



**Michelle L. Wilson**  
Sr. Director and  
Lead Counsel

*Mailing Address*  
P.O. Box 7442  
San Francisco, CA 94120

*Street/Courier Address*  
Law Department  
77 Beale Street  
San Francisco, CA 94105

(415) 973-6655  
Fax: (415) 973-5520  
Email: MLW3@pge.com

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Administrative Law Judge Janet A. Econome  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102

**Re: Comments of Pacific Gas and Electric Company on Draft Resolution ALJ-299**

Dear ALJ Econome:

Pacific Gas and Electric Company (PG&E) appreciates the opportunity to submit these comments on draft Resolution ALJ-299 regarding Establishing Pilot Program Citation Appeal and General Order (G.O.) 156 Appellate Rules. That draft Resolution, issued on May 5, proposes rules to make the California Public Utility Commission's (CPUC's) appellate process for Citations and G.O 156 more accessible to the public and more uniform. PG&E supports this intent and believes the proposed rules largely meet the CPUC's objective.

While most of the rules are administrative in nature, there are a few that should be revised to reflect the appropriate due process rights afforded participants in CPUC's proceedings. Specifically, Rule 11 (Burden of Proof), Rule 9 (Exchange of Information) and Rule 19 (Ex Parte Communications) require revisions. Attachment A of this letter contains proposed revisions to each of these rules consistent with these comments. With these revisions PG&E supports the adoption of ALJ-299.<sup>1/</sup>

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<sup>1/</sup> PG&E also notes that the CPUC has recently issued R. 14-05-013 to establish an electric safety citation program and to evaluate modifications to the existing gas citation program contained in Resolution ALJ-274. PG&E will be providing comments on related issues during the course of that proceeding.

## 1. Proposed Rule 11 -- Burden of Proof

The proposed rule states as follows:

“The burden of proof in a Citation Appeal or a General Order 156 Appeal is governed by the language in the Citation Program or General Order 156. For Citation Programs which are silent as to which party has the burden of proof, the following rule applies: 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 appellant to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is inappropriate.”  
(Draft Resolution ALJ-299, Appendix A, p. 4)

The proposed rule on burden of proof is defective in several ways.

First, by proposing the “burden-shifting” language as a default rule where citations are silent, the draft Resolution suggests that it is appropriate for the burden of proof rule to differ across programs. The designation of burden of proof in a judicial proceeding is an important safeguard of due process rights. Absent a statutory basis for a distinction, the burden of proof should be uniform throughout the CPUC’s appellate process for citations. The uniform rule – staff bears the burden to prove violations and the reasonableness of the amount of a penalty -- should be reflected in ALJ-299.

Second, by shifting the burden to the appellant, the draft Resolution goes against the consistent holdings in its formal enforcement proceedings that the burden of proving violations rests on staff.<sup>2/</sup> The appellate process at issue in these rules is the formal aspect of a process that begins informally. Once a notice of appeal has been served the citation process (or G.O. 156 complaint) is transformed into a formal process that relies on Administrative Law Judges and the CPUC’s entire decisionmaking process. PG&E does not believe there is any basis in law or policy for the burden of proof to differ between formal enforcement actions and the appellate process of citation programs.<sup>3/</sup> Indeed, the very informality of the underlying citation process makes it even more critical to conform the appellate process to one that reflects the Commission’s holdings on burden of proof in enforcement proceedings. It is only through the appellate process that the utilities will have a hearing on the merits, and it is only at this hearing that staff bears any burden at all. As the California Court of Appeals has held, “... if a judicial

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<sup>2/</sup> See, e.g., *In re Southern California Edison Co.*, D. 04-04-065, p. 2; *In re Qwest Communications Corporation*, D. 02-10-059, p. 4.

<sup>3/</sup> The language in the draft electric citation program justifies the identical language proposed here by including a footnote citing a decision in an application in which PG&E sought authority to increase pressure on pipelines. In that context, PG&E agrees with the CPUC’s statement that “[t]he burden of proving that particular facilities are safe rests with PG&E.” (R.14-05-013, Appendix B, p. B-21, fn 31 citing D. 11-09-006.) However, this language has no applicability or relevance to which party should bear the burden in a citation appeal.

proceeding is the owner's first and only opportunity to have a hearing on the merits of the seizure, then it is essential that the department be required to bear the burden of proof on all issues..."<sup>4/</sup> The only existing citation containing similar language on burden shifting is ALJ-274. It was wrongly decided and should be conformed to the uniform rule that staff bears the burden.

Third, the appellate process also includes the opportunity to challenge the reasonableness of the penalty contained in a citation. Just as the staff should be required to prove the underlying violation or violations, it should also be required to prove the reasonableness of the penalty. The rule should be clear on this point.

## 2. Proposed Rule 9 -- Exchange of Information

The proposed rule states as follows:

"No later than three business days prior to the scheduled hearing on a Citation Appeal or General Order 156 Appeal, the parties must exchange all information they intent to introduces [sic] into the record at the hearing which is not included in the citation or Clearinghouse Decision and the Compliance Filing already filed with the Commission pursuant to Rule 7 of these Rules. The information exchange is not to be filed with the Commission or served upon the Administrative Law Judge or other decisionmakers." (Draft Resolution ALJ-299, Appendix A, p. 4)

PG&E supports the concept of exchange of information and also recognizes that the hearing process in a Citation or G.O 156 appeal should be more streamlined than a hearing in a formal enforcement proceeding. However, Proposed Rule 9 continues the defect of the language contained in the proposed Rule 11 on burden of proof. By requiring a simultaneous exchange of information, the rule ignores the fact that the staff in citation appeals, and the complainant in G.O 156 appeals, have the burden of proof. The exchange of information during an appeal should be sequenced to require the parties with the burden of proof to share information intended to be used at hearings first.

In addition to the proper sequencing of the exchange, PG&E believes due process and efficiency requires the staff and complainants be prohibited from introducing information at a hearing on appeal that they have not provided previously to the utility in a citation process, or to parties to a G.O. 156 complaint. The support for the Citation (or Clearinghouse Decision) should be complete, transparent and available prior to the appeal. If this information is persuasive, it will increase the likelihood that an appeal will not be taken.

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<sup>4/</sup> Menefee and Son v. Department of Food and Agriculture, 199 Cal. App. 3d 774, 783 (1988).

### 3. Proposed Rule 19 -- Ex Parte Communications

The proposed rule states as follows:

“For all Citation Appeals and General Order 156 Appeals, ex parte communications as defined by Rule 8.1(c) of the Commission’s Rules of Practice and Procedure, with a decisionmaker, including any Commissioner, Commissioner advisor, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion Administrative Law Judge, are prohibited from the date the Citation or Clearinghouse Decision issued pursuant to General Order 156 is issued, through the date a final order is issued on the Citation Appeal or General Order 156 Appeal.

A final order means 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 finally resolved.” (Draft Resolution ALJ-299, Appendix A, p. 6)

While PG&E believes an ex parte prohibition is consistent with CPUC’s ex parte rules in adjudicatory and enforcement proceedings, the duration of the prohibition contained in this rule is too long. The formal enforcement proceeding actually begins with the Citation Appeal or the G.O. 156 Appeal. As noted above, these appeals transform what has been an informal process into a formal one that goes before that Commission and enlists the participation of Administrative Law Judges and the CPUC’s entire decisionmaking process. Communications with decisionmakers prior to that point should not be prohibited. By allowing open communications between decisionmakers and the staff, the utility and the participants in a G.O. 156 complaint, the CPUC will ultimately encourage reasonable resolutions of disputes that may not require appeals. This time frame for imposition of an ex parte prohibition is consistent with the CPUC’s Rules of Practice and Procedure.<sup>5/</sup>

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<sup>5/</sup> See, Article 8, Communications with Decisionmakers and Advisors.

4. Conclusion

PG&E endorses the CPUC's goal of making the appellate process for Citation and G.O. 156 Appeals more transparent and uniform. With the incorporation of the suggestions discussed above and contained in Attachment A, PG&E believes draft Resolution ALJ-299 will achieve that goal and be consistent other CPUC policies and rules.

Respectfully submitted,

/s/  
Michelle L. Wilson  
Sr. Director and Lead Counsel

MLW/tvu

cc: CPUC Official Service List R. 14-05-013

## ATTACHMENT A

### PACIFIC GAS AND ELECTRIC COMPANY'S COMMENTS TO DRAFT RESOLUTION ALJ- 299, PROPOSED REVISIONS TO SELECT RULES

#### Proposed Rule 11 -- Burden of Proof

~~The burden of proof in a Citation Appeal or a General Order 156 Appeal is governed by the language in the Citation Program or General Order 156. For Citation Programs which are silent as to which party has the burden of proof, the following rule applies: For all Citation Programs, unless there is a statutory basis for a different burden of proof the following rule applies: Staff has the burden to prove a *prima facie* case supporting its issuance of the citation for the alleged violations and to prove the reasonableness of the amount of any penalty. For General Order 156 appeals, complainant has the burden of proof; the burden then shifts to appellant to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is inappropriate.~~

#### Proposed Rule 9 -- Exchange of Information

~~No later than three business days prior~~ At times to be schedule by the ALJ prior to the scheduled hearing on a Citation Appeal or General Order 156 Appeal, the parties must exchange all information they intend to introduces into the record at the hearing which is not included in the citation or Clearinghouse Decision and the Compliance Filing already filed with the Commission pursuant to Rule 7 of these Rules. The information exchange is not to be filed with the Commission or served upon the Administrative Law Judge or other decisionmakers.

In a Citation Appeal, the exchange of information shall be sequenced with the staff providing information to the appellant first, and the appellant providing information to the staff at a later date. Prior to the appeal, and at the appellant's request, the staff is required to provide the appellant with all information it has relied upon to support the citation. The staff cannot introduce at a hearing on an appeal any information that was not provided to appellant prior to the appeal.

In a General Order 156 appeal, the exchange of information shall be sequenced with the complainant and parties in support of complainant providing information first and parties in opposition to complainant providing information at a later date. The complainant, and supporting parties, cannot introduce at a hearing on an appeal any information that was not provided to the others parties prior to the appeal.

Proposed Rule 19 -- Ex Parte Communications

For all Citation Appeals and General Order 156 Appeals, ex parte communications as defined by Rule 8.1(c) of the Commission's Rules of Practice and Procedure, with a decisionmaker, including any Commissioner, Commissioner advisor, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion Administrative Law Judge, are prohibited from the date the ~~Citation or Clearinghouse Decision issued pursuant to General Order 156 is issued~~ Appeal is served, through the date a final order is issued on the Citation Appeal or General Order 156 Appeal.

A final order means 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 finally resolved.