

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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.

Draft Resolution ALJ-274
(Served October 10, 2011)

**REPLY COMMENTS
OF THE DIVISION OF RATEPAYER ADVOCATES
ON DRAFT RESOLUTION ALJ-274**

I. INTRODUCTION

In accordance with Rule 14.5 of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission) and with the schedule for comments set in the Chief Administrative Law Judge's (ALJ) notice of availability of draft Resolution ALJ-274, the Division of Ratepayer Advocates (DRA) hereby submits its reply comments regarding draft Resolution ALJ-274, issued on October 10, 2011. DRA disagrees with the opening comments of Southern California Gas Company and San Diego Gas & Electric Company (jointly, Sempra)¹ and of Southwest Gas Corporation (SWG)² arguing that Resolution ALJ-274 improperly delegates Commission authority and violates due process.³

¹ Joint Comments of Southern California Gas Company and San Diego Gas & Electric Company on Draft Resolution ALJ-274 (Sempra Comments), Oct. 21, 2011.

² Opening Comments of Southwest Gas Corporation (SWG Comments), Oct. 21, 2011.

³ Silence on an issue does not indicate consent or agreement.

II. DRAFT RESOLUTION ALJ-274 DOES NOT IMPROPERLY DELEGATE AUTHORITY TO COMMISSION STAFF AND DOES NOT VIOLATE DUE PROCESS

Sempra and SWG argue that adoption of the citation program set forth in draft Resolution ALJ-274 would be an improper delegation of Commission authority to the Consumer Protection and Safety Division (CPSD). Sempra states: “the Commission may delegate investigatory duties to Staff but the decision whether and/or what amount of fine is to be imposed would be an ‘exercise of judgment or discretion’ and therefore ‘cannot be surrendered or delegated to subordinates in the absence of statutory authorization.’”⁴ SWG “is concerned that ... the issuance of a citation (and therefore penalties) can be applied unevenly based upon a particular inspector’s experience, knowledge or interpretation of the law because the decision of whether to issue a citation will be based largely upon the subjective determination by each CPSD Staff Inspector.”⁵

It is well settled that a public agency is limited in its ability to delegate discretionary authority to its staff or subordinates, but it “may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action, functions relating to the application of standards, and the making of preliminary recommendations and draft orders.”⁶ The Commission has clarified this general rule to “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.”⁷ “Thus, in determining whether a delegation of authority is unlawful, the question is

⁴ Sempra Comments at 9.

⁵ SWG Comments at 2.

⁶ Decision (“D.”) 09-05-020, Order Modifying Resolution ROSB-002 and Denying Rehearing of Resolution, as Modified, May 7, 2009, citing *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24; *California School Employees Assoc. v. Personnel Comm’n* (1970) 3 Cal.3d 139, 144; *Schechter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 396.

⁷ D.09-05-020 at 3, citing *California Assoc. of Competitive Telecommunication Cos.* [D.02-02-049] 2002 Cal. PUC LEXIS 162.

whether the Commission has delegated its power to make fundamental policy decisions or final discretionary decisions.”⁸ Clearly, here, the Commission has not. Draft Resolution ALJ-274 authorizes CPSD Staff to administer a citation program, but does not transfer final decision-making authority from the Commission to CPSD or other Commission staff.

Sempra and SWG complain that, while on the one hand the draft Resolution gives Staff too much discretion in citing violations, on the other it does not give Staff enough discretion in determining or negotiating with utilities the penalty amount and the timing of responses to citations and corrections of violations. Sempra believes that, because the draft Resolution “directs Staff to impose the maximum penalty in all cases, and does not allow for [Commission] review of the amount of the penalty,” it violates the requirement of Public Utilities Code section 2104.5 that factors such as good-faith attempts to achieve compliance should be considered in determining the amount of a penalty.⁹ Sempra also notes that the draft Resolution requires a utility “to bring itself into compliance within seven days, no matter how burdensome (or even impossible) it may be to do so.”¹⁰ SWG “believes the draft Resolution might actually reduce the effectiveness of the CPSD as it deprives the CPSD of the discretionary power to recommend a penalty amount appropriate to the circumstances and within the range allowed by law,” and that “CPSD should be afforded the discretion to impose a cure date and also the discretion to modify that date.”¹¹ As discussed above, the Commission “may assign certain functions for the Staff to perform, including investigation of facts preliminary to agency action, and the assessment of specific penalties for certain types of violations.”¹² In other citation programs implemented by the Commission, such as those related to resource adequacy (Res. E-4195), power plant operation and maintenance (G.O. 167), and rail safety (Res. ROSB-

⁸ D.09-05-020 at 3.

⁹ See Sempra Comments at 9-10.

¹⁰ Sempra Comments at 6.

¹¹ SWG Comments at 3 and 4.

¹² D.09-05-020 at 7.

002), the fines and penalties for violations have been specified. Here, to allay Sempra and SWG's concerns regarding the draft Resolution's directive that "[e]ach citation will assess the maximum penalty amount provided for by § 2107,"¹³ Resolution ALJ-274 could likewise include a range or schedule of penalties based on which Staff can determine the appropriate amount to include in a citation.¹⁴

Moreover, Sempra and SWG are incorrect that the citation program set forth by draft Resolution ALJ-274 violates procedural due process.¹⁵ The Commission has implemented similar citation programs in the past. For example, the Commission in Resolution ROSB-002 delegated authority to CPSD to administer a citation program to enforce railroad carrier compliance with certain clearance requirements and operating rules.¹⁶ The Commission found that "[a] citation program administered by Staff for specified violations of the Commission's General Orders and other requirements that apply to railroad carriers will allow prompt action by Staff to protect railroad employees, the public, and the environment, minimize enforcement costs, and fulfill the objectives of the Commission's railroad safety program."¹⁷ In rejecting the railroads' due process arguments, the Commission found that the fiscal and administrative burdens on the railroads of defending against a citation were not significant and the railroads' ability to appeal all citations showed "the safeguards provided the railroad to be adequate as demanded under fundamental principles of due process law."¹⁸

¹³ Draft Res. ALJ-274, p.6; *see also* at 8, Finding 8: "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 Commission's broad regulatory powers to protect public safety and to ensure compliance with the Commission's orders and the Public Utilities Code."

¹⁴ For example, a failure to comply with G.O. 26-D has a scheduled penalty of \$1,000 per incident; a failure to comply with G.O. 118 carries a penalty of \$500 per incident plus \$50 per day for each day in violation.

¹⁵ *See* Sempra Comments at 6-8, SWG Comments at 5.

¹⁶ *See* Resolution (Res.) ROSB-002, Resolution Adopting a Railroad Citation Program for Enforcing Compliance with General Orders and Other Requirements Including Procedures for Appeal of Citation Issued to Railroad Carriers, Nov. 6, 2008.

¹⁷ Res. ROSB-002 at 2.

¹⁸ Res. ROSB-002 at 7-8.

Here, the citation program is consistent with other approved citation programs and similarly includes requirements for the contents of a citation, service and procedures for appeal and final Commission determination and, thus, provides procedural safeguards to ensure that respondents have adequate notice and opportunity to be heard.¹⁹

III. CONCLUSION

The citation program established by Resolution ALJ-274 does not constitute an unlawful delegation of Commission authority, and does not violate due process requirements. With the changes proposed by DRA in its opening and reply comments, DRA recommends that the Commission adopt Resolution ALJ-274.

Respectfully submitted,

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October 26, 2011

¹⁹ See Resolution ROSB-002, Nov. 6, 2008.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of “**REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON DRAFT RESOLUTION ALJ-274**” in **A.10-12-005, A.10-12-006, R.11-02-019 and A.09-09-013**, by using the following service:

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Executed on **October 26, 2011** at San Francisco, California.

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