

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



**FILED**

03/30/26

04:59 PM

K1903024

Appeal of City of San José, administrator of San José Clean Energy, to Citation E-4195-0052 issued on February 27, 2019 by Consumer Protection and Enforcement Division

PROCEEDING: K.19-03-024

**APPLICATION OF THE CITY OF SAN JOSE, ADMINISTRATOR OF  
SAN JOSE CLEAN ENERGY, FOR REHEARING OF RESOLUTION ALJ-488**

SUSANA ALCALA WOOD, City Attorney (156366)  
ARDELL JOHNSON, Assistant City Attorney (95340)  
WILLIAM CHARLEY, Sr. Deputy City Attorney (283909)  
BRIAN KIMBALL, Sr. Deputy City Attorney (326179)  
Office of the City Attorney  
200 East Santa Clara Street, 16th Floor  
San José, California 95113-1905  
Tel: (408) 535-1900  
E-mail: [cao.main@sanjoseca.gov](mailto:cao.main@sanjoseca.gov)

Attorneys for  
City of San José

March 30, 2026

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Appeal of City of San José, administrator of San José Clean Energy, to Citation E-4195-0052 issued on February 27, 2019 by Consumer Protection and Enforcement Division

PROCEEDING: K.19-03-024

**APPLICATION OF THE CITY OF SAN JOSE, ADMINISTRATOR OF  
SAN JOSE CLEAN ENERGY, FOR REHEARING OF RESOLUTION ALJ-488**

Pursuant to Public Utilities Code Section 1731(b) and Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission (“**Commission**”), the City of San José (“**City**”), as administrator of San José Clean Energy (“**SJCE**”), hereby files this application for rehearing of Administrative Law Judge (“**ALJ**”) Resolution 488 (the “**Resolution**”).

**I. INTRODUCTION**

The Resolution’s affirmation of the \$6,791,155.40 Resource Adequacy (“**RA**”) Citation (“**Citation**”) issued by the Consumer Protection and Enforcement Division (“**CPED**”) resulted from an abuse of discretion. The decision failed to proceed in the manner required by law because it did not evaluate SJCE’s evidence in the context of the requisite five penalty factors or otherwise follow Commission precedent. SJCE presented un rebutted evidence that warranted withdrawal of the Citation or, at a minimum, substantial reduction of the fine amount. That un rebutted evidence included bids, solicitations, financial analysis of the impacts of PG&E’s withdrawal of RA bids under negotiation, the unique circumstances surrounding the RA market SJCE faced in its first year of operation, SJCE’s actions to reduce the shortfall ahead of the monthly filing timeframe, and the impact of the penalty on SJCE operations and its ability to maintain affordability for its customers.

This Resolution must be reversed to address the following:

- D.21-12-066 granted rehearing to provide SJCE the opportunity to present

- evidence to address the penalty factors, such as the entity's financial resources;
- The burden of proof under the five-factor test does not fall on the appellant;
  - Regardless of whether a party to an enforcement action establishes an affirmative defense, the Commission must consider whether the evidence in the record warrants mitigating the penalty based on the five-factor test;
  - SJCE introduced voluminous evidence into the record at hearing that had not previously been introduced and was never sufficiently considered or characterized;
  - The Resolution did not determine whether the evidence relating to the five-factor test justified a reduction in the penalty; instead it focused exclusively on speculating that buying the RA needed to meet SJCE's RA obligation was possible, regardless of whether 1) buying was commercial reasonable, and 2) whether the five-factors provide a basis to reduce the penalty imposed on SJCE; and
  - In applying the five-part factor test from D.98-12-075, the factors weigh, on balance, in favor of SJCE, and the fine should be reduced or eliminated.

The Resolution commits legal error by (1) ignoring Commission precedent and failing to apply the five penalty factors raised by the parties as prescribed by D.98-12-075,<sup>1</sup> and as directed to in this proceeding; (2) incorrectly finding that SJCE has not met its evidentiary burden; and (3) mischaracterizing and ignoring the undisputed evidence that had not previously been admitted into the record.

The Resolution does not consider important precedent grounded in the public

---

<sup>1</sup> See ALJ-424, pp. 5-6 (holding that the Commission must apply the five-factor test to RA citation appeals because it would not conflict with Pub. Util Code § 380(e) and "...it is not explicit in D.05-10-042, or other RA decisions, that the five-factor test was considered when adopting the RA penalty structure. Thus, we apply the five-factor test in reviewing the instant appeal. We note that the appropriate forum for addressing changes to the RA penalty regime, including whether the five-factor test should not be applied in reviewing individual RA citation appeals, is the Commission's RA rulemaking. Doing so through the RA rulemaking allows all affected parties an opportunity to comment."); see also ALJ-459, p. 3 ("The five-factor test is applicable in reviewing this [RA] citation appeal."); D.25-04-043, p. 10 ("D.98-12-075 provides that: "In future decisions which impose sanctions, the parties and, in turn the Commission will be expected to explicitly address those previously issued decisions which involve the most reasonably comparable factual circumstances and explain any substantial differences in outcome. (D.98-12-075, p. 60.)").

interest, and risks undermining the Commission’s own incentives for LSEs to strive for compliance in good faith. Under the recent conclusion in the Commission’s Order in Shell Energy’s Application for Rehearing (“**Shell Order**”),<sup>2</sup> the Commission must assess the LSE’s conduct and consider mitigating circumstances, regardless of whether the LSE established its defense.<sup>3</sup> The Resolution should have applied the standard of review set by the Commission,<sup>4</sup> and considered evidence that established SJCE’s good-faith and reasonable conduct in the face of external obstacles that impeded its compliance. Instead, the Resolution *was* revised to state:

Another issue that must be considered is how lowering a penalty amount would achieve the objective of deterrence. Lowering a penalty amount could have a direct impact on future compliance.

(Resolution, p. 6.)

Rejecting citation appeals on this basis would undermine parties’ due process rights and the purpose of the appeals process. Additionally, it ignores the Commission’s direction to “implement and enforce the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner” pursuant to Pub. Util. Code § 380(e). As a result of applying the Shell Order and meaningfully engaging in an analysis of the undisputed evidence relating to the five-factor test that **had not** previously been admitted into the record, the Commission should also mitigate the fine for SJCE and make clear to other LSEs that reasonable and good-faith conduct in seeking to comply with the Commission’s regulatory process and to reduce RA shortfalls in the RA annual timeframe prior to the RA monthly timeframe is encouraged. If the Commission does not reverse the Resolution, it will send a signal that LSEs should avoid costly good-faith efforts to mitigate the impact of a potential violation. The Commission can and should avoid sending this message by revising the Resolution to apply the mitigation standard articulated in the Shell Order.

---

<sup>2</sup> D.25-04-043, issued on April 25, 2025, in K.21-11-018.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; see also ALJ-424, p. 5 (“Next, as to whether the Commission must apply the five-factor test to RA citation appeals, Pub. Util. Code § 380(e) provides that: “[t]he commission shall implement and enforce the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner.” All LSEs participating in the RA program are subject to the same requirements and same penalty regime. We do not find that merely applying the five-factor test to a citation appeal conflicts with § 380(e).”).

The Resolution's refusal to recognize this standard is perpetuated by its erroneous treatment of the evidence presented. The Resolution ignores uncontested testimonial evidence, minimizes or discounts the value of circumstantial evidence, and misconstrues compelling evidence in an Energy Division report, all of which created an inference, if not overwhelming proof, that it was not possible to procure the missing RA in accordance with the public interest. As further explained below, the Commission's five-factor test does not assign a burden to any party but is instead intended guide the Commission's objective assessment of an appropriate fine under the facts and circumstances presented. The Resolution's assignment of an evidentiary burden to SJCE nullifies the entire analysis.

These errors denied SJCE its right to a fair hearing on its appeal and should be overturned on rehearing. With this application, SJCE is requesting the Commission (1) apply the relevant precedent to the evidentiary record which demonstrates SJCE's conduct was reasonable and undertaken in good faith, and (2) acknowledge that the evidence, which had not previously been admitted into the record, demonstrates that the unique circumstances surrounding the RA market SJCE faced in its first year of operation warrant consideration under the five-factors. We turn to those issues below.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

CPED issued Citation E-4195-0052 ("Citation") on February 27, 2019, for failing to procure sufficient resource adequacy ("RA") to meet its 2019 system RA requirements for the months of July and September and 2019 flexible RA requirements for July, September, and October.

The Citation assessed SJCE a penalty of \$6,791,155.40, which SJCE paid in full on October 6, 2020.<sup>5</sup> Until 2023, this was the largest RA citation penalty that had ever been assessed under the program, by a factor of nearly four times.<sup>6</sup>

On October 14, 2019, the assigned ALJ issued a Scoping Memo, which determined that certain items needed to be addressed before moving forward to be able to examine the Citation and assess the penalty.

On March 4, 2020, the Chief ALJ issued a Notice of Reassignment, and the

---

<sup>5</sup> See Exh. SJCE 2, at 2.

<sup>6</sup> See Exh. SJCE 108, at 21; *see also* Exh. SJCE 2, at 2-3.

Appeal from Citation K.19-03-024 was reassigned to a new ALJ. On April 17, 2020, the new ALJ issued a Ruling that, among other things, determined that evidentiary hearings were not necessary because, assuming SJCE's asserted facts as true, SJCE had not (1) demonstrated impossibility of compliance with its system or flexible RA requirements or (2) established other mitigating factors that would merit excusing or reducing the Citation penalty.

On May 4, 2020, SJCE filed a Motion for Reconsideration of the Ruling. On June 9, 2020, the ALJ issued a Ruling denying SJCE's Motion for Reconsideration. On September 18, 2020, the Commission issued Resolution ALJ-382 denying SJCE's appeal.

On October 12, 2020, SJCE timely filed an application for rehearing of ALJ-382. On December 16, 2021, D.21-12-066 was issued, which vacated Resolution ALJ-382 and granted a rehearing, which in part, granted SJCE "an opportunity to present evidence to address the penalty factors..."<sup>7</sup> On December 6, 2024, this matter was reassigned to ALJ Kelly.

On January 15, 2025, a ruling setting evidentiary hearings to begin on April 22, 2025, was issued. On April 17, 2025, CPED filed a Motion to Strike some of SJCE's Exhibits. On April 19, 2025, the assigned ALJ issued a ruling to advise the parties that prior to the start of evidentiary hearings on April 22, 2025, there would be a Law and Motion Hearing to discuss CPED's Motion to Strike.

CPED's Motion to Strike was denied on April 22, 2025. After the Motion to Strike was denied, SJCE and CPED requested to forgo evidentiary hearings. SJCE acknowledged that they were waiving their right to a hearing and acknowledged that the matter would be resolved based on the written evidentiary record before the assigned ALJ. On April 23, 2025, the assigned ALJ issued a ruling setting the briefing schedule for the matter. Opening briefs were filed on May 30, 2025, and reply briefs were filed on June 20, 2025.

A Draft Resolution was served on the parties on January 23, 2026, and the final Resolution was mailed on February 27, 2026.

---

<sup>7</sup> D.21-12-066, p. 6.

### III. LEGAL STANDARD

After any Commission order or decision, including a Resolution, a party “may apply for a rehearing in respect to matters determined in the action or proceeding and specified in the application for rehearing.”<sup>8</sup> Commission Rule 16.1 specifies that applications for rehearing “shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous,” and further, that the purpose of such an application “is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.” Should a petition for writ of review be filed in the Court of Appeal, the Court of Appeal may find the Commission’s decision cannot be upheld because:

1. The commission acted without, or in excess of, its powers or jurisdiction.
2. The commission has not proceeded in the manner required by law.
3. The decision of the commission is not supported by the findings.
4. The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.
5. The order or decision of the commission was procured by fraud or was an abuse of discretion.
6. The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

(Pub. Util. Code, § 1757(a).)

Pursuant to Pub. Util. Code § 1760, “in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.”

While the Commission generally does not grant applications for rehearing of a decision on rehearing, the Commission has previously recognized that an exception may be made when “it is the first opportunity that any party has had to appeal this issue.”<sup>2</sup> This application is SJCE’s first opportunity to appeal the Resolution’s failure to address the five factors, and that SJCE’s overwhelming evidence should have compelled findings sufficient to eliminate or reduce the imposed penalty. Rehearing of the Resolution is

---

<sup>8</sup> Pub. Util. Code § 1731, subd. (b)(1).

<sup>2</sup> *Ortega v. AT&T Communications* (1997) [D.97-12-052] 77 Cal. P.U.C.2d 297, 298.

warranted for the reasons set forth herein and pursuant to Pub. Util. Code § 1757.

## I. ARGUMENT

As an initial matter, the Resolution erroneously narrowed the scope of rehearing, finding:

D.21-12-066 granted rehearing *solely* to provide SJCE the opportunity to present evidence that, even if it had accepted withdrawn offers, SJCE still would have remained deficient because no other system or flexible Resource Adequacy (RA) was available.

(ALJ-488, Finding and Conclusion 1 (emphasis added).)

However, the December 16, 2021, Order Granting Rehearing Of Resolution AL-382 and Vacating Resolution specifically granted SJCE the opportunity “to present evidence to address the penalty factors”,<sup>10</sup> ALJ Kelly, later repeated the same,<sup>11</sup> and the parties devoted significant portions of their briefing to address those penalty factors and previously issued Commission decisions involving comparable factual circumstances.<sup>12</sup> Aside from noting in response to SJCE’s comments that “SJCE’s public entity status is not relevant,”<sup>13</sup> the Resolution fails to address or consider any of the five factors (or apply any evidence to those factors) and incorrectly finds that “SJCE has failed to carry its burden on rehearing.”<sup>14</sup> Even assuming *arguendo* that Commission precedent did not provide for application of the five-factor test, these factors must be applied as a matter of state and federal constitutional law.<sup>15</sup>

### a. The Resolution Disregards Commission Precedent by Failing to Apply the Five Factors to the Penalty Amount.

Commission precedent holds that “D.98-12-075 sets out five “principles [that] distill the essence of numerous Commission decisions concerning penalties in a wide

---

<sup>10</sup> D.21-12-066, p. 6 (“In addition, SJCE shall have an opportunity to present evidence to address the penalty factors such as the entity’s financial resources.”).

<sup>11</sup> ALJ Kelly’s January 15, 2025, Ruling, p. 3; *see also* Evidentiary Hearing Transcript April 22, 2025 (“**T**cript”), at 5:2-5 (ALJ Kelly: “In addition, SJCE shall have an opportunity to present evidence to address the penalty factors such as its entity’s financial resources.”).

<sup>12</sup> CPED Opening Brief, pp. 11-18; CPED Reply Brief, pp. 11-17; SJCE Opening Brief, pp. 3, 18-42; SJCE Reply Brief, pp. 1-7.

<sup>13</sup> Resolution, p. 4.

<sup>14</sup> Resolution, p. 4.

<sup>15</sup> SJCE Opening Brief, pp. 42-44.

range of cases” and that can be used “as precedent in determining the level of penalty in the full range of Commission enforcement proceedings....”).<sup>16</sup> Under D.98-12-075, the Commission employs five factors to determine the appropriate level of a fine: (1) the severity of the offense, (2) the entity’s conduct, (3) the entity’s financial resources, (4) the role of precedent, and (5) the totality of the circumstances in the public interest.<sup>17</sup> As discussed above, the five-factor test is applicable in reviewing an RA violation citation appeal.<sup>18</sup>

The Commission must conduct its proceedings “in the manner required by law.” (Pub. Util. Code, § 1757(a)(2).) This includes complying with its scoping rulings and providing fair hearings. (*Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, 1106;<sup>19</sup> *Ventura County Waterworks v. Public Util. Com’n* (1964) 61 Cal.2d 462, 464 [holding that the erroneous “exclusion of evidence” constitutes a failure of the Commission to proceed as required by law if it results in an “unfair hearing.”].) Commission decisions that impose penalties without affording the utility adequate procedural protections may be annulled as a violation of due process. (Pub. Util. Code, § 1757(a)(6); *Kerman Telephone Co. v. Public Utilities Commission* (2023) 94 Cal.App.5th 920, 933.)

**b. The Resolution Incorrectly Applies the Parties’ Evidentiary Burden.**

The Resolution incorrectly finds that “[t]he burden was therefore on SJCE to demonstrate, by a preponderance of the evidence, that (1) acceptance of the withdrawn offers would not have cured its compliance deficiency, and (2) no other system or flexible RA existed in the market to fill the gap.”<sup>20</sup> Again, the Resolution disregards that

---

<sup>16</sup> D.25-04-043, p. 5 (internal citations omitted).

<sup>17</sup> D.98-12-075.

<sup>18</sup> See Resolution ALJ-482, p. 4.

<sup>19</sup> See also, *Southern California Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1105–1106 (finding that the Commission abused its discretion and failed to proceed in the manner required by law where it failed to explain how its alleged practice conformed with its own general order or Pub. Util. Code § 455); *Calaveras Telephone Co. v. Public Utilities Com.* (2019) 39 Cal.App.5th 972, 983 (concluding that the Commission failed to proceed in the manner required by law and abused its discretion because its resolution and decision did not conform with universal service program’s implementing rules).

<sup>20</sup> Resolution, p. 5.

SJCE was specifically granted an opportunity to address the penalty factors and, in so doing, articulates an incomplete description of the evidentiary burden that omits critical elements.<sup>21</sup> By only focusing on the appellant's burden of evidence to prove any affirmative defenses it may raise, the Resolution also ignores Commission precedent finding that the burden of proof under the five-factor test does not fall on the appellant, and that failure to establish a defense does not address whether mitigation of the penalty is warranted.<sup>22</sup>

Although it is SJCE's burden to prove affirmative defenses by a preponderance of evidence,<sup>23</sup> those affirmative defenses are not dispositive of the five-factor test.<sup>24</sup> The purpose of the five-factor test is, upon proof of a violation of a Commission order, decision, rule, or statute, to ensure that the penalty amount is set to an appropriate level. The analysis does not require that either party in the proceeding carry an evidentiary burden. Instead, upon a finding of a violation, the five-factor analysis is meant to determine the appropriate penalty based on an objective review of the factors. The Resolution failed to consider or apply the five-factor analysis for that purpose. The record shows these factors were never evaluated in the scheme of this citation penalty assessment.<sup>25</sup>

CPED's own testimony acknowledged that CPED does not evaluate the factors when determining the citation amount for violation of RA requirements.<sup>26</sup> CPED has no discretion to deviate from its delegated authority to impose a penalty calculated based on

---

<sup>21</sup> See Fn. 1 *supra*.

<sup>22</sup> See D.25-04-043, pp. 4-5; see also Resolution ALJ-482, p. 21 ("Two holdings in D.25-04-043 warrant modification of this resolution. First, the standard for evaluating penalty waivers should not be tied to the appellant's affirmative defense of impossibility. Second, the burden of proof is not on any party in applying the five factor test.")

<sup>23</sup> ALJ-377, p. 15.

<sup>24</sup> D.98-12-075 does not place a burden on any party to prove whether fines and in what amount are warranted. (D.98-12-075, pp. 34-39.)

<sup>25</sup> The burden-shifting standard of ALJ-377 is inapplicable to the RA citation program which plainly assigns the burden of proof to Commission Staff. Resolution E-4195, Appx. A § 2.7.7 ("[a]t an evidentiary hearing, Commission Staff bears the burden of proof and, accordingly, shall open and close."); see also Resolution ALJ-377, Appx. B, p. 27.

<sup>26</sup> Exh. CPED 2 (Christo Reply Testimony), at 2 ("Q5: Does Commission staff consider other factors when determining the citation amount for violation of Resource Adequacy requirements? A5: No. The citation amounts are prescribed in Resolution E-4195, subsequently modified by D.10-06-036, D.11-06-022, D.14-06-050, D.19-06-026, D.20-06-031, D.21-06-029 D.22-06-050, D.23-06-029 and D.24-06-004.").

the RA penalty schedule.<sup>27</sup> Rather, once CPED establishes the violation and calculates a fine, the Commission “may consider whether the evidence in the record warrants mitigating [the] penalty based on the five-factor test....”<sup>28</sup> As such, it necessarily falls to the adjudicator in the appeal of a citation to properly weigh the evidence once presented and apply it to the penalty factors before the Commission acts on a resolution. This is especially true given that SJCE was granted the opportunity to provide evidence on the factors, and the Resolution did not evaluate any of SJCE’s evidence admitted into the record within the context of those factors.

**c. The Resolution Mischaracterizes and Fails to Address the Evidence Admitted into the Record.**

The Resolution mischaracterizes the evidence presented and states that “SJCE introduced minimal new evidence that was not previously introduced into the record.”<sup>29</sup> However, significant evidence was presented through sworn testimony and authenticated documentation,<sup>30</sup> which SJCE had no previous opportunity to present in the intervening years since the fine was initially assessed and paid.<sup>31</sup> The Resolution ignores SJCE’s 105 exhibits, direct testimony from two witnesses, and CPED’s two exhibits and reply testimony admitted into the record by the parties’ stipulation at the April 22, 2025, Evidentiary Hearing.<sup>32</sup> SJCE presented evidence applicable to each of the five factors, including: the unique circumstances in the 2019 RA compliance period that demonstrated mitigation of the severity of the offense, SJCE’s conduct to cure both before and

---

<sup>27</sup> ALJ-424, p. 5; *see also* ALJ-394, at fn. 3 (“CPED asserts that, because the Commission has established a penalty schedule for specified violations which CPED duly applied in assessing the citation penalty, the five mitigating factors do not apply to the penalty determination....This assertion is without merit. While it may be true that CPED does not have the discretion to deviate from its delegated citation authority to impose a penalty calculated based on the Commission’s penalty schedule, the Commission fully retains its discretion to do so.”).

<sup>28</sup> D.25-04-043, p. 4.

<sup>29</sup> Resolution, p. 4.

<sup>30</sup> *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 590 (“Points and authorities are not presented under penalty of perjury. Matters set forth in points and authorities are not evidence. Evidence appears elsewhere – in deposition testimony, discovery responses, and declarations.” (internal citations omitted)).

<sup>31</sup> The City’s former counsel of record and CPED’s former counsel of record exchanged portions of SJCE’s voluminous evidence in 2019 in preparation of the then-cancelled evidentiary hearings (*see* T’cript, at 35:1-36:7), but SJCE’s evidence was not admitted into the record until ALJ Kelly’s ruling doing so on April 22, 2025; *see also* Resolution, p. 2 (“SJCE acknowledged ... that the matter would be resolved based on the written evidentiary record before the assigned ALJ”).

<sup>32</sup> T’cript, at 51:1-3.

following the citation, SJCE’s financial resources and the impact on customer affordability, the role of precedent, and the totality of the circumstances in the public interest.

The Resolution states: “[t]he record demonstrates that RA offers were available in the market but were declined or lost due to SJCE’s business decisions and internal governance processes.”<sup>33</sup> It then goes on to state that “[r]ather than focus on the issue that the Commission granted rehearing on, the witness chose to argue that the amount of time that has passed since the penalty was assessed had prejudiced SJCE’s ability to litigate its appeal.”<sup>34</sup> The Resolution is factually incorrect, as neither of SJCE’s witnesses’ testimony address the due process violation based on passage of time.<sup>35</sup>

The City requests the Commission apply the relevant precedent from the Shell Order to SJCE’s conduct to reverse the Resolution and mitigate the fine because its conduct to avoid and cure the violation was reasonable, which is the standard prescribed by D.98-12-075, and external factors impeded compliance. In doing so, the Commission would follow the precedent set in the Shell Order and make clear to other LSEs that an appellant’s evidence is considered within the penalty appeal assessment process, and that demonstrating good-faith and reasonable conduct in seeking to comply with the Commission’s regulatory process is incentivized and serves the public interest.

**d. The Resolution’s Failure to Address D.98-12-075’s Five Factors Constitutes an Abuse of Discretion.**

A Commission’s decision may be annulled where it fails to proceed “in the manner required by law,” including failure to follow the Commission’s decisions and requirements. (Pub. Util. Code, § 1757(a); *Southern California Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1105–1106 [finding that the Commission abused its discretion and failed to proceed in the manner required by law where it failed to explain how its alleged practice conformed with its own general order or § 455]; *Calaveras Telephone Co. v. Public Utilities Com.* (2019) 39 Cal.App.5th 972, 983

---

<sup>33</sup> Resolution, p. 1.

<sup>34</sup> Resolution, p. 4.

<sup>35</sup> See Exh. SJCE 1 and Exh. SJCE 101.

[concluding that the Commission failed to proceed in the manner required by law and abused its discretion because its resolution and decision did not conform with universal service program’s implementing rules]; *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, 1106 [annulling Commission decision where Commission considered an issue that was not identified in the proceeding’s scoping memo].)

The Resolution’s failure to evaluate the five penalty factors constitutes a failure to proceed in the manner required by law and constitutes an abuse of discretion because as discussed above, the Commission must apply the five-factor test to RA citation appeals.

**e. The Resolution Fails to Proceed in the Manner Required by Public Utilities Code Section 1705.**

Pub. Util. Code Section 1705 requires that Commission decisions “shall contain, *separately stated, findings of fact and conclusions of law* by the commission *on all issues material to the order or decision.*” Pub. Util. Code, § 1705 (emphasis added). “Findings are essential to afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action.” (*California Manufacturers Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 251, 258–259 (internal quotation and citations omitted) [annulling Commission decision for lack of sufficient findings on material issues].) Material issues in the instant citation appeal included: (1) whether SJCE demonstrated by a preponderance of evidence that it was impossible to procure sufficient RA capacity, and (2) if not, whether the application of the guidelines provided by the Commission in D.98-12-075 warranted a reduction in the citation penalty.

The Resolution’s Findings of Fact fail to include separate findings regarding the five-factor analysis pursuant to D.98-12-075. In addressing SJCE’s comments on the draft resolution, the Resolution makes a blanket assertion that “...even if all five principles set forth in D.98-12-075 were evaluated separately, the penalty would not have

been subsequently reduced.”<sup>36</sup> However, the Resolution fails to mention even one of the five principles in the Resolution’s twelve listed findings. The Resolution thus fails to comport with Section 1705’s requirement and, on that basis, fails to proceed in the manner required by law.

## V. Conclusion

For all the reasons stated above, the City of San José, administrator for SJCE, respectfully requests that the Commission set aside the Resolution and find that Citation No. E-4195-0052, must be set aside or otherwise substantially reduced based on a fair assessment of the Commission’s five penalty factors.

Respectfully submitted,

SUSANA ALCALA WOOD, City  
Attorney

By: /s/ William Charley  
WILLIAM CHARLEY  
Senior Deputy City Attorney

Attorneys for CITY OF SAN JOSE  
OFFICE OF CITY ATTORNEY  
200 East Santa Clara Street, 16<sup>th</sup> FL  
San Jose, CA 95113

---

<sup>36</sup> Resolution, p. 6.