

**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
PROPOSED DECISION OF ALJ BUSHEY IMPOSING SANCTIONS FOR
VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF
PRACTICE AND PROCEDURE**

MARIE L. FIALA
Sidley Austin LLP
555 California Street Suite 2000
San Francisco, CA 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-2400
E-Mail: mfiala@sidley.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

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

I. INTRODUCTION

The PD, which finds that PG&E violated Rule 1.1 of the Commission's Rules of Practice and Procedure ("Rule 1") by submitting its pleading entitled "Errata to Pacific Gas and Electric Company's Supporting Information for Lifting Operating Pressure restrictions on Lines 101 and 147" (Exhibit OSC-1) on July 3, 2013, is based on multiple errors of law and fact. The Rule 1 OSC gave PG&E notice of two potential violations in connection with this pleading: (1) whether PG&E attempted to mislead the Commission by using the word "Errata" in the title of Exhibit 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."^{1/} PG&E's evidentiary showing at the September 6, 2013 hearing was based on and responded to the specific issues identified in this notice.

When judged by the evidentiary record, the only permissible conclusion is that, however it may be characterized in hindsight, PG&E's submission of Exhibit OSC-1, after appropriately

^{1/} Rule 1 OSC at 4.

briefing the Commission’s advisory staff months earlier, was a good faith attempt to provide formal notice of the errors identified in that pleading in the absence of any clearly applicable procedure for doing so.

The PD, however, would penalize PG&E 90 times the amount proposed by the Commission’s own Safety and Enforcement Division (“SED”). The PD finds violations not alleged in the Rule 1 OSC, ignores the evidentiary record, makes no findings regarding PG&E’s state of mind, and imposes penalties on grounds – especially as to public safety – explicitly contradicted by the Rule 1 OSC itself. Accordingly, PG&E respectfully urges the Commission to reject the PD and conclude that neither the title nor the timing of the submission of Exhibit OSC-1 violated Rule 1.1.

II. THE RULE 1 OSC PROCEEDING AND PD VIOLATE PG&E’S CONSTITUTIONAL RIGHT TO DUE PROCESS

While the Commission enjoys expansive authority over those entities and activities within its regulatory scope, its proceedings remain bounded by the protections afforded by the Constitutions of the United States and the State of California.^{2/} Both Constitutions prohibit the state from depriving a person of “life, liberty, or property without due process of law.”^{3/} The California Supreme Court invalidates CPUC actions that violate due process requirements.^{4/} As discussed below, the PD violates due process by impermissibly shifting the burden of proof to PG&E and by finding violations based on issues not noticed in the Rule 1 OSC.

A. The OSC Proceeding Impermissibly Shifted the Burden of Proof to PG&E.

The party asserting a violation of Rule 1 must prove the violation by a preponderance of the evidence.^{5/} Typically, the Commission’s enforcement staff (now SED) assumes the role of

^{2/} See, *Sable Communications of California Inc. v. Pacific Telephone and Telegraph Co.*, 890 F.2d 184, 189 (9th Cir. 1989) (“[t]he CPUC was created by the California Constitution Art. XII, § 22, and California’s police power over public utilities has been vested in it. The CPUC derives all its powers from the state constitution and legislature, and the state Supreme Court has consistently held that CPUC regulations, as state action, must comply with the requirements of the federal constitution.”) (internal citations omitted).

^{3/} U.S. Const., amend. XIV § 1; Cal. Const., art. I, § 7(a), cl. 1; § 15, cl. 3. 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.

^{4/} See *Sokol v. Public Utilities Commission*, 65 Cal. 2d 247, 256 (1966).

^{5/} See *Investigation of S. Cal. Edison Co.*, D.04-04-065, 2004 Cal. PUC LEXIS, 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

the “prosecutor” in OIIs and OSCs.^{6/} Here, in contrast, the Chief ALJ and Assigned ALJ issued the Rule 1 OSC without any showing by enforcement staff or any other party.^{7/} SED did not appear at the evidentiary hearing to “prosecute” the alleged violations. Instead, the OSC required PG&E to disprove the presumption that PG&E had violated Rule 1. This approach is reflected in the plain language of the OSC: PG&E’s action “appears to be an unreasonable procedural choice and could be interpreted as attempting to create an inaccurate impression of a routine correction . . . PG&E is ordered to appear at the hearing scheduled below and show cause why it should not be sanctioned.”^{8/} The Commission may not lawfully presume a violation and shift the burden to PG&E to convince it otherwise.^{9/}

B. The PD Purports to Find Violations Outside the Noticed Scope of the OSC Proceeding.

In the Rule 1 OSC, Chief ALJ Clopton and ALJ Bushey ordered PG&E to appear and show cause why it should not be sanctioned for a Rule 1.1 violation arising out of two issues: (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.”^{10/} PG&E made its evidentiary showing at the September 6, 2013 hearing addressing the specific issues identified in the Rule 1 OSC. Thus, as ALJ Bushey observed at the conclusion of the hearing, PG&E was “prepared to rest on the record as it exists.”^{11/}

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.”).

^{6/} 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).

^{7/} Rule 1 OSC at 5.

^{8/} Rule 1 OSC at 4.

^{9/} 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.”).

^{10/} Rule 1 OSC at 4.

^{11/} R.T. 2414.

The PD, however, would impose a \$5.25 million penalty based on a different timing issue. Instead of making any finding about whether the July 3rd submission date was misleading, the PD concludes that PG&E violated Rule 1 for the delay between March 20, 2013 (which the PD identifies as “the day PG&E first became obligated to inform the parties of the error” in the Pipeline Features List for Line 147), and PG&E’s July 3, 2013 submission of Exhibit OSC-1. (PD at 13.) The Rule 1 OSC did not raise this purported violation. Having no notice of it, PG&E did not present evidence on the subject.

Among the fundamental requirements of due process are notice of the charges and a reasonable opportunity to respond.^{12/} 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.”^{13/} A violation of these basic guarantees occurs when new allegations are introduced after the accused has already made its defense, as the PD does here.^{14/}

California courts have condemned the late assertion of new charges in administrative enforcement proceedings. In *Smith v. State Bd. of Pharmacy*, for example, the court of appeal denounced the Pharmacy Board’s mid-hearing change of legal theories as violating “the basic . . . elements” of due process because the respondent was “misled by the [initial] accusation” as to what charges he would have to defend against.^{15/} And in *Cannon v. Commission on Judicial Qualifications*, the Supreme Court held that a charge not “contained in the formal notice” of proceedings had to “be stricken as irrelevant.”^{16/} In so holding, the Court relied on *In re Ruffalo*, a United States Supreme Court decision that found a due process violation had occurred when a county bar association added a new charge midway through a disbarment proceeding.^{17/} The *Ruffalo* Court found that procedure unconstitutional due to the “absence of fair notice as to . . . the precise nature of the charges,” and emphasized that this deficiency “serious[ly] prejudice[d]” the respondent’s right to mount a defense, saying: “How the charge would have been met had it

^{12/} *Salkin v. Cal. Dental Ass’n*, 176 Cal. App. 3d 1118, 1121 (1986) (quoting *Hackethal v. Cal. Med. Ass’n*, 138 Cal. App. 3d 435, 442 (1982)).

^{13/} *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).

^{14/} See *Salkin*, 176 Cal. App. 3d at 1122.

^{15/} 37 Cal. App. 4th 229, 242 (1995).

^{16/} 14 Cal. 3d 678 at 695-96 (1975).

^{17/} *In re Ruffalo*, 390 U.S. 544, 552 (1968).

been originally included in those leveled against [the respondent] no one knows.”^{18/} The same is true here.

The Rule 1 OSC provided notice of two potential violations, which were narrowly and specifically defined, and ordered PG&E to appear and show cause as to why it should not be fined based upon those two potential violations. PG&E relied on that notice in its evidentiary presentation. For the Commission to impose penalties based on allegations not set forth in the Rule 1 OSC would violate the company’s right to due process under the California Constitution.^{19/} If the Commission wishes to consider purported violations outside the scope of the Rule 1 OSC, it must start 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.

C. The PD Impermissibly Expands Rule 1.

Rule 1.1 provides in relevant part as follows:

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission . . . agrees . . . ***never to mislead the Commission or its staff*** by an artifice or false statement of fact or law. (Emphasis added)

The PD acknowledges that on March 20, 2013, PG&E informed the Commission’s advisory staff of the error in some of the supporting information for the prior pressure restoration filing, the correct pipeline features and resulting MAOP, and the results of the company’s investigation of these issues. (PD at 8.) Having informed the Commission’s advisory staff, PG&E discharged its obligation to the Commission and its staff, and the PD does not find to the contrary. Instead, the PD imposes a new duty not set forth in Rule 1. The PD finds that “PG&E’s obligation to inform ***the parties to this proceeding*** of the error in its 2011 supporting documentation” began the day PG&E informed the Commission (March 20, 2013), and that PG&E violated Rule 1 by failing to attempt to formally notify the parties until July 3, 2013.^{20/}

Finding a Rule 1 violation on this basis would impermissibly expand the scope of Rule 1 without prior notice. It is true, as the PD observes, that PG&E acknowledged that it had an

^{18/} 390 U.S. at 551-52 & n.4 (emphasis added).

^{19/} Cal. Const. art. I, § 7(a); *Sokol*, 65 Cal. 2d 256. See also, PG&E’s October 1, 2013 Post-Hearing Reply Comments at 3-5.

^{20/} *Id.* at 9, 13 (emphasis added).

“absolute obligation” to bring the errors it discovered to the attention of the parties. This obligation, however, does not derive from Rule 1 and cannot form the basis for a purported violation of that rule. Nowhere does Rule 1 impose an obligation on PG&E to formally notify non-Commission parties, especially within any particular timeframe, of errors in a prior filing in a then-inactive proceeding. The Due Process Clause of the California Constitution precludes the Commission from expanding the scope of Rule 1 in this adjudicatory proceeding. That is because due process requires that laws and regulations must give fair notice of conduct that is forbidden or required.^{21/} Analogous cases construing the Federal Due Process Clause have held that due process is implicated where, as here, a party first receives notice of a proscribed activity during the pendency of an enforcement action. *See Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 158 (1991) (noting that “the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties”).

What the U.S. Supreme Court said last year in *FCC v. Fox Television Stations* when it struck down an FCC indecency finding and penalty on due process grounds is equally applicable to the PD’s proposal to find a violation through a newly-expanded interpretation of Rule 1:

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.

. . . [T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that

^{21/} *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

those enforcing the law do not act in an arbitrary or discriminatory way.^{22/}

The PD's interpretation of Rule 1 violates the due process principles set out in *Fox Television Stations*. Characterizing the errors disclosed in Exhibit OSC-1 as "provocative . . . in light of the intense public interest in natural gas pipeline safety," as the PD does (PD at 8), does not change the fact that the PD interprets Rule 1 in a manner that goes beyond the text and was not previously articulated by the Commission. Finding a violation of Rule 1.1 based on PG&E's purported delay in formally notifying non-Commission parties of the errors identified in Exhibit OSC-1 would thus violate PG&E's right to due process under the law.

III. THE PD'S FINDING OF A RULE 1 VIOLATION FOR PG&E'S USE OF THE WORD "ERRATA" IN THE TITLE OF EXHIBIT OSC-1 IS CONTRARY TO THE EVIDENTIARY RECORD AND THE LAW

The PD finds that PG&E's counsel's explanation of the title of Exhibit OSC-1 is "not credible because it is not logical."^{23/} (PD at 10.) The PD's discussion is no more logical. To the contrary, the briefs of the parties and the PD together underscore that PG&E made a good faith choice in a situation in which the Commission's Rules of Practice and Procedure provided no clear guidance.

First, the PD acknowledges, as did the Rule 1 OSC itself,^{24/} that Exhibit OSC-1 disclosed "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*." (PD at 2 (emphasis added).) In fact, Exhibit OSC-1 uses the word "error" four times on the first page alone. Thus, Exhibit OSC-1 unambiguously conveyed the information it intended to convey, formally informing the parties of the errors.

Even with the benefit of hindsight, the PD does not point to any specific Rule that required PG&E to follow a specific procedural path to formally notify the parties of the errors in

^{22/} *Fox Television Stations*, 132 S. Ct. at 2317 (citations omitted).

^{23/} The PD notes that PG&E's counsel said an amendment (Rule 1.12) "wasn't appropriate, because the proceeding was closed, if you will." PD at 10 (*citing* R.T. 2348). Rule 1.12(a), however, provides that an amendment "must be filed prior to the issuance of the scoping memo, which by its terms means before the proceeding is concluded. Nonetheless, the PD states that "the record was equally closed for the errata." *Id.* Calling this "flawed logic," the PD does not address the fact that an amendment would have been *expressly improper* under the Rules, while the pleading PG&E submitted was not expressly barred.

^{24/} 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.").

the original pressure restoration filing.^{25/} The PD 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."^{26/} (PD at 10.) 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 PD apparently refers, allows a motion to reopen the record to be filed *after submission* and *before decision*.^{27/} Contrary to the PD, 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.^{28/} The PD does not discuss PG&E's explanation, merely characterizing it as "a complicated analysis suggesting that the Ordering Paragraphs, when read together, did not require modification." (PD at 10.)

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]

^{25/} 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 3; DRA OB at 10-12. 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.

^{26/} One might wonder why, if the motion to reopen is the "obvious solution," no one mentioned it before the PD.

^{27/} 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.")

^{28/} R.T. 2348-50 (PG&E/Malkin).

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 becomes available that requires PG&E to reduce its operating pressure under applicable state and federal law, it must 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 of one or more of these lines at a lower pressure. And, after PG&E corrected the errors, the federal code required a lower operating pressure, which PG&E implemented in accordance with Ordering Paragraph 2.^{29/} 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 PD cites D.01-08-019 for the proposition that intent to deceive is an aggravating factor rather than a required element of a Rule 1 violation. In D.01-08-019, the Commission addressed a failure by Sprint PCS to provide complete information in response to a staff data request, a failure that made the response false and misleading. While the Commission said that proof of specific intent to deceive was not required, the Commission did not suggest that there is no state of mind requirement for a Rule 1 violation. To the contrary, the Commission has repeatedly held that state of mind is an essential element of a violation of Rule 1. “In determining whether a violation of Rule 1 has occurred, one of the steps we must surmount is whether the person who made the statement had *the requisite state of mind*.”^{30/} Commission decisions have elaborated, “Rule 1 violations require purposeful intent, recklessness, or gross negligence in regard to communications with the Commission.”^{31/}

Here, the PD makes no finding regarding PG&E’s state of mind, and thus provides a legally inadequate basis for a Rule 1 violation. Nor is there any evidence to support a finding that PG&E or its counsel intentionally misled the Commission or acted recklessly or with gross negligence in titling Exhibit OSC-1.^{32/} The only evidence in the record is that the decision to use

^{29/} R.T. 2350 (PG&E/Malkin).

^{30/} *Investigation of All Facilities-Based Cellular Carriers*, D.94-11-018, 1994 Cal. PUC LEXIS 1090, at *80-8 (emphasis added).

^{31/} *In re S. Cal. Edison Co.*, D.04-04-065, 2004 Cal. PUC LEXIS 207, at *53; *Application of Pac. Fiber Link, LLC*, D.02-08-063, 2002 Cal. PUC LEXIS 533, at *29 (same); *Application of New Century Telecom, Inc.*, D.06-09-025, 2006 Cal. PUC LEXIS 328, at *27 (finding a Rule 1 violation where the record showed that “[a]t the very least . . . a reckless disregard for the truth [in] allow[ing] these false statements to be submitted to the Commission”).

^{32/} Under California law, “recklessness” generally requires that the party have knowledge of a high degree of probability that harm will result from his or her conduct “and acts with deliberate disregard of that

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.^{33/} While the PD criticizes the explanation offered by PG&E’s counsel as “logically flawed,” disagreements about procedural judgments not explicitly covered by the Rules do not establish a Rule 1 violation.

IV. THE PD’S MONETARY PENALTY IS ARBITRARY AND CAPRICIOUS

The PD also errs in its assessment of monetary penalties for the purported Rule 1 violations. First, the PD imposes maximum penalties on grounds unsupported by the evidentiary record and explicitly contradicted by the Rule 1 OSC itself. Second, the PD violates Commission precedent and California law by imposing daily penalties for the single, completed act of submitting Exhibit OSC-1.

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

As pointed out above, Rule 1 does not provide a legitimate basis to penalize PG&E for the time between notifying the Commission and giving formal notice to the parties. Even if it did, the PD’s imposition of the maximum statutory penalty of \$50,000 for each day between March 20, 2013 and July 3, 2013 is not supported by the facts or the law.

The PD articulates as its basis for imposing the maximum fine on PG&E the fact that “[n]atural gas transmission safety by this operator has been one of the Commission’s highest priorities for three years.” (PD at 12.) While that general statement may be true, the invocation of public safety as a basis for imposition of the maximum fine is inconsistent with the Rule 1

probability or with a conscious disregard of the probable consequences.” *In Conservatorship of Gregory v. Beverly Enterprises, Inc.*, 80 Cal.App.4th 514, 521 (2000). Gross negligence is generally defined as “want of even scant care” or “an extreme departure from the ordinary standard of conduct.” *City of Santa Barbara v. Superior Court*, 41 Cal.4th 747, 754 (2007).

^{33/} 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 Commission and the parties the fact that we have discovered errors.”); R.T. 2408 (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[.]”).

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 pressure.^{34/} In the related Order to Show Cause regarding a potential suspension of the Commission’s prior pressure restoration rulings (the “Substantive OSC”), the Assigned Commissioner and Assigned ALJ also stated, “The 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.***”^{35/}

Nothing in the evidentiary record supports a finding that the timing of the submission of Exhibit OSC-1 presented any public safety issue. Indeed, the evidence in the record of either the Rule 1 OSC proceeding or the Substantive OSC proceeding supports only a finding 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.^{36/} There is no record evidence to the contrary, and thus no factual basis to conclude that safety concerns justify imposition of a maximum statutory fine for each day between PG&E’s March 20, 2013 notification to the Commission and PG&E’s July 3, 2013 submission of Exhibit OSC-1.

Moreover, in a similar case, *Application of PG&E*, D.07-09-041, the Commission decided not to penalize PG&E for conduct of which Commission staff was aware.^{37/} That case involved PG&E’s failure to issue bills at regular intervals based on actual metering data.^{38/} The

^{34/} Rule 1 OSC, at 2-3.

^{35/} Substantive OSC at 3-4 (emphasis added).

^{36/} See, e.g. Ex. OSC-4 (illustrating safety margin between 2011 hydrotest pressure and operating pressure); R.T. 2427-28 (PG&E/Johnson) (“I base that judgment 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.”); 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.”).

^{37/} 2007 Cal. PUC LEXIS 448, at *65.

^{38/} *Id.* at *1.

CPUC’s Consumer Affairs Branch had sent letters in response to customers who complained about PG&E’s billing practices and affirmed the practices.^{39/} In a subsequent Commission proceeding, CPSD argued that PG&E’s reliance on the knowledge of Commission staff did not make the conduct lawful.^{40/} The Commission, however, noted that it was “a mitigating factor in the consideration of whether to impose a penalty” and ultimately found that no penalty was warranted despite finding a significant number of violations.^{41/} The Commission specifically stated that the identified violations were not harmful to the integrity of the regulatory process because “PG&E’s continued violations were made in reliance upon the knowledge that Commission staff was aware of PG&E’s practice and did not object to it.”^{42/} Similarly, the Commission here should decline to impose daily penalties when its own staff was aware of the issues raised in Exhibit OSC-1.

B. The Imposition of Daily Penalties for Use of the Word “Errata” in the Title of Exhibit OSC-1 Is Contrary to Law.

PG&E submitted Exhibit OSC-1 for filing on July 3, 2013 (PD at 1) and served it on all parties the same day.^{43/} The Commission’s Docket Office rejected PG&E’s pleading on August 2, 2013. The PD treats the submission of Exhibit OSC-1 as a “continuing violation” under Public Utilities Code § 2108 until the day the Docket Office rejected it, and would impose daily penalties for the 30 days Exhibit OSC-1 “remained pending at the Commission, when PG&E could have retrieved and corrected it.” (PD at 11-12.) This proposed treatment is erroneous.

First, Section 2108 itself precludes considering the single act of submitting Exhibit OSC-1 as a daily violation simply because the document remained “pending” until the Docket Office acted on it. As its language makes clear, Section 2108 applies only to conduct that continues over time, not to specific acts.^{44/} *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

^{39/} *Id.* at *65.

^{40/} *Id.* at *55-56.

^{41/} *Id.*

^{42/} *Id.*

^{43/} R.T. 2354-56 (PG&E/Malkin).

^{44/} 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.”

PD'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 "pending" until the Docket Office acted on it). 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 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 PD'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 with a different title.

Pegging a penalty to the amount of time it took the Commission's Docket Office to address the pleading, as the PD does, is arbitrary. If the Docket Office had not been backlogged, it would have addressed the pleading in its usual one to two days. Under the reasoning of the PD, that would have meant a maximum penalty of \$50,000 to \$100,000. The Commission cannot lawfully increase the penalty 30-fold because of the time it took its own Docket Office to act.

V. CONCLUSION

The PD tramples PG&E's due process rights by finding violations way beyond the scope of the notice provided in the Rule 1 OSC. The only issues of which PG&E had notice were (1) its use of the word "Errata" in the title of Exhibit OSC-1 and (2) its submission of Exhibit OSC-1 on July 3rd, the day before the July 4th holiday. Those were the issues PG&E addressed in its testimony. The PD's conclusion that there was a Rule 1.1 violation based on the delay between PG&E advising the Commission through its advisory staff and formally notifying the parties of the errors in the original pressure restoration filing unlawfully expands the scope of both Rule 1 and this OSC. The PD's conclusion that the use of the word "Errata" in the title of Exhibit OSC-1 violates Rule 1 is contrary to the facts and the law.

For the foregoing reasons, PG&E respectfully urges the Commission to reject the PD and conclude that the company's submission of Exhibit OSC-1 did not violate Rule 1.

Respectfully submitted,

/s/Marie L. Fiala

MARIE L. FIALA

Sidley Austin LLP

555 California Street Suite 2000

San Francisco, CA 94104

Telephone: (415) 772-1200

Facsimile: (415) 772-2400

E-Mail: mfiala@sidley.com

Attorneys for

PACIFIC GAS AND ELECTRIC COMPANY

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