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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)

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 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.

However, the findings and conclusions from the Presiding Officer's Decision in Proceeding I.11-02-016 ("Records POD") on which the proposed penalty is based in part do not meet applicable legal standards, are based on serious misapplications of California law, and violate PG&E's constitutionally mandated rights.[2] In particular, many – and, in some instances, nearly all – of the alleged violations in this proceeding:

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

[2] PG&E is simultaneously appealing the size and structure of the penalty associated with these findings in its appeal of 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 ("Penalties POD"), issued on September 2, 2014. 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 excessive fines set forth in PG&E's appeal of the Penalties POD.

(1) rest on an incorrect interpretation of Public Utilities Code § 451[3] 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 duplicative of violations asserted in other proceedings, violations asserted in the same proceeding, or both;

(3) are improperly deemed to be "continuing," thus compounding the error;

(4) rely on adverse inferences, thus relieving CPSD of the burden of proof, based on the untenable position that, at all times in its history, PG&E should have anticipated that its pipeline records would become the subject of litigation, and that the loss of such records constitutes spoliation of evidence;[5]

(5) are based on facts and standards that PG&E did not know and could not have known existed or applied at the time of violation; and

(6) are based on the erroneous conclusion that a party does not have to knowingly and intentionally mislead the Commission in order to violate Rule 1.1.

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

II. VIOLATIONS FOUND IN THE RECORDS POD ARE BASED ON MULTIPLE LEGAL ERRORS THAT UNDERMINE THE DECISION.

A. The Records POD Imposes Penalties Without Statutory Authority for the Underlying Violations.

The majority of the violations found in the Records POD – 349,980 all told, including 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 Records POD commits legal error in its application of § 451, and thus any penalty based on these purported violations is invalid.

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 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

[3] Unless otherwise noted, all subsequent references are to the Public Utilities Code.
[4] U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7.
[5] CPSD has been renamed SED, the Safety and Enforcement Division. PG&E uses CPSD here for clarity.

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.[6] 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.[7]

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[6] *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).

[7] The Records POD does not dispute that the statutory heading "Rates" is "entitled to considerable weight," but conclude 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 interpret it as a free-standing utility safety obligation. Records POD at 49-51. The Records POD's analysis, however, rests on a critical error. In focusing on the heading of Chapter 3, the 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. *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 Section 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 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.[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] 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 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.

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 is incompatible with the statutory text. That interpretation divorces one consideration (safety) from all the other 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

[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 *32 ("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.").

request as "gold-plating."[10] An "absolute duty" of safety cannot be reconciled with the statutory text.

The Records POD's mistaken interpretation of § 451 as imposing an "absolute duty"[11] 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.[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.

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.[13]

The Records POD's interpretation would also render superfluous and unnecessary those "safety" rules adopted by the Commission pursuant to this authority. 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)

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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 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.").

[11] Records POD at 51.

[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.").

[13] *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).

industry practice guidelines.[14] Yet the Records 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 nonsensical: if the 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 Records POD concludes that its interpretation of § 451 complements, rather than renders superfluous, specific safety standards.[17] But the Records POD provides no explanation how, if that interpretation of § 451 is correct, specific safety standards could be 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 Records 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.

The Records POD's interpretation of § 451 is essentially a 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 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,

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[14] R.T. 146 (CPSD/Halligan) (where Ms. Halligan explains that GO 112 modified the ASA B31.8 standard to change the word "should" to "shall"); R.T. 161 (CPSD/Halligan).
[15] Records POD at 60-61.
[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 Records POD would graft onto § 451.
[17] Records POD at 53-56.

"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]

Nor do any of the cases cited by the Records POD support this interpretation of § 451. The Records 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] 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 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 or not § 451 can serve as a free-floating source of safety requirements. In another case cited in the Records 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 or not § 451 imposes a stand-alone safety obligation, and thus *Carey* does not constitute precedent on this point. Similarly, *San Diego Gas & Electric 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 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 Records POD claims can be found in its text.[20]

The Records POD also posits that its interpretation of § 451 is necessary to avoid the "absurd result" of concluding that prior to GO 112 in 1960, California had no laws mandating the safe operation of gas facilities and gas operators like PG&E "could engage in unsafe practices with impunity."[21] 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 fines that might have been

[18] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).
[19] Records POD at 51-53.
[20] Records POD at 52.
[21] Records POD at 53.

imposed for specific violations of safety provisions. Conversely, investments needed for safe operations are to be considered when setting rates.

In sum, the Records POD misapplies § 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 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.[22]

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 Records POD does – 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.

[22] *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.

Interpreting § 451 to incorporate extrinsic safety standards would further exacerbate the due process concerns implicated by the Records POD's overly broad (and essentially boundless) view of the authority conveyed by § 451, as it would potentially render utilities 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 B31.8 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.[23] GO 112 expressly incorporated the ASME B31.8 1958 edition with modifications, thereby giving those standards the force of law in California. Recognizing that the standards were up to that point voluntary, the Commission modified ASME B31.8 at the time of its adoption to make certain its provisions were "mandatory rather than ***left optional***."[24] It would have been unnecessary for the Commission to make any provision of ASME B31.8 "mandatory rather than left optional" if compliance with ASME B31.8 was already mandated by § 451. In fact, the very words "left optional" confirm beyond doubt that ASME B31.8 was exactly that – optional – before December 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 Records POD finds that PG&E violated such rules and standards, including specifically the ASME B31.8 standards prior to the effective date

[23] D.61269 at 2, 4.
[24] D.61269 at 11 (emphasis added).

of GO 112 (July 1, 1961),[25] those findings are not authorized by § 451 and cannot support the imposition of penalties.[26]

B. The Records 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 Records POD dramatically inflates the total number of violations 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."[27] 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."[28] This principle is clearly, and repeatedly, contravened by the Records 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.

For example, 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

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[25] Records POD at 54-55. The Records POD insists that rather than making compliance with ASME B31.8S mandatory, it only considers compliance with ASME B31.8 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 reason that PG&E's asserted violations of ASME B31.8 *ipso facto* constitute violations of § 451 as well. Moreover, if this were not the case, it would only exacerbate the due process infirmity by untethering the violations from identifiable (albeit non-binding) industry standards.

[26] The violations implicated by the incorrect interpretation of § 451 include all those premised on that provision, including Records Violations 1-11, 15-24, and 31-33.

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

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

PG&E's leak records.[29] As a basis for its findings the Records POD cites PG&E's testimony that it maintained leak records in job files as well as in local offices.[30] 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.[31] 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 facts, would be properly alleged only as a single violation. The duplicative violations in the Records POD reflect the duplicative and overlapping violations asserted in the parallel reports issued by CPSD's engineering and recordkeeping consultants.

The Records POD also contains violations premised on conduct that is more properly construed as a subset of the conduct described in another Records POD violation. In one 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.[32] 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.[33] But because the pipeline specifications for Segment 180 are a subset of the records that the Records POD finds should be included in the job files,[34] the first violation should have been properly subsumed within the second rather than counted as an independent violation.[35]

These and other duplicative findings in the Records POD 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 any event,

[29] Records POD at 166-174 (Records Violations 21 and 22). The Records POD combines into a single violation two violations originally charged separately by CPSD.
[30] Records POD at 170.
[31] Records POD at 245-46 (Records Violation C.3).
[32] Records POD at 87 (Records Violation 1).
[33] Records POD at 94 (Records Violation 2).
[34] Records POD at 92.
[35] The fact that the Records POD also finds Violations 1 and 2 to be "continuing" each day from 1956 through September 9, 2010 further grossly overstates the number of violations. *See infra* Section B.2.

however, it is clear that the violations that are impermissibly duplicative are not valid and cannot support imposition of the penalty.[36]

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

Equally problematic is the Records POD's conclusion that nearly all of the violations may be deemed "continuing" in nature, supporting the imposition of cumulative penalties under Public Utilities Code section 2108. This conclusion is 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 with governing case law. As such, this assumption 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.[37] Courts in other contexts have also defined continuing violations as courses of unlawful conduct that continue over a period of time.[38]

The Records POD's boundless theory that ongoing consequences cause an otherwise finite act to continue indefinitely is contrary to California Supreme Court precedent. The California Supreme Court has "[u]niformly . . . looked with disfavor on ever-mounting penalties

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[36] The violations implicated by the incorrect quantification of violations include Records Violations 1-11, 13-24, 28, and 33.

[37] *Investigation of Qwest Commc'n 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).

[38] *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).

and [has] narrowly construed the statutes which either require or permit them."[39] *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 remained in the water; or (2) each day the process of deposit lasted.[40] The Court adopted the latter, narrower construction because the alternative – each day the oil remained on the water – was illogical and unduly punitive.[41] Unlike the statute in *Younger*, § 2108 is not ambiguous. 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.[42]

The Records POD fails to address the Supreme Court's decision and reasoning in *Younger*, which PG&E raised in its post-hearing briefing.[43] Under the Records POD's holding 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 Section 2108 must be construed narrowly.

The San Bruno POD, by contrast, 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

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[39] *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.

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

[41] *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).

[42] *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).

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

violation to occur under Section 2108, ***it is the violation itself that must be ongoing, not its result***."[44] 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*** after the installation has occurred."[45] 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.[46]

C. The Records POD Improperly Applies the Spoliation Doctrine.

Among the most significant of the legal errors in the Records POD is 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 spoliation doctrine, and calls into doubt many of the violations found in the POD.

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."[47] Without any analysis of how courts apply the "reasonably foreseeable litigation" element, the 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*** . . . ."[48] In other words, the Records POD concludes that PG&E should have been on 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.

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[44] 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.").
[45] San Bruno POD at 63 (emphasis added)
[46] The violations implicated by the incorrect interpretation of § 2108 include all those premised on that provision, including Records Violations 1-7, 9-10, and 12-33.
[47] Records POD at 42 (citing *Reeves v. MV Transp., Inc.*, 186 Cal. App. 4th 666, 681 (2010) (emphasis added by Records POD)).
[48] Records POD at 43 (emphasis added).

This application of the spoliation doctrine is improper. A "general concern over litigation" does not satisfy the reasonable foreseeability prong of the doctrine.[49] The duty to preserve documents only arises when a party "reasonably should know that evidence may be relevant to anticipated litigation."[50] 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.[51] "This standard does not trigger the duty to preserve documents from the ***mere existence of a potential claim or the distant possibility of litigation***."[52] Rather, identification of a specific potential claim is a signal that litigation is reasonably foreseeable.[53]

The Records POD fails to apply this objective standard. Instead, it 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 commonly understood by society as

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[49] *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).

[50] *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).

[51] *Micron Tech., Inc. v. Rambus, Inc.*, 645 F. 3d 1320; *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).

[52] *Micron*, 645 F.3d at 1320 (Fed Cir. 2011) (emphasis added) (citing *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681-82 (7th Cir. 2008).

[53] *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).

unfair or immoral."[54] 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,"[55] 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.[56]

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

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

[55] *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).

[56] *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).

maintain adequate records, or that the lack of a particular record impacted PG&E's operations. Rather, the Records POD relied entirely on the adverse inference – invoked by virtue of the spoliation holding – to conclude that in the absence of ***any*** evidence the issues could be decided against PG&E. The Records POD 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."[57] Here, it is undisputed that CPSD bore the burden of proof in these proceedings.[58] Thus, even if an adverse inference were permissible here – which it is not – it would not be sufficient to support the Records POD findings. These findings must be rejected, and the penalties on which the findings are based must be reassessed.[59]

D. The Records POD Improperly Finds Violations Based on Hindsight.

The Records POD finds violations based on facts and standards that PG&E did not know and could not have known existed or applied at the time that the violation occurred. 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.[60] 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 Records POD violates this principle. For example, the Records POD concludes that PG&E failed to adequately maintain its gas transmission system records based on the testimony and reports of CPSD's records management consultants.[61] These consultants evaluated PG&E's

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[57] *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).

[58] Records POD at 39–43.

[59] The violations implicated by the incorrect application of the spoliation doctrine and improper reliance on adverse inferences include (among others) Records Violations 1-11 and 15-33.

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

[61] Records Violation 24.

historic records management practices using the GARP standard, which the Records POD acknowledges was first published in 2009,[62] in support of violations going as far back as 1955.[63] The Records POD commits legal error when it uses a modern recordkeeping standard to support violations stretching back decades. The POD's assertion that the "principles" reflected in the GARP standard do not impose new recordkeeping requirements[64] provides an insufficient basis to conclude that PG&E should have known in 1955 that its recordkeeping practices would be judged by a standard not developed until decades in the future.[65]

E. The Records POD Misapplies Rule 1.1.

Notwithstanding the absence of evidence that PG&E intended to mislead the Commission or its staff, the Records POD concludes that PG&E "misl[e]d the Commission or its staff by an artifice or false statement of fact or law," in violation of Rule 1.1 of Commission's Rules of Practice and Procedure, by mistakenly characterizing the status of a video recording and omitting certain personnel information in two separate responses to discovery requests. These findings and the Records POD's holding that "there is no requirement that there be an intention to mislead the Commission" under Rule 1.1[66] 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."[67] The verb "mislead," particularly as used in this context, necessarily implies a purposeful action – one taken with the affirmative intent to "deceive" the Commission.[68] 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

[62] Records POD at 201.
[63] Records POD at 202.
[64] Records POD at 202.
[65] The violations implicated by the incorrect reliance on hindsight include (among others) Records Violations 1-3, 15-22, and 24-33.
[66] Records POD at 130.
[67] Comm'n Rules of Practice & Proc. 1.1.
[68] *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).

of precedent holding that penal statutes must be presumed to carry a *mens rea* element[69] and numerous decisions from this and other jurisdictions interpreting similar provisions.[70] 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.[71]

III. THE RECORDS 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.[72] "[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."[73]

Section 451 fails this standard both on its face and specifically as applied in the Records POD. Section 451 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."[74] 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

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[69] *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.").

[70] *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).

[71] The violations implicated by the incorrect interpretation of Rule 1.1 include Records Violations 12-14.

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

[73] *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).

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

of their own experience and views. This is precisely the type of statute that the courts have deemed impermissibly vague and therefore void.[75]

The history of § 451's application in Commission proceedings, including in these OIIs, confirms the section's 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,"[76] – has it been applied in that manner, over due process objections.[77] 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 finding 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,[78] 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 Section 451 of the Public Utilities Code."[79] 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."[80] 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

[75] *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).
[76] *Carey*, D.99-04-029, 1999 Cal PUC LEXIS 215, at *7.
[77] The other case is *Investigation of Pac. Bell Wireless, LLC*, D.04-09-062, 2004 Cal. PUC LEXIS 453, which resulted in the *Cingular* court of appeal decision, addressed below.
[78] Records POD at 57 (quoting D.61269 at 12).
[79] Ex. PG&E-1 at 2 (emphasis added).
[80] Ex. CPSD-1 at 3.

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[81] and that CPSD explicitly disavowed this standard in its Records Opening Brief.[82] That the adjudicating officials and CPSD could not maintain a consistent position on the safety standard purportedly inherent in § 451 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 Records POD asserts, the Commission's decision in *Carey* could be read as establishing that the Commission would enforce a safety standard under § 451.[83] 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.[84] In any event, 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 Records 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.

The Records POD's reliance on voluntary industry standards and investigation reports, claiming that these provided PG&E the requisite notice that its conduct would be deemed unlawful,[85] exacerbates rather than cures the constitutional defect. Whatever information and advice these materials contained, and no matter how well respected or broadly followed, they did not and could not establish legally enforceable standards that would provide the constitutionally

[81] Records POD at 51. Moreover, as discussed *supra*, at 4, had PG&E requested the rates needed to pursue an "absolute duty" of safety the Commission might have rejected the request as "gold plating."
[82] CPSD Opening Brief at 15-16.
[83] Records POD at 56-57.
[84] The other case cited by the Records POD, *Pac. 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 § 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 § 451 to punish a utility for what it concludes have been general across-the-board deficient operations.
[85] Records POD at 60-61.

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-1961 violations found by the Records 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.[86]

In sum, § 451 does not by its terms give notice of any safety standard, much less the regulatory scheme the Records POD attributes to it. The Records 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 safety obligations through § 451 deprives PG&E of the constitutionally required fair notice of the standards to which it would subsequently be held.[87]

[86] *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).

[87] The violations implicated by the unconstitutional application of § 451 include all those premised on that provision, including Records Violations 1-11, 15-24, and 31-33.

IV. 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, 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 penalize operators for past violations but also to encourage and enhance current and future safe natural gas pipeline operations 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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