BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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| 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. | Rulemaking 11-02-019<br>(Filed February 24, 2011) |

# SAFETY AND ENFORCEMENT DIVISION'S RESPONSE TO APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY FOR REHEARING OF DECISION 13-12-053

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February 7, 2014

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## I. INTRODUCTION

Pursuant to Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission), the Safety and Enforcement Division (SED) submits its response to the application for rehearing of Pacific Gas and Electric Company (PG&E), filed herein on January 23, 2014.[1]

PG&E's Application raises three grounds of legal error. PG&E's first ground is that the Final Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure, Decision ("D.") No. 13-12-053 ("Decision") fails to make any finding or any proof that PG&E intended to mislead the Commission. Second, PG&E claims that the Decision fails to provide "any evidence" of the continuing nature of the Decision's Rule 1.1 violations. In particular, PG&E claims the Commission does not clearly explain the date that PG&E's duty to disclose began. Also, PG&E claims its "Errata" filing was allegedly a one-time event with no continuing consequences. Finally, PG&E claims that the Decision deprives PG&E of due process and violates the Excess Fines Clauses of the Federal and State Constitutions. Particularly, PG&E claims the

[1] References to PG&E's application for rehearing will be marked as "Application or App."

Commission provides insufficient advance notice of the charge of misleading the Commission and imposes "sanctions that are 'grossly disproportionate' to the alleged misconduct." (App. at p. 2.) Each of these grounds is baseless.

## II. THE COMMISSION HAS PROPERLY DETERMINED PG&E VIOLATED RULE 1.1 WITHOUT FINDING INTENT TO MISLEAD

As noted in the Decision, the Commission addressed this issue in D.01-08-019[2] holding that "the question of intent to deceive merely goes to the question of how much weight to assign to any penalty that may be assessed." (Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, D.01-08-019 (August 2, 2001), 2001 Cal. PUC LEXIS 653 at *14.) In D.01-08-019, the Commission also reasoned that "The lack of direct intent to deceive does not necessarily. . .avoid a Rule 1 violation." (Id.) The Commission has found Rule 1 violations in other proceedings without a showing of intent.[3] The Decision elaborated upon the basis for a Rule 1.1 violation here, stating "[W]here there has been a lack of candor, withholding of information, or failure to correct information or respond fully to data requests" the Commission has found a Rule 1.1 violation. (Decision at p. 21)[4] The Decision correctly pointed out that PG&E failed to provide the necessary information until August 30, 2013 in the Verified Statement of the Vice President of Gas Transmission Maintenance and Construction. (Decision at p. 18.) The Decision also clearly points out that such omissions are particularly offensive in this case where the Commission put PG&E on

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[2] "In this instance, not only did Sprint PCS fail to provide complete information to the staff initially, but the company never brought the nondisclosure to the Commission's attention. Commission staff involved in the Sprint PCS matter did not actually learn of the additional NXX codes until confronted with it in an adversarial court proceeding aimed at legally challenging the Commission's action in denying NXX codes to Sprint PCS." (Id. at p. 26.)

[3] *For example, see* D.09-04-009, p. 32, finding of fact 24, finding a utility ". . .subject to a fine for its violations, including noncompliance with Rule 1.1, even if the violations were inadvertent. . ."; *See also* D.01-08-019 at p. 21, Conclusion of Law Number 2, holding "The actions of Sprint PCS in not disclosing relevant information concerning NXX codes in its possession in the Culver City and Inglewood rate centers caused the Commission staff to be misled, and thereby constitutes a violation of Rule 1." (Sprint PCS had an employee attest by affidavit that the omission of responsive information to Commission staff was unintentional.) .

[4] *The Decision also cited* D.93-05-020, D.92-07-084, D.92-07-078, and D.01-08-019.

notice shortly after the San Bruno tragedy that it was to report "immediately to the CPUC…specific data on all leak reports"[5] Moreover, PG&E was undeniably aware that the San Bruno rupture and explosion was "the most deadly tragedy in California history from public utilities operations." (D.11-06-017 (June 9, 2011), 2011 Cal. PUC LEXIS 324 at p. *24.)

The San Bruno incident made the need for prompt notifications of problems and errors in PG&E's natural gas transmission system very clear. Additionally, the Commission cautioned PG&E to be forthright and prompt in notifying the Commission of all concerns, errors, and potential weaknesses it might discover in its transmission pipeline system.

> To perform our Constitutional and statutory duties, we must have forthright and timely explanations of the issues, as well as comprehensive analysis of the advantages and disadvantages of potential actions. Attempts at legal exculpation have no place in our proceedings to address these urgent issues. (*Id.* at p. 17.)

Moreover, the Commission has concluded Rule 1.1 violations exist without also finding that the violator intentionally misled the Commission. (D.01-08-019 (August 2, 2001), 2001 Cal. PUC LEXIS 653 at *36, Conclusion of Law 2.)

In an attempt to support its claim that it did not violate Rule 1.1 intentionally, PG&E suggests it presented uncontradicted evidence that it used an "Errata" filing procedure based on an allegedly good faith assessment of procedural rules in the absence of a clearly applicable procedural pathway.[6] However, PG&E ignores that the Commission did not find this evidence credible. In the Commission's words,

> "This testimony is not credible because it is not logical. The Lead Counsel, with decades of experience, admits that notice of the corrections was 'absolutely required.' Then, he dismissed use of an amendment because the record was closed; but the record was

[5] The CPUC President's directive to the CPUC's Executive Director, Sept. 12, 2010, http://www.cpuc.ca.gov/NR/rdonlyres/69828A82-B1E3-4483-A85C-27D43277CBCC/0/PeeveryDirective091210.pdf . See also: Commission's Press Release of Sept. 12, 2010, http://docs.cpuc.ca.gov/PUBLISHED/NEWS_RELEASE/123315.htm

[6] App., p. 4.

equally closed for the errata. No explanation was offered for this flawed logic." (Decision at p. 16.)

In addition, a utility's lack of candor raises "a serious issue whether [it] … will handle future dealings with the Commission truthfully." (In the Matter of the Order Instituting Investigation on the Commission's own motion into the operations and practices of Paradise Movers LLC, and its chief Executive Officer, James Shioloh, Respondents, D.99-06-090 (June 24, 1999), 1999 Cal. PUC LEXIS 432 at p. *22.) Withholding of information or lack of complete candor with the Commission regarding accidents would of course result in severe consequences for any public utility. (San Diego Gas and Electric Co., for rehearing of Resolution L-240, D. 93-05-020 (May 7, 1993),1993 Cal. PUC LEXIS 373 at pp. *7 – *8.) Failing to provide correct information in reports or candidly informing the Commission of the actual facts may mislead the Commission resulting in a Rule 1.1 violation." (D. 92-07-084 (July 22, 1992), 1992 Cal. PUC LEXIS 639 at pp. *3 – *4.) A false statement of law can be misleading and a violation of Rule 1. (Application of PACIFIC GAS AND ELECTRIC COMPANY for Authority to Adjust its Electric Rates Effective November 1, 1991, and to Adjust its Gas Rates Effective January 1, 1992; and for Commission Order Finding that PG&E's Gas and Electric Operations During the Reasonableness Review Period from January 1, 1990 to December 31, 1990, were Prudent, D.92-07-078 (July 22, 1992), 45 CPUC2d 178 at p. *13.)

The attorneys for U.S. West misled the Commission and its staff, leading to the approval of Resolution T-13052 approving Advice Letter 8-A. "U.S. West took full advantage of the "mistake" it had implanted, and by failing within a reasonable time after March 8, 1989 to bring this "mistake" and the resulting language ambiguity to the attention of the Commission, persisted in further sharp dealing to its competitive advantage and profit in the cellular marketplace." The Commission found a Rule 1.1 violation. (Investigation on the Commission's own motion into the operations, rates and practices of U.S. West Cellular of California, Inc., D.90-12-038 (December 6, 1990),

1990 Cal. PUC LEXIS 1296 at pp. *34 – *35.) "This type of sharp dealing has no place in Commission practice and will not be countenanced [under Rule 1]." (Id. at p. *34.)

## III. THE COMMISSION HAS PROPERLY HELD THAT PG&E COMMITTED CONTINUING VIOLATIONS

### A. PG&E Incorrectly Asserts That The Commission Decision Does Not Properly Account For Start And End Dates Of The Failure To Disclose

PG&E asserts that the Commission committed legal error by finding continuing violations without any evidence of an identifiable start or end date.[7] Moreover, PG&E asserts that the seven month delay in revealing the discrepancies in its assumed values for Line 147 was the result of the time it required to consider whether Line 147 could operate at classification one-level-above the earlier determination as permitted by federal regulations. (Decision. at pp. 13 – 14.) PG&E ultimately determined it could not do so because it had not confirmed MAOP as commensurate with its classification in the 1970 to 1973 period.

As explained in detail by the Decision and below, at any time from October 18, 2012 through July 3, 2013, PG&E could have, and should have, notified the Commission of the discrepancies while still determining whether a reduction on MAOP was necessary. PG&E did not do so.

The Decision explains that on October 18, 2012, PG&E discovered that several components of Line 147's pipeline features list had been based on erroneous assumptions. The Decision also notes that PG&E's Vice President of Gas Transmission Maintenance and Construction acknowledged in his testimony at the hearing on the order to show cause that he became aware of the first records discrepancy in late October or early November, shortly after it was discovered by engineers in the field on October 18, 2012. (Decision at p. 11.) He also testified that on November 14, 2012, a PG&E pipeline engineer sent an e-mail notification of the discrepancies resulting in PG&E's decision to lower the pressure on Line 147 to 330 psig and to re-review the

[7] App., pp. 2 and 5.

entire MAOP documentation for the pipeline. (Ibid.) The Decision uses November 16, 2012 as the latest date that PG&E "should have prepared and submitted a filing to inform the Commission of this significant and material discovery" and, consequently, the start date for PG&E's duty to disclose the errors previously discovered. (Decision at p. 13.) The November 16, 2013 start date is tied to the record, which shows that Mr. Sumeet Singh communicated these discrepancies with Mr. Johnson's direct superiors, Mr. Jesus Soto and Mr. Nick Stavropolous on November 16, 2012.[8] Nonetheless, these record discrepancies were not directly disclosed to the Commission until July 3, 2013, when PG&E attempted to file its Errata. The July 3, 2013 date is the end date for the first
Rule 1.1 continuing violation for failure to disclose.

This significance of these discrepancies was that some of the segments of Line 147 were previously assumed to be seamless when in fact they had welds. Moreover, certain of these welds were improperly identified as Double Submerged Arc Welds when they were actually Single Submerged Arc Welds, which resulted in PG&E having to lower the efficiency factor for those welds from 1.0 to 0.8. (Decision at p. 2.) In addition, PG&E determined that it could not operate the pipeline on a one-class-out basis because it had failed to confirm the Maximum Allowable Operating Pressure ("MAOP") for Line 147 in the 1970 through 1973 period as required by the federal regulations then in effect. As a result, PG&E concluded that the MAOP for the pipeline had to be reduced from the 365 psig MAOP previously ordered by the Commission in D.11-12-048 based on PG&E's 2011 assumptions. PG&E claims that this error requires a reduction of MAOP to 330 psig on Line 147.

The errors in determining the kind of pipe and welds and PG&E's past failure to confirm MAOP on Line 147 in the 1970 through 1973 period[9], constituted material

[8] November 18, 2013 Tr. pp. 2607-2609; OSC-Exhibit B.

[9] Title 49 Code of Federal Regulations, Part 192.607 [35 Fed. Reg. 13248 (Aug. 18, 1970)], required operators to confirm the MAOP of all pipelines operating at a hoop stress more than 40% of SMYS to ensure that the pipeline is operating commensurate with the present class. Although now repealed, "[t]his regulation required operators to confirm the MAOP on their systems relative to class locations no later

corrections to the facts previously assumed by PG&E regarding Line 147. There were significant discrepancies in the type of pipe and welds actually found in Line 147 in contrast to the facts previously assumed by PG&E. Furthermore, the MAOP reduction in Line 147 was a material change in the critical pressure determination in the pipeline. Nevertheless, PG&E waited 229 days to inform the Commission of these material facts regarding the nature of the pipeline segments and the MAOP of Line 147. (Decision at pp. 14 – 15, and 19.) The Commission explained that PG&E's delay was not justified, stating,

> Once PG&E had knowledge of material errors in its filed Supporting Information that the Commission relied upon to set a safety standard in D.11-12-048, PG&E should have brought the record discrepancies to the Commission's attention through an appropriate filing while it investigated the application of its one-class-out policy. (Decision at pp. 13 - 14.)

**B. Unreasonable delay in notifying the Commission of errors in its earlier calculations and descriptions of Line 147 constitutes a "false statement of fact" under Rule 1.1**

There can be little doubt that the 229 day delay in correcting essential facts regarding Line 147 was unreasonable. Rule 1.1 provides that "Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees… never to mislead the Commission or its staff by an artifice or false statement of fact or law." PG&E knew that certain facts concerning Line 147 were incorrect but failed to notify the Commission of those errors for an unreasonable length of time. As noted in the Decision, "[t]his unreasonable delay misled the Commission by allowing a key 'false statement of fact' to persist uncorrected." (Decision at p. 15.)

The material errors in critical facts described supra at pages 5 through 6, were relied on by the Commission in determining that the MAOP of Line 147was safely set at

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than January 1, 1973. The regulatory requirement was removed in 1996 because the compliance dates had long since passed. PHMSA believes documentation that was used to confirm MAOP in compliance with this requirement may be useful in the current verification effort." (*Pipeline Safety: Verification of Records*, Docket No. PHMSA–2012–0068, 77 Fed. Reg. 26822 (May 7, 2012).

365 psig in D.11-12-048. (Decision at p. 2.) Not only were there errors in the pipeline features list for Line 147 as discovered October 18, 2012, but by July 3, 2013 (the date of PG&E's Errata), PG&E determined that it could no longer rely on the 1989 hydro test for the pipeline. (Ibid.) PG&E knew that the Commission had relied upon this inaccurate information in approving PG&E's calculations establishing the MAOP for Line 147 in D.11-12-048." (Decision at p. 1.)

PG&E's suggestion that the end date to this first Rule 1.1 violation for failure to disclose should not have extended beyond the date it communicated the discrepancy information to Commission staff is also invalid for three reasons.[10] First, the Commission correctly addressed this point in the decision stating, ". . .informing staff about erroneous data upon which a Commission decision is based is not the proper way to inform the Commission of erroneous information on the record in a proceeding. We emphasize that Rule 1.1 does not treat the Commission and its staff as synonymous. (Decision at p. 10 n. 12.) This is the only reasonable interpretation of Rule 1.1, which provides in part that any person transacting business with the Commission is, "never to mislead the Commission or its staff. . ." In other words, a utility does not fulfill its duty not to mislead the Commission even if she is completely candid and forthright with Commission staff on the same exact issue.

Second, PG&E's March 2013 disclosure to SED staff still impaired the regulatory process in another separate Commission proceeding. Specifically, PG&E did not communicate the corrected pipeline information to parties in the Commission's 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). Although SED was one of these parties, PG&E also did not inform Safety and Enforcement Division expert witnesses, staff or attorneys who represented SED in that proceeding. As PG&E was

[10] App. p. 6.

aware, I.11-02-016 had hearings scheduled for January, 2013, after PG&E realized the discrepancies in October and November of 2012.

The third reason that the March 2013 disclosure to SED staff was an invalid ending date is that the SED concurrence report was not served until November 14, 2013, approximately eight months after PG&E provided these disclosures to SED staff. The fact that it took SED staff eight months to prepare its report regarding pressure on Line 147 is consistent with the Decision's note that PG&E's disclosure to staff was a two-page handout, containing only one cryptic message that might refer to record discrepancies for Line 147. (Decision, p. 10, n 12.) If PG&E had been transparent to staff in March 2013, the concurrence report likely could have been issued much sooner.

## IV. THE COMMISSION CORRECTLY FOUND THAT PG&E'S ERRATA CONTINUOUSLY VIOLATED RULE 1.1 FROM JULY 3 TO AUGUST 30, 2013

PG&E asserts it did not continuously violate Rule 1.1 because any violation was allegedly complete once the errata was filed.[11] However, the Decision properly explains why the Rule 1.1 violation continued from July 3[12] to August 30, 2013[13] for each of the reasons provided below.

On July 3, 2013, PG&E attempted to file an Errata notifying the Commission of the discrepancies in Line 147's records and the reduction in its MAOP. While PG&E admits that it had an "'absolute obligation' to bring to the Commission's and the parties' attention these discrepancies" (Decision at p. 4), the filing was "a short document with only one page devoted to a brief description of the errors in the MAOP validation records" which "did not disclose…when or how PG&E became aware of the errors, any reason for the errors, or corrective actions that were being taken following discovery of the errors." (Decision at p. 17.)

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[11] App. P. 7.

[12] The date PG&E filed OSC-1, the errata.

[13] The date PG&E filed and served the Verified Statement of its Vice President of Gas Transmission Maintenance and Construction.

Because of these omissions, the Decision correctly finds that the Errata "had the effect of concealing from the Commission and the parties the actual nature of the document" and would have precluded the parties from filing responses under the Commission's procedural rules. (*Id.*) The Decision that the Errata was an "artifice" as used in Rule 1.1 that misled the Commission by failing "to convey the nature and significance of the facts set forth within" (*Id.*), i.e., the reason for the record discrepancies on Line 147, the corrective actions taken, and, most importantly, the reason for the delay in notifying the Commission of these facts.

Nevertheless, PG&E contends that its Errata filing of July 3, 2013, was "a good faith assessment of [the Commission's] procedural rules in the absence of a clearly applicable procedural pathway, and long-standing practice…." (App. at p. 4.) However, the Decision notes that filings intended "to correct minor typographical or wording corrections" are prohibited and that the corrections to the record intended to be disclosed in the Errata required a re-opening of the record. (Decision at p. 15.)

The Decision determined that these shortcomings were not presented to the Commission until August 30, 2013, when the PG&E Vice President submitted his Verified Statement. (Id. at p. 18.)

Because the Commission's Rules did not provide for filing an errata, PG&E could not file it. Moreover, PG&E failed to re-open and correct the record, even though the Rules did provide for that. (*Id.* at p. 6.) The Decision properly pointed out that "Rule 16.4 sets forth the procedure for seeking to modify an issued Commission decision based on allegations of new or changed facts." (*Id.* at p. 6.) PG&E's Errata did not follow the procedure for modifying the Commission's decision.

## V. THE DECISION COMPORTS WITH PG&E'S DUE PROCESS RIGHTS

PG&E claims that the Order to Show Cause failed to provide "the precise nature of the charges" (App. at p. 9.) and deprived PG&E of an "opportunity to be heard in [its own] defense" (Ibid.) In support of this claim, PG&E claims that an initiating document must describe the alleged misconduct specifically enough to allow it to challenge those

allegations at a hearing.[14] However, PG&E has long since known of Rule 1.1, of precedents regarding Rule 1.1 violations, and has even been found guilty of violating Rule 1.1.[15]

More specifically, the Commission's Ruling of Chief Administrative Law Judge And Assigned Administrative Law Judge Directing Pacific Gas And Electric Company To Show Cause Why It Should Not Be Sanctioned By The Commission For Violation of Rule 1.1 of The Commission's Rules of Practice And Procedure ("Ruling") (August 19, 2013) provides:

> Here, PG&E appears to be revealing a substantial error in an application upon which the Commission has relied in issuing a decision. Attempting to correct an application eighteen months after the Commission issued a decision appears to be an unreasonable procedural choice and could be interpreted as attempting to create an inaccurate impression of a routine correction. (Id. at p. 4.)

In addition, the Commission noted that "[t]he timing of the attempted filing, the day before a summer holiday weekend, also raises questions. (Ibid.) Given the fact that "PG&E's natural gas transmission pipeline records ha[ve] been and remain[] an extraordinarily controversial issue" the Ruling states that "[t]he facts stated in PG&E's July filing appear to directly implicate this issue, particularly the continuing inaccuracy of PG&E's records and the happenstance means by which this most recent instance of erroneous records was discovered." (Ibid.) Finally, the Ruling questions whether the attempted Errata filing contained "provocative information in a routine-appearing document could be seen as an attempt to mislead the Commission and the public on the significance of this new information." (Ibid.)

Most significantly, as part of this Rulemaking, the Commission issued D.11-06-017 more than two and a half years ago and stated,

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[14] App., P. 9.

[15] See for example, Supra at page 4.

> This Commission is currently confronting the most deadly tragedy in California history from public utility operations. We are resolute in our commitment to improve the safety of natural gas transmission pipelines. In this context, it is absolutely essential that our regulated utilities display the highest level of candor and honesty. . .To perform our Constitutional and statutory duties, we must have forthright and timely explanations of the issues, as well as comprehensive analysis of the advantages and disadvantages of potential actions. Attempts at legal exculpation have no place in our proceedings to address these urgent issues.
>
> PG&E needs to rebuild the Commission's and the public's trust in the safety of its operations. The directives in today's decision are necessary steps to ensure safe operations and to restore public trust. (D.11-06-017 (June 9, 2011), 2011 Cal. PUC LEXIS 324 at pp. *16-17.)

PG&E also claims the Order to Show Cause failed to notify PG&E of the issue of "whether PG&E had violated Rule 1.1 by failing to disclose the corrected pipeline specification information after it was first discovered."[16] SED disagrees. The Order itself articulates this issue in some depth, stating,

> "PG&E's July document (errata) raises procedural and substantive issues. . .Here, PG&E appears to be revealing a substantial error in an application upon which the Commission has relied in issuing a decision. Attempting to correct an application eighteen months after the Commission issued a decision appears to be an unreasonable procedural choice. . ." (Order to Show Cause Ruling, pp. 3-4.)

PG&E also asserts that nothing in the Order to Show Cause indicates PG&E might face continuing violation sanctions based on any breach of disclosure of filing obligations.[17] However, PG&E's notice of a potential continuing violation is found in Cal. Pub. Util. Code §2108, which provides:

> "Every violation of the provisions of this part of or any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and

[16] App., p. 9, Citing Order to Show Cause Ruling, p. 4

[17] App., pp. 9-10, citing Order to Show Cause Ruling, p. 4.

distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

Indeed, other Commission precedent provide for continuing and separate violations for each day the violation continues. (D.08-09-038 (September 18, 2008), 2008 Cal. PUC LEXIS 401 at p. *161; D.13-09-028 (September 19, 2013), 2013 Cal. PUC LEXIS 514 at p. *45.)

## VI. THE DECISION DOES NOT VIOLATE THE EXCESS FINES CLAUSE

PG&E alleges that the decision violates the excessive fines clause of the California and United States Constitutions,[18] and specifically that the amount of the fine is disproportionately greater than the actual damages associated with PG&E's violation.[19]

In support of its allegations, PG&E boldly asserts that the fines imposed by the decision are "the largest fines ever imposed by the Commission for a violation of Rule 1.1; indeed, they are higher than any fine ever imposed by any court for a violation of a rule of this type, so far as research discloses."[20]

Contrary to PG&E's assertion, the Commission has levied multiple other Rule 1.1 related fines with comparable amounts to $14 million. For example, the Commission fined Southern California Edison $30 million in the aggregate for violation of several statutes, Commission decisions, and Rule 1.1 due to its misleading conduct. (D.08-09-038 (September 18, 2008), 2008 Cal. PUC LEXIS 401 at p. *143.) In that case, the Commission stated, "For a continuing violation (Public Utilities Code) §2108 counts each day as a separate offense". (*Id.* at p. 148.)

In a second comparable set of facts, the Court of Appeal upheld the Commission's assessment of a $10,000 per day penalty for each day the carrier failed to offer potential customers disclosures detailing network deficiencies, and another $10,000 per day

[18] App., p. 11.

[19] App., pp. 11-12.

[20] App., pp. 11-12.

penalty for each day a wireless carrier failed to offer a trial period for its service. These penalties, levied under California Public Utilities Code §2107, totaled $12.14 million. (*Pacific Bell Wireless, LLC v. Pub. Util. Comm'n*, 140 Cal. App. 4th 718, 728 (2006).

Just last year, Southern California Edison ("SCE") agreed to total penalty payments of $37 million for several violations, including Rule 1.1, (D.13-09-028 (September 19, 2013), 2013 Cal. PUC LEXIS 514 at p. *68 Finding of Fact 5) which included a penalty of $20 million to the General Fund. (Id. at pp. 74-75, Ordering Paragraphs 1, 2, and 5.) In that case, the Rule 1.1 violations constituted a significant portion of the overall fine. (*Id.* at p. 61).

In assessing the penalty amount, the Commission has noted it considered the utility's action to disclose and rectify a violation, stating,

> Utilities are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by a utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty. (D.08-09-038 (September 18, 2008), 2008 Cal. PUC LEXIS 401 at p. *156.)

The Commission further noted that,

"A penalty must take into account the scope of a utility's investigatory efforts, level of self-reporting and cooperation, and corrective measures, to avoid the unintended consequences of discouraging such behavior in the future." (Id.)

The Commission also considered the revenue and income of SCE in deciding upon the $20 million penalty, stating,

> "It is apparent that there are few companies in California that are comparable in revenue and in income to SCE. Companies that are comparable include Pacific Bell (or AT&T in its most recent incarnation), PG&E, and SoCalGas. To deter future violations and reflect the financial resources of the utility, a substantial fine is warranted." (*Id.* at p. 152.)

Consistent with this principle, the present Decision supported its levying of maximum daily fines by reasoning that in spite of discovering several errors on

October 18, it waited until July 3, 2013 to disclose the information to the Commission, and waited again until August 30, 2013 to disclose that a routine gas leak survey had led to the discovery of a gas leak on Line 147. (Decision at p. 9).

Under California statutes, each day constitutes a separate offense (see Cal. Pub. Util. Code § 2108.), for much of the time at issue fines could be set at a minimum of $500 or a maximum of $50,000 (see Cal. Pub. Util. Code § 2107) and fines can be compromised. See Cal. Pub. Util. Code § 2104.5. Moreover, courts have held that the Commission may levy separate daily penalties against utilities for each violation under California Public Utilities Code Section 2107 without being unconstitutionally excessive. *People v. Western Air Lines, Inc.* (1954) 42 Cal. 2d 621, 642. In this case, the Commission's daily violation of $50,000 per day of each violation fit within these statutorily authorized amounts.

Moreover, to help guide setting fines which are proportionate to a violation, the Commission regularly uses two general factors, including: (1) severity of the offense and (2) conduct of the utility. (*Id.*) Here, the Commission used both factors to evaluate appropriate daily fine amounts. (Decision at pp. 18-19.)

## VII. CONCLUSION

For all of the foregoing reasons, SED recommends that the Commission deny PG&E's application for rehearing of D.13-12-053.

Respectfully submitted,

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February 7, 2014