



Laura M. Fulton
Senior Counsel
8330 Century Park Court, CP 32F
San Diego, CA 92123-1548
(858) 654-1759
LFulton@SDGE.com

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Caroline Thomas Jacobs
Director, Office of Energy Infrastructure Safety
California Natural Resources Agency
715 P Street, 20th Floor
Sacramento, CA 95814
info@energysafety.ca.gov

Reference Attorney
California Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
Staff@oal.ca.gov

Docket No. 2022-RM

**RE: Joint IOU Comments Regarding the Office of Energy Infrastructure Safety's
(Energy Safety) Proposed Rulemaking to Establish a Written Hearing Process**

Dear Director Thomas Jacobs and the Office of Administrative Law:

Pursuant to the August 26, 2022 Notice of Proposed Rulemaking to Establish a Written Hearing Process (Notice of Proposed Rulemaking), San Diego Gas & Electric Company (SDG&E) hereby submits these comments on behalf of SDG&E, Southern California Edison Company (SCE), and Pacific Gas and Electric Company (PG&E) (collectively, the Joint IOUs) addressing the proposed section 29104 of Article 2, Chapter 1 of Division 17 of Title 14 of the California Code of Regulations (Proposed Regulation).

I. Introduction

The Joint IOUs generally appreciate Energy Safety's initiative to establish a hearing process by which electrical corporations who receive a Notice of Defect or a Notice of Violation related to compliance with their Wildfire Mitigation Plans (WMP) may provide additional information to address the allegations contained therein.¹ Further, Energy Safety's proposed revisions to the current Emergency Regulation in effect correctly recognize the distinction

¹ See Notice of Proposed Rulemaking, "Informative Digest" (February 22, 2022).

between the hearing process and any applicable appellate review by omitting the term “appeal” from the Proposed Regulation.

The Joint IOUs recognize the importance and gravity of compliance with their respective WMPs, the need for timely resolution of notices of violation or defect, and the potential significance of penalties associated with WMP initiatives. For those reasons, Energy Safety must respect and preserve all appropriate and applicable rights of the parties involved. To preserve these rights, Energy Safety should consider the following clarifications and revisions to the Proposed Regulation:

- Section (c) of the Proposed Regulation should reflect that the entity issued a notice of defect or violation may request a hearing to present additional information *or contest* the alleged deficiency, violation, or failure to act. As currently drafted, the Proposed Regulation inappropriately creates a presumption of a violation without the benefit of an adequate factual record.
- The Proposed Regulation should codify the roles of the Public Utilities Commission and Energy Safety consistent with the Initial Statement of Reasons and the discussion below to avoid confusion regarding the responsibilities and processes of the agencies involved.
- Consistent with the Public Utilities Code, Energy Safety should allow entities issued a notice of violation or defect to request an oral hearing to preserve due process.
- Energy Safety should consider an expedited rehearing process to facilitate appeals of decisions and avoid potentially unnecessary legal processes.

II. Energy Safety Should Revise the Proposed Regulation to Clarify that Regulated Entities May Contest a Notice of Violation or Notice of Defect

As currently drafted, the Proposed Regulation provides an entity issued a notice of defect or notice of violation with the ability to request a written hearing “to take public comment or present additional information regarding the alleged deficiency, violation or failure to act contained in the notice of violation or defect.”² Further, the Initial Statement of Reasons also provides that the purposes of the Proposed Regulation include providing “an opportunity to the regulated entities to submit additional information regarding their notices of defect of violation and ... an opportunity for the public to provide comments.”³ By omitting the word “contest” from the Proposed Regulation, Energy Safety erroneously establishes a presumption that the underlying conduct alleged in a notice of violation or defect is correct. While ostensibly the regulated entities’ ability to “present additional information” could lead the hearing examiner and the Director to revise or reverse the findings of the notice of violation or notice of defect, the Proposed Regulation should be revised to remove any presumptions regarding the alleged conduct.

² Proposed Regulation §29104(c).

³ Initial Statement of Reasons at 3.

To preserve the due process rights of the regulated entities and remove any presumption regarding the conduct alleged in a notice of violation or notice of defect, Joint IOUs recommend that Proposed Regulation Section 29104(c) be revised to read as follows (with added language underlined):

Any entity issued a notice of defect or notice of violation pursuant to Government Code section 15475.4(a) may request a written hearing to contest, take public comment or present additional information regarding the alleged deficiency, violation, or failure to act contained in the notice of violation or defect. The request must be received within 30 calendar days of issuance of the notice. Requests must be submitted in accordance with subdivision (b).

Joint IOUs proposed addition does not create additional burden or cost for stakeholders or Energy Safety, nor is it inconsistent with the spirit of the Proposed Regulation or California Government Code Section 15474.4. It merely clarifies that the regulated entities retain the ability to contest the findings outlined in a notice of defect or violation and present additional information in support.

III. Energy Safety Should Clearly State the Process Regarding Referrals to the Public Utilities Commission to Ensure Due Process

As the Notice of Proposed Rulemaking describes, Government Code Section 15475 requires that Energy Safety conduct a hearing regarding Notices of Violation or Defect if requested by the electrical corporation. Upon potential referral from Energy Safety, the Public Utilities Commission is separately responsible for imposing penalties if an electrical corporation fails to substantially comply with its WMP.⁴ This new process is unique in that it involves the potential for investigation and factfinding efforts by two different agencies. Joint IOUs seek additional clarity within the body of the Proposed Regulations regarding the roles and interplay between the two processes.

Joint IOUs appreciate Energy Safety's recognition of this bifurcated process and an effort to establish the roles of each agency in the Initial Statement of Reasons. As explained in Footnote 2:

The California Public Utilities Commission is responsible for imposing penalties for failure to comply with wildfire mitigation plans. (Pub. Util. Code §8386.1). Energy Safety's role is to refer notices of defect or violation to the California Public Utilities Commission. The hearing to which this regulation [sic] does not supplant the Commission's investigative or hearing process.

Joint IOUs agree that Energy Safety is tasked with issuance of and initial hearings regarding notices of defect or violation regarding an approved WMP.⁵ To avoid confusion and properly codify these responsibilities, Joint IOUs request that Energy Safety also include the language of Footnote 2 of the Initial Statement of Reasons within the Proposed Regulation. Joint IOUs

⁴ Pub. Util. Code §8386.1; Pub. Util. Code §8389(g)

⁵ Cal. Gov. Code §§15475.2, 15475.4.

specifically propose that Energy Safety add a provision (h) to Section 29104 to state as follows: *The hearing process established by this regulation does not supplant the investigative or hearing process of the California Public Utilities Commission.* Memorializing this intent—as already provided in the Initial Statement of Reasons—will afford all stakeholders additional clarity regarding the process of referring notices of violation or defect to the Commission.

IV. Energy Safety Should Provide the Opportunity to Request an Oral Hearing, Consistent with Due Process and the Public Utilities Code

The Joint IOUs generally believe that a written hearing process will be an expeditious and efficient means to address Notices of Violation or Defect, particularly those deemed “moderate,” or “minor.” But limiting the hearing process to only a written procedure implicates due process concerns if it restricts the Joint IOUs or other stakeholders from conducting additional factfinding, presenting testimony, or cross-examining witnesses regarding contested material facts.

Energy Safety may issue a Notice of Violation or Defect with no effort to gain initial input from the electrical corporation in question. During the hearing process, the regulated entity may seek to gain additional information from Energy Safety regarding the defect, question the inspectors regarding the findings, or cross-examine relevant witnesses. The current process provides no such opportunity, which limits the due process rights of the electrical corporations.

“The fundamental requisite of due process of law is the opportunity to be heard.”⁶ The Supreme Court has established that a “hearing must be at a meaningful time and in a meaningful matter.”⁷ And “[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. . . . [W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important.”⁸ Even in an administrative context, the “relatively immutable principle” applies that “where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”⁹ Given the potentially significant penalties and reputational damage that might be associated with findings of non-compliance with a Wildfire Mitigation Plan, Energy Safety must include—at the minimum—the opportunity for regulated entities to *request* an oral hearing in appropriate instances.

Government Code Section 15475.4 anticipated a “hearing” process, which traditionally implies an in-person hearing affording parties to present evidence and examine witnesses.¹⁰

⁶ *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

⁷ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

⁸ *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970) (holding welfare recipients must be given an opportunity to confront and cross-examine witnesses in termination proceedings).

⁹ *Id.*, citing *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959)

¹⁰ *See, e.g.* New York Courts Glossary of Common Legal Terms definition of hearing: “A preliminary examination where testimony is given and evidence presented for the purpose of determining an issue of fact and reaching a decision on the basis of that evidence.” Available at https://www.nycourts.gov/legacyPDFs/courts/6jd/forms/SRForms/glossary_common_legal.pdf.

Further, the opportunity to request oral, in-person evidentiary hearings is rooted in Energy Safety’s obligations as successor to the Wildfire Safety Division at the Public Utilities Commission. Energy Safety’s enabling legislation specifically provides that the Office is vested with “all the duties, powers, and responsibilities of the Wildfire Safety Division pursuant to Section 326 of the Public Utilities Code.”¹¹ To maintain further continuity of regulation, the Legislature also clarified that “All laws prescribing the duties, powers, and responsibilities of the Wildfire Safety Division to which the office succeeds, together with all lawful rules and regulations established under those laws, are expressly continued in force.”¹²

Thus, it is only logical that the Legislature anticipated Energy Safety to establish a hearing process which includes the right to request in-person evidentiary hearings and be heard when a contested issue of material fact arises—as is the case at the Public Utilities Commission. Pursuant to Public Utilities Code 1701, *et. seq.* parties to proceedings at the Commission are afforded the right to seek an evidentiary hearing or the assigned Commissioner may determine a hearing is required.¹³ During a hearing, parties “shall be entitled to be heard and to introduce evidence,” and use process to “enforce the attendance of all necessary witnesses.”¹⁴ The hearings envisioned by the Code are in-person, oral hearings. Energy Safety remains bound to observe the laws governing the hearing process through its enabling legislation and should clarify the legal availability to request in-person hearings—when warranted—in the Proposed Regulations.

This is not to say that the Joint IOUs anticipate the need for hearings in the case of most notices of violation or defect. Many notices, especially those characterized as moderate or minor, will most likely result in either a written hearing process to provide additional information regarding the circumstances or a stipulation from the regulated entity. The Joint IOUs therefore do not agree that allowing the regulated entities to make a request for an oral hearing—one that need not necessarily be granted—would result in unnecessary additional costs to any parties.¹⁵ But WMP initiatives—like the electrical system itself—are complicated and complex, and there will likely be instances where an oral hearing would facilitate the development of a more fulsome evidentiary record on which Energy Safety is obligated to base its findings.¹⁶ Moreover, given the significance of the due process implications in completely denying the availability of hearings and witness testimony, citing largely to the potential for additional costs is insufficient.

Additionally, it is inaccurate to claim that a hearing process could “leave a defect or violation unresolved for a longer time period.”¹⁷ Joint IOUs are constantly mindful of the safety of the areas they serve and the public, and if a potential defect is brought to their attention the electrical corporations can inspect that area post-haste to remedy any areas of concern. Corrective actions are taken outside of the hearing process—or even the noticing process. For instance, when SDG&E has been made aware of potential compliance concerns by Energy Safety inspectors in the past, it has sent teams to review the issue and remediate it if there are any

¹¹ Cal. Gov. Code §15475.

¹² *Id.*

¹³ Pub. Util. Code §1701.1

¹⁴ Pub. Util. Code §1704

¹⁵ Initial Statement of Reasons at 13.

¹⁶ Pub. Util. Code §15475.5(c).

¹⁷ *Id.*

concerns. That has occurred without SDG&E even being issued a notice of violation or defect—let alone seeking a hearing. Energy Safety should not conflate the engagement of due process by requesting an oral hearing with a delay in taking corrective action or promoting safe and reliable service.

The Joint IOUs thus respectfully request that Energy Safety amend the Proposed Regulations to include the right to request an oral hearing, consistent with the language stated in Alternative 3 of the Initial Statement of Reasons.¹⁸

V. The Joint IOUs Recommend that Energy Safety Consider a Rehearing Process in the Permanent Rules

As explained in the Joint IOUs comments on the Emergency Regulations, the Joint IOUs do not anticipate instances of significant non-compliance with their WMPs and believe that many moderate or minor infractions may be expeditiously addressed through the written hearing process proposed. As Energy Safety recognizes, however, it may refer any findings to the Public Utilities Commission with a recommendation for an enforcement action. In the meantime, Energy Safety's findings are directly appealable to Superior Court. To reduce court resources and mitigate the potential for dual track proceedings, the Joint IOUs recommend that Energy Safety consider a rehearing process by which a final decision may be reconsidered where appropriate. As at the Public Utilities Commission, a rehearing process allows for reconsideration of decisions that may be factually or legally problematic and could reduce the need for unnecessary litigation.

VI. Conclusion

The Joint IOUs encourage Energy Safety to consider the recommendations contained herein to clarify the proposed processes, avoid duplicative or contradictory regulatory procedures, and prioritize safety and wildfire prevention in a streamlined process.

Respectfully submitted,

/s/ Laura M. Fulton

By: Laura M. Fulton

Attorney for:
 SAN DIEGO GAS & ELECTRIC COMPANY
 8330 Century Park Court
 San Diego, California 92123
 Telephone: (858) 654-1759
 E-mail: Laura.Fulton@sdge.com

¹⁸ Initial Statement of Reasons at 13.