

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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to Show Cause on the Commission's
Own Motion into the Operations and
Practices of Pacific Gas and Electric
Company with respect to Facilities
Records for its Natural Gas Distribution
System Pipelines.

Investigation 14-11-008
(Filed November 20, 2014)

**SAFETY AND ENFORCEMENT DIVISION'S
APPLICATION FOR REHEARING**

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I. INTRODUCTION

Pursuant to Rule 16.1 of the Commission’s Rules of Practice and Procedure (“Rules”), the Safety and Enforcement Division (“SED”) hereby submits its application for rehearing of Decision (“D.”) 16-08-020 (“Decision”). Rule 16.1(c) explains that “[t]he purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.”¹ To that end, SED advises the Commission that the Decision errs in its determination regarding PG&E’s violation of 49 Code of Federal Regulations (“CFR”) § 192.619, which is related to maximum allowable operating pressure (“MAOP”). The Decision’s determination that SED did not meet its burden in proving the 49 CFR § 192.619 violation is not supported by substantial evidence in light of the record, which includes PG&E’s admission to that violation. The Commission further errs in failing to adopt SED’s fine recommendation regarding MAOP, which was not disputed by PG&E in the event that PG&E was found in violation of that code section.

¹ Rule 16.1(c).

There are other errors in the Decision which will also be identified in this application. First, the Decision erroneously asserts that PG&E's system is generally complaint and that "a system that works over 99% of the time is not a *system* in need of improvement."² Second, the Decision uses the wrong end date for the missing De Anza Records violations. Third, the Decision erroneously describes the applied fine for the Fresno Incident.

II. PG&E SHOULD BE ORDERED TO PAY A SHAREHOLDER FUNDED FINE OF \$7.12 MILLION FOR ITS ADMITTED VIOLATION OF 49 CFR § 192.619

A. PG&E Admits That It Violated 49 CFR § 192.619

The Decision states:

We conclude that SED has failed to meet its burden of proving by a preponderance of the evidence that PG&E violated 49 CFR § 192.619(c) by failing to have paper records of highest actual operating pressure for 243 distribution lines after 1970. The plain words of 49 CFR § 192.619(c) do not require paper records, although PG&E concedes that paper records of pressure logs or similar documents are the type of evidence they preferred to use to demonstrate highest actual operating pressure between 1965 and 1970. Nevertheless, 49 CFR § 192.619(c) does not specify actual copies of written pressure records.³

The Decision errs in not finding PG&E in violation of 49 CFR §192.619. PG&E failed to locate *any* of the required MAOP documentation for the subject systems.⁴ PG&E has admitted to this violation regarding the Colusa records⁵, and there is no difference in principle between the missing Colusa records, and other missing MAOP records. Thus, the Decision's determination that SED did not meet its burden regarding

² Decision at 25, 45 (emphasis in original).

³ Decision at 33.

⁴ PG&E states that: "[f]or approximately 243 of those systems, however, PG&E was unable to locate paper records reflecting the operating pressure during that time frame." (PG&E Opening Brief, dated: February 26, 2016, at 57 (footnote omitted).)

⁵ Exhibit 7, Attachment W106, at W106.013.

proving the 49 CFR § 192.619 violation is not supported by substantial evidence in light of the record.⁶

The specific admission language is found in the August 16, 2010 letter from PG&E to SED, which is included in PG&E's workpapers. At page W106.013, under CPUC Findings, the letter states:

During the audit, PG&E notified us that PG&E could not locate any MAOP documentation and the as-built installation records from 1961 for Zone #196 in Colusa District. ...⁷

On the same page, under PG&E Response, the letter states:

PG&E respectfully disagrees that this finding is a violation of §192.328, *but does however agree that it is a violation of §192.619 Maximum allowable operating pressure*: Steel or plastic pipelines. ... The corrective action was yet to be determined at the time of the audit.⁸

PG&E recently confirmed in a filed pleading that “[i]n that letter, PG&E acknowledged that it ‘could not locate any MAOP documentation’ for a particular system in Colusa, which PG&E stated constituted a violation of section 192.619.”⁹ PG&E's admission is credible and goes against PG&E's interests.

Further, this is not an admission to some set of facts that could only arguably constitute a violation. This is an unambiguous admission to a violation of the code section itself. PG&E, by its own words, admits that it violated the code section at issue. There was no undue burden or duress on PG&E in asserting its admission. It is indefensible to hold that SED has not met its burden of proving that PG&E is in violation of the code section that PG&E has admitted to violating.

PG&E defended its admission with the following testimony:

⁶ See Pub. Util. Code § 1757(a)(4).

⁷ Exhibit 7, Attachment W106, at W106.013.

⁸ Exhibit 7, Attachment W106, at W106.013 (emphasis added, typographical error in original).

⁹ PG&E Response to Appeals, dated: July 18, 2016, at 35.

Q 39 According to the PWA Report, PG&E acknowledged that it violated section 192.619 in an August 16, 2010 letter to SED. How do you respond?

A 39 The violation of section 192.619 included in the referenced letter is not based on the MAOP policy at issue in this proceeding. ...¹⁰

PG&E's apparent view is that the MAOP violation that PG&E admitted was "not at issue" in this proceeding. Instead, PG&E relies on the incorrect premise that only its MAOP policy, not the broader issue of whether or not records were maintained, is at issue. This is patently wrong from two reasons. First, the Scoping Memo of this proceeding includes investigation of PG&E's gas distribution recordkeeping practices:

The scope of the matter properly before the Commission is whether or not PG&E violated any provision of the Public Utilities Code, general orders, federal law adopted by California, other rules, or requirements, and/or other state or federal law, by its recordkeeping policies and practices with respect to maintaining safe operation of its gas distribution system. If any such violations are proven, fines may be imposed in this matter pursuant to Pub. Util. Code §§ 2107 and 2108, and remedial operational measures may be directed pursuant to Pub. Util. Code §§ 451, 701, 761, and 768.¹¹

PG&E's missing records on the MAOP issue fall squarely within the scope of this proceeding. Indeed, missing such critical records demonstrates PG&E's failures in both its recordkeeping policies and practices.

Second, in its Opening Testimony, Paul Wood and Associates ("PWA") asserts the following regarding PG&E's admission:

The SED finding related to PG&E's inability to locate MAOP documentation and as-built installation records from 1961 for Zone 196 in the Colusa District. *PG&E responded that it believed the violation was actually of provisions in 192.619, further that the correct reference system was #178 not #196.*¹²

¹⁰ Exhibit 4, PG&E Reply Testimony at 5-19:13-16 (internal citation omitted).

¹¹ Assigned Commissioner's Scoping Memo and Ruling, dated: April 10, 2015 ("Scoping Memo"), at 3.

¹² Exhibit 1, PWA Report at 50:32-35 (emphasis in original).

PG&E's admission was part of SED's case from the outset. PG&E's failure to maintain such records was appropriately raised as an issue in this proceeding. SED's allegation does not rely solely on arguments about PG&E's MAOP policy. Regardless of PG&E's MAOP policy, PG&E was missing the mandated records.

The Decision relied heavily on PG&E's description of its subsequent actions on the MAOP issue.¹³ However, those subsequent actions do not erase the violation itself. Nor do SED's subsequent actions, deemed by PG&E as approval, erase the violation itself.

Further, PG&E cannot produce the *Commission's* waiver or approval of PG&E's "alternative" method. PG&E's defense relies on the premise that it consulted with the regulator by corresponding with SED.¹⁴ Yet assuming arguendo that consulting with the regulator was all that was required, PG&E still failed that test. The Commission is the regulator, not SED.¹⁵

Further, in attempting to distinguish the missing Colusa records admission, PG&E asked: "But if there were no difference, how could PG&E (with SED's acknowledgement and approval) have resolved the admitted violation in Colusa by using the alternative method?"¹⁶ Here, PG&E is conflating the notion of "resolving" a violation with "absolving" a violation. "Resolving" a violation does not mean that the violation never occurred. A missing record is a missing record. Indeed, even if the Commission had granted PG&E a waiver on this issue, such an action would not retroactively absolve PG&E of the decades that it was in violation.

In apparent reliance on PG&E's arguments, the Decision states that:

The plain words of 49 CFR § 192.619(c) do not require paper records, although PG&E concedes that paper records of pressure logs or similar documents are the type of evidence

¹³ Decision at 33.

¹⁴ PG&E Opening Brief at 60-61.

¹⁵ See Cal. Const. art. 12.

¹⁶ PG&E Response to Appeals at 36.

they preferred to use to demonstrate highest actual operating pressure between 1965 and 1970.¹⁷

Yet, the Decision's discussion of "paper" records does not correctly describe the burden that SED had in proving this violation. For the approximately 243 subject systems, PG&E does not have *any* of the required MAOP records for the 1965-1970 "grandfather" timeframe.¹⁸ Without an actual historical record, paper or otherwise, to demonstrate operating pressure, there are no means of meeting the criteria of the "grandfather" provision. PG&E was aware of this at the time that it admitted to violating 49 CFR § 192.619.

The Commission should find that PG&E violated 49 CFR § 192.619, especially considering that PG&E has admitted that it violated 49 CFR § 192.619. The Decision's determination that SED did not meet its burden regarding proving the 49 CFR § 192.619 violation constitutes legal error, as it is not supported by substantial evidence in light of the record, including PG&E's admission to the violation.¹⁹

B. The Decision Errs by Not Adopting SED's Proposed Fine of \$7.12 Million Regarding MAOP

The Decision outlined a two-step process, drawn from the Scoping Memo, of first determining whether or not a requirement was violated, followed by determining whether fines (or remedial measures) should be imposed if a requirement was violated:

The assigned Commissioner determined that the scope of the matter properly before the Commission was whether or not PG&E violated any provision of the Public Utilities Code, general orders, federal law adopted by California, other rules, or requirements, and/or other state or federal law, by its recordkeeping policies and practices with respect to maintaining safe operation of its gas distribution system. If any such violations are proven, then the scope of this proceeding will include whether fines may be imposed in this matter pursuant to Pub. Util. Code §§ 2107 and 2108[.]²⁰

¹⁷ Decision at 33.

¹⁸ See PG&E Opening Brief at 57.

¹⁹ See Pub. Util. Code § 1757(a)(4).

²⁰ Decision at 5.

As indicated above, the Commission should hold that PG&E is in violation of 49 CFR § 192.619. Regarding fines, PG&E has stated that:

While PG&E does not agree that SED has shown that PG&E violated the pipeline safety regulations in connection with the setting of MAOP on these systems, if the Commission finds PG&E in violation, ***PG&E does not disagree with SED's maximum fine calculation.***²¹

PG&E provided its “suggested maximum fine” of \$7.12 million regarding MAOP next to SED’s recommended fine of the same amount.²² PG&E’s Reply Brief also acknowledges, regarding the MAOP issue, that “PG&E believes that it could have done better”²³ and that:

[W]hile not admitting to the alleged violations, PG&E recognizes that it could have communicated more effectively with SED regarding its alternative method for setting MAOP. For that reason, PG&E submits that any fine associated with this issue should not exceed SED’s proposed \$7.12 million.²⁴

Because PG&E did not disagree with SED’s methodology in determining the proposed \$7.12 million fine, the imposition of that fine for MAOP should turn on whether or not PG&E is found in violation of 49 CFR § 192.619.²⁵ Holding otherwise would constitute legal error, as it would not be supported by substantial evidence in light

²¹ PG&E Reply Brief, dated: April 1, 2016, Appx. A, A-12 - A-13 (emphasis added).

²² PG&E Reply Brief, Appx. A, A-13.

²³ PG&E Reply Brief at 1.

²⁴ PG&E Reply Brief at 10.

²⁵ A Commission Decision must be supported by its findings. (See Pub. Util. Code § 1757(a)(3).) SED notes that the Decision declines to penalize PG&E for its violation of 49 CFR § 192.619, but does not include a finding of fact or conclusion of law which confirms whether or not the code section was violated by PG&E. (See Decision, Conclusion of Law 12, see also Finding of Fact 11.) Language in the body of the Decision stated that SED did not meet its burden in proving a violation of 49 CFR § 192.619. (Decision at 33.) However, the basis for applying fines would be a violation of a statute or other requirement. (Pub. Util. Code § 2107.)

of the record, including PG&E's lack of disagreement with SED's maximum fine calculation regarding MAOP.²⁶

III. OTHER ERRORS IN THE DECISION

A. **The Commission Should Remove All Language That Implies that PG&E's System is Generally Compliant and that A System That Works Over 99% of the Time is Not a System in Need of Improvement**

The Decision's determination that PG&E's system is "generally compliant" is not supported by substantial evidence in light of the record.²⁷ The Decision similarly errs in stating that "[a] system that works over 99% of the time is not a *system* in need of improvement."²⁸

The premise that PG&E's system is generally compliant is flawed and PG&E's self-serving analysis on this topic is insufficient to support that determination. Indeed, the Decision acknowledges that "there could be thousands of unmapped plastic inserts in PG&E's system."²⁹ Exhibit 32, an internal PG&E audit that was presented by SED at hearings, estimated that since the 1980's, tens of thousands of plastic services have been installed without a locating wire.³⁰ This is not general compliance.

Further, by stating that PG&E's system does not need improvement, the Commission has not proceeded as required by law.³¹ This language in the Decision contravenes Pub. Util. Code § 451, which requires utilities to "promote the safety, health, comfort, and convenience of its patrons, employees, and the public." The statute does not allow for a system that is only 99% safe. The Decision itself acknowledges that "[a] violation is a violation."³²

²⁶ See Pub. Util. Code § 1757(a)(4).

²⁷ See Pub. Util. Code § 1757(a)(4).

²⁸ Decision at 25, 45 (emphasis in original).

²⁹ Decision at 23.

³⁰ Exhibit 32 at 6-7.

³¹ See Pub. Util. Code § 1757(a)(2).

³² Decision at 25.

The Commission should strike the Decision’s statements that indicate that PG&E’s system is “otherwise complaint,” “generally complaint,” or “in general compliance.”³³ The Commission should also strike the Decision’s statements that “[a] system that works over 99% of the time is not a *system* in need of improvement.”³⁴

B. The Commission Should Correct the End Date for the Missing De Anza Records Violation

In its appeal of the Presiding Officer’s Decision, SED pointed out the following error:

From a purely typographical standpoint, SED notes that the POD uses inconsistent end dates. A pages 37 and 38, a “January 1, 2011” date is used. In a summary table on page 38, a “December 31, 2011” date is used. SED notes that December 31, 2011 is 12,052 days after the start date of the violation: January 1, 1979.³⁵

The Decision did not correct this error. Furthermore, neither of the end dates used by the Decision are supported by substantial evidence in light of the record. The violation did not end in 2011. The 2011 timeframe approximates when some PG&E staff may have been aware of the issue.³⁶ Yet, the Decision itself explains that:

On February 18, 2014, a CAP notification was initiated to locate the missing DeAnza A Forms. On June 16, 2014, the User Responsible reported his conclusion that —the extensive search for these records was unsuccessful. [footnote omitted.] The record shows no further action by PG&E to address this issue.³⁷

If the violation ended in 2011, then the Commission’s critique of PG&E’s actions in 2014 is inapposite to the violation under discussion. In SED’s Appeal of the POD,

³³ See Decision at 2, 19, 25, 45.

³⁴ See Decision at 25, 45 (“emphasis in original”).

³⁵ SED Appeal of POD, dated: July 1, 2016, at 11-12. The erroneous January 1, 2011 end date also appears in Conclusion of Law 18.

³⁶ The Decision states that the 2011 date corresponds to “when PG&E appears to have realized the records were missing.” (Decision at 37.)

³⁷ Decision at 35.

more appropriate end dates are presented for the Commission's review.³⁸ In sum, the Decision's use of a 2011 end date for the missing De Anza records violation is not supported by substantial evidence in light of the record, because the violation continued until at least 2014, according to the Decision's analysis.³⁹

C. The Commission Should Correct the Fresno Incident Fine Description

The Decision's identification of a \$20,000 per violation amount for the Fresno Incident appears to be a typographical error due to the total calculation of \$100,000 for this incident, and the date when it occurred.⁴⁰ The per violation fine should be \$50,000 based on the Decision's analysis. The Commission should correct this error.⁴¹

IV. CONCLUSION

For the foregoing reasons, SED's recommendations should be adopted

Respectfully Submitted,

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³⁸ SED Appeal of the POD at 11-16.

³⁹ See Pub. Util. Code § 1757(a)(4).

⁴⁰ Decision at 52.

⁴¹ See Pub. Util. Code § 1757(a)(4).