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April 1, 2019

VIA FIRST CLASS AND ELECTRONIC MAIL

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

Re: Draft Resolution ALJ-377; Comments of Goodin, MacBride, Squeri and Day, LLP

Dear Judge MacDonald and Judge Econone:

Pursuant to the letter from Chief Administrative Law Judge Simon dated March 13, 2020, Goodin, MacBride, Squeri and Day, LLP ("GMSD") respectfully submits its comments on Draft Resolution ALJ-377 ("Draft Res. ALJ-377"). Judge Simon's letter stated that comments were to be submitted by April 2, 2020. These comments are timely submitted.

GMSD filed comments on March 7, 2019 with regard to the proposed modifications to the citation appeal process circulated a year ago ("2019 Proposal"). In those comments, we observed that the current citation appeal process already rests on somewhat tenuous legal grounds Accordingly, we recommended that great care be taken to insure that the modifications to that process recognize existing statutory requirements.

Draft Res. ALJ-377 sets forth the current stated basis for the lawfulness of the current citation program.[1] It also responds to certain other concerns set forth in our March 7, 2019 Comments by offering citation appellants the option of proceeding under the standard Citation Appeal rules rather than the Expedited Citation Appeal Rules.[2] Below we offer comments with respect to both points.

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[1] Draft Res. ALJ-377, pp. 2-3.

[2] *Id* at p. 9.

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I. THE EXISTING CITATION PROGRAM LACKS A STATUTORY FOUNDATION; THE STATUTORY FRAMEWORK GOVERNING ADJUDICATORY PROCEEDINGS AT THE COMMISSION DOES NOT EXEMPT FINES INITIALLY IMPOSED BY CITATION

A. The Commission should act to cure the legal infirmities in a program that offers practical benefits.

No one can contest the fact that the citation programs the Commission has initiated largely make sense from a practical perspective. The practical benefits of the programs, however, are not a reason to ignore the fact that they are also largely devoid of statutory support. Indeed, the practical benefits call for action to either (1) obtain the requisite statutory support or (2) develop procedures[3] to insure that the programs met the requirements of Sections 1701.1-1701.2 of the Public Utilities Code.[4]

The Commission should not simply continue to take the view that its jurisdiction to adopt citation programs is "well-established".[5] Nor should it rely on an assumption that because the Commission's citation programs do not follow the requirements of Sections 1701.1-1701.2, the citation programs must not be subject to those requirements.[6] By failing to act, the Commission leaves itself open to a determination by an appellate court in some future proceeding that it has failed to proceed as required by law[7], an outcome which would leave the Commission in a difficult position with respect to its enforcement programs for all industries it regulates.

B. The Proposed Imposition of a Fine on Appellant is an Adjudicatory Proceeding

Virtually all citations that are appealed impose a fine on the entity appealing the citation ("Citation Appellant").

The imposition of a fine is an adjudication. Section 1701.1(d)(2) provides that "(a)djudication cases…are enforcement cases" which may result in a monetary penalty. Court

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[3] The Commission could, for example, consider ratifying recently issued citations through regular resolutions on its Consent Calendar providing that any due date for "payment or appeal" is measured from the date of the resolution. Other features of the current program would still have to be addressed. The Commission should conduct a workshop to do so.

[4] All statutory references herein are to the California Public Utilities Code unless otherwise indicated.

[5] Draft Res/ ALJ-377, p.3. See discussion at pp. 4-7 *infra*.

[6] See, pp. 8-9 *infra*.

[7] Section 1757(a)(2).

decisions affirm that "(t)he Legislature has…provided the PUC with extensive enforcement powers, including the imposition of monetary civil penalties."[8]

No provision of Section 1701.1 exempts citation proceedings from its requirements.

C. SB 960 and its successors enacted requirements that govern all Commission proceedings

In 1996, the Legislature enacted Sections 1701.1 and 1701.2 as part of Senate Bill 960[9], an omnibus measure providing for the categorization of Commission proceedings as either adjudicatory, ratesetting, or rulemaking. The bill also established the first statutory requirements for pre-hearing conferences and scoping memos.

Since the enactment of SB 960, the Legislature has enlarged rather than restricted the reach of its provisions. For example, under the provisions of Section 1701.1 as enacted by SB 960, a Prehearing Conference and Scoping Memo were not required unless the Commission had determined, prior to the Prehearing Conference and the issuance of a Scoping Memo, that a hearing was required. In 2016, however, the Legislature enacted Senate Bill 215[10], requiring that a Prehearing Conference be held and a Scoping Memo issued in all proceedings.[11] No comparable legislation has been enacted restricting the scope of Sections 1701.1-1701.2 in a manner that would permit the current Citation Appeal process.

D. Section 1702.5 Represents the Legislature's Only Possible Authorization For the Commission to Depart From Sections 1701.1-1701.2

In 2013, the Legislature directed the Commission to:

> "(D)evelop and implement a safety enforcement program applicable to gas corporations and electrical corporations which includes procedures for monitoring, data tracking and analysis, and investigations, as well as issuance of citations by commission staff, under the direction of the executive director."[12]

To the best of our knowledge, the Legislature has never enacted a comparable measure with respect to any other activity lying within the broad jurisdiction of the Commission. No

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[8] *Pacific Gas and Electric Company v. Public Utilities Commission* (2015) 237 Cal.App.4th 812, 820.

[9] Stats 1996, c. 856.

[10] SB 215 (Leno-Hueso), Chapter 807, Statutes of 2016).

[11] Section 1701.1(b)(1)

[12] Section 1702.5. added by Stats 2013, c. 601. (Emphasis supplied.)

statute, other than, arguably, Section 1702.5,[13] authorizes truncated proceedings (whether characterized as "citation" proceedings or something else) that do not comply with the core provisions of the Public Utilities Code governing Commission proceedings.[14]

By enacting Section 1702.5 the Legislature demonstrated that when it wishes to authorize or direct the Commission to establish a citation program or other abbreviated procedure, it knows how to do so.

E. Past Statements That the Authority for Citation Programs is "Well-Established" Are Not Accompanied By Any Citation of Specific or Express Statutory Authority

Arguments that the current citation programs are lawful fall into one or more of the following three categories: (1) the Legislature has enacted statutes authorizing the Commission to impose fines, (2) the Commission has issued Resolutions establishing citation programs to be administered by the Commission staff and, most recently, (3) citation programs are not governed by Sections 1701.1-1701.2 because they are not conducted pursuant to Sections 1701.1-1701.2.[15]

The missing link, of course, is any authority[16] from the Legislature authorizing the Commission to establish a citation program or any other procedure for reaching a decision that departs from the requirements of Sections 1701.1 and 1701.2. [17]

F. Past Commission Resolutions Provide No Express Statutory Authority for a Citation Program.

Neither Res. ALJ-187[18] (the original citation program adopted in 2005) nor Res. ALJ-299 (the current citation appeal program) set forth specific statutory authority for the citation programs governed by the appeal process. Res. ALJ-299 states that "(o)ur jurisdiction to create citation programs is well-established" and then simply cites the Commission resolutions establishing citations programs in the past. The only statutory citations in ALJ-299 are to

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[13] Even Section 1702.5 does not exempt actions under it from the procedural requirements found elsewhere in the Code. (Compare, Section 1702.1 and other exceptions (to Section 1705 and 1706) enacted contemporaneously in 1977. Stats 1977, c. 1091.)

[14] Sections 1701-1709

[15] See footnote 28 *infra.*

[16] The exception is Section 1702.5.

[17] The lone exceptions are Section 1702.1 (ECP) and section 1702.5 which requires the Commission to establish a citation program for safety matters involving energy utilities. Again, the two statutes demonstrate that when the Legislature elects to authorize the Commission to establish a citation program, it knows how to do so.

[18] Res. ALJ-187 is devoid of statutory references.

Sections 7, 451, 702 and 2101. None of these statutes, however, make any reference to citation programs and only two of the four even mention the Commission.

Section 7 provides that:

> "Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise."

Section 7 makes no reference to the Commission, Commission procedures, or citations. It is part of the "General Provisions" preceding the substantive provisions of the Public Utilities Code and, if given any substantive import at all, applies only to powers granted to "a public officer." Moreover, "As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization."[19] No such statutory authorization exists.

Section 451 provides that:

> "All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.
>
> Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.
>
> All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable"

At the outset, most citation recipients, charter-party carriers ("TCPs") or those whose actions are asserted to be actions of TCPs, are not public utilities.[20] Moreover, Section 451

[19] *California Sch. Employees Assn. v. Pers. Comm'n*, 3 Cal. 3d 139, 144 (1970).

[20] Under current California law, the only motor carrier of passengers that is a common carrier (Section 211(c), and thus a "public utility" under Section 216(a) , is a "passenger stage corporation" (Section 226). "Common carriers" are excluded from the definition of charter party carriers. Section 5353 (c).

makes no reference to citations. Indeed, as the California Supreme Court pointed out a few years ago, Section 451 offers little basis for any assertion of jurisdiction by the Commission since "section 451 does not mention the PUC at all; it simply provides that the charges of a public utility must be 'just and reasonable'".[21]

Section 702 provides that:

> "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 or 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."

Again, TCPs are not public utilities. More importantly, Section 702 says nothing about how the Commission may or shall conduct its proceedings.

Section 2101 provides that:

> "The commission shall 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, and to this end it may sue in the name of the people of the State of California. Upon the request of the commission, the Attorney General or the district attorney of the proper county or city and county shall aid in any investigation, hearing, or trial had under the provisions of this part, and shall institute and prosecute actions or proceedings for the enforcement of the provisions of the Constitution and statutes of this State affecting public utilities and for the punishment of all violations thereof."

Section 2101 authorizes the Commission to "sue in the name of the people of the State of California" to enforce laws "affecting public utilities…" It forms the basis for actions brought by the Commission in Superior Court against public utilities.[22] Section 2101 does not mention citations or any other form of proceeding before the Commission.

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[21] *Monterey Peninsula Water Management District v. Public Utilities Commission* 62 Cal. 4th 693, 699; 2016 Cal. LEXIS 45*7 (January 25, 2016)

[22] See, *People v. Western Airlines,* 42 Cal.2d 621 (1954)

Finally, Section 2101 addresses the enforcement of statutes "affecting public utilities". The largest group of citation recipients, however, are TCPs or those whose actions are asserted to be actions of TCPs. TCPs are not "public utilities."

Even if there were some remote inference that could be drawn from any of the four statutes that authorized a citation program, which there is not, it would fail where in conflict with the far more specific and later enacted Sections 1701.1-1701.2.[23]

Indeed, even if Sections 1701.1 and 1701.2 were never enacted, it would be next to impossible to find statutory support for the current citation programs in the Code as it existed prior to the enactment of SB 960. Even the citation programs that pre-date SB 960 appear to recognize that fact and provide that if the cited entity refused to pay the fine sought by the CPUC staff, the staff's next option was to seek the issuance of an Order Instituting Investigation ("OII") from the full Commission.[24] An OII would be required because even prior to the enactment of SB 960, the only adjudicatory proceeding excluded from the reach of Sections 1701-1706, the portion of the Code governing Commission hearings, were those initiated under the Expedited Complaint Procedure enacted by Section 1702.1. All other adjudicatory proceedings are governed by the general procedural requirements of the Public Utilities Code.

G. Recent Defenses of the Citation Program Provide No Evidence That the Legislature Has Authorized the Commission to Initiate or Conduct an Adjudicatory Proceeding In the Manner Embraced in the Current Citation Appeal Process.

In a recent proceeding[25], the Consumer Protection and Enforcement Division ("CPED") defended the legality of the current citation program by relying on: (1) statutes authorizing the

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[23] "If conflicting statutes cannot be reconciled, later enactments supersede earlier ones, and more specific provisions take precedence over more general ones. . . . The courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes." (*Santa Clara Valley Transportation Authority v. Public Utilities Com.* (2004) 124 Cal.App.4th 346, 360.)

[24] In 1987, when the Commission authorized the Transportation Division (the predecessor to CPED) to impose fines on companies that had operated without Commission authority, the resolution provided that if the company disputed the fine, the Transportation Division was to request that the Commission issue an Order Instituting Investigation ("OII"). Res. CE 4-87 (April 8, 1987).

[25] K19-03-015 *Citation Appeal of GoGo Technologies from Citation No. F-5517 issued on February 1, 2019, by the Commissions Consumer Protection and Enforcement Division.*

Commission to impose fines and (2) Commission Resolutions establishing citations programs.[26] Again, the missing link is any authority from the Legislature authorizing to the Commission to establish a citation program or other truncated procedure.

> In another recent docket[27], CPED employed circular reasoning stating that:
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> [The citation appellant]…argues that Public Utilities Code section 1701.1 applies to citation proceedings. However, that is not the case. As stated in Resolution ALJ-299, the Commission's jurisdiction to create citation programs is well established and used in many areas. These citation programs are not governed by section 1701.1 as evidenced by the numerous differences between an adjudication proceeding, discussed under sections 1701.1 and 1701.2, and a citation. For example, in an adjudicatory proceeding, a Commissioner is assigned to the proceeding, the Commissioner also issues a scoping memo, and a decision is issued within 60 days. This contrasts with the citation program where no Commissioner is assigned and therefore there is no scoping memo, and the citation is resolved through a resolution.[28]

Reduced to its essence, the CPED argument advanced above becomes:

> *(1) Resolution ALJ-299, states that the Commission's jurisdiction to create citation programs is "well established";* and
>
> *(2) Citation programs are not governed by Sections 1701.1-1701.2 because citation proceedings employ procedures different than adjudicatory proceedings governed by Sections 1701.1-1701.2.*

ALJ-299, however, does not provide anything close to "well established" authority, specific and express statutory authorization for a citation program.[29] The second argument-

[26] *Id.* CPED Opening Brief, pp. 24-27

[27] K. 19-03-024 *Appeal of City of San José, administrator of San José Clean Energy, to Citation E-4195-0052 issued on February 27, 2019 by Consumer Protection and Enforcement Division.*

[28] *Response Of The Consumer Protection And Enforcement Division To The Motion Of The City Of San Jose To Request A Prehearing Conference And For Continuance Of The Evidentiary Hearing* (April 25, 2019.)

[29] See discussion at pp. 4-7 *supra.*

(footnote continued)

citation proceedings employ procedures different than adjudicatory proceedings governed by Sections 1701.1-1701.2[30]- simply begs the critical question: **may** citation proceedings employ procedures different than all other adjudicatory proceedings, dockets governed by Sections 1701.1-1701.2?

According to the Public Utilities Code, they may not. Section 1701(a) means what it says: "All hearings, investigations, and proceedings shall be governed by this part".

II. AN OPPORTUNITY TO OPT OUT OF THE EXPEDITED APPEAL PROCESS MAY NOT CURE ALL THE DEFECTS IN THE 2019 PROPOSAL

In our March 2019 comments we pointed out that while the proposed Expedited Citation Appeal process embraces many of the features of the Expedited Complaint Procedure ("ECP") enacted by the Legislature in 1977,[31] the proposed Expedited Citation Appeal process lacks any comparable statutory mandate. Draft Res. ALJ-377 addresses a number of points raised in our March 2019 comments and modifies the 2019 proposal to address some of them. Our comments on those modifications follow:

A. Findings of Fact and Conclusions of Law

Rule 6.1(e) in the 2019 proposal stated that no findings of fact or conclusions of law would be made in a resolution resolving an expedited appeal, an omission we believe contravened Section 1705[32]. We noted that when the Legislature created the ECP in 1977, it amended Section 1705 to exempt ECP decisions from the requirements of Section 1705. No comparable exception, however, exists with respect to resolutions[33] deciding citation appeals.

Draft Res. ALJ-377 addressed this concern by modifying the 2019 Proposal "to require that resolutions resolving the expedited citation appeal contain findings of fact and conclusions of law."[34]

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[30] "These citation programs are not governed by section 1701.1 as evidenced by the numerous differences between an adjudication proceeding, discussed under sections 1701.1 and 1701.2, and a citation."

[31] Section 1702.1.

[32] See also, Section 1757(a)(3).

[33] Commission "orders" include decisions and resolutions. See *Actions of Estelle Nunemaker, et al. , v. P.T. & T. Co. and Henry Wood, et al. , v. P.G.&E. Co., regarding constitutionality of deposits given for services rendered, dismissed.* 1969 Cal. PUC LEXIS 368, *55. Affirmed *Henry Wood v. Public Utilities Com.,* 4 Cal. 3d 288 (1971).

[34] Draft Res ALJ-377 at p. 9.

B. Participation By Attorneys or Non-Attorney Advocates; the "Opt-Out" Process

In the 2019 Proposal, Rule 6.1(b) provided that "no attorney at law shall represent any party other than himself," thereby precluding the citation appellant from being represented by an attorney. Section 1706, however, expressly permits a party to a Commission proceeding "to be heard in person or by attorney". ECP hearings are statutorily exempt from the requirements of Section 1706. No comparable statutory exception exists with respect to hearings on citation appeals.[35]

Draft Res. ALJ-377 proposes to address this issue by adopting Rules 6.1(a) and (e) providing that:

> a) No representative (attorney at law or other representative) shall represent any party other than himself under the Expedited Citation Appeal Procedure. Rule 13 of these Rules, only as to party representative, does not apply.
>
> e) A party who is subject to the Expedited Citation Appeal Procedure may at any time prior to the swearing in of the first witness at the evidentiary hearing request termination of the Expedited Citation Appeal Procedure, and that the matter be recalendared for hearing under the Commission's regular procedure for Citation Appeals. The Commission or the assigned Administrative Law Judge, when the public interest so requires, may at any time prior to the filing of a resolution addressing the Citation Appeal, terminate the Expedited Citation Appeal Procedure and recalendar the matter for hearing under the Commission's regular procedure for Citation Appeals.

Because the new Proposed Rules provide for an opportunity to proceed "under the Commission's regular procedure for Citation Appeals" many of our concerns with respect to the Expedited Citation Appeal Procedure have been alleviated. With respect to attorneys, however, the proposed rules leave the following questions (and possibly more.):

- Is the "opt-out" provision available to both CPED and the Citation Appellant?
- What steps will the Commission take to insure that the decision by the Citation Appellant to "opt-out" (or not) is an informed decision?

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[35] A separate issue is raised by the fact that the Commission permits non-attorneys to act as compensated advocates for parties even though that practice is not permitted by Section 1706. The Commission apparently relies on *dicta* from *Consumers Lobby Against Monopolies v. Public Utilities Com.*, (1979) 25 Cal.3d 891, 913-914, which did not address Section 1706. An Opinion of the Attorney General reached the same conclusion relying on the same *dicta*. 80 Op. Atty. Gen 221 (1997).

- If the Citation Appellant does not "opt-out", may CPED be represented by the holder of a law degree who is not a member of the Commission's Legal Division?

- If the Citation Appellant does not "opt-out", may the Citation Appellant nonetheless be represented by a person described in Code of Civil Procedure Sections 116.530-116.540?

C. Transcripts

Section 1706 also requires the preparation of a transcript "taken down by a reporter appointed by the commission…" Again, while ECP hearings are exempt from the requirements of Section 1706, no comparable statutory exception exists with respect to hearings on citation appeals.

Proposed Rule 6.1(c) provides that in Expedited Appeal Proceedings, "(a) hearing without a court reporter shall be held…." While the Citation Appellant is provided with an opportunity to "opt-out" of the Expedited Process and obtain a transcript, it remains the case that a hearing without a reporter contravenes Section 1706 except in ECP proceedings.

III. THE REVISION TO RULE 7 (COMPLIANCE FILING) MAKES SENSE.

As we noted in our 2019 comments, the slight increase in the amount of time afforded for preparation and service of the compliance filing is appropriate. It will permit the filer adequate time to prepare a complete submission.

IV. THE PROPOSED MODIFICATION TO THE BURDEN OF PROOF IMPROVES RULE 11.

It is appropriate to modify Rule 11 to describe the burden of proof by reference to a "preponderance of the evidence" rather than "the burden to prove a *prima facie* case….". Our earlier comments explained our support for this change and they need not be repeated here.

Goodin, MacBride, Squeri and Day LLP appreciates the opportunity to comment on Draft Res. ALJ-377.

Very truly yours,

GOODIN, MACBRIDE,
SQUERI & DAY, LLP

/s/*Thomas J. MacBride, Jr.*

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