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By E-Mail to: CitationAppealsResolution@cpuc.ca.gov

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

Re: Joint Comments of Southern California Gas Company and San Diego Gas & Electric Company on Draft Resolution ALJ-299

Dear Judge Econome:

Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E) thank you for the opportunity to submit the following Opening Comments on Draft Resolution ALJ-299 (ALJ-299) issued May 5, 2014.

ALJ-299 proposes to enhance accessibility to the Commission's regulatory process by establishing a pilot program for filing citation appeals, revocation appeals and General Order 156 appeals with the Commission's Docket Office. Through this new pilot program, interested parties, Commission Staff, reviewing courts and the public at large will have a central location for access to records of citation appeals. The pilot program would also clarify and make more consistent some of the procedural rules governing citation appeals.

SoCalGas and SDG&E support the Commission's adoption of ALJ-299. The proposed pilot program will enhance the transparency of the Commission's citation appeals process by providing a means for interested parties, Commission Staff and reviewing courts to access records of appeals. The proposed procedural clarifications also will make it easier for appellants and interested parties to comply with the Commission's procedural rules. In the comments that follow, SoCalGas and SDG&E offer specific suggestions for how the pilot program can be refined to further enhance the ability of parties to understand and comply with the Commission's citation appeals process.

Rule 3: The Pilot Program Should Adopt a Consistent Deadline for Filing Notices of Appeal

ALJ-299 notes that in order to contest a citation, the cited entity must initiate an appeal and that currently, the time period within which an appellant must file a notice of appeal is not uniform. ALJ-299 further notes that in some instances, the deadline for filing a notice of appeal is governed

by statute. Rule 3 does not propose to harmonize the filing deadlines for the various citation programs, and instead only provides that an appellant must file a notice of appeal with the Commission's Docket Office within the time specified in the citation program.

Disparate filing deadlines can lead to confusion and make it more difficult for parties to comply with the Commission's rules. SoCalGas and SDG&E recommend that the Commission adopt a uniform deadline of 30 days for filing notices of appeal, which would be superseded only where the 30-day period is inconsistent with a statutory requirement. Specifically and additionally, the ten-day period provided under ALJ-274 should be modified in the pending Rulemaking on the Commission's Natural Gas and Electric Safety Citation programs, R.14-05-013. A 30-day period would provide a reasonable time for cited entities to conduct an investigation into the facts underlying a citation and, if appropriate, resolve a dispute concerning a citation with Commission Staff prior to filing a notice of appeal. This would preserve the resources of the Commission and interested parties, and may help speed the implementation of safety enhancements. In contrast, a ten-day period for filing a notice of appeal does not provide a reasonable time for a cited entity to conduct its investigation into the facts underlying a citation and resolve disputes without an appeal.

Rule 4: The Pilot Program Should Not Prohibit Extensions of Time to File Notices of Appeal

Rule 4 prohibits extensions of time to file notices of appeal unless an extension is expressly authorized by a citation program. A prohibition on extensions of time may preclude cited parties from completing a full investigation of the facts underlying a citation before filing a notice of appeal. The prohibition may also preclude a cited party from attempting to resolve a dispute concerning a citation with Commission Staff prior to filing a formal appeal. In such circumstances, this prohibition would create inefficiencies by forcing the Commission and parties to expend resources litigating an appeal that might otherwise have been avoided, and could also force the Commission to resolve an appeal based on an incomplete record. Rule 4 should be modified to allow the Division Director to grant a reasonable extension of time to file a notice of appeal even if extensions are not expressly authorized under the applicable citation program.

Rule 6: The Pilot Program Eliminates the Need to Serve Multiple Hard Copies of Notices of Appeal on Various Divisions of the Commission.

Rule 6 requires that a notice of appeal be served on the Chief Judge and the Director of the Division that issued the citation. ALJ-299 notes that some citation programs require the appellant to serve the notice of appeal on additional persons. For example, ALJ-274 requires that, in addition to serving the Chief Judge and Division Director, the appellant must also serve the notice of appeal on the Commission's Executive Director, General Counsel, and the Director of the Division of Ratepayer Advocates. ALJ-299 provides that the additional service requirements of the various citation program resolutions will remain unchanged.

ALJ-299 adopts a pilot program for filing notices of the appeal with the Docket Office so that those documents will be accessible by interested parties, Commission Staff, and reviewing courts. Because the documents will now be accessible through the Commission's Docket Office, it should no longer be necessary for an appellant to mail numerous hard copies of each notice to various

divisions within the Commission that may or may not need to review a hard copy. Now that the Commission will have a central location for such files, appellants should no longer be required to serve paper copies of notices of appeal to individuals at the Commission.

Rule 9: The Pilot Program Should Clarify that Newly-Discovered Information May Be Exchanged Up to the Time of Hearing, If Timely Disclosed.

ALJ-299 adopts a new rule that no later than three business days before a scheduled appellate hearing, the parties must exchange all information they intend to introduce into the record at the hearing which is not included in the citation or General Order 156 decision and Compliance Filing already filed with the Commission pursuant to Rule 7. Rule 9 should be clarified to provide that it does not relieve parties of the obligation to respond to data requests in a timely manner, and does not prohibit the introduction of evidence discovered within the three-day window or evidence to address facts or issues raised by an opposing witness at a hearing.

Under existing ALJ-274 a pipeline operator has only ten days to file a notice of appeal, and under ALJ-299, the Commission may set a matter for hearing ten days from the date the notice of appeal is filed. As noted above, ALJ-299 would preclude a pipeline operator from requesting an extension of time to file a notice of appeal of an ALJ-274 citation in order to complete its investigation. Thus, pending modification of ALJ-274, a pipeline operator may have an unreasonably short period of approximately two weeks to investigate the facts underlying a citation before disclosing evidence for the hearing, when its investigation may not yet be complete. Rule 9 should be revised to allow parties to introduce evidence discovered within the three-business-day period prior to the hearing, so long as the evidence is disclosed promptly upon discovery.

Rule 11: The Pilot Program Improperly Shifts the Burden of Proof Under Staff Citation Programs

ALJ-299 adopts a rule that improperly shifts the burden of proof from Commission Staff to the cited party under the Commission's citation programs. Rule 11 provides: "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 the appellant to demonstrate that the violation did not occur and that citation should not issue or that the amount of the penalty is inappropriate." Thus under ALJ-299, Staff would no longer have the ultimate burden to prove that a violation occurred and that the issuance of a citation and the penalty imposed are appropriate. Merely submitting *prima facie* evidence of a violation would be sufficient to shift the entire burden onto the appellant. This is inconsistent with longstanding Commission precedent.¹

¹ See, e.g., D.87-12-067, 27 CPUC 2d 1 at 22 ("where DRA is affirmatively seeking a statutory or other penalty based in a violation of statute, rule, order, or tariff, it indeed does have the burden of proving that there has been such a violation, or some other conduct by the regulated entity which justifies imposition of a penalty. In this limited situation we are prepared to acknowledge that the ultimate burden of proof that such violation has occurred rests with the party initiating the investigatory action. Similarly, in Phase 2, where DRA and other parties are recommending penalties due to Pacific Bell's violation of statutes, general orders, and tariff in connection with the marketing abuse problem, we are prepared to say that these parties have the ultimate burden of proof regarding existence of the violation and the appropriate penalty to be imposed."); D.14-01-037, 2014 Cal PUC LEXIS 39 at *23 ("CPSD has the burden to

In D.93-05-013 the Commission considered the proper allocation of the burden of proof where a penalty is proposed, and determined that, consistent with prior Commission precedent, the party proposing a penalty “has the burden to prove the existence of any violation of statute, order rule, tariff or instruction, or express policy, and the propriety of the penalty that might be imposed.”² There is no legal basis for ALJ-299 to deviate from this longstanding precedent for Staff citation programs. In formal Commission proceedings the party proposing a penalty bears the burden of proof. It is essential that the rights of parties accused of violations be protected in the same manner where the Commission delegates authority to its Staff to impose penalties outside of a formal Commission proceedings.

Rule 19: *Ex Parte* Rules Should Apply Upon the Filing of a Notice of Appeal.

Rule 19 clarifies that *ex parte* rules apply for citation appeals from the date a citation is issued. SoCalGas and SDG&E agree that the point at which *ex parte* rules apply should be clarified in Rule 19, but propose that the rules apply from the date that a notice of appeal is filed. This is the point at which the matter becomes adjudicatory in nature, and would therefore be more consistent with Rule 8.3(b) of the Commission’s Rules of Practice and Procedure. This would also give Commission Staff and cited parties an opportunity to attempt to resolve citation disputes informally to avoid the filing of formal notices of appeal.

Thank you for your consideration of these comments.

Sincerely,

/s/ John R. Ellis

John R. Ellis
Attorney for Southern California Gas Company and
San Diego Gas & Electric Company

cc: Timothy J. Sullivan, Chief Administrative Law Judge (Acting)
Office CPUC Service List for R.14-05-013

establish by a preponderance of the evidence that TracFone owes past due amounts, the amount owed, if any, and the amount of penalties, if any, in connection with violations set forth in the Phase 1 Decision.”

² 49 CPUC 2d 218 at *7 (*see also* COL 2 “DRA has the burden of proof for violations of law or policy and for the propriety of any penalty that might be imposed for those violations.”)