

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

RESOLUTION ALJ-277

Affirming Citation No. 2012-01-001 Issued to
Pacific Gas and Electric Company for
Violations of General Order 112-E

Draft Resolution ALJ-277

**PACIFIC GAS AND ELECTRIC COMPANY'S REPLY
COMMENTS ON DRAFT RESOLUTION**

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In support of the Draft Resolution’s affirmance of CPSD’s \$16.8 million penalty, the City and County of San Francisco (CCSF) points out that CPSD could have fined PG&E more than \$500 million. (CCSF Comments at 2.) \$500 million would be an absurd penalty for this self-identified and self-reported violation and, to its credit, CPSD – like CCSF – recognized that fact. While CPSD’s motive is laudable, the method it chose is contrary to the authority the Commission granted in Res. ALJ-274, and CCSF does not argue otherwise. Under Res. ALJ-274, CPSD had only three options: (1) it could fine PG&E on a daily basis (more than \$500 million); (2) it could fine PG&E the statutory maximum for each violation (\$420,000); or (3) it could not fine in light of the fact that PG&E self-identified and self-corrected the violation.¹

¹ Res. ALJ-274 contains some inconsistent language. On the one hand, it states, “It is reasonable to direct Staff to take account of the factors delineated in Pub. Util. Code § 2104.5 in issuing citations.” (Res. ALJ-274, Finding & Conclusion (F&C) 12.) On the other hand, the discussion of the delegation of authority to Commission staff states, “Each citation will assess the maximum penalty amount provided for by § 2107.” (Res. ALJ-274 at 7; emphasis added.) And further, “It is reasonable to assess penalties for each violation at the maximum amount set forth in Pub. Util. Code § 2107 . . .” (*Id.*, F&C 11; emphasis added.) In its discussion of self-identified and self-corrected violations, Res. ALJ-274 states that “Staff should consider those facts [that the violation is self-report and self-corrected and where no injury or damage has resulted] in deciding whether or not to cite a violation.” (*Id.* at 12; emphasis added.)

PG&E's self-identified and self-reported violation was the failure to conduct five-year leak surveys required by 49 C.F.R. § 192.723(b)(2).² Under Public Utilities Code §§ 2107 and 2108, CPSD only had two options once it chose to penalize PG&E: (1) It could treat each missed five-year survey as a violation or (2) it could claim that each was a continuing violation from the date the leak survey was first missed, treating each day as a separate violation under section 2108. CCSF does not argue otherwise.

Having decided a daily penalty was inappropriate, CPSD's only option was to penalize PG&E the maximum statutory amount, as required by Res. ALJ-274, for each of the 21 missed five-year leak surveys – \$420,000. (*See* PG&E Op. Br. at 4.) CPSD could not declare something other than the missed five-year leak survey or every day after the first survey was missed to be an “incident” that would be subject to a penalty. In this case, CPSD chose to treat each month as a separate “incident”; in other cases, it could choose to treat each week or each quarter as a separate “incident.”

CPSD untethered its determination of an “incident” from what constitutes a violation, claiming, “CPSD may count ‘incidents’ using its discretion and relying upon the factors it may consider in setting a fine.” (CPSD Op. Br. at 5.) Neither the Public Utilities Code nor Res. ALJ-274 authorizes such an approach or uses the term “incident.” The Public Utilities Code refers to a “violation” or “failure to comply” (Pub. Util. Code §§ 2107 & 2108); Res. ALJ-274 to a “violation.”³

² As CPSD noted in its citation, distribution mains and services on 13 of PG&E's plat maps “missed one or more five-year leak surveys as required by 49 C.F.R. § 192.723(b)(2).” Ex. 1, Preliminary Investigation Report at 1; *see also Id.* at 2 (“PG&E missed one or more of the required 5-year distribution leak survey[s] for the distribution mains and services on the remaining 13 plat maps.”). Thus, CPSD tacitly acknowledged the violation lies in missing the five-year leak survey. Nevertheless, the citation imposed penalties as if the requirement were to conduct **monthly** leak surveys. It treated each month after the first missed leak survey as a separate violation.

³ Pub. Util. Code § 2107 states in relevant part: “Any public utility that violates or fails to comply with any provision . . . is subject to a penalty . . . for each offense.” CPSD argued that its term, “incident,” is equivalent to the last word, “offense,” and apparently

CCSF's comments never address the relevant legal issue – what constitutes a violation that is subject to a penalty? Res. ALJ-274 did not delegate to CPSD authority to define an “incident” as a violation and thereby alter the equation it used to calculate a fine. Because the course CPSD chose is not legally supported – and CCSF has not provided a basis on which it could be – the Commission should reject the Draft Resolution and in its place adopt a penalty based on the actual number of violations.

While CCSF supports the Draft Resolution's rejection of PG&E's argument for less than the maximum statutory penalty amount (CCSF Comments at 2), it does not address the fact that the five cases the Draft Resolution uses for comparative fine amounts all involved widespread financial irregularities at customer expense where the Commission concluded that restitution alone was not sufficient to deter future violations. The Draft Resolution dismisses D.04-04-065, a case involving a large number of safety violations that PG&E had cited. But, in that case, the Commission rejected CPSD's recommended fine of approximately \$97 million and instead fined Southern California Edison \$656,000: (1) \$20,000 for each of 30 violations of GO-95 and GO-128, specifying the requirements for the construction, operation, and maintenance of overhead and underground electric utility systems, because Edison either knew or should have known of the violations and failed to timely cure them, and (2) \$1,000 for each of 56 violations of GO-165 for failure to identify unsafe conditions. The Commission did not fine Edison for 4,721 GO violations it remedied promptly after CPSD brought them to Edison's attention.

The present case is an opportunity for the Commission to reinforce its policy objectives and the safety message PG&E's management has sent its employees (*see* PG&E Op. Br. at 2, 6-7), by taking account of PG&E's good faith in identifying, correcting and reporting the violation, and reducing the fine to no more than \$420,000.

Even if the Commission were to agree with CPSD's method of counting violations, it has the discretion to adopt a penalty at any level up to \$20,000 per violation. (Pub. Util. Code §

can, at CPSD's discretion, mean something other than a violation. Sections 2107 and 2108 both make clear that an “offense” is a violation, not some amorphous “incident.”

2107, as in effect through December 31, 2011.) Public Utilities Code § 2104.5 mandates the Commission's consideration of the good faith of the utility in assessing the amount of any penalty. It provides in relevant part:

Any penalty for violation of any provision of this act, or of any rule, regulation, general order, or order of the commission, involving safety standards for pipeline facilities or the transportation of gas in the State of California may be compromised by the commission. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation, shall be considered.

Res. ALJ-274 makes clear that one purpose of the citation appeal process is to ensure that the Section 2104.5 factors are properly considered:

If a utility believes that the amount of the fine imposed in any Staff-issued citation is not consistent with the factors set forth in § 2104.5, it may appeal the amount of the fine to **the full Commission**, which **will ensure that those factors are properly considered**.

(Res. ALJ-274, F&C 12 (emphasis added).)

Under the circumstances here, the Commission should exercise its discretion either not to impose a penalty or to do so at less than the statutory maximum. Not only did PG&E's employees act with an unswerving commitment to safety, the Company quickly investigated the issue, corrected it by performing leak surveys and repairing the leaks found, and voluntarily undertook to review its maps system-wide to identify any other possible missed leak surveys. PG&E's system-wide evaluation identified an additional 46 plat maps throughout its gas distribution system that were not included in the leak survey schedule and missed five-year leak surveys. Although the self-reported missed leak surveys represent a small percentage of PG&E's system (the 16 maps in the Diablo Division and the 46 additional maps represent less than 0.3% of PG&E's approximately 21,600 gas distribution system maps), the improvement in public safety – including the measures PG&E is taking to ensure such a lapse never happens again – is

obvious. PG&E does not in any way minimize the importance of timely performing all leak surveys. It corrected the problem as soon as it was discovered, and took steps to prevent a recurrence.

PG&E's prompt remedial actions for a self-reported violation and the absence of any harm or property damage argue for the Commission to exercise its discretion to adopt no penalty or a penalty at less than the maximum amount, as it did in D.04-04-065. Even if the Commission were to agree with CPSD's count of violations, endorsed by CCSF in its comments, it should penalize each of the claimed 838 violations no more than the statutory minimum of \$500, resulting in a total penalty of \$419,000.

The Commission should intervene both to promote its policy objectives for self-reporting and to ensure that CPSD is acting in accordance with the rules previously adopted by this Commission. The Commission should reject the Draft Resolution and exercise its discretion to impose no penalty or, at most, a penalty of \$420,000.

Respectfully submitted,

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April 16, 2012

CERTIFICATE OF SERVICE

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department, B30A, 77 Beale Street, San Francisco, California 94105.

On April 16, 2012, I served a true copy of:

**PACIFIC GAS AND ELECTRIC COMPANY'S REPLY
COMMENTS ON DRAFT RESOLUTION**

on the official serviced list for **Citation No. ALJ-274 2012-01-001** by electronic mail for those who have provided an e-mail address and U.S. mail for those who have not.

Copies were also enclosed in a sealed envelope and hand delivered to:

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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in San Francisco, California on April 16, 2012.

/s/
Tauvela V. U'u

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