

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Safety and Enforcement Division

**Resolution SED-6A
July 14, 2022**

RESOLUTION

**RESOLUTION REVISING RESOLUTION SED-6 PURSUANT TO
DECISION 22-04-058 TO INCLUDE THE PENALTY ASSESSMENT
METHODOLOGY**

SUMMARY

In this Resolution, the California Public Utilities Commission (Commission) approves a revision to Resolution SED-6 to include an analysis of the Penalty Assessment Methodology set forth in Commission Resolution M-4846.¹ In Decision (D.) 22-04-058 the Commission held on rehearing that Resolution SED-6 did not include the required analysis of the Penalty Assessment Methodology, and remanded Resolution SED-6 back to the Commission's Safety and Enforcement Division (SED) and Pacific Gas and Electric Company (PG&E) to incorporate this analysis for the Commission's consideration. (D.22-04-058 at 4.)

In response to the direction in D.22-04-058, this Resolution includes an analysis of the Penalty Assessment Methodology relating to the Administrative Consent Order and Agreement (ACO) between SED and PG&E that was approved in Resolution SED-6 and resolved issues relating to the 2019 Kincade Fire. No other changes are made to Resolution SED-6.

BACKGROUND

In 2019, the Kincade Fire occurred in PG&E's service territory. SED conducted an investigation of the Kincade Fire and identified possible violations by PG&E of provisions of the California Public Utilities Code and the Commission's General Orders.

¹ The Penalty Assessment Methodology is set forth in Appendix I to the Enforcement Policy, which in turn is an attachment to Resolution M-4846.

Resolution M-4846, issued in November 2020, adopted the Commission Enforcement and Penalty Policy (Enforcement Policy) and authorized Commission staff to negotiate and propose an Administrative Consent Order to resolve an enforcement matter, subject to review and consideration by the Commission. SED and PG&E executed an Administrative Consent Order and Agreement (ACO) that resolved all issues related to SED's investigations of the 2019 Kincade Fire.

The ACO relating to the 2019 Kincade Fire was presented to the Commission for its approval via Resolution SED-6. On December 9, 2021, the Commission issued Resolution SED-6, approving the ACO. The Utility Reform Network (TURN) filed an application for rehearing of Resolution SED-6, alleging multiple legal errors. In D.22-04-058, the Commission denied all but one of TURN's claims. The one issue on which the Commission granted rehearing was Resolution SED-6's failure to include an analysis of the Penalty Assessment Methodology, which the Commission found to be required under the Commission's Enforcement Policy. (D.22-04-058 at 3-4.)

Accordingly, this Resolution provides an analysis of the Penalty Assessment Methodology applicable to Resolution SED-6.

DISCUSSION

According to D.22-04-058, the Penalty Assessment Methodology sets forth five factors that staff and the Commission must consider in determining the amount of a penalty for each violation: "[S]everity or gravity of the offense, conduct of the regulated entity, financial resources of the regulated entity, totality of the circumstances in furtherance of the public interest, and role of precedent." (D.22-04-058 at 4.) Those factors were not expressly addressed in Resolution SED-6, and accordingly are addressed here.

A. Severity or Gravity of the Offenses

The Commission has stated that the severity of the offense includes several considerations, including economic harm, physical harm, and harm to the regulatory process.

1. Physical and Economic Harm

The Commission has described the physical and economic harm criteria as follows:

Economic harm reflects the amount of expense which was imposed upon the victims. In comparison, violations that cause actual physical harm to people or property are generally considered the most severe, followed by violations that threaten such harm.²

² Enforcement Policy at 16.

The Kincade fire burned over 75,000 acres of land, destroyed approximately 374 structures, damaged approximately 60 buildings, and injured four firefighters before it was fully contained. PG&E did not contest CAL FIRE's determination that the Kincade Fire was caused by PG&E's electrical transmission lines. The ACO acknowledged and reflected the significant physical and economic harm arising from the Kincade Fire.

2. Harm to the Regulatory Process

As part of the severity of the offense factor, the Commission has described the harm to the regulatory process criterion as follows:

“Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the Commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.” (Public Utilities Code §702).

Such compliance is essential to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.³

There were no allegations of Rule 1.1 violations and no allegations of other ethical violations or any deliberate misconduct associated with the Kincade Fire. PG&E complied with SED during the investigation of the Kincade Fire and in the negotiation and presentation of the ACO. Accordingly, this was not a significant factor in determining the basis for the penalty imposed pursuant to the ACO.

B. The Conduct of the Utility

In describing the conduct of the utility aspect of the reasonableness analysis, the Commission has recognized the utility's conduct in: (1) preventing the violation; (2) detecting the violation, and (3) disclosing and rectifying the violation.⁴

This was the primary area of disagreement between the parties. SED alleged that PG&E violated Public Utilities (PU) Code section 451 and Commission General Order (GO) 95, Rules 31.1 and 31.6 in its maintenance of its Geysers #9 transmission line, and that PG&E failed to prevent, detect, disclose and rectify those violations. PG&E contends that it followed the requirements of PU Code section 451 and GO 95 when maintaining the Geysers #9 line prior to the Kincade Fire.

³ Enforcement Policy at 17.

⁴ Enforcement Policy at 17.

Accordingly, the details of this factor, such as the parties' evaluations of their respective litigation risk, were the focus of negotiations subject to the confidentiality provisions of Commission Rule 12.6, and are not described here. This is consistent with the Enforcement Policy, which states:

The Policy does not list the full range of considerations that may be relevant to negotiating a proposed settlement. However, the following general considerations should be evaluated as part of any proposed settlement to be submitted for Commission review: 1. Equitable factors; 2. Mitigating circumstances; 3. Evidentiary issues; and 4. Other weaknesses in the enforcement action that the division reasonably believes may adversely affect the ability to obtain the calculated penalty. (Enforcement Policy at 15.)

Nevertheless, PG&E's conduct in preventing the violation, detecting the violation, and disclosing and rectifying the violation were expressly considered in negotiating and resolving the ACO.

In response to the Kincade Fire and pursuant to the ACO, PG&E removed the final three spans of the Geysers #9 and has expedited its efforts to de-energize, ground, and remove transmission lines with no foreseeable future use. SED will monitor PG&E's progress in removing those transmission lines to further reduce the future risk of catastrophic wildfires.

C. Financial Resources of the Utility

The Commission has described this criterion as follows:

Effective deterrence also requires that staff recognize the financial resources of the regulated entity in setting a penalty that balances the need for deterrence with the constitutional limitations on excessive penalties. . . . If appropriate, penalty levels will be adjusted to achieve the objective of deterrence, without becoming excessive, based on each regulated entity's financial resources.⁵

PG&E provided SED with information about its financial resources over the course of its negotiations leading to the ACO, and SED took that into consideration. According to PG&E, its recent reemergence from Chapter 11 bankruptcy proceedings and settlement agreements to pay monetary penalties relating to fires has affected its financial situation and its ability to pay monetary penalties. PG&E's current financial situation is characterized by sub-investment grade corporate credit ratings, weak credit metrics, and a

⁵ Enforcement Policy at 19.

restriction on the ability of its parent company to pay dividends to its common shareholders. PG&E's corporate, or issuer, rating is BB- by S&P, and Ba2 by Moody's. (The Moody's rating is equivalent to a BB "flat" rating on the S&P scale.) PG&E's poor credit ratings and weak credit metrics are driven by the high business risk in California, as well as by the high debt levels that PG&E incurred in order to execute the Plan of Reorganization in 2020.

PG&E's financial situation is highly atypical of regulated utilities that virtually all pay dividends and have credit ratings solidly in the investment grade category. As a result, PG&E's financial situation remains challenged as it strives to improve its cash flows and restore its financial health in the coming years. PG&E's financial resources remain constrained by the need to use its cash to fund new utility infrastructure investment, and also to reduce its high level of debt. Cash used to pay penalties is cash that otherwise could be used to pay down debt, a major step in improving PG&E's credit metrics and ultimately improving its credit ratings which would benefit customers through lower financing costs of infrastructure.

The Commission itself is aware of most of the details of PG&E's significant financial obligations, but for clarity they are summarized here. PG&E has entered into settlement agreements in other venues pursuant to which it has total financial obligations of \$25.5 billion to settle claims related to the 2017 and 2018 wildfires as part of its Plan of Reorganization. In addition, the Commission's approval of the Settlement of the 2017 and 2018 Wildfire OII, with modifications, imposed additional penalties on PG&E of \$2.137 billion (with \$200 million permanently suspended). Further, PG&E has entered into settlement agreements with the Sonoma District Attorney under which it has total financial obligations of \$20.25 million to settle the civil complaint relating to the Kincade Fire and with the District Attorneys of Plumas, Lassen, Tehama, Shasta, and Butte Counties under which it has total financial obligations of \$34.75 million to settle civil complaints relating to the Dixie and Fly Fires filed by those district attorneys.

The \$125 million combination of amounts for which PG&E will pay penalties or not seek rate recovery pursuant to the ACO is reasonable and appropriate in light of PG&E's financial condition.

D. Totality of Circumstances in Furtherance of Public Interest

The Commission has described this criterion as follows:

Setting a penalty at a level that effectively deters further unlawful conduct by the regulated entity and others requires that staff specifically tailor the package of sanctions, including any penalty, to the unique facts of the case. Staff will review facts that tend to mitigate the degree of wrongdoing as well as any facts that

exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.

An economic benefit amount shall be estimated for every violation. Economic benefit includes any savings or monetary gain derived from the act or omission that constitutes the violation.⁶

In SED's estimation, PG&E derived relatively minimal "economic benefit" in the form of cost savings or monetary gain as a result of the act or omission that constituted the violation. The package of sanctions, including remedial actions and a monetary penalty, were tailored to the unique facts of this case.

The totality of the circumstances in furtherance of public interest supports approval of the ACO. First, it provides a significant resolution of the issues identified here. PG&E agrees to pay \$40 million in penalties and not seek rate recovery for \$85 million in shareholder-funded costs for removal of permanently abandoned transmission lines. By reaching a settlement, SED and PG&E have implicitly agreed that the total shareholder cost of \$125 million is not constitutionally excessive.

Second, with an appropriate resolution having been reached, it is in the public interest to resolve this proceeding now. The ACO obviates the need for the Commission to adjudicate the disputed facts, alleged violations, and appropriate penalty. Approval of the ACO promotes administrative efficiency so that the Commission and parties are not required to expend substantial time and resources on continued litigation for a matter that has been satisfactorily resolved.

E. Consistency with Precedent

The Commission has described the role of precedent as follows:

Penalties are assessed in a wide range of cases. The penalties assessed in cases are not usually directly comparable. Nevertheless, when a case involves reasonably comparable factual circumstances to another case where penalties were assessed, the similarities and differences between the two cases should be considered in setting the penalty amount.⁷

The ACO is reasonable when compared to the outcome of other settlements and outcomes in Commission proceedings. The following are examples of approved settlements and enforcement decisions involving electric utilities and safety issues.

⁶ Enforcement Policy at 19.

⁷ Enforcement Policy at 21.

1. Long Beach Power Outages OII Decision (D.17-09-024)

In this proceeding, the CPUC approved a settlement between Southern California Edison Company (“SCE”) and SED related to multiple power outages on SCE’s secondary network system, which serves Long Beach. The electric facility failures caused fires in several underground structures and explosions. No fatalities or injuries resulted from the power outages. SED alleged, among other things, that (1) SCE violated PU Code §§ 451 and 768.6 and GO 128, for failing to properly maintain, inspect, and manage the electrical system in Long Beach; (2) SCE violated a commitment to an earlier settlement by failing to provide accurate estimates of service restoration times during outages; and (3) the violations that caused or contributed to the power outages that resulted in fires, explosions, and property damage endangered the safety of the public. Under the settlement, SCE admitted to violations of Rule 17.1 of GO 128 and PU Code § 451. SCE agreed to pay a penalty of \$4 million to the General Fund. SCE also agreed to perform \$11 million worth of corrective actions, designed to prevent future outages, at shareholder expense.

2. Huntington Beach Underground Vault OII Decision (D.17-06-028)

In this proceeding, the CPUC approved a settlement between SCE and SED related to an accident that resulted in the death of an employee of SCE’s subcontractor. The employee died as a result of inadvertently removing an energized dead-break elbow while preparing underground cables for testing. SED alleged that SCE had, among other things, (1) delegated its safety responsibilities to the subcontractor in violation of California law; (2) failed to ensure that contractors and subcontractors performed their work safely, in violation of PU Code § 451 and Rule 17.1 of GO 128; and (3) refused to submit its investigation report and the documents reviewed in its investigation. Under the settlement, SCE admitted that it failed to identify unsafe practices and failed to prevent the accident. SCE did not “expressly admit” responsibility for “ensuring” contractor safety. SCE agreed to pay a fine of \$2.01 million to the General Fund and to implement safety enhancements, including: (1) improving processes for evaluating contractors and subcontractors; (2) increased oversight and observation over SCE representatives or their designees performing contracted field work; (3) performing Contractors Safety Quality Assessments; and (4) hiring personnel with special safety training to conduct field observations and assessments of Tier 1 contractors.

3. Kern Power Plant OII Decision (D.15-07-014)

In this proceeding, the CPUC approved a settlement between PG&E, Bayview / Hunters Point Community Legal, and SED related to a fatality at the decommissioned Kern Power Plant. The fatality occurred when a subcontractor of PG&E demolished an unused fuel oil tank. SED alleged that PG&E had: (1) failed to maintain a safe system; (2) improperly delegated its duty to maintain a safe system to a third-party contractor; (3) failed to adequately investigate incidents to identify and implement corrective actions; and

(4) violated PU Code § 451 by failing to furnish and maintain equipment and facilities to promote the safety of the public. Under the settlement, PG&E admitted that, due to a lack of expertise in power plant demolition, it attempted to transfer primary responsibility for safety and safety oversight to a contractor to demolish the fuel oil tank at Kern Power Plant. PG&E also admitted that it had not verified the safety data from the hired contractor and that the onsite representative did not have formal training in safety management and risk assessment. Under the settlement, PG&E agreed to pay \$5,569,313 in shareholder penalties, which consisted of \$3,269,313 in ratemaking offsets that benefit customers and \$2.3 million in fines paid to the General Fund. PG&E also agreed to implement a Corrective Action Plan to improve safety at PG&E on a company-wide basis. The Corrective Action Plan included a Contractor Safety Program and an Enterprise Causal Evaluation Standard.

4. Malibu Canyon Fire OII Decision – Settlement 1 (D.12-09-019)

In this proceeding, the CPUC approved a settlement between AT&T, Sprint, Verizon Wireless (the “Settling Respondents”), and SED related to three utility poles that fell during a Santa Ana windstorm and ignited the Malibu Canyon Fire. The poles were jointly owned by SCE, AT&T, Sprint, Verizon Wireless, and NextG. The power lines on the poles were owned and operated by SCE. There were no reported injuries or fatalities. SED alleged, among other things, that (1) one of the felled poles that ignited the Malibu Canyon Fire was overloaded in violation of GO 95 and PU Code § 451; (2) the safety factor of replacement poles did not meet the requirements of GO 95 for new construction; and (3) the Settling Respondents violated Rule 1.1 by submitting accident reports, data responses, and written testimony that contained incorrect information. The Settling Respondents denied all of SED’s allegations. Ultimately, the Settling Respondents agreed to pay \$12 million (divided equally between the three Settling Respondents). Of the \$12 million, \$6.9 million was to be allocated to the General Fund and \$5.1 million to the Enhanced Infrastructure and Inspection Fund (“EIIF”), established pursuant to the settlement agreement. Funds paid to the EIIF were to be used to strengthen utility poles in Malibu Canyon and to conduct a statistically valid survey of joint-use poles in the service territory for compliance with GO 95. Any funds leftover from the EIIF would revert to the General Fund.

5. Malibu Canyon Fire OII Decision – Settlement 2 (D.13-09-026)

In the above-referenced Malibu Canyon Fire proceeding, the CPUC also approved a settlement between NextG Networks of California, Inc. (“NextG”) and SED. SED alleged the same violations of GO 95, PU Code § 451, and Rule 1.1. Under the settlement, NextG admitted noncompliance with GO 95, PU Code § 451, and Rule 1.1. NextG agreed to pay \$14.5 million in penalties. The penalties were comprised of \$8.5 million in fines to the General Fund and \$6 million allocated for a safety audit of all NextG poles and pole attachments in California. The settlement required NextG to complete the audit and any remedial work required following the audit within three years from the start date of the

audit. NextG agreed to pay any money left over from the \$6 million to the General Fund; that money could not be used for any remedial work related to substandard facilities identified in the audit.

6. Malibu Canyon Fire OII Decision – Settlement 3 (D.13-09-028)

In the above-referenced Malibu Canyon Fire proceeding, the CPUC also approved a settlement between SCE and SED. SED alleged the same violations of GO 95, PU Code § 451, and Rule 1.1. SCE admitted that: (1) one of the poles was overloaded in violation of GO 95; (2) it failed to take prompt action to prevent the pole from overloading, in violation of PU Code § 451; and (3) it withheld relevant information from SED and the CPUC in violation of Rule 1.1. Under the settlement, SCE admitted noncompliance with GO 95, PU Code § 451, and Rule 1.1. SCE agreed to pay \$20 million to the General Fund and provide \$17 million to assess utility poles in the Malibu area for compliance with GO 95 safety factors and SCE’s internal standards. SCE agreed to remediate all substandard utility poles. All \$37 million in fines were comprised of shareholder penalties.

7. The Witch/Rice and Guejito Fire Settlements (D.10-04-047)

In late October 2007, several severe fires occurred in the San Diego area. The Rice Fire ignited in Fallbrook, California, and the Witch Fire ignited in southern San Diego County near State Highway 78 and Santa Ysabel. The Guejito Fire started in the San Pasqual area of the county. In San Diego County, the fires burned more than 197,000 acres, over 1,100 residences were destroyed, and two people were killed. Under the terms of the approved settlement, San Diego Gas & Electric Company (“SDG&E”) paid \$14.35 million to the General Fund; CoxCom Inc., and Cox California Telcom LLC Agreement, CoxCom Inc. and Cox California Telcom LLC paid \$2 million to the General Fund; SDG&E was also required to reimburse SED up to an additional \$400,000 in order to implement a computer work module; and SDG&E was required to remit any unused balance of the \$400,000 to the General Fund.

8. The 2017 and 2018 Wildfire Settlement (D. 20-05-019)

In October 2017 and November 2018, multiple wildfires occurred across PG&E’s service territory in Northern California. The 2017 and 2018 wildfires were unprecedented in size, scope, and destruction. The Commission’s decision states that at the peak of the 2017 wildfires, there were 21 major wildfires that, in total, burned 245,000 acres and causing 44 fatalities, 22 of which are attributed to fires started by PG&E facilities. PG&E’s equipment failure started the 2018 Camp Fire, which burned approximately 153,336 acres, destroyed 18,804 structures, and resulted in 85 fatalities. The Commission imposed penalties totaling \$2.137 billion on PG&E, which consisted of \$1.823 billion in disallowances for wildfire-related expenditures, \$114 million in System enhancement Initiatives and corrective actions, and \$200 million fine payable to the General Fund (which was permanently suspended).

Discussion of Precedents

The above precedents provide a wide range of outcomes in enforcement decisions involving electric operations safety issues. Some of the violations include violations of Commission rules, including Rule 1.1. While this case involves serious allegations, there are no allegations of deliberate misconduct and no Rule 1.1 allegations.

As the Enforcement Policy notes, “The penalties assessed in cases are not usually directly comparable.”⁸ That appears to be the situation here – an examination of potentially relevant Commission precedent shows that the factual circumstances presented here are not reasonably comparable to those in other cases where penalties were assessed, except in a very broad sense. When examined in a broad manner, the level of sanctions imposed here is certainly within the range previously imposed by the Commission – there is nothing to indicate that the ACO is an outlier. The ACO results in a reasonable outcome considering the applicable precedents.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution was served by email on PG&E and other interested parties on June 7, 2022, in accordance with Cal. Pub. Util. Code § 311(g). Comments were due on June 27, 2022. Comments were received: _____.

FINDINGS AND CONCLUSIONS

1. Pursuant to Resolution M-4846, SED and PG&E negotiated a proposed settlement relating to PG&E’s involvement in the ignition of the 2019 Kincade Fire, and presented an ACO to the Commission for its review and consideration.
2. In Resolution SED-6, the Commission approved the ACO.
3. TURN filed an application for rehearing of Resolution SED-6.
4. In Decision 22-04-058, the Commission denied rehearing on all but one issue raised by TURN, and granted rehearing on Resolution SED-6’s failure to include the analysis set forth in the Penalty Assessment Methodology.
5. This Resolution performs the analysis set forth in the Penalty Assessment Methodology relating to the ACO for the Kincade Fire, and incorporates that analysis into Resolution SED-6.
6. Based on the analysis under the Penalty Assessment Methodology, the agreed-upon fines, safety measures and disallowances are reasonable in light of the circumstances.
7. No other changes are made to Resolution SED-6.

⁸ Enforcement Policy at 21.

THEREFORE, IT IS ORDERED that:

1. Resolution SED-6 is revised to include the analysis of the Penalty Assessment Methodology, as directed by D.22-04-058.
2. This Resolution is effective today.

I certify that the foregoing Resolution was adopted by the California Public Utilities Commission at its regular meeting on July 14, 2022, and the following Commissioners approved favorably thereon:

RACHEL PETERSON
Executive Director