State of California

Office of Energy Infrastructure Safety

FINAL STATEMENT OF REASONS

AND

UPDATED INFORMATIVE DIGEST

TITLE 14. NATURAL RESOURCES
DIVISION 17. OFFICE OF ENERGY INFRASTRUCTURE SAFETY
CHAPTER 1. RULES OF PRACTICE AND PROCEDURE
ARTICLE 2. PROCEEDINGS
SECTIONS 29104

WRITTEN HEARING PROCESS

OAL Notice File No. Z-2022-0816-01

JANUARY 2023

Updated Informative Digest

Energy Safety made the proposed regulations available for public review and comment from August 26, 2022 through October 10, 2022. Energy Safety did not receive a request for public hearing; therefore, Energy Safety did not conduct a public hearing.

15-Day Modifications

Following the close of the 45-day public comment period, Energy Safety made changes to the text of the proposed regulation in response to comments received regarding the proposed regulation and to streamline the hearing process. Energy Safety published and made all regulation text changes, which were all sufficiently related to the original text, available to the public for comment from October 25 through November 8, 2022.

Changes to the originally proposed text were made primarily for the purposes of clarity and to facilitate public participation. Energy Safety made modifications to section 29104 subdivisions (b)(2), (d), (f) and (g). An Update to the Initial Statement of Reasons was produced to more thoroughly describe the necessity for the amendments.

Energy Safety received no public comments during the 15-day comment period on the modified text of regulations. Following the close of the 15-day comment period, there were no further modifications or comment periods and the record was closed.

Summary and Response to Comments Following 45-Day Publication

Energy Safety accepted public comments from August 26, 2022 through October 10, 2022. No public hearing was requested.

On October 10, 2022, San Diego Gas & Electric Company (SDG&E) submitted to Energy Safety a set of written comments on behalf of SDG&E, Southern California Edison Company (SCE), and Pacific Gas and Electric Company (PG&E) (collectively, the regulated entities). The regulated entities' comments are the only comments received on the proposed regulation following the 45-day publication. Energy Safety's summary and response to regulated entities' comments are as follows.

Comment 1

The regulated entities generally appreciate Energy Safety's initiative to establish a hearing process by which electrical corporations who receive a Notice of Defect or a Notice of Violation related to compliance with their Wildfire Mitigation Plans (WMP) may provide additional information to address the allegations contained therein. Further Energy Safety's proposed revisions to the current Emergency Regulation in effect correctly recognized the distinction between the hearing process and any applicable appellate review by omitting the term "appeal" from the Proposed Regulation.

Response to Comment 1

Energy Safety acknowledges and appreciates the comment from the regulated entities.

Comment 2

Energy Safety should revise the proposed regulation to clarify that the regulated entities may contest a notice of violation or notice of defect. As currently drafted, the Proposed Regulation inappropriately creates a presumption of a violation without the benefit of an adequate factual record. While the regulated entities' ability to "present

additional information" could lead to the hearing examiner and the Director to revise or reverse the findings of the notice of violation or notice of defect, the proposed regulation should be revised to remove any presumptions regarding the alleged conduct.

To preserve the due process rights of the regulated entities and remove any presumption regarding the conduct alleged in a notice of violation or notice of defect, regulated entities recommend that proposed regulation Section 29104(c) be revised to read as follows (with added language underlined):

> *Any entity issued a notice of defect or notice of violation pursuant to Government Code section 15475.4(a) may request a written hearing to <u>contest</u>, take public comment or present additional information regarding the alleged deficiency, violation, or failure to act contained in the notice of violation or defect. The request must be received within 30 calendar days of issuance of the notice. Requests must be submitted in accordance with subdivision (b).*

The regulated entities' proposed addition does not create additional burden or cost for stakeholders or Energy Safety, nor is it inconsistent with the spirit of the proposed regulation or California Government Code section 15474.4. It merely clarifies that the regulated entities retain the ability to contest the findings outlined in a notice of defect or violation and present additional information in support.

Response to Comment 2

Energy Safety does not intend to amend the proposed regulation to add "contest" into section 29104(c).

Government Code section 15475.4(b) requires Energy Safety to provide in the notice of defect or violation to a regulated entity that the entity may request "a hearing to ***take public comment or present additional information***." A regulation to implement the statute is limited by the scope of authority the statute grants. Here, the statute does not require or authorize Energy Safety to conduct an adjudicatory proceeding. Instead, subdivision (b) expressly provides that the purpose of the hearing is only to "take public comment or present additional information."

Also, as acknowledged by the regulated entities, the presentation of additional information could lead to the hearing examiner and the Director to revise or reverse the findings of the notice of violation or notice of defect.

The proposed regulation does not implicate any due process rights because Energy Safety's decision regarding a notice of defect or violation does not affect any protected

interests or rights vested by statute. As acknowledged by the regulated entities in Comment 3, Energy Safety refers notices of defect or violation to CPUC. Statutory language in Public Utilities Code section 8386.1, states expressly, without exception, that CPUC, not Energy Safety, "shall assess penalties on an electrical corporation that fails to substantially comply with its plan."

Comment 3

Energy Safety should clearly state the process regarding referrals to the California Public Utilities Commission to ensure due process. Upon potential referral from Energy Safety, CPUC is separately responsible for imposing penalties if an electrical corporation fails to substantially comply with its Wildfire Mitigation Plan (WMP). This new process is unique in that it involves the potential for investigation and factfinding efforts by two different agencies. The regulated entities seek additional clarity within the body of the proposed regulations regarding the roles and interplay between the two processes.

The regulated entities appreciate Energy Safety's recognition of this bifurcated process and an effort to establish the roles of each agency in the Initial Statement of Reasons (ISOR). As explained in Footnote 2 of the ISOR,

> The California Public Utilities Commission is responsible for imposing penalties for failure to comply with wildfire mitigation plans. (Pub. Util. Code § 8386.1). Energy Safety's role is to refer notices of defect or violation to the California Public Utilities Commission. The hearing to which this regulation [sic] does not supplant the Commission's investigation or hearing process.

The regulated entities agree that Energy Safety is tasked with issuance of and initial hearings regarding notices of defect or violation regarding an approved WMP. To avoid confusion and properly codify these responsibilities, the regulated entities request that Energy Safety also include the language of Footnote 2 of the Initial Statement of Reasons within the proposed regulation. The regulated entities specifically propose that Energy Safety add a provision (h) (in underlined text) to Section 29104 to state as follows:

> *The hearing process established by this regulation does not supplant the investigative or hearing process of the California Public Utilities Commission*.

Memorializing this intent—as already provided in the ISOR—will afford all stakeholders additional clarity regarding the process of referring notices of violation or defect to CPUC.

Response to Comment 3

Energy Safety acknowledges and appreciates the comment from regulated entities that Energy Safety has made clear the different roles and responsibilities Energy Safety and CPUC each has. Energy Safety does not intend to amend the proposed regulation to add the above-referenced underlined text in Comment 3.

Join IOUs' proposed text and Footnote 2 of the ISOR are not appropriate additions to regulatory text because they do not help implement, interpret, or make specific a statute such that Energy Safety can accomplish its legislative goal. While helpful as part of the rulemaking, as regulatory text they may be duplicative of CPUC's clear authority in Public Utilities Code section 8386.1, which states expressly, without exception, that CPUC, not Energy Safety, "shall assess penalties on an electrical corporation that fails to substantially comply with its plan."

Comment 4

Energy Safety should provide the opportunity to request an oral hearing, consistent with due process and the Public Utilities Code. The regulated entities generally believe that a written hearing process will be an expeditious and efficient means to address notices of violation or defect, particularly those deemed "moderate," or "minor." But limiting the hearing process to only a written procedure implicates due process concerns if it restricts the regulated entities or other stakeholders from conducting additional factfinding, presenting testimony, or cross-examining witnesses regarding contested material facts.

Energy Safety may issue a notice of violation or defect with no effort to gain initial input from the electrical corporation in question. During the hearing process, the regulated entity may seek to gain additional information from Energy Safety regarding the defect, question the inspectors regarding the findings, or cross-examine relevant witnesses. The current process provides no such opportunity, which limits the due process rights of the electrical corporations. Given the potentially significant penalties and reputational damage that might be associated with findings of non-compliance with a Wildfire Mitigation Plan, Energy Safety must include—at the minimum—the opportunity for the regulated entities to request an oral hearing in appropriate instances.

Government Code section 15475.4 anticipated a "hearing" process, which traditionally implies an in-person hearing affording parties to present evidence and examine witnesses. Further, the opportunity to request oral, in-person evidentiary hearings is rooted in Energy Safety's obligations as successor to the Wildfire Safety Division at CPUC. Energy Safety's enabling legislation specifically provides that the Office is vested with "all the duties, powers, and responsibilities of the Wildfire Safety Division

pursuant to Section 326 of the Public Utilities Code." To maintain further continuity of regulation, the Legislature also clarified that "All laws prescribing the duties, powers, and responsibilities of the Wildfire Safety Division to which the office succeeds, together with all lawful rules and regulations established under those laws, are expressly continued in force."

Thus, it is only logical that the Legislature anticipated Energy Safety to establish a hearing process which includes the right to request in-person evidentiary hearings and be heard when a contested issue of material fact arises—as is the case at the Public Utilities Commission. Pursuant to Public Utilities Code sections 1701, et. seq. parties to proceedings at the Commission are afforded the right to seek an evidentiary hearing or the assigned Commissioner may determine a hearing is required.

This is not to say that the regulated entities anticipate the need for hearings in the case of most notices of violation or defect. Many notices, especially those characterized as moderate or minor, will most likely result in either a written hearing process to provide additional information regarding the circumstances or a stipulation from the regulated entity. The regulated entities therefore do not agree that allowing the regulated entities to make a request for an oral hearing—one that need not necessarily be granted—would result in unnecessary additional costs to any parties. But WMP initiatives—like the electrical system itself—are complicated and complex, and there will likely be instances where an oral hearing would facilitate the development of a more fulsome evidentiary record on which Energy Safety is obligated to base its findings.

Moreover, given the significance of the due process implications in completely denying the availability of hearings and witness testimony, citing largely to the potential for additional costs is insufficient.

Additionally, it is inaccurate to claim that a hearing process could "leave a defect or violation unresolved for a longer time period." The regulated entities are constantly mindful of the safety of the areas they serve and the public, and if a potential defect is brought to their attention the electrical corporations can inspect that area post-haste to remedy any areas of concern. Corrective actions are taken outside of the hearing process—or even the noticing process.

The regulated entities thus respectfully request that Energy Safety amend the Proposed Regulations to include the right to request an oral hearing, consistent with the language stated in Alternative 3 of the Initial Statement of Reasons.

Response to Comment 4

Energy Safety does not intend to amend the proposed regulation to adopt Alternative 3 to proposed regulation section 29104(d), as described on page 13 of ISOR, which adds the option that a regulated entity may request an oral hearing.

Energy Safety appreciates the regulated entities acknowledgement that a written hearing process will be an expeditious and efficient means to address notices of violation or defect, particularly those deemed "moderate," or "minor." Energy Safety finds that a written hearing process will be an expeditious and efficient means for all notices of violation and defect.

First, the proposed regulation does not implicate due process protections because Energy Safety's decision regarding a notice of defect or violation does not affect any protected interests or rights vested by statute. Statute requires the regulated entities to comply with the requirements of their respective Wildfire Mitigation Plans, requires Energy Safety to conduct inspections and audits to confirm that compliance. However, with respect to the regulated entities' due process argument, regulated entities do not have a statutory right to a finding of compliance.

Further, as acknowledged by the regulated entities in Comment 3, Energy Safety refers notices of defect or violation to CPUC. Public Utilities Code section 8386.1, states expressly, without exception, that CPUC, not Energy Safety, "shall assess penalties on an electrical corporation that fails to substantially comply with its plan." The regulated entities once again use the term "contest," but as noted in Comment 2, Government Code section 15475.4(b) requires Energy Safety to provide in the notice of defect or violation to a regulated entity that the entity may request "a hearing to ***take public comment or present additional information***." Subdivision (b) does not authorize Energy Safety to provide a hearing to "***contest***, take public comment or present additional information."

Second, the regulated entities conflate Energy Safety and CPUC process with the argument that, "[g]iven the potentially significant penalties and reputational damage that might be associated with findings of non-compliance with a Wildfire Mitigation Plan, Energy Safety must include—at the minimum—the opportunity for the regulated entities to request an oral hearing in appropriate instances." Again, Energy Safety does not issue penalties. To the extent the regulated entities argue that Energy Safety might arbitrarily find a violation without underlying factual information, the proposed written hearing process satisfies any need for a regulated entity to provide additional information relating to the finding.

Third, the regulated entities argue that Government Code section 15475.4 anticipated a "hearing" process, which traditionally implies an in-person hearing affording parties

to present evidence and examine witnesses. The regulated entities also argue that the opportunity to request oral, in-person evidentiary hearings is rooted in Energy Safety's obligations as successor to the Wildfire Safety Division at CPUC, and that to maintain further continuity of regulation, the Legislature also clarified that "All laws prescribing the duties, powers, and responsibilities of the Wildfire Safety Division to which the office succeeds, together with all lawful rules and regulations established under those laws, are expressly continued in force." Thus, the regulated entities argue, it is only logical that the Legislature anticipated Energy Safety to establish a hearing process such as the one CPUC has pursuant to Public Utilities Code sections 1701, et seq.

Energy Safety is an entity separate from CPUC and is not vested with the same statutory authority as the CPUC. The comment misreads the statute to require Energy Safety to provide the same adjudicative venue and process as the CPUC. As the regulated entities noted in Comment 3, Energy Safety and the CPUC are different agencies with different investigation and factfinding responsibilities. The statutory language of Government Code section 15475.4 is clear. The plain meaning of the words provides the exact purpose of the hearing at issue: "a hearing to take public comment or present additional information."

As the regulated entities noted, Energy Safety's enabling legislation specifically provides that Energy Safety is vested with "all the duties, powers, and responsibilities of the Wildfire Safety Division pursuant to Section 326 of the Public Utilities Code," which does not include Public Utilities Code sections 1701, et seq.

Fourth, the regulated entities argue it is inaccurate to claim that a hearing process could "leave a defect or violation unresolved for a longer time period," and that they are constantly mindful of the safety of the areas they serve and the public and if a potential defect is brought to their attention the electrical corporations can inspect that area post-haste to remedy any areas of concern. Corrective actions are taken outside of the hearing process—or even the noticing process. In Comment 4, the regulated entities describe extensively the evidentiary hearing they propose, that it should be oral, in person, and allow for questioning the inspectors regarding the findings, and cross-examining relevant witnesses, prolonging the existing of a defect or a violation they seek a hearing for. The proposed language in contrast simply asks Join IOUs to provide what additional information they need to provide to Energy Safety in response to a notice of defect or violation. Also, the regulated entities do not explain why an evidentiary hearing would not take more time. Rather, the regulated entities states that they would simply fix whatever defect or violation they seek a hearing for as the hearing is occurring. Energy Safety agrees that fixing defects or violations is necessary and that the work can appropriately be done regardless of the status of a particular hearing.

Comment 5

The regulated entities recommend that Energy Safety consider a rehearing process in the permanent rules. The regulated entities do not anticipate instances of significant non-compliance with their WMPs and believe that many moderate or minor infractions may be expeditiously addressed through the written hearing process proposed. To reduce court resources and mitigate the potential for dual track proceedings (in the event of an appeal to the superior court and/or a recommendation to CPUC for an enforcement action), the regulated entities recommend that Energy Safety consider a rehearing process by which a final decision may be reconsidered where appropriate. As at the CPUC, a rehearing process allows for reconsideration of decisions that may be factually or legally problematic and could reduce the need for unnecessary litigation.

Response to Comment 5

Energy Safety does not intend to amend the proposed regulation to adopt a rehearing process.

Energy Safety acknowledges and thanks the regulated entities for this comment. However, the comment does not make objections or recommendations specifically directed at the proposed action.

Further, as referenced by the regulated entities, there exists already a judicial review process. Pursuant to Government Code section 15475.5, an electrical corporation may request a judicial review of an Energy Safety decision. A decision resulting from a rehearing process would also be subject to the same judicial review. Therefore, a rehearing process would not save judicial resource. In addition, in the event of a judicial review, a court could order a stay of the CPUC proceeding pending the court's resolution of the action before it.

Technical, Theoretical, or Empirical Studies or Reports

Energy Safety did not rely on any report or other document in the development of this rulemaking beyond that previously identified in the Initial Statement of Reasons and the Update to the Initial Statement of Reasons.

Alternatives That Would Lessen Adverse Impacts on Small Business

No alternatives were proposed to Energy Safety that would lessen any adverse economic impact on small business.

Alternatives Determination

In accordance with Government Code section 11346.9(a)(4), Energy Safety has considered proposed alternatives, and, for reasons set forth in the Initial Statement of Reasons, the Update to the Initial Statement of Reasons, the responses to comments received, and in this Final Statement of Reasons, Energy Safety has determined that no available alternative would be more effective in carrying out the purposes for which the regulations are proposed, or would be more cost effective to affected private persons, or would be equally effective in implementing the statutory policy.

Local Mandate Determination

The proposed regulations do not impose any mandate on local agencies or school districts.

Coordination with Federal Law

Energy Safety has determined that this proposed regulatory action neither conflicts with nor duplicates any applicable federal regulation contained in the Code of Federal Regulations. There have been no changes in applicable laws related to the proposed action or to the effect of the proposed regulation from the laws and effects described in the Notice of Proposed Action.