

Decision 08-11-009 November 6, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking to implement the provisions of Public Utilities Code Section 761.3 enacted by Chapter 19 of the 2001-02 Second Extraordinary Legislative Session.

Rulemaking 02-11-039
(Filed November 21, 2002)

**FINAL DECISION REGARDING PETITION TO MODIFY
DECISION 04-05-018 AND GENERAL ORDER 167**

1. Summary

In response to the energy crisis of 2000-2001, the Legislature found that electric powerplants “are essential facilities for maintaining and protecting the public health and safety of California residents and businesses.”¹ The Legislature also found that it “is in the public interest to ensure that electric generating facilities and powerplants located in California are effectively and appropriately maintained and efficiently operated” in order to provide the “critical and essential good” that is electricity.²

The Legislature implemented these findings by establishing the California Electricity Generation Facilities Standards Committee (Committee). The Committee was charged with developing and adopting operation and maintenance standards for California’s electric generating facilities and

¹ Senate Bill (SB) 39XX, § 1(a). (SB 39XX (Burton and Spier), added by Statutes 2002, Second Extraordinary Session, Chapter 19, Section 4, effective August 8, 2002.) SB 39XX repealed Pub. Util. Code § 342, amended § 362, and added § 761.3. All subsequent statutory references are to the Public Utilities Code, unless noted otherwise.

powerplants. The Legislature also ordered that the Commission implement and enforce Committee-adopted standards, and enforce the California Independent System Operator (CAISO) Outage Coordination Protocol.

The Commission responded by adopting General Order (GO) 167, which includes both (a) Committee-adopted standards and (b) provisions for implementation and enforcement. Upon considering applications for rehearing, we made clarifying changes to the enforcement protocols, and directed further development of those protocols.

Here, we grant a petition for modification that adds further procedural details to the enforcement mechanisms in GO 167. These details include specification of the form and content of citations, and clarification of the process for issuance and review of citations. This results in a program with enhanced clarity, improved efficiency, and desirable consistency with other Commission citation programs. All issues are now resolved. This proceeding is closed.

2. Background

We adopted GO 167 in 2004, and have made various modifications in subsequent years.³ GO 167 provides for implementation and enforcement of all Committee-adopted operation and maintenance standards for electric generating facilities and powerplants including: General Duty Standards,⁴ Generator

² SB 39XX, §§ 1(b) and (c).

³ See, for example, Decision (D.) 04-05-017, D.04-05-018, D.04-12-049, D.05-08-038, D.06-01-047, D.06-06-001, D.06-06-069, and Resolution E-4184 (adopted August 21, 2008).

⁴ The General Duty Standards ceased to be applicable as separate and independent standards on and after December 20, 2004. Necessary and appropriate General Duty Standards were incorporated at that time for facilities that are one megawatt or larger in specific operation and maintenance standards. (See GO 167, § 4.3.)

Logbook Standards (Thermal Energy), Generator Logbook Standards (Hydroelectric Energy), Generator Maintenance Standards, and Generator Operation Standards. It provides for Commission enforcement of the CAISO Outage Coordination Protocol. It also delegates authority to the Commission's Consumer Protection and Safety Division (CPSD) to assess a scheduled fine for each of five specific violations.

Several parties applied for rehearing of two orders adopting GO 167. As a result, we modified GO 167 to provide further clarity, and denied the applications for rehearing of our decisions, as modified.⁵ We directed that CPSD draft a proposal to provide greater detail on the procedures to be followed when implementing the citation program.⁶ We directed that CPSD serve the proposal on parties for comment. We also directed that, after reviewing comments, CPSD propose supplements to GO 167 by resolution, or changes to GO 167 by a petition for modification.⁷

CPSD reports that it circulated proposed changes to GO 167 on March 16, 2007, but that no party served comments. On July 10, 2007, CPSD filed a petition for modification of D.04-05-018 and GO 167.

On August 9, 2007, the Generating Asset Owners Coalition (Coalition) filed a response in opposition to the petition.⁸ Also on August 9, 2007, Southern

⁵ D.06-01-047 ("Order Modifying and Denying Rehearing of Decisions 04-05-017 and D.04-05-018").

⁶ *Id.*, Ordering Paragraph (OP) 11.

⁷ *Id.*

⁸ The Coalition is composed of 15 entities: AES Alamitos LLC; AES Huntington Beach LLC; AES Redondo Beach LLC; Calpine Corporation; Dynegy South Bay LLC; Dynegy Morro Bay LLC; Dynegy Oakland LLC; Dynegy Moss Landing LLC; GWF Energy LLC;

Footnote continued on next page

California Edison Company (SCE) filed a response in partial opposition, commenting on two specific items in CPSD's proposal (ex parte rules, and placing a cap on the level of a fine if a generating asset owner (GAO) appeals the citation).

3. Timeliness of Petition

Petitions for modification must be filed within one year or, if later, must explain why the petition could not have been presented within one year of the effective date of the decision. We may, at our discretion, summarily deny the petition if the late submission is not justified.⁹

CPSD filed the petition on July 10, 2007, more than three years after our May 6, 2004 order on GO 167 (D.04-05-018), and more than one year after our January 26, 2006 order on the applications for rehearing (D.06-01-047). Coalition asserts that we should summarily deny the petition. We decline to do so for the following reasons.

First, Coalition asserts that CPSD could have proposed changes within one year of the initial order adopting GO 167, particularly since CPSD's petition, according to Coalition, proposes not only procedural but substantive changes. To the contrary, while CPSD could have filed a petition within one year of our May 2004 order, it was not until our order in January 2006 that certain pending matters were addressed, clarifying program changes were made, and CPSD was directed to make a proposal. Also, we do not agree with Coalition that the proposed changes involve substance. Rather, the proposed changes all

High Desert Power Project, LLC; La Paloma Power Plant; Mirant California, LLC; Mirant Delta, LLC; Mirant Potrero, LLC; and NRG West Coast LLC.

⁹ Rule 16.4(d) of the Commission's Rules of Practice and Procedure (Rules).

fundamentally involve procedure and are consistent with our January 2006 directions.

Second, Coalition argues that the petition is more than one year after the January 2006 order directing CPSD to make a proposal and should, therefore, be summarily denied. We disagree. CPSD correctly points out that the delay was caused, in part, by its efforts to make the GO 167 citation program consistent with two other staff citation programs developed during the same time frame.¹⁰ We are also persuaded by CPSD that the delay has not resulted in prejudice to the Coalition, GAOs, or any party to this proceeding. An enforcement process was in place. A delay in considering modifications does not harm the interest of any GAO or party in a way that would justify summary dismissal.

Third, Coalition asserts that consistency with unrelated citation programs cannot be a basis upon which to make the proposed changes, and does not justify a delay in CPSD filing of the petition. Coalition is incorrect. While different industries, entities and Commission Divisions may be involved, our goal is to make the Commission's various enforcement processes as similar as is reasonable and feasible. Coalition minimizes the value of consistency between programs, when such consistency provides an opportunity to increase efficiency for both the Commission and stakeholders. Moreover, Coalition unreasonably

¹⁰ Resolution UEB-001 (August 24, 2006, regarding a citation program to enforce compliance with third-party verification requirements in Pub. Util. Code § 2889.5, administered by Telecommunications Division). Also, Resolution E-4017 (October 5, 2006, regarding a citation program to enforce compliance with resource adequacy filing requirements for certain load serving entities, administered by Energy Division).

discounts the time necessary for CPSD to formulate a proposal and formally file a petition while fulfilling its other vital public health and safety duties.

CPSD reasonably explains why the petition was not filed within one year. Coalition fails to convincingly argue that the petition should be summarily denied. It is reasonable to consider the petition. The petition is timely.

4. Discussion

Existing § 13 of GO 167 provides Commission process for formal and informal enforcement. Subsection 13.3 (“Imposition of Fines for Specified Violations”) delegates authority to CPSD to assess a scheduled fine for a specified violation, and states the process to be used by a GAO for accepting or contesting a fine. Appendix F lists the five specified violations along with the applicable scheduled fine.

CPSD recommends changes to § 13.3 and Appendix F. In particular, CPSD proposes that § 13.3 clarify and expand upon who may assess the fine; change “contest” to “appeal”; and include new sections related to default, form and content of citations, service of citations, procedures for appeal, and prohibition of ex parte communication. CPSD also proposes the fourth specified violation in Appendix F be modified to eliminate the requirement that the violation be the result of negligence. (See Attachment A for a version that shows the proposed changes in strike-out and underline form.)

We adopt all of CPSD’s proposals. (See Attachment B for the final version without strike-out and underline.) These changes provide exactly the type of procedural detail that we found desirable and necessary.¹¹ The modifications

¹¹ D.06-01-047, p. 13.

benefit all stakeholders by providing clarity in, and streamlining of, the administrative process. They provide desirable consistency with other citation programs.¹² As discussed below, the objections and concerns raised by Coalition and SCE are not persuasive.

4.1. Nature of Program

Coalition argues that CPSD's proposed modifications fundamentally change the nature of the citation program from one where the GAO must (a) agree to the fine to (b) defend itself in a formal matter appealing the fine. This exceeds the Commission's instructions, according to Coalition, to "further detail the procedural steps to be followed in implementing the program," which the Coalition points out we said might include specifying "the form and content" of the notice to a GAO.¹³

We disagree. The proposed changes essentially do nothing more than streamline the administrative process for hearing contested matters consistent with other citation programs. For example, GO 167 now provides that staff may "proceed to any remedy otherwise available to the Commission." (Existing GO 167, § 13.3.4.) The proposed changes state with greater specificity the remedy we expect CPSD to use. The changes clarify and streamline the procedures and processes that apply to the remedy.

¹² In addition to the two resolutions referenced in a previous footnote (i.e., Resolution UEB-001 and Resolution E-4017), also see Resolution ALJ-187 (September 22, 2005, regarding a citation program for certain violations committed by Household Goods Carriers, Charter Party Carriers, and Passenger Stage Corporations, administered by CPSD).

¹³ Coalition Comments, p. 4 and footnote 7, citing D.06-01-047. (See D.06-01-047, p. 13.)

Moreover, in determining “that there should be supplemental proceedings to refine the program,” we did not limit CPSD to the form and content of notice requirements. This was an example, not a strict limitation. We intended a somewhat broader examination “to refine the program,” including examination of the relationship with “other citation programs that the Commission has implemented.”¹⁴ CPSD’s proposal accomplishes this broader examination.

Coalition complains that the proposed process shifts the burden to the GAO.¹⁵ Coalition is incorrect. The proposal clearly states that CPSD bears the burden.¹⁶

Coalition is concerned that the proposal requires the GAO to state its grounds for appeal. Coalition reasons that this suggests the existence of some sort of appeal screening process that is not presently in GO 167. Coalition’s concern is misplaced. Requiring a clear, written statement of the GAO’s position provides an additional opportunity for CPSD to “withdraw the citation where facts and circumstances warrant such action.”¹⁷ This promotes efficiency.

Further, the requirement to state the grounds for appeal simply results in the provision of relevant information to the Administrative Law Judge (ALJ) in a timely manner so that the fundamental positions are clear. This provides cost savings and efficiency by, for example, potentially eliminating or streamlining an otherwise costly and time-consuming prehearing conference. It is not a screening tool to minimize or eliminate any party’s rights. Unless the GAO

¹⁴ D.06-01-047, p. 13.

¹⁵ The shift is, according to Coalition, from the GAO accepting a fine to the GAO defending itself in a formal appeal of a fine.

¹⁶ Proposed § 13.3.8.7 of GO 167.

declines, the GAO will have a hearing before an ALJ, no matter the stated grounds for appeal.¹⁸

Coalition is concerned that the CPSD proposal improperly delegates powers to CPSD, and thereby resurrects “the delegation issue the Commission has twice addressed.”¹⁹ To the contrary, the proposal does not increase the authority delegated to CPSD. Both in GO 167 now and with the proposed change, the fine is payable only if the GAO accepts the fine, or the fine is levied by the Commission. The proposal simply provides specificity and efficiency for Commission consideration of the matter when a GAO does not accept the fine. For a contested fine, that includes a hearing before an ALJ, followed by an order placed on a Commission agenda.²⁰ It also includes efficient process if the GAO fails to respond within a reasonable amount of time (i.e., default). This does not improperly delegate powers or shift burden. Rather, it provides reasonable procedure that protects the rights of each party.

Finally, Coalition asserts that changing the terminology from that wherein the GAO may “contest” a fine to one in which the GAO is obligated to “appeal” suggests a different framework and expectation. Further, Coalition says referring to the GAO as “respondent” confuses matters since a respondent “usually refers to the party that is the defender of an appealed decision.”²¹ We are not persuaded. Existing citation programs refer to the process as an “appeal”

¹⁷ Proposed § 13.3.4 of GO 167.

¹⁸ Proposed § 13.3.8.4 of GO 167.

¹⁹ Coalition Comments, p. 5.

²⁰ Proposed § 13.3.8 of GO 167.

²¹ Coalition Comments, p. 6.

with a “respondent.”²² The proposal conforms GO 167 to other citation programs. It does not change either the framework or expectation. Most importantly, it does not change the fundamental rights or responsibilities of any participant. Rather, it provides clarity and efficiency in a parallel manner to other similar programs.

In summary, the proposal is not a fundamental change in the nature of the existing program. Rather, our adoption of the proposal is responsible government implementing efficiencies for all stakeholders.

4.2. Confusion and Unnecessary Details

Coalition asserts that CPSD’s proposed revisions “create confusion regarding how the process would work in practice.”²³ Coalition’s concern is unsupported and without merit. CPSD has modeled the proposed process on other Commission citation programs that function well. Coalition offers no evidence that the other programs cause confusion among their participants. Coalition offers no compelling reason why an analogous program would create confusion when applied to GAOs.

Coalition claims that the proposed changes foster further confusion because they include provisions which are unnecessary or redundant of existing rules. In support, Coalition cites a proposal which states that the ALJ may continue hearings, but Coalition points out that an ALJ already has that authority. Coalition also cites several other examples of proposed changes that

²² See, for example, Resolution UEB-001, Items 6-8 at pp. 3-6; Resolution E-4017, Item 2.7 at pp. 6-7; Resolution ALJ-187, Item 4 at pp. 2-3.

²³ Coalition Comments, p. 7.

are unnecessary or redundant, such as: hearings may be re-calendared, transcripts may be ordered, and the GAO must pay for its own attorney.

We think inclusion of these details is not unreasonable. First, it provides desirable consistency in a parallel structure to the rules in other enforcement programs wherein these provisions are stated. Second, it summarizes relevant matters in one place for a GAO who may not have as much experience with Commission process as may other regulated entities or more frequent practitioners before the Commission.

Coalition is concerned that there are conflicts between the Commission's Rules of Practice and Procedure and the proposed changes to GO 167. In support, Coalition notes that proposed § 13.3.8.7 states:

Formal rules of evidence do not necessarily apply, and all relevant and reliable evidence may be received in the discretion of the Administrative Law Judge.

In contrast, Coalition says Rule 13.6(a) places greater emphasis on fairness to the parties by that ruling stating:

Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.

We find no conflict. First, the proposed language provides desirable consistency in a parallel structure to the language used in other enforcement programs.²⁴ Second, the absence of saying "substantial rights of the parties shall be preserved" does not vacate either the principle or those rights. Appeal of a

²⁴ See, for example, Resolution E-4017, Item 2.7.7 at p. 7; Resolution ALJ-187, Item 4(h) at p. 3.

Commission order may be taken if the Commission commits legal error. Failure to provide a party its substantial rights would be grounds to allege legal error.

Coalition believes needless confusion is created by a possible difference in treatment of submission. According to Coalition, proposed § 13.3.8.8 provides: “ordinarily, the case will be submitted at the close of hearing” while existing Rule 13.14 provides: “a proceeding shall stand submitted for decision by the Commission after the taking of evidence, the filing of briefs, and the presentation of oral argument as may have been prescribed.” Coalition wonders if this means that under the proposed program there will be no opportunity for briefs or oral argument.

There is no confusion. The proposed rule is consistent with treatment of submission in other citation programs. These programs seek to minimize cost and burden on each respondent and the Commission. To accomplish this, the proceeding will normally be submitted at the close of hearing. As with other citation programs, proposed § 13.3.8.8 continues:

The Administrative Law Judge, upon a showing of good cause, may keep the record open for a reasonable period to permit a party to submit additional evidence or argument.

Thus, the taking of briefs, or the hearing of oral argument, will occur when appropriate. In the interest of designing a program that is not unnecessarily burdensome on stakeholders, however, briefs or oral argument will not necessarily take place in all cases. This slight difference in approach to submission is efficient and reasonable while maintaining the rights of all parties.

CPSD proposes that ex parte communications be banned from the date the citation is issued until after the final order is issued. Coalition and SCE contend that CPSD’s proposed ex parte rule is unnecessary since current rules cover

ex parte communication. They also assert that the proposed rule may conflict with the Commission's existing ex parte rules because under current rules not all ex parte communications are prohibited. Coalition and SCE conclude that the proposed rule should be deleted. Again, we are not persuaded.

CPSD's proposed ex parte provision is consistent with that in other Commission citation programs.²⁵ We see no reason to depart from applying a uniform approach. Furthermore, these matters are clearly adjudicatory in nature.

Finally, Coalition strongly encourages that we limit the provisions of GO 167 to only those strictly necessary to carry out the Commission's intent, and that we do not clutter GO 167 with what Coalition characterizes as unnecessary, redundant, conflicting and confusing provisions. We disagree in part, for the reasons stated above. At the same time, we agree in part, and, therefore, do not include other items in the GO that would unquestionably be unnecessary, redundant, conflicting or confusing.²⁶

4.3. Cap on Fine

SCE argues that CPSD's proposed § 13.3.4 should be changed to limit the available remedies in the event of an appeal. Otherwise, SCE reasons that an appeal might lead to an even greater fine than specified in Appendix F, thereby effectively penalizing a GAO for exercising its right to an appeal. We are not persuaded.

²⁵ See, for example, Resolution ALJ-187, Item 4(k) at p. 3; Resolution UEB-001, Item 9 at p. 6; Resolution E-4017, Item 2.7.10 at p. 7.

²⁶ For example, we do not include Commission rules regarding ethics, construction, signatures, service, amendments, corrections, filing, and computation of time. (See Article 1 of the Commission's Rules).

The current language of § 13.3.4 provides:

If the matter proceeds to a more formal proceeding before the Commission, neither CPSD in its investigation nor the Commission will be limited to the specified Violations or the schedule of fines set forth in Appendix F to this General Order.

CPSD proposes that § 13.3.4 read:

In the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated or limited to the scheduled fine.

There is no substantive difference in the remedies available under either version of § 13.3.4. Nonetheless, the proposed language is a modest improvement. For example, facts learned during the appeal may mitigate the penalty.²⁷ The new language makes clear that the fine is not mandated to be at the level of the scheduled fine.

On the other hand, facts learned at hearing might enhance the penalty. The proposed language, just as the existing language, makes clear that the Commission is not limited to the scheduled fine.

This does not punish a GAO for exercising its rights. It merely clarifies that the authority and process delegated to CPSD is somewhat constrained consistent with delegation of certain matters to staff. The same constraints do not apply to the Commission.

²⁷ Whether or not the Commission imposes a sanction at all is govern by several factors. (See GO 167, § 14.1.) Sanctions may be mitigated or enhanced based on several factors. (See GO 167, §§ 14.2 and 14.3.) Consideration of these factors is not for CPSD, however, but is for the Commission, since GO 167 directs that these factors do not apply to specified violations and the schedule of fines set forth in GO 167, Appendix F, when administered by CPSD. (See GO 167, § 14.4.)

Moreover, it would be unreasonable for the Commission to limit itself before hearing the facts and considering the law in any particular case. Rather, CPSD and the GAO may present the facts and the law at hearing. The GAO may argue at the appropriate time that the penalty, if any, should not exceed the scheduled fine in order not to effectively penalize the GAO for undertaking the appeal. The Commission will consider that argument, if made, and all other facts and argument at the appropriate time. We decline to prejudge such arguments here.

4.4. Negligence as an Element in Fourth Specified Violation

Appendix F lists five specified violations and the related fines to be imposed. The fourth specified violation is: “Negligent submission of inaccurate information in response to an information request under Section 10.0 of the General Order.” CPSD proposes to remove the word “negligent.”

We adopt CPSD’s proposed change. The purposes of GO 167 include ensuring vitally and critically important public health, public safety, electric system reliability and electric system adequacy.²⁸ As we said in D.04-05-018:

The GO does require adherence to the standards or other obligations set forth therein, and this obligation exists whether or not the generator intended a violation or was negligent or reckless.²⁹

²⁸ See, for example, GO 167, § 1.0, which says in relevant part: “The purpose of this General Order is to implement and enforce standards for the maintenance and operation of electric generating facilities and power plants so as to maintain and protect the public health and safety of California residents and businesses, to ensure that electric generating facilities are effectively and appropriately maintained and efficiently operated, and to ensure electrical service reliability and adequacy.”

²⁹ D.04-05-18, Attachment B, p. 12 (emphasis added).

This unconditioned requirement is reflected in the language of the other four specified violations, none of which require an inquiry into the intent, negligence, recklessness or reasonableness of a GAO's failure to comply with GO 167. In the first instance of applying a scheduled fine for a specific violation, a straightforward adherence to the standard is reasonable. This approach is as applicable for the fourth specified violation as the other violations.

Coalition objects. First, Coalition contends that this alteration expands the scope of the fourth specified violation. We disagree. As noted above, the removal of the word "negligent" is consistent with the purposes of GO 167, and is a parallel application with the other four violations.

Second, Coalition says deleting the word "negligent" greatly expands the scope of the fourth violation, potentially applying penalties to a much broader set of possible errors. Coalition cautions:

Negligence is a legal doctrine that is directly tied to a duty of care; if a party exercised reasonable care under the circumstances, there is no legal negligence. With CPSD's proposed deletion, submission of any inaccurate information, regardless of the reason for the inaccuracy, the efforts of the filer to ensure the accuracy of the information, or the immateriality of the error, would become a specified violation subject to substantial fines.³⁰

We largely agree with Coalition in this regard, and adopt the CPSD proposal in part because of these concerns. We do not intend that our delegation to CPSD compel CPSD to make judgments requiring an application of the legal doctrine of negligence. The delegation is intended to be more direct, clear and straightforward. If the GAO disagrees with the citation (including the GAO's defense that it exercised reasonable care under the circumstances), the GAO may

appeal the citation. The appeal involves a level of judgment properly before an ALJ and the Commission. That judgment may include whether or not the sanction should be applied, and whether or not a sanction, if applied, should be adjusted for mitigating factors.³¹

At the same time, this does not limit CPSD's ability to apply reasonable, if limited, judgment. For example, CPSD may "at its discretion...withdraw the citation where facts and circumstances warrant such action."³² CPSD may withdraw the citation if the GAO presents facts and circumstances that reasonably explain the situation and warrant such withdrawal.

Finally, Coalition says the proposed change is in excess of our direction to CPSD to provide detail on the procedural steps in the citation program. This argument is without merit. Whether the proposed change is procedural or substantive is of no matter. Whether or not D.06-01-047 directs CPSD to provide such proposals, we are not bound to reject constructive proposals. Moreover, we sought a refinement of the program, including consideration of other citation programs. This proposal is a reasonable refinement that considers other citation programs. For example, negligence is not a factor in the specified violations included in our resource adequacy citation program.³³

4.5. Other Concerns

Coalition raises other concerns. Coalition recommends that we direct CPSD to initiate a meet and confer process with GAOs in order to address these

³⁰ Coalition Response, pp. 9-10.

³¹ GO 167, § 14.0.

³² Proposed § 13.3.4 of GO 167.

³³ See, for example, Resolution E-4017, Appendix A.

concerns, and to develop the citation program further. We decline to do so. As discussed below, these concerns do not merit our ordering a meet and confer process.

First, a meet and confer session would use the limited time, money, and resources of all stakeholders, including GAOs, Coalition, and the Commission. It would further delay implementation of proposed changes which are reasonable, for the reasons discussed in previous sections of this decision. Moreover, Coalition and/or GAOs have had adequate time to seek a meeting with CPSD if they, in fact, believed a meeting would have been productive. We have no information that such meeting was sought and denied.³⁴ We decline to order parties to meet and confer when we are not convinced that the extra costs would outweigh the benefits, if any.

Second, Coalition is concerned that, as proposed, the CPSD Director may designate an employee to assess the scheduled fine. Coalition says it is not clear how the CPSD Director will designate that person, or how GAOs will be made aware of this delegation. GAOs ask that the process be further clarified with GAO input. We are not convinced. There is no need for GAO input on the method used by the CPSD Director to designate or assign an employee to carry out CPSD's duties. The CPSD Director has the authority and responsibility to make such determinations and staff assignments. Industry input is not needed on internal personnel and management issues.

Regarding the GAO being made aware of the delegation, a GAO may assume that any CPSD employee who issues a citation is authorized to do so. A

³⁴ Coalition does not support its request, for example, by showing that it sought a meeting with CPSD, but that CPSD denied the request.

GAO may appeal the citation if there is reason to believe otherwise. The GAO should list this as one reason in its grounds for appeal, if appropriate. (Proposed § 13.3.8.1.) Absent compelling reason otherwise, we would expect the CPSD Director to withdraw the citation if it was issued by an employee who was not authorized to do so. (Proposed § 13.3.4.) If the matter moves to hearing, CPSD has the burden of proof. The required proof may include that the citation was issued by an employee delegated to do so. If CPSD does not meet its burden of proof that the employee was authorized to cite the GAO, absent compelling reason otherwise, we would expect the citation to be set aside.

Third, Coalition asserts it is crucial for the Commission to ensure that the GAO has actually received the citation, since default results in significant financial implications. Coalition proposes that the Commission replace the requirement of service by first class mail with a requirement that citations be served by both registered mail and electronic mail. We decline to adopt this suggestion. Service by first class mail is the standard in other citation programs. We are not aware of any complications related to service by first class mail in other programs that would caution us to adopt a different approach here.

In addition, because failure to receive notice might be grounds for appeal, CPSD has a strong incentive to ensure that service is perfected. We are confident that CPSD will take reasonable actions in order to establish, if challenged, that service was properly completed. In addition to first class mail, we encourage (but do not require) CPSD to use electronic mail in most, if not all cases. Further, CPSD may consider using registered mail in cases where that would help establish service was completed. We leave the details up to CPSD.

Finally, Coalition recommends that program modifications be designed to encourage settlements before CPSD issues a citation. In particular, Coalition

suggests that a requirement be added for CPSD and the GAO to meet and confer on the possibility for settlement before CPSD issues a citation.

We consistently encourage open communication between GAOs and the Commission, but are not convinced that a meet and confer duty should be added. We expect GAOs to fully cooperate with all staff information requests, audits, inspections and investigations. We expect there will be opportunities for meeting and conferring during the pendency of those requests, audits, inspections and investigations. We do not believe it is necessary or desirable to require a specific meeting and conference. A GAO may request a meeting and conference at any time, including before or when the citation is issued. The GAO may also request a meeting when it files its Notice of Appeal. The Notice of Appeal may, in fact, ripen the issue to the point where a meeting and conference, if not held before, would be productive. We expect CPSD to agree to all reasonable requests for a meeting and conference. The hearing may be continued if both parties inform the ALJ that they desire time to meet and confer.

Thus, for all the reasons discussed above, we decline to direct GAOs and CPSD to meet and confer on further modifications to GO 167 before the petition is considered.

5. Close Proceeding

All issues in the petition for modification are now resolved. This proceeding is closed.

6. Comments on Proposed Decision

On October 6, 2008, the proposed decision of the assigned Commissioner in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on

October 23, 2008 by Pacific Gas and Electric Company (PG&E). No reply comments were filed. Consistent with our rules, we give no weight to comments which fail to focus on factual, legal or technical errors; fail to make specific references to the record; or merely reargue positions already stated. (Rule 14.3(c) of the Commission's Rules of Practice and Procedure.)

PG&E makes two recommendations, which we address here. First, PG&E recommends that we direct CPSD to provide service of citations not only by first-class mail but also by electronic mail. PG&E states that electronic mail is cost efficient, allows for the quickest service, saves resources, and allows distribution of the citation within the GAO's organization to occur quickly and without wasteful paper copies.

PG&E's comment essentially fails to focus on errors, reargues positions already taken by parties, and fails to make specific references to the record. It also apparently seeks to introduce new facts after the filing of the proposed decision. While we may agree with the advantages of electronic mail noted by PG&E, we also consider that regulated entities provide an address for service of formal documents by first-class mail. We do not place the extra requirement on CPSD to research and find an electronic mail address, and perform the extra service. We continue to encourage CPSD to use electronic mail, but do not make it a requirement.

Second, PG&E requests clarification of the 30-day timeline for the ALJ to issue an order "after the appeal is submitted." (§ 13.3.8.9.) If submission of the appeal is not the day that the Notice of Appeal is filed with the CPUC Director, PG&E asks for an estimate of the timeline for appeals, asserting that it otherwise appears to be an open timeline.

Consistent with Commission use of the term “submission” or “submitted,” the 30-days begins when the record is complete (i.e., taking of evidence, the filing of briefs, presentation of oral argument, if any³⁵). While PG&E asks for an estimate of the timeline for appeals, we decline to make a specific estimate or set a strict schedule. The facts and law relative to each case will dictate that some matters may be resolved quickly, but others might be more complex and take more time. In general, we expect citation appeals to be fact-specific, with necessary consideration of only very limited facts. If true, we expect each appeal to be handled quickly.

7. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner. Burton W. Mattson is the assigned ALJ.

Findings of Fact

1. The Commission directed CPSD to draft a proposal that would provide greater detail on the citation program implemented by GO 167 and, if changes should be made to GO 167, to propose such changes via a petition to modify D.04-05-018 and GO 167.
2. The petition is not untimely, and it is reasonable to consider the petition.
3. The changes proposed by CPSD to GO 167 provide desirable and necessary procedural detail; benefit all stakeholders by providing clarity in, and streamlining of, the administrative process; provide desirable consistency with other Commission citation programs; and implement efficiencies in the program.
4. CPSD’s proposals do not change the fundamental nature of the program.

³⁵ See, for example, Rule 13.14(a).

5. CPSD's proposals neither create confusion nor introduce unnecessary details.

6. Adherence to the standards and obligations in GO 167 is required whether or not the generator intended a violation, and that unconditioned requirement is already reflected in four of five specified violations in Appendix F of GO 167.

Conclusions of Law

1. The petition for modification should not be summarily denied.

2. The petition for modification should be granted.

3. The proposed changes do not shift the burden of proof, nor do they create a screening process for appeals.

4. There is no substantive difference in the remedies available when an appeal is lodged under either existing or proposed § 13.3.4, but facts and argument at hearing may mitigate or enhance the penalty, while placing a cap on the level of a fine prior to consideration of an appeal would unreasonably prejudge those facts and arguments.

5. CPSD should not be required to make judgments requiring an application of the legal doctrine of negligence before assessing a scheduled fine for a specified violation.

6. Coalition, GAOs, and CPSD should not be ordered to engage in a meet and confer session before the petition for modification is considered.

7. This proceeding should be closed.

8. This order should be effective today so that the improved enforcement protocols are effective without delay.

FINAL ORDER

IT IS ORDERED that:

1. The July 10, 2007 Petition to Modify Decision 04-05-018 and General Order (GO) 167 filed on July 10, 2007 by the Commission's Consumer Protection and Safety Division (CPSD) is granted. GO 167, § 13.3 and Appendix F are modified as shown in Attachment B.
2. Within 15 days of the date this order is mailed, the CPSD Director shall notify each known Generating Asset Owner subject to GO 167 of this decision, and post a revised GO 167 on the Commission's web site.
3. Rulemaking 02-11-039 is closed.

This order is effective today.

Dated November 6, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

ATTACHMENT A

RULEMAKING 02-11-039
PROPOSED CHANGES TO GENERAL ORDER 167

Changes are proposed to § 13.3 and Appendix F of General Order 167 as shown below. Underlined text indicates additions and strikeout text indicates deletions.

A. CPSD Proposes the Following Changes to § 13.3:

13.3 Imposition of Fines for Specified Violations

13.3.1 Specified Violations. For specified Violations of this General Order, the Director of CPSD and his/her designee may assess a scheduled fine or, in the alternative, proceed with any remedy otherwise available to CPSD or the Commission. Scheduled fines may be assessed by CPSD only for the Violations referenced in subsection 13.3.2 of this General Order. CPSD shall notify the Generating Asset Owner, in writing, of any specified Violations and assessed fines, and shall include notice of the right to contest the fine as set forth in subsections ~~13.3.3 and~~ 13.3.4 and 13.3.8 of this General Order. No fine assessed by CPSD pursuant to this subsection shall become payable if contested by the Generating Asset Owner pursuant to subsection 13.3.4.

13.3.2 Schedule of Fines. The Specified Violations and the corresponding fines that may be assessed are set forth in Appendix F to this General Order. The Commission may modify this schedule of fines no earlier than 30 days after providing reasonable notice and affording interested persons with an opportunity to comment.

13.3.3 Acceptance of Assessed Fine. A Generating Asset Owner may either accept or appeal ~~contest~~ the assessment of a scheduled fine. In the event the Generating Asset Owner accepts the assessment and elects to pay the scheduled fine in lieu of an appeal ~~formal proceeding~~, the Generating Asset Owner shall so notify CPSD in writing within 30 days of the assessment, shall pay the fine in full, and shall bring itself into compliance with the applicable provision(s) of the General Order within 30 days of the written acceptance. Fines shall be submitted to CPSD for payment into the State Treasury to the credit of the General Fund. Fines are delinquent if not paid within 30 days of the Generating Asset Owner's acceptance; and, thereafter, the balance of the fine bears interest at the legal rate for judgments.

13.3.4 Appeal Contest of Citation Assessed Fine. If a Generating Asset Owner ~~appeals~~ ~~contests~~ the citation and assessment of a scheduled fine, the Generating Asset Owner must file its Notice of Appeal ~~contest~~ within 30 days of the date of the citation assessment. In the event of such a contest, staff shall, at its discretion, proceed with evidentiary hearings on the appeal, or withdraw the citation where facts and circumstances warrant such action and provide a written notice of withdrawal to the Generating Asset Owner. ~~offer of the scheduled fine and proceed to any remedy otherwise available to the Commission, or shall withdraw the assessed fine and proceed no further, depending on the circumstances of each case. In the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated or limited to the scheduled fine.~~ ~~If the matter proceeds to a more formal proceeding before the Commission, neither CPSD in its investigation nor the Commission will be limited to the Specified Violations or the schedule of fines set forth in Appendix F to this General Order.~~

13.3.5 Default. If a Generating Asset Owner (a) notifies CPSD of acceptance of a scheduled fine and fails to pay the full amount of the fine within 30 calendar days of the date of the written acceptance of the fine; or (b) fails to notify CPSD of acceptance of a scheduled fine and fails to serve a written notice of appeal on the Director of CPSD in the manner and time required, the Generating Asset Owner shall be in default, and the fine contained in the citation shall become final. Upon default, any unpaid balance of a citation fine shall accrue interest at the legal rate of interest for judgments, and CPSD and the Commission may take any action provided by law to recover unpaid penalties and ensure compliance with applicable statutes and Commission orders, decisions, rules, directions, demands or requirements.

13.3.6 Form and Content of Citations. The Director of CPSD or his/her designee is authorized to draft a citation and present it to the Generating Asset Owner. If after investigation, CPSD finds violations of any of the Specified Violations, CPSD may issue a citation and levy the corresponding fine set forth in Appendix F to this General Order. Citations shall include the following:

13.3.6.1 Citations shall clearly delineate the alleged violations and fine amount and shall summarize CPSD's evidence.

13.3.6.2 Citations shall include an explanation of how to file an appeal, including an explanation of the Generating Asset Owner's right to have a hearing, to have a representative at the hearing, and to request a transcript of the hearing.

13.3.6.3 Citations shall be supported by evidence documenting the alleged violation and this information, if not voluminous, shall be provided with the citation. If the evidence is voluminous, CPSD may summarize the evidence and make it available for timely inspection by the Generating Asset Owner.

13.3.7 Service of Citations. Citations shall be sent by first class mail to the Generating Asset Owner's authorized representative as set forth in the most recent verified statement or certification records on file with the Commission, or the agent for service of process of the corporation or LLC or other business entity filed with the Secretary of State of California.

13.3.8 Appeals will be conducted as follows:

13.3.8.1 The appeal shall be brought by Filing a written Notice of Appeal upon the Director of CPSD within 30 days from the date of the citation. The Notice of Appeal must indicate the grounds for the appeal.

13.3.8.2 CPSD shall promptly advise the Chief Administrative Law Judge upon receipt of a timely Notice of Appeal. The Chief Administrative Law Judge shall designate an Administrative Law Judge to hear appeals under this resolution.

13.3.8.3 Upon advice from CPSD that a citation has been appealed, the Chief Administrative Law Judge shall forward the matter to the assigned Administrative Law Judge, who shall promptly set the matter for hearing. The Administrative Law Judge may, for good cause shown or upon agreement of the parties, grant a reasonable continuance of the hearing.

13.3.8.4 Appeals of citations shall be heard in the Commission's San Francisco or Los Angeles hearing rooms on regularly scheduled days. Appeals shall be calendared accordingly, except that a particular matter may be re-calendared at the direction of the Administrative Law Judge.

13.3.8.5 The respondent may order a transcript of the hearing, and shall pay the cost of the transcript in accordance with the Commission's specified procedures.

13.3.8.6 The respondent may be represented at the hearing by an attorney or other representative, but any such representation shall be at the respondent's expense.

13.3.8.7 At an evidentiary hearing, CPSD bears the burden of proof and accordingly shall open and close. The Administrative Law Judge may, in his or her discretion to better ascertain truth, alter the order of presentation. Formal rules of evidence do not necessarily apply, and all relevant and reliable evidence may be received in the discretion of the Administrative Law Judge.

13.3.8.8 Ordinarily, the case shall be submitted at the close of the hearing. The Administrative Law Judge, upon a showing of good cause, may keep the record open for a reasonable period to permit a party to submit additional evidence or argument.

13.3.8.9 The Administrative Law Judge shall issue an order resolving the appeal not later than 30 days after the appeal is submitted, and the order shall be placed on the first available agenda, consistent with the Commission's applicable rules.

13.3.9 Ex Parte Communications. From the date that CPSD issues a citation to and including the date when the final order is issued, neither the Generating Asset Owner nor CPSD staff, or any agent or other person acting on behalf of the Generating Asset Owner or CPSD, may communicate regarding the appeal, orally or in writing, with a Commissioner, Commissioner's advisor, or Administrative Law Judge, except as expressly permitted under these procedures.

B. CPUC Proposes the Following Changes to Appendix F:

Appendix F: Fines For Specified Violations

Violation	Fine
1. Failure to file a formal document at the time or in the manner required by this General Order. These documents are Initial Certification, Recertification, Notice of Material Change, Maintenance Plan Summary, Operation Plan Summary, Update to Maintenance Plan Summary, and Update to Operation Plan Summary.	\$1,000 per incident <i>plus</i> \$500 per day for the first ten calendar days the filing was late and \$500 for each day thereafter.
2. Failure to maintain specific documents as required by this General Order. These documents are Maintenance Plan, Operation Plan, Logbook (Thermal), and Logbook (Hydroelectric).	\$5,000 per incident.
3. Failure to respond to an Information Requirement set forth in Section 10.0 of this General Order.	\$1,000 per incident <i>plus</i> \$500 per day for the first ten calendar days the Information Requirement was not satisfied after being requested and \$1,000 for each day thereafter.
4. negligent Submission of inaccurate information in response to an information request under Section 10.0 of this General Order.	\$2,000 per incident <i>plus</i> \$500 per day for the first ten days the inaccuracy was not corrected and \$1,000 for each day thereafter.
5. Repeated violation of any requirement listed in this schedule.	200% of the fine that would be imposed for a first-time violation.

(END OF ATTACHMENT A)

ATTACHMENT B

**RULEMAKING 02-11-039
ADOPTED CHANGES TO GENERAL ORDER 167**

Changes are made to § 13.3 and Appendix F of General Order 167 as provided below:

A. Existing § 13.3 is deleted and replaced with the following new §13.3:

13.3 Imposition of Fines for Specified Violations

13.3.1 Specified Violations. For specified Violations of this General Order, the Director of CPSD and his/her designee may assess a scheduled fine or, in the alternative, proceed with any remedy otherwise available to CPSD or the Commission. Scheduled fines may be assessed by CPSD only for the Violations referenced in subsection 13.3.2 of this General Order. CPSD shall notify the Generating Asset Owner, in writing, of any specified Violations and assessed fines, and shall include notice of the right to contest the fine as set forth in subsections 13.3.4 and 13.3.8 of this General Order. No fine assessed by CPSD pursuant to this subsection shall become payable if contested by the Generating Asset Owner pursuant to subsection 13.3.4.

13.3.2 Schedule of Fines. The Specified Violations and the corresponding fines that may be assessed are set forth in Appendix F to this General Order. The Commission may modify this schedule of fines no earlier than 30 days after providing reasonable notice and affording interested persons with an opportunity to comment.

13.3.3 Acceptance of Assessed Fine. A Generating Asset Owner may either accept or appeal the assessment of a scheduled fine. In the event the Generating Asset Owner accepts the assessment and elects to pay the scheduled fine in lieu of an appeal, the Generating Asset Owner shall so notify CPSD in writing within 30 days of the assessment, shall pay the fine in full, and

shall bring itself into compliance with the applicable provision(s) of the General Order within 30 days of the written acceptance. Fines shall be submitted to CPSD for payment into the State Treasury to the credit of the General Fund. Fines are delinquent if not paid within 30 days of the Generating Asset Owner's acceptance; and, thereafter, the balance of the fine bears interest at the legal rate for judgments.

13.3.4 Appeal of Citation. If a Generating Asset Owner appeals the citation and assessment of a scheduled fine, the Generating Asset Owner must file its Notice of Appeal within 30 days of the date of the citation. In the event of such a contest, staff shall, at its discretion, proceed with evidentiary hearings on the appeal, or withdraw the citation where facts and circumstances warrant such action and provide a written notice of withdrawal to the Generating Asset Owner. In the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated or limited to the scheduled fine.

13.3.5 Default. If a Generating Asset Owner (a) notifies CPSD of acceptance of a scheduled fine and fails to pay the full amount of the fine within 30 calendar days of the date of the written acceptance of the fine; or (b) fails to notify CPSD of acceptance of a scheduled fine and fails to serve a written notice of appeal on the Director of CPSD in the manner and time required, the Generating Asset Owner shall be in default, and the fine contained in the citation shall become final. Upon default, any unpaid balance of a citation fine shall accrue interest at the legal rate of interest for judgments, and CPSD and the Commission may take any action provided by law to recover unpaid penalties and ensure compliance with applicable statutes and Commission orders, decisions, rules, directions, demands or requirements.

13.3.6 Form and Content of Citations. The Director of CPSD or his/her designee is authorized to draft a citation and present it to the Generating Asset Owner. If after investigation,

CPSD finds violations of any of the Specified Violations, CPSD may issue a citation and levy the corresponding fine set forth in Appendix F to this General Order. Citations shall include the following:

13.3.6.1 Citations shall clearly delineate the alleged violations and fine amount and shall summarize CPSD's evidence.

13.3.6.2 Citations shall include an explanation of how to file an appeal, including an explanation of the Generating Asset Owner's right to have a hearing, to have a representative at the hearing, and to request a transcript of the hearing.

13.3.6.3 Citations shall be supported by evidence documenting the alleged violation and this information, if not voluminous, shall be provided with the citation. If the evidence is voluminous, CPSD may summarize the evidence and make it available for timely inspection by the Generating Asset Owner.

13.3.7 Service of Citations. Citations shall be sent by first class mail to the Generating Asset Owner's authorized representative as set forth in the most recent verified statement or certification records on file with the Commission, or the agent for service of process of the corporation or LLC or other business entity filed with the Secretary of State of California.

13.3.8 Appeals. Appeals will be conducted as follows:

13.3.8.1 The appeal shall be brought by Filing a written Notice of Appeal upon the Director of CPSD within 30 days from the date of the citation. The Notice of Appeal must indicate the grounds for the appeal.

13.3.8.2 CPSD shall promptly advise the Chief Administrative Law Judge upon receipt of a timely Notice of Appeal. The Chief Administrative Law Judge shall designate

an Administrative Law Judge to hear appeals under this resolution.

- 13.3.8.3 Upon advice from CPSD that a citation has been appealed, the Chief Administrative Law Judge shall forward the matter to the assigned Administrative Law Judge, who shall promptly set the matter for hearing. The Administrative Law Judge may, for good cause shown or upon agreement of the parties, grant a reasonable continuance of the hearing.
- 13.3.8.4 Appeals of citations shall be heard in the Commission's San Francisco or Los Angeles hearing rooms on regularly scheduled days. Appeals shall be calendared accordingly, except that a particular matter may be re-calendared at the direction of the Administrative Law Judge.
- 13.3.8.5 The respondent may order a transcript of the hearing, and shall pay the cost of the transcript in accordance with the Commission's specified procedures.
- 13.3.8.6 The respondent may be represented at the hearing by an attorney or other representative, but any such representation shall be at the respondent's expense.
- 13.3.8.7 At an evidentiary hearing, CPSD bears the burden of proof and accordingly shall open and close. The Administrative Law Judge may, in his or her discretion to better ascertain truth, alter the order of presentation. Formal rules of evidence do not necessarily apply, and all relevant and reliable evidence may be received in the discretion of the Administrative Law Judge.
- 13.3.8.8 Ordinarily, the case shall be submitted at the close of the hearing. The Administrative Law Judge, upon a showing of good cause, may keep the record open for

a reasonable period to permit a party to submit additional evidence or argument.

13.3.8.9 The Administrative Law Judge shall issue an order resolving the appeal not later than 30 days after the appeal is submitted, and the order shall be placed on the first available agenda, consistent with the Commission's applicable rules.

13.3.9 Ex Parte Communications. From the date that CPSD issues a citation to and including the date when the final order is issued, neither the Generating Asset Owner nor CPSD staff, or any agent or other person acting on behalf of the Generating Asset Owner or CPSD, may communicate regarding the appeal, orally or in writing, with a Commissioner, Commissioner's advisor, or Administrative Law Judge, except as expressly permitted under these procedures.

B. Existing Appendix F is deleted and replaced with the following new Appendix F:

Appendix F: Fines For Specified Violations

Violation	Fine
1. Failure to file a formal document at the time or in the manner required by this General Order. These documents are Initial Certification, Recertification, Notice of Material Change, Maintenance Plan Summary, Operation Plan Summary, Update to Maintenance Plan Summary, and Update to Operation Plan Summary.	\$1,000 per incident <i>plus</i> \$500 per day each day thereafter.
2. Failure to maintain specific documents as required by this General Order. These documents are Maintenance Plan, Operation Plan, Logbook (Thermal), and Logbook (Hydroelectric).	\$5,000 per incident.
3. Failure to respond to an Information Requirement set forth in Section 10.0 of this General Order.	\$1,000 per incident <i>plus</i> \$500 per day for the first ten calendar days the Information Requirement was not satisfied after being requested and \$1,000 for each day thereafter.
4. Submission of inaccurate information in response to an information request under Section 10.0 of this General Order.	\$2,000 per incident <i>plus</i> \$500 per day for the first ten days the inaccuracy was not corrected and \$1,000 for each day thereafter.
5. Repeated violation of any requirement listed in this schedule.	200% of the fine that would be imposed for a first-time violation.

(END OF ATTACHMENT B)