

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-299
Administrative Law Judge Division
June 26, 2014

RESOLUTION

RESOLUTION ALJ-299. Establishes Pilot Program Citation Appeal and General Order 156 Appellate Rules.

1. Summary

This Resolution issues as part of this Commission's ongoing efforts to enhance accessibility to our regulatory process. Specifically, this resolution establishes a pilot program that requires all citation appeals, revocation appeals and General Order 156 appeals,¹ to be filed with the Commission's Docket Office so that all interested parties, Commission Staff, reviewing courts and the public at large will have a central location from which to access the record of citation appeals and General Order 156 appeals. Currently, these appeals are not filed with the Commission's Docket Office so there is no electronic docket card or central electronic location by which to access these appellate records. Under this pilot program, these appellate records will be easily accessible, thus enhancing due process in these expeditious proceedings. This pilot program also enacts several procedural appellate rules and harmonizes others to further due process and administrative efficiency in processing citation appeals and General Order 156 appeals.

The pilot program appellate rules are set forth in Appendix A to this resolution and are applicable on January 1, 2015. Appendix B to this resolution summarizes the key appellate provisions for each citation program and General Order 156. For these key appellate provisions, Appendix B also indicates (for each General Order and resolution)

¹ General Order 156 concerns the rules governing the development of programs to increase participation of women, minority and disabled veteran business enterprises in procurement of contracts from utilities as required by Pub. Util. Code §§ 8281-8286.

whether these appellate provisions are new requirements and which sections of the General Orders or resolutions are changed by this pilot program.

The Administrative Law Judge Division will monitor the success of this pilot program, which we adopt today as an experimental procedural reform. Depending upon the initial results of these new procedures, and any additional needs that surface, we may consider an expanded program or related rules changes in the future.

2. Background

The Commission has broad regulatory authority, as set forth in Article XII of the California Constitution and § 701 of the Pub. Util. Code.² Section 701 authorizes the Commission to “supervise and regulate every public utility in the State . . . and do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”

As mandated in § 702:

Every public utility 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 any way relating to affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.

Pursuant to § 451 each public utility in California must:

Furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment and facilities, . . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

Indeed, the Commission has stated that “[t]he duty to furnish and maintain safe equipment and facilities is paramount for all California public utilities.³

² All code citations are to the California Public Utilities Code unless otherwise stated.

³ Decision (D.) 11-06-017 at 16.

Pursuant to § 2101, the Commission is directed “to see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected . . .”

Existing law, such as § 7, allows the Commission to delegate certain tasks to Commission Staff. The Commission may lawfully delegate to its Staff the performance of certain functions, including the investigation of facts preliminary to agency action and the assessment of specific penalties for certain types of violations.⁴ The primary purpose of an effective enforcement program should be to deter misbehavior or illegal conduct by utilities and other entities subject to Commission jurisdiction thereby ensuring that both the employees of the utility and the public it serves are properly protected from the inherent hazards of providing utility services.

Our jurisdiction to create citation programs is well-established. We have adopted citation programs in many areas. See Commission Resolutions ALJ-187 [appeal procedures for household goods carriers, charter party carriers, and passenger stage corporations], E-4195 [resource adequacy], E-4257 [renewables portfolio standard filing requirements], ROSB-002 [transportation/railroad], UEB-002 [telecommunications], USRB-001 [propane], and W-4799 [water and sewer]. These resolutions may be accessed at the following link:

<http://www.cpuc.ca.gov/PUC/Practitioner/DecRes.htm>. More recently, we established additional citation programs in Resolutions ALJ-274 [gas safety], TL-19102 [household goods carriers], E-4550 [failure to comply with Permits to Construct or Certifications of Public Convenience and Necessity issued pursuant to the California Environmental Quality Act]; and TL-19108 [charter party carriers]. For a complete list of the Commission’s current citation programs⁵ and how this pilot program interacts with them, see Appendix B attached to this resolution.

In furtherance of due process, each citation program permits the cited entity to appeal the issuance of a particular citation. These citation appeals are heard by an Administrative Law Judge (Judge). Currently, these appeals are not filed with the Commission’s Docket Office so there is no electronic docket card or central electronic location by which to access the citation appeals record. A similar situation exists with

⁴ D.09-05-020 at 8.

⁵ Under some of the citation programs described in Appendix B, the citation may revoke a carrier’s license. (See e.g., Resolution TL-19108.) We also refer to these programs in this resolution as “citation programs.”

respect to General Order (GO) 156 appeals⁶ except the Clearinghouse issues the initial decision that is subject to appeal.⁷

The pilot program we establish today is part of this Commission's ongoing efforts to enhance accessibility to our regulatory process. Specifically, this resolution requires all citation appeals and GO 156 appeals to be filed with the Commission's Docket Office so as to establish a docket card and service list for each appeal. Interested parties, Commission Staff, reviewing courts and the public at large will have a central location from which to access the record of citation appeals and GO 156 appeals. These appellate records will be easily accessible, thus enhancing due process in these expeditious proceedings. This pilot program also enacts several procedural appellate rules and harmonizes others to further due process and administrative efficiency in processing citation appeals and GO 156 appeals.

The Administrative Law Judge Division will monitor the success of this pilot program, which we adopt today as an experimental procedural reform. Depending upon the initial results of these new procedures, and any additional needs that surface, we may consider an expanded program or related rules changes in the future.

We discuss the specific aspects of this docketing procedure and rules below.

3. Interplay Between This Resolution and the Existing and Future Citation Programs or GO 156

This resolution adopts a pilot program with appellate rules to enable the citation appeals and GO 156 appeals to be filed with the Commission's Docket Office. (See Appendix A to this resolution for the Pilot Program Rules which are applicable as of January 1, 2015.)

Many of the existing GOs and resolutions have appellate rules; most address similar topics but not all the rules are consistent in content. This pilot program strives for consistency among the rules to the extent practicable. This pilot program also enacts several new procedural appellate rules and harmonizes others to further due process and administrative consistency. To the extent the pilot program rules we adopt by this resolution supercede an appellate provision in an existing citation GO or resolution, or

⁶ See footnote 1 for a general description of GO 156.

⁷ GO 156 § 1.3.19 defines Clearinghouse as "a Commission-supervised program that shall conduct WMBE verifications and maintain a database of WMDVBEs [women, minority and disabled veteran businesses] for the use of utilities and the Commission."

in GO 156, we so state below or in Appendix B to this resolution. We also state below when we are standardizing an appellate rule among all GOs and resolutions or adopting a new rule not present in the existing GOs and resolutions.

The pilot program and appellate rules we adopt by this resolution are to be read together with the existing citation programs and GO 156. Appendix B, which is adopted by this resolution, summarizes key existing appellate provisions for each citation program and GO 156. For these key appellate provisions, Appendix B also indicates (for each GO and resolution) whether there are new rules and which sections of the GOs or resolutions are changed by these rules. If the Commission establishes new citation programs, these pilot program rules are also applicable to the new citation programs.

We now turn to a discussion of the specific pilot program appellate rules.

4. Filing and Serving the Notice of the Citation Appeal or GO 156 Appeal

A. File the Notice of Appeal with the Commission's Docket Office - New Rule (Rule 3)

In order to contest a citation, the cited entity (appellant)⁸ must initiate an appeal. The various resolutions currently differ as to where appellant should submit the notice of appeal to initiate it. See e.g., GO 167; Resolutions ALJ-187; UEB-001; USRB-001; ROSB-002; ALJ-274 [lodge or serve notice of appeal or letter of appeal with the Director of the Commission's Safety and Enforcement Division (SED) or with SED];⁹ Resolutions E-4195; E-4257; E-4550; W-4799 [file notice of appeal with Commission Staff]; and Resolution TL-19108 [send letter appeal to the Commission's Docket Office].¹⁰

This pilot program changes each citation GO and resolution with respect to where and how to submit the appeal and provides a central place (Docket Office) where each appellant must submit the notice of appeal by filing it. We make a similar change

⁸ The entity initiating the appeal (referred to by various terms in the citation GOs and resolutions and GO 156) is referred to in this resolution as appellant.

⁹ GO 167 states that a written appeal shall be filed with the Director of the Consumer Protection and Safety Division (CPSD) which Division is now referred to as SED. Therefore, we refer to CPSD as SED in this resolution.

¹⁰ As stated in the text of this paragraph, the document initiating the citation appeal or GO 156 appeal is referred to by different names in existing GOs and resolutions. These rules refer to the initiating document as a notice of appeal.

regarding GO 156 which formerly required appeals to be served on the Clearinghouse as well as the Chief Judge. (See Rule 3.) The caption of the appeal should read “Appeal of [who] from [Citation 12345] or [Clearinghouse Decision 12345] issued by [Commission Division which issued the citation] or [the Clearinghouse].”

Thus, the requirement in Rule 3 of this pilot program of where and how to submit the notice of appeal is new and supercedes the various instructions for lodging or filing the notice of appeal contained in each resolution.

B. Content of the Notice of Appeal- New Rule for Most Appeals as to Identification of the Citation; No Change as to Statement of Rationale for Appeal Unless Statute, GO or Resolution Is Silent; New Rule for Authorization for Extension of Time (Rule 5)

We add the requirement not present in many of the citation GOs or resolutions that the notice of appeal must state the date of the citation. This requirement will provide early detail by specifically identifying the citation which is appealed and will help determine the timeliness of the appeal. We also add this requirement for GO 156, thus supplementing § 7.3.1. (See Rule 5.)

Rule 5 also provides that the notice of appeal must also contain a statement of the rationale for such appeal. This is not a new requirement. Most of the citation GOs and resolutions require the appellant to state or indicate the grounds for the appeal or explain the reasons for the appeal. See GO 167, Resolutions ALJ-187; E-4195; USRB-001; ROSB-002; E-4257; W-4799; E-4550 and GO 156. However, some of the resolutions require more specificity or a narrower ground for appeal. See Resolutions ALJ-274 [explain with specificity each and every ground for appeal]; TL-19108 [provide a full explanation of the basis for the appeal and copies of documents that demonstrate factual error caused the revocation or refusal to issue]; TL-19102 [provide a full explanation of why appellant has not complied with Staff’s letter].

In Rule 5 of this pilot program, we do not change the various requirements to state the rationale of the appeal. Those requirements remain unchanged. We merely require that the notice of appeal state the rationale for each appeal in the manner required by each individual GO or resolution. If a resolution is silent, we adopt the requirement that the notice of appeal must state the grounds for the appeal.

Finally, we add the requirement that if appellant receives an extension of time to file a notice of appeal pursuant to Rule 4 of these rules, that the written extension of time from the appropriate Division Director must be attached to the notice of appeal. (See also discussion at Section 4.D below.)

C. When to File the Notice of Appeal - No Change (Rule 3)

We clarify that we do not address or alter the date by which a notice of appeal must be filed under each citation GO or resolution or GO 156. (See Rule 3.) As set forth in Appendix B to this resolution, the time period by which appellant must appeal a citation is not uniform. In several instances, the time period for appeal is governed by statute. See e.g., TL-19108 [15-day appeal period, implementing § 5387(c)(1) concerning charter party carriers]; § 5285 [30-day appeal period for some violations concerning household goods carriers]; § 5285.5 [10-day appeal period concerning certain violations of household goods carriers]. Similarly, not all Commission citation GOs or resolutions have the same appeal period, and this appeal period depends on the circumstances of each citation program. GO 156 has a 20-day appeal period.

Because of the statutory differences and the different needs of each citation program, Rule 3 of our pilot program does not standardize the appeal period for citation appeals and GO 156 appeals. The time to appeal remains governed by the individual citation statute, GO or resolution, or GO 156, and we make no changes to those appeal periods in this resolution.

We also clarify that timeliness is governed by the deadlines in the specific statutes, GOs or resolution authorizing the citation program or GO 156. Thus, even if the Docket Office accepts the notice of appeal for filing, this act does not mean that the appeal is timely. The assigned Judge may recommend dismissal of a citation appeal or GO 156 appeal if the notice of appeal is untimely, even if the Docket Office has filed the appeal.

D. Extension of Time to File the Notice of Appeal - New Rule (Rule 4)

Currently, some of the citation GOs and resolutions permit SED or other Commission Staff to grant a request for an extension of time for appellant to appeal. See e.g., Resolutions ALJ-187 [if request made before deadline for filing the notice of appeal, SED may grant up to two 30-day extensions] and ROSB-002 [if request made before deadline for filing the notice of appeal, SED may grant up to two 30-day extensions; SED, the Judge or Commission may extend the time for appeal upon showing of good cause].

Rule 4 of the pilot program adds a new rule which is consistent with the various citation programs and GO 156. Rule 4 of the pilot program provides that unless authorized by a citation program, there shall be no extension of time to file a notice of appeal from a citation issued pursuant to a citation program or from a Clearinghouse decision issued pursuant to GO 156. If a citation program authorizes the Commission to issue an extension of time to file a notice of appeal, and the request is granted, it shall be in writing and attached to the notice of appeal. This resolution also clarifies that the

Division Director (or designee) may grant an extension of time to file the notice of appeal, if such extension is authorized in a citation program.

E. Service of the Citation Notice of Appeal – Standardized as to Minimum Service Requirement; If a Resolution Authorizes Service on More Parties, That Requirement Remains; New Requirement for GO 156 Appeals (Rule 6)

Because Commission Staff (generally SED) issues the citation, and the citation appeal is heard by a Judge, both the SED and Administrative Law Judge Divisions must receive timely notice of the citation appeal. If a Commission Division other than SED issues the citation, the Director of that Division must also receive timely notice of the citation appeal. Thus, this pilot program establishes a new rule applicable to all citation appeals; namely, that the notice of appeal must be served at a minimum on both the Chief Judge, (with an electronic copy to: ALJ_Div_Appeals_Coordinator@cpuc.ca.gov), the Director of SED, and the Director of the Division issuing the citation if SED does not issue the citation. (e.g., Director of Water, Energy or Communications Division), on the same day that the notice of appeal is filed. The appellant must also provide a proof of service to this effect when filing the notice of appeal. (See Rule 6.)

Some citation programs also require serving the notice of appeal on other persons. For instance, Resolution ALJ-274 requires that, in addition to serving the Chief Judge, 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 (now the Office of Ratepayer Advocates). Because the standardized pilot program rule contains only a minimum service requirement, the additional service requirements of the various citation programs remain unchanged.

For GO 156 appeals, because SED is generally not involved, appellant must serve the Chief Judge (with an electronic copy to: ALJ_Div_Appeals_Coordinator@cpuc.ca.gov) as well as the Clearinghouse that issued the decision appealed from. One of the permissible areas for Commission review of a GO 156 Clearinghouse decision is to challenge the Clearinghouse's determination of another entity's WMDVB's status. These challenges are referred to as third party appeals herein. In the event a person appeals a Clearinghouse determination of another entity's WMDVB status, the appellant must also serve the entity whose WMDVB status is challenged (and this entity may also be a party to the appeal). Thus, this resolution changes GO 156, § 7.3 which states that "[t]he complainant and clearinghouse shall be the only parties to the appeal" to permit the entity whose WMDVB status is challenged to be served with the appeal and to also be a party to the appeal. (See also Section 6 below.)

5. Compliance Filing - New Rule (Rule 7)

The citation appeal process envisions an expeditious hearing and resolution of the appeal. As discussed below, if appellant requests a hearing, and a hearing is appropriate, the hearing occurs promptly. In order for the hearing to be meaningful and for all parties and the Judge to have the appropriate documents, this pilot program establishes a new requirement for Staff issuing the citations. For GO 156, the pilot program establishes a new rule for the Clearinghouse.

No later than seven business days after the notice of appeal is filed, staff (generally SED) must file with the Commission's Docket Office a compliance filing which includes the complete citation, including all attachments, and simultaneously serve the Chief Judge (with an electronic copy to: ALJ_Div_Appeals_Coordinator@cpuc.ca.gov) and appellant with this compliance filing. Staff must also provide a proof of service to this effect when filing the compliance filing. Similarly with respect to GO 156, no later than seven business days after the notice of appeal is filed, the Clearinghouse must file with the Commission's Docket office a compliance filing which attaches a complete copy of the Clearinghouse's appealed decision, including all attachments, and simultaneously serve the Chief Judge (with an electronic copy to: ALJ_Div_Appeals_Coordinator@cpuc.ca.gov) and appellant. The Clearinghouse must also provide a proof of service to this effect when filing its compliance filing. (See Rule 7.)

In this way, interested parties and the Judge promptly will have a copy of what is at issue in the proceeding. To the extent that certain material is perceived as confidential, Commission Staff or the Clearinghouse may file a separate written motion requesting confidential treatment together with its compliance filing (and serve this motion on the persons who are being served with the compliance filing). However, we envision that the citation will be a public document. (See discussion in Resolution ALJ-274 at 9.)¹¹

¹¹ "SCE [Southern California Edison Company] raises certain concerns regarding recommendations to publicize citations and related correspondence on the Commission's website, because SCE states that GO 66-C specifically excludes accident reports and investigation records from public disclosure that are submitted under Pub. Util. Code § 315, except to the extent disclosed at hearing or by formal Commission action. We do not agree with SCE: it is reasonable to make citations and appeals publicly available. Because this resolution, which is a formal action of the Commission, authorizes this disclosure, there can be no question of any violation of GO 66-C. Furthermore, in those situations where a violation involves an accident, by not requiring that all related correspondence be posted, we do not require the posting of the full accident report (although the full text of the citation will be posted.) Again, the onus is on the gas corporations to operate their systems and facilities safely. The public and local authorities need to be aware of violations that occur in their areas. As the Center for

Footnote continued on next page.

6. Service List - New Rule for All; Further Clarification for GO 156 (Rule 8)

Once the notice of appeal is filed, the Commission's Process Office will establish a service list which will generally include the appellant and either the Staff which issued the citation which is appealed, or in the case of GO 156, the Clearinghouse which issued the decision which is appealed. Other interested persons may be placed on the information only section of the service list.

As stated above, one of the permissible areas for Commission review of a GO 156 Clearinghouse decision is to challenge the Clearinghouse's determination of another entity's WMDVB's status, which we refer to as a third party appeal. In the event a person appeals a Clearinghouse determination of another entity's WMDVB status, permissible parties to the appeal will be appellant, the Clearinghouse, and the entity whose WMDVB status is challenged. Thus, as stated above, this resolution changes GO 156, § 7.3 to permit the entity whose WMDVB status is challenged to also be a party to the appeal.

7. Exchange of Information - New Rule (Rule 9)

Citation appeals are expeditious proceedings and the record on appeal is generally the citation and supporting material (which the cited entity has already received) and the cited entities' defense. Similarly, with respect to GO 156, the appeal concerns a decision which the Clearinghouse has already made.

In order to expedite these appeals and to eliminate potential delay, we establish a new rule requiring an information exchange. Specifically, this pilot program requires that, no later than three business days prior to the scheduled 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 GO 156 decision and Compliance Filing already filed with the Commission pursuant to Rule 7, unless otherwise directed by the Judge. Rule 9 will help ensure that the hearing can proceed expeditiously. This information exchange is not to be filed with the Commission or served upon the Judge or other decision makers. This is a new rule applicable to all citation appeals and GO 156 appeals.

Accessible Technology points out, it is reasonable to require such an approach, particularly because local agencies can inform and assist disabled constituents, if necessary." (Resolution ALJ-274 at 9.) To clarify, nothing we say in this resolution modifies the requirements of Resolution ALJ-274 in this regard.

8. Commencement of the Hearing - No Change Unless Statute, GO or Resolution Is Silent (Rule 10)

The time within which a citation appeal hearing or GO 156 appeal hearing must commence is not uniform. This time period is governed by statute in some instances. See e.g., Resolution TL-19108, implementing § 5387.3(b) and § 5285.6, § 5387.5, and § 1033.7 [hearing within 21 days of receipt of the appeal].

Many of the citation GOs and resolutions provide for a different deadline; namely that the hearing on the appeal must occur promptly [with at least 10 days advance notice of hearing], or not less than 10 days after the appeal is received from Staff. See GO 167 [commence hearing promptly]; Resolutions W-4799, ALJ-274 [commence hearing promptly; parties notified at least 10 days in advance of hearing]; Resolutions ALJ-187, E-4195; ROSB-002, E-4257, E-4550 [commence hearing promptly; not less than 10 days after appeal is filed or received].

Some resolutions provide a slightly longer period between filing the notice of appeal and the hearing. See Resolution UEB-001 [commence hearing promptly; not less than 15 days after appeal is received from Staff]; Resolution USRB-001 [commence hearing within 30 calendar days after appeal received]. Resolution TL-19102 sets more specific dates and provides that the hearing be set no more than 20 days after the appeal is filed and held within 45 days after the appeal is filed. GO 156 requires a hearing between 10 to 20 days after the Judge is assigned. In all instances (except for the statutory citation appeals addressed in the first paragraph of this section), the resolutions generally grant the Judge the discretion for good cause or the parties' agreement to grant a reasonable hearing continuance.

Because of the statutory differences and the different requirements of each citation resolution program and GO 156, our pilot program does not standardize the time within which to commence the hearing. The time to commence a hearing remains governed by the individual citation GO or resolution and GO 156 and we make no changes to that provision if a statute, GO or resolution addresses it specifically. If a statute, GO, or resolution is silent on the time within which the hearing on the appeal must commence, the pilot program requires that the hearing occur promptly, with the parties notified at least 10 days in advance of the hearing. Furthermore, in this instance, the Judge may for good cause or the parties' agreement grant a reasonable continuance of the hearing. (See Rule 10.)

9. Burden of Proof - No Change Unless Statute, GO or Resolution Is Silent; Clarification Regarding GO 156 (Rule 11)

Most of the citation GOs or resolutions address who has the burden of proof. We make no modifications in that regard.

For citation statutes, GOs or resolutions that are silent, the pilot program adopts the following language with respect to the 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 appellant to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is inappropriate. (See Rule 11.)

GO 156 § 7.3.9 provides that complainant (appellant) shall open and close the hearing, but the Judge has the discretion to alter the order of presentation. We interpret this provision of GO 156 to mean that appellant, who opens and closes, has the burden of proof in a GO 156 appeal. We make a similar clarification to citation resolutions that state which party opens and closes but do not directly state which party has the burden of proof. (See e.g., Resolution ALJ-187, § 4.h.)

10. Submission of Record - No Change Unless Statute, GO or Resolution Is Silent (Rule 16)

GO 156 and the citation GOs and resolutions that address when the appeal is submitted provide that, ordinarily, the appeal will be submitted at the close of the hearing. These GOs and resolutions permit the Judge to keep the record open for a reasonable period to permit a party to submit additional evidence or argument, either based on the Judge's discretion (See GO 156, § 7.3.9), or upon a showing of good cause (See GO 167, § 13.3.8.8). We make no changes to the citation programs and GO 156 in this regard.

To the extent the citation programs do not address when the appeal is submitted, we adopt language similar to GO 156 regarding the submission date. That is, ordinarily, the appeal will be submitted at the close of the hearing. In the Judge's discretion, the record may be kept open for a reasonable period to permit a party to submit additional evidence or argument. (See Rule 16.)

11. Issuance Date of Draft Resolution-New Rule (Rule 17)

The citation GOs and resolutions and GO 156 differ on the date of issuance of the draft decision (by resolution) concerning the appeal. This timeframe is not governed by applicable statutes. The intent of these appellate programs is for the appeals to be resolved expeditiously. We find merit to a uniform date for issuing a draft resolution on these appeals, and therefore adopt a new rule superseding existing individual dates

set forth in the citation programs and GO 156. We require in all such appeals, the Judge will issue a draft resolution resolving the citation appeal or GO 156 appeal expeditiously, and no later than 60 days after the appeal is submitted. (See Rule 17.)

12. Issuance of Draft Resolution for Comment-Standardize (Rule 18)

Section 311(g) provides for public comment on resolutions except as provided by statute. Citation appeals are addressed in a resolution and therefore are subject to the public comment period as set forth in § 311(g) and Article 14 of the Commission's Rules of Practice and Procedure. Specifically, See Rule 14.5 of the Commission's Rules of Practice and Procedure. (See Rule 18.)¹²

13. *Ex Parte* - Standardized (Prohibited From Date Citation Issues to Date When Final Order On Appeal Is Issued) (Rule 19)

Ex parte communications are defined by Rule 8.1(c) of the Commission's Rules of Practice and Procedure as follows:

8.1(c): "Ex parte communication" means a written communication (including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:

- (1) concerns any substantive issue in a formal proceeding,
- (2) takes place between an interested person¹³ and a decision maker, and

¹² The current text of Rule 14.5 reads as follows:

(Rule 14.5) Comment on Draft or Alternate Resolution.

Any person may comment on a draft or alternate resolution by serving (but not filing) comments on the Commission by no later than ten days before the Commission meeting when the draft or alternate resolution is first scheduled for consideration (as indicated on the first page of the draft or alternate resolution) in accordance with the instructions accompanying the notice of the draft or alternate draft resolution in the Commission's Daily Calendar.

¹³ Rule 8.1(d) of the Commission's Rules of Practice and Procedure defines an interested person as any of the following: "(1) any party to the proceeding or the agents or employees of any party, including persons receiving consideration to represent any of them; (2) any person with a financial interest, as described in Article I (commencing with Section 87100) of Chapter 7 of

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(3) does not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the proceeding, or on the record of the proceeding.

Communications regarding the schedule, location, or format for hearings, filing date, identity of parties, and other such nonsubstantive information are procedural inquiries, not *ex parte* communications.

Not all the citation statutes, GOs and resolutions address *ex parte* communications. However, those which address *ex parte* communications, as well as GO 156, provide that no *ex parte* communications with decision makers can occur in these appellate proceedings.

The GOs and resolutions differ as to the applicable period when *ex parte* communications are prohibited. Some prohibit *ex parte* communications from the date the citation issues through final decision while others prohibit *ex parte* communications starting from the date the notice of appeal is filed. Statutes authorizing citation programs do not address this issue directly.

In this resolution, we standardize the *ex parte* rule applicable to all citation appeals and GO 156¹⁴ to prohibit *ex parte* communications (as defined by Rule 8.1(c) of the Commission's Rules of Practice and Procedure) with a decision maker (including any Commissioner, Commissioner advisor, the Chief Judge, any Assistant Chief Judge, the assigned Judge, or the Law and Motion Judge) from the date the citation or decision concerning a GO 156 appeal issues through the date a final order is issued on the citation appeal.¹⁵ (See Rule 19.)

Title 9 of the Government Code, in a matter at issue before the Commission, or such person's agents or employees, including persons receiving consideration to represent such a person; or (3) a representative acting on behalf of any formally organized civic, environmental, neighborhood, business, labor, trade, or similar association who intends to influence the decision of a Commission member on a matter before the Commission, even if that association is not a party to the proceeding."

¹⁴ GO 156 § 7.3.12 currently prohibits *ex parte* communications from the date the notice of appeal is served to and including the date the Commission's final order is mailed.

¹⁵ 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.

14. Rehearing – Standardize (Rule 20)

Several of the citation resolutions state that resolutions approved by the Commission are subject to rehearing [see e.g., Resolutions W-4799 and ALJ-274] but many of the GOs and resolutions are silent on this point. We here standardize all citation GOs and resolutions, and GO 156 and clarify that Commission resolutions adopted pursuant to the citation GOs and resolutions and GO 156 are subject to rehearing. (See Rule 20.)

15. Standardizing Additional Procedural Rules (Rules 12, 13, 14 and 15)

Some GOs and resolutions address the following procedural matters and most are consistent. These procedural matters include:

- place of hearing (hearing venue);
- whether a party can be represented by an attorney or other representative at the hearing; applicable rules of evidence;
- how to obtain a transcript of the hearing; and
- if a party is entitled to an interpreter and if so, how to obtain one.

These procedural matters are not addressed by any statute authorizing citations. We address these issues individually below.

A. Hearing Venue – No Change Unless GO or Resolution is Silent (Rule 12)

Most citation GOs and resolutions and GO 156 addressing hearing venue provide for hearing in San Francisco or Los Angeles, at the Commission’s discretion. Several resolutions, primarily energy citation resolutions, provide for hearing only in San Francisco. Our pilot program does not change each GO or resolution’s rule concerning place of hearing if the GO or resolution specifically addresses it. However, for GOs or resolutions that are silent on this issue, the pilot program requires that hearing may be held in either San Francisco or Los Angeles, at the Commission’s discretion. (See Rule 12.)

B. Party representation/evidence; obtaining a transcript; interpreter-Standardized (Rules 13, 14 and 15)

Most GOs and resolutions addressing these three issues have similar but not identical language. The statutes authorizing citations do not address this issue.

We find merit to uniformity on these matters and thereby adopt the following rules that contain standardized language on these three issues. These rules supercede existing rules in the citation programs and GO 156. The new rules are as follows:

- Appellant may be represented at the hearing by an attorney or other representative, but such representation will be at the appellant's sole expense. Rule 13.6 (Evidence) of the Commission's Rules of Practice and Procedure is applicable.¹⁶ (See Rule 13.)
- Appellant may order a transcript of the hearing, and pay the cost of the transcript in accordance with the Commission's usual procedures. (See Rule 14.)
- Upon a good faith showing of language difficulty, the appellant will be entitled to the services of an interpreter at the Commission's expense upon written request to the assigned Administrative Law Judge and the Commission's Public Advisor's Office not less than five business days prior to the date of the hearing. (See Rule 15.)

16. Additional Matters (Rule 22)

We cannot anticipate every procedural question that may arise concerning citation and GO 156 appeals, and it is unnecessary for these pilot program rules to be that detailed when we have existing rules that apply. Therefore, we add a pilot program rule providing that in the event the pilot program rules and the applicable GO or citation resolution, or GO 156, is silent on the procedural issue raised, the Commission's Rules of Practice and Procedure are applicable. (See Rule 22.)

¹⁶ Rule 13.6 of the Commission's Rules of Practice and Procedure states:

- (a) Although the technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.
- (b) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly.
- (c) The Commission may review evidentiary rulings in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote substantial justice, the assigned Commissioner or Administrative Law Judge may refer evidentiary rulings to the Commission for determination.
- (d) Formal exceptions to rulings are unnecessary and need not be taken.
- (e) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

As a general matter, we clarify that any changes to existing GOs, resolutions and GO 156 set forth in this pilot program are to the appeal process. No other portion of these GOs or resolutions is intended to be modified by this resolution.

Finally, this resolution shall be effective immediately so that the Commission can effectuate the necessary electronic changes to implement the new docketing procedures for citation and GO 156 appeals. The Pilot Program Citation Appeals and GO 156 Appellate Rules shall be effective on January 1, 2015.

17. Service of this Resolution with the Citation (Rule 21)

Because this Resolution modifies the appeals procedures for citations and GO 156, the Commission Division serving the citation or the Clearinghouse serving the WMVDBE decision must serve a copy of this resolution together with the citation or decision. (See Rule 21.)

Notice and Comment

A draft of this Resolution was issued to all known service lists to the GOs or citation resolutions and GO 156 attached hereto as Appendix B, as well as to all regulated entities or their representatives currently practicing before the Commission in accordance with § 311 of the Pub. Util. Code. Comments were allowed under Rule 14.5 of the Commission's Rules of Practice and Procedure.

On June 16, 2014, the following interested persons served timely comments on the draft resolution: the law firm of Goodin, MacBride, Squeri, Day & Lamprey (GMSDL); Pacific Gas and Electric Company (PG&E); Southern California Edison Company (Edison); Joint Comments of Southern California Gas Company and San Diego Gas & Electric Company (SoCalGas/SDG&E); and Union Pacific Railroad Company (Union Pacific). We have modified various aspects of the resolution as discussed below and in the relevant sections of the resolution. Additionally, we have made some nonsubstantive changes to improve the discussion and to correct any typographical errors.

All commenters except Union Pacific were generally supportive of the Commission's endeavors to file citation appeals and to standardize procedures to the extent possible. Union Pacific states that the railroads negotiated the applicable citation resolution (Resolution ROSB-002) with SED, questions why further refinement is necessary and seeks to exempt ROSB-002 from Resolution ALJ-299. Resolution ALJ-299 strikes an appropriate balance by incorporating many of the provisions of the existing resolutions while standardizing certain aspects so that the citation appeals and GO 156 appeals can be filed with the Commission and the records can be electronically available. Most

aspects of ROSB-002 remain unchanged and we decline to exempt any specific citation program from the requirements of Resolution ALJ-299.

GMSDL argues that the Commission should modify its list of statutory authority in the “Background” section to exclude § 451 and to include the statutes authorizing various citation programs, specifically statutes applicable to charter party carriers and household goods carriers, claiming that the general statutes do not apply to the later carriers. We find it unnecessary to further elaborate on the Commission’s authority to adopt this resolution and make no changes to Resolution ALJ-299 in this regard. We note that the text of the resolution reiterates that the Commission’s authority to create citation programs is well established and that Appendix B lists additional statutory authority for specific citation programs.

Several of the commenters suggest changes to the rule concerning extensions of time to file notices of appeal. Rule 4 provides that there will be no extension of time to file a notice of appeal unless authorized by the citation program. It further clarifies that only the Director (or designee) of the Division issuing the citation can authorize the extension. SoCalGas/SDG&E and GMSDL suggest modifications so that the Director of the Division issuing citations can permit reasonable extensions, even if not explicitly authorized by the citation program. Union Pacific requests exemption from Rule 4 and believes that staff who issues the citation, as well as the Director, should also be authorized to grant extensions of time. Rule 4 recognizes that the citation appeals and GO 156 appeals are intended to be processed expeditiously. The underlying programs are diverse, including programs applicable to large entities with many resources as well as smaller entities. Rule 4 strikes an appropriate balance in that if a citation program permits extensions of time to file an appeal, this provision is preserved. However, we decline to broaden the rule to provide for extensions that are not specifically permitted in the individual programs. Finally, we believe that the Director or designee should be the responsible person for granting such extensions. We note that this is a minor change in Resolution ROSB-002, applicable to railroads, which currently grants the Director and the Deputy Director such authority.

SoCalGas/SDG&E also recommend that the time by which citation appeals and GO 156 appeals must be filed should be a uniform 30-day period and not, as Rule 3 provides, by the time provided in each citation program or GO 156. SoCalGas/SDG&E specifically refer to Resolution ALJ-274 which contains a 10-day appeal period, and suggest that the 10-day appeal period should be modified. We decline to make this broad change because each citation program and GO 156 is crafted to the specific circumstances of each program. If SoCalGas/SDG&E wish to modify Resolution ALJ-274, they should seek to do so specifically, and not by means of this resolution.

Several parties also address Rule 11 concerning the burden of proof in citation appeals. Rule 11 does not change the burden of proof established by each citation program or GO 156. Only when a citation program is silent does Rule 11 provide for a default measure. In their comments, PG&E, Edison, and SoCalGas/SDG&E seek to change not only the default burden of proof provided by Rule 11, but also question the burden of proof set forth in Resolution ALJ-274 (the gas citation program). Union Pacific raises similar general concerns, although the default standard in Rule 11 is not applicable to railroads in ROSB-002. Edison made similar arguments in response to draft Resolution ALJ-274 and the Commission declined to make changes to the burden of proof. (See Resolution ALJ-274 at 11.) We similarly make no changes to Rule 11 here.

Most commenters raise issues concerning Rule 9 as well as other general discovery concerns.¹⁷ Rule 9 is a new rule regarding exchange of information and requires that 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 intend to introduce into the record at the hearing which is not included in the citation or Clearinghouse Decision and the Compliance filing already on file with the Commission. The purpose of this rule is to ensure that a hearing, if appropriate, occurs promptly and that the potential for delay is minimized. Although these appeals are expedited proceedings, we recognize that there might be some need to deviate from this rule and for flexibility, and therefore modify Rule 9 to give the Judge the explicit discretion to do so.

Several commenters also suggest changes to Rule 19 concerning *ex parte* communications. GMSDL recommends that the prohibition against *ex parte* communications should end when the Commission issues the final order resolving applications for rehearing or when the period to apply for rehearing has expired and no application for rehearing has been filed, citing Rule 8.3(g) of the Commission's Rules of Practice and Procedure. Edison, PG&E, and SoCalGas/SDG&E recommend that the period for the *ex parte* prohibition to commence should be the filing of the citation

¹⁷ Other general discovery concerns include whether Rule 9 is the exclusive means of discovery (GMSDL); that Rule 9 should not prohibit parties from otherwise obtaining documents during discovery and that appellant should be permitted to object to information submitted by Staff to the extent such information was not disclosed during discovery (Edison); that Rule 9 should not relieve parties from responding timely to data requests and should not prohibit introducing evidence discovered within the three day window or evidence to address facts or issues raised by an opposing witness at a hearing (SoCalGas/SDG&E); and that there should be a staggered, not simultaneous exchange of information with staff exchanging the information first and that staff should be prohibited from introducing information at the hearing which it has not provided in advance to the utility (PG&E).

appeal or GO 156 appeal, not the issuance of the citation. We decline to modify Rule 19 which prohibits *ex parte* communications from the date the citation issues through the date a final order issues (either by the Commission or the courts). The triggering event for the appeal is the citation; therefore *ex parte* communications should be prohibited from when the citation is issued. (See e.g. General Order 167 and Resolution ALJ-274 which both contain this provision.) Similarly, the prohibition should continue until a final order is issued, whether by the Commission or the courts.

Union Pacific requests exemption from Rule 22 which states that in the event the pilot program appellate rules are silent on a procedural issue, the Rules of Practice and Procedure apply. Union Pacific believes that all parties should have input to resolve such issues. Because these pilot program appellate rules cannot anticipate every procedural issue in citation appeals and GO 156 appeals, it is useful to utilize the existing Rules of Practice and Procedure in resolving such issues. We therefore decline to modify Rule 22.

SoCalGas/SDG&E believe the pilot program appellate rules should eliminate the need to serve hard copies of the notice of appeal on various staff, as required by Rule 6. We decline to eliminate this requirement because the notice of appeal is the initiating document in the appellate process. Rule 6 does not apply to the service of other filings in the proceeding, which can be made electronically, or as otherwise directed by the Judge.

GMSDL also seeks clarity on several technical issues. GMSDL questions whether the citation appeals will appear in the "Docket Card" link on the Commission's website. Once the pilot program appellant rules set forth in Appendix A are effective, citation appeals and GO 156 appeals will be docketed with other proceedings and appear on the Commission's website docket card. GMSDL also requests guidance on how the appeal should be captioned. In Section 4.A above, we clarify how to caption such appeals, and also modify Rule 3 accordingly. GMSDL also requests modification of the draft resolution to eliminate the word "neutral" in describing the Judge presiding on the appeal, arguing against potential confusion as the term "neutral" is also used in the alternative dispute resolution context. Because Judges are presumptively neutral and in order to avoid the confusion GMSDL describes, we make this suggested modification. GMSDL also requests clarity as to whether the Judge is permitted to allow briefs before submission pursuant to Rule 16. Rule 16 utilizes language present in many existing citation programs concerning the submission date and states the submission date is governed by the time specified in the citation program or GO 156. If a citation program is silent on the submission date, Rule 16 provides that ordinarily the appeal will be submitted at the close of the hearing but that in the Judge's discretion, "the record may be kept open for a reasonable period to permit a party to submit additional evidence or argument." We clarify here that "additional argument" may be made orally or in briefs,

at the Judge's discretion. GMSDL points out that comments are permitted on a draft resolution pursuant to Rule 14.5 of the Commission's Rules of Practice and Procedure. Because Rule 14.5 differs from the rule governing comments on a proposed decision, GMSDL proposes the Commission reprint the text of current Rule 14.5 into a footnote of the resolution. For the convenience of interested persons, we adopt this recommendation.

Findings and Conclusions

1. Pub. Util. Code § 701 authorizes the Commission to supervise and regulate every public utility in the State.
2. Pub. Util. Code § 702 mandates every public utility to obey and promptly comply with every Commission order, decision, direction, or rule.
3. California law, including Pub. Util. Code § 7, authorizes the commission to delegate certain powers to its Staff, including the investigation of acts preliminary to agency action, and the issuance of citations for certain types of categories of violations in specified amounts.
4. The Commission's citation programs permit the cited entity to appeal the issuance of a particular citation. These citation appeals are heard by an Administrative Law Judge. A similar situation exists with respect to Clearinghouse decisions issued pursuant to GO 156.
5. Currently, citation appeals or appeals of a Clearinghouse decision issued pursuant to GO 156 are not filed with the Commission's Docket Office so there is no electronic docket card or central electronic location by which to access the citation appeal or GO 156 appeal record.
6. Requiring all citation appeals and GO 156 appeals to be filed with the Commission's Docket Office is reasonable, and will enhance accessibility to the Commission's regulatory process and due process.
7. It is reasonable to adopt several new citation appeal and GO 156 procedural appellate rules and harmonize others to further due process and administrative efficiency in processing citation appeals and GO 156 appeals.
8. Appendix B summarizes key existing appellate provisions for each citation program and GO 156. For these key appellate provisions, Appendix B also indicates (for each GO and resolution) whether there are new rules and which sections of the GOs or resolutions are changed by these rules. It is reasonable to adopt the changes to the

various GOs and resolutions set forth in Appendix B in order to implement this pilot program.

9. If the Commission establishes new citation programs, these pilot program rules are also applicable to the new citation programs.
10. The Pilot Program Citation Appeal and GO 156 Appellate Rules, attached to this resolution as Appendix A, are reasonable and should be adopted. The Pilot Program Citation Appeal and GO 156 Appellate Rules shall be applicable on January 1, 2015.
11. The Administrative Law Judge Division should monitor the success of the pilot program adopted today. Depending on the initial results of these new procedures, and any additional needs that surface, the Commission may consider an expanded program or related rules changes in the future.
12. Any changes to the existing citation GOs and resolutions and to GO 156 are to the appeal process. No other portion of these GOs or resolutions is intended to be modified by this resolution.
13. This resolution should be effective today so that the Commission can effectuate the necessary electronic changes to implement the new docketing procedures for citation and GO 156 appeals by January 1, 2015.

THEREFORE, IT IS ORDERED that:

1. The Pilot Program Citation Appeal and General Order 156 Appellate Rules, attached hereto as Appendix A are adopted and apply to all Commission citations issued and to all decisions of the Clearinghouse issued pursuant to General Order 156 as of January 1, 2015.
2. Appendix B to this resolution is adopted. The citation General Orders (GO) and resolutions listed in Appendix B, and GO 156, are changed as set forth in Appendix B and this decision in order to implement this pilot program. Appendix B summarizes key existing appellate provisions for each citation program and for GO 156. For these key appellate provisions, Appendix B also indicates (for each GO and resolution) whether there are new rules and which sections of the GOs or resolutions are changed by these rules.
3. The Pilot Program Citation Appeal and General Order 156 Appellate Rules are a pilot program. The Administrative Law Judge Division will monitor the success of the pilot program. Depending on the initial results of these new procedures, and

any additional needs that surface, the Commission may consider an expanded program or related rules changes in the future.

4. Any changes to the existing citation General Orders (GO) and resolutions and to GO 156 are to the appeal process. No other portion of these GOs or resolutions is intended to be modified by this resolution.

This resolution is effective today.

I hereby certify that this Resolution was duly introduced, passed, and adopted by the Public Utilities Commission of the State of California at its regular business meeting held on June 26, 2014. The following Commissioners approved it:

/s/ PAUL CLANON

PAUL CLANON
Executive Director

MICHAEL R. PEEVEY
President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

MICHAEL PICKER

Commissioners