Decision 17-08-017 August 10, 2017

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.	A.15-05-014 (Filed May 14, 2015)

ORDER MODIFYING DECISION 16-09-002 AND DENYING REHEARING OF THE DECISION AS MODIFIED

I. SUMMARY

This decision addresses the applications for rehearing of Decision (D.) 16-09-002 (or "Decision") filed separately by the Safety and Enforcement Division ("SED") and James Duncan ("Duncan").[1] In D.16-09-002, we granted the application of the City of Santa Rosa ("City") to construct an at-grade pedestrian and bicycle crossing across the Sonoma-Marin Area Rail Transit ("SMART") tracks at Jennings Avenue in Santa Rosa. In its rehearing application, SED argues that D.16-09-002 misinterprets Commission precedent with respect to at-grade crossings and unlawfully relies on a new public interest standard, in place of safety, to grant the at-grade crossing. In his rehearing application, Duncan argues that the Commission errs in its assertion of jurisdiction over the Jennings Avenue crossing. Duncan also contends that changes made to the proposed

[1] Unless otherwise noted, citations to Commission decisions are to the official pdf versions, which are available on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

decision were substantive which required an additional 30-day review and comment period.

We have carefully considered the arguments raised in the applications for rehearing and do not find grounds for granting rehearing. We modify D.16-09-002, as set forth below, to clarify an ambiguity regarding the importance of safety and how safety is considered by the Commission and to correct some minor errors. Rehearing of D.16-09-002, as modified, is denied.

II. DISCUSSION

A. D.16-09-002 properly interprets Commission precedent in evaluating the proposed Jennings Avenue crossing.

SED argues that D.16-09-002 is unlawful because it misinterprets Commission precedent with respect to at-grade crossings. (SED Rehg. App., p. 1.) SED contends that D.16-09-002 wrongly relies on factors found in D.02-05-047 ("*Blue Line*") which it argues applies only to light-rail and not to heavy-rail passenger and freight systems. (SED Rehg. App., p. 1.) SED argues that the Commission committed legal error in applying the *Blue Line* factor test to a heavy-rail crossing in contradiction to Commission precedent. (SED Rehg. App., p. 2.)

SED is not correct. In *Blue Line*, we rejected Pasadena Metro Blue Line Construction Authority's argument that a different legal standard should apply to light rail. (D.02-05-047, p. 10.) We stated:

> Our determination in this and future applications will continue to apply the "heavy burden" and "convincing" standard enunciated in *City of San Mateo, supra*. When an application is filed to construct an at-grade, rather than separate crossing, we shall look for the following:
>
> 1. A convincing showing by applicant to eliminate all potential safety hazards.
> 2. The concurrence of the local community authorities.
> 3. The concurrence of local emergency authorities.
> 4. The opinions of the general public, and specifically those who may be affected by an at-grade crossing.

5. Also relevant, though much less persuasive than safety considerations, should be the comparative costs of an at-grade crossing in comparison with [] grade separation.
6. A recommendation by staff indicating that it concurs in the safety of the proposed at-grade crossing, though there may be conditions recommended.

(D.02-05-047, p. 12.)

While we rejected a different legal standard of practicability for light rail, we recognized that "whether or not a particular crossing is safe may well depend on whether the crossing is used by light rail exclusively or by heavy rail." (D.02-05-047, p. 10.) Thus, we consider the type of rail when determining whether the applicant has demonstrated that its proposed at-grade crossing is safe.

Since *Blue Line* was issued, we have repeatedly stated that a multiple-factor test for practicability applies to all rail types. In D.03-12-018 we indicated that parties agreed that the six factors adopted in *Blue Line* covered the scope of the issues in that proceeding. (D.03-12-081, p. 9.) We stated that we would evaluate the *Blue Line* factors and precedent in factually similar crossings (a seventh factor) when determining whether the applicant had meet its burden of showing that the crossing met the Public Utilities Code standards. (D.03-12-081, p. 9.) D.03-12-018 involved at-grade crossings in San Diego which had both light and heavy-rail tracks. (D.03-12-081, p. 3.)

We also considered the multiple-factor test in D.04-08-013, D.07-03-027, D.09-02-031, D13-08-005 and D.14-08-045.[2] Two of these decisions involved heavy-rail

[2] In the *Application of the City of Bakersfield*, D.04-08-013, the Commission approved the City of Bakersfield's request to construct four at-grade crossings over a freight railroad track. In the *Application of the City of Glendale,* D.07-03-027, the Commission approved a settlement allowing the City of Glendale to construct an at-grade crossing over a combined passenger/freight railroad line. In the *Application of the Exposition Metro Line Construction Authority,* D.09-02-031, the Commission denied the City of Los Angeles' request for an at-grade crossing at Farmdale Avenue because all potential safety hazards could not be eliminated and granted a light-rail line over an existing pedestrian tunnel crossing at Harvard Boulevard. In the *Application for Neighbors for Smart Rail for Rehearing of Resolution SX-100*, D.13-08-005, the Commission affirmed Resolution SX-100 granting the Exposition Metro Line Construction Authority authorization to construct sixteen at-grade and eleven grade-separated highway light-

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crossings. Thus, D.19-09-002 followed precedent by considering the multiple-factor test first enumerated in *Blue Line* in evaluating the Jennings Avenue crossing.

B. D.16-09-002 did not create a new standard for approving at-grade crossings.

SED contends that D.16-09-002 unlawfully relies on a new public interest standard, in place of safety, to authorize the at-grade crossing. (SED Rehg. App., p. 2.) SED contends that D.16-09-002 does not adequately explain the rationale for weighing factors other than safety. (SED Rehg. App., p. 3.) SED cites, in part, to the following discussion to support its contention:

> Safety is of paramount importance to the Commission. Ensuring safe utility service is in the public interest. But safety and public interest are not synonymous. Evaluating a particular facility for safety is different from evaluating what is in the public interest as a whole. Usually the safest type of crossing is a separated grade crossing or no crossing. However, the public interest requires a more nuanced review that considers the public interest as a whole. This includes safety impacts of a separated grade crossing and the alternative detour. As discussed above, both of these options present safety concerns.

(D.16-09-002, p. 25.)

SED is not correct. In D.16-09-002 we considered safety and determined that the proposed Jennings Avenue at-grade crossing was sufficiently safe.[3] D.16-09-002 stated that the design of the proposed grade crossing is intended to comply with Commission safety standards as set forth in General Order 75-D, Americans with Disabilities Act, Caltrans Highway Design Manual path standards, California Manual of Uniform Traffic Control Devices and Federal Highway Administration Railroad-

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rail crossings. In the *Application of Los Angeles County Metropolitan Transportation Authority*, D.14-08-045, the Commission granted the Los Angeles County Metropolitan Transportation Authority authorization to construct seven, two-track at-grade light-rail crossings.

[3] As discussed above, D.16-09-002 appropriately used the *Blue Line* factor test to assess the practicability of a grade-separated crossing.

Highway Grade Crossing Handbook. (D.16-09-002, p. 21.) D.16-09-002 also noted that the City's testimony showed that "the Pedestrian Clearing Sight Distance was sufficient (visibility 1500 to north and 2000 feet to south), but safety devices . . . will be installed. [Footnote omitted]." (D.16-09-002, p. 30.) As D.16-09-002 summarized:

> Safety improvements include flashing light signal assemblies with automatic gate arms, audible warning signals, pedestrian gates, hand rails, paving, walkways and fencing. The warning devices will indicate when a train is approaching and the gate arms will block pedestrian access. The crossing will have additional safety features including pavement markings and truncated domes.
>
> Additional safety improvements would be made because the site consists of a double track. Electronic signs will be installed to notify pedestrians if a second train is coming in close proximity to the first. Exit swing gates would allow pedestrians to exit the track if the gate arms were activated while the pedestrian was in the crossing. Power and fiber optic cable would be available from within the rail corridor for the crossing equipment. Vandal-resistant fencing would be installed to channel pedestrians to the crossing. [Citation omitted.]
>
> The pathway leading to the crossing would be asphalt or concrete, and would be 8 feet wide with 2-foot shoulders on either side. On the east side, the pathway would cross Steele Creek using the existing box culvert. A new streetlamp would also be installed on the east side. [Citation omitted.]

(D.16-09-002, pp. 21-22.)

Thus, we concluded that the City had made a convincing showing that it had eliminated all potential safety hazards. (D.16-09-002, p. 41 [Conclusion of Law 11].)

In considering safety of the at-grade crossing, we also considered and recognized that the proposed grade-separated crossing had its own set of safety risks. (D.16-09-002, pp. 19-20.) After considering the at-grade crossing design and the safety impacts of a separated-grade crossing, we determined that in this particular factual setting, a convincing showing of safety of the at-grade crossing had been established.

However, we note that the language cited by SED may create some ambiguity regarding how we consider safety in reviewing at-grade crossing applications. Thus, we clarify the importance of safety in the ordering paragraphs below.

C. The Commission has jurisdiction over the Jennings Avenue crossing.

Duncan contends that D.16-09-002 misinterprets controlling statutes and case law construing those statutes to conclude that Public Utilities Code sections 1201,[4] 1202,[5] 99152, and 229, when read together, provide the Commission with jurisdiction

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[4] Section 1201 provides:

> No public road, highway, or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade, or shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the commission. This section shall not apply to the replacement of lawfully existing tracks. The commission may refuse its permission or grant it upon such terms and conditions as it prescribes.

[5] Section 1202 provides in part:

> The commission has the exclusive power:
>
> (a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or of a railroad by a street.
>
> (b) To alter, relocate, or abolish by physical closing any crossing set forth in subdivision (a).
>
> (c) To require, where in its judgment it would be practicable, a separation of grades at any crossing established and to prescribe the terms upon which the separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of crossings or the separation of grades shall be divided between the railroad or street railroad

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over the Jennings Avenue railroad crossing.[6] (Duncan Rehg. App., pp. 19-20.) Duncan argues that *Santa Clara Valley Transportation Authority v. Public Utilities Commission of the State of California* ("*Santa Clara*") 124 Cal.App.4th 346 establishes that the Commission's jurisdiction under sections 1201 and 1202 does not apply to transit districts and that the Commission has no authority to regulate public agencies such as transit districts absent express statutory authorization. (Duncan Rehg. App., p. 2.) Duncan contends that our jurisdiction under section 99152 is limited to ministerial approval of safety appliances and procedures and does not grant us jurisdiction over placement, construction and grade separation of rail crossings. (Duncan Rehg. App., p. 7.) This contention has no merit.

In *Santa Clara,* the California Court of Appeal, Sixth Appellate District, annulled D.01-12-053 and D.03-05-081 to the extent that these decisions determined that we had exclusive railroad crossing jurisdiction over the Santa Clara Valley Transpiration Authority ("VTA") light-rail transit crossings pursuant to sections 1201 and 1202. However, the *Santa Clara* Court acknowledged our safety jurisdiction under section 99152. The Court stated:

> Under the circumstances, we find that sections 1201 and 1202 do not apply to the VTA. Therefore, while the PUC has safety jurisdiction over the VTA's light rail transit crossings under section 99152, the PUC does not have exclusive railroad crossing jurisdiction over these crossings pursuant to sections 1201 and 1202.

(*Santa Clara, supra,* 124 Cal.App.4th at p. 365, emphasis removed.)

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> corporations affected or between these corporations and the state, county, city, or other political subdivision affected.

[6] Subsequent section references are to the Public Utilities Code, unless otherwise noted.

Santa Clara did not address the extent of our safety jurisdiction under section 99152.[7] Our safety jurisdiction over transit district guideways is governed by section 99152 which states:

> Any public transit guideway planned, acquired, or constructed, on or after January 1, 1979, is subject to regulations of the Public Utilities Commission relating to safety appliances and procedures.
>
> The commission shall inspect all work done on those guideways and may make further additions or changes necessary for the purpose of safety to employees and the general public.
>
> The commission shall develop an oversight program employing safety planning criteria, guidelines, safety standards, and safety procedures to be met by operators in the design, construction, and operation of those guideways. Existing industry standards shall be used where applicable.
>
> The commission shall enforce the provisions of this section.

We disagree with Duncan's contention that our jurisdiction under section 99152 is limited to ministerial approval of safety appliances and procedures and does not grant us discretionary authority regarding location, construction and design or need for grade separation. We interpret our jurisdiction under section 99152 broadly to encompass all aspects of safety oversight of public transit systems including crossing

[7] The Court stated:

> We wish to emphasize that the issue we decide is limited to the question of whether the exclusive railroad crossing jurisdiction conferred on the PUC by the Legislature pursuant to sections 1201 and 1202 also applies to the VTA's light rail transit crossings. We do not reach the separate issue of whether the PUC has the authority to require the VTA to file an application and obtain the PUC's approval of its light rail transit crossings pursuant to the PUC's section 99152 safety jurisdiction and the existing General Order 143-B application requirement since the VTA has conceded this issue and did not contest this aspect of the Decision in its rehearing application.

Santa Clara, supra, 124 Cal.App.4th at pp. 354-355.

proposals. (*Brown v. Santa Clara Transportation Agency* ("*Brown*") [D.94-10-009] (1994) 56 Cal.P.U.C. 2d 554, 559.) Both the language of section 99152 and our decisions implementing section 99152 support our interpretation. In *Brown,* we stated:

> For our jurisdiction over safety to be meaningful under § 99152, we must be able to issue orders over the entire public transit guideway system…. Any dispute over facilities and defendants must be resolved such that we have a direct and comprehensive - not indirect or piecemeal - regulatory approach to implement our safety responsibilities in furtherance of the overall public interest.

(*Brown*, at p. 559.)

The terms "safety appliances and procedures" and "oversight program," as used in section 99152, are logically read as providing us with complete safety authority over transit systems. The statutory language requiring our "oversight" of "design, construction and operation" of transit systems provides us jurisdiction to review proposed crossing for safety hazards.

In addition to our safety jurisdiction over the Jennings Avenue crossing under section 99152, we also have jurisdiction over the crossing under sections 1201 and 1202. Although SMART owns the rail corridor, the North Coast Railroad Authority is responsible for freight service that runs over the corridor under an agreement with Northwestern Pacific Railroad. Northwestern Pacific Railroad operates the heavy-rail freight service and is a railroad corporation as defined by section 229. SMART's status as a transit district is not relevant to the determination of jurisdiction under 1201 and 1202. What is relevant is that the railroad track is used by Northwestern Pacific Railroad, a railroad corporation, which is subject to our jurisdiction.

Thus, D.16-09-002 lawfully determined that sections 1201, 1202, 99152, and 229, read together, provide us with jurisdiction over the Jennings Avenue railroad crossing.

Next, Duncan argues D.16-09-002 erroneously states that the *Santa Clara* Court determined that VTA's enabling legislation altered the scope of our jurisdiction

under sections 1201 and 1202. Duncan argues that the Court found that the Commission had no jurisdiction over VTA unless expressly provided by statute. (Duncan Rehg. App., p. 21.) We agree that the discussion in D.16-09-002 of the Court's finding is not fully accurate and we remove this discussion in the ordering paragraphs below.

Duncan argues that it was erroneous for D.16-09-002 to state that the *Santa Clara* holding is specific and limited to VTA and cannot be directly applied to SMART. (Duncan Rehg. App., p. 22.) Duncan argues that while the *Santa Clara* case could have been considered technically moot, "the court exercised its discretion 'to resolve the jurisdiction dispute since it is a matter of continuing public importance and the issue is likely to recur with respect to . . . other public entities . . . throughout the state.'" (Duncan Rehg. App., p. 22, citing *Santa Clara*, *supra*, 124 Cal.App.4th at pp. 355-356). Duncan contends that the Santa Clara case is intended to resolve the jurisdictional issue for all public transit agencies. (Duncan Rehg. App., p. 22.)

In D.16-09-002, we correctly concluded that *San Clara* did not impact our jurisdiction over the Jennings Avenue crossing. *Santa Clara* looked at whether or not VTA's light rail could be considered a street railroad corporation. In this case, SMART is providing heavy-rail passenger service as a railroad. Moreover, the *Santa Clara* Court's holdings appear to be limited to light-rail transit crossings.[8] As discussed above, the *Santa Clara* Court also did not consider the extent of our jurisdiction under section 99152. Thus, we legally concluded that *Santa Clara* did not impact the Commission's

[8] *Santa Clara* concerned the Commission's jurisdiction under 1201 and 1202 over light-rail transit systems operated by a transit district. *Santa Clara, supra,* 124 Cal.App.4th 346. The Court stated that the issue before it was "limited to the question of whether the exclusive railroad crossing jurisdiction conferred on the PUC by the Legislature pursuant to *sections 1201* and *1202* also applies to the VTA's light rail transit crossings." (*Id*. at p. 354.) While the Court indicated that it was exercising its discretion to resolve the jurisdiction dispute, it stated it was doing so because it was likely to recur with respect to future light rail transit crossing constructed by the VTA and other public entities that operate light rail transit systems throughout the state." (*Id*. at pp. 355-356, emphasis added.) The Court further stated that this "case turns on statutory interpretation and issues of legislative intent underlying *sections 1201* and *1202* as well as the VTA enabling legislation and related statutes applicable to public light rail transit systems. (*Id*. at p. 359, emphasis added.)

jurisdiction over the proposed Jennings Avenue crossing. (D.16-09-002, p. 40 [Conclusion of Law 2].)

Finally, Duncan contends that D.16-09-002 errs in stating that he relied on *Santa Clara* to assert a total lack of any Commission jurisdiction over the Jennings Avenue crossing. (Duncan Rehg. App., p. 18.) Duncan states that he cited to *Santa Clara* as authority that sections 1201 and 1202 did not apply to SMART. (Duncan Rehg. App., p. 6.)

Duncan is correct that he did not contend that we had no jurisdiction over SMART; rather, he argued that there were no matters in the application that concerned issues within the Commission's limited jurisdiction over transit districts under section 99152. As set forth below in the ordering paragraphs, we make minor modifications to the Decision to accurately represent his position.

D. The Commission did not violate its Rules of Practice and Procedure.

Duncan argues that we violated our Rules of Practice and Procedure by substantively revising the proposed decision without providing an additional 30-day review and comment period because the revision changed the proposed decision to an alternate proposed decision. (Duncan Rehg. App., p. 3.) Duncan takes issue with text, Conclusion of Law 12, and Ordering Paragraph 6[9] which directs the City to work with the School District to determine if a crossing guard should be located at the Jennings Avenue crossing and to provide a report on this to the Commission. (Duncan Rehg. App., p. 26.) Duncan argues that this requirement was not suggested in prior comments by parties, and thus, the addition of this requirement makes the proposed decision an alternate which requires an additional 30-day review and comment period.

The Administrative Law Judges' ("ALJ") modification to the proposed decision adding the direction to consider if a crossing guard should be located at the

[9] Duncan cites to Ordering Paragraph 5 but the language with which he takes issue is in Ordering Paragraph 6.

Jennings Avenue crossing did not transform the proposed decision to an alternate within the meaning of section 311(e) and Rule 14.1(d). Section 311(e) defines an alternate as: "either a substantive revision to a proposed decision that materially changes the resolution of a contested issue, or any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs. (Pub. Util. Code, § 311, subd. (e).) Consistent with Section 311(e) the Commission adopted Rule of Practice and Procedure 14.1 to implement the statute. Rule 14.1 states that an: (d) "alternate proposed decision" means "a *substantive revision by a Commissioner* to a proposed decision . . . which either: (1) materially changes the resolution of a contested issue, or (2) makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs."[10] (Cal. Code of Regs., tit. 20, § 14.1, subd. (d).) A substantive revision to a proposed decision is not an "alternate" if "the revision does no more than make changes suggested in prior comments on the proposed decision." (*Ibid*.)

The addition of the direction was not a substantive revision by a Commissioner but was a revision made by the ALJ in response to SED's comments on the proposed decision. It is normal practice for decisions to contain changes made by an ALJ following comments on the proposed decision. That practice is consistent with section 311(d), which allows us to adopt, modify, or set aside all or part of a proposed decision without any additional review or comment. We have "never interpreted section 311(e) to require circulation of a revised proposed decision for comment if the revisions are based on party comments. To require recirculation of the proposed decision in such instances would subject the Commission and the parties to endless rounds of comments

[10] As we determined in *Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms -- Order Modifying Decision (D.) 12-12-030 and Denying Rehearing, As Modified*, D.15-07-044, "[t]he legislative history of section 311(e) affirms that Rule 14.1 is lawful. It shows that the Legislature intended 'alternates' to be substantive changes made by a Commissioner, not revisions made by an ALJ. (D.15-07-044, p.9, citing Sen. Comm. on Energy and Public Utilities on Assem. Bill 2850 (1993-1994 Reg. Sess.), as amended June 8, 1994, p. 1.)

and unnecessarily prolong Commission proceedings and thus waste limited Commission resources." (D.14-02-042, pp. 7-8.)

Here, the Commission did not mandate the hiring of a crossing guard but merely directed the City and School District to consider whether a crossing guard is necessary. Thus, the change was not substantive as it did not materially affect the outcome of the case, which granted the at-grade crossing. Moreover, the ALJ made the changes to the proposed decision after SED raised the issue of the safety of school children who will be using the at-grade crossing in its comments on the proposed decision. (SED Comments on Proposed Decision, pp. 5-6, 14, A-1.) SED argued, in part, that the City had not eliminated all potential safety hazards. (SED Comments on Proposed Decision, p. 6.) Mr. Duncan had the opportunity to respond to SED's safety concerns. Thus, we did not violate our Rules of Practice and Procedure because there was no alternate proposed decision within the meaning of our Rules.

III. CONCLUSION

As discussed above, we modify D.16-09-002 to clarify an ambiguity regarding the importance of safety and how safety is considered by the Commission and to correct some minor errors. Rehearing of D.16-09-002, as modified, is denied as no legal error has been shown.

THEREFORE, IT IS ORDERED that:

1. D.16-09-002 is modified as follows:
   a. Page 4, last sentence of the second full paragraph:

      add the word "exclusive" before the word "jurisdiction."

   b. Modify the first sentences of the third full paragraph on page 12 to read:

      In his Response, and throughout this proceeding, Duncan has asserted that the Commission does not have exclusive jurisdiction over the crossing pursuant to sections 1201 and 1202 and the Commission's limited jurisdiction under section 99152 does not cover matters within the scope of this application.

c. Replace the last paragraph starting on page 13 and continuing to page 14 with the following:

> The *Santa Clara VTA* holding is specific to VTA and should not be applied directly to SMART. The *Santa Clara VTA* court based its decision on analysis of VTA's enabling legislation and the facts of that case. *Santa Clara* did not consider the extent of our jurisdiction under section 99152.

d. On page 14, first sentence of the first full paragraph, remove "Finally," and capitalize the word "as."

e. Replace the second full paragraph on page 25 with the following:

> Safety is of paramount importance to the Commission. Ensuring safe service is in the public interest. Safety is thus a critical element of public interest. In this particular case, public interest necessitates consideration of the safety impacts of a separated-grade crossing and the alternative detour. As discussed above, both of these options present safety concerns.

2. Rehearing of D.16-09-002, as modified, is denied.

3. This proceeding, Application 15-05-014, is closed.

This order is effective today.

Dated August 10, 2017, at San Francisco, California.

MICHAEL PICKER
President
CARLA J. PETERMAN
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners