

Decision 15-05-054

May 21, 2015

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the  
Commission’s Natural Gas and Electric  
Safety Citation Programs.

Rulemaking 14-05-013  
(Filed May 15, 2014)

**ORDER MODIFYING DECISION (D.) 14-12-001,  
FOR PURPOSE OF CLARIFICATION,  
AND DENYING REHEARING, AS MODIFIED**

**I. INTRODUCTION**

This decision disposes of the application for rehearing of Decision (D.) 14-12-001 (or “Decision”),<sup>1</sup> filed by Pacific Gas and Electric Company (“PG&E”).

Subsequent to the San Bruno explosion in September 2010, the Commission’s Independent Review Panel (“Panel”) and the National Transportation Safety Board (“NTSB”) both noted in their respective reports that the Commission’s traditional enforcement procedures, under which Commission staff would investigate and prepare a report and proposal for a formal Order Instituting Investigation (“OII”), were cumbersome and limited the Commission’s ability to quickly address safety violations. (D.14-12-001, p. 7.)

In response to the recommendations in these reports, the Commission issued Resolution ALJ-274 on December 7, 2011, instituting a gas safety citation program. Resolution ALJ-274 gave specified authority to the Commission’s Safety and Enforcement Division’s staff or other staff designated by the Executive Director to issue

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<sup>1</sup> Citation to Commission decisions are to the official pdf version, which are available on the Commission’s website at: <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>

citations to all gas corporations to enforce compliance with the Commission's General Order ("GO") 112-E, including federal regulations that the GO incorporates by reference,<sup>2</sup> to require immediate correction of violations, and to levy fines for violations in the amounts prescribed by Section 2107, among other things.

(D.14-12-001, p. 7.)

In 2013, the Legislature enacted Senate Bill 291 ("SB") 291, which added Section 1702.5 to the Public Utilities Code<sup>3</sup> requiring the Commission to develop and implement a safety enforcement program for gas corporations and electrical corporations by July 1, 2014, and January 1, 2015, respectively.<sup>4</sup>

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<sup>2</sup> GO 112-E contains specific rules governing the design, construction, testing, maintenance, and operation of utility gas gathering, transmission, and distribution pipeline systems and supplements compliance with the federal standards set forth in the Code of Federal Regulations Title 49, Parts 190, 191, 192, 193, and 199.

<sup>3</sup> All subsequent section references are to the Public Utilities Code, unless otherwise specified.

<sup>4</sup> Stats. 2013, ch. 601. Section 1702.5 provides as follows:

- (a) The commission shall, in an existing or new proceeding, develop and implement a safety enforcement program applicable to gas corporations and electrical corporations which includes procedures for monitoring, data tracking and analysis, and investigations, as well as issuance of citations by commission staff, under the direction of the executive director. The enforcement program shall be designed to improve gas and electrical system safety through the enforcement of applicable law, or order or rule of the commission related to safety using a variety of enforcement mechanisms, including the issuance of corrective actions, orders, and citations by designated commission staff, and recommendations for action made to the commission by designated commission staff.
  - (1) When considering the issuance of citations and assessment of penalties, the commission staff shall take into account voluntary reporting of potential violations, voluntary removal or resolution efforts undertaken, the prior history of violations, the gravity of the violation, and the degree of culpability.
  - (2) The procedures shall include, but are not limited to, providing notice of violation within a reasonable period of time after the discovery of the violation.
  - (3) The commission shall adopt an administrative limit on the amount of monetary penalty that may be set by commission staff.

*(footnote continued on next page)*

In D.14-12-001, we adopted an electric safety citation program, similar in substance to Resolution ALJ-274's gas safety citation program, and determined that it meets the requirements of SB 291. (D.14-12-001, p. 2.)<sup>5</sup> The Decision gives to the Safety and Enforcement Division ("SED"), or such other staff as may be designated by the Executive Director, the authority to issue citations to any electrical corporation owning or operating electrical supply facilities for violations of GO 95, GO 128, GO 165, GO 166, GO 174, or "other related decisions, codes, or regulations applicable to electrical supply facilities." (D.14-12-001, p. 11.) The Decision also authorizes Commission staff to require the immediate correction of violations and to assess penalties for each violation at the maximum amount set forth in section 2107. (D.14-12-001,

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*(footnote continued from previous page)*

- (b) The commission shall develop and implement an appeals process to govern the issuance and appeal of citations or resolution of corrective action orders issued by the commission staff. . . . The appeals process shall provide the respondent a reasonable period of time, upon receiving a citation, to file a notice of appeal, shall afford an opportunity for a hearing, and shall require the hearing officer to expeditiously provide a draft disposition.
- (c) The commission shall, within a reasonable time set by the commission, conclude a safety enforcement action with a finding of violation, a corrective action order, a citation, a determination of no violation, approval of the corrective actions undertaken by the gas corporation or electrical corporation, or other action. The commission may institute a formal proceeding regarding the alleged violation, potentially resulting in additional enforcement action, regardless of any enforcement action taken at the commission staff level.
- (d) The commission shall implement the safety enforcement program for gas safety by July 1, 2014, and implement the safety enforcement program for electrical safety no later than January 1, 2015.
- (e) This section does not apply to an exempt wholesale generator, a qualifying small power producer, or qualifying cogenerator, as defined in Section 796 of Title 16 of the United States Code and the regulations enacted pursuant thereto. Nothing in this section affects the commission's authority pursuant to Section 761.3.

<sup>5</sup> In Order Instituting Rulemaking ("OIR"), R.14-05-013, the Commission stated that because the existing ALJ-274 gas safety citation program complies with SB 291, the Commission did not need to address development and implementation of an SB 291-compliant gas safety citation program. (R.14-05-013, p. 8, fn. 8; see also, D.14-12-001, p. 9, fn. 9.)

pp. 11-12.) The Decision further provides that the proceeding (R.14-05-013) remains open to, among other things, provide a forum for making improvements and refinements to the Commission's natural gas and electric safety citation programs. (D.14-12-001, p. 2.)

PG&E timely filed a timely application for rehearing. In its rehearing application, PG&E alleges the Decision errs by: (1) failing to provide notice of violation within a reasonable period of time as required by SB 291; (2) retroactively applying the electric safety citation program in violation of due process; (3) failing to adopt an administrative limit on penalties as required by SB 291; and (4) adopting a program that is unconstitutionally vague about what constitutes a violation while contradicting Commission precedent about the purpose of the Commission's maintenance requirements.

The Office of Ratepayer Advocates ("ORA") filed a response opposing PG&E's application for rehearing and supporting D.14-12-001. Southern California Edison Company filed a response supporting PG&E's application for rehearing.

We have carefully considered all of the arguments presented by PG&E, and are of the opinion that no legal error has been demonstrated. However, for the purpose of clarification, we modify Section 1.B.1 of Appendix A of D.14-12-001 to incorporate the language set forth in Section 1702.5(a)(2). Accordingly, rehearing of D.14-12-001 is denied, as modified.

## II. DISCUSSION

- A. Consistent with the requirements of section 1702.5(a)(2), the procedures adopted by the Decision for the Commission's electric safety citation program provide that the utility is given notice of a violation within a reasonable period of time after discovery.**

Section 1702.5(a)(2) requires the Commission's electric safety citation program to include procedures ensuring that the Commission provides notice of a violation or violations within a reasonable period of time after discovery.

PG&E alleges that the Commission's procedures for its electric safety citation program – as set forth in Appendix A to the Decision – does not include any requirement that the Commission provide notice of violation to the utility within a reasonable period of time after discovery of the violation. (Rhg. App., p. 1.)

PG&E appears to be arguing non-compliance with a statutory requirement when none exists. Although Appendix A of the Decision does not incorporate the specific language set forth in Section 1702.5(a)(2), the Decision does discuss this notice requirement. (D.14-12-001, pp. 8-9.) The Decision acknowledges that the first priority of this proceeding (R.14-05-013) was to develop and implement a program consistent with SB 291, which includes various requirements including providing reasonable notice of violations. (D.14-12-001, pp. 8-9.) Moreover, the Decision found that the electric safety citation program satisfies the requirements of SB 291. (D.14-12-001, p. 43 [Conclusion of Law 19].) Thus, there is no legal error. However, for the purpose of clarification, Section 1.B.1 of Appendix A of D.14-12-001 should be modified to incorporate the language set forth in Section 1702.5 (a)(2).

Although it is unclear, PG&E also appears to be arguing the Commission should have spelled out a specific time period. It appears that PG&E is implying that the Legislature meant to create a statute of limitations defense, or laches defense, or that a citation issued is otherwise time barred. PG&E is wrong.<sup>6</sup>

First, there is no express or implied language in Section 1702.5 establishing the Legislature's intent to create any type of time bar to the authorized citations. The fact that the Legislature did not define a "reasonable amount of time" in Section 1702.5(a)(2) shows the Legislature intended for the Commission to make that determination. Given the many different types of safety violations, it makes sense that the Legislature meant

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<sup>6</sup> Rhg. App., pp. 2-3. See also D.14-12-001, pp. 19-20.

for the Commission to have some flexibility in this regard.<sup>7</sup> Thus, there was no requirement in the statute for the Commission to set forth a specific time period.

Second, the primary purpose of SB 291 was to authorize the Commission to act quickly when it comes to addressing safety violations of a gas or electrical corporation. The Senate Energy, Utilities and Communications Committee's March 28, 2013 analysis of SB 291, as introduced, sheds light on this issue. That analysis, states in pertinent part, as follows:

1. Author's Purpose. This bill would direct the CPUC to . . . develop procedures to delegate authority to issue citations . . . and fines to electrical and gas corporations to its safety enforcement staff. Authority is already delegated to staff under ALJ-274 to cite and fine gas corporations, and the author seeks to extend that authority to electrical corporations. The author argues this delegation of authority will increase safety by expediting the process for safety enforcement. Furthermore, it will satisfy any concern that the delegation of this authority is unlawful.<sup>8</sup>

Similarly, the Assembly Committee on Appropriation's July 3, 2013 analysis of SB 291, as amended, states in pertinent part as follows:

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<sup>7</sup> The Legislature clearly specified its intent for the Commission to determine what constitutes "a reasonable amount of time." As stated in Section 1702.5(c):

The commission shall, within a reasonable time set by the commission, conclude a safety enforcement action with a finding of violation, a corrective action order, a citation, a determination of no violation, approval of the corrective actions undertaken by the gas corporation or electrical corporation, or other action. The commission may institute a formal proceeding regarding the alleged violation, potentially resulting in additional enforcement action, regardless of any enforcement action taken at the commission staff level.

<sup>8</sup> Bill Analyses of SB 291, dated March 28, 2013 (emphasis added), which is available at <http://www.leginfo.ca.gov>. Go to Bill Information 2013-2014, search for SB 291.

Traditional enforcement mechanisms may take over a year and are usually performed in reaction to accidents involving multiple fatalities or extensive property damage. Smaller violations may indicate serious problems and should be addressed in an expedited manner.<sup>2</sup>

Pursuant to this legislative mandate, the Decision states, “[t]he Commission delegates this authority to staff to require the immediate cure of the cited violations and requires staff to levy penalties for violations. . . .” (D.14-12-001, p. 11, emphasis added.)

Based on the above, and in accordance with Section 1702.5(a)(2), it is clear that PG&E will receive notice of violations in a reasonable period of time after discovery by Commissions staff. Thus, PG&E’s allegation lacks merit, and thus, should be denied.

**B. The Decision does not result in a retroactive application of section 1702.5.**

In the Decision, the Commission granted staff the authority to issue citations for violations that have occurred before and after the date of the Decision. (D.14-12-001, p. 12 & 43 [Ordering Paragraph 2].)

PG&E argues that consistent with constitutional principles of notice and due process, laws should not be given retroactive application. “SB 291 directed the Commission to create a new program – in addition to its existing enforcement authority – to impose penalties for violations of the rules. As such, the new electric citation program should be operative prospectively only.” PG&E argues that the Commission has other enforcement tools, including initiating an OII, to enforce alleged violations of the rules that pre-date the new electric safety citation program. (Rhg. App., pp. 3-4.)

PG&E’s legal analysis of this issue is flawed. The Commission’s application of the electric safety citation program to violations that occurred prior to the issuance of the Decision does not result in a retroactive application of the statute. In fact,

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<sup>2</sup> Bill Analyses of SB 291, dated July 3, 2013 (emphasis added), which is available at <http://www.leginfo.ca.gov>. Go to Bill Information 2013-2014, search for SB 291.

the one case PG&E cites in support of its allegation of retroactivity actually clarifies this issue and supports the lawfulness of D.14-12-001. In *Elsner v. Uvegas* (2004) 34 Cal. 4<sup>th</sup> 915, the California Supreme Court explained as follows:

New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 (*Tapia*); *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393 (*Aetna Casualty*)). However, this rule does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment. (*Tapia*, at pp. 288-289.) This is so because these uses typically affect only future conduct--the future conduct of the trial. "Such a statute 'is not made retroactive merely because it draws upon facts existing prior to its enactment ... . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future.' [Citations.] For this reason, we have said that 'it is a misnomer to designate [such statutes] as having retrospective effect.' " (Id. at p. 288.)

(*Elsner, supra*, 34 Cal. 4<sup>th</sup> at p. 936, emphasis added.)

The Court's same reasoning applies in the instant case. The Commission is applying the new safety enforcement procedure – issuance of citations - prospectively after both enactment of Section 1702.5 and issuance of the Decision. Such application is not made retroactive simply because citations are being issued for violations that occurred prior to enactment of Section 1702.5 or issuance of the Decision. The effect of the Decision is actually prospective in nature because it relates to the procedure followed by Commission staff in the future.

Moreover, in deciding whether the application of a law is prospective or retroactive, courts look to function, not form. (*Tapia, supra*, 53 Cal.3d at p. 289; *Aetna Casualty, supra*, 30 Cal.2d at p. 394.) Courts consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies. Does the law "change the legal consequences of past conduct by imposing new or different



liabilities based upon such conduct[?]" (*Tapia*, at p. 291.) Does it "substantially affect existing rights and obligations[?]" (*Aetna Casualty*, at p. 395.) If so, then application to a trial of preenactment conduct is forbidden, absent an express legislative intent to permit such retroactive application. If not, then application to a trial of preenactment conduct is permitted, because the application is prospective. (*Elsner*, *supra*, 34 Cal. 4<sup>th</sup> at pp. 936-937.)

In this instance, the issuance of citations for violations that occurred prior to the enactment of Section 1702.5 or the issuance of the Decision will not result in imposing any new or different liabilities on PG&E, or substantially affect existing rights or obligations, or change the legal consequences of past conduct in any manner whatsoever. PG&E is already required to comply with GO 95, GO 128, GO 165, GO 166, GO 174, or other related decisions, codes or regulations applicable to electrical supply facilities. Similarly, PG&E is already subject to penalties as specified in the Public Utilities Code, including sections 2107 and 2108. The Decision does not create any new violation – it simply creates a new safety enforcement procedure by which the Commission can expedite prompt correction of safety violations.

Hence, we find PG&E's allegation that the Decision results in an unlawful retroactive application of the law lacks merit. Thus, no good cause exists for granting rehearing on this issue.

**C. The Commission correctly adopted an administrative limit based on the statutory maximum in section 2107.**

Section 1702.5 (a) (3) provides: "The commission shall adopt an administrative limit on the amount of monetary penalty that may be set by Commission staff." The Decision provides, in pertinent part, as follows: "In the electric safety citation program, we adopt the administrative limit set forth in Resolution ALJ-274 [the

gas safety citation program], based on the statutory maximum in §2107.” (D.14-12-001, p. 28.)<sup>10</sup>

PG&E alleges that the Decision fails to adopt any administrative limit. PG&E also alleges that the Decision’s reliance on Resolution ALJ-274 is misplaced because Resolution ALJ-274 was issued prior to the passage of SB 291 and has no bearing on whether the electric safety citation program complies with SB 291. (Rhg. App., pp. 4-5.) Specifically, PGE alleges:

When enacting SB 291, the Legislature was well aware that “current law” or “existing law” already set a “penalty between \$500 and \$50,000 for each offense.” In adding Section 1702.5(a)(3), the Legislature could only have intended the Commission to have an administrative limit in addition to the existing statutory limit. . . . By adopting an administrative limit equal to the statutory limit, Decision 14-12-001 turns the Legislature’s “administrative limit” language in Section 1702.5(a)(3) into an idle act. (Rhg. App., pp. 4-5.)

To support this allegation, PG&E cites to the legislative history of SB 291<sup>11</sup> and asserts that it is a well-established tenet of statutory construction that courts will avoid a construction that renders any part of a statute meaningless, or extraneous, or that suggests the Legislature engaged in an idle act. (Rhg. App., pp. 4-5.)

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<sup>10</sup> In the OIR initiating this proceeding, the Commission stated that Resolution ALJ-274 meets the requirements of SB 291. Regarding the provision requiring that the Commission adopt an administrative limit on the amount of the monetary penalty that may be set by the Commission staff, the OIR stated:

Resolution ALJ-274 set a limit per violation, based on the statutory maximum in § 2107. Because there can be more than one violation per citation, this per-violation limit does not limit the total amount of penalty that could be imposed by a Commission staff-issued citation. It is not clear that SB 291 requires a per-citation limit, so the existing per-violation limit appears to comply with the statute. We will, however, consider as a policy matter in this proceeding whether a per-citation limit should also be implemented. (OIR at 6.) (D.14-12-001, pp. 27-28.)

<sup>11</sup> Rhg. App., p. 4, fn. 8 cites to Bill Analyses of SB 291 dated March 28, 2013, April 17, 2013, June 14, 2013, and September 11, 2013. The analyses are available at <http://www.leginfo.ca.gov>. Go to Bill Information 2013-2014, search for SB 291.

We find this allegation to lack merit. Once again, PG&E is alleging non-compliance with the statute when none exists. Moreover, PG&E is speculating about the Legislature's intent without any evidence to support its claim.<sup>12</sup> Contrary to PG&E's allegation, the legislative history of SB 291(cited to by PG&E) shows that the Legislature was well aware of Resolution ALJ-274, including the authority delegated to Commission staff to issue citations and the penalty for each citation. For example, the Senate Energy, Utilities and Communications Committee's March 28, 2013 analysis of SB 291, as introduced, demonstrates unequivocally that the Legislature intended to extend that same authority to electrical corporations:

Authority is already [given] to staff under ALJ-274 to cite and fine gas corporations, and the author seeks to extend that authority to electrical corporations. . . .

In addition, the monetary fine for staff citations is predetermined to be the maximum penalty allowed for in statute. Concerns that staff have too much authority should be alleviated by the establishment of the appeals process.<sup>13</sup>

Further, there is no language in Section 1702.5 prohibiting the Commission from using existing statutory limits set forth in section 2107 as the administrative limit on the amount of monetary penalty that may be set by Commission staff. Again, the electric safety citation program does not create any new violations. It simply provides Commission staff with a new safety enforcement procedure - the ability to issue citations - for violations of existing law such as GOs 95, GO 128, GO 165, GO 166, GO 174, "or other related decisions, codes or regulations, all of which are already subject to penalty amounts set forth in section 2107." (D.14-12-001, pp. 11 & 43 [Ordering Paragraph 1].)

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<sup>12</sup> Pursuant to Section 1732, [t]he application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. . . ." (Pub. Util. Code, §1732.) PG&E's allegation fails to specify, analyze, or explain how the Decision violates any legal authority or requirement, as required by section 1732, and should be dismissed on this ground alone.

<sup>13</sup> Bill Analysis of SB 291, March 28, 2013 (emphasis added). The analysis is available at <http://www.leginfo.ca.gov>. Go to Bill Information 2013-2014, search for SB 291.

Accordingly, we find that PG&E's allegation that the Decision failed to adopt an appropriate administrative limit lacks merit and rehearing is denied.

PG&E also alleges that by requiring staff to assess the maximum penalty (subject to discretionary reductions) the Decision violates both the plain language and legislative intent of Section 2107 and SB 291, but provides no further analysis of this allegation. (Rhig. App., p. 5.)

Pursuant to Section 1732, [t]he application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. . . ." (Pub. Util. Code, §1732.) On this issue, PG&E has failed to comply with this statutory requirement because it has failed to specify, analyze, or explain how the Decision violates any legal authority or requirement in this allegation. Accordingly, we deny this allegation on this ground.

**D. The Decision is neither unconstitutionally vague about what constitutes a violation nor does it conflict with GO 95.**

PG&E alleges that the Decision is unlawful because it fails to provide fair notice about the kinds of utility conduct subject to the electric safety citation program. (Rhig. App., p. 2.) PG&E also alleges that the Decision is unconstitutionally vague about what constitutes a violation. (Rhig. App., p. 6.)

PG&E supports this allegation by citing to *Federal Communications Commission v. Fox Television Stations, Inc.* (2012) 132 S.Ct. 2307. In that decision, the United States Supreme Court observed that the "regulation at issue was so broad and so vaguely worded that it did not give regulated parties "fair notice" of conduct that would be subject to sanction and imposed effectively no limit against arbitrary enforcement." (Rhig. App., p. 6.) PG&E argues that [t]he Commission's adoption of the electric citation program fails for the same reason." (Rhig. App., p. 6.) PG&E's reliance on this decision is misplaced.

In D.14-12-001, the Commission clearly describes what conduct would be subject to a citation. Specifically, the Decision authorizes staff to issue citations to any

electrical corporation owning or operating electrical supply facilities for violations of GO 95, GO 128, GO 165, GO 166, GO 174, “or other related decisions, codes or regulations applicable to electrical supply facilities.” (See D.14-12-001, pp. 11 & 43 [Ordering Paragraph 1].) In addition, the contents of a citation shall include a specification of each alleged violation, including references to the portion of the general order or general orders, or other decision, code or regulation allegedly violated, among other requirements that had been violated. (See D.14-02-001, Appendix A, p. 1.)

Hence, the Decision is abundantly clear about what conduct constitutes a violation and would be subject to citations pursuant to the electric safety citation program. Therefore, we find this allegation to lack merit, and thus, rehearing is denied on this issue.

**E. Rehearing is denied on the allegation that the Commission has not followed its own precedent involving its maintenance requirements.**

PG&E also alleges that the Decision contradicts the Commission’s own precedent about the purpose of the Commission’s maintenance requirements. (Rhg. App., p. 6.) Specifically, PG&E argues that if a utility has a schedule to repair violations consistent with the priorities in Rule 18A of GO 95, the utility should not be subjected to daily fines or citations simply because all violations have not yet been addressed as of the day the Commission begins an audit. (Rhg. App., p. 7.)

Again, PG&E has failed to specify, analyze, or explain how the Decision violates any legal authority or requirement with respect to this allegation, and has failed to comply with section 1732. Accordingly, rehearing on this issue is denied.

### **III. CONCLUSION**

For the reasons discussed above, PG&E has failed to demonstrate legal error in the Decision. Accordingly, PG&E’s application for rehearing of D.14-12-001 is denied. However, for purpose of clarification, Section 1.B.1 of Appendix A of D.14-12-001 should be modified to incorporate the language set forth in Section 1702.5 (a)(2). Rehearing of D.14-12-001, as modified, should be denied.

**THEREFORE, IT IS ORDERED that:**

1. Section 1.B.1. on page 2 of Appendix A of D.14-12-001 is modified to read as follows:

Service of the citation shall be effected either personally in the field or to an officer of respondent by electronic mail or by first-class mail- within a reasonable period of time after the discovery of the violation.

2. Rehearing of D.14-12-001, as modified, is denied.

3. Rulemaking (R.) 14-05-013 is closed.

This order is effective today.

Dated May 21, 2015 at San Francisco, California.

MICHAEL PICKER

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

LIANE RANDOLPH

Commissioners