

**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 High Population Density.

I.11-11-009
(Issued November 10, 2011)
(Not Consolidated)

**REBUTTAL BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO
TO PG&E RESPONSE TO CPSD AMENDED REPLY BRIEF**

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I. INTRODUCTION

Pursuant to the August 15, 2013 ruling of Administrative Law Judges Yip-Kikugawa and Wetzell, the City and County of San Francisco (San Francisco) submits this rebuttal brief to the CPSD Amended Reply Brief and PG&E's Response to the Amended Reply Brief. In its Amended Reply Brief, CPSD asserts that the Commission should impose both a fine of \$300 million to be paid to the general fund and a \$1.950 billion disallowance for remedial pipeline safety measures necessitated by "PG&E's unreasonable and imprudent conduct in neglecting to repair and replace its aging infrastructure."¹ In its Response to the Amended Reply Brief, PG&E first asserts that CPSD's proposal is internally inconsistent and then rehashes the arguments from PG&E's Coordinated Remedies Brief that the Overland analysis is flawed and that the excessive fines clause of the California Constitution restrains the Commission's authority. Neither the law nor evidence in these cases supports these arguments.

As San Francisco and other parties argued in their earlier briefs, the Commission should impose both a sizeable fine and additional financial sanctions on PG&E, including requiring PG&E to fund gas pipeline work necessary for safe operations. CPSD's recommendation that the Commission order PG&E to pay a fine of \$300 million to the State's general fund while contributing \$1.950 billion of shareholder dollars towards pipeline improvements is well within the Commission's recognized authority.

II. THE COMMISSION HAS AMPLE AUTHORITY TO ISSUE BOTH FINES AND DISALLOWANCES IN THIS PROCEEDING

A. The Commission Has the Discretion to Impose Fines and Other Remedies under the Law.

PG&E attempts to build a straw man proposal by claiming that under CPSD's new proposal, all money from a penalty must go to the state general fund.² The Commission should disregard this

¹ CPSD Amended Reply Brief at p. 5.

² PG&E Response to Amended Reply Brief at p. 2-3.

argument because the Commission retains ample authority to order remedies, as PG&E itself has recognized. PG&E's argument that a penalty is limited to a fine paid to the general fund is frivolous. It ignores longstanding Commission authority which establishes that the Commission is not limited to imposing fines in these proceedings. As the Commission stated in the Order Instituting Investigation, it retains ample authority to impose "statutory penalties pursuant to Sections 2107 and 2108 of the California Public Utilities Code³, and other appropriate remedies under the law."⁴ In its Coordinated Remedies Brief, PG&E even acknowledged the fact that "the Commission has the discretion under Public Utilities Code Section 701 to adopt the form of penalty that is appropriate under the circumstances."⁵ The Commission's authority to order "other remedies under the law" that are "appropriate under the circumstances" includes any remedial action that is necessary to ensure safety.⁶

Under Section 701, the Commission has "expansive authority to 'do all things, whether specifically designated in [the Public Utilities Act] or addition thereto, which are necessary and convenient' in the supervision and regulation of every public utility in California."⁷ The courts have construed this provision to grant the Commission broad authority, so long as the additional powers and jurisdiction are cognate and germane to the regulation of public utilities.⁸ Pursuant to Section 761, the Commission may correct any utility conduct, practice or rule that the Commission finds is unjust, unreasonable, unsafe, improper, inadequate, or insufficient.⁹ In addition, pursuant to Section 451, the Commission must ensure that all charges demanded or received are just and reasonable. Under the Commission's substantial equitable jurisdiction, it may also issue injunctions, mandate the creation of

³ All references are to the California Public Utilities Code unless otherwise noted.

⁴ Order Instituting Investigation 12-01-007 at p. 9.

⁵ PG&E CRB at p. 8.

⁶ See, e.g., *Pacific Bell Wireless v. Cal. Pub. Util. Comm'n* (2006), 140 Cal.App.4th 718, 736 (citations omitted).

⁷ *Pac Bell Wireless*, 140 Cal.App.4th at 736.

⁸ *Id.*

⁹ Cal. Pub. Util. Code § 761.

a trust fund, reform contracts to conform to the public interest, and order utilities to make reparations to ratepayers.¹⁰ Thus, the Commission has a sufficient basis for disallowing PG&E's costs for a substantial portion of the remedial pipeline safety measures that the Commission finds are necessary due to PG&E's years of neglect.

The evidence in these proceedings supports the Commission imposing additional remedies including directing PG&E shareholders to fund pipeline safety measures necessary as a result of the violations identified in therein.¹¹ As noted in San Francisco's Reply Brief, the Commission should impose a financial sanction of at least \$2.25 billion in these cases, consisting of both a fine and a substantial package of remedial measures, including the cost of an independent monitor.¹² Given PG&E's failure to follow pipeline safety laws, rules and standards over many years, the substantial harm caused by these violations, and the public interest in seeing these claims brought to justice, the Commission must issue a large fine.

B. PG&E Has Already Recognized the Commission's Ample Authority to Order Shareholders to Fund Pipeline Safety Measures.

In its Coordinated Reply Brief (CRB), PG&E recognized that the "Commission has the authority to apply unrecovered gas safety costs to any penalty."¹³ At that time, PG&E appeared to believe that the appropriate remedy was for the Commission to direct PG&E to apply shareholder funds to pipeline safety measures.¹⁴ PG&E noted that Section 701 gave the Commission the discretion "to adopt the form of penalty that is appropriate under the circumstances."¹⁵ Now, PG&E has reversed

¹⁰ *Wise v. Pacific Gas and Electric Company* (1999) 77 Cal.App.4th 287, 299-300 (citations omitted).

¹¹ San Francisco supports the analysis in the opening briefs of TURN and DRA regarding the costs of funding these remedial measures. See TURN Opening Remedies Brief at pp. 1-9 and DRA Opening Remedies Brief at pp. 14-16.

¹² San Francisco Remedies Reply Brief at pp. 1-7. The remedial work should include measures that were approved by the Commission in D.12-12-030 and funded by ratepayers, subject to refund.

¹³ PG&E CRB at p. 18.

¹⁴ *Id.* at p. 18.

¹⁵ PG&E CRB at p. 8.

course. Citing the same authority it cited in the CRB, PG&E now asserts that those authorities prohibit the Commission from ordering shareholders to fund pipeline safety activities.¹⁶

PG&E's reversal demonstrates the fallacy of PG&E's argument. As discussed earlier, the Commission has ample authority to impose substantial remedial measures that are not limited to a fine paid to the general fund. The Commission should reject PG&E's argument that any penalty is limited to a fine paid to the general fund.

C. A Disallowance Has Always Been Within the Scope of Potential Remedies In These Proceedings.

1. There has been no deprivation of due process in these proceedings.

Generally, due process requires that a person subject to penalties and fines be given notice and an opportunity to be heard.¹⁷ The Commission has satisfied due process here. From the outset of each of these proceedings, the Commission has put PG&E on notice that the Commission would consider a suite of remedies that included fines and other actions available at law. Each of the Orders Instituting Investigation put PG&E on notice that the Commission was considering issuing fines and other appropriate remedies:

The Commission may impose “statutory penalties pursuant to Sections 2107 and 2108 of the California Public Utilities Code, and other appropriate remedies under the law....

We emphasize that the Commission's remedial powers are not limited to its authority to impose civil penalties.¹⁸

If any violation by PG&E is found, PG&E is directed to show why penalties and/or any other form of remedial relief should not be applied.¹⁹

¹⁶ Compare PG&E Coordinated Remedies Brief at p. 18 (*citing* Cal. Pub. Util. Code §§ 701, 2107 and *Assembly v. Public Utilities Comm'n* (1995) 12 Cal.4th 87, 103) and PG&E Response to Amended Reply Brief at p. 3 (*citing* Cal. Pub. Util. Code §§ 701, 2107 and *Assembly v. Public Utilities Comm'n* (1995) 12 Cal.4th 87, 103).

¹⁷ See Cal. Const. Art. I § 7. PG&E also cites *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445-1448 as support for its claim that it has not received a fair process or sufficient notice in these proceedings. Contrary to PG&E's unsupported assertions, the Commission has provided ample process and notice throughout this proceeding. In addition, *Rosenblit* is inapt because it deals with the common right of due process in the context of membership to a private organization and is inapplicable to the case at hand. PG&E has made no claims that any party has excluded it from a private organization.

¹⁸ Order Instituting Investigation 12-01-007 at p. 9 (emphasis added), and p. 10 (emphasis added).

If, after hearings, the Commission were to find that management practices and policies contributed towards recordkeeping violations of law that adversely affected safety, the Commission would have an obligation to consider the imposition of statutory penalties pursuant to Section 2107 of the California Public Utilities Code, and other appropriate relief under the law.²⁰

Due process requires nothing more. PG&E has known from the very beginning of these proceedings that, if the Commission finds that PG&E violated the relevant safety standards and laws, the Commission could issue not only fines payable to the general fund but also other appropriate relief under the law, and has given PG&E the opportunity to oppose the imposition of such fines. As discussed above, the Commission has the discretion under Sections 701 and 761 to craft an appropriate remedy, which remedy even PG&E has acknowledged could include ordering shareholders to fund pipeline safety improvements to its system.²¹

2. The rates approved in D.12-12-030 were subject to adjustments in these proceedings.

Next, although PG&E asserts that D. 12-12-030 contemplated further ratemaking in the gas pipeline safety rulemaking, a closer reading of D.12-12-030 reveals that the Commission explicitly contemplated that disallowances may occur in these proceedings:

Our upcoming decisions in Investigations (I.) 11-02-016, I.11-11-009, and I.12-01-007 will address potential penalties for PG&E's actions under investigation. We do not foreclose the possibility that further ratemaking adjustments may be adopted in those investigations; thus, all ratemaking recovery authorized in today's decision is subject to refund.²²

There is no merit to PG&E's assertion that the parties are trying to collaterally attack D.12-12-030. The rates approved in that proceeding were explicitly subject to refund, and not final.²³ In fact, the Commission approved the rates contemplating that an adjustment might be necessary based on the

¹⁹ Order Instituting Investigation 11-11-009 at p. 14 (emphasis added).

²⁰ Order Instituting Investigation 11-02-016 at p. 11 (emphasis added).

²¹ PG&E CRB at p. 18.

²² D.12-12-030 at p. 4 (emphasis added).

²³ *Id.*

findings in these investigations and that such adjustment would occur in these investigations.²⁴ The Commission should ignore PG&E's vague procedural arguments.

PG&E also asserts, without support, that the ratemaking principals of prudence and reasonableness are inapplicable to these enforcement proceedings.²⁵ PG&E has advanced this argument before, and it has no more merit now than it did earlier.²⁶ This argument ignores the clear language of Section 451,²⁷ and fails to consider the Commission's ample authority to issue fines and remedies as well as the clear language from the orders instituting investigation,²⁸ as described above. The argument also ignores Commission precedent previously determining that a violation of Section 451 justified a penalty pursuant to Sections 2107 and 2108.²⁹ For all these reasons, there is no legal basis for PG&E's assertion that an order directing shareholders to bear the costs of pipeline safety activity "lacks legal foundation."

III. PG&E'S CRITICISMS OF THE OVERLAND ANALYSIS CONTINUE TO LACK MERIT

PG&E continues to assert that the Overland analysis does not provide a valid legal basis for a penalty.³⁰ Rather than providing any new insights as to why it believes the Overland analysis lacks

²⁴ *Id.*

²⁵ PG&E Response to Amended Reply Brief at p. 5.

²⁶ *See* San Francisco Reply Brief in I.12-01-007 pp. 6-21.

²⁷ Section 451 provides, in part "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

²⁸ For example Order Instituting Investigation 12-01-007 stated "Pursuant to Public Utilities Code Section 761, if the Commission finds that PG&E's maintenance or operations practices were unsafe, unreasonable, improper, or insufficient, we may consider ordering PG&E to change or improve its maintenance, operations, or construction standards for gas pipelines, in order to ensure system-wide safety and reliability." (emphasis added).

²⁹ D.98-12-076, *Carey*, 1998 Cal. PUC LEXIS 924, Conclusions of Law 2 and 3; 84 CPUC2d 196.

³⁰ PG&E Response to Amended Reply Brief at p. 6.

support, PG&E simply rehashes the arguments from its Coordinated Reply Brief. Given the substantial briefing already in the record on this issue and the confidential aspects of the Overland report, San Francisco incorporates by reference the arguments made by San Francisco and the other parties to these proceedings that demonstrate why PG&E’s position lacks merit.³¹

IV. THE LARGE FINANCIAL CONSEQUENCES SOUGHT BY CPSD AND THE OTHER PARTIES ARE NOT UNCONSTITUTIONAL

PG&E acknowledges that its attempt to draw comparisons between its conduct in these proceedings and other natural gas pipelines disasters is “less than perfect.”³² This is because this case is far larger than any single accident case referred to by PG&E.³³ The record clearly demonstrates that PG&E’s inadequate maintenance of its natural gas transmission system and associated recordkeeping, which spanned more than 50 years, placed the public at great risk.³⁴ The proposed fines and remedial actions currently before the Commission directly result from the harm caused by PG&E’s failure to follow laws, rules and standards for many decades. This misconduct caused substantial and irreparable harm and has created the need and urgency for many additional pipeline safety measures.

A. PG&E’s Argument Regarding Other State Statutes Is Unpersuasive.

PG&E seems to argue that the statutory penalty scheme in California is unconstitutional because other states have a cap on penalties for violations of gas safety laws.³⁵ This amounts to a claim that Sections 2107 and 2108 are unconstitutional on their face simply because the statutes are different from the penalty caps codified in other state law. PG&E has provided no convincing

³¹ See San Francisco Opening Brief at pp. 14-16; TURN Reply Brief at pp. 44-46; DRA Reply Brief at pp. 4-10.

³² PG&E Response to Amended Reply Brief at p. 9.

³³ See San Francisco Remedies Reply Brief at pp. 13-24.

³⁴ See e.g. CPSD Remedies Brief at p. 5, (“CPSD has proven more than one hundred violations that continued for years, some as long as 54 years.”), and pp. 7-36.

³⁵ PG&E Response to Amended Reply Brief at p. 9 *citing* *Hale v. Morgan* (1978) 22 Cal.3d 388, 403.

argument on this point. The fact that other states impose a penalty cap is irrelevant to the Commission's analysis and determination of the appropriate remedy in these cases.

PG&E relies upon *Hale v. Morgan* to assert that other state statutes may be significant. That argument, while true, doesn't mean that Sections 2107 and 2108 are unconstitutional on their face. In *Hale v. Morgan*, the court found that the state statute was unconstitutional given the specific application of facts to that law, but recognized that "there are doubtless some situations in which very large punitive assessments are both proportioned ... and necessary to achieve the penalty's deterrent purposes."³⁶ Thus, *Hale v. Morgan* stands for the proposition that the constitutionality of a penalty cannot be judged simply by the statute authorizing the penalty, but must wait until the actual penalty is determined.

Here, as the parties have briefed previously, a financial consequence of at least \$2.25 billion is both proportional and necessary to deter future misconduct. The disallowance and penalty proposals are actually a very small proportion given that the penalty could be in the hundreds of billions of dollars based on California law.³⁷

V. CONCLUSION

San Francisco urges the Commission to impose both a sizeable fine and additional financial sanctions on PG&E, including an order to fund gas pipeline work necessary for safe operations.

³⁶ (1978) 22 Cal 3d 388, 403.

³⁷ See San Francisco Reply Remedies Brief at p. 2.

Dated: August 28, 2013

Respectfully submitted,

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