

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Petition of the Safety and Enforcement
Division to Adopt, Amend, or Repeal
General Order 95 Pursuant to Pub. Util.
Code Section 1708.5

P.16-05-004
(Filed May 9, 2016)

**SAFETY AND ENFORCEMENT DIVISION'S
REPLY TO THE RESPONSES TO SAFETY AND ENFORCEMENT DIVISION'S
AMENDED PETITION TO ADOPT, AMEND OR REPEAL
RULE 18 OF GENERAL ORDER 95**

CHARLOTTE F. TERKEURST
Electric Safety and Reliability Branch
Safety and Enforcement Division

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-3124
Email: charlotte.terkeurst@cpuc.ca.gov

RASHID A. RASHID
Attorney for
Safety and Enforcement Division

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2705
Email: rashid.rashid@cpuc.ca.gov

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I. INTRODUCTION

Pursuant to Rule 6.3(d) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rules), California Public Utilities Code (Pub. Util. Code) § 1708.5, and Administrative Law Judge Kenney's Ruling¹, the Safety and Enforcement Division (SED) submits its Reply to the Responses to SED's Petition (P.) 16-05-004. SED's Petition requests the Commission to commence a Rulemaking proceeding to consider repealing Rule 18 of General Order (GO) 95. Southern California Edison Company (SCE); the CIP Coalition;² San Diego Gas & Electric Company (SDG&E); PacifiCorp; Pacific Gas and Electric Company (PG&E); Citizens Telecommunications Company of California Inc., Frontier Communications of the Southwest Inc., and Frontier California Inc. (collectively, Frontier); and Liberty Utilities LLC (Liberty) filed Responses to the Petition.

The points and arguments in the Petition and relevant portions of the Responses should provide the preliminary scope of issues to be litigated through a Rulemaking.

¹ On June 13, 2016 (updated on June 17, 2016), ALJ Kenney issued a Ruling setting the Reply date to June 27, 2016.

² The CIP Coalition's response identifies all of the Communication Infrastructure Providers (CIPs) that jointly filed that response.

P.16-05-004 includes all the necessary requirements for the Commission to commence a Rulemaking.

SED has identified a particular safety Rule that has resulted in unsafe conditions that could lead to catastrophic events. The Petition requests that the Commission commence a Rulemaking for SED to demonstrate through the record to be developed in that proceeding that Rule 18 hinders the Commission's ability to keep electric and communications facilities safe. The Rulemaking will provide a forum for the parties opposed to repealing Rule 18 to support their opposition through record evidence. Therefore, SED respectfully requests the Commission to grant the Petition by opening a Rulemaking.

II. SED'S PETITION ASKING THE COMMISSION TO OPEN A RULEMAKING TO CONSIDER REPEAL OF RULE 18 HAS MET THE REQUIREMENTS OF RULE 6.3

A. The Commission Must Only Decide at this Juncture Whether or Not to Commence a Rulemaking

The Commission's consideration regarding a Petition for a Rulemaking submitted pursuant to Rule 6.3 and Pub. Util. Code § 1708.5 is to determine whether to commence a Rulemaking. The Legislature passed Assembly Bill (AB) 301, and Pub. Util. Code §1708.5 was enacted as a mechanism for interested parties, such as SED, to request that the Commission consider amendment, repeal, or adoption of regulations such as GO 95 rules. In deciding whether a Rulemaking is warranted, the Commission only needs to determine whether the Petition contains sufficient justification for a Rulemaking and complies otherwise with Rule 6.3. In the responses, no party has successfully challenged that SED's Petition complies with these requirements.

It is only through a Rulemaking, and not the Petition, that the Commission will decide whether to add, modify, or repeal a rule or regulation in response to a petition filed pursuant to Rule 6.3 and Pub. Util. Code § 1708.5. A Rulemaking proceeding is necessary to create a record and allow parties to participate so that the Commission can determine whether to in fact adopt the changes proposed in the Petition.

The Petition's objective is for the Commission to initiate a formal process where the merits of SED's proposal can be vetted through more formal and public Commission process where all interests have an opportunity to be heard. Many of the Responses fail to recognize that a petition, per P.U. Code § 1708.5, is merely a procedural vehicle to request commencement of a Rulemaking proceeding and that the Petition standing alone is not required to contain all the merits to persuade the Commission to repeal Rule 18. Indeed, the Rulemaking will allow parties to file comments and/or briefs, request workshops, and potentially submit testimony into the record for the Commission to consider when issuing a decision regarding the merits of the proposal.

B. Some Parties Suggest, and Do Not Oppose, Commencement of a Rulemaking

While all the Responses oppose SED's substantive position that Rule 18 should be repealed, their arguments do not support denial of the proposed Rulemaking. In fact, some parties suggest a Rulemaking if the Commission believes that a review of Rule 18 is warranted, and that the Commission should make any determinations on the merits through a Rulemaking.³ SED's Petition asks for the same relief, for the Commission to commence a Rulemaking, through the procedural mechanism that Pub. Util. Code § 1708.5 and Rule 6.3 require for a petition to adopt, amend, or repeal a regulation.

C. SED's Petition is in Full Compliance with Rule 6.3

Petitions to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5 must comply with Rule 6.3. As SED will demonstrate below, SED's Petition complies with Rule 6.3 in its entirety, both in substance and procedure. As a result, SED's Petition provides a sound basis for the Commission to commence a Rulemaking.

Rule 6.3(a) requires that the proposed change in regulation "must apply to an entire class of entities or activities over which the Commission has jurisdiction and must apply to future conduct." SED's Petition complies with Rule 6.3(a) because Rule 18

³ Response of Frontier, page (p.) 4.; Response of SCE, p.6; Response of CIPs, pages (pp.) 4, 13-15 *e.g.* The CIP Response states that the "procedural vehicle that the Commission has used successfully to consider GO 95 amendments has been a Rulemaking." (CIP, at p. 14).

applies to all utilities and CIPs that use overhead electrical supply or communication facilities subject to GO 95, and the proposed repeal of Rule 18 would apply only on a prospective basis.⁴ No Response challenges SED's position regarding the Commission's jurisdiction for the safety of overhead electric and communication facilities. Likewise, parties do not dispute that Rule 18 of GO 95 applies to the utilities and CIPs.

Rule 6.3 (b) provides substantive criteria that SED's Petition must meet. Rule 6.3(b) states:

A petition must concisely state the justification for the requested relief, and if adoption or amendment of a regulation is sought, the petition must include specific proposed wording for that regulation. In addition, a petition must state whether the issues raised in the petition have, to the petitioner's knowledge, ever been litigated before the Commission, and if so, when and how the Commission resolved the issues, including the name and case number of the proceeding (if known). A petition that contains factual assertions must be verified. Unverified factual assertions will be given only the weight of argument. The caption of a petition must contain the following wording: "Petition to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5."

SED has met the criteria set by Rule 6.3(b). SED's Petition concisely provides several justifications for the requested relief. The justifications include, but are not limited to, SED's assertion that Rule 18 hinders SED's enforcement of GO 95,⁵ Rule 18 incorrectly distinguishes GO 95 nonconformances from GO 95 violations,⁶ and Rule 18 removes utility and CIP responsibility to work with SED.⁷ The SED petition does not need to include specific proposed wording, because SED proposes repeal of a regulation rather than adoption of a new regulation or amendment of an existing regulation,

⁴ See also SED's Amended Petition, pp. 5-6.

⁵ *Id.*, pp. 8-10.

⁶ *Id.*, at p. 11.

⁷ *Id.*, at p. 4.

SED provided in its Petition a comprehensive assessment of whether the issues have been raised in other proceedings.⁸ As explained in Section III.A below, the assertions in several of the Responses that issues raised in SED's Petition are also under consideration (or should be considered) in the pending citation proceeding, Rulemaking (R.)14-05-013,⁹ are incorrect.

All of SED's factual assertions are verified within the Petition through footnotes and examples, through the sworn affidavit of SED's enforcement staff, and/or through examples contained in Appendix A to the Petition. Finally, SED's Petition is captioned consistent with the requirements in Rule 6.3(b).

SED also ensured that its Petition complied with the service and filing procedural requirements in Rule 6.3(c).¹⁰

III. DISCUSSION

The Responses oppose the repeal of Rule 18 and offer several arguments as well as different interpretations of Rule 18. The Responses raise some non-trivial concerns. There are several points of contention that buttress SED's request for a Rulemaking. Parties disagree with SED's position that Rule 18 decreases safety. In fact the Responses assert that repealing Rule 18 does not improve safety.¹¹

The substance of the Petition and the relevant arguments in the Responses can serve as the basis of the preliminary scope of issues for the Rulemaking. Below, SED lists some of the more relevant issues raised within the Responses and briefly addresses them.

⁸ *Id.*, pp. 8-10.

⁹ Response of SCE, p. 1; Response of PG&E, pp. 1, 8; Response of SDG&E, pp. 4, 6; Response of PacifiCorp, pp. 6-7.

¹⁰ SED ensured compliance with the procedural requirements in Rule 6.3(c), by serving the Petition upon the Executive Director, Chief Administrative Law Judge, Director of the Energy Division, and Public Advisor. Prior to filing, SED consulted with the Public Advisor to identify any additional persons upon whom to serve the petition. SED also served the proper service lists, including all proceedings that adopted or modified Rule 18.

¹¹ *See e.g.*, Response of CIPs, p. 11; Response of SCE, p. 8.

A. R.14-05-013 is Not a Proper Venue for the Commission to Assess SED's Petition

Several of the Responses argue that the Commission should consider the issue of repealing Rule 18 in R.14-05-013.¹² However, R.14-05-013 is not a proper venue for the Commission to determine whether to repeal Rule 18 of GO 95. The Commission instituted R.14-05-013 to refine its gas safety citation program and to establish an electric safety citation program. SED proposes that the Commission repeal Rule 18 in its entirety because fundamental flaws in the rule create an untenable situation that threatens public safety. The issue of whether to repeal Rule 18 is not within the scope of R.14-05-013.

In R.14-05-013, some of the parties have asked that the Commission interpret Rule 18 in a way that would limit the applicability of the gas and electric citation programs. The effect of that proposed interpretation of Rule 18 on the gas and electric citation programs is a very different issue and is irrelevant to SED's Petition. SED recognizes, however, that repeal of Rule 18, as SED advocates for a breadth of reasons, would make moot the Rule 18 interpretation issues that those parties have asked the Commission to address in determining the scope of the gas and electric citation programs in R.14-05-013.

Further, the Commission's citation programs that are the subject of R.14-05-013 do not apply to CIPs and, as indicated by the service list in R.14-05-013, the CIPs are not participants in that proceeding.

For all of these reasons, it would be unreasonable for the Commission to consider repealing Rule 18 in the citation proceeding.

¹² Response of PG&E, p. 3; Response of PacifiCorp, p. 6; Response of SCE, pp. 2, 5, and 9.

B. SED and Parties Disagree on the Facts, Application, and Analysis of Commission Decision 04-04-065 and the SED/SCE Memorandum of Understanding

The majority of the Responses reference Decision (D.) 04-04-065 to argue against repealing Rule 18.¹³ The Parties' analyses of D.04-04-065 are either in error or inapplicable, or confuse and issues of D.04-04-065 by choosing certain facts and omitting others.¹⁴

For instance, SCE erroneously applies the facts and analysis in D.04-04-065 and the SCE and SED (then the Consumer Protection and Safety Division) Memorandum of Understanding (MOU) to justify Rule 18.¹⁵ SCE omits a significant principle stated in the MOU, that it "does not change ... the [SED]'s existing power to investigate and enforce GO 95 and 128 violations..."¹⁶ SCE takes out of context SED's language in its Petition discussing D.04-04-065 and the MOU in relation to Rule 18.¹⁷

In D.04-04-065, the Commission stated that the penalties in that decision were intended to encourage SCE to focus on "preventing GO violations wherever possible and finding and curing them in a timely fashion..."¹⁸ SED's position is that Rule 18 has had the opposite effects such as, but not limited to, SED's inability to enforce GO 95.

SED asserts that D.04-04-065 supports SED's Petition, in that the Commission rejected in D.04-04-065 SCE's current request to distinguish nonconformances from violations. As discussed in the Petition, D.04-04-065 determined that a "nonconformance" is a "violation."¹⁹ When parties proposed to modify Rule 18 to

¹³ Response of SCE, pp. 2, 5-8; Response of PacifiCorp, pp. 3-4; Response of CIPs, pp. 5-9; Response of PG&E pp. 15, 23; and Response of Liberty, p. 4.

¹⁴ SED will not address all the arguments made within the Responses in this Reply because the proposed Rulemaking is the proper forum to address the merits of these arguments.

¹⁵ Response of SCE, pp. 3-4; It should be noted that the CIPs attempt to make the same connection *See* Response of CIPs, pp. 5-6.

¹⁶ SED/SCE MOU, p. 2.

¹⁷ Response of SCE, p. 2.

¹⁸ D.04-04-065, p. 2.

¹⁹ SED Petition at p. 3, *citing* D.12-01-032 and D.04-04-065.

substitute the term nonconformance for the term violation in R.08-11-005, SED relied on the Commission's D.04-04-065 to take a neutral position because the Commission had held that there was no practical difference between the two terms.²⁰

Much has happened since the Commission adopted D.04-04-065 in 2004, not just the unfortunate experiences with Rule 18 that led SED to file the instant Petition. Of particular note also is the Commission's 2012 discussion of D.04-04-065 in Resolution ALJ-277, in which the Commission rejected PG&E's appeal of a gas citation issued by SED:

PG&E contends a 2004 case involving a number of safety violations by SCE is of greater relevance than the cases cited by [SED]. (PG&E Reply Brief at 3, citing D.04-04-065.) In the 2004 case the Commission rejected a [SED] recommended fine of approximately \$97 million and instead fined SCE \$656,000. PG&E points out that the Commission did not fine SCE for 4,721 violations that SCE promptly remedied after they were brought to SCE's attention by [SED]. PG&E does not convincingly state the reasonably comparable facts, if any, and we find the facts are not reasonably comparable...

... [SED] characterizes prior enforcement implementation as working collaboratively with self-reporting utilities and, where possible, generally avoiding fines. As explained in Resolution ALJ-274, however, both the Independent Review Panel and the NTSB recommended additional enforcement tools and an expansion of staff enforcement authority. [citation omitted.] We adopted those recommendations and have increased staff's tools and authority. The regulatory regime is not the same as it was in 2004. [SED] has in this case used these new tools and authority as we expect it to do, and we affirm the result here.²¹

The Responses' inadequate and erroneous interpretations of D.04-04-065 to justify Rule 18 are an attempt, not just to take the Commission back to 2004, but also to weaken that regulatory regime. SCE's analysis, like many of the parties' Responses, is flawed, or

²⁰ SED Petition, pp. 3 and 15.

²¹ Resolution ALJ-277, pp. 13-14.

at best, incomplete. The proposed Rulemaking will allow parties to further discuss and provide a thorough and objective analysis of D.04-04-065, including introducing evidence into the record such as the underlying pleadings and reports from D.04-04-065.

C. The Responses Demonstrate that Some Parties Interpret Rule 18 in a Way that Undermines the GO 95 Safety Standards

In their Responses, some parties argue that a failure to meet GO 95 requirements should not be considered a violation unless it creates an immediate threat to public safety.²² They assert that nonconformances that the owners or users deem to not be significant safety hazards are not violations and are not subject to enforcement action by the Commission.

Ironically, some of the same parties that put forth this argument think that the Commission's SED can "continue to be the final arbiters of whether a utility has violated General Order 95" or that SED would still have enforcement authority.²³ However, their interpretation that Rule 18 allows facility owners to determine whether a condition is a nonconformance and not a violation contradicts their assertion that SED has simultaneous authority to determine whether the same condition is a violation. The recourses that they suggest—that SED could audit the facilities and either request that the Commission open Order Instituting Investigation (OII) proceedings through which SED could seek fines, or issue citations under the gas and electric citation programs—are resource-intensive and, particularly for OIIs, lengthy processes that necessarily must be used sparingly.

D. The Responses Err in Stating that Other Safety Related General Orders Contain the Same Provisions and Effects as Rule 18 of GO 95

The CIP Coalition, PG&E, and SDG&E assert that SED errs in stating that no other General Orders contain the same provisions as Rule 18.²⁴ This is not true. The

²² Response of Liberty Utilities, p. 5; Response of SDG&E, pp. 3 and 5; Response of CIPs, p. 9.

²³ Response of Liberty Utilities, p. 5; Response of PacifiCorp, p. 6.

²⁴ Response of CIP Coalition, p.10; Response of PG&E, p. 8; Response of SDG&E, p. 2 .

Commission has never had any safety regulation within a GO that would allow the regulated parties to deem that violations otherwise subject to enforcement are instead acceptable nonconformances that are allowed to persist, indefinitely in some cases.

These parties point to Rule 12.5 in GO 128 and to Rule 12.6 and Rule 35, Exception 3 in GO 95. However, there are important distinctions between those rules and the manner in which Rule 18 deals with “nonconformances.”

The CIP Coalition cites Rule 12.5 of GO 128, but in an incomplete way that is misleading. Rule 12.5 in GO 128 and Rule 12.6 in GO 95 contain identical language:

Third Party Nonconformance. *When a third party that is not subject to the requirements of this Order (emphasis added) causes a condition on or near a utility facility that does not conform with this Order, the utility shall be allowed reasonable time to address the condition by pursuing corrective action and/or notification procedures. While addressing this condition, the utility is in conformance with the Order.*

As an example, if a vehicle hit a CIP pedestal/padmound and damaged it, Rule 12.5 in GO 128 would allow the CIP a “reasonable time” to address the condition. The same would not be true if the CIP let a pedestal/padmound become corroded without replacing it before it became corroded; that would be a violation subject to immediate enforcement. A similar distinction should be maintained for Rule 95 requirements, e.g., if a vehicle hit a utility pole and damaged it versus if a utility allows the safety factor of a pole to fall below the requirement in GO 95 due to the utility’s lack of maintenance.

Similarly, GO 95, Rule 35 (Vegetation Management), Exception 3 provides as follows:

3. The Commission recognizes that ***unusual circumstances beyond the control of the utility (emphasis added)*** may result in nonconformances with the rules. In such cases, the utility may be directed by the Commission to take prompt remedial action to come into conformance, whether or not the nonconformance gives rise to penalties or is alleged to fall within permitted exceptions or phase-on requirements.

SED seeks to make GO 95 consistent with how it was before Rule 18 and consistent with other GOs to cure this serious situation. In all other areas of Commission safety regulation, including underground electric safety (GO 128), gas, rail operations, and rail transit, safety rules are required to be met and any and all noncompliance with the rules are violations of the rules and are subject to SED and Commission enforcement action.

E. The Responses Give Unwarranted Credibility to the Criteria in Rule 18

Parties' Responses argue that the categorization structure in Rule 18A does not hinder safety.²⁵ PacifiCorp's assertion that the standards in Rule 18A for categorizing "safety hazards" and "nonconformances" are "objective"²⁶ is simply incorrect. The definition of "safety hazard" and the criteria for the three priority levels²⁷ are very subjective, and Rule 18A leaves them completely to the facility user's interpretation, therefore rendering the terms and priority levels meaningless and unenforceable.

SED recognizes that a GO 95 violation by itself does not always lead to an accident or a catastrophic event. Safety incidents are generally caused by a series of contributing factors combined with rule violations, with the result of significant harm to life and property. Many violations may not be significant threats until combined with external conditions such as environmental factors (e.g., wind, rain, or heat), or human factors (e.g., worker error or children near the facilities).

²⁵ See e.g. Response of CIP Coalition, p. 3; Response of PacifiCorp, pp. 3-5.

²⁶ Response of PacifiCorp, p. 5.

²⁷ Safety Hazard: "A condition that poses a significant threat to human life or property."

Level 1 priority: "Immediate safety and/or reliability risk with high probability of significant impact," requiring immediate action;

Level 2 priority: "Variable (non-immediate high to low) safety and/or reliability risk," allowing action within up to 59 months; and,

Level 3 priority" "Acceptable safety and/or reliability," allowing "action (re-inspect, re-evaluate, or repair) as appropriate," with no time limits.

The notion that it is possible to evaluate a violation in isolation without considering possible external factors in determining its risk is flawed. Every Rule in GO 95 exists because at one time a condition that the Rule now prohibits caused an accident or became a significant threat to safety or reliability. SED's investigations over the years have found that many, if not most, incidents causing fatalities, injuries, or significant property damage were caused by one or more violations that utilities and CIPs now would not consider “significant” safety hazards. Rule 18 now provides the authority to the facility owners to determine GO 95 violations by superficially distinguishing them from nonconformances.

Rule 18 eliminates the utilities and CIPs' responsibility to perform preventative maintenance.

F. SED as the Commission's Expert Safety Staff is Asking the Commission to Revisit and Repeal a Rule that Hinders Safety in the State of California

In response to the parties' assertions that SED has not provided enough examples, SED states that 1) SED would submit more evidentiary support for its position through a Rulemaking proceeding and 2) SED's Petition is a preventative step to ensure that Rule 18 does not lead to a catastrophic example such as the San Bruno or Aliso Canyon incidents.

The Commission has been criticized for not being able to prevent or foresee catastrophic incidents. The Commission's expert safety staff has identified a Rule that can and has resulted in unsafe conditions and is taking preventative measures by proposing the repeal of that Rule. SED has the sufficient experience and knowledge to realize that Rule 18 hinders safety. If a Rule hinders safety, catastrophic incidents may and will occur.

G. Rule 18 Removes SED's Enforcement Authority

Most of the Responses take the position that SED exaggerates the concern that Rule 18 removes its enforcement authority.²⁸ To the contrary, Rule 18 severely limits, if not cripples, SED's authority to enforce GO 95.

Under Rule 18, a condition that does not meet GO 95 requirements is not a violation if the owner or user becomes aware of it or if the owner or user has scheduled it for repair. Therefore, utilities/CIPs no longer have an incentive to prevent violations but instead, have an incentive to run their systems to failure before taking corrective action. Any accident caused by such conditions arguably would no longer be subject to enforcement action by SED. Inspections would be reduced to looking only for 1) “nonconformances” already discovered by the utilities/CIPs, but not corrected per their own schedules, or 2) as suggested by PacifiCorp,²⁹ violations that the utilities/CIPs have not discovered and thus have not categorized under Rule 18 or scheduled for repair.

H. SED Does Not Oppose CIPs and Utilities Having Auditable Maintenance Programs Subject to Inspection and Record Keeping

Some of the Responses laud Rule 18's record keeping and auditable maintenance program. Notwithstanding Rule 18, GO 95, Rule 31.2, requires utilities and CIPs to inspect their systems as frequently and as thoroughly as necessary to ensure that their facilities comply with all GO 95 requirement at all times. .

IV. PROCEDURE FOR RULEMAKING

SED does not take a position on whether evidentiary hearings will be needed for the proposed Rulemaking. Pub. Util. Code § 1708.5(f) provides that "the commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary

²⁸ See e.g. Response of Liberty Utilities, p. 4; Response of CIP Coalition, pp. 12 - 13.

²⁹ Response of PacifiCorp, pp. 5-6.

hearing accorded by Section 1708." Because the Commission adopted and subsequently amended Rule 18 of GO 95 in R.08-11-005 without any evidentiary hearings, Pub. Util. Code § 1708.5(f) does not require evidentiary hearing upon request by a party to the original proceeding. Nevertheless, the Commission should consider during the Rulemaking proceeding whether evidentiary hearings are needed for other reasons. SED may take a position at that time on the need for evidentiary hearings.

Per Commission practice in Rulemakings, SED requests that the Commission provide parties with an opportunity to conduct discovery and for SED and parties to litigate the matter through commenting or briefing. Parties also should have an opportunity to request one or more workshops to discuss the proposed repeal of Rule 18.

V. CONCLUSION

The Parties' Responses show the complex, easily misunderstood, and contentious nature of SED's proposal to repeal Rule 18. SED's Petition, filed pursuant to Pub. Util. Code § 1708.5 and Rule 6.3(c), requests that the Commission open a Rulemaking so that the Commission can address the merits underlying the Petition's request to repeal Rule 18. Therefore, SED respectfully requests that the Commission grant SED's Petition to commence a Rulemaking to consider repeal of Rule 18.

Respectfully submitted,

/s/ RASHID A. RASHID
RASHID A. RASHID

Attorney for
Safety and Enforcement Division

California Public Utilities Commission
505 Van Ness Avenue, Rm. 5131
San Francisco, CA 94102
Telephone: (415) 703-2705
Email: rashid.rashid@cpuc.ca.gov

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