

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

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

R.11-02-019
(Filed February 24, 2011)

**COMMENTS OF PACIFIC GAS AND ELECTRIC COMPANY ON
ALTERNATIVE PROPOSED DECISION OF COMMISSIONER FERRON
IMPOSING SANCTIONS FOR VIOLATION OF RULE 1.1 OF THE
COMMISSION'S RULES OF PRACTICE AND PROCEDURE**

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Pacific Gas and Electric Company ("PG&E") submits the following comments on the Alternate Proposed Decision of Commissioner Ferron Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure ("APD").

I. INTRODUCTION

The APD accuses PG&E of "deliberate and calculated dishonesty – behavior which clearly represents an 'artifice' as the term is used in Rule 1.1,"^{1/} a grave accusation that should not be made lightly or without foundation. But in this case, the APD's conclusion is based only on speculation and conjecture on discovery materials that are not in this proceeding. The actual evidentiary record – even when scrutinized through the most skeptical lens – contains no support for a finding that PG&E deliberately misled the Commission. And the Commission's rules – even when read with the broadest discretion and deference afforded by law – do not permit capricious penalties not rooted in evidence. PG&E respectfully urges the Commission to reject the APD and conclude, as the record requires, that the company did not violate Rule 1.

II. THE APD PURPORTS TO FIND VIOLATIONS OUTSIDE THE NOTICED SCOPE OF THIS OSC PROCEEDING.

The Rule 1 OSC ordered PG&E to appear and show cause why it should not be sanctioned for a Rule 1 violation arising out of two narrowly-defined and specific issues:

^{1/} APD at 11.

(1) whether PG&E attempted to mislead the Commission by using the word “Errata” in the title of its July 3, 2013 pleading (Ex. OSC-1), thereby creating “an inaccurate impression of a routine correction” to a previously-submitted pressure restoration filing; and (2) whether PG&E attempted to mislead the Commission by “[t]he timing of the filing, the day before a summer holiday weekend.”^{2/} PG&E relied on that notice in making its evidentiary showing at the September 6, 2013 hearing, responding to and rebutting the specific allegations made in the Rule 1 OSC. Thus, as ALJ Bushey observed at the conclusion of that hearing, PG&E was “prepared to rest on the record as it exists.”^{3/} No other party presented any evidence to the contrary.

The APD, however, would impose a \$14.35 million penalty based on a materially different issue. Instead of making any finding about whether the July 3rd submission date was misleading in and of itself, the APD addresses an entirely new issue, concluding that PG&E violated Rule 1 during the period between November 16, 2012 (which the APD asserts is the day PG&E became obligated to inform the Commission and the parties of the error in the Pipeline Features List for Line 147), and PG&E’s August 30, 2013 submission of the Verified Statement of its Vice President of Gas Transmission Maintenance and Construction (“Verified Statement”).^{4/} The fact that the record contains no evidence on this issue is unsurprising; the Rule 1 OSC nowhere hinted at this purported violation and PG&E therefore did not respond with respect to that issue.

Among the fundamental requirements of due process are notice of the charges and a reasonable opportunity to respond.^{5/} These “basic ingredient[s]” of fair procedure are essential safeguards of the “fundamental principle of justice” that no party may be “prejudiced in [its] rights without an opportunity to make [its] defense.”^{6/} A violation of these basic guarantees occurs when new allegations are introduced after the accused has already made its defense, as the APD does here.^{7/} For the Commission to impose penalties based on allegations not set forth in

^{2/} Rule 1 OSC at 4.

^{3/} R.T. 2414.

^{4/} APD at 17.

^{5/} *Salkin v. Cal. Dental Ass’n*, 176 Cal. App. 3d 1118, 1121 (1986) (quoting *Applebaum v. Bd. of Directors*, 104 Cal. App. 3d 648, 657 (1980)).

^{6/} *Pinsker v. Pac. Coast Soc’y of Orthodontists*, 12 Cal. 3d 541, 555 (1974); see also *Salkin*, 176 Cal. App. 3d at 1122 (“The individual must have the opportunity to present a defense.”) (citing *Pinsker*, 12 Cal. 3d at 555).

^{7/} See *Salkin*, 176 Cal. App. 3d at 1121-22.

the Rule 1 OSC would violate the company's right to due process under the California Constitution.^{8/} If the Commission wishes to consider purported violations outside the scope of the Rule 1 OSC, it must commence a new proceeding with proper notice to PG&E, place the burden of proof on its enforcement staff, SED, and provide PG&E with a full opportunity to respond to the allegations.^{9/}

III. THERE IS NO EVIDENTIARY OR LEGAL BASIS FOR THE APD'S FINDING OF RULE 1 VIOLATIONS.

The APD alleges that PG&E violated Rule 1 on two separate grounds: (a) the "delay" in submitting Exhibit OSC-1; and (b) the title and content of Exhibit OSC-1 itself.^{10/} The APD's conclusions of these purported violations find no support in the evidentiary record; instead, the APD impermissibly imposes the burden on PG&E to establish its innocence – including on charges of which it had no notice – and relies on conjecture to fill the evidentiary gap. For these reasons, and as discussed in detail below, the Commission should reject the APD and find that PG&E did not violate Rule 1.

A. The APD's Findings Regarding PG&E Management's Actions and Conclusions Consist of Baseless Conjecture.

The APD asserts that PG&E's obligation to inform the Commission and the parties of the errors identified in Exhibit OSC-1 began on November 16, 2012 because "it is reasonable to find that senior managers at PG&E were aware on or before November 16, 2012 that there was a serious discrepancy in PG&E's pipeline records and that this discrepancy could have represented a significant safety risk."^{11/} Far from being "reasonable," the APD's conclusions represent unwarranted speculation with no support in the evidentiary record of this proceeding.

^{8/} Cal. Const. art. I, § 7(a); *Sokol v. Pub. Util. Comm.*, 65 Cal. 2d 256 (1966). See also PG&E's October 1, 2013 Post-Hearing Reply Comments at 3-5.

^{9/} APD at 19-20.

^{10/} APD at 19-20.

^{11/} APD at 12-13.

1. The APD Impermissibly Relies on Evidence Outside the Rule 1 OSC Record.

The APD relies on testimony presented at the hearing on the Substantive OSC in support of its conclusion that PG&E had a duty to report as of November 16, 2012.^{12/} The Substantive OSC, however, is a separate proceeding, initiated by a distinct order related to a different subject matter than the Rule 1 OSC.^{13/} The evidentiary record in the Substantive OSC hearing was still open when the APD was issued, and the testimony on which the APD relies had not even been completed.^{14/} There is no legal basis for the APD to assert purported violations based on evidence from a separate proceeding, let alone incomplete evidence. In *Application of AT&T*, in the context of a rate proceeding (as opposed to an enforcement proceeding) with lesser due process requirements, the Commission held that:

[t]he Commission is required to make separate findings of fact and conclusions of law on all material issues. Failure of the Commission to make such findings and conclusions may require annulment of the Commission's order. *All such findings must be based on substantial evidence in the record.*^{15/}

For the Commission to impose penalties in the Rule 1 OSC, it must do so based on evidence in the record of that proceeding.

2. The APD's Allegations Regarding PG&E Management Are Devoid of Evidentiary Support.

Even if the APD could appropriately rely on testimony from the Substantive OSC hearing, it cites to no evidence that supports its conclusion that PG&E deliberately withheld information that represented a safety risk. The APD merely asserts as *ipse dixit* that, by

^{12/} APD at 10-11 (citing to September 6, 2013 testimony of PG&E's Vice President of Gas Transmission Maintenance and Construction).

^{13/} See Rule 1 OSC at 2-3 ("The assigned Commissioner and Chief Administrative Law Judge are holding a separate hearing to address the substantive issues raised by the July document"); See also R.T. 2333 ("This is the time and place set for the hearing in response to ruling...directing Pacific Gas & Electric Company to show cause why it should not be sanctioned by the Commission for violation of Rule 1.1[.]"); Substantive OSC at 4 ("The Chief Administrative Law Judge is holding a separate hearing to address the ethical issues raised by the attempted filing of the July document."). R.T. 2422 ("This is the time and place set for the order to show cause hearing on the ruling...directing Pacific Gas and Electric Company to appear and show cause why all Commission Decisions authorizing increased operating pressures should not be stayed pending demonstration that records are reliable.").

^{14/} R.T. 2514 (discussing timing of continued cross-examination).

^{15/} 1991 Cal. PUC LEXIS 67, *20 (emphasis added) (internal citations omitted).

November 16, 2012, PG&E’s senior management “must have recognized this as a significant safety matter.”^{16/} Nothing in the evidentiary record supports a finding that the errors reported in Exhibit OSC-1 presented any public safety issue – or that anyone in PG&E’s management ever believed them to be a safety issue. Indeed, the evidence in the record of both the Rule 1 OSC and the Substantive OSC proceedings demonstrates conclusively that the natural gas transmission pipelines that were the subject of Exhibit OSC-1 were (and remain) safe to operate at their then-current operating pressure. The testimony of PG&E’s Vice President of Gas Transmission and Maintenance, on which the APD purports to rely, establishes exactly the opposite of the APD’s conclusion – that PG&E did not (and does not) believe that the matters raised in Exhibit OSC-1 represented a safety risk:

I base that judgment based on the very fact that every one of those pipeline segments that we’re referring to both on Line 147, 132A, and Line 101 – all of the segments of pipelines had been pressure tested or hydrostatically tested for all of those segments . . . So in my mind, that pipeline – the pipelines were operating safely then and continue to operate safely today.^{17/}

Indeed, the Assigned Commissioner and Assigned ALJ acknowledged in the text of the Substantive OSC that “[t]he Safety and Enforcement Division emphasized the importance of pressure testing to guard against any record-keeping shortcomings, and ***agreed that all public***

^{16/} APD at 11.

^{17/} R.T. 2427-28 (PG&E/Johnson). *See also* Ex. OSC-4 (illustrating safety margin between 2011 hydrotest pressure and operating pressure); R.T. 2433 (PG&E/Johnson) (“These pipelines saw the same pressure test regardless of that information, and the pressure test is what we ultimately rely on to show that our pipelines are safe.”); R.T. 2483 (PG&E/Johnson) (“when we look at those issues from an engineering perspective, they do not raise any safety concerns.”); R.T. 2499 (PG&E/Johnson) (“Yes, I would say that having a pressure test on a line with a significant safety margin gives you great comfort in terms of understanding how that pipeline will operate and will operate safely. . . . The MAOP is about 35 pounds less than it was when we made the request to upgrade the pipe. But it is still significantly below, obviously, the pressure test.”); R.T. 2508 (PG&E/Johnson) (“I think getting a pressure test in with a spike test that we’re using gives you great comfort. It’s almost as good as replacing the entire pipeline.”). And Michael Rosenfeld, one of the leading pipeline safety experts in the country, concluded that Line 147 is safe “without doubt.” *See* Declaration of Sumeet Singh Supplementing the Verified Statement (Oct. 18, 2013) (“Singh Decl.”), Ex. F at 1 (Letter from Kiefner and Associates dated Oct. 18, 2013); *id.* at ¶ 12. PG&E cites to this latter evidence from the Substantive OSC solely to provide context for the evidence cited in the APD without waiving its argument that such evidence may not provide the basis for disposition of this Rule 1 proceeding, as it is not part of the Rule 1 record.

safety issues have been addressed by PG&E's operational actions.^{18/} There is no record evidence to the contrary, and thus no basis to conclude that PG&E management believed that the errors identified in Exhibit OSC-1 represented a safety risk.

Nor does the APD's arbitrary identification of November 16, 2012 as the point at which PGE management "must have recognized ... a significant safety matter,"^{19/} find any support in the evidentiary record.^{20/} The only place that date is even mentioned is in an email PG&E produced in discovery *after* the record in the Rule 1 OSC was closed. Materials produced in discovery which are not part of the Rule 1 OSC evidentiary record provide an impermissible basis for the APD's finding that PG&E violated Rule 1 as of that date. *Application of AT&T* ("***Commission findings must be based on substantial evidence in the record***") (emphasis added).^{21/}

B. The APD Impermissibly Shifts the Burden of Proof to PG&E.

It is well established that the party asserting a violation of Rule 1 must prove the violation by a preponderance of the evidence.^{22/} Typically, the Commission's enforcement staff (now SED) assumes the role of the "prosecutor" in OIIs and OSCs.^{23/} Here, by contrast, the Chief ALJ and Assigned ALJ issued the Rule 1 OSC without any showing by enforcement staff or any other party.^{24/} As discussed in detail in PG&E's Comments on the PD, this procedural defect delegitimizes the entire Rule 1 OSC proceeding. The prejudice inherent in this impermissible burden shifting is highlighted by the APD's imposition of Rule 1 penalties for the time period after PG&E had already apprised Commission staff of the errors identified in Exhibit OSC-1.

^{18/} Substantive OSC at 3-4 (emphasis added).

^{19/} APD at 11.

^{20/} APD at 19, Finding of Fact No. 9.

^{21/} *App. of AT&T*, 1991 Cal. PUC LEXIS at *36-37.

^{22/} *See Investigation of S. Cal. Edison Co.*, D.04-04-065, 2004 Cal. PUC LEXIS 207, at *4-5, *92 ("CPSD has the burden of proving that Edison violated the GOs and Rule 1."); *Investigation of Titan Telecomm., Inc.*, D.03-01-079, 2003 Cal. PUC LEXIS 79, at *4-5 ("In this OII, CPSD has the burden of proving that Respondents violated Rule 1 by a preponderance of the evidence."); *Investigation of All Facilities-Based Cellular Carriers*, D.94-11-018, 1994 Cal. PUC LEXIS 1090, at *30, *200 ("In the OSC the staff must prove a violation of . . . Rule 1 by a preponderance of the evidence.").

^{23/} *See, e.g., Decision Resolving Order to Show Cause*, D.12-04-047 (adopting resolution of Order to Show Cause proposed in joint status report by CPSD and PG&E).

^{24/} Rule 1 OSC at 5.

PG&E presented evidence that on March 20, 2013, representatives of the company conducted a conference call with Commission staff regarding, among other subjects, the pipeline specification errors identified on Line 147. PG&E and SED specifically discussed “the corrected pipe specifications for Line 147,” and SED requested, and PG&E provided, copies of the MAOP validation reports and PFL for Line 147, as well as the original MAOP validation records for Line 147.^{25/} This record evidence was not rebutted by any party. The APD, however, concludes that “PG&E did not establish that its March 20, 2013 conference call with Commission staff provided adequate notice regarding the errors in Line 147 pipeline specifications or the need to modify D.11-12-048.”^{26/} This conclusion constitutes plain legal error. It finds no support in the record and is contrary to the only evidence that is in the record. The Commission may not lawfully presume facts supporting a violation and shift the burden to PG&E to convince it otherwise.^{27/}

C. The APD’s Finding of a Rule 1 Violation in Connection with PG&E’s Submission of Exhibit OSC-1 Is Contrary to the Evidence and the Law.

The APD asserts that PG&E violated Rule 1 “because of the title and incomplete content” of Exhibit OSC-1^{28/} and relies on these purported deficiencies as a basis for imposing further Rule 1 penalties for the supposedly misleading document caption as well as for the time period between July 3, 2013 and August 30, 2013.^{29/} As discussed below, neither basis for a Rule 1 violation is supported by the law or the evidentiary record.

^{25/} Verified Statement at ¶¶ 66-68.

^{26/} APD at 19, Finding of Fact No. 10.

^{27/} See, e.g., *Investigation of the Conlin-Strawberry Water Co., Inc.*, D.05-07-010, 2005 Cal. PUC LEXIS 294, at *22 (concluding it would “violate[] California constitutional law” to place the burden of proof on respondents in an enforcement proceeding “where substantial property rights are at issue”). See also Evid. Code § 500 (“Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”); *Valentine v. Provident Mut. Life Ins. Co. of Phila.*, 12 Cal. App. 2d 616, 618 (1936) (“It is not contended by either litigant that the burden of proof to establish the affirmative of an issue ever shifts. This is, of course, the law.”).

^{28/} APD at 15.

^{29/} APD at 15-16.

1. The APD’s Findings Regarding the Title of Exhibit OSC-1 Are Erroneous.

The APD finds that PG&E’s counsel’s explanation of the title of Exhibit OSC-1 is “not credible because it is not logical.”^{30/} The APD’s discussion is no more logical. To the contrary, the parties’ briefs and the APD together underscore that PG&E made good faith decisions regarding the content and timing of Exhibit OSC-1 in a situation in which the Commission’s Rules of Practice and Procedure provided no clear guidance.

Even with the benefit of hindsight, the APD does not point to any specific rule that required PG&E to follow a prescribed procedural path to formally notify the parties of the errors in the original pressure restoration filing.^{31/} The APD does, however, come up with a procedural path not previously mentioned in the Rule 1 OSC, in any party’s brief, or in any of the questioning at the hearing: “The obvious solution to a closed record is a motion to reopen the record, which apparently was not considered, notwithstanding the admitted need to give notice, presumably on the record.”^{32/} Finding of Fact 6 reiterates that a motion to reopen is one of only two “filings permitted pursuant to the Commission’s Rules of Practice and Procedure.”

But this is wrong. Rule 13.14 of the Commission’s Rules of Practice and Procedure, to which the APD apparently refers, allows a motion to reopen the record to be filed *after submission* and *before decision*.^{33/} Contrary to the APD, this Rule does not provide a mechanism for PG&E to reopen the record of an already concluded proceeding.

That leaves only a petition for modification. At the September 6th hearing, PG&E explained why, in its counsel’s view, a petition for modification was not needed or required.^{34/} The APD does not discuss PG&E’s explanation, merely characterizing it as “a complicated

^{30/} APD at 14.

^{31/} The intervenors and SED could do no better. TURN and DRA asserted that a petition for modification was required. *See, e.g.*, TURN OB at 4; DRA OB at 10-13. In contrast, SED argued that PG&E could have submitted either (a) a petition to modify; (b) an amendment to its prior submission; or (c) some “other pleading.” SED OB at 15.

^{32/} APD at 14. One might wonder why, if the motion to reopen is the “obvious solution,” no one mentioned it before the Proposed Decision issued by ALJ Bushey.

^{33/} Rule 13.14(b) begins, “A motion to *set aside submission* and reopen the record for the taking of additional evidence . . .” (emphasis added). By definition, “submission” refers to the period a matter is under consideration before decision. *See, e.g.*, <http://www.legaldictionaries.org/Submission> (“When a judge does not immediately announce a decision, the judge is said to take the case under submission.”)

^{34/} R.T. 2348-50 (PG&E/Malkin).

analysis suggesting that the Ordering Paragraphs, when read together, did not require modification.”^{35/}

In fact, there is nothing complicated about it. D.11-12-048 contains two relevant ordering paragraphs:

1. Pacific Gas and Electric Company *may* operate natural gas transmission Lines 101, 132A, and 147, with associated shorts, with a maximum operating pressure of 365 pounds per square inch gauge. [Emphasis added]
2. Pacific Gas and Electric Company *must* operate Lines 101, 132A, and 147 in accord with applicable state and federal law and regulations. [Emphasis added]

Ordering Paragraph 2 made clear that, notwithstanding the authorization in the first paragraph, PG&E could not operate these pipelines in violation of state and federal law. If new information became available that required PG&E to reduce its operating pressure under applicable state and federal law, PG&E was required to do so under Ordering Paragraph 2. In other words, D.11-12-048 already covered the possibility that some future development or discovery might require operating one or more of these lines at a lower pressure. After PG&E corrected the errors, the federal code required a lower operating pressure, which PG&E implemented in accordance with Ordering Paragraph 2.^{36/} The fact that PG&E *could* have filed a petition for modification does not prove that such a petition was so clearly required that PG&E was reckless or grossly negligent in submitting a different pleading. The only evidence in the record is that the decision to use the word “Errata” in the title of Exhibit OSC-1 reflected the good faith judgment of PG&E’s counsel in the absence of a clear procedural path under the Commission’s Rules of Practice and Procedure.^{37/} While the APD criticizes the explanation

^{35/} APD at 14.

^{36/} R.T. 2349-50 (PG&E/Malkin). PG&E’s internal standards require inclusion of a segment’s joint efficiency factor in the design calculation, a conservative approach not explicitly required by the federal code.

^{37/} See, e.g., R.T. 2347-51 (PG&E/Malkin) (“This was, in my experience at the Commission which as I’ve already described goes back a long ways, this was a completely unique situation. . . . There wasn’t anything that exactly fit. To me, errata is literally a list of errors and corrections, and that is exactly what we submitted.”); R.T. 2357 (PG&E/Malkin) (Q: “Mr. Malkin, did you at any time in connection with the preparation, the titling, or the filing of the errata intend to mislead the Commission, the parties, or the public?” A: “Absolutely not. As I said, I was trying to find a vehicle that would satisfy what I felt was our absolute obligation to bring to the attention of the

offered by PG&E’s counsel, disagreements about procedural judgments not explicitly covered by the Rules do not establish a Rule 1 violation.

2. The APD’s Findings Regarding the Content of Exhibit OSC-1 Lack Support in the Facts or Law.

The APD also asserts that PG&E’s submission of Exhibit OSC-1 violated Rule 1 because Exhibit OSC 1 “did not clearly convey the nature or significance of the facts set forth within.”^{38/} However, both the APD and the Rule 1 OSC itself acknowledge that Exhibit OSC-1 disclosed that “the supporting information PG&E filed with the Commission on October 31, 2011 and November 15, 2011, to justify its request to lift operating pressure restrictions on Lines 147 and 101 *contained errors*.”^{39/} In fact, Exhibit OSC-1 used the word “error” four times on the first page alone. In addition, Exhibit OSC-1 clearly stated in the second paragraph that “after correcting these errors the affected segments will have a lower MAOP than approved in D.11-12-048.” Thus, Exhibit OSC-1 unambiguously conveyed the information it intended to convey, formally informing the parties of errors and that the errors resulted in a lower MAOP.

Instead, the APD finds a purported Rule 1 violation on the theory that Exhibit OSC-1 contains only “a brief description of the errors” and “did not disclose when or how PG&E became aware of those errors.”^{40/} However, the APD’s assertion that Exhibit OSC-1 was a “short document with only one page devoted to a brief description of the errors in the MAOP validation records” (APD at 9) does not change the fact that PG&E did, in fact, specifically disclose the errors and the lower MAOP in that document. The APD identifies no rule or Commission precedent that would have required PG&E to elaborate on all the facts and circumstances surrounding discovery of the error in order to avoid a Rule 1 violation. Absent that, finding a Rule 1 violation based on an arbitrary and subjective judgment that Exhibit OSC-1

Commission and the parties the fact that we have discovered errors.”); R.T. 2408-09 (PG&E/Malkin) (“I – it never crossed my mind that this wasn’t going to serve the purpose we intended, which was to bring it to the attention of the parties and the Commission with the thought that the Commission might well want to have a proceeding like this afternoon’s[.]”).

^{38/} APD at 15

^{39/} Rule 1 OSC at 1 (“That document [Exhibit OSC-1] stated that the supporting information PG&E filed with the Commission on October 31, 2011, to justify its request to lift operating pressure restrictions on Line 147 and 101 contained errors.”); APD at 2 (emphasis added).

^{40/} APD at 9.

was insufficiently detailed would expand the scope of Rule 1 without prior notice and thus violate PG&E's right to due process under the law.^{41/}

IV. THE APD'S MONETARY PENALTY IS CONTRARY TO THE LAW.

The APD also errs in assessing monetary penalties for the purported Rule 1 violations. First, the APD imposes maximum penalties on grounds unsupported by the evidentiary record and explicitly contradicted by the Rule 1 OSC itself. Second, the APD violates Commission precedent and California law by imposing daily penalties for the single, completed act of submitting Exhibit OSC-1.^{42/} Finally, any penalty within the range contemplated by the APD would also violate California's Excessive Fines Clause because it is grossly disproportionate to PG&E's conduct as revealed in the evidentiary record in this matter.

A. There Is No Support for the Imposition of Maximum Daily Fines for the Timing of Exhibit OSC-1.

The APD articulates as its basis for imposing the maximum fine on PG&E that “[n]atural gas transmission safety by this operator has been one of the Commission’s highest priorities for three years.”^{43/} Although that general statement may be true, the invocation of public safety as a basis for imposition of the maximum fine is inconsistent with the evidentiary record and the Rule 1 OSC itself. In that order, the Chief ALJ and Assigned ALJ specifically stated that they had confirmed with SED advisory staff that PG&E had addressed any public safety concerns associated with the error in its prior filings and that the natural gas transmission pipelines at issue were safe to operate at their then-current operating pressures.^{44/} Even if it were permissible to look beyond the record of this proceeding to the Substantive OSC record, which it is not, the APD finds no more support in the latter. The Assigned Commissioner and Assigned ALJ specifically observed in the Substantive OSC that “[t]he Safety and Enforcement Division emphasized the importance of pressure testing to guard against any record-keeping shortcomings, and **agreed that all public safety issues have been addressed by PG&E’s operational actions.**”^{45/} For the same reasons, the evidentiary record does not support a finding that the timing of submitting Exhibit OSC-1 presented any public safety issue. There is no

^{41/} *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

^{42/} See PD Comments at 12-13.

^{43/} APD at 16.

^{44/} Rule 1 OSC, at 2-3.

^{45/} Substantive OSC at 3-4 (emphasis added). See also *supra* fn. 17.

record evidence to the contrary, and thus no factual basis to conclude that safety concerns justify imposition of a maximum statutory fine.

B. The Imposition of Daily Penalties for the Submission of Exhibit OSC-1 Is Arbitrary and Contrary To Law.

PG&E submitted Exhibit OSC-1 for filing on July 3, 2013 and served it on all parties the same day.^{46/} The Commission's Docket Office rejected PG&E's pleading on August 2, 2013. The Substantive OSC was issued on August 19, 2013 and set a deadline of August 30, 2013 for PG&E to provide a verified statement of its Vice President of Gas Transmission Maintenance and Construction "setting forth the exact events, with dates, which revealed PG&E's errors, and PG&E's subsequent actions."^{47/} PG&E submitted the Verified Statement by that deadline.

The APD treats the submission of Exhibit OSC-1 as a "continuing violation" under Public Utilities Code § 2108 and would impose daily penalties for the 58 days between PG&E's submission of Exhibit OSC-1 and the company's August 30, 2013 filing of the Verified Statement pursuant to the Substantive OSC.^{48/} This proposed treatment is plainly unjustified. First, Section 2108 itself precludes considering the single act of submitting Exhibit OSC-1 as a daily violation simply because the document remained "uncorrected." As its language makes clear, Section 2108 applies only to conduct that continues over time, not to specific acts.^{49/} *Investigation of Qwest Commc'ns Corp.*, 2003 Cal. PUC LEXIS 67, at *20-21 ("The Commission has calculated fines on the basis of Section 2108 in cases where the evidence established that . . . practices that violated statutory or decisional standards had occurred over a period of time, rather than specific instances of violations."). The APD's approach conflates the specific act that constitutes the alleged violation (here, submission of Exhibit OSC-1 to the Docket Office) with a consequence that flows from that act (the pleading remained "uncorrected" until PG&E's submission of the Verified Statement). Under Section 2108, it is the *violation* that must be ongoing, not its natural consequences.

Consistent with the language of Section 2108, the California Supreme Court narrowly construes statutes that permit the aggregation of daily penalties. *See Hale v. Morgan*, 22 Cal. 3d

^{46/} APD at 1; R.T. 2354-56 (PG&E/Malkin).

^{47/} Substantive OSC at 6.

^{48/} APD at 17.

^{49/} Section 2108 provides in relevant part that "in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

388, 401 (1978) (“Uniformly, we have looked with disfavor on ever-mounting penalties and have narrowly construed the statutes which either require or permit them.”). For example, in *People ex rel. Younger v. Superior Court*, 16 Cal. 3d 30 (1976), the Court narrowly construed Water Code § 13350(a), which at the time imposed a penalty of \$6,000 “for each day in which [an unlawful oil] deposit occurs.” The Court found this language to be ambiguous between the two competing interpretations urged by the parties: (1) each day that the oil remains on the water; or (2) each day of depositing oil. The Court adopted the latter, narrower construction because the alternative – each day the oil remains on the water – was unduly harsh and made little sense. 16 Cal. 3d at 43-44 (explaining that under the broader construction “liability is measured by a critical factor normally beyond the control of the violator, namely the time in which the oil spill is or reasonably can be cleaned up”). The narrow construction rule precludes the APD’s imposition of daily fines for the singular act of submitting Exhibit OSC-1, a conclusion that is bolstered by the fact that Section 2108 is not ambiguous as was the statute in *Younger*.

Even if the law permitted aggregating daily penalties in this situation, the facts do not support it. There is no evidence that PG&E knew the pleading had not been accepted for filing prior to receipt of the August 2 rejection, and thus the company had no meaningful opportunity before that date to withdraw and re-submit the document. If the Docket Office had not been backlogged, it would have addressed the pleading in its usual one to two days. Nor, as noted above, is there any basis for concluding that PG&E must have known it had to submit the details the Substantive OSC required in order to avoid a Rule 1 violation. The Assigned Commissioner and Assigned ALJ did not issue the Substantive OSC until August 19, and that order specifically permitted PG&E to file the Verified Statement by August 30. If the Commission had ordered PG&E to submit the Verified Statement at an earlier date, the company would have done so. The Commission cannot lawfully impose daily maximum penalties for the time it took its own Docket Office to act plus the time until PG&E’s submission of the Verified Statement on the exact date ordered by the Substantive OSC.

C. The Aggregate \$17.25 Million Fine Violates the Constitutional Protection Against Excessive Fines.

Any penalty within the range contemplated by the APD would violate California’s Excessive Fines Clause. *See* Cal. Const. art. I, § 17. As demonstrated above, the APD’s

conclusions underpinning the purported violations are unsupported by the evidentiary record and instead depend on a combination of conjecture and an unlawful presumption that PG&E bore the burden of establishing its innocence of violations announced only *after* the company made its evidentiary showing. The APD imposes maximum fines for purported safety concerns dismissed by the Commission itself, imposes daily fines for the Commission's own administrative delays, and penalizes PG&E for adhering to a Commission-imposed deadline.

The evidentiary record itself shows only that there was no meaningful safety concern associated with the errors identified in Exhibit OSC-1 and that PG&E submitted that document in good faith following legitimate factual investigation and consideration of procedural ambiguities. It would be an understatement to describe a \$17.25 million penalty based on such a record as "grossly disproportional to the gravity of [the] offense." *People v. Urbano*, 128 Cal. App. 4th 396, 406 (Ct. App. 2005) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)); *see also People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728 (2005) (explaining that the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality" (internal quotation marks omitted)).

V. CONCLUSION

The APD tramples PG&E's due process rights by finding violations that far exceed the scope of the notice provided in the Rule 1 OSC, are unsupported by the evidentiary record, and are contrary to the Commission's own rules and precedent. For the foregoing reasons, PG&E respectfully urges the Commission to reject the APD and conclude that the company's submission of Exhibit OSC-1 did not violate Rule 1.

Respectfully submitted,

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