

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.

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**JOINT PARTIES' RESPONSE TO APPEALS AND REQUESTS FOR REVIEW
OF THE PRESIDING OFFICERS' DECISIONS IN THE PIPELINE INVESTIGATIONS**

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I. INTRODUCTION

Pursuant to Rule 14.4(d) of the Commission’s Rules of Practice and Procedure and the Presiding Officers’ email ruling of October 7, 2014, the Joint Parties (together The Utility Reform Network (TURN), the Office of Ratepayer Advocates (ORA), and the City and County of San Francisco (CCSF)) hereby jointly file this “Joint Parties’ Response To Appeals And Requests For Review Of The Presiding Officers’ Decisions In The Pipeline Investigations.”

In reviewing Pacific Gas and Electric Company’s (PG&E) four appeals of the Presiding Officers’ Decisions (PODs) in the Pipeline Investigations,¹ the Commission must look behind PG&E’s rhetoric and focus on what those appeals do not say. First, the appeals do not offer a single new legal argument that has not already been thoroughly rebutted in prior briefs, and carefully considered and rejected by the Presiding Officers in their PODs. Second, the appeals speak in generalizations and fail to provide specific proof of specific legal or factual error.

Instead, PG&E’s appeals contain repeated references to evidence that was struck from the record, inaccurate or incomplete summaries of applicable law, irrelevant arguments, and unsupported assertions, all offered in an effort to argue that the remedies imposed are unwarranted.

Thus, while PG&E reiterates that it “deeply regrets the loss of life, injuries, and the effect on the San Bruno community caused by the September 9, 2010, pipeline rupture and explosion,”² it continues to evade responsibility for the fact that its failure to comply with state and federal gas safety rules and laws for over half a century caused that explosion. PG&E continues to frame these proceedings and the proposed penalties in the

¹ The “San Bruno POD” addresses I.12-01-007, the “Recordkeeping POD” addresses I.11-02-016, the “Class Location POD” addresses I.11-11-009, and the “Remedies POD” addresses the fines, penalties, and remedies for all three investigations.

² PG&E Remedies POD Appeal, p. 1.

context of the “tragic accident” that occurred on a single day in 2010, while turning a blind eye to the substantial evidence in the record.³

As the PODs document, nothing can be farther from the truth. The events of September 9, 2010 were tragic, but can hardly be called accidental. The PODs show that the San Bruno explosion was the foreseeable result of nearly 60 years of mismanagement, willful disregard for the law, willful disregard of multiple warnings concerning the unsafe condition of its pipeline system, deliberate cost-cutting despite more than ample ratepayer furnished revenues, and indifference to public safety.

The Presiding Officers arrived at the findings in the PODs after reviewing a record presented to them over the past two years, including their personal participation in over 30 days of hearings from September 2012 through January 2013. PG&E has not presented any grounds to second-guess those findings. The focus now should be on whether, given the findings and conclusions in the PODs, the total package of proposed penalties in the Remedies POD are appropriate.

PG&E claims that the total package is “far in excess of what is necessary or appropriate to deter future violations” and that “[a] substantial reduction in the penalty imposed on PG&E is also warranted because of the factual and legal errors on which the penalties are based.”⁴ However, as the Joint Parties explain in their Remedies POD Appeal filed on October 2, 2014, the Presiding Officers’ recommended \$1.4 billion total penalty⁵ is lawful, reasonable, and appropriate, and is far less than what the Commission could impose in these circumstances.⁶ The most pressing issue for the Commission to address regarding those penalties is how to fashion them to best serve the goals of deterrence and mitigating the harm to ratepayers from PG&E’s reprehensible violations.

³ PG&E Remedies POD Appeal, p. 1.

⁴ PG&E Remedies POD Appeal, p. 2.

⁵ In this Response the Joint Parties use the same nomenclature as the Remedies POD, i.e., “fines” refers to monies to be paid to the General Fund, and “penalties” refers to the combination of fines, disallowances and remedies.

⁶ Joint Parties Remedies POD Appeal, Section II, pp. 2-12.

In that regard, the penalties should be modified as proposed in the Joint Parties’

Remedies POD Appeal:

- The total \$1.4 billion penalty should be revised to require PG&E to fund all of PG&E’s Pipeline Safety Enhancement Plan (PSEP) work authorized in D.12-12-030, as modified by the PSEP Update Settlement in Application (A.) 13-10-017;⁷
- Ordering Paragraph 10 of the Remedies POD, which requires PG&E shareholders to pay all of the reasonably incurred litigation costs of TURN, ORA, CCSF and the City of San Bruno should be clarified to provide procedures for parties to submit their requests for reimbursement;⁸ and
- Language should be added to the Remedies POD to clarify that PG&E may not pass on to ratepayers its own legal expenses for the Pipeline Investigations or for criminal and civil proceedings related to the San Bruno explosion or pipeline safety violations that came to light in the aftermath of the explosion.⁹

The discussion that follows first addresses various questions raised in the three Commissioner Requests for Review (in Section II), and then turns to rebutting PG&E’s claims regarding errors of law in the PODs, including, among other things, a response to PG&E’s groundless arguments that Public Utilities Code § 451 is not a safety statute, that fines may not be imposed on a daily basis, and that PG&E was not on notice of all the violations identified in the PODs (in Section III).

In sum, not one of PG&E’s arguments on appeal regarding alleged legal errors in the PODs is new or has merit. Instead, the Commission should focus at this stage on refining the package of penalties in the Remedies POD as requested by the Joint Parties, and on making other limited modifications to the Remedies POD and to the other PODs to address other issues raised by the Safety and Enforcement Division (SED)¹⁰ and the Joint Parties, as discussed below.

⁷ Joint Parties Remedies POD Appeal, Section III, pp. 12-21.

⁸ Joint Parties Remedies POD Appeal, Section IV, pp. 22-26.

⁹ Joint Parties Remedies POD Appeal, Section IV, pp. 22-26.

¹⁰ SED is also referred to herein and in the PODs by its prior title the “Consumer Protection and Safety Division” or “CPSD.”

II. REQUESTS FOR REVIEW

A. The Magnitude Of The Proposed Penalty Package Is Reasonable And Appropriate

Both Commissioners Florio and Sandoval ask in their Requests for Review whether the total penalties proposed in the Remedies POD are appropriate.¹¹ The Remedies POD proposes a package of more than \$1.4 billion in penalties to be funded entirely by PG&E shareholders. Those penalties include a \$950 million fine payable to the State's General Fund, a \$400 million rate reduction (or refund) to PG&E ratepayers for the costs of remedial gas transmission work PG&E performed at ratepayer expense, \$50 million for PG&E to implement over 75 remedies proposed by the Commission's Safety and Enforcement Division (SED),¹² and a requirement that PG&E shareholders pay the Joint Parties' and the City of San Bruno's litigation expenses.¹³

As explained in Section II of the Joint Parties' Remedies POD Appeal, the total penalty amount is reasonable, lawful, and easily supported by the record, especially considering PG&E's special status as a public utility.¹⁴ That discussion should be reviewed and can be incorporated into the text of the Remedies POD to supplement its discussion regarding the reasonableness of the proposed penalty package.

Further, it bears repeating that, while the record shows that PG&E could pay much higher penalties – Overland conservatively estimated PG&E could pay up to \$2.45 billion after taxes in fines and other penalties¹⁵ – the Joint Parties nevertheless elected to support the Remedies POD, with appropriate modifications, to bring a timely and appropriate end to the Pipeline Investigations so that resources can be devoted to overseeing the safety of PG&E's repairs to its gas pipeline system:

¹¹ See Sandoval Request for Review, Issue 1, and Florio Request for Review, Issue 2. The Joint Parties recognize that Commissioner Florio recused himself from these proceedings on October 15, 2014. However, we determined that it remained beneficial to address the questions raised in his Request for Review in these proceedings and we do so here.

¹² See Remedies POD, p. 3.

¹³ See Remedies POD, OP 10, p. 167.

¹⁴ Joint Parties Remedies POD Appeal, Section II, pp. 2-12.

¹⁵ DRA Fines and Remedies (F&R) Rebuttal Brief, June 7, 2013, pp. 5-11 (discussing the Overland Analysis).

While the Joint Parties do not agree with every finding and conclusion in all four of the Presiding Officer Decisions (PODs) ... we recognize that, if adopted with limited modifications, these four PODs provide the Commission with a reasonable, lawful, and appropriate resolution of the Pipeline Investigations. Furthermore, unnecessary litigation over the PODs would only deflect attention from the important task of overseeing the repairs and operation of PG&E's gas pipeline system to ensure public safety.¹⁶

PG&E argues that the penalty package should be "significantly reduced" in part because of the "factual and legal errors" in the PODs and "the substantial unrecovered amounts that PG&E shareholders have already spent and have committed to spend on gas system safety."¹⁷ PG&E's arguments are without merit and should be rejected. As discussed in Section III below, there is no proof of factual and legal errors (with the exception of minor errors identified by SED) and therefore no adjustments to the penalty total are warranted on that basis. Further, the Remedies POD properly concludes that PG&E's arguments regarding unrecovered shareholder expenditures are "both outside of the scope of this proceeding and speculative and should be given no weight."¹⁸

B. To Bring Closure To This Matter, The Joint Parties Support The Magnitude Of The Penalties Proposed By The Remedies POD, But Suggest An Alternative Allocation Of Those Penalties

All three Requests for Review ask whether the allocation of the total penalty to fines, disallowances, and remedies, is appropriate and/or whether a portion of the PG&E shareholder payments should be applied towards pipeline safety improvements.¹⁹

This question is specifically addressed in Section III of the Joint Parties' Remedies POD Appeal, which is summarized here. As discussed in Section II.A above, while the Joint Parties support the total amount of penalties proposed in the Remedies POD to bring resolution to these proceedings, we propose that the allocation of the penalties be

¹⁶ Joint Parties Remedies POD Appeal, p. 1.

¹⁷ PG&E Remedies POD Appeal, p. 3.

¹⁸ Remedies POD, p. 81. See also CPSD's Motion to Strike and For Contempt filed October 15, 2014, regarding PG&E's improper reliance on the same extra-record evidence in its Remedies POD Appeal.

¹⁹ Sandoval Request for Review, Issue 2, Florio Request for Review, Issue 3, Picker Request for Review, Issues 1 and 2.

modified to reduce the fine payable to the general fund, and instead disallow the full costs to ratepayers of PG&E's Pipeline Safety Enhancement Plan (PSEP) expenditures.

As the Remedies POD recognizes, the majority of the PSEP work was remedial – to begin to correct the safety violations identified in the Pipeline Investigations.²⁰ In response, the Remedies POD orders a \$400 million disallowance of PSEP revenue requirement as an “equitable remedy” for PG&E's failure to perform certain work earlier.²¹ As discussed in Section III of the Joint Parties' Remedies POD Appeal, important equitable considerations support a different allocation of the penalties between disallowances and fines.

The logic of the Remedies POD supports a full disallowance of all of the PSEP costs that would otherwise be charged to ratepayers – \$766 million in capital expenditures and \$111 million in expenses, for a total disallowance of \$877 million.²² Such a disallowance would better: (1) reflect the remedial nature of the PSEP work; (2) serve the goals of deterrence and fairness to ratepayers by preventing PG&E from collecting a 65-year return on PSEP assets; and (3) alleviate the burden on PG&E customers who will still be called upon to pay several billion dollars to improve the safety of PG&E's gas system. Leaving the Remedies POD's \$1.4 billion total penalty amount and other remedies unchanged, the fine paid to the State's General Fund should be \$473 million, a substantial and fully justified amount. A General Fund fine is not restitution and instead serves a “public, penal objective” of punishment for past conduct and provides a significant deterrent to future unlawful behavior by all regulated utilities.²³ Such an allocation would also resolve the ratemaking issues identified in Section III.C of

²⁰ Remedies POD, FOF 37. See also Remedies POD, p. 80.

²¹ Remedies POD, Conclusion of Law (COL) 29, p. 163 (“PG&E should be ordered to refund \$400,000,000 of costs associated with its Pipeline Modernization Program to ratepayers.”) and Remedies POD, COL 30, p. 163 (“The additional \$400,000,000 disallowance is an equitable remedy for PG&E's failure to replace pipeline as needed to ensure the safe operation of its gas transmission pipeline system.”).

²² The derivation of these numbers is discussed below.

²³ *State of California v. Altus Finance, S.A.*, 36 Cal.4th 1284, 1308 (2005).

the Joint Parties' Remedies POD Appeal, and may also avoid the need to address PG&E's request for 180 days to pay the fine.²⁴

C. It Is Within The Commission's Authority And Appropriate From A Policy Perspective To Order PG&E To Compensate Specified Parties Who Significantly Contributed To The Proceedings For Their Legal Costs

Commissioner Picker's Request for Review acknowledges that the Remedies POD orders PG&E shareholders to pay the litigation costs of the Joint Parties and the City of San Bruno.²⁵ Commissioner Picker asks whether the Commission can order a public utility's shareholders to compensate parties in a Commission proceeding outside of the Intervenor Compensation framework.²⁶ The answer to that question is "yes."

The California Constitution and Public Utilities Code § 701 confer broad authority on the Commission to regulate public utilities. Public Utilities Code § 701 provides that the Commission "may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." The Commission's remedial powers include the power to fashion equitable remedies in addition to those specifically authorized by the Public Utilities Code.²⁷ Given this authority, and for the reasons discussed below, it is well within the Commission's authority, and appropriate from a policy perspective, to order PG&E to pay the legal costs of specified parties who significantly contributed to the proceeding.²⁸

²⁴ See PG&E Remedies POD Appeal, pp. 14-16.

²⁵ See Remedies POD, Ordering Paragraph (OP) 10, p. 167.

²⁶ Picker Request for Review, Issue 4.

²⁷ See *Consumers Lobby Against Monopolies v. Cal. Pub. Utilities Comm'n*, (1979) 25 Cal. 3d 891 and as discussed at note 53 below; see also *Wise v. PG&E*, (1999) 77 Cal.App.4th 287, 293 (Article XII of the California Constitution confers on the Commission broad regulatory power over public utilities "including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures.") and Remedies POD, COL 10 ("The Commission has authority to fashion equitable remedies.").

²⁸ This is especially so given that PG&E did not challenge OP 10 of the Remedies POD, awarding litigation costs to the Joint Parties and the City of San Bruno.

1. **Ordering Compensation For Legal Costs Under § 701 Is Not Inconsistent With The Intervenor Compensation Program**

The intervenor compensation program was established by statute.²⁹ The utilities normally recover the costs of the program from ratepayers, and only certain intervenors qualify for the program.³⁰ The Commission explicitly invited intervenor participation in the Pipeline Investigations,³¹ and the Presiding Officers found that four of those intervenors – TURN, ORA, CCSF and the City of San Bruno – contributed substantially to the proceedings.³² Three of the four, however, are not eligible for intervenor compensation because they are government entities.³³ The intervenor compensation program does not prohibit the Commission from requiring utility shareholders to pay the legal costs of these parties. Indeed, there is precedent for the Commission taking such action here.

In Decision 11-03-049, the Commission authorized a water utility to loan up to \$2.7 million to pay the legal costs of a local agency party who intervened in support of the utility in the proceeding, but who would not otherwise qualify for intervenor compensation. If the project being applied for went forward, the loan would be forgiven and the local agency's legal costs would be paid by the utility's ratepayers.³⁴ The Commission rejected arguments that this arrangement was, among other things, contrary to the intervenor compensation statutes. It stated:

This argument [that payment of the local agency's legal costs violates the intervenor compensation statutes] wrongly presumes that the intervenor compensation statutes constitute the only lawful means for the Commission to authorize third party funding. Nothing in the statutes support[s] such a conclusion. It is true that state, federal and local agencies are not considered utility customers for purposes of funding authorized under those provisions. However, nothing in

²⁹ See, e.g., California Public Utilities Code § 1801 *et seq.*

³⁰ See, e.g., California Public Utilities Code §§ 1802(b) and 1803.

³¹ Remedies POD, p. 153 (quoting the San Bruno and Recordkeeping OIIs).

³² Remedies POD, p. 154; See, e.g., California Public Utilities Code § 1802(i).

³³ See, e.g., California Public Utilities Code § 1802(b)(2).

³⁴ D.11-03-049, *mimeo*, pp. 1-2.

the statutes prohibits funding for such entities or restricts the Commission's authority to do so.³⁵

That conclusion is even more appropriate here, where PG&E shareholders, rather than ratepayers, would compensate the intervenors.

It is appropriate for the Commission to rely upon its broad authority under § 701 to require PG&E to pay the legal costs of the parties who contributed substantially to these proceedings for a number of reasons. First, and foremost, as the PODs document, PG&E brought these legal proceedings upon itself as a result of multiple, knowing, and longstanding violations of state and federal laws, regulations, and industry practices – all compromising the safety of its high pressure gas transmission system. Given the documented violations, there is no reason why ratepayers or the parties who contributed substantially to the Pipeline Investigations should pay these legal costs. Second, the Commission explicitly encouraged interested parties to intervene, and as the Remedies POD finds, TURN, ORA, San Bruno, and CCSF, the parties identified in Ordering Paragraph 10 of the Remedies POD, contributed significantly to the proceedings. Third, the Intervenor are public entities which participated in these cases to further the public interest in safety, not to seek financial gain or to protect their personal economic interests. Fourth, requiring PG&E shareholders to pay the litigation costs of these intervenors is an appropriate equitable remedy under Public Utilities Code § 701 because the litigation, with its associated costs, has a direct nexus to the violations demonstrated in the Pipeline Investigations. Finally, the Pipeline Investigations are unique in the history of the Commission in terms of the sheer magnitude of the violations and the potential risk to public safety. Consequently, unique remedies are warranted.

2. The Commission Should Clarify Certain Provisions Of The Remedies POD Regarding PG&E's Payment Of Legal Costs

Commissioner Florio's Request for Review asks whether "other remedies" addressed in Section 7 of the Remedies POD should be adopted or modified.³⁶ As one

³⁵ D.11-03-049, *mimeo*, p. 10; *see also* pp. 9-11.

³⁶ Florio Request for Review, Issue 7.

remedy for PG&E’s violations, the Remedies POD – in Ordering Paragraph 10 – requires PG&E shareholders to pay the litigation costs of the Joint Parties and the City of San Bruno. As explained in Section IV of the Joint Parties’ Remedies POD Appeal, Ordering Paragraph 10 should be modified and expanded to provide procedures for the named intervenors to submit their requests for reimbursement. Further, language should be added to clarify that PG&E may not pass on to ratepayers its own legal expenses for the Pipeline Investigations or for criminal and civil proceedings related to the San Bruno explosion or pipeline safety violations that came to light in the aftermath of the explosion. The Joint Parties’ proposed clarifications to address both of these issues are provided at the end of Section IV of the Joint Parties’ Remedies POD Appeal.³⁷

D. Other Necessary Remedies

Commissioner Florio’s Request for Review asks whether “other remedies” addressed in Section 7 of the Remedies POD should be adopted or modified.³⁸ While all parties appear to support the many remedial measures already adopted in Section 7 of the Remedies POD,³⁹ additional remedial measures are necessary to make PG&E’s gas pipeline safety system safe and to ensure the public confidence. This stage of these proceedings presents a unique opportunity for the Commission to take a holistic view of the underlying concerns and bolster its oversight of pipeline safety through creative remedies. These additional remedies will provide greater expertise to the Commission, ensure that PG&E performs the remedial work as ordered, and bring much needed transparency to ensure public confidence. In this respect, the Commissioners should reconsider the Remedies POD’s rejection of the requests for an Independent Monitor and a California Pipeline Safety Trust.⁴⁰

³⁷ Joint Parties Remedies POD Appeal, Section IV, pp. 22-26, with line edits proposed at pp. 24-26.

³⁸ Florio Request for Review, Issue 7.

³⁹ PG&E Appeal of Remedies POD at p. 1 (“PG&E embraces the operational remedies set forth in the Remedies POD.”).

⁴⁰ Remedies POD, p. 142.

As discussed below, the Joint Parties urge the Commission to ensure appropriate oversight of the reconstruction of PG&E's system by: (1) providing more guidance in the Remedies POD to ensure that the audits proposed in the Remedies POD are performed in an open and transparent manner and take interested party concerns into account; and (2) either ordering an Independent Monitor or establishing a pipeline safety trust.

1. The Commission Should Take Steps To Ensure The Ordered Audits Are Performed In An Open And Transparent Manner And Take Interested Party Concerns Into Account

The Remedies POD adopts CPSD's proposed remedies 4.C.21 and 4.C.22 regarding CPSD's audit of PG&E's recordkeeping practices and PG&E's correction of any deficiencies found.⁴¹ It also orders CPSD to present various audit proposals to the Commission within 60 days of the effective date of the decision, including proposals to audit PG&E's MAOP Validation Projects and Project Mariner,⁴² and to perform the comprehensive audit recommended by the NTSB.⁴³ The Remedies POD also provides that PG&E shareholders shall reimburse CPSD for the contracts and industry experts required to perform these various audits.⁴⁴

The City of San Bruno's (San Bruno) Remedies POD Appeal properly observes that the Remedies POD should provide guidance on how CPSD will conduct the various audits it has authorized. Among other things:

There is no requirement on how the auditors will report to the Commission, the extent of the auditor's duties, the public's opportunity to view any reports (if any are required, no such order was provided), [or] the frequency or timing of such reporting....⁴⁵

⁴¹ Remedies POD, pp. 130-131, OP 5, p. 166, and Appendix E, p. 11.

⁴² Remedies POD, OP 8, pp. 166-167. Project Mariner is the new name for PG&E's database upgrade, referred to as "Gas Transmission Asset Management Project" or "GTAM," which was denied cost recovery in D.12-12-030, the PSEP Decision.

⁴³ Remedies POD, OP 9, p. 167.

⁴⁴ Remedies POD, pp. 86-88, OP 5, p.166, and Appendix E, p. 1.

⁴⁵ San Bruno Remedies POD Appeal, p. 16.

And

The POD provides no means for public access to PG&E's progress or the findings of the CPSD auditor. San Bruno thus asks that the Commission provide greater public access and transparency to the audit program ...⁴⁶

In sum, San Bruno seeks procedural safeguards to ensure that the audits will be performed in an open and transparent manner that permits participation by interested parties. The Joint Parties share San Bruno's concerns in this regard. The Remedies POD should be clarified to direct CPSD to work with interested parties to develop procedural safeguards to be incorporated into the audits and audit proposals ordered by the final decision.

Among other things, the Remedies POD should be modified to require CPSD to identify how the auditors will report to the public and the Commission, how the Commission will review and/or approve the audits, and how the public will be given access to the audit reports. CPSD should also be directed to propose structural safeguards to ensure the process is transparent, including full availability of all information considered during an audit.

To the extent audit information is confidential, the procedures should provide that the information shall be made available upon the parties' execution of a non-disclosure agreement (NDA), and CPSD should have a standard NDA prepared and ready for such circumstances. Adopted procedures should encourage aggregation or other treatment of confidential information to make it publicly available where possible, and should provide interested parties' comments to be reflected in any final audit reports, including comments regarding the costs of the audit and CPSD's management of audit resources.

These suggestions are not comprehensive – they are minimum requirements necessary to keep the Commission, the parties and the public apprised of PG&E's progress in implementing the remedial measures ordered by the Remedies POD and in the PSEP Decision. Without such disclosure, the Commission, the parties, and the public are left to hope that PG&E is implementing all remedial measures as ordered and with

⁴⁶ San Bruno Remedies POD Appeal, p. 17.

adequate quality assurance and quality control measures. Finally, these modifications provide a mechanism for parties to seek appropriate relief from the Commission should PG&E fail to comply with the decisions issued in the Pipeline Investigations.

To that end, the Remedies POD should clearly state that it expects CPSD to work collaboratively and openly with interested parties to develop additional procedures to facilitate transparency and public participation in the audit processes. Only by ensuring the transparency of its audits will the Commission be able to ensure the integrity of the process and rebuild public trust in its procedures.

2. An Independent Monitor Is Necessary

In its Remedies POD Appeal, San Bruno argues that the Commission should order PG&E shareholders to fund an Independent Monitor.⁴⁷ The Remedies POD commits error by rejecting this request based on an erroneous finding that San Bruno’s proposal is not supported by “substantial evidence in light of the whole record.”⁴⁸ To the contrary, there is ample proof demonstrating that the Commission needs additional technical assistance to achieve effective oversight of PG&E’s gas transmission system.

The Commission should not shy away from this opportunity to improve its oversight of natural gas pipeline safety. An Independent Monitor would not replace or “obviate the need for, a properly resourced, trained, and tasked CPSD.”⁴⁹ To the contrary, an Independent Monitor would complement and improve CPSD’s current efforts by providing additional expertise. This is precisely the scenario envisioned by the Independent Review Panel (IRP). The IRP found that resource constraints had limited the Commission’s ability to evaluate utility activities and develop necessary expertise.⁵⁰

⁴⁷ San Bruno Remedies POD Appeal, pp. 1 and 17.

⁴⁸ Cal. Pub. Util. Code § 1757(a)(4).

⁴⁹ Remedies POD, p. 142.

⁵⁰ Independent Review Panel Report (IRP Report), p. 20. The IRP Report is Ex. CPSD-10 in the San Bruno Investigation, I.12-01-007 and is available at: <http://www.cpuc.ca.gov/NR/rdonlyres/85E17CDA-7CE2-4D2D-93BA-B95D25CF98B2/0/cpucfinalreportrevised62411.pdf>.

Thus, the IRP specifically recommended that the Commission use outside consultants in order to effectively oversee natural gas pipeline safety.⁵¹ In other words, given the score of highly technical remedies set forth in this decision and the PSEP Decision (D.12-12-030), it is reasonable to expect the Commission to rely on outside assistance. In fact, it is the responsible thing to do given the limitations of the Commission’s internal resources. Rather than bristling at the prospect of an Independent Monitor, the Commission should embrace the opportunity to obtain the resources necessary to fulfill its mission.

The Remedies POD finds “shortcomings” in the proposal for an Independent Monitor based on the fact that in the examples cited the investigated entity “consented to be monitored and, moreover, was not subject to the comprehensive regulatory oversight such as this Commission exercises.”⁵² The Commission does indeed have broad oversight responsibilities and, as discussed earlier, it may impose equitable remedies so long as they are “cognate and germane” to the Commission’s existing authority.⁵³ The fact that other entities consented to an Independent Monitor as part of a settlement has no bearing on whether this Commission can or should adopt such a remedy here. The Commission can improve its oversight of PG&E’s gas operations and do a better job of protecting public safety by obtaining the assistance of an Independent Monitor.

An Independent Monitor could help remedy the organizational failures identified by both the National Transportation Safety Board (NTSB) and the IRP. The Remedies POD acknowledges that “the Commission, including CPSD, did not meet all reasonable expectations for its oversight of PG&E’s gas transmission safety.”⁵⁴ It further

⁵¹ IRP Report, p. 20.

⁵² Remedies POD, pp. 142-143.

⁵³ *Consumers Lobby Against Monopolies v. Cal. Pub. Utilities Comm’n*, (1979) 25 Cal. 3d 891, 905-907 (“For example, the commission may issue injunctions in aid of jurisdiction specifically conferred upon it. [Citations omitted] It may direct that a trust fund be created to conserve potential refunds during a stay of an order lowering rates. [Citations omitted] Its power to reform contracts of public utilities to make them conform to the public interest has been recognized. [Citations omitted] And the commission itself has relied on equitable precedent in implementing its authority to issue cease and desist orders. [Citations omitted].”).

⁵⁴ Remedies POD, p. 142.

acknowledges that both the NTSB and the IRP identified resource constraints and organizational deficiencies that have hindered the Commission's oversight of natural gas pipeline safety. Indeed, both ORA and San Bruno marshaled substantial evidence in support of their requests for an Independent Monitor.⁵⁵

Despite these sobering facts, the Remedies POD asserts that "it does not follow from evidence of past shortcomings that CPSD cannot or will not fulfill its mission if provided with adequate resources."⁵⁶ In support of this argument, the Remedies POD asserts that "there is no record evidence that CPSD is stuck in the culture of the past." That is true – only time will tell whether CPSD will be able to provide more effective oversight of gas pipeline safety. But the record in these proceedings – as well as the findings of the NTSB and IRP – compel the conclusion that thus far, CPSD's gas pipeline safety oversight it has been ineffective insofar as PG&E is concerned. Until that changes, a technically competent and independent monitor or auditor is necessary to achieve adequate and credible oversight of PG&E's gas transmission operations.

Moreover, recent events have further highlighted the need for an Independent Monitor. The two Commissioners assigned to oversee these Pipeline Investigations have recused themselves from further action in these proceedings.⁵⁷ These recusals appear to validate San Bruno's public assertions that "historically there has been too close a relationship between the regulator and the regulated utility"⁵⁸ resulting in regulation

⁵⁵ San Bruno F&R Opening Brief, May 6, 2013, pp. 43-49; ORA F&R Opening Brief, May 6, 2013, pp. 36-40.

⁵⁶ Remedies POD, p. 142.

⁵⁷ See Notice of Reassignment, October 16, 2014, advising that "Investigation 12-01-007 is being reassigned from President Michael R. Peevey to Commissioner Michael Picker" available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M108/K542/108542016.PDF>, and Notice of Reassignment, October 16, 2014, advising that (I.) 11-02-016 and I.11-11-009 are being reassigned from Commissioner Michel Peter Florio to Commissioner Michael Picker, available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M119/K054/119054600.PDF>

⁵⁸ San Bruno OII Ex.CSB-1, p. 5, Prepared Direct Testimony of Mayor Jim Ruane on Behalf of the City of San Bruno.

“more ‘convenient’ for the parties than are scientifically or technically based.”⁵⁹ These extraordinary circumstances highlight the need for transparency and accountability by the Commission and the utilities it regulates. An Independent Monitor can help provide that by reporting its findings publicly and maintaining independence from the Commission and PG&E. In order to ensure confidence in the remedial measures ordered in these Pipeline Investigations and in the PSEP Decision, the Commission should consider implementing the Independent Monitor proposal before it.

3. Alternatively, The Commission Should Order The Creation Of A California Pipeline Safety Trust.

In its appeal, San Bruno argues that the Commission should order PG&E shareholders to endow a California Pipeline Safety Trust with \$100 million over 20 years.⁶⁰ The Remedies POD recognizes that “there is no safety/advocacy counterpart to CPSD” and that “we do not dispute that such an organization could provide a unique voice and perspective in Commission proceedings.”⁶¹ In many ways, a California Pipeline Safety Trust would provide many of the same benefits as an Independent Monitor: a safety advocate with guaranteed independence that could complement the efforts of CPSD by acting as a watchdog for utility compliance with safety regulations and decisions. Should the Commission not require PG&E to fund an Independent Monitor, it should require PG&E to endow a California Pipeline Safety Trust because of the additional benefits a California Pipeline Safety Trust will bring to the public and the Commission’s oversight of pipeline safety in California.

As one reason for declining to order PG&E to endow a California Pipeline Safety Trust, the Remedies POD asserts that the California Pipeline Safety Trust could participate in Commission proceedings through the intervenor compensation rules.

⁵⁹ San Bruno OII Ex.CSB-1, p. 5, Prepared Direct Testimony of Mayor Jim Ruane on Behalf of the City of San Bruno.

⁶⁰ San Bruno Remedies POD Appeal, pp. 1 and 17.

⁶¹ Remedies POD, p. 139.

While true, the Joint Parties respectfully suggest that this reasoning takes an overly narrow view of the Commission's responsibilities as a safety regulator. In its oversight of utility service in California, the Commission is not limited to setting rates and investigating non-compliance with safety requirements. As these proceedings have demonstrated, broader public awareness and advocacy of natural gas pipeline issues is necessary. A California Pipeline Safety Trust may help the Commission marshal independent public interest experts in the field to help it meet the considerable challenge of ensuring the safety of PG&E's gas pipeline system.

E. The Potential Tax Benefits Associated With Certain Remedies Are Significant And Should Be Understood, But Do Not Require A Different Magnitude Of Penalty

Commissioner Florio's Request for Review asks whether the potential tax consequences of any penalties should be taken into account, and if so, how.⁶² This issue was fully briefed numerous times in the Fines and Remedies phase of these proceedings, including briefs submitted on August 21, September 20, and October 15, 2013, in response to specific questions raised by the Presiding Officers.

Ultimately, the Remedies POD elected not to take tax benefits that PG&E may receive after payment of the various penalty amounts into account on the basis that "it would be difficult to project the actual tax impact of disallowances and ... a subsequent proceeding would be necessary to ensure that the actual after-tax consequences were obtained" and "[o]ur desire is to provide finality of these proceedings with this decision and our companion decisions on violations."⁶³

The Joint Parties do not necessarily agree with these conclusions in the Remedies POD. Among other things, PG&E agreed with record evidence showing that the tax benefit of costs that it can deduct is 37%.⁶⁴ Therefore, if any portion of the total penalty

⁶² Florio Request for Review, Issue 5.

⁶³ Remedies POD, p. 83.

⁶⁴ See 14 Jt. RT 1390-1392, CPSD/Lobo where, among other things, PG&E added to the record an exhibit (Joint Exhibit 59) showing that PG&E used the 37% tax rate for purposes of calculating its post-tax liability for its 2012 Annual Report. See also ORA F&R Rebuttal Brief, June 7, 2013, pp. 6-8.

package is tax deductible, PG&E will likely retain, at a minimum, 37% of that expenditure, and simple assumptions could be made for purposes of calculating a higher total penalty package that would take the tax benefits into account, yet bring closure to the proceeding.

However, the Joint Parties agree, given the \$1.4 billion package of penalties, that it is appropriate to support the Presiding Officers' desire to bring finality to these proceedings by not taking such tax benefits into account. If the Commission were to reduce the amount of the total penalty package, the Joint Parties urge the Commission to revisit the tax deductibility issue based on the evidence already in the record.

III. PG&E'S POD APPEALS RAISE NO NEW ISSUES AND ITS CLAIMS OF LEGAL AND FACTUAL ERROR LACK MERIT

A. PG&E Has Failed To Carry Its Burden On Appeal

Commission Rule of Practice and Procedure 14.4(c) clearly states that appeals "shall set forth specifically the grounds on which the appellant or requestor believes the presiding officer's decision to be unlawful or erroneous. Vague assertions as to the record or the law, without citation, may be accorded little weight." As discussed more fully below, PG&E claims that the PODs are full of errors, but many of these claims are vague and unsupported.

B. The PODs' Findings Of "Continuing" Offenses Pursuant To § 2107 And § 2108 Are Lawful

PG&E asserts that the PODs' findings of numerous continuing violations going back decades is flawed.⁶⁵ PG&E correctly states that Public Utilities Code § 2108 applies to violations that continue over time, not the continuing consequences of a single violation. PG&E also acknowledges that, if the party continues to engage in the same conduct, a "new violation will be recognized for each day during which that conduct

⁶⁵ PG&E Remedies POD Appeal, pp. 30-33; PG&E Class Location POD Appeal, pp. 5-7; PG&E Recordkeeping POD Appeal, pp. 10-13; PG&E San Bruno POD Appeal, pp. 12-14.

continues.”⁶⁶ PG&E asserts that none of the violations deemed continuing in the PODs meet the § 2108 definition of “continuing.”⁶⁷

The San Bruno POD states that the determination of whether any of the violations are continuing are, “in part, fact-specific matters.”⁶⁸ The proper interpretation and application of § 2108 requires an analysis of the specific conduct – an affirmative act or an omission – that constitutes the violation.⁶⁹ The San Bruno, Class Location, and Recordkeeping PODs carefully considered the conduct at issue to determine whether the violation was continuing as defined by § 2108. They determined the dates each continuing violation began and ended based on the facts in the record and the applicable law.⁷⁰

Unsupported allegations of legal and factual error do not provide grounds for an appeal. For example, in its Class Location POD Appeal, PG&E makes the broad argument that the Class Location POD improperly characterizes one-time events as “continuing” violations but then it fails to provide any factual or legal analysis of any violation to demonstrate error.⁷¹ For instance, the Class Location POD finds that PG&E failed to continuously patrol the pipeline system as required by 49 C.F.R. § 192.613, but PG&E does not provide any explanation of how this violation is just a “one-time event.”⁷² The Class Location POD also finds that PG&E operated pipelines at higher pressures than allowed by 49 C.F.R. § 192.619, but PG&E fails to demonstrate why continuing operation in violation of the law is a single event.⁷³ PG&E simply ignores the laws and facts, thus failing to meet its burden to “set forth specifically the grounds” for

⁶⁶ PG&E Remedies POD Appeal, p. 31.

⁶⁷ PG&E Class Location Appeal, p. 7 fn. 23; PG&E San Bruno Appeal, p. 14 fn. 44; PG&E Recordkeeping Appeal, p. 14 fn. 46; PG&E Remedies POD Appeal, p. 33 fn. 115.

⁶⁸ San Bruno POD, p. 63.

⁶⁹ See, *People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 43-45 (statutory analysis construing nature of action prohibited by Water Code § 13350).

⁷⁰ See, e.g., Class Location POD, pp. 41-44, COL 9, and Appendix B; Recordkeeping POD, pp. 63-66, 249, and Appendix B; San Bruno POD, pp. 62-64, 208-209, and Appendix B.

⁷¹ PG&E Class Location POD Appeal, pp. 5-7.

⁷² Class Location POD, COL 6; PG&E Class Location POD Appeal, pp. 5-7.

⁷³ Class Location POD, COL 7; PG&E Class Location POD Appeal, pp. 5-7.

the claimed error.⁷⁴ In any event, the Class Location POD properly reviewed the applicable rules to determine what action was prohibited or required and analyzed whether the violation continued over time.

PG&E asserts that the Recordkeeping POD erred in its conclusion that the continued absence of a record is a continuing violation, but provides no analysis for a contrary conclusion.⁷⁵ The Recordkeeping POD explained that the violation is not the failure to save a piece of paper, it is the failure to have statutorily required information that can be easily located, accessed, and relied upon to provide vital and accurate information to PG&E about the condition of its gas pipeline system.⁷⁶ Operating a gas pipeline system without legally required information is a continuing violation. If these records cannot be found, PG&E must investigate the condition of the pipeline segment and create a record that provides accurate information (or make conservative assumptions to the extent permitted by the applicable regulations). Recordkeeping is not about pieces of paper abandoned in the back of a warehouse; it is about vital information necessary to the safe operation and maintenance of the gas pipeline system that PG&E is legally required to have and admits it does not have. The Recordkeeping POD correctly concluded that every day that PG&E does not have easily accessible and accurate records is a violation of the law.

PG&E's San Bruno POD Appeal is also deficient. It declares that all of the findings of continuing violations are erroneous, but provides only two examples of violations that it contends are not continuing violations (defective pipe in Segment 180 and failure to conduct hydrostatic pressure tests). PG&E again fails to identify the specific conduct that is required or prohibited by law, analyze the application of the law to the facts, or explain why the San Bruno POD erred.⁷⁷ The San Bruno POD found that the violation was not just the action of installing defective pipe in Segment 180, it was

⁷⁴ Rules of Practice and Procedure, Rule 14.4(c).

⁷⁵ PG&E Recordkeeping POD Appeal, p. 13.

⁷⁶ Recordkeeping POD, p. 64.

⁷⁷ PG&E San Bruno POD Appeal, p. 13.

the creation of an unreasonably unsafe system by the continuing operation of the defective pipe.⁷⁸ Similarly, the San Bruno POD found that the obligation to conduct hydrostatic tests on Segment 180 was “not extinguished with the passage of time,” therefore, the violation was continuing.⁷⁹

PG&E extensively and misleadingly cites to *People ex rel. Younger v. Superior Court* for the proposition that courts disfavor continuing penalties and narrowly construe statutes providing for them.⁸⁰ *Younger* was narrowly focused on the interpretation of Water Code § 13350 which imposes penalties of \$6,000 per day for every day that oil is “deposited” into the waters of the state. Based on a detailed review of the language and legislative history of that statute, the Court concluded that the statute imposes penalties for the act of depositing oil in the water regularly and over a period of time, not for the omission of allowing oil to remain in the water.⁸¹ In contrast, Public Utilities Code § 2108 is not limited to a specific, defined action; it encompasses any violation of applicable laws, rules, and orders and states that each violation is “a separate and distinct offense, and in the case of a continuing violation each day’s continuation thereof shall be a separate and distinct offense.”

PG&E also relies on *Hale v. Morgan* and *Walnut Creek Manor v. Fair Emp’t & Housing Commission* to argue that continuing violations are generally disfavored by the courts.⁸² The Court in *Hale* found, based on the specific facts in that case, that cumulative penalties of \$17,300 imposed under Civil Code § 789.3 were excessive where the case involved a rental of a trailer space for \$65 per month. The Court did not find

⁷⁸ San Bruno POD, p. 93 and COL 22, p. 235.

⁷⁹ San Bruno POD, p. 79, COL 15.

⁸⁰ PG&E Remedies POD Appeal, p. 31; PG&E San Bruno POD Appeal, pp. 12-13; PG&E Recordkeeping Appeal, pp. 12-13; PG&E Class Location Appeal, pp. 31-32; and *Younger*.

⁸¹ *Younger*, 16 Cal.3d at 43-44.

⁸² PG&E Remedies POD Appeal, p. 31; *Hale v. Morgan*, 22 Cal.3d 388, 401 (1978); *Walnut Creek Manor v. Fair Emp’t & Housing Commission*, 54 Cal. 3d 245, 271 (1991). The constitutional holding in *Walnut Creek* was subsequently superseded by statute. See, *Konig v. Fair Employment and Housing Com’n*, 28 Cal.4th 743, 758 (2002) (“we conclude that the judicial option provision of section 12989, as well as subsequent legislation and administrative experience, have remedied constitutional difficulties identified in *Walnut Creek Manor*.”)

that the Civil Code § 789.3 penalty formula of \$100 per day of violation was unconstitutional in every case; however, the Court noted that Civil Code § 789.3 was overly severe because the imposition of penalties was mandatory and not subject to any consideration of the circumstances of the case.⁸³ What PG&E failed to reveal in its appeals is that the Supreme Court in *Hale* expressly contrasted Civil Code § 789.3 to Public Utilities Code § 2107, which it had found to be lawful in a prior case, noting that utilities are able to show “factors in extenuation” in the assessment of penalties.⁸⁴ PG&E also fails to discuss subsequent Supreme Court cases interpreting *Hale*. In *People ex. Rel Lungren v. Superior Court*, the Court stated that the rule of strict construction of penal statutes has “generally been applied in this state to criminal statutes, rather than statutes which prescribe only civil monetary penalties.”⁸⁵ The *Lungren* Court went on to limit the holding in *Hale* stating that *Hale* does not support the proposition that “all statutes with civil monetary penalties should also be strictly construed.”⁸⁶ “*Hale* did not purport to alter the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.”⁸⁷

Decision 98-12-075 explains the important policy behind assessment of daily fines:

The 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. For a "continuing offense," Public Utilities Code § 2108 counts each day as a separate offense.⁸⁸

⁸³ *Hale*, 22 Cal.3d at 404.

⁸⁴ *Hale*, 22 Cal.3d at 401, citing, *People v. Western Air Lines, Inc.*, 41 Cal.2d 621, 627-628 (1954).

⁸⁵ *People ex. Rel Lungren v. Superior Court*, 14 Cal. 4th 294, 313 (1996); see also, *Smith v. Superior Court*, 39 Cal.4th 77, 92 (2006).

⁸⁶ *Lungren*, 14 Cal.4th at 313 (emphasis in original).

⁸⁷ *Lungren*, 14 Cal.4th at 313.

⁸⁸ D.98-12-075, 1998 Cal. PUC LEXIS 1016, * 56.

The Remedies POD appropriately set the fines and penalties at a level that is proportionate to the scope, depth, and breadth of PG&E’s violations and the findings that PG&E “did not take adequate steps to prevent the violations from occurring” and PG&E failed to “take adequate steps to ensure compliance with applicable laws and regulations.”⁸⁹ The fines and penalties are appropriate given that the Remedies POD does “not find that PG&E has acted in good faith to discover, disclose and remedy the violations.”⁹⁰

C. Section 451 Requires Utilities To Provide Safe Service And Is Enforceable As A Stand-Alone Requirement

In each of its four appeals, PG&E raises the legal argument that § 451 of the Public Utilities Code is “a ratemaking provision and cannot serve as a free-floating source of pipeline safety requirements and penalties.”⁹¹ This is the same legal argument that PG&E previously asserted in its Opening Briefs in these Proceedings and which was carefully considered and soundly rejected in the Class Location, Recordkeeping, and San Bruno PODs.⁹² PG&E ignores and/or misrepresents long-standing legal precedent on statutory construction, as well as Commission precedent and case law on § 451 that have repeatedly concluded that § 451 imposes an independent obligation on public utilities to provide just and reasonable service.

1. Section 451 Is Not Exclusively A Ratemaking Provision

PG&E engages in a lengthy dissertation on interpretation of the headings and title of Article 1 of Chapter 3 of the Public Utilities Code to support its argument that because § 451 appears in Article 1, which is titled “Rates”, § 451 is a ratemaking statute and does not impose a safety obligation on utilities. PG&E claims that § 451 allows the Commission to take safety into account when setting rates, but does not authorize the

⁸⁹ Remedies POD, p. 55.

⁹⁰ Remedies POD, p. 58.

⁹¹ PG&E San Bruno POD Appeal, pp. 2-10; PG&E Remedies POD Appeal, pp. 18-25; PG&E Recordkeeping POD Appeal, pp. 2-10; PG&E Class Location POD Appeal, pp. 12-19.

⁹² Recordkeeping POD, pp. 49-63; Class Location POD, pp. 38-41; San Bruno POD, pp. 26-27.

Commission to require utilities to operate safely.⁹³ PG&E argues that the requirement to promote safety is “explicitly tied to a consideration of the rates that the utility may properly charge.”⁹⁴ PG&E’s position fails on multiple grounds.

While PG&E argues that courts give “considerable weight” to headings,⁹⁵ PG&E ignores § 6 of the Public Utilities Code which states, “Division, part, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.” Courts will follow the long-standing principle where the plain language of a statute is clear; courts and agencies cannot engage in statutory interpretation or second guess the ordinary meaning of the words.⁹⁶ The plain language of § 6 invalidates PG&E’s legal argument that the heading of Article 1 trumps the actual words of § 451.

The “scope, meaning, [and] intent” of Section 451 is clear and codifies the critical principle of public utility regulation that all aspects of public utility operations must be just and reasonable. As PG&E points out, the section is “specifically titled, ‘Just and reasonable charges, service, and rules.’”⁹⁷ The word “and” is a “logical operator that requires both of two inputs to be present or two conditions to be met for an output to be made or a statement to be executed.”⁹⁸ Section 451 identifies three separate and independent components of the just and reasonable requirement. The first paragraph addresses charges:

⁹³ PG&E San Bruno POD Appeal, pp. 3-4; PG&E Remedies POD Appeal, pp. 18-20; PG&E Recordkeeping POD Appeal, pp. 2-4; PG&E Class Location POD Appeal, pp. 12-14.

⁹⁴ PG&E San Bruno POD Appeal, p.3; PG&E Remedies POD Appeal, p. 19; PG&E Recordkeeping POD Appeal, p. 3; PG&E Class Location POD Appeal, p. 13.

⁹⁵ PG&E San Bruno POD Appeal, p.3, fn. 3; PG&E Remedies POD Appeal, p. 19, fn. 55-56; PG&E Recordkeeping POD Appeal, p. 3 fn. 6-7.; PG&E Class Location POD Appeal, p. 13, fn. 42-43.

⁹⁶ *West Covina Hospital v. Superior Court*, 41 Cal.3d 846, 850 (1986) (“We give effect to statutes according to the usual, ordinary import of the language employed in framing them. When statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it.” Citing to *People v. Belleci* (1979) 24 Cal.3d 879, 884; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658; *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198.).

⁹⁷ PG&E San Bruno POD Appeal, p.3; PG&E Remedies POD Appeal, p. 18; PG&E Recordkeeping POD Appeal, p. 3; PG&E Class Location Appeal, p.13.

⁹⁸ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/and>.

All charges demanded or received by any public utility . . . for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

The second paragraph of § 451 requires utilities to provide “just and reasonable” services and facilities and defines “just and reasonable” as the obligation to protect the safety, health, comfort, and convenience of the public:

Every public utility shall furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities . . . as are necessary to promote the safety, health, comfort and convenience of its patrons, employees and the public.

The third paragraph addresses rules:

All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

There are no words in the first, second or third paragraphs or the heading of § 451 that support PG&E’s assertion that the safety requirement is “explicitly” tied to the consideration of rates.⁹⁹ If the Legislature had intended to make public safety one component in a balancing test to determine whether rates set by the Commission are just and reasonable, it could have done so explicitly. Instead, the statutory language clearly imposes an affirmative obligation for safety that is not tied to rates: “[e]very public utility shall furnish and maintain such adequate, efficient, just and reasonable service . . . as are necessary to promote the safety, health, comfort, and convenience of . . . the public.” (emphasis added.) Section 14 of the Public Utilities Code states: “‘Shall’ is mandatory and ‘may’ is permissive.” The plain language is clear and PG&E’s attempt to use one-word article headings to rewrite Section 451 is barred by Section 6 and legal precedent.¹⁰⁰

⁹⁹ PG&E San Bruno POD Appeal, p.3; PG&E Remedies POD Appeal, p. 19; PG&E Recordkeeping POD Appeal, p. 3; PG&E Class Location POD Appeal, p. 13.

¹⁰⁰ If the Commission were to accept PG&E’s interpretation, it would lead to absurd results. Article 1 covers a broad range of utility responsibilities that are not primarily ratemaking issues: § 453 prohibits discrimination in provision of services and facilities; § 454.5 requires electric utilities to submit procurement plans with a loading order of preferred resources to the Commission for approval; § 454.7 requires the Commission to give co-generation projects the highest priority for the purchase of natural gas; § 465 requires utilities to pay prevailing wages for out-sourced janitorial services. There is no doubt that the utilities must comply with these provisions and Commission has the authority to enforce them even though they are not directly related to ratemaking.

The safety obligation in § 451 does not conflict with the Commission’s authority to adopt specific safety measures pursuant to § 768. Section 451 requires PG&E to provide just and reasonable service and a component of that obligation is the promotion of public safety. In contrast, § 768 is directed at the Commission, not the utilities, and is a nonsubstantive statute regarding rulemaking. It authorizes, but does not require, the Commission to adopt safety regulations. If the Commission had never adopted the natural gas system safety regulations in General Order 112, or adopted narrow regulations that only covered a small subset of natural gas operations, § 451 would still require utilities to operate their entire gas system safely. In fact, in 1960 when the Commission adopted General Order 112, it stated explicitly that, notwithstanding the specific safety regulations, the gas utilities were still liable for their “primary obligation and responsibility ... to provide safe service and facilities in their gas operations.”¹⁰¹ There is no conflict between these statutes.

2. Section 451 Can Be Interpreted To Impose A Stand-Alone Safety Obligation

Astonishingly, PG&E simply dismisses legal precedent on § 451 as irrelevant when it claims that prior Commission decisions and case law do not address the specific issue of whether § 451 imposes a safety obligation.¹⁰² PG&E is forced to argue that the Commission decision in *Carey v. PG&E (Carey)*¹⁰³ is not precedent for these proceedings because it did not “specifically” address the issue of whether § 451 imposes a stand-alone safety obligation. PG&E also asserts that the appellate court decision in the *Pacific Bell Wireless, LLC v. Public Utilities Commission (Cingular)*¹⁰⁴ case does not apply because it involved a Commission enforcement action for violations of § 451 for

¹⁰¹ D. 61269, p. 12, Finding and Conclusion Number 8.

¹⁰² PG&E San Bruno POD Appeal, pp.7-8; PG&E Remedies POD Appeal, pp. 22-23; PG&E Recordkeeping POD Appeal, pp. 6-7.

¹⁰³ *Carey v. Pacific Gas & Elec.*, D.99-04-029, 85 CPUC2d 682 (1999) (*Carey Rehearing Order*).

¹⁰⁴ *Pacific Bell Wireless, LLC v. Public Utilities Commission* (2006) 140 Cal. App. 4th 718, 741-742 (*Cingular*).

unjust and unreasonable services and charges. However, both of these cases are clearly and directly on point.

The Commission issued the original *Carey* decision in 1998 in response to a 1996 natural gas explosion caused by an improper gas shut-off. PG&E failed to change its procedures for allowing fumigators to conduct gas shut-offs despite a 1994 house fire also caused by an improper gas shut-off. The *Order Instituting Investigation* in that proceeding stated”

Section 451 requires a public utility to maintain its equipment and facilities in a safe and reliable manner. We hereby place PG&E on notice and provide an opportunity for PG&E to be heard on the issue of whether it violated section 451, and whether penalties should be imposed.¹⁰⁵

The Commission determined that PG&E had a non-delegable duty “under PU Code § 451 to provide safe gas service” and PG&E’s failure to investigate compliance with an agreement allowing fumigation companies to conduct gas shutoffs and to require amendments to the agreement to require training for the fumigators was unreasonable and a violation of the § 451 safety mandate.¹⁰⁶ The Commission fined PG&E \$800 per day for 1,221 days of safety violations under § 451 for continuing its unsafe operations for three years after the 1994 explosion.¹⁰⁷ *Carey* is clearly relevant to the issue of whether PG&E has an enforceable safety obligation under § 451, and it is difficult to imagine how much more “specifically” the Commission could have described PG&E’s obligations under § 451 in order to satisfy PG&E’s criteria for applicable precedent.

PG&E also argues that *Cingular* does not support the position that public utilities have independent and enforceable obligations under § 451 because that case did not involve safety.¹⁰⁸ That case involved imposition of an early transaction fee for cell phone service without a grace period and failure to make certain disclosures. The Court held

¹⁰⁵ Order Instituting Investigation, Notice Of Opportunity For Hearing, And Order To Show Cause Why The Commission Should Not Impose Appropriate Fines And Sanctions, I.05-03-011, p. 10.

¹⁰⁶ *Carey*, D.98-12-076, 84 CPUC 2d 196 (1998); *Carey v. Pacific Gas & Elec.*, D.99-04-029, 85 CPUC 2d 682, COL 4 (1999) (*Carey Rehearing Order*).

¹⁰⁷ *Carey*, D.98-12-076, 84 CPUC2d 196, 198 (1998).

¹⁰⁸ PG&E San Bruno POD Appeal, pp.7-8; PG&E Remedies POD Appeal, pp. 22-23; PG&E Recordkeeping POD Appeal, pp. 6-7.

that § 451 imposes a stand-alone obligation to provide just and reasonable service, even though the Commission had no legal authority to set Cingular's rates.¹⁰⁹ The Court found that Cingular could be held liable under § 451 for its failure to provide adequate, efficient, just, and reasonable service to its customers even in the absence of a specific statute, rule, or order expressly prohibiting the practices at issue.¹¹⁰ *Cingular's* holding that utilities have an enforceable obligation under § 451 to provide just and reasonable service is directly applicable to this case because § 451 unequivocally states that safety is a component of "just and reasonable service."

3. Section 451 Can Be Read To Incorporate Separate Industry Standards And Regulations

PG&E protests that § 451 cannot be read to incorporate extrinsic safety standards,¹¹¹ thus attempting to strip the statute of all possible meaning and purpose.¹¹² PG&E argues that, because § 451 does not contain a specific reference allowing the Commission to rely on industry standards, the Commission cannot rely on industry standards to determine whether PG&E acted reasonably to protect public safety. PG&E interprets § 451 to authorize the Commission to determine only whether a utility's "service, instrumentalities, equipment, and facilities" are safe or unsafe, without regard to the "nature and number" of independent violations of safety standards that could be relevant to that assessment.¹¹³

This position is without merit. Public Utilities Code § 701 vests the Commission with broad authority to "supervise and regulate every public utility in the State" and to do all things necessary and convenient in the exercise of its jurisdiction. The Commission's authority has been liberally construed and "includes not only administrative but also

¹⁰⁹ *Cingular*, 140 Cal.App.4th at 744.

¹¹⁰ *Cingular*, 140 Cal.App.4th at 740.

¹¹¹ PG&E San Bruno POD Appeal, pp.8-10; PG&E Remedies POD Appeal, pp. 24-25; PG&E Recordkeeping POD Appeal, pp. 8-10. PG&E Class Location POD Appeal, pp. 17-18.

¹¹² As PG&E points out, "courts must strive to give meaning to every word in a statute and to avoid construction that render words, phrases, or clauses superfluous." PG&E Recordkeeping POD Appeal p. 5, fn. 12, quoting, *Klein v. United States* (2010) 50 Cal.4th 68, 80.

¹¹³ PG&E San Bruno POD Appeal, p.8; PG&E Remedies POD Appeal, p. 24; PG&E Recordkeeping POD Appeal, p. 8; PG&E Class Location POD Appeal, p. 17.

legislative and judicial powers.”¹¹⁴ The Commission’s interpretation of its governing statutes is given presumptive value by the courts and the interpretation “should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.”¹¹⁵ As the California Supreme Court explained:

[T]he commission has broad authority to determine whether the service or equipment of any public utility poses any danger to the health or safety of the public, and if so, to prescribe corrective measures and order them into effect. Every public utility is required to furnish and maintain such “service, instrumentalities, equipment, and facilities . . . as are necessary to promote the safety, health, and comfort, and convenience of its patrons, employees, and the public. (§ 451, italics added.) The Legislature has vested the commission with both general and specific powers to ensure that public utilities comply with that mandate.

As noted above, the Legislature has declared that the commission “may do all things” necessary and convenient to supervising and regulating public utilities in this state. (§ 701.) In particular, the commission has comprehensive jurisdiction over questions of public health and safety arising from public utility operations.¹¹⁶

The PODs properly determined that, prior to 1960, the applicable standard to determine whether PG&E’s actions with regard to gas pipeline safety were reasonable were the contemporaneous industry standards.¹¹⁷ These standards were known to PG&E at the time and PG&E agreed to comply with them.¹¹⁸ This interpretation of the “just and reasonable” service requirement in § 451 is well within the Commission’s “broad

¹¹⁴ *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 915 (citations omitted); *see also, Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 271 (even though the Legislature had vested primary responsibility for administration of safe drinking water laws in the Department of Health Services, the Commission had the authority to enforce water quality standards adopted by state and federal agencies under its “constitutional and statutory authority and responsibilities to ensure that the regulated water utilities provide service (e.g. water) that protects the public health and safety. (§§ 701, 451, 768.)”).

¹¹⁵ *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 11 and *PG&E Corp. v. Public Utilities Commission* (2004) 118 Cal.App.4th 1174, 1194.

¹¹⁶ *San Diego Gas & Electric Co.*, 13 Cal.4th at 923-924.

¹¹⁷ Recordkeeping POD, COL 15; San Bruno POD, pp. 34-35, COLs 4 and 5.

¹¹⁸ Recordkeeping POD, p. 28 (citing to Ex. PG&E-4 at 4 and observing that PG&E notes that some of its former employees were members of the ASME B31.1.8 subcommittee). *See also*, Findings of Fact (FOF) 12 and 46, pp. 252 and 255 (PG&E voluntarily complied with the 1955 ASME B.31.1.8 standards for gas transmission operators.).

authority to determine whether the service or equipment of any public utility poses any danger to the health or safety of the public.”¹¹⁹

4. Enforcement Of § 451 Does Not Violate Due Process/Fair Notice Principles

PG&E argues that § 451 violates its due process rights because the statute is a content-less, unlimited license to second guess utility decisions after the fact.¹²⁰ The Court in *Cingular* dismissed Cingular’s claims that its due process rights were violated because it had no notice that its practices were unjust and unreasonable.¹²¹ The Court cited to numerous Commission decisions dating back to 1977 finding violations of the just and reasonable service obligation under § 451 and concluded that Cingular could reasonably understand that its practices violated the statute even though no specific law, rule or regulation prohibited the conduct at issue. The Court also analogized the requirements of § 451 to fraud cases under the Civil Code prohibiting deceitful conduct and misrepresentations, stating that there is no due process violation where “reasonable persons would know that their conduct is at risk.”¹²² As the Commission stated in *Carey*:

It would be virtually impossible to draft Section 451 to specifically set forth every conceivable service, instrumentality and facility which might be defined as ‘reasonable’ and necessary to promote the public safety. That the terms are incapable of precise definition given the variety of circumstances likewise does not make Section 451 void for vagueness, either on its face or in application to the instant case. The terms ‘reasonable service, instrumentalities, equipment and facilities’ are not without a definition, standard or common understanding among utilities.¹²³

¹¹⁹ *San Diego Gas & Electric*, 13 Cal.4th at 923.

¹²⁰ PG&E’s argument that § 451 requires “gold-plating” of safety and/or an “absolute” duty of safety is irrelevant to the PODs and does not constitute grounds for appeal. (PG&E San Bruno POD Appeal, p.5; PG&E Remedies POD Appeal, p. 20; PG&E Recordkeeping POD Appeal, pp. 4-5; PG&E Class Location POD Appeal, pp. 14-15.) PG&E does not challenge any of the remedies proposed in the Remedies POD or any other gas pipeline safety order issued by the Commission, such as the Pipeline Safety Implementation Plan (Decision 12-12-030), as “gold-plating” or requiring safety above all other considerations. PG&E does not assert a facial challenge to the federal safety regulations on the grounds of “gold-plating”. The only legal error demonstrated by this argument is in PG&E’s articulation and interpretation of the law.

¹²¹ *Cingular*, 140 Cal.App.4th at 739-744

¹²² *Cingular*, 140 Cal.App.4th, 742-744, citing *Maynard v. Cartwright* (1988) 486 U.S. 356, 361.

¹²³ *Carey*, 85 Cal.P.U.C.2d, p. 689.

To paraphrase the U.S. Supreme Court, the question is whether § 451 provides a public utility of “ordinary intelligence fair notice of what is prohibited,” and whether a reasonable public utility “would have known that its conduct was at risk.”¹²⁴ It is difficult to argue that in 1956, when PG&E put into operation a pipeline with defects that were obvious to the naked eye, a utility of ordinary competence could not have understand that its actions were unreasonable. It is also difficult to argue that a utility could not have understood that the failure to maintain any records of the physical condition of hundreds of miles of highly pressurized, highly flammable gas pipelines was an unreasonable practice. Presumably, PG&E would not argue that it does not have, and never had, an obligation to provide just and reasonable service or that “just and reasonable” has no, and has never had, a common usage or understanding in the industry that incorporates public safety. Section 451 is the only statute in the Public Utilities Code that imposes what is arguably the most basic and long-standing requirement of public utility service: that rates, services, and charges be just and reasonable and safe. To argue that § 451 does not create any enforceable obligations for public utilities is to ignore the entire framework and logic of public utility regulation.

The central theme of PG&E’s entire § 451 argument is that the Commission’s authority to interpret statutes, require safe utility operations, and to enforce safety requirements is severely limited and the statute must be given the most restrictive interpretation possible. This argument is contrary to the Constitution, statute, and case law, and must be rejected. The California Supreme Court has stated, “[T]he commission has broad authority to determine whether the service or equipment of any public utility poses any danger to the health or safety of the public, and if so, to prescribe corrective measures and order them into effect. . . . The Legislature has vested the commission with both general and specific powers to ensure that public utilities comply with that

¹²⁴ *F.C.C. v. Fox Television* (2012) 132 S.Ct. 2307, 2317; *Maynard v. Cartwright* (1988) 486 U.S. 356, 361.

mandate.”¹²⁵ In addition, civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.”¹²⁶

D. PG&E’s Alleged “Unrecovered Costs” Are Speculative, PG&E Failed to Provide Valid Data in its Case in Chief, and Its Request for Credit for All Past Cost Overruns for PSEP and GT&S Spending Would Both Violate the One-Way Balancing Account Treatment of the PSEP and Normal Ratemaking Treatment of GT&S

PG&E alleges that the Remedies POD fails to take into account approximately \$1.5 billion of “other unrecoverable gas safety-related PSEP and Gas Accord V costs that PG&E’s shareholders have incurred or will incur.” PG&E further asserts that unless the Commission recognizes these “voluntary expenditures,” it will have reduced motivation to fix its safety problems voluntarily in the future. As explained in CPSD’s Motion to Strike this portion of PG&E’s Appeal, this figure is based on assertions that the Presiding Officers ordered stricken and redacted from PG&E’s opening brief on this issue because they are untested assertions that – for good reasons – are not part of the record. The argument is based on unreliable evidence cited in violation of a previous order in these proceedings, and should be given little weight.

Contrary to PG&E’s assertions, the alleged \$1.5 billion in “unrecoverable” expenditures are indeed speculative. There is no valid evidence in the record that these costs were “unrecoverable” rather than covered by the authorized revenue requirement by reductions in spending in other areas, or that these expenditures were necessary, reasonable, prudently incurred, and not the result of inefficiencies or poor decision-making.

It would be wrong for the Commission to give PG&E advantageous treatment by granting PG&E “credit” for these unsubstantiated cost overruns. First, under normal ratemaking principles, PG&E shareholders should remain at risk for cost overruns. Second, Decision 12-12-030 ordered PG&E to track its costs in a one-way balancing

¹²⁵ *San Diego Gas & Electric Co.*, 13 Cal.4th at 923-924.

¹²⁶ *Lungren*, 14 Cal. 4th 294, 313 (1996).

account. PG&E's request asks the Commission to contravene its own order by granting PG&E the equivalent of a two-way balancing account. There is absolutely no basis for giving PG&E additional credit for these "cost overruns" resulting from work necessary to respond to the San Bruno explosion and the long overdue remedial work required by the Commission and the NTSB to ensure public safety.

1. PG&E's Argument Concerning Additional "Unrecovered Costs" Relies on Evidence that Was Excluded from the Record

PG&E's argument is largely based on evidence excluded from the record or evidence that should be given very little weight. As explained in detail in the October 15, 2014 CPSD Motion to Strike, the alleged cost numbers presented in PG&E's appeal are the same numbers that were ordered stricken and redacted from PG&E's Opening Brief on Fines and Remedies. On June 3, 2013, the Presiding Officers in these investigations granted CPSD's previous motion to strike, finding that "the Commission must base its decisions on evidence in the record, and briefs that refer to extra record evidence are not to be filed." PG&E was required to re-file its Coordinated Remedies Opening Brief excluding all reference to any specific dollar figures for "unrecovered or unrecoverable costs."

Subsequently, on July 18, 2013, PG&E moved to reopen the record to provide additional evidence intended to quantify these past and future "unrecovered and unrecoverable costs." PG&E specifically sought to provide new evidence concerning:

- Information relating to PG&E's actual and forecast spending over and above the PSEP authorized amounts. ... PG&E's evidence will demonstrate that its actual PSEP costs in fact have been higher than the costs authorized by D.12-12-030; and
- Information regarding other unrecovered and unrecoverable costs PG&E's shareholders have incurred or will incur. ¹²⁷

The Presiding Officers denied PG&E's motion, finding that "there is no need for additional evidence."¹²⁸ Most recently, the Remedies POD yet again rejected PG&E's

¹²⁷ PG&E Motion to Reopen Record, filed July 18, 2013, pp. 5-6.

assertion of unrecovered costs.¹²⁹ The Commission should therefore disregard PG&E's citations to extra record evidence and find that there is a dearth of substantiated record evidence to support PG&E's figures and give little weight to PG&E's arguments regarding its "unrecovered costs."

2. The Evidence in the Record Does Not Support PG&E's Arguments of Additional Unrecovered or Unrecoverable Costs

PG&E claims total "unrecovered costs" of about \$2.2 billion. This amount is comprised of four categories of expense and capital costs: actual PSEP expense overruns in 2011-2012; forecast PSEP expense overruns in 2013-2014; PSEP capital cost overruns in 2011-2014; and cost overruns for work funded in the Gas Transmission and Storage (GT&S) rate case. These costs are speculative, both because the evidence does not support the actual amounts claimed by PG&E, and also because PG&E failed to show that these costs were not covered in rates by underspending in other areas of its business. Thus, none of these alleged costs qualify as valid "unrecovered costs" that should be deducted from the total financial penalty.

The lack of any valid record evidence results from PG&E's decision not to address the issue of "unrecovered" costs in its case-in-chief. Overland witnesses explained that any credit for past expenses should only result from Commission disallowances or spending that was actually not covered by rates. Yet, PG&E failed to address this argument, and now seeks to amend its showing. The Commission should not countenance this attempt to evade the evidentiary rulings in this proceeding. PG&E's attempt to weave a \$2 billion tale out of extremely general cost forecasts does little to refute the findings in the POD that the evidence of additional unrecovered costs is "speculative" and cannot be relied upon to support reducing PG&E's penalty.

¹²⁸ Administrative Law Judges' Ruling Addressing July 18, 2013 Motion Of Pacific Gas And Electric Company, issued August 1, 2013, p. 4.

¹²⁹ Remedies POD, COL 27, p. 162 (unrecovered costs "should not be given any weight").

a) PSEP Expenses for 2011-2012

PG&E claims “unrecoverable PSEP expenses of approximately \$600 million through 2012.” As TURN explained in detail in its Opening Brief on Fines and Remedies, the \$600 million figure double counts cost disallowances already credited to PG&E.¹³⁰ The \$635 million disallowance credited to PG&E in the Remedies POD already includes a large portion (in the hundreds of millions) of PSEP expenses for 2011-2012. Thus, these figures grossly overstate any actual overspending of PSEP expenses in 2011-2012.

b) PSEP Expenses for 2013-2014

Even more troubling, PG&E asks the Commission to credit its shareholders for unsubstantiated estimates of future cost overruns for PSEP spending against the financial consequences ordered by the Commission in these cases. PG&E “forecast[s] additional unrecoverable expenses of approximately \$300 million in 2013 and 2014.”

The Commission should give very little weight to these estimates. First, these are PG&E’s best guesses as to future costs overruns. Second, the evidence in support simply alleges that PG&E expects to incur \$150 million in “unrecovered PSEP Expense” for 2013, and claims that similar cost overruns will occur in 2014. There is absolutely no explanation of the basis for this number. As discussed at length in TURN’s Reply Brief on Fines and Remedies,¹³¹ The Commission cannot rely on this figure, and the supporting exhibit lacks any evidentiary support.

c) PSEP Capital

PG&E alleges that it also will not be able to recover \$353 million in PSEP capital expenditures. Once again, this number reflects speculative future cost overruns based on PG&E’s forecast of capital costs for 2010-2014 above authorized PSEP capital expenditures. This is not a sufficient basis for offsetting the financial penalties ordered in this decision.

¹³⁰ See, TURN F&R Opening Brief, May 6, 2013, Section IV.C.4, pp. 45-46.

¹³¹ TURN F&R Reply Brief, June 7, 2013, p. 38-40.

d) GT&S Expenses

Perhaps the most egregious example of speculative costs that should not be considered by the Commission is the alleged \$1 billion dollars in unrecovered costs for activities authorized in the Gas Transmission and Storage [Gas Accord V] rate case decision. PG&E describes these costs as including “integrity management costs above the adopted amounts, pipeline and station maintenance work, emergency preparedness work, work to address CPSD’s and the NTSB’s operational recommendations, and right-of-way expenses for PG&E’s ‘centerline’ survey project.” In a footnote, PG&E claims these costs were supported in Ms. Yura’s appendix and in Exhibits Joint-57 and Joint-58.

The claimed GT&S cost overruns are similarly speculative and do not represent any disallowance imposed by the Commission. There is no basis for finding that these costs, especially for such activities as “integrity management” and the “centerline survey,” represent anything other than normal cost overruns or that these costs, such as those for integrity management, were related to the Line 132 explosion. But even if these costs overruns were caused by work PG&E had to undertake as a result of the explosion of Line 132, PG&E failed to provide evidence on the record that some or all of these costs were not recovered in rates by reductions in spending in other areas.

3. The Commission Should Reject PG&E’s Attempt to Gain Preferential Ratemaking Treatment And to Evade the One-Way Balancing Account Adopted in Decision 12-12-030

Even if the Commission found that PG&E’s numbers had evidentiary support, PG&E would not be permitted to recover these cost overruns under traditional ratemaking principles. Under typical ratemaking, authorized cost recovery is based on forecast costs, and actual costs will almost certainly exceed or be less than forecast costs. As discussed in detail in TURN’s Reply Brief, under standard ratemaking the utility has full discretion to shift costs from other spending to cover cost overruns in one area, and shareholders ultimately bear the risk of actual costs exceeding forecasts or gain the benefit of actual costs being below forecasts. Thus, these alleged “cost overruns” for

PSEP expenses, capital and GT&S should be treated just like any other cost overrun between utility rate cases.

Regarding GT&S expenses, PG&E is asking the Commission to provide it with greater assurance of cost recovery for GT&S expenses than PG&E gets in a normal rate case application. Even if shareholders had to cover some of these costs, PG&E should not be made better off than under normal ratemaking by obtaining the equivalent of two-way balancing account treatment for gas transmission expenses through a “credit” against a penalty imposed in this proceeding.

Even more egregious is the fact that by asking for a “credit” of PSEP cost overruns against the proposed penalty here, PG&E is in effect seeking to evade the ratemaking adopted by the Commission in the Rulemaking 11-02-019. In that proceeding the Commission explicitly rejected PG&E’s request for a memorandum account to cover 2011-2012 PSEP costs. In other words, the Commission rejected PG&E’s request to allow recovery of any cost overruns in 2011-2012, the same request that PG&E is making here. The Commission subsequently ordered that PSEP costs be included in a one-way balancing account, so that PG&E could not to shift under-spending to other areas of business, or recover any overspending by raising its rates. Moreover, the Commission required that PG&E complete the entire scope of work within the approved forecast costs, or else reduce the authorized budgets if it removes projects from the work scope. By now seeking credit for any such cost “overruns,” PG&E is asking for ratemaking treatment that would undermine the purpose of the one-way balancing adopted in the PSEP decision.

4. Public Policy Considerations Do Not Warrant Reducing PG&E’s Penalty Due to Alleged Additional Cost Overruns

PG&E argues that not counting the “unrecovered gas safety-related costs” would be poor public policy because it would “create a disincentive for other utilities to incur costs voluntarily before penalty determinations” are made by the Commission, and that

counting these alleged “unrecovered costs” creates the proper incentive for PG&E to address problems proactively “before being ordered to do so.”

PG&E’s argument has superficial appeal, since presumably all parties would want the utility to address immediate safety problems before the completion of an investigation proceeding. However, PG&E has a duty to respond to an emergency situation so as to maintain safe service, even if such duty includes spending above authorized amounts. Indeed, this Commission already rejected PG&E’s request for a memorandum account to cover additional costs. Moreover, while this Commission explicitly provides assurances of cost recovery for utility response to a natural disaster, there is no equivalent public policy rationale for providing cost recovery for response to a disaster that was caused by the utility. Indeed, providing such cost recovery would undermine the deterrence effect of a penalty by making the utility better off than under normal ratemaking.

a) PG&E Has a Duty to Maintain Safety, Even If It Must Spend in Excess of Authorized Amounts

PG&E’s public policy argument must be balanced against other equally important policy considerations. Not the least is the fact that, as a regulated gas utility, PG&E has the duty and obligation to fix problems and do all the work that is necessary to provide safe and reliable service. In the aftermath of the San Bruno explosion, PG&E undertook a number of measures, including aerial surveys of its gas transmission system and a massive search for pipeline records. While PG&E portrays these measures as voluntary, some or all of them were undertaken in response to specific recommendations from the National Transportation Safety Board and the orders of this Commission directing PG&E to diligently search for all relevant pipeline records.

Though PG&E failed to provide credible evidence, PG&E’s own argument is that most of these unrecovered costs were due to spending for various safety-related measures above amounts authorized either in the PSEP or the Gas Accord V rate case. This spending was necessary to ensure safety in the wake of the massive deficiencies in

record keeping and integrity management evident after the San Bruno explosion. PG&E's claim that it should be compensated for all such spending in excess of authorized amounts ignores its obligation as a regulated public utility. Just two months ago in PG&E's 2014 General Rate Case decision, the Commission reminded PG&E that:

. . . the utility has the obligation to maintain its operations and plant in the condition to provide efficient, safe and reliable service, even if that condition requires more expenditures than the Commission had authorized.

In that same decision, the Commission further stated:

PG&E is responsible for providing safe and reliable customer service whether or not its overall spending matches funding levels authorized or imputed in rates. PG&E bears the risk that, as a result of spending obligations, the earned rate of return may be less than the authorized return. While PG&E has finite funds to meet capital and operational needs, PG&E is not restricted to spending only up to the forecast adopted in a GRC.

Indeed, the utility not only has the obligation to spend whatever is necessary to maintain safe and reliable service, even if such spending exceeds authorized amounts, the prohibition against retroactive-ratemaking prohibits rate increases to recover past costs absent the grant of a memorandum account. In this case, the Commission explicitly rejected PG&E's request for a memorandum account to track these very costs, and at the same time reminded the utility that "PG&E is bound by this statute [P.U. Code 451] to keep its gas system safe regardless of our decision on the proposed memorandum account." PG&E's request to obtain "credit" for all past cost overruns is a blatant attempt to evade the fact that the Commission denied its prior request for a memorandum account.

b) The Line 132 Explosion Was Not a Natural Disaster

Both this Commission and state law have long promoted the recovery of costs necessary to respond immediately to a natural disaster, through the operation of the Catastrophic Event Memorandum Account (CEMA). PG&E's public policy argument that a utility should respond quickly without the worry of cost recovery is indeed the

rationale for the CEMA. However, the explosion of pipeline 132 was not a natural disaster. The NTSB and this Commission have found that deficiencies and errors in PG&E's pipe installation, records management and integrity management created problems that resulted in the explosion. The logic of the CEMA account does not apply in this situation.

While it is important to promote immediate response by the utility, it is equally important as a matter of fairness and deterrence to ensure that the utility does not get a financial benefit by recovering all response costs, when such costs would not be recoverable under normal circumstances, and when those costs are the utility's own fault. Moreover, as explained above, if PG&E had provided evidence on the record of genuine "unrecovered" costs that were not covered in rates, parties could have addressed these claims when litigating the analysis made by CPSD and Overland Consulting. PG&E cannot now claim a public policy necessity to recover such costs when it chose not to provide valid evidence concerning those costs in this proceeding.

E. PG&E's Arguments That Rule 1.1 Requires A Showing Of Intent Are Without Merit

Several violations in the Remedies POD are based on PG&E's violation of Commission Rule of Practice and Procedure 1.1, which provides:

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 to comply with the laws of the State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law. (Emphases added).

PG&E argues that the Remedies POD Appeal commits legal error by failing to find that PG&E intended to mislead the Commission; PG&E argues that intent is a necessary element of any violation of Rule 1.1.¹³² PG&E does not cite to any Commission decision in

¹³² PG&E Remedies POD Appeal, pp. 25-26.

support its argument, nor does it acknowledge the Commission decisions that reject this argument.¹³³

Instead, PG&E baldly states with no legal support that: “Rule 1.1 can only be read as incorporating an intent element.”¹³⁴ PG&E then analogizes Rule 1.1 to penal statutes that require an element of intent or “*mens rea*.”

PG&E made nearly identical arguments when it challenged the \$14.35 million fine imposed against it for failure to disclose to the Commission material information requiring the operating pressure of Line 147 to be lowered. In wholly rejecting PG&E’s argument on rehearing, Decision 14-05-034 explains:

PG&E reads “mislead,” “artifice,” and “false” as incorporating an element of intent in the Rule 1. As a result, it argues there can be a violation only if there was a purposeful intent to mislead or deceive. PG&E states that interpretation is consistent with numerous Court decisions that require *mens rea*, i.e., the “requisite state of mind” in order to impose sanctions. ...

We disagree. Commission Rules are generally interpreted using the same principles of construction that apply to statutes or tariffs. Their meaning is derived by first looking to the language of the Rule, and giving words their ordinary or “plain meaning.” If the plain words are clear and unambiguous, that is where the inquiry ends.

Nowhere does the plain language of Rule 1 refer to *mens rea*, state of mind, or purposeful intent. Had the Commission meant to include such a requirement, it could easily and clearly have done so. It need only have said that a party should “never knowingly mislead,” or “never intentionally mislead,” or even “never purposely

¹³³ In D.01-08-019, *mimeo*, p. 9, also known as *Sprint PCS*, the Commission explained that intent to deceive is not required to prove a Rule 1.1 violation, but goes to the weight of the penalty:

In any event, the question of intent to deceive merely goes to the question of how much weight to assign to any penalty that may be assessed. The lack of direct intent to deceive does not necessarily, however, avoid a Rule 1 violation. We address this question further in the section below dealing with the size of the penalty to be assessed.

See, also, D.14-05-035, and the Commission decisions cited to in that decision.

¹³⁴ PG&E Remedies POD Appeal, p. 26.

mislead.” But it did not. The plain language of the Rule does not require intent, and thus, fails to support PG&E’s interpretation.¹³⁵

Decision 14-05-035 also rejected PG&E’s argument in that case that Commission decisions have recognized that Rule 1 requires a purposeful intent to mislead, explaining:

We are aware that in some cases the Commission has focused on factors such as intent, recklessness, and/or gross negligence. However, we have never held that a purposeful intent is a prerequisite to impose Rule 1 sanctions. In fact, we have rejected such arguments, finding instead that violations may be found based on a utility’s lack of candor, withholding of information, and failure to correctly inform and correct mistaken information.¹³⁶

While PG&E has sought appellate review of D.14-05-035, this does not change the fact that that decision is wholly consistent with many other final Commission decisions rejecting similar arguments, such as *Sprint PCS*, and that the Commission has repeatedly found that intent is not an element required to find a Rule 1.1 violation.¹³⁷

F. The Proposed Penalties Are Not Unconstitutional

PG&E argues that the penalty is unconstitutional because: (1) penalties for violation of § 451 deprived PG&E of due process because PG&E did not have fair notice that its conduct was unreasonable; (2) CPSD’s revised Appendix C increased the number of alleged violations after the close of evidentiary hearings; and (3) the penalties violate the constitutional prohibition against excessive fines.¹³⁸ PG&E’s first claim of unconstitutionality is refuted in Section III.C.4 of this Reply.

With regard to the second claim, PG&E states that the San Bruno POD’s conclusion that the revised Appendix C provided greater specificity of the charges against PG&E “is an impossible leap”, but fails to provide even one example, fact, legal citation,

¹³⁵ D.14-05-035, Order Denying Rehearing Of Decision (D.) 13-12-053 (numerous legal citations omitted), pp. 3-4.

¹³⁶ D.14-05-035, Order Denying Rehearing Of Decision (D.) 13-12-053 (numerous legal citations omitted), pp. 4-5.

¹³⁷ See footnote 133 above.

¹³⁸ PG&E Remedies POD Appeal, pp. 37-51.

or explanation of its broad generalization.¹³⁹ PG&E also fails to address any factual finding or legal conclusion in the San Bruno POD's 11-page analysis of the adequacy of the notice of alleged violations,¹⁴⁰ including the fact that CPSD and each of the Intervenor had thoroughly discussed each alleged 49 CFR Part 192 code section contained in Appendix C in the CPSD report and in testimony.¹⁴¹ PG&E also fails to address the fact that the San Bruno POD rejected PG&E's motion to strike Appendix C; the San Bruno POD also noted that Appendix C is expressly based on CPSD's Appendix B which sets out each of the alleged 55 violations and to which PG&E had no objection.¹⁴² Further, PG&E fails to acknowledge the fact that the San Bruno POD analyzed each case cited by PG&E in its Remedies POD Appeal, and PG&E fails to rebut or challenge the San Bruno POD's legal analysis or provide one concrete allegation of legal error.¹⁴³

With respect to the excessive fines claim, PG&E has the temerity to claim that "the company acted at all times in good faith and with the goal of complying with all applicable regulations, rules and standards" and that none of its disastrous failures to behave reasonably and responsibly were "willful or knowing."¹⁴⁴ It is important to note, once again, what PG&E does not say. The entire section on PG&E's "good faith" and excessive fines focuses on the San Bruno explosion. However, the appropriate magnitude of the fines and penalties in these cases encompasses a far broader set of violations and a pattern and practice of unreasonable, irresponsible, knowing, and willful business practices. PG&E fails to acknowledge, address, or rebut the detailed 9-page

¹³⁹ PG&E Remedies POD Appeal, p. 43.

¹⁴⁰ San Bruno POD, pp. 49-60.

¹⁴¹ San Bruno POD, p. 57.

¹⁴² San Bruno POD, pp. 59-60.

¹⁴³ PG&E Remedies POD Appeal, pp. 42-43.

¹⁴⁴ PG&E Remedies POD Appeal, p. 45.

legal and factual analysis of PG&E’s excessive fines claim in the Remedies POD and fails to make any specific claim of legal error with regard to the Remedies POD.¹⁴⁵ PG&E also fails to address the fact that the Remedies POD considered each of the previous gas explosion cases PG&E cites in its Appeal and explained why these cases were not applicable precedent.¹⁴⁶ PG&E fails to address the fact that the penalty is not a single fine, and fails to identify which element of the package of fines, disallowances and remedies it challenges as excessive.

Finally, PG&E fails to address, challenge or rebut the conclusions of law in the Remedies POD stating that: “the fact that PG&E’s violations are pervasive throughout its pipeline system and result in violations of more than one regulation or law does not change the need to consider them as separate violations”;¹⁴⁷ “PG&E’s offenses should be considered severe”;¹⁴⁸ that PG&E has not acted in good faith to discover, disclose and remedy the violations”;¹⁴⁹ “PG&E destroyed pipeline records”;¹⁵⁰ or that:

Based on the gravity and severity of the violations, PG&E’s statutory obligation to provide safe and reliable gas service, the pervasive nature of PG&E’s recordkeeping shortfalls, the impact of the San Bruno explosion on its residents, and the commission’s and public interest in ensuring safe and reliable natural gas service, a severe penalty is warranted.¹⁵¹

In short, the PODs in these proceedings fully respect PG&E’s constitutional rights.

¹⁴⁵ PG&E Remedies POD Appeal pp. 46-51; Remedies POD, pp. 31-40. Notably PG&E fails to acknowledge that the Remedies POD relied on a four part test for excessive fines set forth in *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 728 (2005), citing *United States v. Bajakajian* 524 U.S. 321, 337-338 (1998). Instead, PG&E claims that the correct legal standard is a two part test set forth in a U.S. Supreme Court case. PG&E does not assert that the Remedies POD erred in applying *Lockyer*, and makes no attempt to analyze the cases or argue that the two part test should apply.

¹⁴⁶ Remedies POD, pp. 34-37.

¹⁴⁷ Remedies POD, COL 16.

¹⁴⁸ Remedies POD, COL 18.

¹⁴⁹ Remedies POD, COL 22.

¹⁵⁰ Recordkeeping POD, FOF 30.

¹⁵¹ Remedies POD, COL 25.

IV. CONCLUSION

The findings in the Pipeline Investigations of thousands of safety violations occurring over millions of days are well-founded and support penalties well above the Presiding Officers' recommended \$1.4 billion total penalty to resolve the Pipeline Investigation. PG&E's special status as a public utility, and its egregious breach of the public trust over a very long period of time, should also be considered in determining the appropriate magnitude – and purpose – of the penalties for PG&E's violations.

Assuming the total penalty amount recommended in the Remedies POD remains unchanged, the Remedies POD should nevertheless be modified to reallocate that penalty. PG&E shareholders should be required to fund all of PG&E's PSEP work, which would amount to a disallowance of \$877 million of primarily capital costs. The amount of the fine paid to the General Fund should be correspondingly reduced to \$473 million. This allocation better serves the goal of deterrence by preventing PG&E from collecting a 65-year return (profit) on PSEP assets, and better alleviates the financial burden on PG&E ratepayers, who will still be called upon to pay several billion dollars to improve the safety of PG&E's gas system.

Two other clarifications should be made in the Remedies POD. Ordering Paragraph 10, which requires PG&E shareholders to pay all of the reasonably incurred litigation costs of the Joint Parties and the City of San Bruno, should specify reimbursement procedures and language should be added to ensure that PG&E does not pass on to ratepayers its own legal expenses for the Pipeline Investigations or for criminal and civil proceedings related to the San Bruno explosion or pipeline safety violations that came to light in the aftermath of the explosion. The Joint Parties' proposed clarifications to address both of these issues are provided at the end of Section IV in their Remedies POD Appeal.

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Respectfully submitted,

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