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

PACIFIC GAS AND ELECTRIC COMPANY'S APPEAL OF THE PRESIDING OFFICER'S DECISION ON FINES AND REMEDIES

MARIE L. FIALA
SIDLEY AUSTIN LLP
555 California Street
San Francisco, California 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-2400
Email: mfiala@sidley.com

CARTER G. PHILLIPS
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
Email: cphillips@sidley.com
Email: qsorenson@sidley.com

JOSEPH M. MALKIN
SCOTT A. WESTRICH
ERIC MATTHEW HAIRSTON
Orrick, Herrington & Sutcliffe LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105
Telephone: (415) 773-5505
Facsimile: (415) 773-5759
Email: jmalkin@orrick.com

MICHELLE L. WILSON
LISE H. JORDAN
Pacific Gas and Electric Company
Law Department
77 Beale Street
San Francisco, CA 94105
Telephone: (415) 973-6655
Facsimile: (415) 973-0516
Email: MLW3@pge.com
Email: LHJ2@pge.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

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I. EXECUTIVE SUMMARY

PG&E 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. PG&E has fully accepted legal and financial responsibility for this tragic accident and has compensated those affected. PG&E has also made extraordinary efforts to reduce and minimize the risk of another such tragedy occurring. Before any penalty is imposed in this proceeding PG&E will already have invested and committed to invest more in safety improvements than any other utility in the history of the United States gas industry. PG&E has made real and lasting enhancements to its gas system, with PG&E shareholders having already spent hundreds of millions of dollars and, as of the close of the record, expected to spend approximately $2.2 billion on these efforts. As of mid-year 2012, PG&E had, among other things, completed an accelerated leak survey of its entire gas transmission system, validated the maximum allowable operating pressure (MAOP) on more than 2,000 miles of transmission pipeline, automated 37 valves, strength tested or verified strength test pressure records on 262.5 miles of pipeline, and retrofitted nearly 172 miles of transmission pipeline to accommodate in-line inspection equipment.[1] PG&E has also compensated those affected by the accident, including tens of millions of dollars to the San Bruno community. These investments are critical to our goal of making PG&E's gas system the safest in the nation and for helping rebuild the San Bruno community.

PG&E embraces the operational remedies set forth in the Penalties POD.[2] It also acknowledges that the Commission should impose a penalty in this proceeding. However, the penalties imposed and the findings and conclusions on which they are based do not meet applicable legal standards, are based on the misapplication of California law and regulations, and violate PG&E's constitutionally mandated rights. Any penalty must be reasonable and proportionate in light of the nature of the violations and PG&E's response. That is not the case here. This accident was not the result of willful or knowing violations of state law, federal standards, or Commission orders, policies, or directives. PG&E did not know and could not have known that defective pipe had been erroneously installed in 1956 that might rupture more

[1] Ex. San Bruno PG&E-1 at 13-8 (PG&E/Yura).

[2] PG&E refers to the Presiding Officers' Decision on Fines and Remedies to Be Imposed on Pacific Gas and Electric Company for Specific Violations in Connection with the Operation and Practices of Its Natural Gas Transmission System Pipelines as the "Penalties POD." PG&E refers herein to the Presiding Officers' Decisions in Proceedings I.12-01-007, I.11-02-016, and I.11-11-009, respectively, as the "San Bruno POD," the "Records POD" and the "Class Location POD."

than fifty years later, and the record does not show that any additional integrity management program that PG&E might have instituted would have necessarily discovered the defective pipe or prevented the accident. While PG&E accepts responsibility for the accident, it acted at all times in good faith and with the goal of complying with all applicable regulations, rules, and standards. Indeed, immediately after the accident, PG&E undertook a series of measures – of its own volition and at its own expense – to address and resolve any deficiencies in its pipeline system and improve the safety and reliability of that system to the greatest degree possible.

The unprecedented penalty imposed by the POD, including a fine of nearly $1 billion, bears no reasonable relation to PG&E's actual conduct and serves no legitimate purpose – especially not with respect to improving safety. It is true that longstanding Commission policy holds that penalties against a utility should be constructed as a deterrent against activities and behavior that could result in future accidents, but the penalty here is far in excess of what is necessary or appropriate to deter future violations. It is also many times larger than the largest penalty ever imposed for any natural gas accident. The next largest penalty was $101.5 million (including a civil penalty and program improvements) paid by El Paso Natural Gas Company for a pipeline rupture in Carlsbad, New Mexico, that killed 12 people and implicated the adequacy of El Paso's gas pipeline safety programs over many years. The total penalty in the POD (including the PSEP disallowance) is also more than 50 times larger than the largest penalty ever imposed by the Commission. Moreover, a nearly $1 billion fine paid to the state General Fund does nothing to further the objective of deterrence, or more importantly, the goal of improving pipeline safety. The Commission should for these reasons eliminate the fine and materially reduce the overall penalty imposed on PG&E and (as other parties to this proceeding have also suggested) direct PG&E to apply any penalty toward further investments in gas system safety.

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. Many of the violations rest on the incorrect application of California law and Commission rules, particularly California Public Utilities Code § 451 and Rule 1.1 of the Commission Rules of Practice and Procedure. The decisions also repeatedly and improperly characterize individual instances in which PG&E was found to have violated a statute or rule as constituting both "multiple" and "continuing" violations, ignoring the well-settled rule that a discrete instance of misconduct can support only a single violation of a statutory or regulatory provision. In addition, many of the violations were

based on clearly impermissible applications of the principles of spoliation and hindsight. Neither spoliation nor hindsight make up for the fact that there is no evidence of knowing or intentional misconduct by PG&E involving the accident. Moreover, and no less importantly, the decisions infringe upon PG&E's rights under the Due Process and Excessive Fines Clauses of the United States and California Constitutions by imposing a patently excessive penalty on PG&E based on conduct that occurred more than half a century ago and was not proscribed at that time.

In light of all of these factual and legal errors, and given the substantial unrecovered amounts that PG&E shareholders have already spent and have committed to spend on gas system safety, the Commission should order PG&E to pay a significantly reduced penalty and that any such penalty should take the form of disallowances of costs for further pipeline safety improvements. With these investments, together with the substantial enhancements to its system PG&E continues to make every day, PG&E's gas system will be safer than any state or federal regulation has ever required.

II. THE PENALTIES IMPOSED IN THESE PROCEEDINGS SHOULD BE REASONABLE, PROPORTIONATE, AND FOCUSED ON IMPROVING PIPELINE SAFETY.

PG&E embraces the improvement initiatives set forth in the POD. In fact, PG&E has already implemented or is in the process of implementing most of the suggested operational measures. These initiatives are in addition to the unprecedented enhancements the company has made and continues to make to its natural gas pipeline operations. After these improvements are completed, PG&E will have one of the safest gas systems in the country.

PG&E has also publicly acknowledged that prior to the San Bruno accident its gas system operations were not what the company or the Commission expected and that a reasonable and proportionate penalty reflecting this fact is appropriate. However, PG&E strongly believes that the monetary penalty set forth in the Penalties POD should be reduced and reoriented toward future pipeline safety enhancements to be made at shareholder cost. In addition, the Commission should extend the time in which any fine must be paid and adopt PG&E's proposed implementation plan for the ordered refunds.

A. The Commission Should Take into Account the Unrecovered Amounts That Shareholders Have Spent and Plan to Spend on Gas System Safety in Determining the Penalty.

The Penalties POD acknowledges the relevance of the unrecoverable costs PG&E is in fact incurring before any penalties in these proceedings and recognizes that the Commission must "balance the need to set the proper penalty at the appropriate level to deter future violations with the need to ensure that any penalty imposed does not adversely impact PG&E's ratepayers."[3] The Penalties POD therefore takes into account the fact that the PSEP decision "already disallows rate recovery of costs incurred prior to the date of that decision, for the Pipeline Records Integration Program, and for certain pressure-test and pipeline replacement expenditures."[4] According to the Penalties POD, these identified PSEP disallowances total $635 million not including PG&E's request for a $380.5 million contingency, which the Commission also rejected.[5]

The Penalties POD, however, fails to consider other unrecoverable gas safety-related PSEP and Gas Accord V costs that PG&E's shareholders have incurred or will incur. As of the close of the record, these costs totaled more than approximately $1.5 billion after taking into account the $635 million PSEP disallowance.[6] The Penalties POD disregards those costs as "outside of the scope of this proceeding" and "speculative," and concludes that considering them in determining the amount of the penalties "would imply that CPSD could not initiate any future enforcement actions against PG&E for violations associated with operating its gas transmission pipeline system."[7] These rationales are mistaken and cannot justify disregarding the total unrecoverable costs PG&E is incurring to improve its gas transmission system in setting any penalties in these proceedings.

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[3] Penalties POD at 78.
[4] Penalties POD at 81.
[5] Penalties POD at 81 & n.223.
[6] The unrecoverable costs discussed in text all are based on PG&E's actual and forecast costs as of the close of the record. At that time, PG&E's total unrecoverable costs associated with gas pipeline safety-related work were approximately $2.2 billion. Since the close of the record, the total amount of forecast unrecoverable costs has changed. PG&E has provided updated forecasts in its testimony in the ongoing Gas Transmission and Storage rate case and in its public financial disclosures. *See*, *e.g.*, PG&E Chapter 18A, Rebuttal Testimony of Bruce Smith, PG&E's 2015 GT&S Rate Case, A.13-12-012 (Sept. 15, 2014); PG&E Corporation, Form 10-Q for the period ended June 30, 2014, at 41, *available at* http://www.sec.gov/Archives/edgar/data/75488/000100498014000069/form10q.htm.
[7] Penalties POD at 81.

***First*,** the Penalties POD fails to give consideration to approximately half of PG&E's unrecoverable PSEP costs that are just as closely related to the issues in these proceedings as the explicit PSEP disallowances that the Penalties POD agrees must be taken into account. The unrecoverable PSEP costs, totaling more than $1.2 billion as of the close of the record (of which the Penalties POD took only $635 million into account), all relate to work completed or to be completed by PG&E to implement the Pipeline Safety Enhancement Plan approved and mandated by D.12-12-030. As of the close of the record, PG&E had incurred unrecoverable PSEP expenses of approximately $600 million through 2012[8] and forecast additional unrecoverable expenses of approximately $300 million in 2013 and 2014.[9] PG&E also will not be able to recover PSEP capital expenditures that totaled $353 million as of the close of the record.[10] The unrecovered PSEP expenses in 2011 and 2012 reflect actual costs over and above the amounts authorized for rate recovery. The unrecoverable expenses in 2013 and 2014 are based on forecasts of actual costs less authorized amounts (without any contingency).[11] Similarly, the unrecovered and unrecoverable PSEP capital expenditures represent the amount of actual and forecast capital expenditures over and above the authorized amounts. These unrecoverable costs include pipeline modernization costs (expense and capital) such as strength testing, pipeline replacement, in-line inspections, and upgrades to make lines piggable; work relating to the Gas Transmission Asset Management Project, including the continuing collection, review, and verification of gas transmission system records and their assembly into a new electronic records management system; valve automation costs (expense and capital); costs for interim safety measures directed by the Commission, such as pressure reductions and increased patrols and leak surveying; and other costs necessary to execute the PSEP.[12]

The Penalties POD also entirely disregards unrecoverable safety-related expense spending of approximately $1 billion (actual and forecast, as of the close of the record) above the

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[8] Ex. San Bruno PG&E-1A, Chapter 13, Appendix C (PG&E/Yura).

[9] Ex. Joint-57 at 8 (showing forecast unrecovered PSEP expenses in 2013 and using the low end of the range), 13 (showing these expenses continue in 2014).

[10] Ex. Joint-58 (table including disallowed capital expenditures).

[11] The Commission should take into account PG&E's actual and forecast costs. It does not need to reach the issue of how to treat the original $380.5 million contingency requested by PG&E in the PSEP proceeding.

[12] Ex. San Bruno PG&E-1A, Chapter 13, Appendix C (PG&E/Yura) (showing categories of unrecoverable PSEP expenses); Ex. Joint-58 (discussing categories of unrecoverable pipeline-related expenses); *see also* PG&E Remedies Opening Brief at 14.

amounts adopted in the Gas Accord V rate case.[13] These costs include 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.[14] These gas transmission safety-related costs are just as much within "the scope of these proceedings" as the explicitly disallowed PSEP costs referenced by the Penalties POD.

The table below summarizes the costs that the Penalties POD failed to consider in determining the amount of the penalty against PG&E.

Actual and Forecast Unrecoverable Gas Transmission Safety-Related Costs
(As of the Close of the Record)

PSEP Expense	~ $900 million
PSEP Capital	~ $353 million
GT&S Expense	~ $1 billion
TOTAL UNRECOVERABLE	**~ $2.2 billion**
Amount acknowledged by the POD (PSEP disallowance)	($635 million)
AMOUNT POD FAILS TO TAKE INTO ACCOUNT	**> $1.5 billion**

***Second*,** the Penalties POD rightly acknowledges the importance of taking into account the costs that PG&E's shareholders are already incurring as there is a limit to the costs that PG&E can bear without having an adverse impact on ratepayers.[15] The distinction that the Penalties POD draws between explicit PSEP disallowances and other unrecoverable gas safety-

[13] Ex. San Bruno PG&E-1A, Chapter 13, Appendix C (PG&E/Yura) (showing integrity management and other non-PSEP expense spending of $179 million); Ex. Joint-65 at 2 (Table 1) (additional gas transmission expenses included in referenced $250 million above authorized levels in 2012 and 2013); Ex. Joint-57 at 8 (showing costs of emerging work in 2013 and using the midpoint of the range), 13 (referencing emerging work in 2014 and beyond).

[14] Ex. San Bruno PG&E-1A, Chapter 13, Appendix C (PG&E/Yura) (showing integrity management and other non-PSEP expenses); Ex. Joint-57 at 8 (showing costs of emerging work in 2013 for integrity management and right-of-way encroachment), 13 (referencing similar work in 2014 and beyond); Ex. Joint-58 (discussing multi-year effort to identify and remove encroachments from transmission pipeline rights-of-way and costs associated with the transmission integrity management work); *see also* PG&E Remedies Opening Brief at 14-18.

[15] Penalties POD at 64 ("There is no dispute that the Commission must consider PG&E's financial resources in setting the penalty amount."); *id.* at 78.

related costs as being "outside the scope of this proceeding" is irrelevant when considering potential adverse effects on PG&E's ratepayers if the company's financial stability is impaired. From the standpoint of a potential investor in PG&E's equity, it does not matter whether PG&E needs to issue equity to fund an explicit PSEP disallowance, or because it spent more than authorized in either the PSEP or Gas Accord V proceedings to improve the gas transmission system.[16]

***Third*,** the contention that these costs are "speculative" is wrong and does not justify disregarding them in determining the appropriate amount of additional penalties in these proceedings. The 2011 and 2012 unrecovered costs discussed above are not speculative at all – they are costs that PG&E actually incurred but did not recover in rates approved in either the PSEP proceeding or the Gas Accord V rate case. The unrecoverable costs for 2013 and 2014 (and beyond) are based on actual forecasts that were included in public disclosures to investors and the SEC.[17] The possibility that actual costs might deviate somewhat from these forecasts is immaterial, as PG&E is not asking the Commission to make a precise calculation based on the exact amount of unrecovered costs. Any such differences would not alter the fact that the Penalties POD unjustifiably fails to take into account an enormous amount – more than $1.5 billion – of unrecoverable costs that PG&E is incurring to enhance the safety of the gas transmission system before any fines or additional disallowances in these proceedings.[18]

***Fourth*,** the POD's concern that taking into account all of PG&E's unrecoverable gas safety-related costs in determining the amount of the penalty would prevent CPSD from initiating a future enforcement proceeding is misplaced. If there is a proper basis for financial penalties in a hypothetical future enforcement proceeding, the Commission may impose penalties based on the relevant circumstances at that time. PG&E has never said that because of the total amount of unrecoverable costs it is incurring for gas transmission safety-related work following the San Bruno accident, it will never be able to pay another penalty at any time for any reason.

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[16] Joint R.T. 1432 (CPSD/Overland); Ex. Joint-66 at 19-20 (PG&E/Fornell).

[17] Ex. Joint-57 (investor presentation available on PG&E's web page); Ex. Joint-58 (excerpt of 2012 annual report).

[18] As noted, PG&E's estimate of actual and forecast unrecoverable gas transmission pipeline-related costs has changed since the close of the record. *See supra* note 6. If the Commission would find it useful, PG&E could provide current information on actual unrecovered costs for 2013 and updated forecasts for 2014 that would provide even greater precision than the information currently in the record.

***Finally*,** the Commission's refusal to recognize PG&E's unrecovered safety-related costs as part of the penalty process would be bad policy. It would send the message that PG&E's voluntary safety investments are not important and create a disincentive for other utilities to incur costs voluntarily before penalty determinations in future proceedings lest those voluntary expenditures be disregarded when the Commission sets the penalty. Here, for example, CPSD issued numerous recommendations to PG&E in its January 12, 2012, report in the San Bruno OII. PG&E did not wait to be ordered to carry out those recommendations, but has been acting on most of them – and incurring related implementation costs – since they were first announced.

Yet, by disregarding these costs in setting the penalties in these proceedings, the Commission would be telling PG&E and other utilities to take a "wait and see" approach before undertaking any improvements on their own at their financial peril. This is exactly the wrong message. Instead, the Commission should use the penalties in these proceedings not only to deter future violations, but also – by taking into account all of PG&E's unrecoverable pipeline safety-related costs in determining the amount of the penalties – to create an incentive for utilities proactively to address problems before being ordered to do so.

PG&E's total unrecoverable costs for gas transmission safety-related work therefore should have been, and must now be, considered in determining the amount of the penalty against PG&E. In light of the billions of dollars that PG&E is already incurring to enhance the safety of its gas transmission system, the Commission should significantly reduce the financial penalties in these proceedings.

B. The Monetary Penalty Should Be Redirected Toward Enhancing Pipeline Safety.

The ultimate purpose of monetary penalties and other remedies in these proceedings, as the Commission explained in its Order Instituting Investigation in the San Bruno docket, is "to ensure that a catastrophe of this type does not occur again."[19] The San Bruno accident has shed light on the need for not only PG&E but also other utilities across the state and country to make improvements to their gas pipeline infrastructure to reduce and minimize the risk of similar tragedies in the future. The best way to ensure that the remedies imposed in these proceedings achieve the Commission's goal is to direct that the penalties be used to improve pipeline safety. The unprecedented size of the penalty, the overriding public importance of pipeline safety, and

[19] San Bruno OII at 2-3.

the fact that PG&E has finite resources to spend on pipeline improvement projects without rate recovery all weigh in favor of directing that any penalty be invested in the gas pipeline system. Requiring PG&E to spend its own money on pipeline safety without rate recovery would act as a forceful deterrent to PG&E and other California utilities and would send a strong message about the importance of gas pipeline safety.

The Penalties POD deviates from this purpose by ordering PG&E to pay a fine of $950 million to the state's General Fund. A fine payable to the General Fund will, however, do nothing to improve gas pipeline safety in PG&E's service territory or in California. The Penalties POD attempts to justify this result on two grounds: (1) the Commission lacks the authority to impose monetary penalties directed to a specific purpose rather than fines payable to the General Fund; and (2) directing that the penalty be used to fund pipeline safety improvements would "fl[y] in the face of the purpose of the penalties and fines."[20] The Penalties POD is wrong on both accounts.

1. The Commission may order PG&E to pay a penalty to be used to improve gas pipeline safety.

The Penalties POD mistakenly concludes that the Commission does "not have discretion to direct how monies paid by a utility under Public Utilities Code § 2107 are to be used."[21] The Commission in fact possesses such authority, as confirmed by decisions of the California Supreme Court. In *Assembly v. Public Utilities Commission*,[22] for example, the court explained that Public Utilities Code § 701 authorizes the Commission to shape appropriate remedies so long as the remedy does not contravene "*express* legislative directives and restrictions."[23] The Court reaffirmed this principle in *Southern California Edison Co. v. Peevey*,[24] stating that, where the Commission has authority under § 701, only "specific statutory limit[s] on [its] power" bar it from acting.[25]

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[20] Penalties POD at 27.
[21] Penalties POD at 26-27.
[22] *Assembly v. Pub. Utils. Comm'n*, 12 Cal. 4th 87 (1995).
[23] *Assembly*, 12 Cal. 4th at 103 (emphasis added); *see also Pac. Gas & Elec. Corp. v. Pub. Utils. Comm'n*, 118 Cal. App. 4th 1174, 1199 & n.24 (2004).
[24] *S. Cal. Edison Co. v. Peevey*, 31 Cal. 4th 781 (2003).
[25] *S. Cal Edison Co.*, 31 Cal. 4th at 792 (citing *Assembly*, 12 Cal. 4th at 103).

Section 2107 contains no requirement that a penalty imposed pursuant to that code section be paid to the General Fund.[26] In sharp contrast, "[s]everal statutes authorizing the imposition of penalties by the Commission under a variety of circumstances ***expressly require*** that any monies collected pursuant to these provisions be deposited in the General Fund."[27] The express inclusion of this requirement in other provisions of the Code (including other provisions of the chapter of which § 2107 is part) shows that the Legislature knows how to limit the Commission's discretion when it intends to do so.[28] Consistent with the lack of any requirement that penalties pursuant to § 2107 be paid to the General Fund, a recent California Court of Appeal opinion has construed the statute to authorize the Commission to impose penalties on its own authority and without invoking the state's power through the judicial process.[29]

The *Assembly* decision does not mandate, as the Penalties POD assumes, that penalties imposed under § 2107 be paid to the General Fund. The issue that was before the court in that case – the Commission's authority to allocate rate refunds – is not germane here. *Assembly* set aside a Commission order allocating a rate refund because it was in direct violation of the strict language of Public Utilities Code § 453.5. Section 453.5 mandates a specific procedure for distributing rate refunds; it does not inform how to construe the Commission's authority to assess penalties under § 2107. The *Assembly* decision does contain broad *dicta*, which the POD quotes, stating that "[e]xisting statutory provisions authorize such a penalty proceeding, but require that any penalty be deposited in the General Fund."[30] Aside from being *dicta*, this statement is qualified in the accompanying footnote, which refers to specific statutes that "expressly require"

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[26] Section 2107 provides:

> Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than fifty thousand dollars ($50,000) for each offense.

[27] *Assembly*, 12 Cal. 4th at 103 n.10 (emphasis added).

[28] *See Wells Fargo Bank v. Super. Ct.*, 53 Cal. 3d 1082, 1096-97 (1991) (where the legislative branch has "employed a term in one place and excluded it in another, it should not be implied where excluded"); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[29] *See Pac. Bell Wireless*, *LLC (Cingular) v. Pub. Utils. Comm'n*, 140 Cal. App. 4th 718, 735-37 (2006).

[30] *Assembly*, 12 Cal. 4th at 102-03; *see also* Penalties POD at 27 (quoting *Assembly*, 12 Cal. 4th at 102-03).

fines to be paid to the General Fund.[31] In fact, the *Assembly* court cites § 2107 as one of "a number of penalty provisions that do not specify the use of the penalty funds."[32]

Moreover, the rationale of *Assembly* is that § 701 gives the Commission authority to shape remedies absent "express legislative directives [or] restrictions" limiting that authority."[33] Because § 2107 is silent as to the use of penalty funds, the Commission has authority under § 701 to decide this issue. To be sure, the *Assembly* Court pointed out, as the POD does here, that the Commission "on occasion has recognized that in accordance with the legislative policy expressed in sections 2100 and 2104, the penalties assessed under these provisions [including 2107] must be deposited in the General Fund."[34] The *Assembly* Court's recognition that the Commission has in the past exercised its discretion to direct penalties under § 2107 to the General Fund does not imply that the Commission is under a statutory mandate to do so. Nor does it deprive the Commission of its authority under § 701 to fashion an appropriate remedy in these cases.

Indeed, the Penalties POD's reliance on the Commission's "broad authority" under § 701 in discussing the Commission's ability to order PG&E to spend $50 million to carry out the required remedies[35] is inconsistent with its conclusion that the Commission lacks the discretion to direct that financial penalties be used to fund gas pipeline safety enhancements. The Penalties POD states that the Commission may order PG&E to carry out the identified remedies at its own expense because they are intended "to ensure that PG&E's gas transmission pipeline system will be maintained and operated safely."[36] However, the same rationale permits the Commission under § 701 to direct PG&E to spend a certain amount on pipeline safety costs rather than paying those monies to the General Fund, which would do nothing to enhance gas pipeline safety.

While PG&E encourages the Commission to direct that any penalties be used to improve gas pipeline safety, it notes that the Penalties POD's attempt to justify the $400 million disallowance as "approximat[ing] the amount of revenues earned by PG&E's GT&S group in

[31] *Assembly*, 12 Cal. 4th at 103 n.10. This footnote is quoted in the Penalties POD at 27 n.35.
[32] *Assembly*, 12 Cal. 4th at 103 n.10.
[33] *Assembly*, 12 Cal. 4th at 103.
[34] *Assembly*, 12 Cal. 4th at 103 n.10; *see also* Penalties POD at 27 (referring to the Commission's "long-standing interpretation of Pub. Util. Code § 2107").
[35] Penalties POD at 31.
[36] Penalties POD at 31.

excess of revenue requirements between 1999 and 2010"[37] is inappropriate and inconsistent with long-standing Commission precedent.[38] In this case, the revenues that PG&E's GT&S business earned in excess of its revenue requirements were due to its "at risk" market storage business, not any "underspending" on gas transmission safety-related work.[39] Furthermore, the utility as a whole earned returns during this period that were consistent with the Commission's authorized returns.[40]

2. Directing that the penalty be used for pipeline safety would meet the Commission's policy objectives in imposing monetary penalties on PG&E in these proceedings.

The Penalties POD also refuses to direct that the penalty be used to improve gas pipeline safety on grounds that doing so would not '"deter further violations by this perpetrator or others.'"[41] That is plainly not the case.

The Commission does not need to use extraordinary fines to send a message to PG&E to make its system safer. Not only has PG&E already brought in new management and overhauled its gas operations; it has spent hundreds of millions of dollars on improvements to the gas transmission system without rate recovery, and as of the close of the record, forecasts spending a total of more than $2.2 billion in shareholder funds before any additional penalties. This is not to say that the Commission should not impose a penalty on PG&E in these proceedings, but ordering a fine payable to the General Fund as opposed to ordering disallowances for further shareholder expenditures on pipeline safety would have the same effect in terms of motivating PG&E to do what is necessary to reduce and minimize the risk of similar tragic accidents in the future. Other utilities are undoubtedly also well aware of the extraordinary costs to PG&E and the operational changes PG&E has undertaken as a result of the San Bruno accident.

Moreover, the Penalties POD never explains why a penalty that does not allow recovery of costs for pipeline safety improvements would not also be a deterrent to PG&E or other

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[37] Penalties POD at 81.
[38] *See, e.g.*, D.85-03-07, 17 CPUC 2d 246, 254 (discussing Commission's practice of allowing utilities to retain benefit of cost savings during rate case periods).
[39] *See* Ex. San Bruno PG&E-10, MPO-1 at 76 (PG&E/O'Loughlin); *cf.* San Bruno POD at 199 (noting that the POD is "not able to make findings whether PG&E spent less or more on O&M and capital expenditures" relative to amounts adopted by the Commission in setting rates").
[40] Ex. San Bruno PG&E-10, MPO-1 at 79-81 (PG&E/O'Loughlin).
[41] *See* Penalties POD at 27 (quoting *Standards of Conduct Governing Relationships Between Energy Utils. Their Affiliates* (D.98-12-075), 84 Cal. P.U.C. 2d 155, 188 (1998)).

utilities. The only explanation offered is that "such an outcome would not even be considered an appropriate penalty, since PG&E has always been required to invest in pipeline safety."[42] If the point is that PG&E would have to spend this money in any event, the Penalties POD fails to distinguish between "investments" made by PG&E without rate recovery and infrastructure improvements funded by ratepayers.[43] Requiring PG&E's shareholders to foot the bill for $950 million in gas pipeline safety improvements would serve as a powerful deterrent to PG&E and other California utilities.[44] The notion that PG&E and other utilities are not deterred from violating pipeline safety statutes and regulations by the billions of dollars in unrecovered costs PG&E's shareholders already have incurred or will incur – and any additional monies that PG&E would be required to spend on gas pipeline improvements – defies logic and has no support in the record.

The Penalties POD also suggests that ordering PG&E to pay for future pipeline safety improvements would provide an inappropriate "windfall" to ratepayers and therefore would be inconsistent with the purpose of fines and penalties.[45] As the Commission knows, ratepayers will be expected to pay for billions of dollars in infrastructure improvements to ensure the safety of PG&E's and other California utilities' gas pipeline systems. It is difficult to understand how requiring PG&E to pay a portion of those costs without rate recovery constitutes a "windfall" to ratepayers, any more so than do the disallowances in the PSEP proceeding and the Penalties POD. This is not a situation where a small number of individuals would disproportionately benefit if the utility were directed to pay them instead of paying a fine to the General Fund. In this instance, ***all*** ratepayers – indeed all residents in PG&E's service territory – would benefit from a safer gas pipeline system paid for by PG&E. Also, as discussed above, directing the penalty to improving gas pipeline safety would in no way compromise the Commission's goal of deterrence.

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[42] Penalties POD at 28.

[43] The Penalties POD also states that the penalties adopted in the decision "shall not be considered 'paid' through prior, current or future pipeline safety investments" as if there were an important difference, from a deterrence perspective, between requiring PG&E to pay for future safety costs that ratepayers otherwise would bear and requiring PG&E to pay the same amount of money to the General Fund. Penalties POD at 84. The deterrence is the same, but only a penalty used to improve gas pipeline infrastructure would ensure that safety improvements are made at no expense to the ratepayers.

[44] As noted above, the discussion here focuses only on whether or not the penalty included in the Penalties POD should be used to improve gas pipeline safety without considering the fact that the $950 million fine lacks a legal basis and is constitutionally excessive.

[45] *See* Penalties POD at 27-28.

The penalty imposed on PG&E should, for all these reasons, be substantially reduced and should be directed towards pipeline safety improvements rather than as a fine paid to the state's General Fund.

C. The Commission Should Extend the Amount of Time for PG&E to Pay the Fine and Adopt PG&E's Implementation Plan for the Ordered Ratepayer Refund.

The Penalties POD orders PG&E to pay a $950 million fine within 40 days of the effective date of the order.[46] As discussed above, this amount is excessive as a fine and should be redirected as a penalty toward disallowed costs to pay for pipeline safety enhancements rather than being paid to the General Fund. In addition, 40 days is not enough time to raise the required funds, and as such PG&E requests that the Penalties POD be modified to allow PG&E 180 days from the date of the order to pay any fine.

First, like all public companies, PG&E is prohibited under federal and state securities laws from issuing public securities unless all material information has been disclosed.[47] Information about quarterly or annual financial results is considered material information. Therefore, PG&E is prohibited from selling securities during regular earnings "blackout periods" while its quarterly or annual financial information is being prepared. To ensure compliance with this prohibition, PG&E long ago adopted an Insider Trading Policy that imposes regular quarterly blackout periods beginning 14 calendar days before the end of a quarter and ending two trading days after the financial results are reported to the SEC. The length of PG&E's blackout period is consistent with that of other public companies.[48] PG&E's current blackout period began on September 15 and is scheduled to end on October 31, 2014. The next blackout period will begin approximately one week before the Boards of Directors of PG&E Corporation and PG&E meet in December 2014 and is scheduled to end in mid-February 2015, after the joint Annual Report on Form 10-K for the year ended December 31, 2014, has been filed with the SEC. As a result, depending on the timing of a final decision, it may be legally impossible for PG&E to issue public securities during the 40-day time period to

[46] Penalties POD, Ordering Paragraph 1, at 165. Ordering Paragraph 1 also specifies that the payment be made by check or money order. For purposes of efficiency PG&E requests permission to pay any fine ordered in these proceedings by wire, rather than check.
[47] *See, e.g.*, 15 U.S.C. § 77k(a); 15 U.S.C. § 771; Corp. Code § 25401.
[48] The Corporate Counsel's survey of public companies shows that the majority of blackout periods start from 8 to 21 days before a quarter ends. *See* http://www.thecorporatecounsel.net/survey/Feb12_total.htm.

pay for a fine. It is also possible that PG&E could be restricted from issuing public securities during other times throughout the year due to management's knowledge of material non-public information, as has occurred numerous times over the past few years. This would only compound the challenge of raising funds in a truncated time period.

Second, financial markets are volatile, and it is important that PG&E have the ability to carefully choose the optimal time to access the capital markets to raise such a considerable amount of cash. A large equity issuance by a utility is extremely unusual for any purpose, much less to fund a fine.[49] CPSD's witness Overland agreed that it is "intuitively obvious" that an "equity offering to fund a penalty is not going to be as well received by investors as would an offering to fund capital expenditures or an acquisition that would add to the earnings of the company," and also agreed that PG&E would not necessarily be able to pay a substantial fine in a short amount of time.[50] PG&E will need some flexibility in timing to ensure that the capital raising transaction is successful, and 40 days is not sufficient.

The Penalties POD also orders that PG&E refund to ratepayers $400 million of revenue requirement through the "Implementation Plan Rate" rate component. If the Commission ultimately adopts a refund in the Penalties POD, PG&E requests that the language in Ordering Paragraph 4 be revised to permit the option of a rate reduction and/or a one-time bill credit to implement the $400 million revenue requirement refund as follows (proposed revision in bold and underlined):

> 4. Pacific Gas and Electric Company shall submit a Tier 3 Advice Letter to revise its Preliminary Statement, Part B, to reflect the change to its "Implementation Plan Rate" rate component ***and/or propose a bill credit*** to reflect the decrease in revenue requirement adopted in Ordering Paragraph 3 within 45 days of the effective date of this decision.

The Commission would then be able to consider a rate reduction and/or bill credit proposal in addressing PG&E's Tier 3 Advice Letter.

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[49] From 2008 through 2012, only three utility equity issuances (for two utilities) exceeded $600 million. *See* Ex. Joint-66 at 25 (Figure 11) (PG&E/Fornell).

[50] Ex. Joint-53 at 9 (CPSD/Overland); *see also* Ex. Joint-66 at 3, 15 (PG&E/Fornell); Ex. Joint-60 (Overland agrees with PG&E's witness Fornell regarding this point); Joint R.T. 1383-84 (CPSD/Overland) (acknowledging PG&E could need up to a year to issue large amounts of equity).

For these reasons, PG&E requests that the Commission allow it 180 days to pay any fine ordered in these proceedings and adopt PG&E's proposed change to Ordering Paragraph 4 regarding the $400 million ratepayer refund.

D. PG&E Requests Limited Changes to the Ordered Remedies.

As discussed, PG&E embraces the operational remedies set forth in the Penalties POD. Here, PG&E requests modest changes to a limited number of remedies intended to enhance the efficacy of both PG&E's implementation and CPSD's auditing and oversight.

1. San Bruno OII CPSD Adopted Remedy 33

This remedy states (underlining added):

> PG&E's gas employee incentive plan shall include safety. PG&E shall revise its STIP program to make safety performance 40% of the score used to determine the total award. PG&E shall require all gas leaders including officers to participate in annual training activities that enhance and expand their knowledge of safety, including exercises in which gas leaders including officers will have an opportunity to enhance their knowledge of incident command and will participate in an annual safety leadership workshop.

The STIP (Short Term Incentive Program) referenced in the remedy is an incentive plan for certain PG&E employees. STIP is not limited to employees whose daily responsibilities involve PG&E's natural gas business. The STIP puts a portion of pay at risk if targeted objectives are not met.[51] The CPUC has recognized that incentive compensation is useful in helping companies meet a variety of goals, including diversity and customer service as well as safety.[52] PG&E does not believe the specific requirement that the safety component of STIP be set at 40% is necessary because PG&E is already meeting this requirement.

2. Records OII Adopted Remedy 14

This remedy states:

> PG&E shall create a standard format for the organization of a job file so that PG&E personnel will know exactly where to look in a job file folder, or set of file folders, to find each type of document associated with a job file. At a minimum, a job file will contain traceable, verifiable and complete records to support the MAOP of

[51] D.14-08-032 at 516.
[52] D.13-05-010 at 882.

> the pipeline segment installed; design documentation; purchase documentation showing the sources and specifications of equipment purchased; permits; environmental documents; field notes; design, construction and as-built drawings; x-ray reports and weld maps; pressure test records; correspondence with the CPUC; and inspection reports and correspondence.

PG&E's MAOP validation effort and records management improvement efforts have been reviewed and approved by the Commission in R.11-02-019.[53] As an alternative to the current phrasing of this remedy, PG&E requests that it be permitted to proceed with its Gas Transmission Asset Management Project (as presented in R.11-02-019 as part of PG&E's Pipeline Safety Enhancement Program Implementation Plan). In the alternative, PG&E requests to meet with the Commission's Safety and Enforcement Division to clarify the scope of record retention ordered by this remedy.

III. THE PENALTIES IMPOSED ARE BASED ON CLEAR LEGAL ERROR.

In imposing penalties on PG&E, the Penalties POD relies on findings from the respective PODs in the San Bruno, Records, and Class Location investigations.[54] The violations identified in those proceedings, however, result from multiple legal errors. Many of these violations lack the requisite statutory authority, as they are premised on the overbroad application of Public Utilities Code § 451 and Rule 1.1 of the Commission Rules of Practice and Procedure. The decisions also commit legal error in repeatedly finding "multiple" and "continuing" violations based on individual instances in which PG&E was found to have violated a statute or rule. A substantial number of the alleged violations are based on clearly impermissible applications of the principles of spoliation and hindsight, resulting in findings of violations without evidence of misconduct and when the record showed that PG&E did not know and could not have known of the circumstances on which the violations are based. These errors, individually and collectively, render many of the found violations invalid and mandate a substantial reduction in the penalty imposed on PG&E.

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[53] *See, e.g.*, *Rulemaking Decision Determining Maximum Allowable Operating Pressure Methodology & Requiring Filing of Natural Gas Transmission Pipeline Replacement or Testing Implementation Plans*, D.11-06-017, 2011 Cal. PUC LEXIS 324 (approving PG&E's MAOP validation methodology); PG&E' Aug. 26, 2011 Natural Gas Transmission Pipeline Replacement or Testing Implementation Plan at 32-34 (R.11-02-019).

[54] Penalties POD at 10-23, 75.

A. The PODs Impose Penalties Without Statutory Authority for the Underlying Violations.

Many of the violations on which the Penalties POD relies are premised on an overbroad and impermissible reading of Public Utilities Code § 451. As shown below, the Penalties POD's interpretation of § 451 is at odds with the basic principles of statutory construction. Additional alleged violations rely on a misapplication of Rule 1.1 of the Commission Rules of Practice and Procedure. The Commission should reduce or reject any penalty based upon these findings.

1. The penalty is based on an impermissible application of Section 451.

A significant number of the violations found in the Penalties POD – 2,019,750 all told, considering those deemed continuing – are based upon § 451 of the Public Utilities Code. That section, however, is a ratemaking provision and cannot serve as a free-floating source of pipeline safety requirements and penalties, as the Penalties POD erroneously concludes. The Penalties POD commits legal error in its application of § 451, and thus any penalty based on these purported violations is invalid.

a. Section 451 is a ratemaking provision.

Section 451 cannot reasonably be interpreted as imposing a general safety obligation on public utilities or authorizing penalties for violation of safety standards that are not specified in any statute, regulation, or Commission order. That section appears in Chapter 3, Article 1 of the Public Utilities Code, entitled "Rates," and is specifically titled "Just and reasonable charges, service, and rules." It reads as follows:

> All charges demanded or received by any public utility, or by any two or more public utilities, 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.
>
> Every public utility shall furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.
>
> All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

The placement of § 451 within the "Rates" article of the Public Utilities Code, the title of the provision, and the language and structure of the section itself require that it be interpreted as a ratemaking provision.[55] The first paragraph of § 451 mandates that a utility charge just and reasonable ***rates***; the second paragraph specifies what level of service a utility must furnish in exchange for receiving just and reasonable ***rates***; and the last paragraph specifies that any rules affecting ***rates*** must similarly be just and reasonable. To be sure, the provision states that a utility must maintain its services to promote "safety," but this requirement is explicitly tied to consideration of the rates that the utility may properly charge. Section 451 was written to address ratemaking and is relevant only in a ratemaking context.[56]

This reading is affirmed by extensive precedent. It has long been settled that § 451, by its terms, requires a balancing of several considerations. Most basically, § 451 requires a balancing of rates against the proper level of service.[57] As the Commission has long maintained, in determining the proper level of service, it must evaluate and balance what is adequate, efficient, just, and reasonable.[58] In achieving this balance, the safety of the public is one important consideration – as are the health, comfort, and convenience of the public and others. In setting

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[55] *See People v. Hull*, 1 Cal. 4th 266, 272 (1991) ("[I]t is well established that chapter and section headings of an act may properly be considered in determining legislative intent . . . and are entitled to considerable weight.") (internal citations and punctuation omitted).

[56] The PODs do not dispute that the statutory heading "Rates" is "entitled to considerable weight," but conclude that because Section 451 appears in Chapter 3 of the Act, titled "Rights and Obligations of Utilities," it is "entirely consistent" with the statutory scheme to interpret it as a free-standing utility safety obligation. San Bruno POD at 24-25; Records POD at 50-51; Class Location POD at 38. The PODs' analyses, however, rest on a critical error. In focusing on the heading of Chapter 3, the PODs ignore the more specific heading in Article 1 ("Rates"). It is a cardinal principle of interpretation that a specific provision prevails over a more general provision. *E.g.*, *S.F. Taxpayers Ass'n v. Bd. of Supervisors*, 2 Cal. 4th 571, 577 (1992). Thus, the relevant heading is the more specific one, Article 1 ("Rates"). Given the "considerable weight" to which statutory headings are entitled under California law, it would be anomalous to interpret § 451 as anything other than a ratemaking provision, especially where all of the other substantive provisions of Article 1 address ratemaking. On this point, it is notable that Chapter 4 ("Regulation of Public Utilities"), Section 3 ("Equipment, Practices, and Facilities") addresses utility "practices" and includes § 768, which concerns the Commission's regulation of safety issues. *See also infra* note 61 and accompanying text.

[57] *See Pac. Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 34 Cal. 2d 822, 826 (1950) (defining the Commission's primary purpose as "insur[ing] the public adequate service at reasonable rates without discrimination"); *see also Application of Pac. Gas & Elec. Co.*, D.00-02-046, 2000 Cal. PUC LEXIS 239, at *46 ("Our charge is to ensure that PG&E provides adequate service at just and reasonable rates").

[58] *See Corona City Council v. S. Cal. Gas Co.*, D.92-08-038, 1992 Cal. PUC LEXIS 563, at *28 ("SoCalGas argues that PU Code § 451 requires a balancing of the four factors: adequate, just, reasonable and efficient. We agree with SoCalGas that to determine the proper level of utility service we must carefully balance all four factors.").

just and reasonable rates, the Commission has broad latitude to adopt the safety standards that are consistent with the rates. Section 451 is, in other words, a ratemaking provision that allows the Commission to consider the relative "safety" of a utility's services and record in deciding the rates it may charge.

b. Section 451 cannot be interpreted to impose a stand-alone and absolute safety obligation.

PG&E is fully committed to safety, and with the substantial enhancements the company continues to make every day, PG&E's natural gas pipeline system will be safer than any state or federal regulation has ever required. However, reading § 451 to create a stand-alone, free-floating safety obligation, as the PODs do, is incompatible with the statutory text. That interpretation divorces one consideration (safety) from all the factors § 451 requires to be evaluated and balanced in setting just and reasonable rates. Not only does it ignore the four factors the Commission must balance when determining the level of service to require in exchange for reasonable rates ("adequate, efficient, just and reasonable"), it also ignores that the statute requires only that the quality of "service, instrumentalities, equipment, and facilities" approved by the Commission must "***promote*** . . . safety," not achieve it perfectly. In fact, had PG&E requested the rates needed to pursue safety at all costs, the Commission might have appropriately rejected the request as "gold-plating."[59] In short, an "absolute duty" of safety cannot be reconciled with the statutory text.

The PODs' mistaken interpretation of § 451 as imposing an "absolute duty" of safety – such that a utility could be found in violation based on new safety rules adopted years later – would also impermissibly render superfluous entire provisions of the Public Utilities Code and every Commission regulation that requires any safety measure of any kind.[60] Public Utilities Code § 768, for instance, authorizes the Commission to prescribe that utilities implement specified safety measures:

> The commission may, after a hearing, require every public utility to construct, maintain, and operate its line, plant, system,

[59] *See, e.g.*, *Application of Pac. Gas & Elec. Co.*, D.00-02-046, 2000 Cal. PUC LEXIS 239, at *65 (explaining in a rate case that "Section 451 does not require that ratepayers pay for the best service possible from a technological standpoint. We do not intend to set revenues at a level to provide funding for what some parties have called 'gold-plated' service").

[60] *See Klein v. United States*, 50 Cal. 4th 68, 80 (2010) (describing the rule of statutory construction that "courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous").

> equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public. The commission may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signaling. The commission may establish uniform or other standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand.

This provision would be surplusage if § 451 already provided the Commission with authority to prescribe or enforce general "safety" standards for utilities. Indeed, when adopting safety standards in the past, the Commission has notably relied not on § 451 but on § 768.[61]

The PODs' interpretation of § 451 as requiring compliance with not-yet-adopted safety standards would also render superfluous and unnecessary those "safety" rules adopted by the Commission pursuant to § 768. For example, one of the rules at issue in these proceedings, General Order 112 (GO 112, adopted in December 1960), requires utilities to comply with safety standards modeled on previously issued (voluntary) industry practice guidelines.[62] Yet the PODs hold that even before the Commission adopted this standard, § 451 already obligated California utilities to adhere to the as-yet unadopted standards because they reflected safe practices.[63] This is nonsensical: if the standards had already applied to California utilities through § 451, then the Commission's adoption of GO 112 in 1960 would have been a pointless and redundant rulemaking exercise.[64]

In response, the PODs conclude that their absolute interpretation of § 451 complements, rather than renders superfluous, specific safety standards.[65] But the PODs provide no explanation how, if that interpretation of § 451 is correct, specific safety standards could be

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[61] *See, e.g.*, *Investigation into the Need of a Gen. Order Governing Design*, *Constr., Testing*, *Maint. & Operation of Gas Transmission Pipeline Sys.*, D.61269 at 2, 4 (Cal. P.U.C. Dec. 28, 1960) (adopting General Order 112).

[62] Ex. San Bruno CPSD-5 at 1-2 (CPSD/Stepanian); Records R.T. 146 (CPSD/Halligan) (where Ms. Halligan explains that GO 112 modified the ASA B.31.8 standard to change the word "should" to "shall"); Records R.T. 161 (CPSD/Halligan).

[63] San Bruno POD at 32-33; Records POD at 60-61.

[64] Other parts of the Public Utilities Code would be similarly impacted. Public Utilities Code § 2794, for example, requires a gas or electric system acceptable for transfer to meet "the commission's general orders" regarding safety and reliability. The Legislature did not specify that the system must also comply with an "absolute duty" of safety that the PODs would graft onto § 451.

[65] San Bruno POD at 27-28; Records POD at 53-56; Class Location POD at 38-39.

anything other than redundant. Section 451 does not directly regulate conduct or "safety." Safety is only one element in a set of criteria to be applied by the Commission in determining rates, and specific safety regulations contain no hint that § 451 provides an overriding safety standard. The PODs' erroneous interpretation of § 451 would completely swallow the need for specific safety regulations because it would allow the Commission to find a violation wherever it determines, after the fact, that a utility's conduct was anything other than the safest possible. This would render meaningless every other safety provision under California law, contrary to basic principles of statutory construction.

The PODs' interpretation of § 451 is essentially an unlimited license for the Commission to second-guess any engineering decision or utility practice after the fact, and to impose crippling penalties for any practice it determines in hindsight to have been lacking from a safety perspective. It would be extraordinary to conclude that the Legislature prescribed such an extreme standard by making a mere passing reference to safety in a ratemaking provision. The Legislature would have spoken with a great deal more clarity had it intended to impose on every public utility in the state an "absolute" statutory duty of safety, enforced by massive financial penalties (§§ 2107-2108), and distinct from the Commission's explicit safety rulemaking authority and the rules promulgated thereunder. As the U.S. Supreme Court explained in an analogous context, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."[66]

Nor do any of the cases on which the PODs rely support their interpretation of § 451. The PODs rely most heavily on *Pacific Bell Wireless, LLC (Cingular) v. Public Utilities Commission*, 140 Cal. App. 4th 718 (2006), which sustained the Commission's reliance on § 451 over due process objections.[67] However, *Cingular* had nothing to do with safety: it involved a fine imposed by the Commission against a wireless telephone service provider for unjust and unreasonable practices related to an early termination fee and the failure to disclose network problems that misled consumers about the available coverage and service. *Cingular* did not address the statutory interpretation issue presented here – that is, whether § 451 can serve as a free-floating source of safety requirements. In another case cited in the PODs, *Carey v. Pacific*

[66] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).
[67] *See* San Bruno POD at 29-34; Records POD at 51-53.

Gas & Electric Co., D.99-04-029, 1999 Cal. PUC LEXIS 215, the holding likewise did not address the statutory interpretation question of whether § 451 imposes a stand-alone safety obligation, and thus also does not constitute precedent on this point. Similarly, *San Diego Gas & Elec. Co. v. Superior Court*, 13 Cal. 4th 893, 924 (1996), cited in the Records POD, does not at any point suggest that § 451 imposed any self-executing or stand-alone safety requirements, much less an "absolute duty" of safety to be applied based on standards adopted after the fact, and in fact identified § 768 as supporting the Commission's authority to adopt and enforce safety regulations. The court's reasoning in this regard would be inexplicable if § 451 carried the expansive meaning the PODs claim can be found in its text.[68]

The Records POD also posits that its interpretation of § 451 is necessary to avoid the "absurd result" of concluding that prior to adoption of GO 112 California had no laws mandating the safe operation of gas facilities and gas operators like PG&E "could engage in unsafe practices with impunity."[69] This, of course, is not the case. Although § 451 did not and does not grant authority for the Commission to impose sanctions for particular violations of "safety" standards, it clearly allows the Commission to consider a utility's record on "safety" issues in setting rates – meaning that a utility that engaged in unsafe practices would face the possibility of monetary disallowances equally as great and often greater than any penalties that might have been imposed for specific violations of safety provisions. Conversely, investments needed for safe operations are to be considered when setting rates.

In sum, the PODs misapply § 451. The provision addresses safety only as one element among several considerations that must be balanced as part of a § 451 inquiry aimed at determining just and reasonable rates and commensurate levels of service. To read § 451 as incorporating an independent source for enforcing every conceivable safety measure the Commission determines in hindsight should have been taken would defeat the objectives of the broader statutory scheme of the Public Utilities Code, and would raise further concerns under the Due Process Clauses of the United States and California Constitutions that can and should be avoided through a more limited interpretation.[70]

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[68] *See* Records POD at 52.
[69] *See* Records POD at 53.
[70] *See, e.g.*, *Ass'n for Retarded Citizens v. Dep't of Developmental Servs.*, 38 Cal. 3d 384, 394 (1985) (holding that "[w]hen faced with a statute reasonably susceptible of two or more interpretations, of which at least one raises constitutional questions, we should construe it in a manner that avoids *any* doubt about

c. Section 451 cannot be read to incorporate separate industry standards and regulations.

Even if § 451 could be construed as authorizing the imposition of penalties based on "safety" violations (which it cannot), it is in all events clear that the section cannot be interpreted – as the PODs do – to implicitly incorporate separate industry standards and regulations. Such an interpretation is absolutely inconsistent with the language of the provision.

Section 451 states simply that a utility should maintain its "service, instrumentalities, equipment, and facilities" so as to promote "safety," among other interests. It includes no reference to other standards that are or may be adopted (as does, for instance, § 768), nor does it indicate or suggest that a violation of such a standard, even if related to "safety," could itself constitute a violation of § 451. To the contrary, the language of § 451 would appear to contemplate that the "safety" assessment should be conducted in a holistic and essentially binary fashion, with the utility's "service, instrumentalities, equipment, and facilities" deemed either safe or unsafe overall, without regard to the nature and number of individual issues or independent violations of separate safety standards that may bear upon that assessment. Certainly nothing in the provision can be read as expressly incorporating such standards, much less deeming each violation of them to also constitute an independent violation of § 451.

Interpreting § 451 to incorporate extrinsic safety standards would further exacerbate the due process concerns implicated by the Commission's overly broad (and essentially boundless) view of the authority conveyed by § 451, as it would render utilities potentially doubly liable for any violation of any rule or regulation, without any notice that such punishment might be imposed. This is especially and obviously true for industry standards that have not yet been adopted through statute or rule and, indeed, may never be adopted. Such standards are by their nature voluntary, and unless and until mandated by regulation noncompliance with them cannot be deemed a legal violation. Nothing in § 451 suggests or supports a contrary result.

The Commission's own practice demonstrates its understanding that voluntary standards cannot be enforced through § 451. For example, between 1956 and 1961, PG&E generally adhered to the ASME B.31.8 voluntary industry standards, as did other California utilities. In July 1961, the Commission began regulating the design, construction, operation, and

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its validity") (citing *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 407-08 (1909); *Carlos v. Super. Ct.*, 35 Cal. 3d 131, 147 (1983); *Cal. Hous. Fin. Agency v. Elliott*, 17 Cal. 3d 575, 594 (1976)).

maintenance of natural gas pipelines in California under GO 112, which the Commission adopted in 1960 pursuant to § 768.[71] GO 112 expressly incorporated the ASME B.31.8 1958 edition with modifications, thereby giving those standards the force of law in California.[72] Recognizing that the standards were up to that point voluntary, the Commission modified ASME B.31.8 at the time of its adoption to make certain its provisions were "mandatory rather than ***left optional***."[73] It would have been unnecessary for the Commission to make any provision of ASME B.31.8 "mandatory rather than left optional" if compliance with ASME B.31.8 was already mandated by § 451. In fact, the very words "left optional" confirm beyond doubt that ASME B.31.8 was exactly that – optional – before 1960.

In short, while § 451 cannot reasonably be interpreted to incorporate separate safety rules and regulations, it would be doubly inappropriate to construe it as incorporating voluntary industry standards and guidelines. Insofar as the PODs find that PG&E violated such rules and standards, including specifically the ASME B.31.8 standards prior to the effective date of GO 112 (July 1, 1961),[74] those findings are not authorized by § 451 and cannot support the imposition of penalties.[75]

2. The Penalties POD misapplies Rule 1.1.

Several other violations for which penalties are assessed are based not on § 451 but on Rule 1.1 of the Commission Rules of Practice and Procedure.[76] Notwithstanding the absence of any evidence that PG&E intended to mislead the Commission or its staff,[77] the Records POD concludes that PG&E "misl[e]d the Commission or its staff by an artifice or false statement of

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[71] D.61269 at 2, 4.
[72] D.61269, Appendix A, § 107.2; Ex. San Bruno CPSD-9 (NTSB Report) at 34.
[73] D.61269 at 11 (emphasis added).
[74] *See, e.g.*, San Bruno POD at 35-36; Records POD at 60. The Records POD insists that rather than making compliance with ASME B.31.8 mandatory, it only considers compliance with ASME B.31.8 as "relevant to assessing whether PG&E fulfilled the safety obligation under Pub. Util. Code § 451 prior to 1960." Records POD at 54-55. This is a distinction without a difference. Many of the individual § 451 violations found by the PODs reason that PG&E's purported violations of ASME B.31.8 *ipso facto* constitute violations of § 451 as well. Moreover, the Records POD's reasoning would only exacerbate the due process infirmity by untethering the violations from identifiable (albeit non-binding) industry standards.
[75] The violations implicated by the incorrect interpretation of § 451 include all those premised on that provision, including San Bruno Violations 1-8, 17, 19, 21, 31, and 32; Records Violations 1-11, 15-24, and 31-33; and the 199 violations of § 451 alleged in the Class Location POD.
[76] Penalties POD at 49, 58.
[77] Records POD at 131 ("In this instance, PG&E may very well have mistakenly believed that the video in Camera 6 had been overwritten.").

fact or law,"[78] in violation of Rule 1.1, by mistakenly characterizing the status of a video recording and omitting certain personnel information in two separate responses to discovery requests.[79] These findings and the POD's holding that "there is no requirement that there be an intention to mislead the Commission" under Rule 1.1[80] are erroneous because a violation of Rule 1.1 may be found and sanctions imposed only upon proof of an intent to mislead.

Rule 1.1 can only be read as incorporating an intent element. The Rule states that any person who transacts business with the Commission "agrees . . . never to mislead the Commission or its staff by an artifice or false statement of fact or law."[81] The verb "mislead," particularly as used in this context, necessarily implies a purposeful action – one taken with the affirmative intent to "deceive" the Commission.[82] The terms "artifice" and "false statement" confirm this reading of the Rule, as they necessarily incorporate an element of intentional deception as opposed to, *e.g.*, mere inadvertence. This reading is, indeed, required by a long line of precedent holding that penal statutes must be presumed to carry a *mens rea* element[83] and numerous decisions from this and other jurisdictions interpreting similar provisions.[84] Consistent with the Rule's language and purpose and these precedents, Rule 1.1 must be read to require an intent to mislead the Commission.[85]

B. The PODs Commit Legal Error in Quantifying the Alleged Violations and Characterizing the Violations As Continuing.

In addition to finding alleged violations lacking in any applicable statutory authority, the decisions also dramatically inflate the total number of violations on which the penalty is based

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[78] Comm'n Rules of Practice and Proc., Rule 1.1.
[79] Records POD at 131-32.
[80] Records POD at 130.
[81] Comm'n Rules of Practice and Proc., Rule 1.1.
[82] *Oxford English Dictionary* (3d ed. 2002) (definition of "mislead"); *see also Flores-Figueroa v. United States*, 556 U.S. 646, 649-51 (2009) (addressing interpretation of transitive verbs in statutes).
[83] *E.g.*, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) ("The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence."); *see also Staples v. United States*, 511 U.S. 600, 604-06 (1994); *Morissette v. United States*, 342 U.S. 246, 250 (1952); *United States v. Project on Gov't Oversight*, 616 F.3d 544, 549 (D.C. Cir. 2010); *United States v. Semenza*, 835 F.2d 223, 224 (9th Cir. 1987) ("Absent a clear indication of legislative intent, courts should be reluctant to dispense with a mens rea requirement.").
[84] *See, e.g.*, *Schaefer v. State Bar of Cal.*, 26 Cal. 2d 739, 748 (1945) ("[S]ince it does not appear that petitioner intentionally attempted to mislead the court, we do not believe the incident warrants the imposition of disciplinary punishment."); *In re Attorney C*, 47 P.3d 1167, 1174 (Colo. 2002) (prosecutor's duty to timely disclose exculpatory evidence includes *mens rea* of intent).
[85] The violations implicated by the incorrect interpretation of Rule 1.1 include Records Violations 12-14.

by repeatedly finding duplicative violations premised on individual acts or omissions and by improperly characterizing one-time events as "continuing" violations. These findings are at odds with the fundamental principle that a discrete instance of misconduct can support only a single violation of a statutory or regulatory provision.

1. The penalty is improperly based on numerous duplicative and overlapping violations.

A fundamental principle of statutory construction, with roots in due process principles, is that a statute cannot be interpreted to allow the imposition of "double penalties for the same conduct."[86] As the court of appeal has explained, "overlapping damage awards violate that sense of fundamental fairness which lies at the heart of constitutional due process."[87]

This principle is clearly and repeatedly contravened by the PODs, which find multiple and overlapping violations of the same statutory and regulatory provisions based on the same conduct and course of conduct, thus exponentially inflating the total number of "separate" adjudicated violations. These exaggerated numbers of violations cannot support the penalty imposed on PG&E.

Some of the most egregious examples of duplicative violations occur across the different PODs. For example, the Penalties POD bases its findings and conclusions in part on three separate allegations found in the San Bruno, Records, and Class Location OIIs (San Bruno OII alleged Violation 8, Records OII alleged Violation 24, and Class Location OII alleged Violation 1) that PG&E improperly used assumed Specified Minimum Yield Strength ("SMYS") values greater than 24,000 psi.[88] However, the fact that an assumed value – once assumed, and even if it should not have been – is utilized in various aspects of PG&E's pipeline operations does not form a proper basis for multiple violations premised on the same initial act.

The same can be said for many of the "documentation" violations adjudicated in each of the proceedings. For instance, both the San Bruno POD and the Records POD find violations based on PG&E's purported failure to maintain adequate documentation establishing the MAOP

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[86] *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 912 (2001).
[87] *Troensegaard v. Silvercrest Indus.*, 175 Cal. App. 3d 218, 227-28 (1985) (internal quotation marks omitted).
[88] Penalties POD at 21-22.

for Line 132.[89] While the Penalties POD attempts to justify this result on grounds that the San Bruno POD addresses the records maintained during the pipeline's installation (in the 1950s), whereas the Records POD addresses the records available during pressure testing conducted decades later, this distinction is functionally meaningless and does not change the fact that both PODs find violations based on the absence of the same records relating to Line 132. Similarly, the Penalties POD relies on findings from both the San Bruno and Records OIIs that PG&E's clearance documentation did not meet company standards but, even after recognizing that those findings are duplicative at least in part,[90] goes on to impose separate penalties for them.[91] As a final example, the Penalties POD relies on findings regarding deficiencies in PG&E's GIS data from both the San Bruno and Records PODs[92] and justifies treating them separately on the ground that the San Bruno violation is found under 49 C.F.R. § 192.917(b) while the Records violations are based on § 451.[93] As with the Penalties POD's other attempts to justify its duplicative findings, this argument does not address the fact that all three purported violations of law are premised on identical underlying facts. These and other duplicative alleged violations across different proceedings cannot properly constitute separate offenses.

The penalty is also based on duplicative violations found within the respective proceedings. In relying on findings from the San Bruno OII, the POD counts broad violations followed by more specific violations that are encompassed within the broader violation. For example, in the San Bruno POD Violation 8 is premised on § 451, for "[v]iolation of industry standards [ASME B.31.8-1955] by installing pipe unsafe for operational conditions."[94] Violations 1 through 7 are each based on individual "industry standards" from ASME B.31.8-1955, all relating to the installation of the Segment 180 pipe and all encompassed by Violation 8. This duplication can also be observed in Violations 18 and 19, where the San Bruno POD finds

[89] San Bruno POD at 89-91 (Violation 7: "Establishment of Design Pressure and MAOP"); Records POD at 100-04 (Violation 4: "Underlying Records Related to Maximum Allowable Operating Pressure on Segment 180").
[90] San Bruno POD, Appendix B at B-2 (San Bruno OII alleged Violation 30); Records POD, Appendix B at 1 (Records OII alleged Violation 5).
[91] San Bruno POD at 155 (Violation 18); Records POD at 107-111 (Violation 5).
[92] Penalties POD at 23 (San Bruno OII alleged Violation 15, Records OII alleged Violations 24-25).
[93] Penalties POD at 23.
[94] San Bruno POD, Appendix B at B-1.

separate violations of 49 C.F.R. § 192.913(c) and § 451 for the same conduct, "[f]ailure to follow internal work procedures."[95]

Other examples appear in the Records OII. For instance, the Records POD finds a violation based in large part on CPSD's inability, through what the Records POD acknowledges was a "limited review," to locate certain of PG&E's leak records.[96] As a basis for its findings the Records POD cites to PG&E's testimony that it maintained leak records in job files as well as in local offices.[97] While the reasoning is not entirely clear, the Records POD appears to justify its finding of a violation because of the decentralized nature of those records. The Records POD then finds a further violation for PG&E's failure to maintain a "complete and readily accessible database" for its leak records.[98] These violations are premised on the same course of conduct, namely PG&E's historic practices for maintaining leak records, and thus even if supported by the facts would be properly alleged only as a single violation. In another example, the Records POD premises one violation on a finding that PG&E did not document the source of pipe used in the 1956 relocation of Line 132, Segment 180.[99] The Records POD then finds a second violation on the basis that PG&E did not maintain adequate records for the 1956 relocation of Line 132, Segment 180.[100] But because the pipeline specifications for Segment 180 are a subset of the records the Records POD finds should be included in the job files,[101] the first violation should have been properly subsumed within the second, rather than counted as an independent violation.[102]

The number of violations was further, and dramatically, inflated as a result of the Class Location POD's counting violations of various standards and rules on a per-"segment" basis. PG&E uses the term "pipeline segment" to identify a continuous length of pipe with similar characteristics (pipe specifications, class location, etc.), i.e., a new segment is designated anytime material pipe characteristics differ. Notwithstanding that this internal classification

[95] San Bruno POD, Appendix B at B-2.
[96] Records POD at 166-74 (Records Violations 21 and 22). The Records POD combines two violations originally charged separately by CPSD into a single violation.
[97] Records POD at 170.
[98] Records POD at 245-46 (Records Violation C.3).
[99] Records POD at 87 (Records Violation 1).
[100] Records POD at 94 (Records Violation 2).
[101] Records POD at 92.
[102] The fact that the Records POD also finds Violations 1 and 2 to be "continuing" each day from 1956 through September 9, 2010 further improperly overstates the number of violations. *See infra* Section III.B.2.

carries no legal significance, and despite the fact that the number and identity of PG&E's pipeline segments regularly fluctuate due to maintenance activities and the installation of new components, the Class Location POD concluded that for any breach of a rule or regulation that affected or related to multiple pipeline "segments," as defined by PG&E, each of those segments constituted a separate violation. It explained that, in its view, "[s]ince PG&E identified these segments, it cannot now argue that there is no violation simply because previously identified segments have changed or no longer exist."[103] This explanation, besides being itself illogical and inappropriate, cannot justify the double, triple, quadruple, and even quintuple-counting of individual segments affected by a single class location change.

In addition, the PODs then improperly rely on many of the violations to find yet further violations. For instance, the Class Location POD finds at various points that PG&E's failure to correctly designate the classification of a segment constituted a violation of applicable standards. It then goes on to find that the consequences of that violation – including, as just one example, that as a result of the misclassification PG&E did not apply the maximum allowable operating pressure that would have been consistent with the correct classification[104] – themselves constituted separate violations of related safety standards. These cascading violations are based only on a single alleged error by PG&E, which should at most have been counted as a single violation.

These and other duplicative findings across and within the PODs account for thousands of the adjudicated findings. Indeed, for many of the alleged offenses, including those relating to § 451, the appropriate result would be for the Commission to deem PG&E's conduct – if properly held a breach of any provision at all – to constitute a single violation. In any event, however, it is clear that the violations that are impermissibly duplicative are not valid and cannot support imposition of the penalty.[105]

2. The penalty is based on flawed reckoning of "continuing" violations under Section 2108.

Equally problematic is the PODs' conclusion that many of the violations may be deemed "continuing" in nature, supporting the imposition of cumulative penalties under Public Utilities

[103] Class Location POD at 22.
[104] Class Location POD at 49.
[105] The violations implicated by the incorrect quantification of violations include (among others) San Bruno Violations 1-8, 10, 15, 17, 18, 19, 20-29, and 31-32; Records Violations 1-11, 13-24, 28, and 31-33 and all violations listed in the Class Location POD Table of Violations.

Code § 2108. This conclusion was based in large part on the assumption that a specific act that was a violation on the day it occurred remains a "continuing violation" every day it is not corrected or its effects linger. That assumption is flatly inconsistent with the statutory language – which refers not to "un-remediated" violations, but to "continuing" ones – and governing case law, and should be rejected.

Section 2108 provides: "Every violation of . . . [a] rule . . . of the commission . . . is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense." This language by its terms provides that a violation will generally be considered a "separate and distinct" event – ***unless*** the party continues to engage in the same conduct, in which case, a new violation will be recognized for each day during which that conduct continues. As its language makes clear, § 2108 applies only to violations that ***continue*** over time, not to the subsequent consequences of finite events that themselves constitute a violation.[106] Courts in other contexts have also defined continuing violations as courses of unlawful conduct that continue over a period of time.[107]

A penalty based upon the boundless theory that ongoing consequences cause an otherwise finite act to continue indefinitely violates California Supreme Court precedent. The California Supreme Court has "[u]niformly . . . looked with disfavor on ever-mounting penalties and [has] narrowly construed the statutes which either require or permit them."[108] *People ex rel. Younger v. Superior Court*, 16 Cal. 3d 30 (1976), is particularly instructive. In that case, the court construed Water Code § 13350(a), which at the time imposed a penalty of $6,000 "for each day in which [an unlawful oil] deposit occurs." The court found this language to be ambiguous

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[106] *Investigation of Qwest Commc'ns Corp.*, D.03-01-087, 2003 Cal. PUC LEXIS 67, at *20-21 ("The Commission has calculated fines on the basis of Section 2108 in cases where the evidence established that. . . practices that violated statutory or decisional standards had occurred over a period of time, rather than specific instances of violations."); *cf. People v. W. Air Lines*, *Inc.*, 42 Cal. 2d 621 (1954) (upholding daily penalties under Section 2107 during time period in which the airline continued to sell tickets at unreasonable prices not approved by the Commission).

[107] *See, e.g.*, *Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) (en banc) ("[A] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)); *Ward*, 650 F.2d at 1147; *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 823 (2001); *Birchstein v. New United Motor Mfg., Inc.*, 92 Cal. App. 4th 994, 1006 (2001).

[108] *Hale v. Morgan*, 22 Cal. 3d 388, 401 (1978)*; accord Walnut Creek Manor v. Fair Emp't & Hous. Comm'n*, 54 Cal. 3d 245, 271 (1991). Statutes permitting penalties for continuing violations are anomalies. Civil penalty provisions are generally "limited either to a fixed multiple of actual damages, to a specified total amount per 'violation' or to a fixed duration." *Hale*, 22 Cal. 3d at 401.

regarding the two competing interpretations urged by the parties: the penalty is imposed for (1) each day the oil remained in the water; or (2) each day the process of deposit lasted.[109] The court adopted the latter, narrower construction because the alternative – each day the oil remained on the water – was illogical and unduly punitive.[110] Unlike the statute in *Younger*, § 2108 is not ambiguous. But, even if a strained reading of the statute could allow for a "continuing violation" to be found based on the mere failure to right a wrong, under *Younger*, the Commission must reject that interpretation in favor of the narrower construction in which a violation is deemed "continuing" – and cumulative penalties authorized – only when the misconduct at issue was actually ongoing.[111]

The Penalties POD and the Records POD on which it relies fail to address the Supreme Court's decision and reasoning in *Younger,* which PG&E raised in its post-hearing briefing.[112] Under these PODs' holdings, the continued absence of a record – even a record that may never have existed in the first place – makes a violation continuing until that record appears. This approach conflates the specific act that constitutes the violation (*e.g.*, the failure to preserve the record) with a consequence that flows from the act (*e.g.*, the record remaining unavailable indefinitely into the future), and runs directly contrary to the presumption that cumulative penalty statutes such as § 2108 must be construed narrowly.

The San Bruno POD, by contrast, agreed with and adopted PG&E's interpretation of the statute: "[W]e note as a general matter our concurrence with PG&E that for a continuing violation to occur under Section 2108, ***it is the violation itself that must be ongoing, not its result***."[113] As an example, Judge Wetzell noted that "it is only logical that a requirement to visually inspect a pipe segment prior to or during installation ***cannot be continuously violated***

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[109] *Younger*, 16 Cal. 3d at 43.

[110] *Younger*, 16 Cal. 3d at 44 (interpreting statute to impose a penalty "for each day in which oil ***is deposited*** in the waters of the state and not for each day during which such oil ***remains*** in the waters") (emphasis added).

[111] *Younger*, 16 Cal. 3d at 44; *see also Doran v. Embassy Suites Hotel*, 2002 U.S. Dist. LEXIS 16116, at *16 (N.D. Cal. Aug. 22, 2002) ("Even where the Legislature provides for daily damages . . . California courts have 'looked with disfavor on ever-mounting penalties and have narrowly construed the statutes which either require or permit them.") (quoting *Hale*, 22 Cal. 3d at 383-84).

[112] PG&E Records Opening Brief at 40-41.

[113] San Bruno POD at 63 (emphasis added); *see also id*. at 233, Conclusion of Law No. 11 ("For a continuing violation to occur under Section 2108, it is the violation itself that must be ongoing, not its result."). Inexplicably, the San Bruno POD still found some continuing violations that are inconsistent with this conclusion of law. *See*, *e.g.*, San Bruno POD Violation 1 (failure to conduct hydrostatic test on Line 132, Segment 180).

after the installation has occurred."[114] This interpretation of § 2108 – which is the only interpretation permissible under a plain reading of the statute and pursuant to the jurisprudence regarding continuing violations – is entirely at odds with the application of § 2108 in the Records POD and forecloses many of the alleged continuing violations identified in this proceeding and on which the Penalties POD relies.[115]

C. The PODs Commit Legal Error in Assessing the Record.

The decisions on which the penalty is based also commit legal error in their assessment of the record. A significant number of the alleged violations are based on a misapplication of the spoliation doctrine, resulting in findings of violations without evidence of misconduct. The decisions also use impermissible hindsight to find violations of law where the record shows that PG&E did not know and could not have known of the relevant circumstances.

1. The penalty is based on improper application of the spoliation doctrine.

Among the most significant of the legal errors that colored the PODs assessment of the record was the holding that spoliation had been established, based on PG&E's loss or inability to locate pipeline and other records since the 1950s, and on that basis any and all "adverse inferences" could be drawn against PG&E with respect to what those records might have shown. This represents a serious misapplication of the spoliation doctrine, and calls into doubt large parts of the PODs' analyses and conclusions.

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or ***reasonably*** foreseeable litigation."[116] Without any analysis of how courts apply the "reasonably foreseeable litigation" element, the Records POD assumes that because of the breadth of PG&E's operations, "it would be logical to conclude that PG&E should have reasonably foreseen ***some sort of future litigation***."[117] In other words, the Records POD concludes that PG&E should have been on

[114] San Bruno POD at 63 (emphasis added).
[115] The violations implicated by the incorrect interpretation of § 2108 include all those premised on that provision, including San Bruno Violations 1, 8-17, 21, and 32; Records Violations 1-7, 9-10, and 12-33; and all violations listed in the Class Location POD Table of Violations.
[116] Records POD at 42 (citing *Reeves v. MV Transp., Inc.*, 186 Cal. App. 4th 666, 681 (2010) (emphasis added by POD)).
[117] Records POD at 43 (emphasis added).

notice as far back as over 80 years ago that there would be "some sort of future litigation" that would have required PG&E to preserve essentially every one of its documents.

This application of the spoliation doctrine is improper. A "general concern over litigation" does not satisfy the reasonable foreseeability prong of the doctrine.[118] The duty to preserve documents only arises when a party "reasonably should know that evidence may be relevant to anticipated litigation."[119] The question of whether litigation is reasonably foreseeable is determined based on an objective standard which requires an evaluation of whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.[120] "This standard does not trigger the duty to preserve documents from the ***mere existence of a potential claim or the distant possibility of litigation***."[121] Rather, identification of a specific potential claim is a signal that litigation is reasonably foreseeable.[122]

The Records POD fails to apply this objective standard. Instead, the Records POD effectively rules that any party subject to the Commission's jurisdiction is on notice that it might be subject to some ***unidentifiable*** litigation at some ***unidentified*** point in the future and accordingly any destruction of documents, even pursuant to a proper record retention policy, risks future application of the spoliation doctrine. Case law has rejected such an overreaching proposition: "In our opinion, such remote prelitigation document destruction would not be

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[118] *Bel Air Mart v. Arnold Cleaners, Inc.*, No. 2:10-cv-02392-MCE-EFB, 2014 U.S. Dist. LEXIS 23867, at *14, *19 (E.D. Cal. Feb. 21, 2014) (citing *Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc.*, 264 F.R.D. 517, 526 (N.D. Cal. 2006)) (denying motion for spoliation sanctions because "it is not clear that Bel Air knew or reasonably should have known that the destroyed evidence might be relevant to future litigation at the time it removed the building in question"); *see also Willard v. Caterpillar, Inc.*, 40 Cal. App. 4th 892, 922-23 (1995) (case law demonstrates "'common understanding of society' regarding the wrongfulness of evidence destruction is tied to the temporal proximity between the destruction and the litigation interference and the foreseeability of the harm to the nonspoliating litigant resulting from the destruction. There is a tendency to impose greater responsibility on the defendant when its spoliation will clearly interfere with the plaintiff's prospective lawsuit and to impose less responsibility when the interference is less predictable."), *disapproved on other grounds by Cedars-Sinai Med. Ctr. v. Super. Ct.*, 18 Cal. 4th 1 (1998).

[119] *Bel Air Mart*, 2014 U.S. Dist. LEXIS 23867, at * 13; *see also Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

[120] *Micron Tech., Inc. v. Rambus, Inc.*, 645 F. 3d 1311, 1320 (Fed. Cir. 2011); *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1145 (N.D. Cal. 2012) (phrase "reasonably foreseeable" sets an objective standard for a party's duty to preserve).

[121] *Micron Tech., Inc.*, 645 F.3d at 1320 (emphasis added) (citing *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681-82 (7th Cir. 2008)).

[122] *Bel Air Mart*, 2014 U.S. Dist. LEXIS 23867, at *14; *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 991 (N.D. Cal. 2012) (trial courts in Ninth Circuit generally agree that duty to preserve is triggered when potential claim is identified).

commonly understood by society as unfair or immoral."[123] The fact that a company operates natural gas pipelines does not subject it to a higher standard or automatically put it on notice of foreseeable litigation regarding every aspect of its pipeline operations.

The Records POD's application of the spoliation doctrine contravenes both jurisprudence and common sense, and the implications are breathtaking in scope. Litigation is among the potential consequences of ***any*** failure of infrastructure or engineering – whether building or bridge, road or rail, plane or pipeline – regardless of the era of original construction or the recordkeeping requirements then in existence. The threat of adverse inferences as articulated in the Records POD would subject every party to an indefinite duty to preserve documents before any litigation had been anticipated or commenced without an opportunity to ascertain what documents are relevant to the litigation and thus, what documents must be preserved. This application also would allow for a finding that a party improperly "destroyed" materials when the party had no improper intent and did not know the documents were lost. Indeed, it would allow such a finding even when the documents never existed in the first instance. This approach is, again, contrary to governing law – which requires evidence of "willful suppression"[124] – and it resulted here in a spoliation finding that could not properly be made. The Records POD represents an unprecedented and untenable expansion of the spoliation doctrine that must be rejected.[125]

This conclusion in turn requires reconsidering a number of the PODs' findings, particularly those deeming PG&E in violation of recordkeeping requirements. For most of those findings the record did not contain any evidence that PG&E actually failed to create or maintain

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[123] *See Willard*, 40 Cal. App. 4th at 923 (finding prelitigation document destruction that started 10 years prior to the litigation did not constitute spoliation).

[124] *New Albertsons, Inc. v. Super. Ct.*, 168 Cal. App. 4th 1403, 1434 (2008); *see also In re Moore's Estate*, 180 Cal. 570, 585 (1919).

[125] *See United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002) (spoliation occurs if party "'had some notice that the documents were potentially relevant' to the litigation before they were destroyed"); *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991) (spoliation often requires notice that the documents are relevant to the litigation); *see also id.* at 161 (finding district court improperly shifted burden by using adverse inference because nothing in the record indicated government destroyed documents in response to the litigation, its destruction of the records does not suggest the records would have been threatening to the defense, and thus, the destruction of documents was not relevant). While courts in the Ninth Circuit have not applied an adverse inference unless the destruction was willful or grossly negligent, even simple negligence requires the party seeking the inference to prove relevance of the documents and prejudice suffered to justify the severe sanction. *E.g.*, *Reinsdorf v. Skechers USA, Inc.*, 296 F.R.D. 604, 627-28 (C.D. Cal. 2013); *see Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

adequate records, or that the lack of a particular record impacted PG&E's operations. Rather, the PODs relied entirely on the adverse inference – available in their view by virtue of the spoliation holding – to conclude that in the absence of ***any*** evidence the issues could be decided against PG&E. The PODs thus effectively shifted the burden of proof to PG&E through the use of the adverse inference. However, California law is clear that, even where a party's spoliation of evidence justifies an adverse inference, the inference "does not relieve the other party from introducing evidence tending affirmatively to prove his case, in so far as he has the burden of proof."[126] Here, it is undisputed that CPSD bore the burden of proof in these proceedings.[127] Thus, even if an adverse inference were permissible here – which it is not – it would not be sufficient to support the PODs' findings. These findings must be rejected, and the penalties on which the findings are based must be reassessed.[128]

2. The PODs improperly find violations based on hindsight.

It is well-settled, and indeed axiomatic, that a party generally cannot be found to have breached a legal obligation or violated a statutory or regulatory provision unless the circumstances surrounding the violation are known or at least knowable to the party at the time of the event. This is true even for so-called strict liability offenses: while the party need not intend for the violation to occur, the facts that render the conduct unlawful must at least be discernible to the party at the time.[129] Accordingly, only evidence of those facts of which a party was or could reasonably have been aware may properly be considered and relied upon in holding a party liable for an offense.

This core principle was not followed here. In a number of findings, particularly those relating to the installation of Segment 180 in 1956, the PODs deem PG&E's conduct in violation of applicable rules and standards despite the fact that PG&E did not know and could not have known of the facts that rendered the conduct allegedly unlawful. The San Bruno POD, for

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[126] *Estate of Bould v. DaBell*, 135 Cal. App. 2d 260, 265 (1955); *see also Fox v. Hale & Norcross Silver Mining Co.*, 108 Cal. 369, 416 (1895); *Reeves*, 186 Cal. App. 4th at 682 ("[S]poliation of evidence alone does not necessarily create a triable issue"); *5501 Hollywood, Inc. v. Dep't of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 754-55 (1957).

[127] Records POD at 39-43.

[128] The violations implicated by the incorrect application of the spoliation doctrine and improper reliance on adverse inferences include (among others) San Bruno Violations 1-2, 4, 9-17, 19-20, 23, 29-31; Records Violations 1-11, 15--33; and the 133 violations of 49 C.F.R. § 192.107(b) (assumed SMYS values) and the 133 violations of § 451 (assumed SMYS values) alleged in the Class Location POD.

[129] *See, e.g.*, *Lambert v. California*, 355 U.S. 225, 228 (1957).

instance, holds that PG&E violated industry standards when during installation it assigned to Segment 180 a "yield strength" higher than that appropriate for a pipe of "unknown" specification.[130] However, PG&E did not discern and could not have discerned that a lower yield strength was warranted because the pipeline was in fact not classified as "unknown" at that time and indeed it would have been inappropriate to do so based on the circumstances as they existed.[131] Similarly, the San Bruno POD concludes that before the San Bruno accident PG&E should have deemed the relevant pipeline a safety risk because it used "double submerged arc welded pipe,"[132] even though it is undisputed that prior to 2010 such pipes were deemed reliable and safe by the natural gas pipeline industry, pipeline industry experts, and pipeline regulators, as well as by the pipeline safety standards and regulations.[133] These and other findings premised on facts known or assumed now, but unknown and unknowable at the time of the alleged misconduct, cannot support the adjudication of violations. Those violations and the penalties based upon them must therefore be reassessed.[134]

IV. THE PENALTIES IMPOSED ARE UNCONSTITUTIONAL

The errors on which the penalty is based are not limited to misapplication of the law and improper assessment of the record. Instead – and no less importantly – the decisions also infringe upon the Due Process and Excessive Fines Clauses of the United States and California Constitutions. The decisions deprive PG&E of due process by imposing penalties for conduct that was not proscribed at the time it occurred and by finding violations based on belatedly asserted allegations to which PG&E did not have adequate notice and an opportunity to respond. The decisions also impose penalties that are wholly disproportionate to the record in these

[130] San Bruno POD at 81-83.
[131] Ex. San Bruno CPSD-1 at 64-65 (CPSD/Stepanian).
[132] Specifically, the San Bruno POD found: (a) Violation 13 – 49 CFR § 192.917(e)(3), failure to determine risk of DSAW threat; (b) Violation 14 – 49 CFR § 192.917(e)(3), failure to identify threats as unstable after pressure increase; and (c) Violation 15 – 49 CFR § 192.921(a), failure to use an appropriate assessment method. San Bruno POD, Appendix B.
[133] Ex. San Bruno PG&E-1 at 3-5 (PG&E/Caligiuri); Joint R.T. 973-74 (PG&E/Keas); Joint R.T. 733, 790 (PG&E/Kiefner).
[134] The violations implicated by the incorrect reliance on hindsight include (among others) San Bruno Violations 1-17, 21-29, and 31; Records Violations 1-3, 15-22, and 24-33; and the 133 violations of 49 C.F.R. § 192.107(b) (assumed SMYS values), 133 violations of Public Utilities Code § 451 (assumed SMYS values), 224 violations of 49 C.F.R. § 192.609 (class location study), 224 violations of 49 C.F.R. § 192.611 (MAOP confirmation/revision), 677 violations of 49 C.F.R. § 192.613 (continuing surveillance), 63 violations of 49 C.F.R. § 192.619 (non-commensurate SMYS), and the 63 violations of § 451 (non-commensurate SMYS) alleged in the Class Location POD.

proceedings and to penalties imposed in comparable pipeline accidents. In so doing, and for the reasons stated throughout this appeal, the decisions impose patently excessive penalties in violation of PG&E's constitutionally mandated rights.

A. The PODs Violate PG&E's Right to Due Process and Adequate Notice.

The Penalties POD and the decisions on which it relies violate PG&E's right to due process and adequate notice. First, the PODs' reliance on § 451 to find decades-old violations based on conduct not otherwise proscribed by regulation or statute is contrary to all notions of due process. Section 451 offered (and continues to offer) no meaningful guidance regarding the safety-related conduct required of utilities subject to the Commission's jurisdiction. Second, the PODs deprive PG&E of fair notice by finding violations based on allegations asserted for the first time after the close of evidence.

1. The PODs' application of Section 451 violates constitutional principles of due process.

The Due Process Clauses of the United States and California Constitutions require that laws that regulate persons or entities must give fair notice of conduct that is forbidden or required.[135] "[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[136]

Section 451 fails this standard both on its face and specifically as applied in the PODs. That section does not itself impose on regulated entities standards governing safety, and its language gives no indication that any such standards will be applied, or if so, which ones. It thus offers no instruction or direction by which a utility could reasonably determine the "conduct that is forbidden or required."[137] Instead, whether particular conduct will be deemed in conformity or

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[135] U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7; *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

[136] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also*, *e.g.*, *Fox Television Stations*, 132 S. Ct. at 2317 (due process requires invalidation of statutes or rules that "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited, or [are] so standardless that [they] authorize[] or encourage[] seriously discriminatory enforcement") (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)); *People v. Heitzman*, 9 Cal. 4th 189, 199 (1994); *People v. Mirmirani*, 30 Cal. 3d 375, 382 (1981) ("'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' Such also is the law of the State of California.") (internal citations omitted).

[137] *Fox Television Stations*, 132 S. Ct. at 2317.

contravention of the statute is left entirely to the discretion of the adjudicating officials, in light of their own experience and views. This is precisely the type of statute that the courts have deemed impermissibly vague and therefore void.[138]

The history of § 451's application in Commission proceedings, including in these OIIs, confirms its constitutional infirmity. The provision was traditionally not relied upon as an independent ground to support a fine or penalty, and in only two cases – and only one involving "safety"[139] – has it been applied in that manner, over due process objections.[140] Indeed, it appears clear that, in the 1950s and for much of the last century, the Commission itself understood the provision not as a source of safety standards or as an independent basis for safety violation, but instead, as merely confirming and complementing the Commission's authority to remedy violations of rules and regulations promulgated pursuant to powers granted under other statutory provisions. While to be sure the Commission stated on various occasions that such other rules and regulations did not "remove or minimize the primary obligation and responsibility" of the utilities to provide safe service and facilities,[141] it did not characterize § 451 as establishing an independently enforceable safety standard, much less discuss what that standard might be in practice.

Statements in this case confirm the continuing uncertainty over the meaning and scope of the statute. In its initial rebuttal testimony in the Records OII, submitted in August 2012, CPSD formulated the standard as, "PG&E can only [ensure safety] by exercising ***good*** engineering practices in compliance with § 451 of the Public Utilities Code."[142] The night before the Records OII hearing started, CPSD revised its position to state that "PG&E can only [ensure safety] by exercising the ***best*** engineering practices in compliance with Section 451 of the Public Utilities Code."[143] CPSD's position at the conclusion of those proceedings was that § 451 has incorporated a blanket safety standard – whether it is "good utility safety practices," "good engineering practices," or "best engineering practices" is not clear – throughout the entire time

[138] *See Fox Television Stations*, 132 S. Ct. at 2317; *see also, e.g.*, *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) (statute precluding trusts other than those for purposes of seeking "reasonable" profits held unconstitutional).
[139] D.99-04-029, 1999 Cal. PUC LEXIS 215, at *7.
[140] The other case is *Investigation of Pacific Bell Wireless*, *LLC*, D.04-09-062, 2004 Cal. PUC LEXIS 453, which resulted in the *Cingular* court of appeal decision, addressed below.
[141] San Bruno POD at 34 (quoting D.61269 at 12); Records POD at 57 (same).
[142] Ex. Records PG&E-1 at 2.
[143] Ex. Records CPSD-1 at 3.

span of the alleged violations (as far back as 1930). The Records POD adopts yet a different formulation – that "safety" is an "absolute duty" under § 451 – despite the fact that it fails to identify instances in which the Commission had ever put utilities on notice of such a requirement[144] and that CPSD explicitly disavowed this standard in its Records Opening Brief.[145] That the adjudicating officials and CPSD could not maintain a consistent position on the safety standard purportedly inherent in § 451 amply confirms the vagueness of the provision, and the lack of notice to regulated entities of what is required of them or what they might be penalized for in the future.

The statute could not be deemed constitutional as a stand-alone safety provision even if, as the PODs assert, the Commission's decision in *Carey* could be read as establishing that the Commission would enforce a safety standard under § 451.[146] That case held that the statute provided notice of what was "reasonable" because reasonableness could be determined with reference to "a definition, standard or common understanding among utilities," but it did not hold or address other possible applications of § 451.[147] In all events, not until *Carey* was decided in 1999 had the Commission ever suggested that it could impose independent safety violations under § 451 wherever there existed a "definition, standard, or common understanding among utilities." Thus, even under the PODs' logic, PG&E could not have been on notice until at least 1999 that the Commission might consider violations of non-binding industry standards to violate § 451.

At the very least, then, those violations premised on conduct or standards pre-dating 1999 cannot stand. These would include violations in every one of the PODs, but would most significantly impact the San Bruno decision. The only industry standards the San Bruno POD relies on – the pre-GO 112 ASME B.31.8 standards – pre-date *Carey* by more than 40 years.

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[144] Records POD at 51. Moreover, as discussed at *supra* note 59 and accompanying text, had PG&E requested the rates needed to pursue an "absolute duty" of safety, the Commission might have rejected the request as "gold-plating."

[145] CPSD Records Opening Brief at 15-16.

[146] San Bruno POD at 30-31.

[147] The other case cited by the PODs, *Pacific Bell Wireless, LLC (Cingular) v. Public Utilities Commission*, 140 Cal. App. 4th 718 (2006), is likewise inapposite. *Cingular* did not involve safety regulations, but instead concerned a wireless telephone service provider's practices relating to an early termination fee and its failure to disclose network problems to consumers. In rejecting a due process challenge to Section 451's application, the court pointed to prior Commission decisions that indicated "that its conduct in this instance would also violate the statute." *Id.* at 741. PG&E had no such notice. The Commission has never applied § 451 to punish a utility for what it concludes have been general across-the-board deficient operations.

The POD points to nothing that would have put PG&E on notice ***in 1956*** that the Commission would treat violations of the 1955 version of ASME B.31.8, or any other industry standard, as violating § 451.

The PODs' reliance on voluntary industry standards and investigation reports, which in their view provided PG&E the requisite notice that its conduct would be deemed unlawful,[148] exacerbates rather than cures the constitutional defect. Whatever information and advice these materials contained, no matter how well respected or broadly followed, they did not and could not establish legally enforceable standards that would provide the constitutionally requisite notice to regulated entities, including PG&E, of the bounds between permissible and impermissible conduct under § 451. Indeed, the Commission itself recognized that the ASME standards – which form the basis for nearly all of the pre-1960 violations found by the San Bruno and Records PODs – could not be viewed as mandatory when it adopted GO 112 in 1961. Any attempt to reframe those standards or others *post hoc* as legally enforceable obligations, including based on the fact that some of them were later adopted in GO 112 or other rules or regulations, constitutes an impermissible retroactive application of those rules and illustrates the constitutionally vague and malleable nature of § 451, and its application in this case.[149]

In sum, § 451 does not by its terms give notice of any safety standard, much less the regulatory scheme the PODs attribute to it. The PODs do not identify any specific or enforceable pipeline safety standard, rule, or practice submerged within § 451, and certainly none were articulated anywhere prior to these proceedings. The PODs' retroactive imposition of safety obligations through § 451 deprives PG&E of the constitutionally required fair notice of the standards to which it would subsequently be held.[150]

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[148] San Bruno POD at 32-34; Records POD at 60-61.

[149] *E.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 350-55 (1964); *see also, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 n.22 (1996).

[150] The violations implicated by the unconstitutional application of § 451 include San Bruno Violations 1-8, 17, 19, 21, 31, and 32; Records Violations 1-11, 15-24, and 31-33; and the 199 violations of § 451 alleged in the Class Location POD.

2. The PODs also err in finding violations based on belatedly-asserted allegations to which PG&E did not have an adequate opportunity to respond.

Among the other "basic" requirements of due process are notice of the charges and a reasonable opportunity to respond.[151] These "basic ingredient[s]" of fair procedure are essential safeguards of the "fundamental principle of justice" that no party may be "prejudiced in [its] rights without an opportunity to make [its] defense."[152] A severe violation of these basic guarantees occurs where, as CPSD did here, new charges are introduced after the accused has already made its defense.[153]

California courts have condemned the late assertion of new charges in administrative enforcement proceedings. In *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434 (1991), for example, the court of appeal decried disciplinary proceedings in which the accused "was kept in the dark about the specific charges made against him" as being "a charade" and "offen[sive]" to "even an elementary sense of fairness."[154] In *Smith v. State Board of Pharmacy*, 37 Cal. App. 4th 229 (1995), the court denounced the board's mid-hearing change of legal theories as violative of "the basic . . . elements" of due process.[155] Also, in *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678 (1975), the California Supreme Court held that a charge not "contained in the formal notice" of proceedings had to "be stricken as irrelevant."[156] In so holding, the Court relied on *In re Ruffalo*, 390 U.S. 544 (1968), where adding a new charge midway through a disbarment proceeding was found unconstitutional due to the "absence of fair notice as to . . . the precise nature of the charges."[157]

The same constitutional infringement occurred here, when CPSD impermissibly asserted dozens of previously-unalleged violations after the close of evidence. The initial January 12, 2012, report documenting the allegations against PG&E, which served as the charging document

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[151] *Salkin v. Cal. Dental Ass'n*, 176 Cal. App. 3d 1118, 1121 (1986) (quoting *Hackethal v. Cal. Med. Ass'n*, 138 Cal. App. 3d 435, 442 (1982)).
[152] *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 555 (1974); *see also Salkin*, 176 Cal. App. 3d at 1122 ("The individual must have the opportunity to present a defense.") (citing *Pinsker*, 12 Cal. 3d at 555).
[153] *See Salkin*, 176 Cal. App. 3d at 1122.
[154] *Rosenblit*, 231 Cal. App. 3d at 1447-48.
[155] *Smith*, 37 Cal. App. 4th at 242.
[156] *Cannon*, 14 Cal. 3d at 696.
[157] *Ruffalo*, 390 U.S. 544, 551-52 & n.4 (1968) (emphasis added); *see also Rosenblit*, 231 Cal. App. 3d at 1446 ("It is impossible to speculate how [the respondent] might have defended had he been informed of the specific problems with each patient.").

in the San Bruno OII, can be construed at its broadest as asserting 18 violations of law.[158] PG&E responded to those charges with extensive written testimony and documentary evidence and prepared the defense it presented at the evidentiary hearings based on the violations CPSD asserted in the January 12, 2012, report, as well as CPSD's rebuttal testimony, which reaffirmed the alleged violations but added no others.[159] As would any respondent, PG&E grounded its decisions about the relevant evidence and testimony, and its overall defense strategy including whether to cross-examine CPSD's witnesses and on what subjects, on the January 12, 2012, charging document. After the evidentiary hearing (which spanned four months), CPSD in its opening brief expanded its alleged violations against PG&E from 18 to 55 in an attachment it called Appendix C.[160] In addition to asserting some three dozen previously unalleged violations, CPSD contended for the first time that 37 of the now 55 violations were "continuing" violations under § 2108, 13 of which CPSD alleged began in 1956. While "Appendix C" was later struck, CPSD was permitted to re-assert the new violations in a "Revised Appendix C."

This dramatic post-hearing increase in the number of charges deprived PG&E of the process it was constitutionally due. Whether or not these new charges may be characterized as introducing "greater specificity" of the nature of the alleged misconduct, as the San Bruno POD suggests, the fact remains that PG&E was unaware at the time of the evidentiary hearing that it was facing so many separate and independent alleged violations or so significantly higher a potential penalty, and thus had no ability to tailor its hearing presentation accordingly.

Moreover, the POD's conclusion that "Appendix C" merely constituted "greater specificity" in the charges CPSD originally asserted against PG&E is an impossible leap. The San Bruno POD notes that the original charges consistently alleged that "49 CFR Parts 192 and 199 and Section 451 are applicable," but 49 C.F.R. Part 192 contains the entire set of federal regulations addressing gas pipeline construction, operation, maintenance, integrity management, written policies and procedures and emergency response, including hundreds, if not thousands, of regulatory provisions. Alleging that an operator violated 49 C.F.R. Part 192 (or 49 C.F.R.

[158] Ex. San Bruno CPSD-1 at 162-63 (CPSD/Stepanian).
[159] *See* Ex. San Bruno PG&E-1 (PG&E/Various); Ex San Bruno CPSD-1 (CPSD/Stepanian); Ex. San Bruno CPSD-5 (CPSD/Stepanian). CPSD stated in its August 20, 2012 rebuttal testimony, "Regardless of whether the violation was a direct contributing cause of the explosion, CPSD has listed in its [January 12, 2012 report] ***every violation found during its investigation***." Ex. San Bruno CPSD-5 at 4 (CPSD/Stepanian) (emphasis added).
[160] CPSD Opening Brief, Appendix C.

Part 199, or § 451) is only slightly more meaningful than alleging that the operator "violated federal law." CPSD's more specific descriptions of alleged violations, including that PG&E "violated various requirements of 49 CFR 192, Subpart O, in its implementation of the Integrity Management process," fare no better. Due process not only requires that CPSD provide notice of the charges it is pursuing against PG&E but that it provide ***clear and effective notice***.[161] CPSD's responsibility was to allege violations PG&E could identify, understand, and have the opportunity to defend. As the respondent in an enforcement proceeding, PG&E cannot, consistent with due process, be required to search for, decipher, and distill from CPSD's January 12, 2012, report, or other voluminous documents related to the OII, the legal basis for and scope of the alleged violations CPSD asserted.[162] The Penalties POD aggravates this fundamental deprivation of due process by imposing a penalty based on CPSD's belatedly asserted violations.[163]

B. The Penalties Imposed Are Disproportionate and Violate Constitutional Protections Against Excessive Fines.

The United States and California Constitutions prohibit the imposition of "excessive fines."[164] Under both federal and state law, the Excessive Fines Clause places a substantive constitutional limit on the state's power to punish, including imposing civil fines or penalties.[165]

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[161] *See, e.g.*, *Ruffalo*, 390 U.S. at 552 (due process requires fair notice of "the precise nature of the charges"); *Rosenblit*, 231 Cal. App. 3d at 1446 (due process requires notice of "the specific acts or omissions" against which the respondent is expected to defend itself).

[162] *See Rosenblit*, 231 Cal. App. 3d at 1446 (finding a due process violation where respondent had to undertake "a painstaking effort . . . to uncover the basis and scope of the allegations"). The San Bruno POD suggests that the incorporation of the NTSB Report and the IRP Report by the Commission in the OII equated to notice of alleged violations to PG&E. That suggestion demonstrates that the due process scale in this proceeding is fundamentally miscalibrated.

[163] The violations implicated by the failure to provide constitutionally adequate advance notice of the allegations against PG&E include (among others) San Bruno Violations 1 (continuing component), 2, 6, 9, 11, 13, 16, 17, 19, 22-29, 31, and 32; and all violations listed in the Class Location POD Table of Violations.

[164] U.S. Const. amend. VIII; Cal. Const. art. I, § 17.

[165] *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 727-28 (2006); *see also Austin v. United States*, 509 U.S. 602, 609-10 (1993) ("The purpose of the Eighth Amendment . . . was to limit the government's power to punish. . . . The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as ***punishment*** for some offense.'") (citations omitted; emphasis added); *Investigation of S. Cal. Edison Co.*, D.04-04-065, 2004 Cal. PUC LEXIS 207, at *65 (recognizing constitutional limits on the Commission's authority to impose penalties on utilities).

Similarly, the Due Process Clauses of the United States and California Constitutions prohibit "oppressive" or "unreasonable" statutory penalties.[166]

The "'touchstone of the constitutional inquiry . . . is the principle of proportionality.'"[167] In assessing whether a penalty is proportionate and therefore consistent with the protections of the Constitution, courts generally weigh (among other factors) (1) the defendant's culpability and the relationship between the harm and the penalty, and (2) "the sanctions imposed in other cases for comparable misconduct."[168] Evaluation of these factors makes clear that the penalty imposed by the POD violates PG&E's constitutional protections and is therefore subject to reversal on appeal.

1. The violations did not result from intentional misconduct and the penalty is not closely related to the harm.

There is no question that the San Bruno accident was horrific and caused great harm to numerous individuals and the surrounding community. PG&E has accepted responsibility for the accident and deeply regrets the loss of life and human suffering it caused.

However, neither the accident nor any of the violations found in the PODs resulted from willful or knowing misconduct by PG&E. The company acted at all times in good faith and with the goal of complying with all applicable regulations, rules, and standards; indeed, immediately after the accident PG&E voluntarily undertook a series of measures to address and resolve any deficiencies in its pipeline system and improve the safety and reliability of that system to the greatest degree possible. While PG&E has acknowledged that its system operations were not what it or the Commission expected, the record contains no evidence that any errors were intentional, and PG&E has endeavored to correct them. This lack of intentional culpability militates strongly in favor of imposing a lesser penalty.

Also favoring a lesser penalty is the fact that many, if not most, of the violations had no practical impact on system operations. As one example, the Records POD concludes that PG&E failed to maintain a record of a post-installation hydro test on Segment 180.[169] The Records POD, however, does not articulate how a failure to maintain a hydro test record contributed to the San Bruno accident or otherwise undermined system operations, in particular on a segment of

[166] U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7(a); *Hale*, 22 Cal. 3d at 399.
[167] *R.J. Reynolds*, 37 Cal. 4th at 728 (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)).
[168] *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434-35 (2001); *Bajakajian*, 524 U.S. at, 328; *R.J. Reynolds*, 37 Cal. 4th at 728 (including additional factor of defendant's ability to pay).
[169] Records POD at 94-100.

pipeline explicitly exempted from hydro testing requirements under 49 C.F.R. § 192.619(c) (the "Grandfather Clause"), and by each iteration of GO 112 before that.[170] Similarly, although some of the findings in the Records POD may relate in some way to San Bruno facilities or operations – including the findings that PG&E's Operations and Maintenance Instruction manual at the Milpitas Terminal was out of date, that PG&E failed to maintain certain back-up software, and that certain of PG&E's data responses relating to a security camera at an alternate gas control facility or personnel at the Milpitas Terminal were misleading[171] – none of these purported violations actually caused or contributed to the rupture. Findings in the San Bruno POD regarding PG&E's integrity management risk ranking algorithm, its educational and instructional policies, and its substance testing programs are likewise not causally related to the San Bruno rupture.

With regard to the clearance documentation, PG&E acknowledges that the written clearance did not meet company standards. However, adequate or even overly-detailed clearance documentation could not have prevented the electrical problem that led to the unplanned pressure increase which resulted from the failure of two power supplies not involved in the UPS clearance work.[172] Moreover, the evidence is undisputed that the pressure limiting system at Milpitas Terminal functioned as designed to keep the pressure on Line 132 well under regulatory limits.[173]

In summary, the alleged violations were unintentional, and in large part did not have a direct practical impact on system operations. The proposed penalty is unconstitutionally disproportionate in light of these facts.[174]

2. The penalties are excessive in light of the fines and penalties imposed in comparable circumstances.

The Excessive Fines Clause also requires consideration of sanctions imposed in analogous cases.[175] Indeed, the Commission has long recognized the importance of looking to

[170] At the time of installation, no existing pipeline safety regulations required operators to conduct post-installation hydro tests or maintain records of such testing.
[171] Records POD at 111-12, 117-19, 124-34.
[172] PG&E Records Opening Brief at 75; Joint R.T. 92, 115, 150-51 (PG&E/Kazimirsky and Slibsager).
[173] *See, e.g.*, Ex. San Bruno CPSD-1 at 8, 91 (CPSD/Stepanian) (acknowledging that the pressure on Line 132 remained below the 400 psig MAOP and legal limits prior to the accident).
[174] *See R.J. Reynolds*, 37 Cal. 4th at 728.

the fines and penalties that have been imposed in comparable factual situations in assessing fairness and proportionality.[176] Here, such an evaluation leads to the conclusion that the penalties imposed by the Penalties POD are disproportionate and violate PG&E's constitutional protections.

Instead of analyzing reasonable comparisons, the Penalties POD rejects any comparable precedent and un-tethers the imposed penalty from any penalties ever issued for a natural gas accident. The Penalties POD's outright rejection of comparable precedent highlights the extent to which the penalty imposed by the Penalties POD is excessive and disproportionate. The total penalties of $2.035 billion (including the identified $635 million PSEP disallowance) are more than 20 times the largest penalty ever imposed for a natural gas pipeline accident and more than 50 times the largest penalty ever imposed by the Commission.[177]

In particular, the fines and penalties imposed in this case far exceed those imposed in prior circumstances involving "reasonably comparable factual circumstances,"[178] including most notably for the natural gas accidents in Carlsbad, New Mexico, in August 2000 and Allentown, Pennsylvania, in February 2011. The Penalties POD acknowledges these cases, but dismisses them on grounds that the fines and penalties imposed here are dramatically different from those imposed there because the San Bruno accident caused "an explosion and lengthy fire in a major metropolitan area," the accident "resulted in significantly more physical harm," PG&E committed numerous violations that were "very lengthy in time and endangered many other high consequence areas," and the Carlsbad and Allentown penalties resulted from a settlement and a

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[175] *See, e.g.*, *Hale*, 22 Cal. 3d at 403 (finding it constitutionally "significant" that "no other jurisdiction appears to impose a penalty so severe" as the statute at issue); *BMW*, 517 U.S. at 584 (no judicial decision in any state indicated that defendant's policy "might give rise to such severe punishment").

[176] *See* D.98-12-075, 1998 Cal. PUC LEXIS 1016, at *76-77 ("[T]he Commission will be expected to explicitly address those previously issued decisions which involve the most reasonably comparable factual circumstances and explain any substantial differences in outcome.").

[177] The penalty for the Carlsbad pipeline rupture (discussed *infra*) is the largest penalty ever imposed for a natural gas pipeline accident. The largest safety-related penalty the Commission has ever imposed was $38 million in the Rancho Cordova case. *See Investigation into the Gas Explosion and Fire in Rancho Cordova*, D.11-12-021, 2011 Cal. PUC LEXIS 531; *Decision Regarding Joint Motion to Approve the Stipulation of Pac. Gas & Elec. Co. & the Consumer Prot. & Safety Div. Concerning Rancho Cordova*, D. 11-11-001, 2011 Cal. PUC LEXIS 509. The penalty here (including the identified disallowance of $635 million) is more than 50 times greater. *See also* PG&E Opening Brief at 22-23 (additional information regarding penalties imposed for other pipeline accidents).

[178] *See* D.04-04-065, 2004 Cal. PUC LEXIS 207, at *64.

consent order.[179] As PG&E has stated previously, any comparison will necessarily be imperfect, but completely dismissing all consideration of comparable accidents violates the constitutional requirement of proportionality.[180] The Carlsbad and Allentown accidents provide a necessary comparison for the Commission to consider the proportionality of the penalty to the harm.

a. Carlsbad

In the Carlsbad, New Mexico, accident, a 30-inch diameter, grade X52 pipe installed in 1950 and operated by El Paso Natural Gas Company ruptured in August 2000. Contrary to the distinction drawn in the POD, the explosion in that accident also caused a tragic loss of life, killing 12 members of an extended family camping near a bridge that supported the pipeline.[181] The accident also caused approximately $1 million in property damage to nearby steel suspension bridges.[182]

The Penalties POD also errs in attempting to distinguish the San Bruno accident based on the findings in this proceeding of numerous violations over an extended period of time.[183] The safety concerns at issue in Carlsbad included the design and construction of a pipe installed in 1950, and encompassed the adequacy of the company's internal corrosion control program dating back many years. In that case, the NTSB investigation found that the pipe ruptured because of severe internal corrosion that caused a reduction in pipe wall thickness to the point that the remaining metal could no longer withstand pressure within the pipe.[184] The NTSB also made numerous findings about inadequacies in El Paso's gas safety program, including its failure to have "in place an internal corrosion control program that was adequate to identify or mitigate the internal corrosion that was occurring in its pipelines."[185]

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[179] Penalties POD at 36-37.
[180] *Cooper Indus.*, 532 U.S. at 434.
[181] Penalties POD at 36; PG&E Request for Official Notice, Ex. 1 at 1, 16 (NTSB, Pipeline Accident Report: Natural Gas Pipeline Rupture and Fire Near Carlsbad, New Mexico, August 19, 2000 (Feb. 11, 2003)); Consent Decree, *United States v. El Paso Natural Gas Co.*, No. Civ. 07-715 (D.N.M. Oct. 5, 2007), *available at* http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420011004/420011004_Final%20Consent%20Decree_10052007.pdf.
[182] PG&E Request for Official Notice, Ex. 1 at 1 (NTSB, Pipeline Accident Report: Natural Gas Pipeline Rupture and Fire Near Carlsbad, New Mexico, August 19, 2000 (Feb. 11, 2003)).
[183] Penalties POD at 36-37.
[184] PG&E Request for Official Notice, Ex. 1 at 49 (NTSB, Pipeline Accident Report: Natural Gas Pipeline Rupture and Fire Near Carlsbad, New Mexico, August 19, 2000 (Feb. 11, 2003)).
[185] PG&E Request for Official Notice, Ex. 1 at 49 (NTSB, Pipeline Accident Report: Natural Gas Pipeline Rupture and Fire Near Carlsbad, New Mexico, August 19, 2000 (Feb. 11, 2003)).

As a result of the accident, El Paso Natural Gas Company agreed to pay $101.5 million in a 2007 consent decree, consisting of a $15.5 million civil penalty and $86 million to implement program improvements.[186] The total penalties and other relief imposed in the Carlsbad accident remain the largest combined penalties for a natural gas transmission pipeline accident.[187] The $2.035 billion total fines and penalties in the Penalties POD (including the identified PSEP disallowance) are more than 20 times the penalty and other relief imposed for the Carlsbad accident. The Penalties POD's limited analysis and attempt to dismiss the relevance of the Carlsbad accident as a consent decree cannot support such a marked departure from the penalties imposed in that case.

b. Allentown

The Allentown, Pennsylvania, accident also bears many factual similarities to this case. The explosion in that case occurred when a 12-inch cast-iron natural gas main circumferentially fractured.[188] The accident also occurred in a large metropolitan area, and the explosion and fire in that case caused significant physical harm, killing five people, seriously injuring three others, and destroying or significantly damaging eight homes in a residential neighborhood.[189]

The Allentown accident also provides a reasonable point of comparison because the utility was found to have committed numerous violations over a lengthy period of time. In the decades prior to the February 2011 accident the pipeline operator, UGI, had a succession of failures on its cast-iron main system. In 1976, a break in one of its cast-iron mains, also in Allentown, caused an explosion that killed two firefighters, injured 14 people, and destroyed four buildings.[190] In response to that accident, the NTSB issued safety recommendations that the utility should revise its emergency response plans and expedite development of techniques for identifying sinkholes near its cast-iron mains.[191] In 1990, another one of the utility's cast-iron

[186] Ex. Joint-66 at 21 (Figure 10) (PG&E/Fornell); *see also* Consent Decree, *United States v. El Paso Natural Gas Co.*, No. Civ. 07-715 (D.N.M. Oct. 5, 2007).
[187] Ex. Joint-66 at 21 (Figure 10) (PG&E/Fornell).
[188] PG&E Request for Official Notice, Ex. 5 at 3 (Joint Settlement Petition, *Pa. Pub. Util. Comm'n*, *Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (Oct. 3, 2012)).
[189] PG&E Request for Official Notice, Ex. 5 at 3-4 (Joint Settlement Petition, *Pa. Pub. Util. Comm'n*, *Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (Oct. 3, 2012)); Ex. Joint-66 at 21 (Figure 10) (PG&E/Fornell).
[190] PG&E Request for Official Notice, Ex. 3 at 1 (NTSB, Safety Recommendations to UGI Corp. (June 8, 1977)).
[191] PG&E Request for Official Notice, Ex. 3 at 2 (NTSB, Safety Recommendations to UGI Corp. (June 8, 1977)).

mains in Allentown failed, causing an explosion that killed one person, injured nine, destroyed two homes, and damaged others.[192] The NTSB again issued several safety recommendations in response, including that the utility implement a cast-iron replacement program.[193] The Pennsylvania PUC staff stated in its complaint that these prior explosions provided "ample warning signs regarding the integrity of its cast-iron mains in the Allentown area."[194] In a joint motion, the Chairman and Vice Chairman of the Pennsylvania PUC stated:

> [W]e want to emphasize that UGI's compliance history related to gas safety issues is patently unacceptable. This is the eighth time in slightly more than four years that this Commission has adjudicated a matter containing allegations of gas safety violations by a UGI-owned gas distribution utility. This goes beyond cause for concern; it is downright alarming.[195]

As a result of the accident and the PUC's allegations of numerous ongoing violations of law, UGI agreed to pay a $386,000 civil penalty and agreed to undertake remedial actions. This penalty was ultimately increased to the statutory maximum of $500,000.[196] The remedial actions included the gas utility accelerating its replacement program for cast-iron mains from 50 to 14 years and the utility agreeing not to seek rate recovery for these remedial measures for two years, which it estimated would cost an additional $24.75 million.[197] Including the estimated cost of the Allentown utility's remedial measures, the total penalty in Allentown was $25.25 million.[198]

The penalty in the Penalties POD is about 80 times larger than the total penalty in Allentown. This does not even take into account the massive amount of unrecovered costs

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[192] PG&E Request for Official Notice, Ex. 2 at 1 (NTSB, Pipeline Accident Brief No. DCA90FP001 (Aug. 6, 1991)).

[193] PG&E Request for Official Notice, Ex. 2 at 3 (NTSB, Pipeline Accident Brief No. DCA90FP001 (Aug. 6, 1991)).

[194] PG&E Request for Official Notice, Ex. 8 at 8-10 (Formal Complaint, *Pa. Pub. Util. Comm'n*, *Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (June 11, 2012)).

[195] PG&E Request for Official Notice, Ex. 7 at 1-2 (Joint Motion of Chairman Robert F. Powelson and Vice Chairman John F. Coleman, Jr., *Pa. Pub. Util. Comm'n*, *Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (Jan. 24, 2013)).

[196] PG&E Request for Official Notice, Ex. 6 at 35-36 (Opinion and Order, *Pa. Pub. Utils. Comm'n*, *Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (Jan. 24, 2013)); PG&E Request for Official Notice, Ex. 5 at 9-10 (Joint Settlement Petition, *Pa. Pub. Util. Comm'n*, *Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (Oct. 3, 2012)).

[197] PG&E Request for Official Notice, Ex. 5 at 5, 9-10 (Joint Settlement Petition, *Pa. Pub. Util. Comm'n*, *Bureau of Investigation & Enforcement v. UGI Utils., Inc.* (Oct. 3, 2012)); *see also id.*, Appendix A at 5 (Bureau of Investigation and Enforcement Statement in Support of Joint Settlement Petition).

[198] This total includes a $500,000 penalty and an estimated $24.75 million in remedial measures for which the utility could not seek rate recovery.

PG&E is incurring to improve its gas transmission system over and above the penalties imposed by the Penalties POD. The Penalties POD provides no sufficient justification for penalizing PG&E by 80 times the penalty for comparable misconduct in Allentown. The POD references different statutory schemes as a possible explanation, but the total penalty imposed on UGI includes disallowances that were not subject to the statutory cap.

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The Constitution requires the Commission to impose a penalty having considered penalties for comparable misconduct. Although the Commission need not impose an identical penalty, the factual similarities to these prior cases demonstrate that the imposition of a total penalty 20 times the size of the Carlsbad penalty and 80 times the size of the Allentown penalty is unjustified. The POD's $1.4 billion penalty over and above the identified PSEP penalty of $635 million is grossly disproportionate and violates PG&E's constitutionally-mandated rights.

V. CONCLUSION

The September 9, 2010, pipeline rupture and explosion in San Bruno was a tragic accident. PG&E deeply regrets the loss of life, injuries, and the effect on the San Bruno community, has fully accepted legal and financial responsibility, and has made extraordinary efforts to reduce and minimize the risk of another such tragedy occurring. However, the Commission has an overriding duty to follow the law, to regulate fairly and to implement policies that not only to penalize operators for past violations but also encourage and enhance current and future safe natural gas pipeline operations. In furtherance of such policies, the Commission should significantly reduce the penalties imposed on PG&E to reflect the total amount of unrecoverable costs being incurred by PG&E to improve the safety of its gas transmission system and in light of the serious legal errors and constitutional concerns described above. The Commission also should direct that any penalties take the form of disallowances of

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costs for further pipeline safety improvements rather than a fine paid to the General Fund. These investments will serve the Commission's purpose of deterrence while also benefiting all ratepayers and residents in PG&E's service territory.

Respectfully submitted,

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

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MARIE L. FIALA

By: /s/
MARIE L. FIALA

SIDLEY AUSTIN LLP
555 California Street
San Francisco, California 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-2400
Email: mfiala@sidley.com

CARTER G. PHILLIPS
QUIN M. SORENSON

By: /s/
CARTER G. PHILLIPS

SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
Email: cphillips@sidley.com
Email: qsorenson@sidley.com

JOSEPH M. MALKIN
SCOTT A. WESTRICH
ERIC MATTHEW HAIRSTON

By: /s/
JOSEPH M. MALKIN

Orrick, Herrington & Sutcliffe LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105
Telephone: (415) 773-5505
Facsimile: (415) 773-5759
Email: jmalkin@orrick.com

MICHELLE L. WILSON
LISE H. JORDAN

By: /s/
MICHELLE L. WILSON

Pacific Gas and Electric Company
Law Department
77 Beale Street
San Francisco, CA 94105
Telephone: (415) 973-6655
Facsimile: (415) 973-0516
Email: MLW3@pge.com
Email: LHJ2@pge.com