

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-274
Administrative Law Judge Division
November 10, 2011

RESOLUTION

RESOLUTION ALJ-274. Establishes Citation Procedures for the Enforcement of Safety Regulations by the Consumer Protection And Safety Division Staff for Violations by Gas Corporations of General Order 112-E and Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199.

1. Summary

This Resolution delegates specified authority to the Consumer Protection and Safety Division Staff, or such other Staff as may be designated by the Executive Director, to issue citations to all gas corporations to enforce compliance with General Order (GO) 112-E including the federal regulations that are incorporated by reference into the General Order. GO 112-E contains specific rules governing the design, construction, testing, maintenance, and operation of utility gas gathering, transmission, and distribution pipeline systems and supplements compliance with the federal standards set forth in the Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199.

The citation program described herein delegates to Staff¹ the authority to draft and issue citations for violations of GO 112-E and the Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199. We delegate to Staff the authority to require immediate correction of the violations, as appropriate, and to levy fines for violations in the amounts prescribed for penalties by Public Utilities Code § 2107.² Each violation is a separate and distinct offense and each day of an ongoing violation may be cited as a separate and distinct offense, consistent with Pub. Util. Code § 2108. Penalty payments are the responsibility of shareholders of the investor-owned natural gas utilities and are

¹ As used throughout this resolution, the term “Staff” refers to Consumer Protection and Safety Division Staff or such other Staff as may be designated by the Executive Director to carry out the particular functions involved.

² All statutory references are to the Public Utilities Code, unless otherwise noted.

not to be charged to ratepayers. This Resolution also sets forth the appeal process for objecting to such citations.

2. Jurisdiction and Authority

The Commission has broad regulatory authority, as set forth in Article XII of the California Constitution and § 701 of the Pub. Util. Code. Section 701 authorizes the Commission to “supervise and regulate every public utility in the State . . . and do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”

As mandated in § 702:

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 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.

Pursuant to § 451 each public utility in California must:

Furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment and facilities,... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

Indeed, the Commission has stated that “[t]he duty to furnish and maintain safe equipment and facilities is paramount for all California public utilities.³

Pursuant to § 2101, the Commission is directed “to see that the provisions of the constitution and the statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed. . .”

³ Decision (D.) 11-06-017 at 16.

Pursuant to § 768⁴ and other relevant authority, the Commission has adopted, and at various times amended GO 112-E (Rules Governing Design, Construction, Testing, Maintenance, and Operation of Utility Gas Gathering, Transmission, and Distribution Piping Systems).

Recent legislation has emphasized the need for increased safety procedures. On October 7, 2011, Governor Brown signed into law several natural gas pipeline safety bills: Senate Bill (SB) 44, Assembly Bill (AB) 56, SB 216, SB 705, and SB 879. We provide an overview of this legislation, because the provisions in this Resolution are consistent with the mandates and the intent of the legislation. As the Division of Ratepayer Advocates (DRA) points out, the new legislation adds new or amends certain provisions to the Pub. Util. Code. SB 44 (Ch. 520, Stats. 2011) adds Chapter 4.5 and §§ 950, 955, and 956 to the Pub. Util. Code. These provisions are known as the Natural Gas Pipeline Safety Act of 2011 and, among other things, address emergency shut-down and pressure reduction procedures, emergency response communication procedures, and require the Commission to establish compatible emergency response standards in consultation with various agencies and the first responder community.

AB 56 (Ch. 519, Stats. 2011) adds §§ 956.5, 958, 958.5, and 969 to the Pub. Util. Code. Among other things, this bill prohibits a gas corporation from recovering any fine or penalty in any rate approved by the Commission. This bill also requires a gas corporation to demonstrate in a General Rate Case proceeding that the requested revenue requirement will be sufficient to enable the gas corporation to fund those projects and activities necessary to maintain safe and reliable service and to meet federal and state safety requirements in a cost-effective manner. SB 216 (Ch. 521, Stats. 2011) adds § 957 to the Pub. Util. Code and requires the Commission, unless it is determined that the Commission is preempted under federal law, to require the installation of automatic shutoff or remote controlled sectionalized block valves on certain intrastate transmission lines that are located in a high consequence area or that cross an active seismic earthquake fault.

⁴ In relevant part, § 768 provides that 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 establish uniform or other standards of construction or equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand.”

SB 705 (Ch. 522, Stats. 2011) adds §§ 961 and 963 to the Pub. Util. Code. Among other things, this bill requires each gas corporation to develop a plan for safe and reliable operation of its gas pipeline facilities and requires the Commission to accept, modify, or reject the plan by year-end 2012, and to allow sufficient flexibility for the gas corporation to redirect activities to respond to safety requirements. SB 705 states that “it is the policy of the state to place safety of the public and gas corporation employees as the top priority and require the commission to require that the distribution rate of a gas corporation include sufficient revenues and employee staffing to provide for prompt provision of service to the public consistent with this policy.” Finally, SB 879 (Ch. 523, Stats. 2011) adds § 969 to the Pub. Util. Code and mandates that the Commission require a gas corporation to establish a balancing account for the recovery of expenses related to the gas corporation’s transmission pipeline integrity management program or related capital expenditures for the maintenance and repair of transmission pipelines; any unspent moneys must be returned to ratepayers with interest. SB 879 also increases the maximum amount of the penalty provisions set forth in § 2107 to \$50,000 for each offense.

Existing law, such as Pub. Util. Code § 7, allows the Commission to delegate certain tasks to Commission Staff. The Commission may lawfully delegate to its Staff the performance of certain functions, including the investigation of facts preliminary to agency action and the assessment of specific penalties for certain types of violations.⁵ The primary purpose of an effective enforcement program should be to deter misbehavior or illegal conduct by utilities and other entities subject to Commission jurisdiction thereby ensuring that both the employees of the utility and the public it serves are properly protected from the inherent hazards of providing utility services. To increase the effectiveness of our safety program, it is reasonable to provide our Staff with an additional enforcement procedure to ensure that utilities adhere to their statutory and service obligations.⁶

The delegated authority we approve today is designed to allow our Consumer Protection and Safety Division (CPSD) Staff inspectors, or such other Staff as may be designated by the Executive Director, to issue citations as part of their inspection duties in order to help ensure the safety of gas facilities and the utilities’ operating practices.

⁵ D.09-05-020 at 8.

⁶ Our jurisdiction to create citation programs is well-established. We have adopted similar citation programs in several other areas. See Commission Resolutions ALJ-187 (appeal procedures for household goods carriers, charter party carriers, and passenger stage corporations), E-4195 (resource adequacy), E-4257 (renewables portfolio standard filing requirements), ROSB-002 (transportation), UEB-002 (telecommunication), USRB-001 (propane), and W-4799 (water and sewer). The resolutions may be accessed at the following link: <http://www.cpuc.ca.gov/PUC/Practitioner/DecRes.htm>.

Such regulatory authority does not in any way diminish the utilities' primary responsibility in operating their facilities. As the Commission noted in D.61269:

It is recognized that no code of safety rules, no matter how carefully and well prepared, can be relied upon to guarantee complete freedom from accidents. Moreover, the promulgation of precautionary safety rules does not remove or minimize the primary obligation and responsibility of respondents to provide safe service and facilities in their gas operations. Officers and employees of the respondents must continue to be ever conscious of the importance of safe operating practices and facilities and of their obligation to the public in that respect.⁷

3. GO 112-E

Pursuant to the requirements of Pub. Util. Code §§ 451 and 768, GO 112 was first adopted in 1960, in D.61269.⁸ GO 112 prescribes the rules governing the design, construction, testing, maintenance, and operation of utility gas gathering, transmission and distribution piping systems. Over the years, GO 112 has been amended several times, and is now designated as GO 112-E, which incorporates by reference the Federal Pipeline Safety Regulations, specifically Title 49 of the Code of Federal Regulations (49 CFR), Parts 190, 191, 192, 193, and 199.⁹ GO 112-E specifically states that "these rules do not supersede the Federal Pipeline Safety Regulations, but are supplements to the Federal Regulations."¹⁰

As stated in GO 112-E, Rule 102.1, "the purpose of these rules is to establish, in addition to the Federal Pipeline Safety Regulations, minimum requirements for the design, construction, quality of materials, locations, testing, operations, and maintenance of facilities used in the gathering, transmission, and distribution of gas and in liquefied natural gas facilities to safeguard life or limb, health, property and public welfare and to provide that adequate service will be maintained by gas utilities operating under the jurisdiction of the commission." Rule 102.2 of GO 112-E states that the rules are "concerned with safety of the general public and employees' safety to the extent they are affected by basic design, quality of the materials and workmanship, and requirements for testing and maintenance of gas gathering, transmission and distribution facilities and liquefied natural gas facilities."

⁷ D.61269, 58 CPUC 1st at 420.

⁸ *Id.* at 413.

⁹ D.95-08-053, 61 CPUC 2d at 190.

¹⁰ GO 112-E, Rule 101.2.

4. San Bruno Explosion and Independent Review Panel Report

On September 9, 2010, a portion of Line 132, installed, operated, and maintained by Pacific Gas and Electric Company (PG&E), ruptured in San Bruno, CA, and the ensuing explosion and fire killed eight people, injured many others, destroyed 38 homes, and damaged 70 additional homes. On September 23, 2010, the Commission issued Resolution L-403, which, among other things, established the Independent Review Panel to gather and review facts related to the San Bruno explosion and make recommendations for the safe management of PG&E's natural gas transmission lines.

In assessing the Commission's oversight authority, the Independent Review Panel recommended that "[t]he CPUC should seek to align its pipeline enforcement authority with that of the State Fire Marshal's by providing the CPSD staff with additional enforcement tools modeled on those of the OSFM [Office of State Fire Marshal] and the best from other states."¹¹ The Panel noted that Pipeline Safety Division of the OSFM has the authority to initiate and conclude enforcement actions and to assess civil penalties without initiating the same kind of formal processes and procedures that is currently required at the Commission.¹²

The OSFM model is similar to and is based on the model used for informal enforcement at the Pipeline and Hazardous Material Safety Administration (PHMSA). PHMSA is part of the United States Department of Transportation and its Office of Pipeline Safety administers the Department's national regulatory program to assure the safe transportation of natural gas, petroleum, and other hazardous materials by pipeline. The federal Office of Pipeline Safety develops regulations and other approaches to risk management to assure safety in design, construction, testing, operation, maintenance, and emergency response of pipeline facilities.¹³

PHMSA is the federal agency broadly charged with overseeing safety of the transportation of natural gas by pipeline, and is responsible for the federal rules which are incorporated into the Commission's GO 112-E. State agencies may enforce pipeline safety regulations under certification by PHMSA's Office of Pipeline Safety. State

¹¹ Independent Review Panel Report, Recommendation 6.7.3.1 at 104.

¹² Pursuant to Government Code §§ 51010 *et seq.*, the OSFM has safety and enforcement jurisdiction over intrastate hazardous *liquid* pipelines. In particular, Government Code §§ 51018.6 *et seq.* mandates that the State Fire Marshal shall adopt regulations for conducting enforcement proceedings and provides that violations may result in civil penalties of \$10,000 per day that the violation exists, up to \$500,000 per occurrence.

¹³ See generally, <http://www.phmsa.dot.gov/portal/site/PHMSA>.

agencies are allowed to adopt additional or more stringent safety regulations as long as such regulations are compatible with the federal minimum regulations. California and 47 other states regulate intrastate gas pipeline facilities through an annual certification program. As with most other states, California has adopted additional safety standards for pipeline facilities that are more stringent than the federal requirements.

5. National Transportation Safety Board Recommendations

On August 30, 2011, the National Transportation Safety Board (NTSB) adopted its Pipeline Accident Report on the rupture of PG&E's Line 132, which included findings, the probable cause of the San Bruno explosion and several recommendations.¹⁴ The NTSB strongly recommends that the Governor of the State of California expand the Commission's Pipeline Safety Division staff enforcement authority and ensure that Commission staff has the authority to issue fines and penalties. The Resolution we adopt today is consistent with both the NTSB's and the Independent Review Panel's recommendations.

6. Delegation of Authority to Commission Staff

We hereby delegate to Staff the authority to issue citations for violations to ensure that immediate hazards to public safety are corrected without delay. These actions will significantly expand the enforcement tools available to our Staff and should help to ensure prompt correction of potential safety violations. We find it is reasonable and necessary to delegate to Staff the ability to issue citations to any gas corporation for violations of GO 112-E and CFR, Title 49, Parts 190, 191, 192, 193, and 199.

This Resolution gives Staff the authority to issue a written citation to any gas corporation, stating the specific violation, the amount of the fine, and information about how to appeal the citation, pursuant to the procedures provided herein. This Resolution grants Staff the authority to issue such written citations to help implement its existing authority to require that the violation be corrected at, or soon after, the time Staff identifies a violation. Each day of an ongoing violation may be penalized as an additional offense. Before issuing a citation, Staff will generally consult with the Director or Deputy Director of CPSD before issuing a citation. The Respondent may either pay the penalty or submit a Notice of Appeal. The procedures for issuing citations and for submitting a Notice of Appeal are set forth in Appendix A. Each citation will assess the maximum penalty amount provided for by § 2107.

¹⁴ NTSB's Report was posted on its website on September 26, 2011:

<http://www.nts.gov/doclib/reports/2011/PAR1101.pdf>

Payment of a citation or submitting an appeal does not excuse the utility from correcting the violation, nor does it prevent the Commission from taking other remedial measures, including, but not limited to, (i) issuing corrective orders and other orders, such as an expedited order to show cause, and (ii) issuing an order instituting investigation in the event the underlying violation is unresolved or becomes part of a pattern and practice of violations. The Commission's regulatory mandate is to ensure that utilities provide safe and reliable service at reasonable rates; authorizing Staff to issue citations is necessary to fulfill that mandate. We require that the utilities correct any violations as soon as feasible, consistent with maintaining a safe and reliable system while prioritizing the safety of the public and gas corporation employees, and we establish fines at the maximum level to protect the public interest, as well as to ensure compliance with the Commission's orders and the Public Utilities Code. We direct Staff to take account of the factors listed in § 2104.5 in issuing citations. Respondents may appeal based on the factors set forth in § 2104.5.

As various entities have proposed, we agree that it is reasonable to add to the transparency of this program by requiring our Staff to publish citations and appeals, on the Commission's website. We will also require the respondent gas corporations to notify local authorities when a citation is issued in their jurisdiction. Within ten days of the date the citation is served, the gas corporations shall notify the appropriate individual in each city and county in which the violation occurs, and shall also serve the Director of CPSD with an affidavit attesting that such notification has been provided to the appropriate local authorities, and specifying who has been notified. We also direct the Director of CPSD to provide a quarterly report to each Commission office that briefly lists the citations issued, the categories of those citations, any appeals that have been submitted, and whether CPSD has noted any trends in the violations for which the citations are issued.

In order to identify and eliminate safety hazards, we encourage effective communication among Staff, the gas corporations, and the gas corporations' employees. Nothing in the citation program we approve today interferes with the utilities' requirements to maintain and operate their systems safely, including invoking any necessary emergency response procedures to address immediate safety hazards, or any other procedures necessary to ensure that immediate safety hazards are promptly corrected. To the extent that Staff discovers violations that constitute immediate safety hazards, pursuant to § 702, Staff has existing authority to ensure that those violations are promptly corrected. The citation program we approve today is cumulative to all other applicable provisions of state and federal law that provide for sanctions against violators, including but not limited to §§ 2112 and 2113, and does not affect or limit the tort liability of the gas system operator.

The citation program provided for above and in Appendix A applies to all gas corporations subject to the Commission's jurisdiction.

Notice and Comment

A draft of this Resolution was issued to jurisdictional gas utilities and other interested parties in accordance with Section 311 of the Pub. Util. Code. Comments were allowed under Rule 14.5 of the Commission's Rules of Practice and Procedure.

Southwest Gas Corporation (Southwest Gas), the Sempra Energy Utilities (Sempra), DRA, the City and County of San Francisco, and the City of San Bruno submitted opening comments on October 21, 2011. Southern California Edison Company (SCE), DRA, the Utility Workers Union of America (UWUA), the Center for Accessible Technology, and The Utility Reform Network (TURN) submitted timely reply comments on October 26, 2011. Upon careful consideration of the comments, we have modified various aspects of the Resolution, as discussed here and in the relevant sections of the Resolution.

As DRA and UWUA suggest, we have included a specific discussion of the gas pipeline safety legislation signed into law by Governor Brown. We have incorporated the recommendations put forth by DRA, the City and County of San Francisco, the City of San Bruno, Center for Accessible Technology, and TURN that any citations and appeals be made public by posting such documents on the Commission's website. We have also incorporated the recommendation that local authorities be notified when a citation is issued in their jurisdiction. SCE raises certain concerns regarding recommendations to publicize citations and related correspondence on the Commission's website, because SCE states that GO 66-C specifically excludes accident reports and investigation records from public disclosure that are submitted under Pub. Util. Code § 315, except to the extent disclosed at hearing or by formal Commission action. We do not agree with SCE: it is reasonable to make citations and appeals publicly available. Because this resolution, which is a formal action of the Commission, authorizes this disclosure, there can be no question of any violation of GO 66-C. Furthermore, in those situations where a violation involves an accident, by not requiring that all related correspondence be posted, we do not require the posting of the full accident report (although the full text of the citation will be posted.) Again, the onus is on the gas corporations to operate their systems and facilities safely. The public and local authorities need to be aware of violations that occur in their areas. As the Center for Accessible Technology points out, it is reasonable to require such an approach, particularly because local agencies can inform and assist disabled constituents, if necessary.

The City and County of San Francisco also suggests that the Resolution clarify how and when a violation will be deemed to be corrected, including requiring an affidavit from the respondent's Chief Executive Officer, affirming that the alleged violation has been

corrected. While this suggestion has merit, we prefer to have our Staff communicate directly with the Respondent to ensure that the violation has been adequately corrected.

Several commenters addressed the timeframe for correcting violations. DRA and the City of San Bruno recommend more specificity in providing a timeline for correcting immediate safety hazards. The City of San Bruno recommends a one-day correction period in all cases and states that no extensions of time should be granted. Southwest Gas, Sempra, and SCE contend that the timeframes described in the draft Resolution are unworkable. We remove the requirement to correct a violation within a specific timeframe, and instead require that violations be corrected as soon as feasible and that the Respondent submit a detailed Compliance Plan to the Director of CPSD, unless the violation can be corrected within ten days, as set forth in Appendix A. In addition, we clarify that fines may continue to accrue for each day of an ongoing violation until the violation is corrected. DRA also recommends that the gas corporations bear the costs of any adjudicated citation. While this recommendation may be consistent with recent legislation, we will not adopt it at this time due to concerns regarding implementation.

Southwest Gas, the Sempra Utilities, and SCE state that they support the intent of the Resolution, but urge the Commission to initiate a rulemaking to consider such delegated authority and to ensure that the enforcement approach adopted mirror that used by PHMSA. The utilities recommend that the period allowed for correcting violations is too restrictive and should be modified. They urge that CPSD be allowed some discretion to set a correction date and to agree to a mutually-acceptable time period for extensions to correct violations. Southwest Gas argues that CPSD should be able to negotiate a different penalty or to withdraw a citation. The utilities contend that imposition of penalties at the maximum amount imposed by § 2107 violates the excessive fines clause and the due process clause of the United States Constitution. Southwest Gas also contends that requiring the respondent to deposit the full amount of the penalty due, even if an appeal is submitted is an illegal “taking” under the U.S. Constitution. Further, Southwest Gas contends that due process requires that the respondent be afforded an opportunity to appeal the correction period and that the affidavit required to be signed by the Chief Executive Officer in seeking an extension of time to correct the violation is not appropriate or realistic. As stated above, we have eliminated a prescriptive correction period, but it is reasonable to ensure that each gas corporation’s Chief Executive Officer is aware of the violation and that the Chief Executive Officer affirms that any delay in correcting a violation will not impact the safe operation of the gas pipelines. We discuss the utilities’ due process concerns below.

Sempra argues that the Resolution grants unfettered discretion to the Staff and agrees that such authority should be delegated only to the Director of CPSD, if it is delegated at all. We decline to make this change. The Commission requires flexibility for its Executive Director to designate CPSD Staff or such other Staff who may be most

appropriate to carry out the various functions involved in this citation program described in this Resolution. As TURN notes, the utilities argue that Staff has too much discretion in some circumstances yet argues for additional Staff discretion in other circumstances. Sempra also contends that the factors set forth in § 2104.5 should be taken into account in setting the penalty. We agree that Staff should consider the factors set forth in § 2104.5, and will direct Staff to do so. In any event, if a utility believes that the amount of the fine imposed in any Staff-issued citation is not consistent with the factors set forth in § 2104.5, it may appeal the amount of the fine to the full Commission, which will ensure that those factors are properly considered. Both SCE and Sempra contend that the Staff must have an affirmative burden to prove its case, and that such an approach violates due process and Commission precedent. Our procedures provide for the appropriate burden of proof from Staff. SCE notes that other citation programs allow a respondent to correct or cure a violation without the imposition of a penalty. In this Resolution, we are specifically sending a strong message to gas corporations: safety is our primary concern and we intend to expand Staff's ability to enforce compliance with safety mandates.

We are not persuaded by the utilities' due process arguments. While we agree that requiring the gas corporations to place the penalty amount on deposit with the Commission's Fiscal Office is a reasonable approach to deterrence, as UWUA notes, we are persuaded that such a requirement may be difficult to implement. On the basis of potential implementation complexities, rather than any legal impediment, we will not now require the deposit of any penalty amount with the Commission's Fiscal Office when a Notice of Appeal is submitted, as described in Appendix A.

In addition, the utilities' constitutional arguments on excessive fines, due process and takings are too hypothetical and speculative in this facial challenge to the citation enforcement procedures adopted in this Resolution. The utilities presume that because the CPSD staff would have the authority to issue citations, that they would be imposing the citations for the maximum amount of penalties (and for the maximum days possible) without sufficient justification, and further that the Commission would, on appeal, uphold these amounts. However, as a facial challenge, the utilities, too, bear a heavy burden (which they have not met here) to challenge the citation enforcement procedures as unconstitutional, because in some future hypothetical situation constitutional problems may arise. *See Calif. Assn. of Private Special Education Schools v. Dep't of Education* (2006) 141 Cal.App.4th 360, 371-72 (and cases cited therein).

Moreover, we do not concur with Sempra's proposed enforcement approach, modeled after PHMSA's. As the Center for Accessible Technology cautions, the lengthy and drawn-out compliance process proposed by utilities would fail to advance the concern expressed by the Independent Review Panel and that National Transportation Safety Board. Such a lengthy process would not restore public confidence in the safety of gas

utilities transmission and distribution facilities and it would not instill confidence in the Commission's own ability to provide effective oversight of the natural gas system.

UWUA points out that an over-emphasis on punitive measures could create obstacles to prevention, i.e., identification and elimination of hazards before they cause injury and damage, and points out that the open and transparent safety culture called for in SB 705 is of utmost importance. However, UWUA agrees that the immediate correction of a violation is the first phase of graduated enforcement and is consistent with the provisions of SB 705. UWUA recommends that CPSD be granted some discretion in imposing fines and suggests that fines should be waived or reduced in cases of violations that are self-identified and self-corrected, and where no injury or damage has resulted from the violation. We agree that Staff should consider those facts in deciding whether or not to cite a violation. It is also reasonable to require the gas corporation to notify Commission Staff and local authorities of such self-identified violations. Again, we remind the gas corporations that the onus is on them to comply with the laws of this State and to ensure that their systems and facilities are operated safely.

TURN fully supports the intent and provisions of the resolution. TURN maintains that the Commission has clear authority to delegate to staff the power to investigate and issue citations with penalties. Both DRA and TURN refer to the Commission's findings in D.09-05-020. We concur that this Resolution is consistent with the approach cited approvingly by the Commission in D.09-05-020. In that decision, the Commission referred to D.02-02-049 and concluded that while the

general rule is that agencies cannot delegate discretionary duties in the absence of statutory authority, [cited cases] 'stand for the narrower principle that while agencies cannot delegate the power to make fundamental policy decisions or 'final' discretionary decisions, they may act in a practical manner and delegate authority to investigate, determine facts, make recommendations. . . even though such activities in fact require Staff to exercise judgment and discretion.'¹⁵

Thus, in determining whether a delegation of authority is unlawful, the question is whether the Commission has delegated its power to make fundamental policy decisions or final discretionary decisions.¹⁶

As in D.09-05-020, we find here that we retain final discretionary authority in determining the outcome of any appeals that may be submitted. As TURN points out, Sempra's due process arguments have been previously dismissed by the Commission.

¹⁵ D.09-05-020 at 3, citing D.02-02-049.

¹⁶ Id at 3.

For example, Resolution ROSB-002 found that the safeguards provided . . . to be adequate as demanded under fundamental principles of due process of law.”¹⁷

Based on concerns regarding implementation of this Resolution, it is reasonable to direct the Director of CPSD to convene a workshop in early 2012 to discuss implementation. It is also reasonable to require Staff to convene a check-in workshop in approximately one year to consider how the program is working, continued implementation concerns, lessons learned, and any necessary mid-course corrections. As stated above, we have modified various sections of the Resolution in response to comments and have also modified the procedures set forth in Appendix A.

Findings and Conclusions

1. Public Utilities Code § 701 authorizes the Commission to supervise and regulate every public utility in the State.
2. Public Utilities Code § 702 mandates every public utility to obey and promptly comply with every Commission order, decision, direction, or rule.
3. Public Utilities Code § 2101 directs the Commission to see that the provisions of the State constitution and statutes dealing with public utilities are addressed and obeyed.
4. Recent legislation, including AB 56, SB 44, SB 216, SB 705, and AB 879 have added provisions to or amended provisions of the Public Utilities Code, specifically mandating increased safety measures related to gas pipeline safety. This Resolution is consistent with the requirements and the intent of the recent legislation.
5. California law, including Public Utilities Code § 7, authorizes the commission to delegate certain powers to its Staff, including the investigation of acts preliminary to agency action, and the issuance of citations for certain types of categories of violations in specified amounts.
6. The citation program for gas corporations, as provided for above and in Appendix A, is necessary to ensure, effective, prompt, and efficient enforcement of Commission decisions and orders.
7. The citation program, as provided for above and in Appendix A, is similar to citation programs previously adopted by the Commission for other utilities.
8. The citation program, as provided for above and in Appendix A, is reasonable, and will facilitate achieving compliance with Commission decisions and orders to protect public safety and to deter future violations.

¹⁷ Resolution ROSB-002 at 7.

9. In order to increase the transparency of the program, it is reasonable to require the Commission's Staff to publish any citation and related correspondence, including appeals, on the Commission's website.
10. In order to promote public safety and increased communication with local authorities and emergency response providers, it is reasonable to require the respondent gas corporations to notify the appropriate local authorities in the cities and counties in which a citation is issued and do so as soon as necessary and reasonable, but in any case no later than ten days after effective service of the citation. Within ten days of notification of the local authorities, the respondent gas corporation should be required to serve the Director of CPSD with an affidavit specifying the date of notification and the name and contact information of each local authority so notified.
11. It is reasonable to assess penalties for each violation at the maximum amount set forth in Pub. Util. Code § 2107; this approach is consistent with the need to protect public safety and to ensure compliance with the safety requirements of the Commission's orders and the Public Utilities Code.
12. It is reasonable to direct Staff to take account of the factors delineated in Public Utilities Code § 2104.5 in issuing citations. If a utility believes that the amount of the fine imposed in any Staff-issued citation is not consistent with the factors set forth in § 2104.5, it may appeal the amount of the fine to the full Commission, which will ensure that those factors are properly considered.
13. As set forth in Public Utilities Code § 2108, in the case of a continuing violation, each day's contenance is a separate and distinct offense; therefore, each day of an ongoing violation may be penalized as an additional offense.
14. The Commission needs the flexibility for its Executive Director to designate CPSD Staff or such other Staff who may be most appropriate to carry out the various functions involved in the citation program described in this Resolution.
15. The gas pipeline citation program should allow a Respondent to appeal Staff-issued citations.

16. Payment of a citation or filing an appeal does not excuse the gas corporation from promptly correcting cited violations, and does not preclude the Commission from taking other remedial measures.
17. Penalty payments are the responsibility of shareholders of the gas corporation and shall not be charged to ratepayers.
18. Nothing in the citation program we approve today interferes with the gas corporations' requirements to maintain and operate their systems safely, including invoking any necessary emergency response procedures to address immediate safety hazards, or any other procedures necessary to ensure that immediate safety hazards are promptly corrected.
19. To the extent that violations are self-identified and self-corrected, and no injury or damage has resulted from these violations, Staff should take these factors into account in deciding whether to cite such violations.
20. It is reasonable to require the gas corporations to provide notice of any self-identified and self-corrected violations, as described in Finding 19, to Commission Staff and to local authorities within ten calendar days of self-identification of the violation.
21. To the extent that Staff discovers violations that constitute immediate safety hazards, pursuant to § 702, Staff has existing authority to ensure that violations are promptly corrected.

THEREFORE, IT IS ORDERED that:

1. The Commission delegates authority to the Consumer Protection and Safety Division Staff, or such other Staff as may be designated by the Executive Director, to issue citations to and to levy fines on gas corporations to enforce compliance with General Order 112-E and the Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199, under the procedures contained in Appendix A.
2. The Citation Procedures and Appeals Process set forth in Appendix A is hereby adopted to govern the issuance and appeal of citations for violation of General Order 112-E and the Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199 by investor-owned gas corporations.
3. Penalty payments are the responsibility of shareholders of the gas corporations and shall not be charged to ratepayers.
4. Gas corporations shall correct any cited violation as soon as feasible, consistent with maintaining safe and reliable systems, while prioritizing the safety of the public and gas corporation employees. Payment of a penalty or submitting a Notice of Appeal does not exempt the utility from correcting the cited violation.

Violations that constitute immediate safety hazards shall be corrected, as appropriate and required by public safety concerns.

This resolution is effective today.

I hereby certify that this Resolution was duly introduced, passed, and adopted by the Public Utilities Commission of the State of California at its regular business meeting held on _____. The following Commissioners approved it:

PAUL CLANON
Executive Director

Appendix A
Citation Procedures and Appeal Process

I. Citation Procedures

A. Contents of Citation

1. A specification of each alleged violation, including citation to the portion of General Order 112-E (including, where relevant, citation to the specific rule in CFR, Title 49, Parts 190, 191, 192, 193, and 199) allegedly violated;
2. A statement of the facts upon which each alleged violation is based;

(a) While the citation need not include all supporting evidence, Staff will make the evidence available for timely inspection upon request by the Respondent;
3. The amount of the fine; which may be expressed as the amount of the fine per day, which may continue to accrue until the violation is corrected, if the citation is for an ongoing violation;
4. A statement that the Respondent shall, within ten calendar days of the date of service of the citation, either pay the amount of the fine set forth in the citation or appeal the citation. The citation shall also inform the Respondent that the violation must be corrected as soon as feasible and that unless the violation is corrected within ten days, the Respondent must submit a Compliance Plan to the Director of CPSD within ten days of the date of service of the citation. An immediate safety hazard will require immediate correction. The citation shall also state that the Respondent will forfeit the right to appeal the citation by failing to do one of these things within ten calendar days. The citation shall also inform the Respondent that the amount of the fine may continue to accrue through the appeal process, until the violation is corrected;
5. A Citation Payment Form;
6. An explanation of how to submit an appeal, including the Respondent's right to have a hearing, to have a representative at the hearing, to request a transcript, and to request an interpreter; and

7. A form for submitting the appeal, which will be called a Notice of Appeal of Citation.

B. Service of Citation and Publication on Commission's Website.

1. Service of the citation shall be effected either personally in the field or to an officer of the Respondent by electronic mail or by first-class mail.
2. Citations served by first class mail may be sent to the Respondent's business address, or the address for the service of process of the Respondent has on file with the Secretary of State of California.
3. On the same date that Staff serves a citation in the field, Staff must also serve a copy of a citation issued in the field to an officer of the Respondent at the Respondent's business address.
4. Service is effective upon the date the citation is served personally in the field or sent to the Respondent by electronic mail or first-class mail.
5. No later than ten days following service of the citation, Staff shall publish each citation on the Commission's website. To the extent that a Respondent submits a Notice of Appeal of Citation, Staff shall publish that Notice of Appeal on the Commission's website within ten days of the date the Notice of Appeal is submitted.
6. The Director of CPSD shall submit quarterly reports to each Commissioner's office that briefly lists the citations issued to each gas corporation, the categories of such citations, any appeals submitted, and a brief description of any trends noted by CPSD.

C. Response to Citation

1. Any immediate safety hazard requires immediate correction, as directed by Staff. For other violations, the Respondent shall inform the Director of CPSD when the violation is corrected. Unless the violation is corrected within ten calendar days after the date of service of the citation, Respondent shall, within ten calendar days after the citation is served,

submit a Compliance Plan to the Director of CPSD that provides a detailed description of when the violation will be corrected, the methodology to be utilized, and a statement supported by an affidavit from the respondent's Chief Executive Officer stating that in the respondent's best judgment, the time that will be taken to correct the violation will not affect the safety or integrity of the operating system or endanger public safety. If the citation is for a continuous violation, the amount of the fine may continue to accrue on a per-day basis until the violation is corrected.

2. Unless otherwise specified, a requirement to notify Staff or serve Staff or the Director of CPSD means to send a written communication by first-class mail or an express mail service to the address specified in the citation.

a. These written communications are not filed with the Commission's Docket Office.

b. Staff may specify an e-mail address in order to allow electronic submissions in addition to, or instead of, communications by mail service,

D. Payment of fine; default.

1. All cited violations must be corrected, as set forth in Sections I.A.4 and I.C.1. Payment of fines shall be submitted to the Commission's Fiscal Office, 505 Van Ness Avenue, San Francisco, CA 94102, in the form of certified check, payable to the California Public Utilities Commission.

a. The respondent shall include the citation number and shall include a completed Citation Payment Form.

b. Upon payment, the fine will be deposited in the State Treasury to the credit of the State General Fund.

2. If Respondent pays the full amount of the fine within the time allowed, the citation shall become final.

3. Failure to pay the full amount of the fine or to file a Notice of Appeal will place Respondent in default, the citation shall become final, and the Respondent will have forfeited its right to appeal the citation. A late payment is subject to a penalty of 10 percent per year,

compounded daily and to be assessed beginning the calendar day following the payment-due date.

E. Notification of Local Authorities

1. As soon as is reasonable and necessary, and no later than ten days after service of a citation is effected, each respondent gas corporation shall notify the Chief Administrative Officer or similar authority in the city and county where a citation is issued, and within ten days of such notification shall notify the Director of CPSD that the local authorities have been notified by serving an affidavit that lists the date of notification and the name and contact information of each local authority so notified.

F. Self-identified and self-corrected violations

1. To the extent that a gas corporation self-identifies and self-corrects violations and no injury or damage has occurred, Staff shall consider such facts in determining whether a citation should be issued. The gas corporation shall provide notification of such violations shall be provided to Commission Staff and to local authorities, as described above, within ten days of self-identification of the violation.

II. Appeal.

A. If Respondent wishes to appeal a citation, Respondent shall submit a Notice of Appeal of Citation to the Director of CPSD.

1. Respondent/Appellant must submit a Notice of Appeal of Citation within ten calendar days from the date service of the citation is effected, and shall serve the Commission's Executive Director, the Chief Administrative Law Judge (ALJ), the General Counsel, and the Director of the Division of Ratepayer Advocates. The Director of CPSD shall promptly notify the Chief ALJ of the Notice of Appeal.

2. Submitting a Notice of Appeal does not excuse the Respondent from correcting the violation described in the citation, consistent with the provisions set forth in Sections I.A.4 and I.C.1. The Notice of Appeal must explain with specificity each and every ground for the appeal.

B. Upon being notified of the Notice of Appeal by the Director of CPSD, the Chief ALJ shall promptly designate an ALJ to hear the appeal.

- C. The assigned ALJ shall set the matter for hearing promptly. The Respondent/Appellant and Staff will be notified at least ten days in advance of the time, date and place for the hearing. The ALJ may, for good cause shown or upon agreement of the parties, grant a reasonable continuance of the hearing.
- D. Any appeal of a citation shall be heard in the Commission's courtroom in San Francisco or Los Angeles, at the discretion of the Commission.
- E. Upon a good faith showing of language difficulty, the Respondent will be entitled to the services of an interpreter at the Commission's expense upon written request to the assigned ALJ and the Public Advisor's Office not less than three business days prior to the date of the hearing.
- F. The Respondent/Appellant may order a transcript of the hearing, and shall pay the cost of the transcript in accordance with the Commission's usual procedures.
- G. Staff has the burden to prove a *prima facie* case supporting its issuance of the citation for the alleged violation; the burden then shifts to Respondent/Appellant to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is inappropriate.¹
- H. Respondent may be represented at the hearing by an attorney or other representative, but such representation shall be at the Respondent's sole expense. Rule 13.6 (Evidence) of the Commission's Rules of Practice and Procedure is applicable.
- I. Ordinarily, the appeal will be submitted at the close of the hearing. Upon a showing of good cause, the ALJ may keep the record open for a reasonable period to permit a party to submit additional evidence or argument.
- J. Within 60 days after the appeal is submitted, the ALJ will issue a draft resolution resolving the appeal. The draft resolution will be placed on the first available agenda, consistent with the Commission's applicable

¹ As most recently stated in D.11-09-006, "[t]he duty to furnish and maintain safe equipment and facilities falls squarely on California public utilities, including PG&E. The burden of proving that particular facilities are safe also rests with PG&E." (D.11-09-006 at 6.)

rules. Parties may file comments on the draft resolution pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure.

- K. A resolution approved by the Commission is subject to rehearing pursuant to Public Utilities Code Section 1731 and to judicial review pursuant to Public Utilities Code Section 1756.
- L. During the period described in the next sentence, none of the following may communicate regarding the appeal, orally or in writing, with a Commissioner, Commissioner's advisor, Chief ALJ, Assistant Chief ALJ, or assigned ALJ: the Respondent, the Staff that issued or is enforcing the citation, or any agent or other person on behalf of the Respondent or such Staff.
 - 1. This prohibition applies from the date of service of the citation and extends to and includes the date when the period to apply for rehearing of the Commission resolution on the appeal has expired and no application for rehearing has been filed, or if an application for rehearing is filed, the date when the period to seek judicial review of the decision finally resolving the application for rehearing has passed without any party seeking judicial review; or if judicial review is sought, the date any court cases are resolved.
 - 2. Inquiries strictly limited to procedural matters are permitted.

(END OF APPENDIX A)