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505 Van Ness Avenue
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Re: Draft Resolution E-4550

Dear Ms. Borak:

Southern California Gas Company offers the following comments on Draft Resolution E-4550, dated January 25, 2013. Attached to these comments are: (1) a Subject Matter Index of Proposed Changes (Attachment 1); (2) Proposed Changes to Findings and Ordering Paragraphs (Attachment 2); and (3) a redlined version of Appendix A to Draft Resolution E-4550 (Attachment 3). Consideration of these attachments is only required if the Commission determines that the Draft Resolution should be adopted despite the numerous policy and legal concerns raised in the comments below.

I. Introduction and Summary

At first glance, Draft Resolution E-4550 appears to set forth a reasonable process for enforcing compliance with Commission regulations. It proposes to initiate a “citation program authorizing Commission Staff to fine public utilities for non-compliance with Permits to Construct (PTC) and Certificates of Public Convenience and Necessity”¹ that is purportedly “consistent with other approved citation programs”² and promises to “provide an efficient way for the Commission to issue non-compliance fines for violations related to conditions of approval of PTC and CPCN

¹ Draft Resolution at 1.

² *Id.* at 2.

permits, which typically include numerous safety-related conditions.”³ Thoughtful review of the Draft Resolution, however, reveals that the Draft Resolution will not and cannot accomplish the goals it purports to achieve. For the reasons set forth in greater detail in the comments below, SoCalGas urges the Commission not to adopt Draft Resolution E-4550.

First, the proposed citation program will not and cannot work in this context. As discussed in greater detail below, the Commission’s PTC and CPCN processes are unique in that Commission Staff actively supervise and direct utility conduct and actively monitor compliance throughout every step of the process. And most importantly, the project-specific requirements that are developed through these processes are not like other rules or regulations that are enforced through the Commission’s citation programs. Construction Requirements are often aspirational, goal-oriented provisions designed to encourage a collaborative approach to achieving the common goal of mitigating environmental impacts. To account for the inherent complexity of utility construction projects and enable the utility to make necessary design refinements, Construction Requirements cannot be prescriptive or overly restrictive—they are necessarily flexible and adaptable to dynamic conditions and circumstances that arise during the construction process.

To this end, the utilities collaborate with Commission Staff, Staff’s consultants, and other agencies to develop mutually-agreeable approaches to addressing these dynamic environmental and safety issues as they arise during the execution of a project. The Draft Resolution proposes to inject an adversarial citation program into this process and risks destroying the current collaborative efforts to the detriment of utility projects. Rather than improving compliance, it could discourage utilities from setting aspirational environmental and safety goals that later could potentially subject them to fines through no fault of their own. Over time, this could lead to less rigorous environmental and standards being established for construction projects.

Second, adoption of the Draft Resolution would lengthen the Commission’s already protracted CEQA review process, by replacing collaboration with litigation and forcing utilities to obtain written clarifications or modifications of all mitigation measure requirements in advance of any work or face the risk of incurring fines for inadvertent non-compliance with provisions that are necessarily open to numerous reasonable interpretations.

Third, the Draft Resolution contains numerous legal errors. A citation program to enforce aspirational guidelines that are subject to numerous reasonable interpretations cannot satisfy due process, because the proscribed conduct is not sufficiently defined to provide adequate notice to the utility and poses too great a risk of arbitrary and discriminatory enforcement by Staff. In addition, the Draft Resolution is based on findings that are not supported by substantial evidence in light of the whole record, as required by Public Utilities Code section 1757(a)(4). Indeed, the Draft Resolution is not supported by any record whatsoever. The Draft Resolution improperly delegates subjective discretionary authority to Commission Staff and contains a provision that appears to serve no other purpose than to encourage retaliation by Staff against a utility for exercising its due process right to a pre-deprivation hearing before a neutral Administrative Law Judge. The Draft Resolution also fails to provide any sort of guidance or checks upon

³ *Id.* at 1.

Commission Staff's exercise of discretion to impose fines, in violation of Public Utilities Code section 2104.5.

At a minimum, a closer look at this proposed citation program is in order. SoCalGas asks the Commission to carefully consider the numerous policy and legal implications of adopting a citation program in these unique circumstances. In the event that the Commission nevertheless determines that it should adopt the Draft Resolution and issue a citation program to enforce subjective project-specific aspirational goals, SoCalGas offers suggestions below that could mitigate some, but not all, of the policy and legal infirmities inherent in doing so. These include:

1. Adding a meet and confer and reasonable cure period process to mitigate the negative impact that the citation program will have on the collaborative process;
2. Striking of the provision that serves no purpose other than to encourage retaliation against a utility for exercising its due process right to an appeal;
3. Adding checks on Staff's exercise of discretion to mitigate the risk of arbitrary and discriminatory enforcement;
4. Adopting an overall cap on the amount of the fines to further the stated objectives of the citation program; and
5. Clarifying that on appeal, Staff bears the burden of proving that a violation has occurred and that the imposition of a fine is appropriate under the totality of circumstances.

II. As Described in the Draft Resolution, the Commission Currently Has a Robust Process in Place for Implementing CEQA and the Process Provides for Constant Oversight by, and Collaboration with, Commission Staff and Their Consultants.

The Draft Resolution begins by noting that the California Environmental Quality Act (CEQA) requires that state and local agencies inform themselves of the environmental impacts of their actions, disclose those impacts to the public and provide an opportunity to comment on environmental issues, and avoid or reduce significant impacts when feasible.⁴ As explained in the Draft Resolution, the Commission has a process in place to comply with CEQA before issuing PTCs and CPCNs for natural gas storage facilities, electric generating plants, electric transmission/ power/ distribution line facilities, and substations:

When an entity applies for a PTC or CPCN, the Commission conducts an Initial Study (IS) to determine the potential environmental impacts of the proposed project. A Mitigated Negative Declaration (MND) is prepared if the project could result in significant impacts, but the impacts can be avoided or reduced to a less-than-significant level with implementation of mitigation measures. An Environmental Impact Report (EIR) is prepared for projects that may cause significant impacts that cannot be avoided or fully mitigated. Mitigation measures developed during the CEQA process are contained in a Mitigation

⁴ *Id.* at 2.

Monitoring, Reporting, and Compliance Program (MMRCP) and adopted as conditions of the PTC or CPCN.⁵

Throughout this process, Commission Staff are directly and actively involved in all aspects of MMRCP compliance. Commission Staff review plans for projects proposed by the utilities and develop recommended mitigation measures and prepare the MMRCP. Then they oversee, direct and monitor the utilities' conduct to ensure that projects comply with the specifications, mitigation measures, and conditions identified in the final decision and implemented through the MMRCP and rely heavily on outside consultants to do so:

Staff rely on the expertise of consultants and monitors, including specialists such as biologists, to ensure compliance. Typically, Staff participate in regularly scheduled conference calls with the utilities and consultants to remain current on construction progress, follow the implementation status of mitigation measures, and discuss compliance issues.⁶

Unlike other areas where the Commission has implemented citation programs, Commission Staff and its consultants monitor every step of the process. Staff's consultants are typically present during construction and directly monitor the utility's construction activities for compliance:

In addition, consultants to Staff provide specialists to monitor work at the project sites to ensure mitigation measures are implemented correctly and to ensure the project is being built in accordance with Commission-approved specifications.

When compliance violations occur, they are identified and reported by monitors and then documented with identified corrective actions.⁷

Throughout this process, the utility, Staff and Staff's consultants, and other agencies collaborate to develop, implement and enforce Construction Requirements and to address any issues that arise as expeditiously as possible. If those issues are not addressed to the satisfaction of Commission Staff, Staff currently has the ability to issue a Stop Work Order or recommend that the Commission initiate an investigation.⁸

In most instances, the collaborative monitoring and reporting process described above is the quickest and most practical method of resolving inconsistencies with Construction Requirements. By and large, most projects are constructed without instances that necessitate a Stop Work Order. In those rare instances where violations cannot be adequately addressed through the collaborative process, a Stop Work Order allows for Staff, consultants and the utility to determine if variances from the Construction Requirements are needed or if re-designs of a given project are in order. Although the Draft Resolution notes that Stop Work Orders "delay

⁵ *Id.*

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.* at 6.

construction and increase costs to ratepayers,”⁹ it ignores the detrimental impact that Stop Work Orders have on utilities. In actuality, the specter of a Stop Work Order and its resulting scheduling disasters pose a much more significant threat to utilities to discourage non-compliance than the citation program proposed in the Draft Resolution.

III. The Citation Program Set Forth in Draft Resolution E-4550 is Not Like Other Citation Programs Previously Adopted by the Commission. If Adopted, the Citation Program Would Likely Lead to Arbitrary and Inconsistent Enforcement of Unconstitutionally Vague Requirements.

The Draft Resolution cites to examples where the Commission has previously delegated authority to staff to issue citations in other contexts and concludes that this proposed citation program is consistent with those other citation programs.¹⁰ However, the Commission’s PTC and CPCN processes present unique sets of circumstances that are not comparable to the Commission’s other citation programs and as a result, a citation program to enforce MMRCs cannot satisfy minimal due process requirements and would undermine, rather than promote, the Commission’s objectives.¹¹

The Draft Resolution does not (and indeed cannot) point to a clearly articulated set of laws or regulations to be enforced by Commission Staff through the proposed citation process. The Construction Requirements that are being created by Staff are not always sufficiently clear to provide the utility with reasonable guidance regarding what is a violation, and do not provide explicit standards to guide their enforcement by Staff and outside consultants. Thus, the Draft Resolution would give Staff the authority to essentially create subjective requirements as they go, interpret them however they deem appropriate, and then enforce their interpretations with fines. The United States Supreme Court explained the dangers inherent in the enforcement of ambiguous laws as follows:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably

⁹ *Id.* at 7.

¹⁰ *See Id.* at 2.

¹¹ Moreover, the fact that the Commission has previously delegated similar authority to Commission Staff, and no party has challenged such delegation through a petition for writ of review, does not necessarily indicate that those programs could withstand judicial review.

lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.¹²

In light of those inherent dangers, “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”¹³ “When prohibiting conduct by government regulation, the regulation must be sufficiently clear so that ‘ordinary people can understand what conduct is prohibited’ and so it ‘does not encourage arbitrary and discriminatory enforcement.’”¹⁴

At first glance, the Draft Resolution may appear to satisfy due process, because it includes examples of citable behavior that provide clear guidelines and standards. These examples include:

- Continuing construction after an authorized staff person has required construction to stop;
- Starting construction components that have not been approved through a Notice to Proceed;
- Violating nest buffer zones;
- Encroachment into an exclusion zone or sensitive resource area designated for avoidance;
- Grading, foundation, line work, or other ground disturbance without required biological pre-construction surveys or biological monitor on site;
- Use of new access roads, overland travel routes, staging areas, or extra work spaces that have not been approved;
- Failure to properly maintain an erosion or sediment control structure;
- Working outside of approved work hours; and
- Project personnel working without proof of training.¹⁵

Each of these examples could be reviewed for compliance and appear unlikely to encourage arbitrary or discriminatory enforcement. Did the utility defy a stop work order? Did the utility start construction before obtaining authorization? Did the utility work outside of approved hours? Those sorts of examples are not likely to raise disputes as to whether or not an act or omission violates a Commission directive.

But a closer review of the Draft Resolution shows that Staff will have the authority to enforce countless provisions that do not provide any sort of explicit guidance or standard to govern their

¹² *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (internal quotation marks, brackets and ellipsis omitted).

¹³ *Id.* at 108.

¹⁴ *Great American Houseboat Co., v. U.S.*, 780 F.2d 741, 746 (1986). *See also Chalmers v. City of Los Angeles*, 752 F.2d 753, 757 (1985) (quoting *Koleander v. Lawson*, 461 U.S. 352, 357 (1983) (“Government regulation must be sufficiently clear so that ordinary people can understand what conduct is being prohibited, and so that the regulation ‘does not encourage arbitrary and discriminatory enforcement.’”) (internal citations omitted).

¹⁵ Draft Resolution at 4.

interpretation or enforcement. Examples of just a few such provisions in one San Diego Gas & Electric project are as follows:

- “Where drainage crossings are unavoidable, construct access roads at right angles to drainages.
- “Final design of transmission towers and access roads through Quino checkerspot butterfly critical habitat shall maximally avoid host plants for Quino checkerspot butterfly.
- “Design and configure wind turbines to maximally avoid and minimize bird and bat resources.
- “Minimize vegetation removal.
- “Minimize electromagnetic and public safety communications.¹⁶

When is a drainage crossing “unavoidable?” How should a project be designed and constructed to “maximally avoid host plants?” How should a wind turbine be designed and constructed to “maximally avoid and minimize bird and bat resources?” What steps must be taken to ensure that vegetation removal is sufficiently “minimized?” What steps must be taken to ensure that electromagnetic and public safety communications are “minimized?”

What all of these environmental mitigation measures share in common is that they establish flexible, aspirational goals that require the exercise of significant discretion by experts, who could disagree, about how those goals can best be achieved. As noted in the Draft Resolution, those experts are not themselves Commission Staff, but rather, are outside experts retained by Commission Staff. Therefore, the Draft Resolution proposes to delegate broad authority to outside experts retained by Commission Staff to monitor particular projects to enforce intentionally flexible provisions that are open to numerous reasonable interpretations, without any checks or balances. Under the circumstances, inconsistent interpretation and enforcement is not only possible, but likely. Due process violations are all but guaranteed.

IV. A Citation Process to Enforce Project-Specific Provisions Adopted as Part of the CEQA Review Process is Unlikely to Achieve Higher Rates of Compliance.

As discussed above, mitigation measures are often aspirational and intentionally flexible in order to adapt to dynamic conditions that are encountered during construction. Often times, complex mitigation measures are written in a manner that is confusing, subject to multiple interpretations or infeasible as applied to circumstances that arise during the construction of a project. Even where mitigation measures are clear and prescriptive, given the challenges and complexity in constructing projects approved under PTCs and CPCNs, it is always possible that inconsistencies or minor violations may arise, oftentimes in a manner unanticipated or outside of the control of

¹⁶ See Attachment D to *Mitigation, Monitoring, Compliance and Reporting Program, San Diego Gas & Electric - East County Substation Project*, Commission Application No. 09-08-003.

the utility. In these instances, cooperation and collaboration between the utility and Staff is the answer, not penalties.

In virtually every instance, Construction Requirement violations that arise are not a result of willful or intentional disregard of the Construction Requirements. Most often “violations,” when or if they occur, are minor, resulting in no harm to humans or resources. In these instances, violations that do occur are quickly reported to Commission Staff, either by the utility itself or by Staff consultants. Thereafter, corrective actions are quickly identified by Staff consultants and can be quickly implemented by utilities. Ordinarily, this monitoring and reporting process is collaborative between the utilities, Staff and its consultants. Thus, implementation of the citation program is unlikely to improve compliance with Construction Requirements.

What the citation program is likely to do is undermine collaboration amongst Staff, consultants and utilities. By injecting an inherently adversarial citation program into the Commission’s existing CEQA process, the Commission would discourage utilities from seeking guidance and assistance from Staff and consultants and from self-reporting inconsistencies with MMRCPC requirements for fear of being hit with penalties for doing so.

V. The Citation Process Set Forth in Draft Resolution 4550-E Would Bog Down an Already Protracted CEQA/Proposed Decision Process at the Commission.

As noted above, proposed mitigation measures are sometimes confusing, subject to multiple interpretations or outright infeasible. Utilities often prepare comment letters during the DEIR comment period addressing flaws contained within the mitigation measures. In those instances where a utility may have elected not to comment, understanding that potential concerns could be ironed out during the collaborative MMRCPC process, a utility may now be compelled to vigorously challenge every word or nuance contained in the measures, because failure to do so could result in penalties down the line during construction. Thus, the threat of citations will invariably slow down the Commission’s already protracted CEQA review processes as Commission Staff will be required, at a minimum, to address comments and propound data requests seeking clarifications. The process, which now takes years to complete may drag on further, causing further delays for projects, many of which are needed to further the statewide policies and objectives, and increase costs to customers.

Moreover, if utility-perceived flaws are not addressed between the DEIR and the issuance of the Final EIR, the utility will be forced to either accept those measures with full knowledge that it cannot comply with the measures as written, or challenge a Proposed Decision on the basis of flawed mitigation measures it cannot comply with. Utility submittal of comments against a Proposed Decision would further delay an already excruciatingly slow process. And if the Proposed Decision becomes a Final Decision with the flaws still intact, the utility may be forced to halt construction activity in order to wait for clarification before proceeding to work any time there is even the slightest question of mitigation measure interpretation, or risk fines. Thus, the injection of a citation program into the Commission’s CEQA review process could lead to additional delays throughout various steps of an already lengthy and burdensome process.

VI. There is no Record to Demonstrate a Need for, or Benefit of, the Proposed Citation Program Compared to Existing Enforcement Tools.

The Draft Resolution is long on conclusory statements, but short on actual facts. For example, the Draft Resolution asserts that the Citation Program will “enable staff to quickly address and prevent situations which may threaten human beings or sensitive environmental resources.”¹⁷ It further states that “[a] citation program will encourage compliance with PTC, CPCN, and MMRCP requirements.”¹⁸ Neither of these assertions are supported by any facts or analysis indicating that the Citation Program will be more effective at reducing the number of violations than enforcement tools currently in place.

The few facts that are set forth in the Draft Resolution do not support adoption of the Draft Resolution. Although the Draft Resolution points to a dozen “non-compliance events” that occurred during the course of two large utility projects, there are no facts in the Draft Resolution about those alleged “non-compliance events,” which in some cases, may have been the result of unforeseen circumstances, contractor error, or factors that are not preventable and would not be deterred by the Draft Resolution. A well-developed record might reveal that the alleged “non-compliance events” were not violations of any Commission order or directive at all. Absent a developed record, the Draft Resolution cannot satisfy Public Utilities Code section 1757(a)(4), which requires that Commission decisions be “supported by substantial evidence in light of the whole record.”

VII. The Draft Resolution Exceeds the Commission’s Authority by Purporting to Empower Staff to Construe and Enforce the Laws and Regulations of Other Agencies.

The Commission asserts that Article XII of the California Constitution and Public Utilities Code Section 701 gives it authority to “supervise and regulate every public utility in the State...and do all things, whether specifically designated in [the Public Utilities Code] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”¹⁹ The Commission also cites Public Utilities Code 702 for the notion that utilities 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 anyway relating to or affecting its business as a public utility and shall do everything necessary or proper to secure compliance therewith by all its officers, agents, and employees.”²⁰ While the Commission indeed has broad powers and authority to regulate the activities of utilities, including the design and construction of projects, the Commission’s authority is not limitless, in particular as it relates to CEQA. CEQA Guidelines Section 15040(b) specifically states that CEQA does not grant an agency new powers independent of those powers granted to the agency by other laws.²¹ Further, CEQA guidelines Section 15040(e) provides that “the exercise of discretionary powers for

¹⁷ Draft Resolution at 4.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 7.

²⁰ *Id.* at 8.

²¹ See also *Corona-Norco Unified School Dist. v. City of Corona*, 13 Cal. App. 4th 1577, 1587 (1993).

environmental protection shall be consistent with the express or implied limitations provided by other laws.”

Additionally, the Commission does not have the authority through the CEQA process to enforce, on its own accord, the rules and orders of agencies of equal dignity, such as the California Department of Fish and Wildlife. Pursuant to Fish & Game Code Section 1802, the California Department of Fish and Wildlife has:

jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. The department, as trustee for fish and wildlife resources, shall consult with lead and responsible agencies and shall provide, as available, the requisite biological expertise to review and comment upon environmental documents and impacts arising from project activities.

Therefore, while the Commission may oversee compliance with Construction Requirements, the Commission does not have authority to impose fines for perceived non-compliance with laws or regulations, where the authority to interpret and enforce those laws resides exclusively with another agency. For example, the Commission cannot impose a citation in connection with the “take” of a species, as the proper agency for implementing citations for a take of species is the California Department of Fish and Wildlife. Further, the Citation Program cannot be implemented in a manner that purports to delegate authority to staff to impose penalties for non-compliance with mitigation measures imposed by another agency as a pre-requisite of the project. Doing so would exceed the Commission’s authority as authorized by statute.

VIII. The Draft Resolution is Drafted so as to Encourage Retaliation Against Utilities for Exercising Their Constitutional Right to Due Process.

The Draft Resolution provides that “[i]n lieu of accepting the Scheduled Fine, a Respondent may appeal the citation and request a hearing. In the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Fine.”²²

As a general matter, the Supreme Court has held that when significant private interests are at stake, guarding against erroneous deprivations requires “that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest.”²³ The courts do “tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”²⁴

²² Draft Resolution, Appendix A, *Permit to Construct and Certificate of Public Convenience and Necessity Citation Program*, at 13, § 2.7.

²³ *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

²⁴ *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (internal quotation marks omitted).

The Supreme Court has further explained that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”²⁵

In a transparent effort to discourage the utilities from exercising their Constitutional right to a pre-deprivation hearing, the Draft Resolution essentially invites Commission Staff to retaliate against a utility that unsuccessfully challenges a citation, by increasing the amount of the fine following the hearing. At that point, under this provision, the discretion afforded to Staff to impose a fine is limitless and no longer confined to the guidelines set forth in the Draft Resolution. This provision of the Draft Resolution violates fundamental notions of fairness and serves no other purpose than to inhibit the free exercise of Constitutional rights. This particularly egregious assault on due process must be stricken in its entirety.²⁶

IX. The Draft Resolution Unlawfully Delegates Discretionary Authority to Commission Staff.

The Draft Resolution unlawfully delegates authority to Commission Staff that the Public Utilities Code and other State law grant to the Commission. California courts have recognized limits on the ability of agencies to delegate discretionary functions.²⁷ Generally, powers conferred upon public agencies and officers that involve the exercise of judgment or discretion are in the nature of a public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization.²⁸ What Public agencies may delegate are the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action,²⁹ functions relating to the application of standards,³⁰ and the making of preliminary recommendations and draft orders.³¹

In the context of issuance of a violation and/or fine, 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.”³²

²⁵ *BMW of North Am. v. Gore*, 517 U.S. 559, 579 (1996).

²⁶ It is also unclear whether the process for changing the amount of the fine would comport with due process. How would the amount of the citation be changed following the hearing? Would a change to the amount of the citation trigger the right to a new pre-deprivation hearing? Would the second hearing need to be assigned to a new administrative law judge to ensure neutrality?

²⁷ *See, e.g., California School Employees Association v. Personnel Comm’n*, 3 Cal.3d 139, 144 (1970) (holding that agencies may delegate ministerial tasks but not discretionary authority).

²⁸ *Bagley v. City of Manhattan Beach*, 18 Cal.3d 22, 24 (1976).

²⁹ *California School Employees*, *supra*, at p. 144.

³⁰ *Bagley*, *supra*, at p. 25.

³¹ *Schechter v. County of Los Angeles*, 258 Cal.App.2d 391, 397 (1968).

³² *Bagley*, *supra*, at p. 24; *California School Employees*, *supra*, at p. 144; *Schechter*, *supra*, at p. 396.

The Commission itself has previously acknowledged these limits, although it has taken a narrow view of what constitutes a non-delegable discretionary function.³³ The fact that the Draft Resolution includes a schedule of fines does not remedy this error. Staff necessarily must exercise discretion when it comes to deciding what constitutes a violation, whether or not a violation causes “harm to human beings or a resource,” and whether to issue citations and fines in a given case. As explained above, many of the provisions involved are aspirational and goal-oriented, rather than prescriptive. Enforcement of such provisions would necessarily require the exercise of considerable discretion and judgment to determine first, what the provisions actually require, and second, whether the actions taken by the utility are sufficient to satisfy those provisions. The unlawfulness of this delegation of authority is further exacerbated by the fact that outside consultants, rather than Commission Staff, are likely to be the persons exercising broad discretion to determine whether or not a utility’s conduct complies with an aspirational mitigation measure.

X. The Proposed Citation Program Violates the Public Utilities Code by Failing to Consider Statutory Factors in Setting the Amount of the Fine.

Section 2104.5 of the Public Utilities Code guides the Commission in its assessment of a penalty, and requires that “[i]n determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of the penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of the violation, shall be considered.” The Draft Resolution fails to require that Staff conduct any such analysis. Accordingly, the Draft Resolution violates section 2104.5 of the Public Utilities Code.

XI. If the Commission Elects to Adopt the Proposed Citation Program, and the Objective is to Encourage Greater Compliance in an Efficient Manner, the Citation Process Must be Revised.

A. A Citation Program Should Include a Meet and Confer Process and Reasonable Cure Period.

As discussed above, the citation program set forth in the Draft Resolution does not and cannot comport with due process, given the inherently aspirational and vague nature of many mitigation measures designed to minimize environmental impacts of a project. If the Commission nevertheless determines to adopt the Draft Resolution, in order to mitigate the detrimental impact that the proposed citation program will have on the environment by discouraging collaboration and aspirational goal-setting by the utilities and Commission staff, the Commission should incorporate a meet and confer process and reasonable cure period into the citation program. The Draft Resolution should be modified to require that once Commission Staff identify a condition

³³ See, e.g., *Union Pacific Railway Co.*, Order Modifying Resolution ROSB-002 and Denying Rehearing of Resolution, as Modified, A.08-12-004, 2009 Cal. PUC LEXIS 250, *5 (May 11, 2009); cf. *Independent Review Panel June 9 Report*, Recommendation 6.7.3.1 at 104 (“The ability of USRB staff to take a greater enforcement role appears limited, but not precluded, by CPUC policy and case law restricting the delegation of Commission authority.”).

that they believe may potentially violate a PTC or CPCN, Staff must meet and confer with the utility, and any other agency tasked with enforcement of the provision at issue, to attempt to resolve the matter collaboratively. Following the meet and confer process, Commission Staff should provide the utility with sufficient time to cure the perceived violation; the amount of time must be reasonable in light of the specific facts and circumstances involved. Inclusion of a meet and confer and cure period requirement is appropriate to address the types of circumstances the Draft Resolution states it is intended to address. The Draft Resolution indicates that the citation program is designed to “provide Staff with an additional expedited and necessary tool to correct ongoing compliance issues.”³⁴ If an identified issue can be quickly and effectively resolved through the collaborative process already in place, then the issuance of a citation will accomplish nothing other than to disrupt the collaborative process and inject distrust into the process.

B. A Citation Program Should Include an Overall Cap.

The Draft Resolution proposes to adopt a schedule of fines ranging from \$500 to \$10,000 per day, but does not include an overall cap on the overall amount of the fine that can be imposed. Sound public policy dictates that the Commission revise the Draft Resolution to include an overall limitation on Staff’s discretion to levy a fine for a single course of conduct or condition. First, an overall cap will encourage Staff to address conduct expeditiously once a concern is identified. This will further the stated goal of enabling staff to quickly address non-compliance. Second, an overall limitation will mitigate the regulatory uncertainty generated by the citation program. Regulatory uncertainty regarding the costs of a project could undermine a utility’s ability to raise the capital necessary for completing the project and are likely to increase project costs. Mitigating this regulatory uncertainty could help minimize the adverse financial impacts of the citation program. Third, adoption of a cost cap is consistent with the objective of graduated enforcement. If Staff issues a citation, but the utility does not avail itself of the opportunity to cure the violation, then the citation has been ineffectual and Staff should take other enforcement actions, such a Stop Work Order or recommendation to open an OII, to induce compliance. Sitting back and allowing daily fines to accumulate indefinitely will not further the objective of quickly addressing non-compliance concerns.

C. A Citation Program Should Provide for Oversight of Staff’s Exercise of Discretion.

As discussed above, the Draft Resolution proposes to adopt a citation program that cannot comport with due process because many of the provisions to be enforced are unconstitutionally vague and subject to reasonable dispute as to interpretation and application. As also noted above, the problem with vague laws and regulations is that they impermissibly delegate basic policy matters to those entrusted with their enforcement for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. To help mitigate the risk of arbitrary and discriminatory application, the Commission should, at a

³⁴ Draft Resolution at 6 (emphasis added).

minimum, require that any citation proposed by Staff first be reviewed and approved by the Director of the Energy Division prior to being forwarded to the Safety Division for further action.

In addition, the Commission should provide guidance to Staff regarding the exercise of this inherently subjective judgment and direct Staff to consider the following factors in determining whether to issue a citation:

- Good faith shown by the Respondent toward compliance
- Whether the prohibited or required action is feasible in light of the totality of the circumstances
- Whether the violation is part of an identified pattern of related violations
- Size of the utility operator
- Size of the project
- Gravity of the Respondent's violation
- Conduct of the utility before, during and after discovery of the violation
- The totality of the circumstances related to the violation
- The amount of the fine as compared to previous Commission decisions
- Trending information related to similar violations by the Respondent

D. The Draft Resolution Should be Clarified to Expressly State that Staff Bears the Burden of Proving that a Violation Occurred and that the Fine Set Forth in the Citation is Appropriate.

Longstanding Commission precedent makes clear that the burden of proving that a violation of a Commission regulation has occurred, and the appropriate penalty to be imposed, rests with the party alleging the violation and seeking the penalty.³⁵ Consistent with this precedent, the

³⁵ See, e.g., D.87-12-067 at 167, Finding of Fact No. 4.

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Commission should clarify that Commission Staff bear the burden of proving both that a violation has occurred and that the amount of the fine is appropriate.

Respectfully submitted,

By: /s/ Deana Michelle Ng
Deana Michelle Ng
Attorney for Southern California Gas Company

cc: Amy C. Baker, Energy Division
Parties of Record in Draft Resolution E-4550
All Commissioners
Director of the Energy Division
Chief Administrative Law Judge
General Counsel

Attachment 1

Subject Matter Index of Proposed Changes

Subject	Proposed Change
Detrimental Impact the Citation Program Will Have on CEQA Process	Do Not Adopt the Draft Resolution. If nevertheless adopted, add meet and confer and reasonable cure period provisions to encourage continued collaboration despite the adversarial nature of the citation program and thereby attempt to avoid some of the delays that will result from additional litigation, dispute resolution and clarification requests.
Due Process Violations	Do Not Adopt the Draft Resolution. Due process violations cannot be cured due to the necessarily dynamic and flexible nature of construction requirements. Due process violation can be mitigated, however, through the deletion of the provision that would encourage Staff to retaliate against a utility who unsuccessfully appeals a citation, the adoption of a reasonable cure period, the adoption of an overall cap, oversight of Staff's exercise of discretion, and the adoption of standards to guide Staff's exercise of discretion.
Lack of Authority to Enforce the Laws and Regulations Exclusively Enforced by Other Agencies	Do Not Adopt the Draft Resolution. If nevertheless adopted, add meet and confer process to obtain and incorporate input from agencies responsible for interpretation and enforcement of applicable requirements.
Unlawful Delegation of Discretionary Authority	Do Not Adopt the Draft Resolution. The unlawful delegation of discretionary authority cannot be cured due to the necessarily flexible and aspirational nature of construction requirements. The unlawful delegation of discretionary authority can be mitigated, however, through the deletion of the provision that would encourage Staff to retaliate against a utility who unsuccessfully appeals a citation, the adoption of a reasonable cure period, the adoption of an overall cap, oversight of Staff's exercise of discretion, and the adoption of standards to guide Staff's exercise of discretion.

Attachment 2

Proposed Changes to Findings and Ordering Paragraphs

Findings

8. The Commission's current process for monitoring construction activities ~~Delegation of authority to Commission Staff to issue citations and levy Scheduled Fines for Specified Violations will~~ encourages compliance with Construction Requirements and facilitates quick and efficient resolution of compliance issues as they arise.
9. The Commission's current PTC and CPCN processes ~~A citation program will~~ provide the timely remedy necessary to correct ongoing compliance issues while project construction is underway and ~~will conserve limited staff resources.~~
10. Staff oversight and monitoring of construction activities as part of the Commission's PTC and CPCN processes, and Staff's ability to issue Stop Work Orders and initiate formal investigations, incentivize utilities to prevent non-compliance issues from recurring or continuing. A citation program will not further incentivize utilities to prevent non-compliance issues from recurring or continuing.
11. Enforcement of Construction Requirements through the issuance of fines ~~The Scheduled Fines set forth in Appendix A are reasonable and will~~ not encourage further compliance with Construction Requirements.
12. The proposed procedures for the citation program fail to ensure due process, fairness, and efficiency in the application of the citation program.
13. The Commission cannot lawfully delegate authority to Staff that exceeds the bounds of its own authority.
14. It is reasonable to require Staff to meet and confer with the utility and agencies tasked with enforcement of Construction Requirements to attempt to resolve non-compliance concerns collaboratively prior to the issuance of a citation.
15. It is reasonable to require Staff to provide the utility with a reasonable period of time to cure non-compliance issues identified through the meet and confer process prior to the issuance of a citation.
16. It is not reasonable to adopt provisions that would encourage Staff to retaliate against a utility for unsuccessfully appealing the issuance of a citation or the amount of a penalty imposed.
17. It is reasonable to cap the overall amount of fines that may be imposed by Staff under a citation program.

18. It is reasonable to require that the Director of the Energy Division review and approve any citation proposed by Energy Division Staff prior to issuance.

19. The burden of proving that a violation of a Commission regulation has occurred, and the appropriate penalty to be imposed, rests with the party alleging the violation and seeking the penalty.

Ordering Paragraphs

1. ~~The citation program and the Scheduled Fines for the Specified Violations as described in Appendix A, are hereby adopted.~~
2. ~~Authority is delegated to Commission Staff to issue citations and levy Scheduled Fines for the Specified Violations set forth in Appendix A to enforce compliance with Permits to Construct and Certificates of Public Convenience and Necessity.~~
3. ~~Fines will be paid by shareholders.~~
4. The issuance of a citation for a Specified Violation is not mandatory, and, in the alternative, the Commission may initiate any formal proceeding authorized by the California Constitution, the Public Utilities Code, other state and federal statutes, court decisions or decrees, the Commission's Rules of Practice and Procedure, or prior Commission orders, decisions, rules, directions, demands or requirements, and pursue any other remedy authorized by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity.
5. Nothing in this Resolution bars or affects the rights or remedies otherwise available to other persons or government agencies.
6. Resolution E-4550 is not enacted.

Attachment 3

APPENDIX A

Permit to Construct and Certificate of Public Convenience and Necessity Citation Program

1.0 Specified Violations and Scheduled Fines

1.1 “Specified Violation” means the failure to comply with Construction Requirements¹ for natural gas storage facilities; electric generating plants; electric transmission/ power/ distribution line facilities or substations. This includes failure to implement the mitigation measures in the project’s environmental document (e.g. Environmental Impact Report, Mitigated Negative Declaration), adopted as part of the final decision, or making unauthorized project changes (e.g. moving work areas without Commission approval).

1.2 “Scheduled Fines” for Specified Violations are set forth in Appendix A.

1.3 Modification of Scheduled Fines. Scheduled Fines may be modified by Resolution.

2.0 Procedures for the Citation Program

2.1 ~~Citations for Specified Violations.~~ Meet and Confer Process. After appropriate informal investigation and verification that a Specified Violation defined in this Resolution has occurred, Commission Staff is directed to meet and confer with the Respondent and any agencies tasked with enforcement of the laws or regulations that the Construction Requirement was drafted to address in order to attempt to resolve the non-compliance issue collaboratively.

2.2 Reasonable Cure Period. If Staff is unable to resolve the Specified Violation through the informal meet and confer process required under Section 2.1, Staff is authorized to issue a Notice of Probable Violation that includes a

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¹ Requirements in a Permit to Construct; Certificate of Public Convenience and Necessity; or Mitigation Monitoring, Reporting, and Compliance Program.

reasonable cure period within which the Respondent is directed to resolve the Specified Violation.

2.3 Citations for Specified Violations. If the Respondent fails to cure the Specified Violation within the reasonable period of time allotted under Section 2.2, the Director of the Energy Division is authorized to issue a citation. The Specified Violations and the corresponding Scheduled Fine that may be levied are described in this Appendix. The cumulative amount of the fine for a single course of conduct or ongoing condition that may be imposed through this Citation Program may not exceed \$100,000.

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2.3.1 Citations Not Mandatory. The issuance of a citation for a Specified Violation is not mandatory.

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2.3.2 Factors to be Considered. In determining whether to issue a citation, Commission Staff the Director of the Energy Division must consider: (1) Good faith shown by the Respondent toward compliance; (2) Whether the prohibited or required action is feasible in light of the totality of the circumstances; (3) Whether the Specified Violation is part of an identified pattern of related violations; (4) Size of the utility operator; (5) Size of the project; (6) Gravity of the Specified Violation; (7) Conduct of the Respondent before, during and after discovery of the Specified Violation; (8) the totality of the circumstances related to the Specified Violation; (9) the amount of the fine as compared to previous Commission decisions; and (10) Trending information related to similar violations by the Respondent.

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2.24 Service of Citations. Citations shall be sent by ~~Commission Staff~~ the Director of Energy Division by first class mail to the Respondent at the address of the agent for service of process.

2.35 Content of Citations. Citations shall state the alleged violation, the evidence supporting the alleged violation, and the proposed Scheduled Fine. The citation may summarize the evidence and Commission Staff shall make the evidence available for timely inspection upon request by the Respondent. Citations also shall include an explanation of how to file an appeal of the citation, including the explanation of a right to have a hearing, to have a representative present at the hearing, and to request a transcript.

2.46 Response to Citation. A Respondent may either: (1) accept the citation and the Scheduled Fine; or (2) appeal the citation.

2.57 Filing with Commission Staff. Unless otherwise specified, “notify Commission Staff,” “filing,” or “file” means to send a written communication by the U.S. Mail or an express mail service to the address specified in the order or citation that requires the filing or notification. These written communications are not filed with the Commission’s Docket Office. In addition to or instead of communications by mail service, Commission Staff may allow electronic submissions.

2.68 Acceptance of Scheduled Fine. In the event the proposed Scheduled Fine is accepted, the Respondent shall notify Commission Staff in writing and shall pay the Fine in full as set forth in subsection 2.8, below within thirty (30) days of the service date of the citation.

2.79 Appeal of Citation. In lieu of accepting the Scheduled Fine, a Respondent may appeal the citation and request a hearing. ~~In the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Fine.~~

2.79.1. Notice of Appeal. To appeal a citation, the Respondent must file a written Notice of Appeal. The Notice of Appeal must state the grounds for appeal and be filed with Commission Staff within thirty (30) days of the date of the citation.

2.79.2. Referral to Administrative Law Judge. Upon receipt of a timely Notice of Appeal, Commission Staff shall promptly provide a copy of the Notice of Appeal to the Chief Administrative Law Judge. The Chief Administrative Law Judge shall promptly designate an Administrative Law Judge to hear the appeal.

2.79.3 Time of Hearing. No less than ten (10) days after the Notice of Appeal is filed, the assigned Administrative Law Judge shall set the matter for hearing promptly. The Administrative Law Judge, may, for good cause shown or upon agreement of the parties, grant a reasonable continuance of the hearing.

2.79.4 Location of Hearing. Appeals of citations shall be heard in the Commission’s San Francisco courtroom on regularly scheduled days.

2.79.5 Transcripts. The Respondent may order a transcript of the hearing, and shall pay the cost of the transcript in accordance with the Commission's specified procedures.

2.79.6 Representation at Hearing. The Respondent may be represented at the hearing by an attorney or other representative, but any such representation shall be at the Respondent's expense.

2.79.7. Evidentiary Hearing. At an evidentiary hearing, Commission Staff bears the burden of proving that a violation of a Commission regulation has occurred, and that the citation imposes an appropriate penalty to be imposed, proof and, accordingly, shall open and close. The Administrative Law Judge may, in his or her discretion to better ascertain the truth, alter the order of presentation. Formal rules of evidence do not necessarily apply, and all relevant and reliable evidence may be received at the discretion of the Administrative Law Judge.

2.79.8 Submission. Ordinarily, the matter shall be submitted at the close of the hearing. The Administrative Law Judge, upon a showing of good cause, may keep the record open for a reasonable period to permit a party to submit additional evidence or argument.

2.79.9 Decision. The Administrative Law Judge shall issue a draft Resolution resolving the appeal not later than thirty (30) days after the appeal is submitted in accordance with subsection 2.7.8, and the draft Resolution shall be placed on the first available agenda, consistent with the Commission's applicable rules.

2.79.10 Communications. From the date that a citation is issued to and including the date when the final decision is issued, neither the Respondent nor Commission Staff, or any agent or other person on behalf of the Respondent or Commission Staff, may communicate regarding the appeal, orally or in writing, with a Commissioner, Commissioner's advisor, or Administrative Law Judge.

2.810 Payment of Scheduled Fines. Payment of Scheduled 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 Public Utilities Commission for the credit of the State General Fund.

2.911 Default. If the Respondent: (a) notifies Commission Staff of acceptance of a Scheduled Fine and fails to pay the full amount of the Scheduled Fine within thirty (30) days of the date of the written acceptance of the Scheduled Fine; or (b) fails to notify Commission Staff of acceptance of a Scheduled Fine or fails to file a written Notice of Appeal in the manner and time required, then the citation and fine shall become final and the Respondent is in default. Upon default, any unpaid balance of a Scheduled Fine shall accrue interest at the legal rate of interest for judgments, and Commission Staff and the Commission may take any action provided by law to recover unpaid penalties and ensure compliance with applicable statutes and Commission orders, decisions, rules, directions, demands or requirements.

2.4012 Reporting. Commission Staff shall regularly report to the Commission summarizing actions taken pursuant to this Resolution. The report shall include a summary of the citations and penalties imposed, fines paid, and the disposition of any appeals.

SPECIFIED VIOLATIONS AND SCHEDULED FINES

SPECIFIED VIOLATION	SCHEDULED FINE
<p>Non-compliance with Construction Requirements for natural gas storage facilities, electric generating plants, electric transmission/ power/ distribution line facilities, and substations that does not cause harm to human beings or a resource.</p>	<p>\$500 per day for the first ten days the non-compliance occurred and \$1,000 for each day thereafter <u>not to exceed \$100,000.</u></p>
<p>Non-compliance with Construction Requirements for natural gas storage facilities, electric generating plants, electric transmission/ power/ distribution line facilities, and substations that does cause harm to human beings or a resource.</p>	<p>\$5,000 per day for the first ten days the non-compliance occurred and \$10,000 for each day thereafter <u>not to exceed \$100,000.</u></p>