

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

SAFETY AND ENFORCEMENT DIVISION
Electric Safety and Reliability Branch

June 24, 2021
Resolution ESRB-9

RESOLUTION

Resolution ESRB-9 - Modifies Citation Procedures for Violations of Commission General Order 167, Enforcement of Maintenance and Operation Standards for Electric Generating Facilities

OUTCOME: Modifies the General Order 167 citation process to allow Commission staff to issue citations for any violation of General Order 167 and aligns the General Order 167 citation process with those of the existing Commission electric citation programs.

SAFETY CONSIDERATIONS: May improve the safety and reliability of California electric generation facilities.

ESTIMATED COST: No significant cost.

SUMMARY

The Commission's General Order (GO) 167 sets forth standards for the maintenance and operation of electric generating facilities. Under the existing language of GO 167, Commission staff may issue citations only for certain specified violations of GO 167. This Resolution modifies the scope of the violations for which Commission staff may issue citations to include any violation of GO 167, and modifies the GO 167 citation process to more closely align with the Commission's other existing electric citation processes.

BACKGROUND

The Commission first adopted GO 167 in 2004, in two decisions issued in Rulemaking (R.) 02-11-039.¹ That proceeding was opened by the Commission to implement the requirements of Pub. Util. Code § 761.3,² which was enacted in response to the California

¹ Those two decisions are Decision (D.) 04-05-017 and D.04-05-018.

² Senate Bill (SB) X2 39 (Burton and Speier), added by Statutes 2002, Second Extraordinary Session, Chapter 19, Section 4 (effective August 8, 2002). All statutory references are to the Public Utilities Code unless specified otherwise.

energy crisis of 2000-2001 and directed the Commission to implement and enforce standards for the maintenance and operation of electric generation facilities. (D.04-05-017 at 2, citing § 761.3(a).)

As the Commission stated in 2004:

The statewide energy crisis of 2000-2001 resulted in many economic and personal hardships to people and businesses within California. In our recent filing with the Federal Energy Regulatory Commission (FERC), we indicated that the total cost of electricity needed to serve California, for the period of May 2000 through June 2001, was \$19 billion higher than the cost incurred during the combined years of 1998, 1999, and 2000. Our filings with FERC document many instances of Generating Assets being placed on reserve status for questionable reasons and resulting in electricity power outages.

In 2002, the California Legislature passed Senate Bill SBX2 39 during its second extraordinary session to help avoid such outages in the future. The Legislature determined that the public interest, as well as the public health and safety, requires the electric generating facilities and power plants in the state to be maintained appropriately and operated efficiently. (D.04-05-018 at 3-4, footnote omitted.)

GO 167 was the Commission's response to this statutory directive. While GO 167 was initially implemented in D.04-05-017 and D.04-05-018, it has been subsequently modified, with the most recent changes in 2008 via Resolution No. E-4184 adopted August 21, 2008 and D.08-11-009 adopted November 6, 2008.³

The first sentence of the current version of GO 167 states:

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. (GO 167, Section 1.0.)

³ The process for adopting the 2004 decisions and the 2008 Resolution and decision did not include evidentiary hearings. Resolution E-4184 modified the reporting requirements for electric and gas emergencies. D.08-11-009 added procedural details to the enforcement provisions for consistency with existing citation programs.

On August 14 and 15, 2020 as the result of an extreme heat storm, the California Independent System Operator (CAISO) implemented rolling outages in response to inadequate electric generation to meet the demand on the system. Hundreds of thousands of Californians lost power as a result. Looking at just Commission-jurisdictional customers, 491,600 were affected by rolling outages on August 14, 2020, and 321,000 were affected by rolling outages on August 15, 2020.⁴

In response to these rolling outages, the Commission's Safety and Enforcement Division (SED) conducted in-person inspections at a select number of electric generating facilities that experienced outages during the August 2020 heatwave and shared its findings with the Commission. At the Commission's public meeting on January 14, 2021, the Commissioners generally expressed support for the concept of expanding Commission staff's authority to issue citations for violations of GO 167, including violations of maintenance and operation standards. This Resolution implements that policy directive.

Notice

A preliminary draft Resolution, with proposed changes to GO 167 attached as Appendix A, was served via e-mail on April 8, 2021 to all generating asset owners⁵ and to the service lists in the following Commission proceedings: Emergency Reliability (R.20-11-003), Resource Adequacy (R.19-11-009), Integrated Resource Planning (R.16-02-007) and the prior GO 167 proceeding (R.02-11-039). Comments on the draft were due on April 27, 2021, and reply comments were due on May 4, 2021.

JURISDICTION

The Commission's authority under GO 167, pursuant to § 761.3, extends beyond the regulated investor-owned utilities and includes other generators, including exempt wholesale generators (EWGs). The Commission's authority specifically encompasses any "Generating Asset," as defined in section 2.8 of GO 167, and any "Generating Asset Owner," as defined in section 2.9 of GO 167, subject to certain exceptions. This Resolution does not change those definitions and exceptions and does not change or expand the range of entities covered by GO 167.

The scope of the Commission's jurisdiction under § 761.3 was discussed in depth in D.04-05-017⁶, D.04-05-018⁷ and D.06-01-047 and need not be repeated here, other than

⁴ Final Root Cause Analysis, Mid-August 2020 Extreme Heat Wave, dated January 13, 2021 at 34-35.

⁵ A list of all generating assets and corresponding generating asset owners is attached as Appendix B to this Resolution.

⁶ See, D.04-05-017 at 5-21.

⁷ See, D.04-05-018 at 6-11.

to note that the Commission previously observed that: “The breadth of the legislation extends our authority to many electric generators who have consistently maintained that they are not otherwise subject to our regulation.” (D.04-05-018 at 6.) The citation authority to be granted to staff by this Resolution does not expand the jurisdiction or authority of the Commission beyond that already established by § 761.3, D.04-05-017, D.04-05-018 and D.06-01-047.

It is clear that the Commission’s jurisdiction for enforcing violations of Commission decisions and rules extends beyond just the investor-owned utilities that the Commission generally regulates. The Public Utilities Code states:

Every corporation or person, other than a public utility and its officers, agents, or employees, which or who knowingly violates or fails to comply with, or procures, aids or abets any violation of any provision of the California Constitution relating to public utilities or of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in the violation or noncompliance, in a case in which a penalty has not otherwise been provided for the corporation or person, is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense. (Pub. Util. Code § 2111.)

PROPOSED CHANGES

The existing language of GO 167 provides that for specified violations the Director of CPSD (predecessor to SED) and his/her designee “may assess a scheduled fine” via a citation process. (GO 167, subsection 13.3.1.) The specified violations for which a scheduled fine can be assessed via citation are limited to certain recordkeeping and reporting requirements, which are set forth in Appendix F of GO 167. (GO 167, subsection 13.3.2.) Additionally, the current language in Appendix F is vague, and there are aspects of its application that are unclear. Violations of other provisions of GO 167 beyond those set forth in Appendix F can be enforced by the Commission via a formal proceeding, such as an Order Instituting Investigation (OII). (GO 167, section 13.1.)

This existing structure presents several practical problems. First, it means that enforcement of even minor violations of GO 167 other than those specified in Appendix F would appear to require opening a full OII. Opening an OII for a relatively minor violation is not resource effective for either the Commission or the respondent, and creates an incentive for the Commission to only take enforcement action in response to the most egregious violations of GO 167, and to let smaller violations go unaddressed. This is not the optimum approach to ensuring the reliability of the electrical grid.

Second, the citation process set forth in GO 167 for violations of Appendix F is separate and distinct from the Commission’s existing and more general electric citation program

adopted in D.14-12-001 and most recently modified in D.18-05-023.⁸ Accordingly, whenever the electric citation program is modified, the GO 167 citation process also has to be modified, or else the Commission and parties will have to deal with differing processes depending on whether they are being cited under the general electric citation program or under GO 167. In fact, a number of the changes to the GO 167 citation program made in D.08-11-009 were for the purpose of making the GO 167 processes more consistent with the processes used in the Commission's electric citation program. (D.08-11-009 at 5-7, 9-12.) Having multiple and differing citation programs that must be separately updated to maintain consistency is not efficient for either the Commission or interested parties.

In order to remedy these problems and to implement the Commissioners' stated desire to expand Commission staff's authority to issue citations for violations of GO 167, the best approach is to align the GO 167 citation process with the Commission's existing general electric citation program. This can be done by using the general electric citation process for all violations of GO 167, and eliminating the current process set forth in subsection 13.3.2 and Appendix F. A redlined version of section 13.3 of GO 167 ("Imposition of Fines for Specified Violations") showing the proposed changes is attached as Appendix A to this Resolution. The proposed changes only affect section 13.3; Appendix F and section 14.4 (referring to section 13.3 and Appendix F) would be eliminated. No changes to other sections of GO 167 are proposed.²

Delegation of Authority to Commission Staff

The Commission has previously delegated citation authority to Commission staff for specified violations under GO 167 and for more general electric violations pursuant to D.14-12-001. The proposed changes do not expand that authority, and only conform staff's authority to issue GO 167 citations with the previously established electric citation program. Given the events of August 14 and 15, 2020, the Commission finds it reasonable and necessary to permit staff to issue citations for violations of any part of GO 167 under the existing delegation of authority for electric violations.

⁸ D.14-12-001 stated: "The Commission finds it is reasonable and necessary to delegate to staff the ability to issue citations to any electrical corporation owning or operating electrical supply facilities for violations of GOs 95, 128, 165, 166, 174, or other related decisions, codes or regulations applicable to electrical supply facilities. [...] This decision gives staff the authority to issue a written citation to any electrical corporation owning or operating electrical supply facilities for violations that occurred both before and after the date of this decision." (Id. at 11-12.)

² Another possible approach would be to leave in place the existing process set forth in subsection 13.3.2 and Appendix F and add new language to provide for citations under the Commission's general electric citation program for any other violations outside of the violations listed in Appendix F. This approach is more complex and does not fix the problem of having two separate processes, and so is less desirable.

Questions/Issues

In adopting this refinement to the Commission's electric citation process for GO 167, there are a number of issues that comments should address, including the following:

- 1) In determining the size or nature of a fine or other penalty for violations of GO 167, are there factors that should be considered that differ from those used in the Commission's existing electric citation program? If so, what are they and how should they be applied?
- 2) Are there any other differences between GO 167 citations and other electric citations that should be taken into consideration? If so, what are those differences and how should they be taken into consideration?
- 3) Should the changes made in the citation process by this Resolution apply to past violations of GO 167, or only to future violations? Any argument that the changes should only apply prospectively should address the discussion in D.14-12-001 at 19-20.

INITIAL COMMENTS AND DISCUSSION

Comments on the preliminary draft Resolution (served on April 8, 2021) were received from the Independent Energy Producers Association (IEP), the California Energy Storage Alliance (CESA), the Protect Our Communities Foundation (PCF), Western Power Trading Forum (WPTF)¹⁰, Arevon Asset Management (Arevon)¹¹, and jointly from Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas & Electric Company (Joint Utilities). Reply comments were received from IEP, PCF and the Joint Utilities.

IEP, PCF, WPTF and the Joint Utilities submitted detailed and thoughtful comments that provided a wide range of views, and that the Commission has carefully considered. The comments of CESA and Arevon were less detailed, and raised more general concerns.

¹⁰ WPTF did not serve Commission staff with its comments on April 27, 2021, but WPTF appears to have timely served other parties, who responded to WPTF's comments. Commission staff received WPTF's initial comments on May 5, 2021, after requesting those comments from counsel for WPTF.

¹¹ It appears that Arevon may not have served their April 27, 2021 comments on anyone other than Commission staff. Accordingly, while Arevon's comments were considered, they were given significantly less weight, as other interested parties did not have an opportunity to respond to Arevon.

IEP

IEP generally opposes the changes proposed in the preliminary draft Resolution, and raises a number of issues. The two main overarching arguments made by IEP are that the proposal does not adequately distinguish between electric public utilities and independent power producers with the status of Exempt Wholesale Generators (EWGs) (IEP Initial Comments at 2-5), and that the proposed changes are an unnecessary shift from what IEP characterizes as an effective compliance-based approach to one more focused on punishment. (Id. at 2, 11-12.)

IEP spends considerable time emphasizing the fact that the scope of the Commission's jurisdiction over EWGs differs from and is more limited than the Commission's jurisdiction over electric utilities. As a general concept, IEP is correct, but in the specific situation presented by GO 167, the distinction is largely irrelevant. The Commission has previously addressed this issue, and has expressly found that it has authority over EWGs pursuant to § 761.3.

In D.04-05-017, the Commission noted that several parties made the argument that the Commission's implementation and enforcement standards, such as those contained in GO 167 cannot govern operation and maintenance practices of EWGs. (D.04-05-017 at 7.) The Commission emphatically rejected that argument, finding that the California Legislature made EWGs "[E]xplicitly subject to the additional, special, specific jurisdiction vested in the Commission to enforce operations and maintenance standards pursuant to § 761.3." (Id. at 10.)

The Commission continued:

"In fact, § 761.3 specifically directs that the Commission implement and enforce Committee-adopted standards to be followed by an electrical corporation notwithstanding specific provisions of the Public Utilities Code that would otherwise exclude EWGs from Commission jurisdiction (i.e., §§ 216(g), 228.5(c), 228.5(d)). As a result, the law provides the Commission with the specific and necessary jurisdictional basis to apply adopted standards to EWGs." (Id. at 11.)

In short, the Commission has previously considered and rejected the argument that GO 167 cannot be enforced against EWGs. (D.04-05-017 at 5-21; see also, D.06-01-047.)

EWGs have been subject to GO 167 for years, and they can be penalized for a violation of GO 167 via a Commission Order Instituting Investigation (OII), or via a citation for

certain specific violations identified in section 13.3 of GO 167. There is no legal barrier to the Commission issuing citations to EWGs for violations of GO 167.

IEP also makes several policy arguments as to why EWGs should not be subject to citations for any violation of GO 167. According to IEP, SED already has substantial existing enforcement authority, including audits of generating assets, data requests, notices of violation, and requests for corrective action. (IEP Initial Comments at 6-8.) IEP notes that this range of actions available to SED allows SED to take quick action, and to have flexibility to tailor its enforcement approach to match the facts on the ground, and an “overly prescriptive enforcement regime” could hinder that flexibility. (Id. at 8-9.)

IEP raises a valid point - it would be counterproductive for the Commission to adopt an overly rigid or prescriptive approach that forces SED to always impose a penalty, and forecloses SED from working with a generation asset to bring a facility into compliance with the requirements of GO 167. Accordingly, we clarify that providing SED with expanded citation authority under GO 167 does not remove or limit SED’s ability to use any of its existing tools to ensure the safe and reliable operation of electric generation assets. While SED is authorized to issue a citation for any violation of GO 167, it is not required to do so.

Similarly, IEP argues that the preliminary draft Resolution shifts the focus from promoting compliance to punishing violations. (IEP Initial Comments at 11-12.) IEP’s argument mischaracterizes the proposed changes as binary, with penalties taking the place of compliance. The Commission is not taking any existing compliance tools away from SED, but is rather providing SED with an additional tool that it may use as appropriate. In some situations, a penalty may be appropriate.

Finally, IEP argues that independent power producers have an inherent economic incentive to comply with the requirements of GO 167, as they will not earn revenues if they are not generating (or ready to generate) electricity. (Id. at 9-10.) However, based on California’s historic experience, it is not clear that this economic incentive guarantees the reliable operation of electric generation units as consistently as IEP’s argument implies.

Currently, if an independent power producer violates GO 167, they can be subject to substantial penalties via an OII. If they comply with the requirements of GO 167, they are not subject to penalties for violation of GO 167. Allowing citations for violations of GO 167 does not change this basic calculus. IEP’s market-based argument would support the elimination of any penalty for violations of GO 167, not just citations, which the Commission is not considering. California’s real-world experience has shown that sometimes a visible enforcement mechanism is a necessary backstop to the invisible hand of the market.

In its Initial Reply Comments, IEP reiterates more vigorously its argument that EWGs should not be subject to the Commission's electric citation rules, on the grounds that those rules were written to apply only to electric utilities, not to EWGs. According to IEP:

Integrating the GO 167 citation program with the broader Citation Rules would require significant revisions to the Citation Rules to maintain jurisdictional clarity and would nonetheless create the risk of jurisdictional overreach by the Commission. (IEP Initial Reply Comments at 1)

IEP further expands on this argument later:

Any attempt to integrate the GO 167 citation program with the Citation Rules will have to be carefully constructed to avoid jurisdictional confusion and potential overreach. [...] Maintaining the existing distinction between the GO 167 program that applies to GAOs [Generating Asset Owners] and the Citation Rules that apply to electric public utilities is simpler, preserves the jurisdictional distinction between EWGs and public utilities, and is consistent with the different functions of the two citation programs.

For these reasons, IEP recommends keeping the citation program for GO 167 within GO 167 and not attempting to integrate the GO 167 citation program with the general Citation Rules. (Id. at 2-3.)

IEP's argument misstates the proposed outcome of the preliminary draft Resolution. While the word "integrate" was used in parts of the preliminary draft Resolution, the Commission would not actually be integrating the GO 167 citation program into the more general electric citation program.¹² The GO 167 citation program would remain separate, but would use the same processes and procedures as the electric citation program, including the appeal process. The proposed revised language of section 13.3.1 reads: For any violation of this General Order, citations may be issued pursuant to Public Utilities Code section 2111 or other applicable authority, following the processes and procedures of the Commission's electric citation program, as set forth in D.14-12-001 as modified by D.16-09-55 and D.18-05-023, or its successor.

In short, the proposed changes do exactly what IEP recommends – keeping the citation program for GO 167 within GO 167 itself. IEP's argument that the proposed changes would somehow result in jurisdictional confusion or overreach is not well founded. The

¹² The word "integrate" used in the preliminary draft Resolution may have caused some confusion, and has been replaced with the word "align."

proposed changes do not change the Commission's jurisdiction over EWGs pursuant to § 761.3.

PCF

PCF strongly supports the proposed changes set forth in the preliminary draft Resolution, both expanding the scope of SED staff's citation authority and making the GO 167 citation processes consistent with the Commission's overall electric system enforcement procedures. (PCF Initial Comments at 7.) PCF provides additional factual background in support of its position, and makes several other recommendations.

PCF notes that the preliminary draft Resolution states that the proposed changes do not expand the existing jurisdiction or authority of the Commission. PCF requests that the Resolution should similarly state that the proposed changes do not reduce or otherwise result in the diminution of the Commission's jurisdiction over electric generation facilities. (Id.) The proposed changes to SED staff's citation authority do not affect or alter the scope of the Commission's authority or jurisdiction. Just as there is no increase in jurisdiction, there is no decrease in jurisdiction.

PCF similarly requests affirmation of the Commission's authority to impose penalties pursuant to PU Code §2111. (Id. at 8.) Since that authority is statutory, the Commission has that authority regardless of whether or not the Commission expressly restates it, but to be clear, nothing in the proposal affects the scope of the Commission's authority pursuant to §2111.

PCF devotes a significant portion of its comments to factual background on both power plant outages and the statutory and regulatory responses to those outages. (PCF Initial Comments at 2-6.) According to PCF, the background they describe supports the Commission vigorously enforcing the requirements of GO 167. (Id. at 3.)

PCF has two other recommendations. First, that GO 167 be updated to require the digital filing, maintenance and transmission of records and logbooks. (Id. at 2, 8.) And second, that the Commission should explicitly include the whistleblower protections for workers and consider adopting additional requirements for workforce training and protections. (Id. at 2,10.) No other comments or reply comments addressed these issues. It is not clear that this is the appropriate forum to fully address these issues, so we do not adopt them at this time, but Commission staff may consider them further as appropriate.

PCF strongly opposes the arguments of IEP, which PCF characterizes as "tired," and echoing arguments made in 2002 against the enactment of § 761.3. PCF opposes IEP's efforts to limit, hobble, stifle or freeze the Commission's enforcement authority. (See, PCF Initial Reply Comments at 2-7.)

WPTF

WPTF's comments on the preliminary draft resolution tend to be the most nuanced. For example, WPTF supports authorizing staff to issue citations for any violation of GO 167, and would require electric generators to immediately correct any violations of GO 167 maintenance and operations standards that are noticed in a citation (WPTF Initial Comments at 1), but would retain the separate citation regime currently embodied in Appendix F (Id. at 7). WPTF offers detailed redline edits of GO 167, along with tables comparing GO 167 with the general electric citation rules.

Overall, however, WPTF's recommendations are not significantly dissimilar from those in the preliminary draft Resolution. The main issue raised by WPTF is the difference in the methodology for calculating penalty amounts under GO 167 compared with the general electric citation program. For example, WPTF points out that the electric citation program requires staff to set the fine for each cited violation at the statutory maximum, while GO 167 sets forth the factors to be considered in determining the sanctions to be imposed on a generation asset owner. (WPTF Initial Comments at 3-4)

WPTF's primary recommendation to address this issue is for the Commission to retain the factors set forth in sections 14.1, 14.2 and 14.3 of GO 167, regardless of any other changes made to GO 167. (Id. at 5.) The preliminary draft Resolution does not eliminate those sections of GO 167, and there is no other proposal to do so. Sections 14.1, 14.2 and 14.3 of GO 167 remain in place unchanged.

Some of WPTF's observations and suggestions are both nuanced and detailed, and deserve further consideration as we implement the changes adopted today. The Commission recommends that SED consider WPTF's recommendations on a going-forward basis when evaluating potential refinements to the GO 167 citation process.

Joint Utilities

In their opening comments, the Joint Utilities generally supported the intent of the preliminary draft Resolution, but their support is conditional, and they requested certain additional language and requirements be placed upon the proposed citation program. (Joint Utilities Initial Comments at 1-3.)

First, the Joint Utilities requested that a revised GO 167 specifically and explicitly incorporate by reference the Commission's recently adopted Enforcement Policy (Resolution M-4846). The Joint Utilities point out that: "The Enforcement Policy notes that 'Staff may decide that violations that are 'administrative' in nature do not warrant the imposition of a penalty given the facts known at the time.'" (Joint Utilities Initial Comments at 4.)

The Joint Utilities further note that:

The Enforcement Policy also specifically contemplates a series of escalating steps that Staff may employ before issuing an NOV [...], which appropriately and sensibly begin with more collaborative Staff-utility “warning communications.” (Id.)

It is understandable why the Joint Utilities may want to expressly incorporate these aspects of the Enforcement Policy into the GO 167 penalty process, but we decline to do so. First, the Commission’s new Enforcement Policy is an over-arching policy, and as such will be taken into consideration as appropriate across Commission proceedings, whether or not it is specifically identified in the applicable General Order or other Commission decision or order. The Commission expects that its processes, including those under GO 167, will be implemented consistent with Commission policies and practices, including the Enforcement Policy. Expressly adding a reference to the Enforcement Policy in GO 167 could potentially cause confusion as to whether or not it is applicable in cases where it is not specifically identified.

Second, the GO 167 citation program we approve today and the Commission’s Enforcement Policy are separate processes, both of which may be subject to refinements and other changes, so it is inadvisable to firmly lock together the current version of GO-167 (and only GO 167) to the current version of the Enforcement Policy. The two processes are separate and additive: the Commission can utilize either one individually or both together as needed, and is not limited to using them in combination. The Enforcement Policy itself states that: “This Policy does not modify any of the Commission’s citation programs...” (Resolution M-4846 at 3.) It is inappropriate and unnecessary to modify the GO 167 citation program to expressly lock it to the Enforcement Policy.

In a mirror image of IEP’s argument, the Joint Utilities argue that the Commission should take into consideration the fact that the regulated electric utilities are subject to additional Commission oversight, such as rate recovery disallowances, that do not apply to independent power producers. (Joint Utility Comments at 5-6.) While this is true, this is currently the case for Commission enforcement actions under GO 167, whether those are notices of violation, citations, or OIIs, so it is not clear why such language needs to be added to GO 167. And it is not clear that the electric utilities should be treated differently (presumably more leniently) than independent power producers for violations of GO 167, which would appear to be the practical implication of the Joint Utilities’ argument.

Later, the Joint Utilities modified their position to more closely correspond to that of WPTF. (Joint Utilities Initial Reply Comments at 1-3.) With some minor exceptions, the changes adopted by this Resolution are generally consistent with the recommendations of WPTF, as discussed above.

While the Joint Utilities agree with IEP that the focus of GO 167 should be on correction rather than punishment, the Joint Utilities also agree with PCF's criticism of IEP, that IEP appears to be primarily focused on evading the Commission's jurisdiction over EWGs, which was previously litigated and resolved, contrary to IEP's arguments. (Joint Utilities Initial Reply Comments at 2.)

CESA and Arevon

CESA expressed concern that the proposed changes "would remove the due process involved in formal investigations into violations of GO 167," because it "would allow staff to more easily review and issue citations and fines." (CESA Initial Comments at 2.) The proposed changes (which would allow staff to more easily issue citations) do not take the place of or obviate the availability of more formal investigations, such as an OII. This Commission anticipates that more significant or larger-scale violations would likely still be the subject of an OII, rather than a citation. As such, the proposed citation process does not remove any due process from the Commission's formal investigation process. In addition, the Commission's general electric citation process that would apply to GO 167 violations provides due process, including an appeal process. CESA fails to identify how the proposed changes "remove" due process.

Arevon makes a number of suggestions, including that the Commission should publish examples of citations that eventually were deemed violations, and the Commission should provide guidance on how the penalty amount will be determined. (Arevon Initial Comments at 3.) The existing electric citation program already provides guidance on how penalty amounts are determined, and GO 167 also sets forth factors to be taken into consideration when calculating penalties. In addition, the Commission posts on its website a listing of electric safety citations that have been issued, including supporting documents. ([Electric Safety Citations \(ca.gov\)](https://www.cpuc.ca.gov/Electric%20Safety/Citations)) Arevon also requests that "that the Commission consider conducting further analysis of historical operations [...] to identify whether such violations have directly caused a public safety or grid reliability issue." (Id. at 3.) In light of the California energy crisis that led to the enactment of § 761.3, such analysis is not necessary here.

Appendix F

The preliminary draft Resolution incorporated a proposal to eliminate GO 167's existing Appendix F, which sets forth penalties for specific reporting and recordkeeping violations. This proposal drew a number of comments, albeit with varying perspectives.

PCF offers the following recommendation:

GO 167 Appendix F specifically calls out record-keeping deficiencies for sanction. PCF suggests that the Commission reconsider eliminating Appendix F in order to provide maximum transparency. At the least, the Resolution's proposed elimination of Appendix F should not be understood as de-emphasizing or excusing record-keeping failures, which are especially important to identify and correct in the GO 167 enforcement scheme. Rather, as noted above, record-keeping failures have a heightened significance for the GO 167 scheme. The Resolution should specifically address these matters with the intention of making records and documents fully compliant, transparent and accessible. (PCF Initial Comments at 10.)

The Joint Utilities also suggest the retention of Appendix F:

Finally, the Joint Utilities understand the intent of the Preliminary Draft Resolution to extend the Commission's citation authority beyond the "limited ... recordkeeping and reporting requirements" found in Appendix F of GO 167. The Joint Utilities do not disagree that such a move is appropriate. It does not follow, however, that Appendix F should be eliminated in its entirety. While the universe of the *types* of requirements that could lead to a citation may be expanding, the magnitude of the associated fines should not. The approximate magnitude and range of penalties set forth in Appendix F continues to be appropriate for violations of GO 167, whether or not those violations are limited to recordkeeping and reporting requirements or are more broadly applicable. (Joint Utilities Initial Comments at 11, emphasis in original.)¹³

First, in response to PCF's request that the proposed elimination of Appendix F "should not be understood as de-emphasizing or excusing record-keeping failures," we concur. Recordkeeping continues to be an essential component of safe and reliable operation of electric generation facilities.

This Commission does not, however, concur with the recommendation of the Joint Utilities that the fine amounts set forth in Appendix F provide a reasonable "magnitude and range" of penalties for any violation of GO 167. Given that the penalties set forth in Appendix F range from approximately \$1000 to \$5000 per incident, the magnitude of those penalties is significantly less than that of the general electric citation program. While a cited generator is free to use those numbers in arguing for a reduced penalty, the

¹³ Arevon makes a similar argument, that Appendix F should be retained to provide guidance on the calculation of penalty amounts. (Arevon Initial Comments at 3.)

Commission declines to require itself to apply those numbers that are inconsistent with the penalty levels imposable under the general electric citation program.

Recordkeeping and reporting continue to be important requirements of GO 167, but should not be the only requirements for which specific penalties are identified, particularly when penalties may be imposed for other sections as well. Given the potential issues arising from the language of Appendix F, we will adopt the approach used by the preliminary draft Resolution of eliminating Appendix F.

Prospective or Retroactive

Commenters were requested to address whether the changes made in the citation process by this Resolution should apply to past violations of GO 167, or only to future violations, and any argument that the changes should only apply prospectively needed to address the relevant discussion in D.14-12-001. IEP, WPTF and the Joint Utilities argue that the changes to the applicable penalty mechanism should be applied only prospectively, not retroactively. PCF disagrees.

The Joint Utilities note that the Commission already has the ability to open an OII to investigate past violations of GO 167, but given the change to a citation program, generation asset owners would not have notice of the steps they could have taken to mitigate potential penalties under the new citation program. (Joint Utilities Initial comments at 7.)

IEP argues:

If the purpose of a citation and fine is to provide a stronger incentive for compliance with the applicable standard, retroactive application of a citation will have no effect, since the entity in question would have no idea, at the time a violation could potentially be prevented, that it was facing higher penalties or engaging in an act or omission that will be defined as a violation at some point in the future. Retroactive citations and fines do not, and cannot, encourage the desired behavior. (IEP Initial Comments at 21.)

IEP and the Joint Utilities raise valid points. In the present situation there does not appear to be a good purpose for a retroactive application of the proposed changes to GO 167. Accordingly, the changes we adopt today only apply prospectively, not retroactively.

Conclusion and Next Steps

The preliminary draft Resolution has been modified in response to comments. This Resolution does not change the scope of the Commission's jurisdiction over EWGs (or utilities), but only changes the process used for responding to violations of GO-167.

Because this Resolution changes existing practices, it will be useful to evaluate the efficacy and workability of the new practices, and to consider further refinements or modifications. Accordingly, the Commission recommends that SED conduct workshops or other methods of obtaining feedback on the processes adopted by this Resolution, and present to the Commission any changes that SED recommends.

COMMENTS

A draft Resolution was distributed for comment pursuant to Commission Rule of Practice and Procedure 14.5 on May 21, 2021. Comments were received on June 10, 2021 from IEP, WPTF and the Joint Utilities.

In its Comments, IEP clarified that it does not dispute the Commission's authority to implement the program authorized in section 761.3 and to enforce the maintenance and operation standards of GO 167 for EWGs that are Generating Asset Owners (GAOs), but was concerned that some language in the preliminary draft resolution potentially blurred the limitations on the Commission's statutory authority over EWGs that are GAOs. (IEP Comments at 3.) Those concerns have been ameliorated as a result of the changes made from the preliminary draft resolution. (Id.)

IEP also points out some inconsistencies between the general electric citation rules and GO 167 that they assert must be addressed in advance. For example, the general electric citation rules refer to the maximum penalty level of \$100,000 set by Public Utilities Code section 2107 for utilities, while the maximum penalty level for non-utilities is set at \$50,000 by Public Utilities Code section 2111. (Id. at 4-5.) IEP is correct, but overstates the potential significance of this (and similar) issues. The Commission's statutory penalty authority over non-utilities is pursuant to section 2111, not 2107, and nothing in this Resolution changes that.

IEP similarly notes that the general electric citation rules refer to violations of "other related applicable decisions, codes, or regulations" that could result in a citation and a fine. IEP proposes language to address this issue: "At a minimum, the Draft Resolution should be revised to clarify that the procedures and practices of the general utility citation rules apply only to violations of GO 167, and not other general orders, by GAOs." (Id. at 5-6.) It is not clear that such a clarification is necessary, as this entire Resolution only addresses violations of GO 167, but to reassure IEP and other non-utility entities, we concur with the above-quoted sentence from IEP.

IEP recommends the formation of a working group that would meet, issue a preliminary report, receive comments, and issue a final report, which would be followed by a resolution to be approved by the Commission, and only then would the new citation process be put into effect. (Id. at 7-9.) Given the relatively minor nature of the potential issues identified by IEP, such a lengthy process is unnecessary. To the extent the citation program adopted by this Resolution needs further refinement, it can be modified as needed based on any real and significant issues that may arise from its implementation and use. Other than the above clarifications, no changes to the Resolution have been made in response to IEP's comments.

WPTF makes very detailed recommendations, asking for the Resolution to spell out precisely which parts of the electric citation program will or will not apply to citations for violations for GO 167. (WPTF Comments at 2-5.) Many of WPTF's recommendations are overbroad, particularly those asking for certain provisions of the electric citation program to be made inapplicable to citations for violations of GO 167, and the remainder are unnecessary. Accordingly, no changes have been made in response to WPTF's comments.

The Joint Utilities generally express support for this Resolution and note that it "materially improves upon" the preliminary draft resolution. (Joint Utilities Comments at 1.) The Joint Utilities request some minor clarifications, with one such request relating to the Resolution's consideration of the Commission's Enforcement Policy, which the Joint Utilities had argued should specifically be incorporated into the GO 167 penalty process. (Id. at 2.) The language of the Resolution has been modified to more clearly reflect the relationship between the Commission's Enforcement Policy and the GO 167 citation process.

The Joint Utilities also requests that this Resolution clarify that "[O]nly the electric citation program's penalty process and procedure elements are relevant in the GO 167 context." (Id. at 2.) This appears to be similar to one of the requests of IEP in that it basically just reiterates the fundamental purpose of this Resolution. As we did above, but this time to reassure the utilities, we concur with the above-quoted language.

FINDINGS

1. On August 14 and 15, 2020 as the result of an extreme heat storm, the California Independent System Operator implemented rolling outages in response to inadequate electric generation to meet the demand on the system.
2. Of Commission-jurisdictional customers, 491,600 were affected by rolling outages on August 14, 2020, and 321,000 were affected by rolling outages on August 15, 2020.

3. While the Commission has authority to impose penalties on electric generators for violations of General Order 167, Commission staff's authority to issue citations for violations of General Order 167 is limited to specified reporting and recordkeeping violations.
4. The Commission has separately delegated to staff the ability to issue citations to any electrical corporation owning or operating electrical supply facilities for violations of General Orders 95, 128, 165, 166, 174, or other related decisions, codes or regulations applicable to electrical supply facilities.
5. The Commissioners have publicly expressed support for granting Commission staff authority to issue citations for any violation of General Order 167, including violations of maintenance and operation standards.
6. It makes sense to modify the General Order 167 citation process to more closely align with the Commission's other existing electric citation processes.
7. The Commission has previously delegated to Commission staff the authority to issue citations for violations of General Order 167 and for other electrical violations.
8. This Resolution does not alter the Commission's existing jurisdiction over electric generation facilities.

IT IS ORDERED:

1. Commission enforcement staff with citation authority may issue citations for any violation of General Order 167, including but not limited to violations of maintenance and operations standards.
2. The General Order 167 citation process is modified to more closely align with the Commission's other existing electric citation processes.
3. General Order 167 is modified as shown in Appendix A to this Resolution. Section 14.4 and Appendix F of General Order 167 are deleted.
4. The Commission's Safety and Enforcement Division (SED) shall revise GO 167 consistent with this Resolution and will post the revised version, identified as General Order 167-B, to the Commission's website within 90 days of the Commission's approval of this Resolution. Existing references to "CPSD" in GO 167 may be changed to "SED" in the revised version.

I certify that this Resolution was duly introduced, passed, and adopted by the Public Utilities Commission of the State of California at its regular business meeting held on June 24, 2021 and the following Commissioners approved favorably:

/s/ RACHEL PETERSON

Rachel Peterson
Executive Director

MARYBEL BATJER

President

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

DARCIE L. HOUCK

Commissioners

APPENDIX A

The following shows the proposed changes to section 13.3 of GO 167:¹

13.3 Imposition of Fines for Specified Violations

13.3.1 Specified Violations. For specified Violations of this General Order, the Director of CPSD the Safety and Enforcement Division (SED) and his/her designee may assess a scheduled fine or, in the alternative, proceed with any remedy otherwise available to SED CPSD or the Commission. For any violation of this General Order, citations may be issued pursuant to Public Utilities Code section 2111 or other applicable authority, following the processes and procedures of the Commission's electric citation program, as set forth in D.14-12-001 as modified by D.16-09-55 and D.18-05-023, or its successor Scheduled fines may be assessed by CPSD only for the Violations referenced in subsection 13.3.2 of this General Order. SED 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.

¹ Appendix F and section 14.4 are eliminated, but not shown here.

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.~~

(END OF APPENDIX A)