are reasonable and prudent.").

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induced by unreasonable forecasts . . . . Penalties are punishments for offenses or actions contrary to statute, order, rule, instruction, or express policy."[20]

In the PSEP portion of R.11-02-019, PG&E and Intervenors litigated rate recovery for PG&E's PSEP Phase 1 costs, and whether PG&E engaged in past "unreasonable and imprudent conduct."[21] Based on its findings that certain PG&E omissions and lack of records were imprudent and unreasonable from a ratemaking standpoint and would result in the imposition of unreasonable costs on customers, the Commission disallowed more than $1 billion of PG&E's proposed PSEP Phase 1 costs.[22] At the same time, the Commission ruled unanimously that PG&E's PSEP is reasonable, and authorized recovery of other PSEP Phase 1 costs because those costs did not result from unreasonable and imprudent conduct.[23] In so ruling, the Commission rejected claims by DRA and TURN that the Commission should disallow all PG&E's PSEP Phase 1 costs as the product of past imprudent conduct, which is, in effect, what CPSD advocates here.[24] Thus, even if CPSD had alleged and proved imprudence in these OIIs (it did not), the Commission has already found the allowed PSEP costs were not the result of such past imprudence, but represent the reasonable cost of the safety enhancements mandated by the Commission in R.11-02-019.[25]

The issues tried in these enforcement proceedings involved legal compliance with safety-related statutes, regulations and orders, not prudence and cost causation. The "unreasonable and imprudent" determination on which CPSD would base the $1.950 billion disallowance cannot be made in these proceedings. Unlike the PSEP, the purpose of these proceedings is and has been "to determine whether PG&E has violated laws requiring safe utility gas system practices."[26] At no time in these OIIs did CPSD assert PG&E's alleged "unreasonable and imprudent conduct" as the legal basis for any violation, fine, penalty or remedy; nor did it attempt to prove that any PSEP costs resulted from any alleged unreasonable or imprudent conduct. In each proceeding,

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[20] 1993 Cal. PUC LEXIS 291 at *30 (quoting D.91-12-076, mimeo., at 174).
[21] *See, e.g.*, D.12-12-030 at 58-85, 102.
[22] *See* D.12-12-030 at *26-29, *205-17.
[23] D.12-12-030 at *198-218. *See* DRA Rebuttal Brief (Remedies) at 16 ("Rather than re-litigate issues of reasonableness already decided by the Commission in D.12-12-030….").
[24] *See* D.12-12-030 at *29-84. *Id.* at *67 ("Like DRA, TURN recommended that the Commission issue a comprehensive disallowance from recovery in rates of all costs in the Implementation Plan Phase 1."); *id.* at *106 ("Therefore, for the reasons set forth above, we deny DRA's and TURN's requests for a comprehensive disallowance of all Implementation Plan costs."). DRA based its claim on post-test year ratemaking prohibitions.
[25] That is why the Commission required safety plans from <u>each</u> of the State's gas corporations.
[26] I.12-01-007 at 10.

CPSD alleged PG&E violated safety-related statutes, regulations and orders.[27] CPSD filed hundreds of pages of post-hearing briefs to explain how, in its view, the record evidence satisfied CPSD's burden to prove legal violations. PG&E defended itself against the violations CPSD alleged, and marshaled evidence in its defense for that purpose.[28] Even if prudence and reasonableness standards applied in these OIIs (they do not), CPSD's late assertion of those standards only adds to an accumulating body of due process/fair notice violations that have marred its prosecution of these OIIs.[29] Prudence and reasonableness standards do not provide a legal basis for CPSD's proposed disallowance.

C. The Commission's Reference To "Refunds" In D.12-12-030 Does Not Support The Proposed $1.950 Disallowance

The only other basis CPSD identifies to support its proposed $1.950 billion disallowance is Ordering Paragraph 3 in D.12-12-030, which states: "All increases in revenue requirement authorized in Ordering Paragraph 2 are subject to refund pending further Commission decisions in Investigation (I.) 11-02-016, 1.11-11-009, and 1.12-01-007."[30] As is clear from the Commission's statement, Ordering Paragraph 3 mentioned potential further ratemaking action in R.11-02-019, not imposition in these OIIs of an arbitrarily-sized, blanket PSEP "disallowance" based on inapplicable, unalleged and untried prudence and reasonableness standards. Disallowances occur in ratemaking proceedings when the Commission finds that specific proposed costs result from particular imprudent or unreasonable conduct, showings that CPSD has not and cannot make here. That CPSD also predetermined that PG&E shareholders should bear costs in PG&E's PSEP Phase 2 – a program that does not yet exist – highlights the factually-unfounded nature of CPSD's proposal. If costs are to be disallowed in PSEP Phase 2 based on past imprudent conduct, that determination must be made in that proceeding based on concrete cost proposals and a proper evidentiary record. The Commission's reference to the possibility of PSEP "refunds" in R.11-02-019 does not provide a lawful basis for imposing CPSD's proposed $1.950 billion "disallowance" in these enforcement proceedings.

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[27] *See, e.g.,* San Bruno Ex. CPSD-1 at 162-63 (CPSD/Stepanian); Records Ex. CPSD-3 at 10-14 (CPSD/Felts); Records Ex. CPSD-7 at 2-5 (CPSD/Duller and North); Class Location Ex. CPSD-1 at 58 (CPSD May 25, 2012 Investigative Report). Exactly what CPSD alleged has been a moving target throughout these proceedings, but it has never included prudence and reasonableness ratemaking standards.

[28] *See, e.g.,* San Bruno Ex. PG&E-1 (PG&E/Various); Records Ex. PG&E-61 to PG&E-67 (PG&E/Various).

[29] *See* Cal. Const. art. I, § 7(a); *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434, 1445–48 (1991).

[30] *See* CPSD ARB at 2 ("The Commission made clear that its order was subject to refund based on the outcome of these OIIs. See D.12-12-030 at p. 126, Ordering Paragraph (OP) 3.").

III. OVERLAND'S ANALYSIS IS FLAWED, AND CPSD INCORRECTLY APPLIES IT IN ANY EVENT

A. Overland's Analysis Is Not A Valid Legal Basis For A Penalty

CPSD's stated objective is to penalize PG&E "the maximum amount that PG&E can be required to pay without hurting [] PG&E's creditworthiness. . . ."[31] As demonstrated in PG&E's Coordinated Remedies Brief (CRB), inflicting "the maximum amount" of financial harm is not a legitimate starting point for setting a penalty.[32]

Regardless, Overland's analysis does not provide a reasonable basis for determining the "maximum amount" PG&E could absorb. Overland's $2.25 billion "threshold level" is derived from Overland's improper use of PG&E's price to book and dividend payout ratios as a "guide."[33] Overland did not "calculate" the "threshold level;" it calculated (incorrectly) the price to book and dividend payout ratios at different hypothetical equity amounts.[34]

Overland never explains what relationship the price to book ratio has to PG&E's ability to raise equity for non-income-generating purposes.[35] In fact, PG&E's price to book ratio, properly calculated, would be the same if it were raising one dollar, $100 billion, or any other amount.[36] That this ratio would "lead you to the same conclusion" regardless of the amount of the penalty makes it a meaningless "guide" to estimate PG&E's capacity to issue equity.[37]

The dividend payout ratio is also not a measure of equity capacity; Overland uses it as an upper limit on its "threshold level."[38] Moreover, the dividend payout ratio is acutely sensitive to the earnings per share (EPS) figure chosen for the calculation. If Overland had properly used the 2013 EPS estimate (rather than 2012), PG&E's dividend payout ratio after adding $2.25 billion in equity would exceed 70%, and Overland would have concluded that the "threshold level" of

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[31] CPSD ARB at 3.
[32] PG&E CRB at 64-84.
[33] Ex. Joint-51 at 11 (CPSD/Overland).
[34] Ex. Joint-51 at 11 (CPSD/Overland); Ex. Joint-53 at 22, 25 (CPSD/Overland); Joint R.T. 1365-66, 1378-79 (CPSD/Overland).
[35] Overland used this ratio as a "check" to ensure that the PG&E's book to equity ratio would remain 1.0 or greater at the "threshold level" of equity. Ex. Joint-51 at 10 (CPSD/Overland).
[36] Joint R.T. 1400-01 (CPSD/Overland); *see also* Joint R.T. 1373-75, 1399-1400 (CPSD/Overland).
[37] *See* Joint R.T. 1400 (CPSD/Overland). *See, e.g., Sargon Enter. Inc. v. University of Southern Cal.*, 55 Cal. 4th 747 770-71 (2012) (("[T]he expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors. . . .") ; *Lockheed Litigation Cases*, 115 Cal.App.4th 558, 563 (2004) ("An expert opinion has no value if its basis is unsound.").
[38] Ex. Joint-51 at 10-11 (CPSD/Overland); Joint R.T. 1416-18 (CPSD/Overland).

equity fell somewhere between zero and $500 million (assuming EPS at the midpoint of the guidance range).[39]

Overland's "analysis" also fails to account for real world facts affecting the amount of equity PG&E could issue. Overland's "analysis" fails to account for PG&E's need to issue equity to support infrastructure improvements forecast to exceed $5 billion annually from 2013-2016.[40] Overland concedes it is "intuitively obvious" that an equity offering to fund a penalty will not be as well received by investors as an offering for income-generating purposes,[41] yet it appears to assume the existence of buyers perpetually willing to buy PG&E stock notwithstanding the lack of return and availability of other investments. As a matter of sound regulatory policy, the Commission should consider the reaction of the rating agencies and equity analysts to CPSD's revised penalty proposal.[42]

B. CPSD's New Approach Ignores Overland's Central Tenet

While claiming to rely on Overland's conclusions, CPSD misapplies and distorts them. Overland's $2.25 billion "threshold level" represents the "maximum"[43] amount of equity that Overland contends PG&E could issue for <u>any</u> non-income-generating purpose, *i.e.*, all costs "that would be the shareholder responsibility as opposed to any ratepayer responsibility."[44] Overland agreed for these purposes that a "penalty" includes costs that "shareholders are responsible for either because it is a fine that is paid to the State General Fund, it is costs that are being incurred for Commission-approved activities but not allowed into rates, like some of the pipeline safety enhancement plan costs, or other costs that the company has incurred and is continuing to incur that are above and beyond whatever is in rates."[45] CPSD's new proposal, however, understates and disregards the costs PG&E shareholders have and will bear. If adopted, CPSD's new recommendation would not cost PG&E's shareholders $2.25 billion, but more than $4 billion.

CPSD's new proposal assumes the PG&E shareholder portion of PSEP is only $435 million based on subtracting $380.5 million in contingency costs and $200 million that CPSD

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[39] Ex. Joint-62 at 3; Joint R.T. 1380-81 (CPSD/Overland).
[40] *See* Ex. Joint-57 at 11; Ex. Joint-66 at 17 (Fig. 7 & 9) (PG&E/Fornell).
[41] Ex. Joint-53 at 9 (CPSD/Overland); *see also* Ex. Joint-66 at 3, 15 (PG&E/Fornell).
[42] Some recent Moody's and Standard & Poor's bulletins are publicly available. See https://www.moodys.com/research/Moodys-Political-Risk-Increases-for-PGE-Californias-Largest-Utility--PR_277589.
[43] Ex. Joint-51 at 10 (CPSD/Overland); Ex. Joint-53 at 27 (CPSD/Overland) ("threshold level" is an "upper limit").
[44] Joint R.T. 1370 (CPSD/Overland).
[45] Joint R.T. 1369-71 (CPSD/Overland).

contends PG&E already raised to fund the payment of a fine [46] from the total disallowance in D.12-12-030. Both adjustments are wrong. Contrary to CPSD's assumption, PG&E's shareholders have funded and are forecast to fund a total of approximately $1.25 billion in PSEP costs – far more than the $635 million CPSD assumes. [47] And PG&E did not issue $200 million in equity when it accrued that amount for a minimum fine, as CPSD assumes, and the record does not support a finding that it did.[48]

CPSD's penalty proposal also disregards spending of approximately $1 billion (actual and forecast) above Gas Accord V adopted amounts [49] and the additional costs outside the gas transmission business PG&E's shareholders have or will incur. [50] To be consistent with Overland's approach, all shareholder costs funded with new equity must count toward Overland's "threshold level."

IV. CPSD'S RECOMMENDATION VIOLATES THE EXCESSIVE FINES CLAUSE OF THE CALIFORNIA CONSTITUTION

Proportionality is the touchstone of the inquiry under the California Constitution's Excessive Fines Clause. [51] PG&E showed in its CRB that a $2.25 billion penalty violated that provision.[52] Now, a proposed penalty that was 22 times the largest penalty ever imposed for a natural gas pipeline accident has grown to nearly 40 times that amount. [53] It is also almost five times the equity investment in PG&E's GT&S business in 2010[54] and almost as much as the total

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[46] CPSD ARB at 3.
[47] San Bruno Ex. PG&E-1A, Chapter 13, Appendix C (PG&E/Yura); Ex. Joint-57 at 8 (showing unrecovered PSEP expense in 2013 and using the low end of the range), 13 (showing these costs continue in 2014); Ex. Joint-58 (table showing disallowed capital expenditures). The shareholder spending amounts shown in this and the next paragraph are based on the information in the record, which may not represent the final 2012 shareholder costs or the most current or precise forecasts of shareholder costs in 2013 and after. For example, the cost information presented in Chapter 13, Appendix C for 2012 is based on information compiled prior to year-end 2012. As PG&E has stated previously, if the Commission adopts a penalty that depends on the specific amount of costs incurred, it is PG&E's expectation that the Commission will audit those costs.
[48] PG&E is not offering additional facts about this issue. The Commission should consider, however, whether a non-cash accrual requires the issuance of equity.
[49] San Bruno Ex. PG&E-1A, Chapter 13, Appendix C (PG&E/Yura) (non-PSEP spending of $179 million); Ex. Joint-65 at 2 (Table 1) (additional gas transmission costs included in referenced $250 million above authorized levels in 2012 and 2013); Ex. Joint-57 at 8 (showing costs of emerging work in 2013 and using the midpoint of the range), 13 (referencing emerging work in 2014 and beyond).
[50] *See* Ex. Joint-65 at 2 (Table 1) (referencing expense spending above authorized amounts for core operations in 2012 and 2013); Ex. Joint-58 (showing contribution to City of San Bruno of $70 million).
[51] *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728 (2006).
[52] Cal. Const. art. I, § 17. *See* PG&E CRB at 21-33.
[53] *See* PG&E CRB at 22-23.
[54] This is based on the 2010 recorded GT&S rate base of $1.6 billion times the authorized equity ratio of 52%. *See* San Bruno Ex. PG&E-10, MPO-7 at 26 (Figure 7-15) (PG&E/O'Loughlin).

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GT&S revenues for the nine years prior to the San Bruno accident.[55] In addition to this empirical evidence, CPSD's self-professed desire to inflict the maximum possible pain demonstrates that proportionality plays no role in CPSD's recommendation.

CPSD asserts that "nothing is comparable to San Bruno," but its rejection of all comparisons does not avoid the constitutional mandate.[56] The law requires that the Commission consider what has been done before in similar situations. While PG&E acknowledges the severity of the San Bruno tragedy, it is not without comparison, even if the comparisons are less than perfect.[57] The August 19, 2000, El Paso Natural Gas Company accident and the February 9, 2011, Allentown, Pennsylvania accident involved reasonably comparable circumstances. The Commission cannot ignore that CPSD's $4 billion recommendation is nearly 40 times the El Paso accident (the largest penalty ever imposed) and 160 times the Allentown accident.[58]

CPSD also disregards statutes that cap penalties in other jurisdictions, asserting "they simply reflect other legislatures' prerogatives."[59] Like comparable prior accidents, however, how other jurisdictions treat penalties cannot lawfully be ignored. On the contrary, other legislatures' determinations should weigh heavily in the constitutional analysis.[60] As shown in the accompanying table (Attachment 1), 48 of the 50 states (and the District of Columbia) have a cap on penalties for violations of gas safety laws, the highest being $2 million consistent with the maximum under federal law.[61] California is one of only two states that does not limit penalties in natural gas accidents, which itself is a significant factor in the constitutional analysis. CPSD's proposed penalty of (purportedly) $2.25 billion is 1,125 times the highest statutory cap, and the actual penalty of $4 billion is 2,000 times that amount.

CPSD's rationale that the penalties against PG&E supposedly could have been much higher is irrelevant. That CPSD alleged dozens of overlapping violations and inappropriately

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[55] San Bruno Ex. PG&E -10, MPO-7 at 2 (Figure 7 -1) (PG&E/O'Loughlin) (GT&S recorded revenues from 2002 through 2010 totaled approximately $4.2 billion).
[56] CPSD ARB at 8.
[57] PG&E CRB at 26-33.
[58] The proposed penalty is 105 times the $38 million penalty in the Rancho Cordova accident, the largest penalty the Commission ever assessed. Recently, the Michigan Public Service Commission imposed penalties of $340,000 and $90,000, respectively, against Consumers Energy Company for two separate accidents in which 3 people lost their lives and the MPSC found the utility at fault. The utility also established a $1 million fund to assist natural gas accident victims and first responders. *See* http://www.freep.com/apps/pbcs.dll/article?AID=2013308120077.
[59] CPSD ARB at 9.
[60] *See Hale v. Morgan*, 22 Cal. 3d 388, 403 (1978) (finding it constitutionally "significant" that no other state appeared to authorize a penalty as severe as California for similar conduct).
[61] 49 U.S.C. § 60122(a) ($2 million cap on administrative penalties "for a related series of violations"); *see* Attachment 1.

counted violation days going back decades to arrive at an astronomical potential penalty does not legitimize a "reduced" penalty that is constitutionally excessive.[62] Nor does CPSD's reliance on "11 laws" passed since the accident, or CPSD's speculation about "destruction . . . that could have occurred elsewhere" validate a constitutionally excessive penalty.[63] The constitutional touchstone is proportionality, not the severity of the emotional, political or legislative reaction to the accident. Whether $2.25 or $4 billion, CPSD's proposal violates the California Constitution.

V. CONCLUSION

CPSD has drawn a legal line that invalidates most of the "penalty" it now proposes. Under CPSD's legal analysis, only the $300 million it advocates as a fine payable to the State General Fund may be considered as a potential penalty in these proceedings.

CPSD has failed to provide legitimate factual or legal support for the $1.950 billion disallowance it now recommends. That recommendation amounts to a backdoor effort to modify the Commission's unanimous PSEP decision. In these OIIs, CPSD did not charge PG&E with "unreasonable and imprudent conduct in neglecting to repair and replace its aging infrastructure," did not present evidence of such conduct, and – even at this late date – cites to none. And eve n if the law supported CPSD's new recommendation, the facts do not. CPSD cannot simply ignore $1.8 billion of unrecovered and unrecoverable costs that PG&E's shareholders have or will incur. To be consistent with CPSD's own consultant's report, and to avoid jeopardizing PG&E's creditworthiness and raising the cost of capital, the Commission must take all these costs into account.

Respectfully submitted,

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[62] *See* PG&E CRB at 39-42 (addressing CPSD's improper compiling of violations).
[63] CPSD ARB at 9.

Attachment 1

Gas Safety Penalty Caps in United States

State	Penalty Limit Per Related Series of Violations	Authority
Alabama	$500,000	Ala. Code § 37-4-87(a)
Alaska (not PHMSA certified)	$2 million	49 U.S.C. § 60122(a)
Arizona	$1 million	Ariz. Rev. Stat. § 40-442
Arkansas	$2 million	Ark. Code Ann. § 23-15-211(a)
California	No limit	Cal. Pub. Util. Code § 2100 *et seq.*
Colorado	$1 million	Colo. Rev. Stat. § 40-7-117(1)
Connecticut	$2 million	Conn. Gen. Stat. Ann. § 16-280e
Delaware	$2 million	Del. Code Ann. tit. 26 § 821; Del. Code Regs. § 26-8000-7.1.2
D.C.	$2 million	D.C. Code § 34-706(b)
Florida	$500,000	Fla. Stat. § 368.061(1)
Georgia	$200,000	Ga. Code Ann. § 46-4-35(a)
Hawaii (not PHMSA certified)	$2 million	49 U.S.C. § 60122(a)
Idaho	$200,000	Idaho Code Ann. § 61-712A
Illinois	$2 million	220 Ill. Comp. Stat. 20/7(a)
Indiana	$1 million	Ind. Code § 8-1-22.5-7(a)
Iowa	$1 million	Iowa Code § 479.31
Kansas	$1 million	Kan. Stat. Ann. § 66-1,151
Kentucky	$1 million	Ky. Rev. Stat. Ann. § 278.992(1)
Louisiana	$100,000	La. Rev. Stat. Ann. § 45:310

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Gas Safety Penalty Caps in United States

State	Penalty Limit Per Related Series of Violations	Authority
Maine	$1 million	Me. Rev. Stat. Ann., tit. 35-A, § 4516-A(2)
Maryland	$2 million	Md. Code Ann. Pub. Util. Cos. § 13–203(a)
Massachusetts	$1 million	Mass. Gen. Laws Ann. ch. 164, § 105A
Michigan	$500,000	Mich. Comp. Laws § 483.161(1)
Minnesota	$1 million	Minn. Stat. § 299F.60(1)
Mississippi	$200,000	Miss. Code Ann. § 77-11-3(1)
Missouri	$150,000	Mo. Rev. Stat. § 386.572(2)
Montana	$1 million	Mont. Code Ann. § 69-3-207(1)
Nebraska	$500,000	Neb. Rev. Stat. § 81-546(1)
Nevada	$200,000	Nev. Rev. Stat. § 703.154(3)
New Hampshire	$1 million (knowing or willful violations); $500,000 (all others)	N.H. Rev. Stat. Ann. § 374:7-a
New Jersey	$1 million	N.J. Rev. Stat. § 48:9-33(1)(a); N.J. Admin. Code § 14:7-2.7(a)
New Mexico	$500,000	N.M. Stat. Ann. § 70-3-19(C)
New York	No limit	N.Y. Pub. Serv. Law § 25
North Carolina	$2 million	N.C. Gen. Stat. § 62□50(d)
North Dakota	$2 million	N.D. Cent. Code § 49-07-05.1
Ohio	$1 million	Ohio Rev. Code Ann. § 4905.95(B)
Oklahoma	$500,000	Okla. Stat. tit. 17, § 6.1(A);

Gas Safety Penalty Caps in United States

State	Penalty Limit Per Related Series of Violations	Authority
		Okla. Admin. Code § 165:20-13-1
Oregon	$500,000	Or. Rev. Stat. § 757.991
Pennsylvania	$2 million	66 Pa. C.S. § 3301(c)
Rhode Island	$2 million	R.I. Gen. Laws § 39-3-40(b)
South Carolina	$500,000	S.C. Code Ann. § 58-5-1030(a)
South Dakota	$1 million	S.D. Codified Laws § 49-34B-12
Tennessee	$500,000	Tenn. Code Ann. § 65-28-108(a)
Texas	$500,000 $2 million (effective 9/1/13)	Tex. Util. Code § 121.204; Tex. Util. Code § 121.206
Utah	$500,000	Utah Code Ann. § 54-13-8(2)
Vermont	$1 million	Vt. Stat. Ann. § 2816(a)
Virginia	$2 million	Va. Code Ann. § 56-257.2(B)
Washington	$1 million	Wash. Admin. Code § 480-93-223
West Virginia	$2 million	W. Va. Code Ann. § 24B-4-6
Wisconsin	$500,000	Wis. Stat. § 196.745(2)
Wyoming	$1 million	Wyo. Stat. Ann. §§ 37-2-128

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