BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company to Determine Violations of Public Utilities Code Section 451, General Order 112, and Other Applicable Standards, Laws, Rules and Regulations in Connection with the San Bruno Explosion and Fire on September 9, 2010.	I.12-01-007 (Filed January 12, 2012) (Not Consolidated)
Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Transmission System Pipelines.	I.11-02-016 (Filed February 24, 2011) (Not Consolidated)
Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas & Electric Company's Natural Gas Transmission System in Locations with Higher Population Density.	I.11-11-009 (Issued November 10, 2011) (Not Consolidated)

OPENING BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO ON PENALTIES

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I. INTRODUCTION AND SUMMARY

The evidence in the record of PG&E's violations of law in these three investigations is substantial. CPSD presented extensive and compelling reports and testimony outlining PG&E's violations and the harm and risk they created. In each of the three investigations, the City and County of San Francisco (San Francisco) presented expert testimony from a gas pipeline regulator addressing specific violations and supporting CPSD's allegations. In addition, the record includes testimony by other intervenors, weeks of evidentiary hearings, and thousands of pages of briefs. This record supports a penalty[1] much larger than the amount PG&E has the ability to pay.

Applying Public Utilities Code sections 2107 and 2108[2] to the large number of violations over many decades shown in the record, the maximum penalty here would be in the hundreds of billions of dollars if not more[3]. Even if the Commission determined that not all violations had been proven or that the duration of some violations was less than alleged, still the maximum penalties would easily be in the tens of billions. The evidence in this proceeding includes an analysis by Overland Consulting, which finds that PG&E has the financial capacity to pay a penalty of at least $2.25 billion.[4] There is no evidence in the record, even from PG&E's own witness, disputing PG&E's ability to pay such a penalty.[5] In fact, the record shows that PG&E would be able to manage a penalty of at least $2.25 billion and still carry out its utility obligations. In these unprecedented circumstances, where a utility's conduct merits a penalty large enough to put the utility out of business, the Commission should impose the largest penalty the utility can reasonably bear.

The Commission recognized the potential for a large penalty at the outset of this proceeding[6]:

> If, after hearings, we find that PG&E's practices and policies contributed towards, or increased the likelihood of, violations of law that adversely affected public safety, the Commission would have an obligation to consider the imposition of statutory penalties pursuant to Sections 2107 and 2108 of the

[1] In this brief, San Francisco uses the term "penalty" to refer to a combination of fines (payable to the general fund) and remedial measures to improve the safety of PG&E's gas pipeline operations.

[2] Subsequent references are to the Public Utilities Code unless otherwise noted.

[3] See section II, B in this brief.

[4] Joint 51, 52, Overland Report.

[5] See section III, A in this brief.

[6] Order Instituting Investigation 12-01-007 at 9.

> California Public Utilities Code, and other appropriate remedies under the law. The Commission is prepared to impose very significant fines if the evidence adduced at hearing establishes that PG&E's policies and practices contributed to the loss of life, injuries, or loss of property that occurred at San Bruno. We also note that it appears, based on the allegations in the CPSD report, that PG&E's violations of safety law and standards may have occurred over long periods of time. If the Commission finds this allegation supported by the evidence, the Commission will consider ordering daily fines for the full duration of any such violations, even if this encompasses a lengthy period of time.

The Commission also noted at the outset that it would consider ordering specific measures to improve the safety of PG&E's gas pipeline operations[7]:

> We emphasize that the Commission's remedial powers are not limited to its authority to impose civil penalties. Pursuant to Public Utilities Code Section 761, if the Commission finds that PG&E's maintenance or operations practices were unsafe, unreasonable, improper, or insufficient, we may consider ordering PG&E to change or improve its maintenance, operations, or construction standards for gas pipelines, in order to ensure system-wide safety and reliability. We place PG&E on notice that the Commission may consider ordering PG&E to implement the recommendations made in CPSD's Report, in order to improve and ensure system-wide safety and reliability.

There is overwhelming evidence in the record supporting the need for the Commission to order specific remedial measures to ensure the safety of PG&E's gas pipeline operations. Without such an order, neither the Commission nor the public can be confident that PG&E will perform needed work on a timely basis. PG&E continues to dispute the need, for example, to evaluate its pipelines for cyclic fatigue.[8] Moreover, it is appropriate in the circumstances of this case for the company, and not its ratepayers, to pay for necessary pipeline safety work. This may include new work as well as work previously included in rates subject to refund in the PSEP.[9] San Francisco generally supports the remedies identified by CPSD and discusses specific remedial measures below.

II. LEGAL ISSUES

A. The Commission Has the Authority to Impose Substantial Penalties in this Case

California Law affords the Commission broad jurisdiction to regulate public utilities, including imposing fines and penalties, and requiring appropriate remedial action. This case merits the imposition of very high penalties.

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[7] Id at 10.

[8] I. 12-01-007, PG&E Opening Brief at 74-81.

[9] D. 12-12-030 at 14.

1. The Commission has broad authority to impose fines, penalties, and remedial measures.

In addition to its broad general powers,[10] the Commission has broad authority to impose fines and penalties pursuant to Section 2107[11] and 2108[12]. The Commission has determined and the Court of Appeals has confirmed that the Commission has authority to directly impose fines under Section 2107 and that it is required to commence an action in superior court only to collect unpaid fines.[13]

The Commission also has broad authority to require remedial action to ensure safety under Section 701 and 761, among others. The Court of Appeals has found that the Commission has substantial equitable jurisdiction[14]. The Commission itself has explained

> [w]e have historically applied various methods of imposing sanctions in different situations based on the circumstances of each case. We have ordered utilities to make reparations or provide refunds to complianants where it has been found that the utility charged an 'unreasonable, excessive or discriminatory amount' in violation of some provision of the Code or the Commission rules; we have suspended, cancelled, and revoked operating authority of companies; we have granted injunctive relief pending final issuance of a decision; we have instituted financial monitoring devices to track progress in the compliance of Commission orders, and we have imposed monetary penalties where we believed such sanctions were most appropriate due to the particular circumstances of the case. [15]

2. Factors to Consider in Determining a Penalty

Since the range of penalties allowed by Section 2107 is wide, the Commission must determine the amount to apply within the floor and the ceiling. In Decision (D.) 98-12-075, the Commission

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[10] See, e.g., *Pacific Bell Wireless v. Public Utilities Commission* (2006), 140 Cal.App.4th 718, 736 (*Pacific Bell*)(citations omitted).

[11] § 2107 states: "Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than fifty thousand dollars ($50,000) for each offense." The maximum penalty in § 2107 was increased from $2000 to $20,000 in 1994 and from $20,000 to $50,000 in 2011.

[12] § 2108 states: "Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

[13] *Pacific Bell*, *supra*, 140 Cal.App.4th at 736.

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

[15] *Strawberry Property Owners Association vs. Conlin-Strawberry Water Company* (2000), D. 00-03-023, Case No. 95-01-038, 2000 Cal. PUC LEXIS 127 at *8-9 (citations omitted).

articulated four factors to consider in determining a penalty for violations of rules governing the relationship between utilities and their affiliates: the severity of the offense, the conduct of the utility to prevent, detect, and disclose and rectify the violation, the financial resources of the utility and the totality of the circumstances.[16] D.98-12-075 states that the resulting fine should also be considered in the context of past Commission decisions.[17] Since they were adopted, the factors articulated in D.98-12-075 have been considered by the Commission in contexts other than violations of the utility-affiliates rules, such as in determining penalties for violations by Southern California Edison of the Commissions General Order (GO) 95 and GO 128.[18] The factors weigh in favor of a very high penalty in this case.

In addition, pursuant to the California and Federal Constitutions, the penalty must be proportional to the gravity of a defendant's offense, and ability to pay is a critical factor. *City and County of San Francisco v. Sainez*, (2000) 77 Cal.App.4th 1302, 1321-1323; 92 Cal.Rptr.2d 418, 431-433. However, these criteria are very similar to the criteria the Commission applies in determining a penalty under Sections 2107 and 2108. Thus, a penalty that is consistent with the Commission's criteria likely will survive constitutional scrutiny.

a. The Violations in the Instant Case are Severe.

The Commission has stated that "the most severe violations are those that cause physical harm to people or property, with violations that threaten such harm closely following."[19] This case involves violations that resulted in a gas explosion which killed eight people, injured fifty eight others,

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[16] D.98-12-075, *Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affilicates Adopted by the Commission in Decision 97-12-88*, R.98-04-009, 1998 Cal. PUC LEXIS 1016, at *9.

[17] *Id.*

[18] D.04-04-065, *Order Instituting Investigation Into Southern California Edison's Electric Line Construction, Operation, and Maintenance Practices*, I.01-08-029, 2004 Cal. PUC Lexis 207, at *60 ("[i]n determining the amount of the penalty, we look to the criteria we established in D.98-12-075 . . . which have provided guidance is all subsequent cases in which such issues arise. We stated that the purpose of fines is to effectively deter further violations by the perpetrator or others."); see also D.08-09-038, *Investigation on the Commission's Own Motion into the Practices of the Southern California Edison Company to Determine the Violations of the Laws, Rules, and Regulations Governing Performance Based Ratemaking, its Monitoring and Reporting to the Commission, Refunds to Customers and Other Relief, and Future Performance Based Ratemaking for this Utility*, I. 06-06-014, *2008 Cal. PUC LEXIS 401*, at *145.

[19] *Id.*

destroyed thirty eight homes, and damaged another seventy homes.[20] The violations are thus among the most severe possible.

In addition, the Commission has stated that "[t]he number of the violations is a factor in determining the severity. A series of temporally distinct violations can suggest an on-going compliance deficiency which the public utility should have addressed after the first instance. Similarly, a widespread violation which affects a large number of consumers is a more severe offense than one which is limited in scope."[21] This case involves a pervasive, systemic and long-standing failure on the part of PG&E to maintain its gas pipeline system safely. The significance of this failure cannot be overstated. As the Commission stated in its review of the severity factor in the Rancho Cordova incident also involving PG&E, "PG&E's underlying public utility service is to provide safe and reliable gas service, and the safety and reliability of its gas system must be PG&E's primary objective."[22]

b. PG&E's Did Not and Has Not Cooperated to Prevent, Detect, Disclose and Rectify the Violation

The Commission has noted that "[p]rudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. This includes becoming familiar with applicable laws and regulations, and most critically, the utility regularly reviewing its own operations to ensure full compliance. In evaluating the utility's advance efforts to ensure compliance, the Commission will consider the utility's past record of compliance with Commission directives." This case involves a pervasive and long-standing failure on the part of PG&E to comply with safety requirements safely maintain its gas pipeline system..

Further the Commission has explained that "[t]he Commission expects public utilities to monitor diligently their activities. Where utilities have for whatever reason failed to meet this

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[20] Order Instituting Investigation 12-01-007 at 1.

[21] D.98-12-075, *Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Adopted by the Commission in Decision 97-12-88*, R.98-04-009, 1998 Cal. PUC LEXIS 1016, at *56.

[22] D.11-12-021, *Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company, Regarding the Gas Explosion and Fire on December 24, 2008 in Rancho Cordova, California*, I.10-11-013, 2011 Cal. PUC LEXIS 531, *62-3.

standard, the Commission will continue to hold the utility responsible for its actions. Deliberate, as opposed to inadvertent wrong-doing, will be considered an aggravating factor."[23] In this case, PG&E systematically failed to safely maintain its gas pipeline system and as a result did not detect the defective pipe that caused the accident. The corporate culture that failed to prioritize safety amounts to deliberate action. As the Commission stated in D.98-12-075 "[m]anagers will be considered, absent clear evidence to the contrary, to have condoned day-to-day actions by employees and agents under their supervision."[24]

Finally, the Commission has stressed "Prompt reporting of violations furthers the public interest by allowing for expeditious correction. For this reason, steps taken by a public utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty."[25] In this case, PG&E did not identify or report the violations, and it delayed in providing the Commission the records necessary for a thorough investigation. Moreover, PG&E continues to contend that its substandard maintenance practices and shoddy record keeping are not violations of the law. These factors also weigh in favor of very high penalties.

c. PG&E's Substantial Resources Require a High Penalty.

The Commission has stated that "[f]ines should be set at a level that deters future violations."[26] The Commission has explained "[e]ffective deterrence . . . requires that the Commission recognize the financial resources of the public utility in setting a fine which balances the need for deterrence with the constitutional limitations on excessive fines. Some California utilities are among the largest corporations in the United States and others are extremely modest, one-person operations. What is accounting rounding error to one company is annual revenue to another."[27]

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[23] D.98-12-075, *Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Adopted by the Commission in Decision 97-12-88*, R.98-04-009, 1998 Cal. PUC LEXIS 1016, at *57.

[24] *Id.* at *58.

[25] *Id.*

[26] D.04-04-065, *Order Instituting Investigation Into Southern California Edison's Electric Line Construction, Operation, and Maintenance Practices*, I.01-08-029, 2004 Cal. PUC Lexis 207, *63.

[27] D.98-12-075, *Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Adopted by the Commission in Decision 97-12-88*, R.98-04-009, 1998 Cal. PUC LEXIS 1016, *58-9.

PG&E is the biggest public utility in California, with ample resources. Nonetheless, because of the large number, and long-standing nature of the violations in this case, application of the highest penalties available under the law could put PG&E out of business. Since application of the highest penalties available under the law is amply justified under all of the other factors the Commission considers in assessing a penalty, the size of the penalty in this case will have to be limited by PG&E's ability to pay. In this context, to devise a penalty high enough to deter a large, well-resourced corporation like PG&E from undervaluing safety in the future, the Commission should impose the highest penalty possible that the corporation can sustain and survive.

d. The Totality of the Circumstances in Furtherance of the Public Interest Support a Very High Penalty

The Commission has stated that setting a fine at a level that effectively deters further unlawful conduct by the utility and others requires it to specifically tailor the package of sanctions, including any fine, to the facts of the case, including consideration of mitigating facts and facts that exacerbate the wrongdoing.[28] This case includes exacerbating facts previously considered by the Commission: a failure to discover and repair violations, and the fact that PG&E is a large utility with extensive financial resources.[29] An overriding exacerbating fact is the degree of physical harm involved in this case, including the deaths of eight people.[30] Additional exacerbating facts include the systematic nature of the violations, the corporate culture that deemphasized safety, and PG&E's continued insistence that its substandard maintenance and shoddy record practices are not violations of the law. The totality of the circumstances, thus weigh heavily in favor of a very substantial fine.

e. There is no Applicable Precedent for this Case.

The Commission has explained that it will consider (1) previous decisions that involve reasonably comparable factual circumstances and (2) any substantial differences in outcome.[31] However, PG&E has been unable to identify any case which involves the pervasive and systemic

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[28] D.04-04-065, *Order Instituting Investigation Into Southern California Edison's Electric Line Construction, Operation, and Maintenance Practices*, I.01-08-029, 2004 Cal. PUC Lexis 207, *63.

[29] *See e.g. Id.*

[30] *Compare Id.*

[31] D.04-04-065, *Order Instituting Investigation Into Southern California Edison's Electric Line Construction, Operation, and Maintenance Practices*, I.01-08-029, 2004 Cal. PUC Lexis 207, *64-5.

failure to maintain a gas pipeline system that is at issue here. Accordingly, prior Commission decisions are simply inapplicable and the Commission must decide this case based on the particular facts before it.

B. Very High Penalties are Justified in this Case.

The numerous and longstanding violations identified by CPSD[32] could result in penalties of several hundred billion dollars. Because of this, as described above, the relevant limiting factor will be PG&E's ability to pay.[33] CPSD's reports have identified the following:

- in the San Bruno investigation, 55 different safety violations, some of which occurred multiple times and continued over decades.[34]
- in the Records investigation, 35 different safety violations, some of which occurred multiple times and continued over decades.[35]
- in the Class Location investigation, over 3000 violations, many continuing over decades.[36]

Section 2108 requires the Commission to treat each day of a continuing violation as a separate offense. Thus, for example, a single violation that continued from 1956 until September 9, 2010 would count as nearly 20,000 separate offenses.[37] This is illustrated by the table in the Class Location brief cited above, which provides a total of 15.9 million days in violation. Of these days, for more than 5 million, the maximum penalty available is $2000, and for more than 10 million, the maximum penalty available is $20,000. The result is a maximum of more than $200 billion in just this one of the three cases.

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[32] PG&E argues that only CPSD can allege violations. San Francisco disagrees with this claim. Nonetheless, for convenience, in this brief San Francisco relies on the violations enumerated by CPSD.

[33] Pursuant to the California and Federal Constitutions, the penalty must be proportional to the gravity of a defendant's offense, and ability to pay is a critical factor. *City and County of San Francisco v. Sainez*, (2000) 77 Cal.App.4th 1302, 1321-1323; 92 Cal.Rptr.2d 418, 431-433. These criteria are similar to the criteria the Commission applies in determining a penalty under Sections 2107 and 2108.

[34] I.12-01-007, Rev. App. C to CPSD Brief, filed April 18, 2013.

[35] I.11-02-016, CPSD Opening Brief, Table of Contents, ii-iii.

[36] I. 11-11-009, CPSD Opening Brief at 16.

[37] Jan. 1, 1956 - Sept. 9, 2010 = 19,976 days; of these, 13,880 days were prior to Jan. 1, 1994 ($2,000 maximum penalty) and 6,096 were after Jan. 1, 1994 ($20,000 maximum penalty). Number of days obtained from the website timeanddate.com.

PG&E has already complained that such large numbers are a result of the flawed analysis of violations.[38] The Commission should reject PG&E's argument and perspective. The large potential penalty is the mathematical illustration of PG&E's astounding failure to operate safely over many decades and the millions of people PG&E placed at risk in addition to those that were actually harmed or killed. Penalties in the hundreds of billions are impractical because PG&E could not pay them, but that does not diminish the violations.

C. The Commission Should Consider All Of The Evidence And Allegations Made By Intervenors In Determining What Fines and Other Penalties Are Appropriate

At the Commission's invitation, San Francisco and other intervenors have been active participants in these proceedings from the outset[39]. San Francisco submitted expert testimony in all three investigations demonstrating that PG&E has violated the Public Utilities Code, Commission General Orders and federal law. In determining the appropriate fines and other penalties in these proceedings the Commission should consider the evidence and arguments presented by intervenors. PG&E's arguments to the contrary are without merit[40].

1. Intervenors Can Allege Violations Independent of CPSD

San Francisco's evidence supports and substantiates CPSD's violations. To the extent that the Commission thinks that San Francisco, or any other intervenor, has alleged violations that are independent of CPSD's, nothing prohibits the Commission from considering those violations when determining what fines and other penalties are appropriate.

By cobbling together a handful of unrelated Commission decisions, PG&E has argued that allowing San Francisco to independently allege any violations would be improper, because only CPSD can act as a "prosecutor" in a Commission enforcement proceeding, and that interveners may not

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[38] I. 11-02-016, PG&E Opening Brief at 41-42.

[39] See, e.g. I. 12-01-007 OII at 10: "The Commission intends to hold public hearings to address these matters. The Commission directs PG&E to cooperate fully with staff's inquiries, and to preserve all records as required by prior Commission orders. The Commission also invites and encourages interested parties to actively participate in this proceeding, as it involves important safety and other policy matters. The record in this proceeding and the Commission's ultimate disposition will benefit from the expertise, participation, and evidence of other parties."

[40] *See* PG&E San Bruno Reply at 159-62; PG&E Records Reply at 157-60.

"usurp" CPSD's authority. Those decisions, however, do not support PG&E's argument that allowing interveners to allege independent violations would be "incompatible with the carefully calibrated procedures that apply to enforcement proceedings."[41]

Either in the context of Commission enforcement proceedings, or in complaint proceedings, the Commission has recognized its authority to fine or penalize a utility after parties other than CPSD have established that the utility violated the Public Utilities Code or a Commission General Order or decision. For example, in D.04-12-058, *Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless*, 2004 Cal. PUC LEXIS 577 (2004), the Commission penalized Cingular based on the "extensive evidence" submitted by "all parties," which included CPSD and the Utility Consumers' Action Network ("UCAN").[42] In rejecting Cingular's due process arguments, the Commission found that: "Over the course of more than two years, Cingular was given ample opportunity to present affirmative evidence related to its conduct and practices, and to cross-examine and rebut evidence submitted against it by both CPSD and UCAN."[43]

Likewise, in D.08-09-038, *Investigation on the Commission's Own Motion into the Practices of the Southern California Edison Company,* 2008 Cal. PUC LEXIS 401 (2008), the Commission investigated whether Southern California Edison ("SCE") had submitted false customer satisfaction data that was used to determine Performance Based Ratemaking ("PBR") customer satisfaction rewards. CPSD, TURN, and DRA were all parties to the proceeding. SCE argued that it was denied due process because the Presiding Officer's Decision ("POD") had prematurely disposed of certain customer satisfaction issues that SCE believed the Commission had been reserved for a Phase 2 of the proceeding. In rejecting SCE's due process claim, the Commission found:

> . . . SCE also had notice of DRA's and TURN's proposals, which were granted by the POD, to refund all customer satisfaction PBR rewards in Phase 1. TURN and DRA served testimony on September 12, 2006, before SCE served testimony. SCE knew of the intervenor proposals before it filed its initial testimony on October 16, 2006. In their Phase 1 testimony, both DRA and

[41] PG&E San Bruno Reply at 162; PG&E Records Reply at 159.

[42] Id. at *19.

[43] *Id.*

TURN proposed $ 48 million in refunds for all customer satisfaction PBR. Neither TURN nor DRA asked for a Phase 2.[44]

Those decisions show that, even if CPSD prosecutes a Commission investigation, the Commission will give consideration to charges and evidence put into the record by interveners when deciding both whether violations have occurred and, if so, what fines and other penalties are appropriate following a Commission investigation led by CPSD. The Commission's only concern should be whether the charged utility had adequate notice of a proposed violation and the evidence supporting it. It is irrelevant whether that notice came from CPSD or from some other party. The Commission will consider all the charges and evidence when determining what fines or other penalties are appropriate based on the violations that were proven by any of the parties.

A finding that San Francisco's charges and evidence should be considered is also consistent with the Commission's practice of allowing parties other than CPSD to file complaints alleging violations that ultimately lead to a Commission decision imposing fines and other penalties on a public utility. For example, in D.01-09-058, *Utility Consumers' Action Network, Complainant, vs. Pacific Bell*, 2001 Cal. PUC LEXIS 914 (2001), the Commission imposed a fine of more than $25 million on Pacific Bell based on complaints filed by UCAN and a number of other consumer groups.[45] Rejecting intervenor charges or evidence here, when the Commission invited intervenors to participate, would ignore the ability intervenors have to raise those issues in a separate proceeding. It is more efficient for the Commission and all parties to adjudicate evidence and claims from all parties in one proceeding.

2. There Are No Potential Due Process Violations, Because San Francisco Gave PG&E Notice and an Opportunity to Respond to Violations Purportedly Identified Independently by San Francisco

PG&E also argues that due process requires the Commission to ignore any violations alleged independently by San Francisco because they were inserted into these proceedings after all the evidence was heard.[46] While San Francisco agrees with PG&E that due process requires that PG&E

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[44] *Id.* at **170-71.

[45] See also D.08-08-017, *Utility Consumers' Action Network v. SBC Communications, Inc.*, 2008 Cal. PUC LEXIS 302 (2008).

[46] *See* PG&E San Bruno Reply at 164; PG&E Records Reply at 162.

be given notice of the "charges against it" and an "opportunity to present a defense" to those charges,[47] San Francisco disagrees with PG&E's assertion that PG&E had no notice of violations alleged by San Francisco until after the hearings. PG&E presents no support for that claim, nor could it since the claim is entirely made up.

Contrary to PG&E's assertions, San Francisco raised all the violations it alleges in its testimony in these proceedings.[48] San Francisco timely filed that testimony and PG&E had the opportunity to confront that testimony either in rebuttal testimony or by cross-examining San Francisco's witness. Due process requires nothing more than that. The only example PG&E provides of such an issue raised by San Francisco is our reference to 49 C.F.R. § 192.909(a) in the recordkeeping proceeding.[49] This issue was explicitly raised in San Francisco's testimony[50].

3. San Francisco Has Not Alleged Any Violations that Are Outside of the Categories of Violations Identified by CPSD

In any event, PG&E is wrong when it asserts that San Francisco has made charges that are independent of CSPD's charges.[51] San Francisco's participation has supported and substantiated CPSD's allegations that PG&E has violated the Public Utilities Code, Commission General Orders and federal law. In fact, the record is clear that San Francisco's charges are consistent with and supportive of CPSD's charges. For this reason, PG&E does not and cannot describe with any degree of certainty how the two diverge. Instead, PG&E is intentionally vague in this regard. San Francisco should not have to go through the record to justify each of PG&E's assertions. Nonetheless, even a

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[47] *See* PG&E San Bruno Reply at 162-165; PG&E Records Reply at 160-62.

[48] None of the cases cited by PG&E support its due process argument. Two of those cases concerned charges that were added to a proceeding during the hearing, thereby preventing the charged party from being heard. See *Smith v. State Bd. of Pharmacy*, 37 Cal. App. 4th 229, 242-43 (1995); *In re Ruffalo*, 390 U.S. 544, 552 (1968). One case concerned "vague" allegations in the charging document concerning a physician's inadequate medical care accompanied by a refusal to allow the physician to examine the applicable medical records. See *Rosenblit v. Superior Court*, 231 Cal.App.3d 1434, 1446-48 (1991). In the last case, PG&E's quote about a charge being "stricken as irrelevant" if not "contained in the formal notice" is taken from an argument made in the case and not from a holding from the Court. See *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 695-96 (1975).

[49] See PG&E Records Reply at p. 156, fn. 979,

[50] I.11-02-016, Exh. CCSF-4 at 13-15.

[51] PG&E San Bruno Reply at 159; PG&E Records Reply at 162.

cursory review shows that PG&E's argument that San Francisco alleges violations that are "independent" of those raised by CPSD is without merit.

Regarding the recordkeeping proceeding, PG&E states that it was "difficult [for PG&E] to ascertain" whether San Francisco's arguments "support CPSD's existing violations or raise independent ones."[52] In fact, the only San Francisco violation that PG&E can point to that it claims to be "independent" of CPSD's is San Francisco's citation to 49 C.F.R. § 192.909(a), which concerns changes to an operator's integrity management program.[53]

Section 192.909(a) is contained within Subpart O of Part 192 of 47 C.F.R. Subpart O is entitled "Gas Transmission Pipeline Integrity Management." Charges related to PG&E's deficient TIMP recordkeeping are a central part of CPSD's case. In particular, CPSD entitled Violation 25 as "Data Used in Integrity Management Risk Model." As CPSD argues in support of Violation 25:

> Good engineering practices and regulations require a transmission pipeline operator to create an integrity management program that includes design and construction details of the pipeline system as well as specifications and operating parameters. The operator is also required to create an Integrity Management Risk Model utilizing the data collected to evaluate the relative risk of continued operation of each segment of pipe in its pipeline system.[421] (Footnote 421 cites to 49 CFR 192 Subpart O.)[54]

Given that CPSD cited violations of Subpart O, it is of no importance that CPSD might not have cited to a particular section within Subpart O. At worst, San Francisco has asserted a different legal theory supporting the same charge that PG&E's TIMP recordkeeping is deficient. According to CPSD, because of PG&E's "incomplete, inaccurate, and inadequate" TIMP data, "PG&E's integrity management decisions have been skewed and unsafe."[55]

Regarding the San Bruno proceeding, PG&E argues that San Francisco's proposed 39 Conclusions of Law in Appendix B to its brief somehow allege nine "independent" violations.[56] Yet, PG&E does not specify what the nine new violations are or state which of those 39 paragraphs contain

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[52] PG&E Records Reply at 156 fn. 979.

[53] PG&E Records Reply at 156.

[54] CPSD Records Opening Brief at 135.

[55] CPSD Records Opening Brief at 134.

[56] PG&E San Bruno Reply at 159, fn 902.

these new violations, so it is unclear what "independent" violations PG&E claims the City has inserted into that proceeding. In the San Bruno proceeding, San Francisco's allegations largely fit within several of the TIMP violations alleged on pages 3-5 of the CPSD's Appendix C.

For example, one of San Francisco's 39 proposed Conclusions of Law is that:

> 6. PG&E failed to collect and analyze relevant data, failed to use conservative assumptions when it lacked pertinent data, underestimated the potential threat posed by manufacturing and construction defects and failed to appreciate the effect of cyclic fatigue and interactive threats on those pipeline threats. 49 CFR 192.917(b).

CSPD included similar violations in Appendix C:

- "49 CFR 192.917(b) – failure to gather and integrate required pipeline data"
- "49 CFR 192.917(a) (incorporating ASME B31.8S (§2.2)) – failure to analyze manufacture threat of weld defect"
- "49 CFR 192.917(e)(3) – failure to consider DSAW as potentially subject to manufacturing defects"
- "49 CFR 192.917(e)(2) – failure to consider and test for cyclic fatigue"

PG&E has provided no factual support for its claim that San Francisco has attempted to insert into these proceedings at the last moment certain violations that are "independent" of CPSD's violations. The factual record shows the opposite—San Francisco has not inserted anything into this proceeding at the last moment. For this reason, the Commission should consider all of San Francisco's arguments and the evidence supporting them when deciding what fines and other penalties are appropriate.

III. THE COMMISSION SHOULD IMPOSE THE LARGEST PENALTY PG&E CAN REASONABLY PAY

PG&E is financially capable of paying at least a $2.25 billion penalty, particularly if the penalty is a combination of a fine paid to the state and remedial measures necessary to upgrade PG&E's system. The evidence, including evidence from PG&E's financial witness[57], overwhelmingly shows that PG&E can sustain a large penalty and remain financially healthy. Moreover, the market

[57] Joint 66 (PG&E, Wells Fargo Report).

expects not only a large penalty, it also expects the Commission to properly regulate PG&E to ensure the company operates reliably and safely so that its earnings remain stable or grow. [58]

A. PG&E Can Pay a Penalty of at Least $2.25 billion

In the context of PG&E's overall financial picture, an equity issuance of $2.5 billion is large, but not out of line with other companies.[59] The record shows that PG&E can improve its ability to pay a penalty of at least $2.25 billion, by measures within its own control. For one thing, PG&E has stated that it plans to issue equity to pay any penalty imposed here.[60] PG&E could, alternatively, use cash on hand to pay some or all of a penalty. In addition, PG&E could enhance its cash flow by pursuing a different dividend policy.[61] Most importantly, PG&E could pursue a reasonable capital expenditure program, instead of the unrealistic and aggressive program PG&E has publicly described.[62] Mr. Fornell emphasized the importance of managing the amount and timing of equity issuances—both of these factors are within PG&E's control due to the large amount of other capital needs PG&E estimates.[63]

There is also no evidence indicating the robustness of the capital expenditure estimates PG&E has published. [64] Part of that estimate includes revenues PG&E has requested in its General Rate Case.[65] That request has not been approved, and it is not unusual in GRCs or other cases for the Commission to reject a large portion of such a request. There is no evidence that reducing the level of capital expenditures estimated in PG&E's would be infeasible or harmful.

A penalty of at least $2.25 billion is not inconsistent with the market analyses in the record, which predict fines and penalties ranging from $300 million to over $2.5 billion. While the opinions

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[58] RT: 1600-1602.

[59] See Id. at Figure 1; Joint 53 (Overland Rebuttal) at Table 6.

[60] Joint 52 (Overland) at 6.

[61] Ex. Joint 52 at 7.

[62] See Joint 57 (Slides from 4th Quarter Earnings Call, Feb, 21, 2013) at 11.

[63] RT at 1588 (Fornell) (selling equity for a large penalty will be difficult due to large amount of equity issued for capital expenditures.)

[64] See, e.g., Joint 57 at 11.

[65] Id. at 11.

of market analysts may provide the Commission some information about how a penalty might impact PG&E's ability to raise capital needed to perform its utility obligations, that information is speculative and generalized. Mr. Fornell agreed that there are many variables that influence the stock price, not just whether equity has been issued to pay a large penalty.[66]

The Commission's main role is to protect ratepayers not to satisfy the market. But the market as well as ratepayers and the public benefits from "predictable" regulation.[67] In this case that means imposing a penalty commensurate with the harm and consistent with the law, to the extent financially feasible. Mr. Fornell agreed that investors are not looking for regulators to let utilities off easy, and that penalties and fines can contribute to stability.[68] In PG&E's case, investors have recognized organizational problems and are looking for change.[69]

B. A Large Portion of the Penalty Should Be Directed to Remedial Measures to Improve the Safety of PG&E's Gas Pipeline Operations

Requiring PG&E to fund pipeline safety work and other remedial measures makes sense for the company, the public, and ratepayers. A large payment to the general fund sends a good signal to utilities but beyond that does not contribute to reasonable rates or ensure that needed safety improvements are made. An equally strong signal can come from a large fine and a large remedial program funded by the utility. The Commission must ensure that the remedial work necessary for safe operations is performed on a timely basis and at PG&E's expense.

While PG&E prefers not to pay any kind of a penalty, money invested in its infrastructure may be tax deductible. In addition, payment of a penalty that consists largely of remedial measures will happen over time and thus can be effectively managed with PG&E's other financial needs.[70]

Mr. Fornell recognized that the use of funds matters to investors; even though utility-funded remedial measures won't immediately increase revenues, they improve the system and at the least

[66] RT: 1571-1572 (Fornell)

[67] RT: 1600-1602.

[68] RT: 1601 at 24 – 1602.

[69] RT: 1632-1633.

[70] RT:1448 at 5-9. (Spreading out equity issuances over time makes them easier to do.)

facilitate stable earnings and may increase the value of existing assets.[71] Moreover, Mr. Fornell was unambiguous that additional significant accidents on PG&E's system could put the utility out of business.[72] The Commission needs to use its penalty and remedial authority to force PG&E to change.

C. Specific Remedial Measures

San Francisco generally supports the remedies proposed by CPSB in its reports and will address those specifically if appropriate after review of CPSD's opening brief. San Francisco also supports TURN's proposal for a comprehensive review and overhaul of PG&E's Transmission Integrity Management Program.[73] The evidence in these three proceedings requires this remedial measure. In addition, San Francisco supports DRA's proposal for an Independent Monitor to oversee the remedial work PG&E must undertake and report to the Commission and the public regarding PG&E's progress.[74]

Dated: May 6, 2013

Respectfully submitted,

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[71] RT: 1598-1599, 1630-1631.

[72] RT: 1600.

[73] I. 12-01-007, TURN-1.

[74] I. 12-01-007, DRA Brief at 61-66.