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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 to Determine Violations of Public Utilities Code § 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)

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

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I. INTRODUCTION

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 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 findings and conclusions from the Presiding Officer's Decision in the Proceeding I.12-01-007 ("San Bruno POD"), on which the proposed penalty is based in part, do not meet applicable legal standards, are based on the misapplication of California law, and violate PG&E's constitutionally mandated rights.[3] In particular, many of the alleged violations in this proceeding:

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

[2] Presiding Officer's 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 ("Penalties POD"), issued on September 2, 2014. PG&E also refers to the Presiding Officer's Decisions in Proceeding I.11-02-016 and I.11-11-009 as the "Records POD" and "Class Location POD," respectively.

[3] PG&E is simultaneously appealing the size and structure of the penalty associated with these findings in its appeal of the Penalties POD. PG&E incorporates by reference as if fully set forth herein the arguments regarding PG&E's constitutional right to due process, adequate notice and protection from

(1) rest on an incorrect interpretation of Public Utilities Code § 451 as a stand-alone safety law, in violation of principles of proper statutory construction and the Due Process Clauses of the United States and California Constitutions;[4]

(2) are based on impermissible application of hindsight, which cannot make up for the fact that there is no evidence of knowing or intentional misconduct by PG&E involving the accident;

(3) are duplicative of violations asserted in other proceedings, violations asserted in the same proceeding, or both;

(4) are improperly deemed to be "continuing," contrary to the San Bruno POD's own stated interpretation of the jurisprudence regarding continuing offenses;

(5) rely on adverse inferences drawn against PG&E, improperly relieving CPSD of the burden of proof; and

(6) were first introduced after the close of evidence, violating PG&E's constitutional right to adequate notice of the charges and the opportunity to defend against them.

For all of these reasons the Commission should reject the legally defective findings in the San Bruno POD and issue a decision grounded on a proper application of the record and the law.

II. VIOLATIONS FOUND IN THE SAN BRUNO POD ARE BASED ON MULTIPLE LEGAL ERRORS

A. The San Bruno POD Finds Violations Based on an Impermissible Application of Section 451.

A significant number of the violations found in the San Bruno POD – 42,500 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. The San Bruno POD commits legal error in its application of § 451 and thus any penalty based on these purported violations is invalid.

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excessive fines as well as the arguments relating to the application in these proceedings of Commission Rule of Practice and Procedure Rule 1.1 set forth in PG&E's appeal of the Penalties POD.

[4] U.S. Const. amend. XIV, § 1; Cal. Const., art. I, § 7.

1. 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 the 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.[5] 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.

The San Bruno POD does not dispute that the statutory heading "Rates" is "entitled to considerable weight" but concludes that because § 451 appears in Chapter 3 of the Act, titled "Rights and Obligations of Utilities," it is "entirely consistent" with the statutory scheme to

[5] *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).

interpret it as a free-standing utility safety obligation.[6] The analysis, however, rests on a critical error. In focusing on the heading of Chapter 3, the San Bruno POD ignores 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.[7] Thus, the more specific heading, Article 1 ("Rates"), is the relevant one. 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.

This reading is affirmed by 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.[8] 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.[9] Public safety is one important consideration in achieving this balance – as are the health, comfort, and convenience of the public and others. In setting 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.

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

The contrary interpretation adopted by the San Bruno POD, reading § 451 to create a stand-alone, free-floating safety obligation is incompatible with the statutory text. That

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[6] San Bruno POD at 24-25; *see Hull*, 1 Cal. 4th at 272.

[7] *E.g.*, *S.F. Taxpayers Ass'n v. Bd. of Supervisors*, 2 Cal. 4th 571, 577 (1992).

[8] *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").

[9] *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.").

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 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."[10] An "absolute duty" of safety cannot be reconciled with the balancing required under § 451 or the plain statutory text.

The San Bruno POD's mistaken interpretation of § 451 as imposing an "absolute duty" of safety[11] – 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.[12] 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, 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.

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[10] *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: "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").

[11] San Bruno POD at 25.

[12] *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").

This provision would be surplusage if § 451 already provided the Commission with authority to prescribe or enforce "safety" standards for utilities. Indeed, in 1960, when adopting safety standards for the first time in California, the Commission notably relied not on § 451 but on the authority provided by § 768.[13]

The San Bruno POD's interpretation would also render superfluous and unnecessary the particular safety rules adopted by the Commission pursuant to this authority. General Order ("GO") 112 (adopted in December 1960), required utilities to comply with safety standards modeled on previously issued (voluntary) industry practice guidelines.[14] Yet the San Bruno POD holds 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.[15] This is illogical: if the voluntary industry standards 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.[16]

The San Bruno POD concludes that its interpretation of § 451 complements, rather than renders superfluous, specific safety standards.[17] But the San Bruno POD provides no explanation how, if that interpretation of § 451 is correct, specific safety standards could be anything other than redundant. Section 451, by contrast, does not directly regulate conduct or "safety." Safety is only one element in a set of criteria to be applied and balanced by the Commission in determining rates, and specific safety regulations contain no hint that § 451 provides an overriding safety standard. The San Bruno POD's 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, thus rendering meaningless every other safety provision under California law, contrary to basic principles of statutory construction.

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[13] *Investigation into the Need of a Gen. Order, etc.,* D.61269 (Cal. P.U.C. Dec. 28, 1960) at 2, 4 (adopting GO 112).

[14] D.61269 at 2, 4; Ex. CPSD-5 at 1-2 (CPSD/Stepanian).

[15] San Bruno POD at 32-33, 35-36.

[16] 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 San Bruno POD would graft onto § 451.

[17] San Bruno POD at 27-28.

The San Bruno POD's 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 fines 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 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, 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."[18]

The cases addressed in the San Bruno POD also do not support its interpretation of § 451. The San Bruno POD relies 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.[19] *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 relating 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 San Bruno POD, *Carey v. Pacific 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 *Carey* does not constitute precedent on this point.

Nor is the San Bruno POD's interpretation of § 451 necessary to avoid the conclusion that, prior to the effective date of GO 112 in July 1961, California had no laws mandating the safe operation of gas facilities. 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

[18] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

[19] San Bruno POD at 29-34.

equally as great and often greater than any fines 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 San Bruno POD misapplies § 451. The provision addresses safety 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 constituting 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.[20]

3. 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 any event clear that the section cannot be interpreted – as the San Bruno POD and other 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.

[20] *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 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)).

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.

Indeed, 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 maintenance of natural gas pipelines in California under GO 112, which the Commission adopted in 1960 pursuant to § 768.[21] GO 112 expressly incorporated the ASME B.31.8 1958 edition with modifications, thereby giving those standards the force of law in California.[22] 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***."[23] 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 1961.

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 San Bruno POD finds that PG&E violated such rules and standards, including specifically the ASME B.31.8 standards prior to the effective date

[21] D.61269 at 2, 4.

[22] D.61269, Appendix A at 2 (adopting GO 112, § 107.2); Ex. CPSD-9 (NTSB Report) at 34.

[23] D.61269 at 11 (emphasis added).

of GO 112 (July 1, 1961),[24] those findings are not authorized by § 451 and cannot support the imposition of penalties.[25]

B. The San Bruno POD Commits 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 San Bruno POD also inflates the total number of violations on which the penalty is based by 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 San Bruno POD improperly finds 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."[26] 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."[27]

This principle is clearly, and repeatedly, contravened by the San Bruno POD, which finds multiple and overlapping violations of the same statutory and regulatory provisions based on the same conduct and course of conduct, thus inflating the total number of "separate" adjudicated violations.

Some of the most egregious examples in the San Bruno POD involve duplication of findings from the other proceedings. For example, the San Bruno, Records, and Class Location PODs all contain findings that PG&E improperly used assumed Specified Minimum Yield Strength ("SMYS") values greater than 24,000 psi. 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

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[24] San Bruno POD at 35-36.

[25] The violations implicated by the incorrect interpretation of § 451 include all those premised on that provision, including Violations 1-8, 17, 19, 21, 31, and 32. Violations addressed in this appeal are presented as numbered in the San Bruno POD unless otherwise indicated.

[26] *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 912 (2001).

[27] *Troensegaard v. Silvercrest Indus.*, *Inc*., 175 Cal. App. 3d 218, 227-28 (1985) (internal quotation marks omitted).

pipeline operations does not form a proper basis for multiple violations premised on the same initial act. Similarly, 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 for Line 132.[28] The San Bruno POD also duplicates findings from the Records POD that PG&E's clearance documentation did not meet company standards.[29] As a final example, the San Bruno POD finds that deficiencies in PG&E's GIS data resulted in violations of 49 C.F.R. § 192.917(b) while the Records POD finds violations on this same subject based on § 451.[30] These and other duplicative alleged violations cannot properly constitute separate offenses.

The San Bruno POD also counts broad violations followed by more specific violations that are encompassed within the broader violation. For example, 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."[31] 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. Further examples of duplication can be observed in Violations 18 and 19, where the San Bruno POD finds separate violations of 49 C.F.R. § 192.913(c) and § 451 for the same conduct, "[f]ailure to follow internal work procedures."[32]

These and other duplicative findings account for a substantial portion 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 all events, however, it is clear that the violations that are impermissibly duplicative are not valid and cannot support imposition of the penalty.[33]

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[28] San Bruno POD at 89-91 (Violation 7: "Establishment of Design Pressure and MAOP"); Records POD at 100-104 (Violation 4: "Underlying Records Related to Maximum Allowable Operating Pressure on Segment 180").

[29] San Bruno Violations 18, 20; Records Violation 5.

[30] San Bruno Violation 10; Records Violations 21, 25.

[31] San Bruno POD, Appendix B at B-1.

[32] San Bruno POD, Appendix B at B-2.

[33] The violations implicated by incorrect quantification include (among others) Violations 1-8, 10, 15, 17, 18-19, 20-29, and 31-32.

2. The San Bruno POD applies a flawed reckoning of "continuing" violations under Section 2108.

Equally problematic is the San Bruno POD's conclusion that many of the violations may be deemed "continuing" in nature, supporting the imposition of cumulative penalties under Public Utilities Code § 2108.

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.[34] Courts in other contexts have also defined continuing violations as courses of unlawful conduct that continue over a period of time.[35]

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."[36] *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 regarding the two competing interpretations urged by the parties: the penalty is imposed for (1) each day the oil

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[34] *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).

[35] *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)); *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).

[36] *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) (en banc). 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.

remained in the water; or (2) each day the process of deposit lasted.[37] The Court adopted the latter, narrower construction because the alternative – each day the oil remained on the water – was illogical and unduly punitive.[38] 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.[39]

The San Bruno POD ostensibly agrees with and adopts 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***."[40] As an example, Judge Wetzell notes that "it is only logical that a requirement to visually inspect a pipe segment prior to or during installation ***cannot be continuously violated*** after the installation has occurred."[41] However, the San Bruno POD goes on to find that PG&E's 1956 installation of defective pipe in Segment 180 constituted a "continuing violation of Section 451" from the date of installation through September 9, 2010.[42] As another example, the San Bruno POD finds a continuing violation because PG&E "failed to conduct a hydrostatic pressure test on Segment 180 after its installation."[43] This application of § 2108 is entirely at odds with

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

[38] *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).

[39] *Younger*, 16 Cal. 3d at 44; *see also Doran v. Embassy Suites Hotel*, No. C-02-1961 EDI, 2002 U.S. Dist. LEXIS 16116, at *16 (N.D. Cal. Aug. 20, 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).

[40] 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.").

[41] San Bruno POD at 63 (emphasis added).

[42] San Bruno POD at 93.

[43] San Bruno POD at 79.

the San Bruno POD's own stated interpretation and is impermissible under a plain reading of the statute and the jurisprudence regarding continuing violations.[44]

C. The San Bruno POD Improperly Finds 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.[45] 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.

The San Bruno POD violates this core principle. It faults PG&E for various actions and inactions related to the Segment 180 construction and PG&E's Integrity Management program[46] even though in several instances the information on which the violations are based only became known after the accident.

1. Segment 180 Construction

The San Bruno POD finds several violations of § 451 based on the pipe characteristics of the defective pups PG&E unknowingly installed in Segment 180.[47] The POD finds that PG&E violated the yield strength standards in ASME B.31.8-1955 (and therefore § 451) because PG&E assigned a yield strength to the pups higher than 24,000 psig.[48] It reasons that, because the pups were manufactured to an "unknown" yield strength specification, ASME B.31.8-1955 required PG&E to assume Segment 180 had a SMYS value of 24,000 psig.[49]

The San Bruno POD's conclusion is not supported by any evidence that pre-dates the San Bruno accident, and its reliance on after the fact information is misplaced. ASME B.31.8-1955,

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[44] The violations implicated by the incorrect interpretation of § 2108 include all those premised on that provision, including Violations 1, 8-17, 21, and 32.

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

[46] *See generally,* San Bruno POD at 73-93, 94-151.

[47] San Bruno POD, Appendix B, Violations 1-8.

[48] San Bruno POD, Appendix B, Violation 4. PG&E's records identified the yield strength of the pipe in Segment 180 as 42,000 psig. Yield strength is also referred to as specified minimum yield strength, or SMYS.

[49] San Bruno POD at 81-83.

Section 811.27(C), provided that an operator should assume a yield strength of 24,000 psig when "the manufacturer's specified minimum yield strength . . . is unknown."[50] In other words, when an operator does not know the yield strength specification for a piece of pipe in its system, it should assume a yield strength of 24,000 psig for that pipe. In application, however, an operator can only know to apply this standard and assume a yield strength of 24,000 psig when the operator ***is aware that the yield strength of the specific pipe is unknown***. When the operator believes it knows the yield strength of the pipe, even if that information is wrong, it is illogical to find that the operator was required to assume a yield strength of 24,000 psig, and that it violated the standard (and the law) by not doing so.

This precisely describes the situation with respect to Segment 180 prior to the San Bruno accident. Prior to September 9, 2010, PG&E's records contained pipe attribute information for Segment 180, including the pipe's yield strength.[51] To PG&E's knowledge at the time, the yield strength was not "unknown." Incorrect yield strength information is not "unknown" yield strength information that would have alerted PG&E to the need to use an assumed SMYS value. Finding that PG&E violated the law for not using an assumed SMYS value when PG&E had no reason to believe it should do so is contrary to logic and a misapplication of the standard based on information that became known only after the accident.[52]

San Bruno POD Violation 7, which faults PG&E for not properly establishing the Segment 180 MAOP,[53] suffers from the same defect. The POD concludes that, "by failing to properly account for the actual condition, characteristics, and specifications of the pups, such as the missing seam welds, when it established MAOP, PG&E failed to comply with Section 845.22 of ASME B.31.8-1955."[54] It is undisputed that PG&E did not know the pups were in Segment 180 and did not know their condition or characteristics until after the accident.[55] Thus,

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[50] San Bruno POD at 82.

[51] Ex. CPSD-1 at 64-65 (CPSD/Stepanian).

[52] As discussed in Section II.A., ASME B.31.8-1955 was a voluntary industry guideline in 1956 when PG&E installed Segment 180, thus this violation is also improperly based on a voluntary standard the San Bruno POD imported into § 451. The discussion here focuses on the use of hindsight information.

[53] San Bruno POD, Appendix B, Violation 7. The POD concludes that PG&E violated ASME B.31.8-1955, § 845.22, which constitutes a violation of § 451.

[54] San Bruno POD at 91.

[55] Joint R.T. 74-75 (PG&E/Zurcher); Joint R.T. 336, 368, 391, 562 (PG&E/Harrison); Joint R.T. 1010-12, 1055 (PG&E/Keas).

the San Bruno POD finds that PG&E violated the law by establishing the Segment 180 MAOP without using pipe specifications PG&E did not know until 54 years later.

2. DSAW Pipe

The San Bruno POD commits similar errors regarding DSAW pipe.[56] The San Bruno POD concludes that before the accident PG&E should have deemed the Segment 180 DSAW pipe to be subject to a long seam manufacturing threat, identified that threat as unstable, and conducted integrity management assessments on that basis.[57] Because it did not, the San Bruno POD finds that PG&E violated the law.[58] This finding revises history based on after-the-fact information about pipeline defects that were unknown at the time.

Before September 9, 2010, the natural gas pipeline industry, pipeline industry experts and pipeline regulators, as well as the pipeline safety standards and regulations, all considered DSAW pipe to be reliable and safe pipe not subject to a long seam manufacturing threat.[59] The federal pipeline safety regulations identified DSAW pipe as having a joint efficiency factor of 1.0.[60] Under the AMSE B31.8S code,[61] by definition this joint efficiency factor ***eliminated the need*** to consider potential longitudinal seam manufacturing threats on that pipe.[62] Even after the San Bruno accident, DSAW pipe continues to be viewed as dependable, safe pipe.[63] Properly made DSAW pipe is not considered subject to long seam manufacturing threats, and would not

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[56] DSAW stands for double submerged arc welded pipe, meaning that the longitudinal seam is welded first on the outside of the pipe and then on the inside.

[57] San Bruno POD at 129-41.

[58] The San Bruno POD found: (a) Violation 13 – 49 C.F.R. § 192.917(e)(3), failure to determine risk of DSAW threat; (b) Violation 14 – 49 C.F.R. § 192.917(e)(3), failure to identify threats as unstable after pressure increase; and (c) Violation 15 – 49 C.F.R. § 192.921(a), failure to use an appropriate assessment method. San Bruno POD, Appendix B.

[59] Joint R.T. 973-74 (PG&E/Keas); R.T. 733, 790 (PG&E/Kiefner). Dr. Caligiuri testified, "Absent any corrosion damage, well-manufactured DSAW pipe from the late 1940s or early 1950s would not have needed replacement merely due to its age in 2010 under any industry practice or standard." Ex. PG&E-1 at 3-5 (PG&E/Caligiuri).

[60] 49 C.F.R. § 192.113.

[61] ASME B.31.8S provides standards specific to pipeline integrity management, which are incorporated into the federal integrity management regulations.

[62] *See* ASME B31.8S-2004, § 6.3.2 ("Seam issues have been known to exist for pipe with a joint factor of less than 1.0"); *see, e.g.*, Joint R.T. 968-69, 992-93 (PG&E/Keas).

[63] DSAW pipe "is considered among metallurgists in the gas transmission pipeline field today to be one of the highest-quality welded pipe." Ex. PG&E-1 at 3-5 (PG&E/Caligiuri).

be expected to experience cyclic fatigue in a natural gas transmission pipeline for decades, if not centuries.[64]

The San Bruno POD's determination that PG&E should have concluded, before the San Bruno accident, that the DSAW pipe in Segment 180 was subject to a long seam manufacturing threat, that PG&E should have assessed Segment 180 on that basis in its Integrity Management program, and that it constituted a violation of law that PG&E did not do so, is an after the fact judgment that revises history based on information only developed after the accident.[65]

D. The San Bruno POD Improperly Relies on Adverse Inferences by Misapplying the Spoliation Doctrine.

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."[66] A "general concern over litigation" does not satisfy the reasonable foreseeability prong of the doctrine.[67] The duty to preserve documents arises only arises when a party "reasonably should know that evidence may be relevant to anticipated litigation."[68] The question of whether litigation is reasonably foreseeable is determined based on an objective standard which requires an evaluation of whether or not a reasonable party in the same factual

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[64] R.T. 691-92, 714-15, 731, 741-42 (PG&E/Kiefner); Joint R.T. 1198-99 (PG&E/Keas) (quoting Ex. PG&E-3 at 1, "Typically gas pipelines are not a significant risk of failure from the-pressure-cycle-induced growth of original manufacturing –related or transportation related defects."); R.T. 803 (PG&E/Kiefner) (indicating the defective pup had a fatigue risk, but there wasn't "a fatigue risk in general" with DSAW pipe).

[65] The violations implicated by the incorrect reliance on hindsight include (among others) Violations 1-17, 21-29, and 31-32.

[66] *Reeves v. MV Transp., Inc.,* 186 Cal. App. 4th 666, 681 (2010).

[67] *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) .

[68] *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).

circumstances would have reasonably foreseen litigation.[69] "This standard does not trigger the duty to preserve documents from the mere existence of a potential claim or the distant possibility of litigation."[70] Rather, identification of a specific potential claim is a signal that litigation is reasonably foreseeable.[71]

The Records POD and Class Location POD each rely on a misapplication of the spoliation doctrine to draw adverse inferences against PG&E and thereby find violations in the absence of any supporting evidence in the record.[72] While the San Bruno POD does not explicitly invoke the spoliation doctrine, its findings rely on the misapplication of the same principles. For instance, the San Bruno POD concludes from the absence of a strength test record that PG&E did not perform a post-installation strength test on Segment 180, in violation of ASME B.31.8, and thus § 451. The POD states, "The lack of any record of a post-installation test is both troubling in light of industry standards calling for such records and ***strongly indicative that such a test was not performed***."[73] As implicitly applied in the San Bruno POD, adverse inferences based on the absence of records would require that any party subject to the Commission's jurisdiction consider itself 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 pre-litigation document destruction would not be commonly understood by society as unfair or immoral."[74] 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

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[69] *Micron Tech., Inc. v. Rambus, Inc.,* 645 F.3d 1311, 1320 (Fed. Cir. 2011) (citing *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681-82 (7th Cir. 2008); *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).

[70] *Micron,* 645 F. 3d at 1320; *see also PersonalWeb Techs., LLC v. Google Inc*., 2014 WL 580290, at *3 (N.D. Cal. Feb. 13, 2014) (litigation was not reasonably foreseeable until patents were acquired as it was the condition precedent for initiating litigation).

[71] *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 triggered when potential claim is identified).

[72] Records POD at 42-43; Class Location POD at 35-36.

[73] San Bruno POD at 77-78 (Violation 1) (emphasis added).

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

first instance. This approach is, again, contrary to governing law – which requires evidence of "willful suppression."[75] The San Bruno POD's reliance on the absence of a record to conclude a strength test did not happen effectively shifted the burden of proof to PG&E. These findings must be rejected.[76]

E. The San Bruno POD Is Constitutionally Defective.

The San Bruno POD violates PG&E's right to due process and adequate notice. Reliance on § 451 to find decades-old violations not otherwise proscribed by regulation or statute violates 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. The San Bruno POD also violates constitutional requirements of fair notice by finding violations based on allegations asserted for the first time after the close of evidence.

1. The San Bruno POD's 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.[77] "[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."[78]

Section 451 fails this standard both on its face and as applied in the San Bruno POD. 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

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[75] *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).

[76] The violations implicated by the incorrect application of the spoliation doctrine and improper reliance on adverse inferences include (among others) Violations 1-2, 4, 9-17, 19-20, 23, and 29-31.

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

[78] *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 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).

offers no instruction or direction by which a utility could reasonably determine the "conduct that is forbidden or required."[79] Instead, whether particular conduct will be deemed in conformity or 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.[80]

The history of § 451's application in Commission proceedings, including in these proceedings, 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,"[81] has it been applied in that manner, over due process objections.[82] 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 violations 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,[83] it did not characterize § 451 as establishing an independently enforceable safety standard, much less discuss what that standard might be in practice.

Statements in the record here and in related proceedings 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."[84] 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

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[79] *Fox*, 132 S. Ct. at 2317.

[80] *See id.*; *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).

[81] *Carey*, D.99-04-029. 1999 Cal. PUC LEXIS 215, at *7

[82] 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.

[83] San Bruno POD at 34 (quoting D.61269 at 12).

[84] CPSD Records Rebuttal Testimony (initial submission) at 2 (emphasis added).

compliance with § 451 of the Public Utilities Code."[85] 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 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[86] and that CPSD explicitly disavowed this standard in its Records Opening Brief.[87] 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 San Bruno POD asserts, the Commission's decision in *Carey* could be read as establishing that the Commission would enforce a safety standard under § 451.[88] 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.[89] 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 San Bruno POD's 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.

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[85] Ex. Records CPSD-1 at 3 (emphasis added).

[86] Records POD at 51. Moreover, as discussed at page 5, *supra*, had PG&E requested the rates needed to pursue an "absolute duty" of safety the Commission might have rejected the request as "gold-plating."

[87] CPSD Records Post-Hearing Opening Brief at 15-16.

[88] San Bruno POD at 30-31.

[89] The other case cited by the San Bruno POD, *Pac. Bell Wireless, LLC (Cingular) v. Pub. Utils. Comm'n*, 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 § 451's application, the court pointed to prior Commission decisions that indicated "that its conduct in this instance would also violate the statute." *Cingular*, 140 Cal. App 4th at 741. PG&E had no such notice. The Commission has never applied Section 451 to punish a utility for what it concludes have been general across-the-board deficient gas operations.

At the very least, then, those violations premised on conduct or standards pre-dating 1999 cannot stand. The only industry standards on which the San Bruno POD relies – the pre-GO 112 ASME B.31.8 standards – pre-date *Carey* by more than 40 years. The San Bruno 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 such as API 5LX and 1104, as violating § 451.

The San Bruno POD's reliance on voluntary industry standards and prior investigation reports as evidencing the requisite notice that PG&E's conduct would be deemed unlawful exacerbates rather than cures the constitutional defect.[90] Whatever information and advice these materials contained, and no matter how well respected or broadly followed, they did not and could not establish enforceable legal standards that would provide the constitutionally requisite notice to regulated entities, including PG&E, of the bounds between permissible and impermissible conduct under the POD's utilization of § 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 POD – 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.[91]

In sum, § 451 does not by its terms give notice of any safety standard, much less the expansive regulatory scheme the San Bruno POD attributes to it. The San Bruno POD does not identify any specific or enforceable pipeline safety standard, rule, or practice submerged within § 451, and certainly none articulated anywhere prior to these proceedings. The retroactive imposition of numerous, particularized safety obligations through § 451 deprives PG&E of the constitutionally required fair notice of the standards to which it would subsequently be held.[92]

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[90] San Bruno POD at 32-34.

[91] *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).

[92] The violations implicated by the unconstitutional application of § 451 include all those premised on that section, including Violations 1-8, 17, 19, 21, and 31-32.

2. The San Bruno POD errs by adopting violations that were alleged after the close of evidence.

a. Due Process requires adequate and effective notice of the charges.

Among the "basic" requirements of due process are notice of the charges and a reasonable opportunity to respond.[93] 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."[94] A severe violation of these basic guarantees occurs where, as occurred here, new charges are introduced after the accused has already made its defense.[95]

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."[96] 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.[97] And 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."[98] 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."[99]

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[93] *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)).

[94] *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).

[95] *See Salkin*, 176 Cal. App. 3d at 1122.

[96] *Rosenblit*, 231 Cal. App. 3d at 1447-48.

[97] *Smith*, 37 Cal. App. 4th at 242.

[98] *Cannon*, 14 Cal. 3d at 695-96.

[99] *Ruffalo*, 390 U.S. at 551-52 & n.4 (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.").

The basic constitutional principle derived from these cases is that due process requires that an accused receive notice of the charge and an opportunity to defend against it, *i.e.*, what the charge is and that it is being asserted, not merely notice of facts that may or may not later be the basis for charging a violation of law that requires a defense.

b. PG&E did not have fair and adequate notice of the allegations on which the San Bruno POD's violations are based.

(i) CPSD impermissibly asserted dozens of previously-unalleged violations after the close of evidence.

On January 12, 2012, CPSD issued its report containing its factual findings from its investigation of the San Bruno accident and setting forth the violations of law it alleged against PG&E.[100] Section X (pages 162-63) of the Report, entitled "PG&E's VIOLATIONS OF APPLICABLE LAWS AND REGULATIONS," listed the violations CPSD alleged, and served as the charging document in this enforcement proceeding.[101] Construed broadly, Section X alleged 18 violations of law. The report explicitly alleged only one continuing violation.[102] PG&E responded to CPSD's 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.[103]

After the evidentiary hearing (which spanned four months), CPSD in Appendix C attached to its opening brief, tripled its alleged violations against PG&E, going from 18 to 55.[104] In addition to asserting more than three dozen previously unalleged violations, CPSD contended for the first time that 37 of the now 55 violations were "continuing" violations under Public Utilities Code § 2108, 13 of which CPSD alleged began in 1956.

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[100] Ex. CPSD-1 (CPSD/Stepanian). The January 12, 2012 report became CPSD's principal testimony in the evidentiary hearing.

[101] CPSD submitted no other charging document prior to or during the evidentiary hearing.

[102] CPSD's ambiguous language in the January 12, 2012 report renders some of its contentions susceptible to interpretation as alleging a continuing violation, though without a stated beginning or ending date. *See*, *e.g.*, SB OII Ex. CPSD-1 at 162 (CPSD/Stepanian) ("This allowed an unsafe condition to persist in violation of Section 451.").

[103] *See* Ex. PG&E-1 (PG&E/Various); Ex. CPSD-1 (CPSD/Stepanian). On August 20, 2012, CPSD submitted rebuttal testimony, which reaffirmed the alleged violations but added no others. Ex. CPSD-5 (CPSD/Stepanian). In fact, CPSD stated in its 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. CPSD-5 at 4 (CPSD/Stepanian) (emphasis added).

[104] CPSD Opening Brief, Appendix C.

The alleged violations regarding emergency response, before and after the evidentiary hearing, illustrate the fundamental due process problem CPSD created and the San Bruno POD adopts. In its January 12, 2012 report, CPSD alleged two violations of the federal regulations, that PG&E "violated Parts 192.605(c) and 192.615" for "failing to adequately maintain written procedures for . . . emergency response."[105] CPSD also included PG&E's alleged "fail[ure] to promptly and safely respond to the incident" as one item in a list of several items CPSD contended "***together*** constitute an unreasonably unsafe condition" in violation of § 451.[106] In contrast to these three alleged violations, in Appendix C CPSD alleged 21 distinct violations related to PG&E's emergency response, 18 based on previously-unidentified subsections of Part 192.605(c) and 192.615, and seven alleged as "continuing" violations.

PG&E moved to strike Appendix C.[107] The ALJ granted the motion, but permitted CPSD to submit a "Revised Appendix C" after adding "specific reference[s] to where the OII or one or more of its referenced documents provides PG&E with ***notice of the factual basis for the allegation***."[108] PG&E raised the issue again in its April 25, 2013 reply brief,[109] asserting that due process requires more than a factual description of conduct that CPSD turns into alleged violations after the close of evidence. Rather than correcting the error, the San Bruno POD compounds it, characterizing the belatedly-alleged violations as merely providing "greater specificity of the charges."[110]

(ii) Revised Appendix C did not and could not cure the due process defect introduced below.

The attempted cure in the proceeding below, Revised Appendix C, was invalid from its inception. Even if CPSD's January 12, 2012 report or other OII documents[111] discussed the factual basis for legal violations CPSD did not allege until after the close of evidence, that does

[105] Ex. CPSD-1 at 163 (CPSD/Stepanian).

[106] Ex. CPSD-1 at 162 (CPSD/Stepanian) (emphasis added).

[107] PG&E's Motion to Strike CPSD Opening Brief, Appendix C, Mar. 18, 2013.

[108] *See* Administrative Law Judge's Ruling On Pacific Gas and Electric Company's Motion to Strike Appendix C to the Opening Brief of the Consumer Protection and Safety Division, issued on April 2, 2013 (ALJ April 2, 2013 Ruling) (emphasis added).

[109] *See* PG&E Reply Brief. Because opening briefs were concurrently filed, PG&E's Reply Brief was its only chance to respond to CPSD's submission of Appendix C, and the numerous newly-alleged violations it contained, based on an unavoidably incomplete evidentiary record.

[110] San Bruno POD at 56, 57.

[111] ALJ April 2, 2013 Ruling.

not constitute prior notice of ***the alleged violations*** CPSD is asserting. Factual references do not establish that PG&E received adequate prior notice of the 37 new violations CPSD charged after trial, and as the case law discussed above demonstrates, citing to such factual discussions could not overcome the constitutional infirmity CPSD created. This infirmity is even more pronounced with respect to CPSD's alleged "continuing violations," which grew from one in the January 12, 2012 report[112] to 37 in Appendix C,[113] increasing by several orders of magnitude – after trial – the potential fines and penalties to which PG&E was exposed.

In an enforcement proceeding, PG&E must defend against alleged violations of law. Providing myriad descriptions of PG&E's allegedly deficient actions in multiple reports and testimony[114] does not have the same force and effect as alleging that PG&E's actions violated a law and that it is being "prosecuted" under that law for those actions; or even more, that it is being prosecuted for "continuing" violations recurring every day for 54 years. By proceeding in this fashion, CPSD failed to satisfy its constitutional obligation to put PG&E on notice of the legal charges against it in a time and manner that permitted PG&E to defend itself against those legal charges.[115]

(iii) The San Bruno POD's attempt to deny the existence of a due process violation also fails.

Apparently recognizing that references to factual discussions could not remedy the constitutional defect, the San Bruno POD jettisons that approach as a solution to CPSD's due process conundrum. Rather, the POD revisits whether CPSD had actually alleged anything new in Appendix C. As framed, the question becomes "whether CPSD has, in effect, by providing more detail in its charges of violations, unfairly alleged a new violation or a new legal theory of a violation in its opening brief."[116] The San Bruno POD concludes that CPSD had not so

[112] Ex. CPSD-1 at 162-63 (CPSD/Stepanian).

[113] CPSD Opening Brief, Appendix C. CPSD realleged all 37 continuing violations in Revised Appendix C.

[114] *See generally* Ex. CPSD-1 (CPSD/Stepanian) and Ex. CPSD-5 (CPSD/Stepanian).

[115] *See, e.g., Smith*, 37 Cal. App. 4th at 243 (holding that an agency violated due process by raising a new legal theory midway through the hearing because due process "requires notice of the statutory theory in the accusation").

[116] San Bruno POD at 56.

transgressed because Appendix C and the 37 additional violations it called out merely provided "greater specificity of the charges" not belatedly alleged, constitutionally infirm violations.[117]

To reach this conclusion, the San Bruno POD accepts that CPSD's originally identified violations fairly stated each of the 55 violations alleged in Appendix C, such that Appendix C did no more than provide "greater specificity" regarding violations of which PG&E had already received adequate notice.[118] The POD states in this regard:

> From the outset of this proceeding CPSD has consistently argued that 49 CFR 192 and Section 451 are applicable, and PG&E was on notice of this position. In its opening brief CPSD has provided greater specificity by referencing subsections of the sections already discussed in the CPSD Report.[119]

The conclusion that Appendix C merely provided "greater specificity" in the charges originally asserted against PG&E is an impossible leap, and demonstrably incorrect. Although the San Bruno POD notes that the original charges consistently alleged that "49 CFR Parts 192 and 199 and Section 451 are applicable," 49 CFR 192 contains the entire set of federal regulations addressing gas pipeline construction, operation, maintenance, integrity management, written policies and procedures and emergency response. It contains hundreds, if not thousands, of regulatory provisions.[120] Alleging that PG&E violated 49 CFR 192 is only slightly more meaningful than alleging PG&E "violated federal law." The same is true with respect to the allegation that PG&E violated § 451, which, as discussed in Section II. A, is essentially boundless in scope and empty in meaning as applied in these proceedings.

CPSD's more specific descriptions of alleged violations fare no better. For example, the San Bruno POD quotes from CPSD's summary allegation regarding integrity management violations in the January 12, 2012 report:

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[117] San Bruno POD at 56. The San Bruno POD observed that CPSD's "approach" was to "place PG&E generally on notice of the charges against [it], by citing the applicable laws in both the OII and the [January 12, 2012 report]." San Bruno POD at 56 n.26 (first alteration in original) (citation omitted). That CPSD and the San Bruno POD believe due process is satisfied by putting PG&E "generally on notice of the charges" underscores the problem.

[118] *See, e.g.*, San Bruno POD at 58 ("However, a fair reading of the CPSD report demonstrates…."); *id.* at 59 ("A fair reading of the OII and the CPSD Report shows. . .").

[119] San Bruno POD at 57. Later, the San Bruno POD reiterates: "As noted earlier, CPSD has consistently argued that 49 CFR Parts 192 and 199 and § 451 are applicable. The OII at pages 6-7 lists all of the state and federal laws applicable to natural gas pipeline safety." San Bruno POD at 59.

[120] *See* 49 C.F.R. 192.

> PG&E violated various requirements of 49 CFR 192, Subpart O, in its implementation of the Integrity Management process, including incomplete data gathering and integration, flawed threat identification, flawed risk assessment and using an incorrect assessment methodology. This allowed an unsafe condition to persist in violation of Section 451.[121]

At best, this general description in the January 12, 2012 report informed PG&E that some unspecified action it took (or did not take) at an unspecified time related to data gathering and integration, threat identification, risk assessment, and assessment methodology, all within its broader "implementation of the Integrity Management process," violated unidentified "various requirements" of 49 CFR Part 192, Subpart O. That regulatory scheme contains 51 separate and complex provisions, most of which contain multiple subsections, that comprehensively regulate integrity management programs and activities. CPSD's assertion that PG&E violated "Subpart O" is no more specific than the generic reference to a violation of 49 CFR 192, and suffers from the same constitutional defect. Similarly, alleging 21 separate violations regarding emergency response after the close of evidence when three were previously alleged cannot be fairly characterized as merely providing "greater specificity of the charges." 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***.[122]

Referring to the Commission's statement in the January 12, 2012 OII that it "will consider ordering daily fines for the full duration of any such violations[,]" the San Bruno POD concludes that "PG&E cannot reasonably claim there was inadequate notice that it faced allegations of continuing violations."[123] But that assertion is far wide of the mark. Being told that it could "face[] allegations of continuing violations" does not give notice to PG&E that it must defend against 37 separate continuing violations dating back to 1956, and that it will not be informed of 36 of them until after the close of evidence. The San Bruno POD's reliance on CPSD's statement in the January 12, 2012 report that "CPSD's investigation is ongoing"[124] is similarly insufficient. CPSD did not assert additional violations during the remainder of its

[121] San Bruno POD at 57; Ex. CPSD-1 at 162 (CPSD/Stepanian).

[122] *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).

[123] San Bruno POD at 53.

[124] San Bruno POD at 51.

investigation, which would have been consistent with an "ongoing" investigation. Nor do the Commission's references in the OII to "other documents such as the CPSD Report, the NTSB Report, and the IRP Report" support the San Bruno POD's reasoning.[125] On the contrary, relying on the rote incorporation of several hundred pages of external reports as a "source of notice of violations" underscores the lack of adequate notice actually provided.[126] The same is true with respect to the San Bruno POD's observation that "statements providing notice of alleged violations are found throughout the CPSD Report. . . ."[127] Directing PG&E to where it can search for statements in CPSD's January 12, 2012 report that may or may not be construed later as allegations of specific legal violations also does not hit the constitutional mark.

As the prosecutor in this enforcement proceeding, CPSD's responsibility was to allege violations PG&E could identify, understand, and have a full opportunity to defend. As the respondent, 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 being asserted.[128] In short, the touchstones by which the San Bruno POD arrived at its conclusion that PG&E received constitutionally adequate notice of the charges against it demonstrate both the miscalibration of the POD's constitutional analysis and the patently inadequate notice PG&E received.[129]

III. CONCLUSION

PG&E deeply regrets the loss of life, injuries, and the effect on the San Bruno community, and it has made and will continue to make extraordinary efforts to reduce and minimize the risk of another such tragedy occurring. Indeed, PG&E has fully accepted legal and financial responsibility for the accident, has compensated those affected, and acknowledges that the Commission should impose a penalty in this proceeding. However, the Commission has an overriding duty to follow the law, to regulate fairly, and to implement policies not only to

[125] San Bruno POD at 52.

[126] San Bruno POD at 52.

[127] San Bruno POD at 52.

[128] *See Rosenblit*, 231 Cal. App. 3d at 1446 (finding a due process violation where respondent had to under a painstaking effort. . . to uncover the basis and scope of the allegations").

[129] The violations implicated by the failure to provide constitutionally adequate advance notice of the allegations against PG&E include (among others) Violations 1 (continuing component), 2, 6, 9, 11, 13, 16-17, 19, 22-29, and 31-32.

penalize operators for past violations but also encourage and enhance current and future safe natural gas pipeline operations that in accordance with state law and pipeline safety regulations. In furtherance of such policies, the Commission should reject these legally defective findings and issue a decision grounded in a proper application of the record and the law.

Respectfully submitted,

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