BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Natural Gas and Electric Safety Citation Programs.	R.14-05-013 (Filed May 15, 2014)

REPLY COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES

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I. INTRODUCTION

Pursuant to Order Instituting Rulemaking R.14-05-013 ("OIR"), page 12, the Office of Ratepayer Advocates ("ORA") submits these reply comments to the opening comments of Coalition of California Utility Employees ("CUE"); Pacific Gas and Electric Company ("PG&E"); PacifiCorp, Bear Valley Electric Service, and Liberty Utilities ("CASMU"); San Diego Gas & Electric Company ("SDG&E"); and Southern California Edison Company ("SCE") on the OIR's proposed Electric Safety Citation Program ("Citation Program").[1]

The Citation Program was drafted to comply with Senate Bill ("SB") 291,[2] which requires the establishment of a natural gas and electric safety program by July 1, 2014 and January 1, 2015, respectively. Although the utilities assert many concerns with the Citation Program, they fail to present any meaningful rationale for making significant changes to the program as proposed. Furthermore, the

[1] Pursuant to Cal. Pub. Util. Code § 309.5, ORA's statutory mandate is to advocate on behalf of the ratepayers to ensure that the utilities rates are as low as possible "consistent with reliable and safe service levels."

[2] SB 291 (2013) is codified at Cal. Pub. Util. Code § 1702.5.

focus should be on finalizing the SB 291 compliant program, which is attached to the OIR, by the statutory deadline. It is ORA's hope that the concerns raised by the utilities will not deter the Commission from complying with the statutory mandate, or persuade the Commission to "water down" the proposed Citation Program. A robust Citation Program will serve to protect the health and safety of millions of Californians.

II. THE UTILITIES' DUE PROCESS ARGUMENTS SHOULD BE REJECTED

As with Resolution ALJ-274, the utilities seem to fear that in implementing the Citation Program, the Commission Staff will fanatically prosecute every conceivable utility violation. At the heart of the utilities' numerous complaints about the Citation Program lies the false implication that it may violate their due process rights. It does not. And this Commission should not be swayed by the litany of hypothetical and speculative errors proposed by the utilities.

SDG&E correctly points out in its opening comments, at page 18, that:

> Resolution ALJ-274 dismissed these arguments on the ground that they were "too hypothetical and speculative." In rejecting the Sempra Utilities' comments, the Commission indicated the Commission Staff could be presumed to exercise its discretion reasonably and the Commission could be expected to review penalties, if appealed, fairly. … Notwithstanding the Commission's prior admonition that the citation program should be judged by its operation and not its potential infirmities, SDG&E is compelled to raise the same due process issues in the context of the instant electric safety citation program.[3]

It would have been advisable to heed the Commission's prior admonition rather than re-litigate these issues here. The Commission should reject these

[3] SDG&E Opening Comments, at p. 18.

analogous due process arguments as it rejected them in Resolution ALJ-274. In that Resolution, the Commission stated:

> In addition, the utilities' constitutional arguments on excessive fines, due process and takings are too hypothetical and speculative in this facial challenge to the citation enforcement procedures adopted in this Resolution. The utilities presume that because the CPSD staff would have the authority to issue citations, that they would be imposing the citations for the maximum amount of penalties (and for the maximum days possible) without sufficient justification, and further that the Commission would, on appeal, uphold these amounts. However, as a facial challenge, *the utilities, too, bear a heavy burden (which they have not met here)* to challenge the citation enforcement procedures as unconstitutional, because in some future hypothetical situation constitutional problems may arise. *See Calif. Assn. of Private Special Education Schools v. Dep't of Education* (2006) 141 Cal.App.4th 360, 371-72 (and cases cited therein).[4]

III. REPLY TO SELECTED ISSUES RAISED BY UTILITIES

ORA does not support any of the utility proposals that seek material modification of the Citation Program, and requests that such proposals be summarily rejected. Thus, ORA will not rebut every issue raised in the opening comments in this pleading. Rather, it presents here a brief reply to certain key issues that have been raised.

a. Administrative Limit on the Level of Fines that May Be Assessed

SB 291 requires that the Commission "adopt an administrative limit on the amount of monetary penalty that may be set by commission staff."[5] The utilities that filed opening comments believe that the Commission has failed to establish

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[4] Resolution ALJ-274, at p. 11. (Emphasis added.)

[5] Cal. Pub. Util. Code § 1702.5(a)(3).

requisite limits,[6] while also asserting that the potential penalties are excessive,[7] because the statutory maximum penalty may be levied per day, per violation, until the violation is cured.[8]

ORA supports the penalty limits already in place in Resolution ALJ-274 and the Citation Program. Such penalties are necessary as a deterrent. Ratepayers (and the public) are harmed by the failure of utilities to maintain safe and reliable facilities, and the penalty amounts should be high enough to incentivize the utilities to inspect, repair, and improve their facilities consistently as a regular practice. Further, the Citation Program offers flexibility in that it "grants Staff discretion to reduce the penalty levels from the maximum daily amount consistent with the factors set forth in Senate Bill 291 (2013) (SB 291), § 2104.5, and Commission decisions interpreting § 2104.5, including, among other things, consideration of self-reporting of the violation."[9]

In sum, the Citation Program's flexible penalties are not excessive, and are conducive to promoting public safety.

b. Retroactivity

The Citation Program allows for citations to "be issued for violations that have occurred both before and after" the date of its enactment.[10] PG&E claims that this retroactivity provision is improper in part because of its belief that SB 291 indicates a contrary "legislative desire."[11] SDG&E believes that a one year statute of limitations should be applied.[12]

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[6] *See*, *e.g.*, SCE Comments, at pp. 2-4.

[7] *See*, *e.g.*, CASMU Comments, at pp. 4-5.

[8] R.14-05-013, at p. B-5.

[9] *Id.*, at p. B-2. (Internal citations omitted.)

[10] *Id.*, at p. B-2.

[11] PG&E Comments, at p. 19.

[12] SDG&E Comments, at pp. 15-17.

Generally, when an Order Instituting Investigation ("OII") is issued, it is classified as adjudicatory,[13] and seeks to determine what the utility did wrong in the past. The very nature of our enforcement scheme (and enforcement schemes in general) is retrospective. SB 291 simply provides another enforcement tool to ensure the utilities' compliance with their safety requirements. Further, prior citations have been retroactive as reflected in the Commission decision involving the litigated gas citation under Resolution ALJ-274.[14] In that appeal, the Commission upheld CPSD's (SED's predecessor) citation even though it applied retroactively and did not have a statute of limitations applied to it.[15]

Ratepayers have an interest in utilities properly implementing the inspection programs authorized in general rate cases ("GRCs"). However, the Commission has learned in such cases as the Malibu Canyon OII that utility safety violations can occur many years before incidents, such as fires.[16] Prompt citations, *particularly* of long-standing violations, would incentivize utilities to fix existing problems promptly and maintain frequent and thorough inspections.[17] Further, a one-year statute of limitations could improperly immunize utilities with long-standing violations. The whole point of SB 291 and the Citation Program is to penalize and fix such violations promptly, in order to promote public safety.

c. Mandatory Meet and Confer

The utilities seem to concur on the notion that pre-citation mandatory meet and confers should be ordered.[18] In contrast, ORA recommends that the Citation

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[13] *See* Cal. Pub. Util. Code § 1701.1(c)(2).

[14] *See* ALJ Resolution 277.

[15] *See id.*, at pp. 21-22.

[16] *See* D.13-09-026, at p. 50, Finding of Fact 3. S*ee also id.*, at pp. A-4 – A-8.

[17] *See* General Order 95, Rule 31.2.

[18] *See, e.g.*, SDG&E Comments, at p. 19.

Program remain flexible in this regard. Certainly Commission Staff may choose to meet and confer with utility staff, prior to citation. However, this may not always be feasible, or consistent with promoting prompt repair of safety hazards. Beyond that, some citations may be so clear cut as to not warrant a meet and confer.

Further, forcing supervisors and lawyers to spend their time meeting on *every citation* would be a poor use of ratepayer funds. Indeed, it would be better for utilities to spend ratepayer resources fixing the problems, rather than arguing about them.

d. Notice and Violations Subject to Citation

Some utilities believe that the Citation Program is impermissibly vague.[19] Utilities also want limits on the types of violations that can be subject to citation.[20] In contrast, the Citation Program clearly states that citations may be issued for violations of General Orders ("GOs") 95, 128, 165, 166, and 174, as well as other applicable electric decisions, regulations and codes regarding electrical supply facilities.[21] Regarding notice, GO 95 was adopted in 1941.[22] Utilities are on notice of its mandates.

Furthermore, the Commission has already held that the utilities' safety obligation under California Public Utilities Code § 451 is not impermissibly vague as to violate the utilities' due process rights.[23] Beyond that, the Supreme Court

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[19] *See, e.g.,* SDG&E Comments, at p. 4.

[20] *See, e.g., id.*, at p. 15 (arguing that citations be limited to only those violations posing a demonstrable, unreasonable risk to the public safety); PG&E Comments, at p. 6 (arguing that citations should only be issued for Level 1 violations under GO 95, Rule 18.A); SCE Comments, at p. 10 (arguing that citations be issued only for violations that are clearly defined immediate safety hazards).

[21] R.14-05-013, at p. B-2.

[22] *See* Decision No. 34884.

[23] *Carey v. PG&E*, D.99-04-029, at pp. 13-14.

has held that "[o]bjections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk."[24] Here, a "reasonable utility" would know that it is required to follow GOs 95, 128, 165, 166, and 174, and other applicable electric decisions, regulations and codes regarding electrical supply facilities. The utilities, therefore, are and have been on notice of what constitutes a citable violation in the Citation Program.

Commission Staff should not be limited as to which Rules and Orders they can enforce through citations.

e. Culpability of Third Parties

Some utilities are concerned about the culpability of third parties with attachments on utility-owned facilities, when such attachments result in violations that are subject to citation.[25] Essentially, electric utilities do not wish to be held accountable when third parties jeopardize the safety of the electrical system.[26]

This argument is not realistic if one considers how utility facilities are connected in the field. For example, clearance violations between an electric line and a communications line might, in some ways, be the "fault" of the communications company. However, that would not relieve the electric company of its responsibility to maintain adequate clearances.[27]

Further, pole overloading can be caused by multiple parties, including Communication Infrastructure Providers ("CIPs"), not currently covered by the citation program. The Citation Program would hold the electric company accountable for its role in the overloading. Indeed, SCE has already agreed to be

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[24] *Maynard v. Cartwright* (1988) 486 U.S. 356, 361.

[25] *See, e.g.,* SDG&E Comments, at p. 19; SCE Comments, at pp. 12-13.

[26] *See, e.g.,* SCE Comments, at pp. 12-13.

[27] *See* GO 95, Rules 12.2, 31.1, 38. *See also* Cal. Pub. Util. Code § 451.

held accountable in the Malibu Canyon Fire OII, a case where multiple parties were attached to an overloaded pole. SCE admitted that:

> i. Pole 252E did not comply with GO 95 safety factor requirements as a result of the NextG's attachment of fiber optic cable facilities to the pole and at the time of the Malibu Canyon Fire.
>
> ii. SCE violated Pub. Util. Code § 451 by not taking prompt action to prevent NextG from attaching facilities to joint poles after an SCE employee determined that NextG's proposed attachments would cause several poles in Malibu Canyon to be overloaded.[28]

The Commission should not have to wait for a completed OII in order to have electric utilities promptly rectify unsafe conditions, regardless of the actions taken by other providers.[29]

f. Burden of Proof

The Citation Program provides the following guidance regarding burden of proof:

> 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 Respondent/Appellant to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is inappropriate.[30]

Some utilities believe that the burden of proof should lie with the Commission Staff for the Citation Program.[31] The Citation Program's formulation is, however, consistent with Commission precedent. For example, as noted in the Citation Program itself, at page B-21, footnote 31:

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[28] D.13-09-028, at p. 48, Finding of Fact 2.

[29] *See* Cal. Pub. Util. Code § 451.

[30] R.14-05-013, at p. B-21.

[31] *See, e.g.,* PG&E Comments, at pp. 17-18.

> As most recently stated in D.11-09-006, "[t]he duty to furnish and maintain safe equipment and facilities falls squarely on California public utilities, including PG&E. The burden of proving that particular facilities are safe also rests with PG&E."[32]

This formulation regarding burden of proof is also reflected in recent electric enforcement cases, such as the Malibu Canyon OII:

> Each Respondent is directed to appear and provide evidence to establish that it has not committed the violations alleged in CPSD's report, and that the October 21, 2007 fire did not occur as a result of any violation.[33]

The burden of proof language in the Citation Program should not be modified.

g. Self-Reporting

The parties' comments indicate general support for the notion that self-reporting of violations should be encouraged and taken into account when considering the appropriate penalty in a citation.[34] ORA supports a workshop process to determine the role that self-reporting will play in the new citation program. Indeed, R.14-05-013 requires the Staff to hold such workshops.[35]

IV. CONCLUSION

ORA urges the Commission to move forward expeditiously in establishing the electric citation program mandated by SB 291 by the statutory deadline of January 1, 2015.

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[32] D.11-09-006, at p. 6.

[33] I.09-01-018, at p. 5.

[34] *See, e.g.*, PG&E Comments, at p. 20; CUE Comments, at pp. 4-6; SCE Comments, at p. 12.

[35] R.14-05-013, at p. B-12.

Respectfully submitted,

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