ATTACHMENT TO NOTICE OF APPEAL

Citation No. ALJ-274 2014-11-001

Pacific Gas and Electric ("PG&E") shares the view of the Commission that safety of the public and of employees must be a core value and integral to everything we do. We believe our commitment is clearly demonstrated through the vast improvements the company implemented both before and after the incident in Carmel-by-the-Sea. To be clear, we view the explosion of a vacant home in Carmel as a very serious matter even while it has unique factors associated with its cause. However, PG&E respectfully disagrees with the Citation No. ALJ-274 2014-11-001 issued on November 20, 2014 and hereby appeals the two violations found by the Safety and Enforcement Division ("SED"). We respectfully request that the Commission vacate the Citation or, at a minimum, reduce the penalty to an appropriate amount that more appropriately applies California law and governing legal standards, factual support and constitutional bounds.[1]

BACKGROUND

The Citation was issued following SED's investigation into an incident that took place in Carmel-by-the-Sea, California on March 3, 2014. On that date, PG&E general construction welding personnel were preparing to tie-in an existing gas distribution main into a newly installed plastic main on an adjacent street. The crew welded and tapped into a two-inch steel pipe, causing damage to an inserted plastic line which resulted in a gas leak. As SED's investigation found, upon realizing that they had tapped into the inserted plastic main, the PG&E crew immediately notified two different PG&E supervisory personnel who dispatched an emergency crew to respond to the scene and stop the flow of gas.[2] The crew also "made the immediate excavation area safe by preventing vehicular and pedestrian traffic near the

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[1] This appeal is based on the allegations made in the Citation and facts known to PG&E. PG&E is entitled to and will seek discovery before any final order adjudicating violations and imposing sanctions is entered.

[2] Incident Investigation Report at 11, 14.

excavation site."[3] Before PG&E personnel could shut off the gas, however, compromised conditions in a sewer lateral line and in plumbing in an unoccupied neighboring house allowed gas to migrate, causing an explosion that produced $302,000 in damage. There were no injuries or fatalities. Following the incident PG&E undertook a number of actions to further minimize the risk of a similar future incident as summarized in the investigative report.[4]

The Citation finds two violations based on this incident. *First*, the Citation asserts that PG&E violated California Public Utilities Code § 451 for failing to equip PG&E general construction welding personnel with "the tools necessary to stop the uncontrolled flow of gas." This asserted violation also mentions 49 C.F.R. § 192 Subpart N, comprising §§ 192.801-192.809, although without stating how that provision relates to the first alleged violation, if at all. The Citation further characterized the first violation as "continuing" since an incident in Mountain View, California, on July 30, 2013; on that basis SED assessed $10,800,000 in penalties. *Second*, the Citation alleges that PG&E violated 49 C.F.R. § 192.615(a)(7) for "not attempt[ing] to make safe the area beyond the excavation hole, despite a possible indication that gas was migrating" for which SED assessed $50,000 in penalties.[5]

ARGUMENT

Neither of the two violations alleged in the Citation has been or could be established in this case. Both violations are premised on a misapplication of governing law and lack adequate factual support. In addition, the penalty imposed in the Citation – more than $10 million for an

[3] *Id.* at 14.

[4] *Id.* at 11-13.

[5] SED's Citation does not allege or make any findings relating to recordkeeping requirements or recordkeeping violations. Claims relating to safety recordkeeping for PG&E's gas distribution serve and facilities will be addressed in other proceedings before the Commission. *See* Investigation into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Distribution System Pipelines, I.14-11-008. PG&E reserves its right to present all arguments and challenges to any such allegations in such other proceedings.

incident that caused $302,000 in property damages and no injuries – is legally invalid and constitutionally excessive. The penalty should be vacated or, at the least, materially reduced.

I. No Violation of California Public Utilities Code Section 451 or "Continuing Violation" Has Been Established.

The first violation alleged by the Citation is that PG&E violated § 451 of the California Public Utilities Code by failing to equip its construction and operator personnel at the incident in Carmel on March 3, 2014, and that this violation was "continuing" under § 2108 of the Code dating from an unrelated incident in Mountain View on July 30, 2013.[6] Neither of these findings is valid.

A. Section 451 Does Not and Cannot Be Interpreted to Impose Enforceable Safety Standards or As Authorizing Findings of or Penalties for Alleged Safety Violations.

The Citation relies on § 451 as a provision that imposes safety obligations on California utilities and authorizes the Commission to adjudicate asserted safety violations and impose penalties. Section 451 cannot properly be interpreted in this way.

The language, structure, and purpose of § 451 confirm that it does not impose safety standards or authorize violations but, rather, is a *ratemaking* provision. It appears in a part of the Code titled "Rates," and it speaks only in terms of setting the *rates* a utility may charge. While the provision does state that a utility should maintain its services to promote "safety," this requirement is explicitly tied to consideration of the *rates* that the utility may properly charge. It includes no reference to other "safety" standards that are or may be adopted; 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. Other provisions in the Code, by contrast, expressly authorize the Commission to prescribe and enforce independent "safety" standards for utilities, *e.g.*, Public

[6] Citation at 2.

Utilities Code § 768 – provisions that would be surplusage if § 451 imposed general safety standards for all utilities. It would be extraordinary to conclude that the Legislature intended, through a mere reference to "safety" in a ratemaking provision, to authorize the Commission to adjudicate violations and impose penalties on any utility throughout the State for any practice it deems "unsafe" in some way.[7]

Indeed, § 451 could not be interpreted this way, even if the statutory language were amenable, as such a reading would render it unconstitutional. The constitutional principle of due process requires, at its most basic, that an individual subject to regulation be given fair notice of the conduct that is forbidden or required. *E.g.*, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *see* U.S. Const. amend. XIV, § 1; Cal. Const., art. 1 § 7. Section 451, as interpreted and applied in this case, fails this essential standard. Section 451 does not define any "safety" standard, and its language gives no indication that any such standards will be applied, or if so, which ones. Instead, whether particular conduct will be deemed in conformity or contravention of some free-floating "safety" standard is left entirely to the discretion of the adjudicating officials in light of their own experience and views. This is precisely the type of statute that the courts have deemed impermissibly vague and therefore void. *E.g.*, *Fox*, 132 S. Ct. at 2317.

Section 451 is not and cannot be interpreted as imposing safety standards or authorizing penalties for alleged safety violations. The alleged violation of § 451 in this case must therefore be vacated.

B. PG&E's Conduct Conformed to Safe Operating Practices.

That violation could not stand in any event, even if § 451 could be read as authorizing the

[7] In promulgating gas safety standards through General Order 112-E (and its predecessor orders) the Commission has not looked upon Section 451 as a source of statutory authority for gas safety regulation.

imposition of penalties for conduct found to violate general standards of safe practice or other safety regulations. That is because the PG&E conduct and practices at issue in this case cannot reasonably be deemed to have been unsafe or improper.

The basis for the asserted violation of § 451 is that PG&E's construction and welding crew should have had with it "tools necessary to stop the uncontrolled flow of gas,"[8] specifically, a pipe squeezer. Those facts, however, do not reflect any departure from safe operating practices. It has long been PG&E's practice to segregate the responsibilities of its construction and emergency response crews and to provide each with the equipment necessary for the proper performance of its function – a practice which violates no requirement or regulation identified by SED.

SED has, in addition, made no showing that PG&E violated 49 C.F.R. § 192 – the provision noted in the Citation as supporting the alleged violation of § 451 – or even explained how that regulation relates to the alleged violation. This regulation requires operators to ensure that individuals are "qualified," a term defined to mean that they can, *inter alia*, "[r]ecognize and react to abnormal operating conditions." 49 C.F.R. §§ 192.803, 192.805. SED provides no support for any assertion that the PG&E employees involved in the incident were not trained to recognize and properly respond to the events that occurred. In fact, SED's Incident Investigation Report notes that the PG&E employees "had the necessary welder qualifications to weld on the tapping fittings," and were "trained" in emergency response procedures and did in fact endeavor to "make the area safe" and otherwise comply with those procedures.[9]

PG&E's practices, in short, were appropriate and conformed fully to safe operating measures. Even if § 451 could be construed to incorporate safety regulations, SED fails to

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[8] Citation at 2.

[9] Incident Investigation Report at 10-11.

establish a violation of any safety regulation, much less of 49 C.F.R. § 192.

C. No "Continuing Violation" Could Be Found on the Facts Asserted in the Citation.

The Citation also asserts that the violation of § 451, although premised on the specific events that occurred in Carmel on March 3, 2014, should be deemed "continuing" under § 2108 since July 30, 2013, the date of a previous incident involving a gas leak in Mountain View for which PG&E was cited for recordkeeping violations. This conclusion represents an unsupportable misapplication of § 2108.

A "continuing violation" occurs, by definition, only when a party has engaged in "a continuing course of unlawful conduct" over a period of time. *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 823 (2001). The language of § 2108 states expressly that a violation will be considered a "separate and distinct" event *unless* the party continues to engage in the same conduct – and thus continues to commit the same violation – over a period of time.

No "continuing violation" could be found based on the record in this case. Even assuming that PG&E violated § 451 by failing to properly equip its personnel to deal with the incident on March 3, 2014, which PG&E disputes, any such violation would have occurred and been completed on that date, when the incident occurred. There is no evidence and no allegation, and in any event could be no finding, that PG&E failed to properly equip its personnel in other incidents, much less that it "continually" failed to do so. The prior event identified in the Citation as the starting date for the "continuing" violation – the July 30, 2013 Mountain View incident – did not even involve an asserted violation of § 451 or equipment standards. Rather, SED asserted in connection with the Mountain View incident a different violation, of 49 C.F.R. § 192.605(b), concerned allegations of inadequate safety recordkeeping.

Thus, the two asserted violations occurred at *different* times and are based on *different*

conduct, *different* standards, and *different* regulatory provisions. They cannot qualify as a single course of "continuing" misconduct. *See, e.g.*, *Richards*, 26 Cal. 4th at 823. No "continuing violation" can therefore be found. For that reason, if a violation of § 451 could be found at all (which it cannot), it was a single violation, and the maximum penalty that could be imposed is $50,000.

II. No Violation of 49 C.F.R. § 192.615(A)(7) Has Been Established.

The second violation alleged by the Citation is that PG&E violated 49 C.F.R. § 192.615(a)(7) when its crew, in responding to the Carmel incident on March 3, 2014, "did not attempt to make safe the area beyond the excavation hole, despite a possible indication that gas was migrating."[10] Neither the language of the regulation nor the facts support this violation.

The regulation directs that operators must "establish written procedures to minimize the hazard resulting from a gas pipeline emergency." 49 C.F.R. § 192.615(a)(7). The regulation imposes, in other words, a written procedures requirement, mandating that a utility develop and adopt appropriate policies and practices to guide personnel in an emergency situation. Undoubtedly, PG&E had such procedures in place at the time of the Carmel incident, and thus complied with this provision. Indeed, the Incident Investigation Report acknowledges as much, stating that PG&E had a "Gas Emergency Response Plan (GERP) which requires that personnel must make the area safe and contact their supervisor for any potentially hazardous situation."[11]

The Citation, rather than challenging PG&E's procedures, instead asserts that PG&E violated 49 C.F.R. § 192.615(a)(7) when its crew allegedly failed as an actual matter to "make safe the area." But, the regulation does not address the conduct of crews, or define a crew's failure to comply with "make safe" procedures as a violation. Thus, even if the allegations were

[10] Citation at 2.

[11] Incident Investigation Report at 14-15.

correct, they would not support a violation of the regulation.

The allegations are, moreover, incorrect. The PG&E crew in this case responded quickly and properly to the emergency, and (as the Incident Investigation Report itself acknowledges) did in fact clear and "make safe" the immediate surrounding area.[12] There is no evidence or indication, in either the Citation or report, that the crew was required to do more under accepted standards of emergency procedure. Thus the crew could not reasonably be found to have violated any safety standard, including the "make safe" procedures, in its response.

III. The Fine Amount Is Invalid and Constitutionally Excessive.

The fine, even if premised on valid findings of violations (which they are not), must still be reduced significantly. That fine amount – more than $10 million – does not reflect a proper consideration of the statutorily mandated factors and is in all events constitutionally excessive.

A. The Citation Fails to Give Due Weight to Statutorily Required Factors.

Section 2104.5 of the California Public Utilities Code sets out with specificity the factors that must be considered in assessing any penalty. These include, among others, "the gravity of the violation" and "the good faith of the person charged in attempting to achieve compliance."

The Citation does not show that these factors were given adequate weight in determining the penalty. The Citation does not consider, for example, the impracticality of construction and operator personnel carrying with them every conceivable tool or device that could be used to remedy an emergency. Instead, it faults PG&E for reaching the reasonable conclusion, consistent with safe operating practices, that such devices and tools should be deployed by PG&E personnel that are specifically tasked with responding to an incident. The Citation also fails to explain the weight given to the facts that PG&E fully cooperated with SED throughout the investigation and that PG&E has voluntarily implemented enhanced safety protocols to

[12] *Id.* at 11, 14.

minimize the risk of this type of incident occurring in the future, including developing a system-wide process to physically verify the status of underground facilities prior to commencing distribution tapping work. SED also does not consider that PG&E had written procedures to minimize the hazard resulting from a gas pipeline and that it was fully compliant with 49 C.F.R. § 192.615(a)(7). Lastly, SED fails to consider the numerous and significant operational measures PG&E has undertaken to enhance its emergency response procedures and performance. Among other things, PG&E has:

- Improved its response to customer gas odor calls to reach top decile performance when benchmarked with other utilities;
- Established the Emergency Preparedness and Public Awareness Department within Gas Operations, which is involved in all facets of emergency preparedness planning, including conducting training and emergency drills with internal employees and external first responders;
- Opened a new Distribution Control Center, which provides real-time monitoring and oversight of the gas distribution system 24 hours a day, 365 days per year;
- Implemented a distribution clearance procedure, under which all work associated with gas distribution facilities requires approval and/or situational awareness from the Distribution Control Center.

These factors, as well as others, militate strongly in favor of a lower penalty. The Commission should accordingly vacate the fine imposed in the Citation.

B. The Fine Imposed Is Unconstitutionally Excessive.

Apart from its statutory invalidity, the fine imposed by the Citation is also unconstitutional. The Excessive Fines Clauses of the California and U.S. Constitutions prohibit

fines that are "grossly disproportiona[te]" to the underlying violation. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998); *People v. Estes*, 218 Cal. App. 4th Supp. 14, 21 (2013). Whether a fine is "grossly disproportiona[te]" is determined by (i) the extent of the harm caused, (ii) the gravity of the offense relative to the fine, (iii) the relationship of the violation to other illegal activity, and (iv) the availability of other penalties and the maximum penalties that could have been imposed. *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197-98 (9th Cir. 1999) (citing *Bajakajian*, 524 U.S. at 337-38); *People v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728 (2005) (same).

The fine at issue here is grossly disproportionate to the gravity of the alleged conduct. The incident involved no willful or intentional misconduct, either by behalf of PG&E itself or its employees, and PG&E has since voluntarily implemented procedures to further minimize the possibility of future incidents of this type. There is no factual basis that can justify a fine of this magnitude, particularly since the fine is in fact significantly *greater* than that permitted by statute because of the Citation's erroneous interpretation of what constitutes a "continuing violation."

All of this confirms that the fine in this case is grossly disproportionate to the underlying offense and, thus, unconstitutional. That fine must be vacated, and reconsidered.

IV. The Conditions Allegedly Constituting Violations Have Been Corrected.

As PG&E has previously advised SED and as SED has confirmed, PG&E has developed and implemented enhanced safety measures and work procedures to resume gas systems operations work in Carmel.[13] PG&E confirms that the conditions noted in the Citation do not present an on-going safety hazard to PG&E's employees and the general public.

CONCLUSION

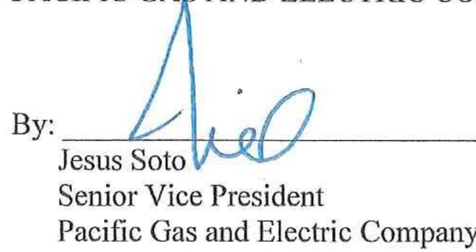
The $10,850,000 penalty assessed by SED is based on a misapplication of California law,

[13] *See* Letter from Elizaveta Malashenko to Kevin Knapp (Oct. 3, 2014).

lacks foundation, and exceeds constitutional bounds. The Commission should vacate the violation findings and the fine or, at a minimum, exercise its discretion to reduce the penalty to an appropriate amount.

Respectfully submitted,

PACIFIC GAS AND ELECTRIC COMPANY



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