

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Petition of the Safety and Enforcement
Division to Adopt, Amend, or Repeal
General Order 95 Pursuant to Pub. Util.
Code Section 1708.5

P. _____

**THE SAFETY AND ENFORCEMENT DIVISION
PETITION TO ADOPT, AMEND OR REPEAL RULE 18
OF GENERAL ORDER 95**

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Pursuant to Public Utilities Code (Pub. Util. Code) §§ 1708.5 and 451, the Safety and Enforcement Division (SED) submits this Petition to repeal Rule 18 of the California Public Utilities Commission's (Commission) General Order (GO) 95. GO 95 contains the Commission's safety regulations for overhead facilities of the Investor Owned Utilities (utilities) and Communication Infrastructure Providers (CIPs) so they maintain their overhead facilities to prevent unsafe conditions.

I. INTRODUCTION AND EXECUTIVE SUMMARY

SED submits this petition to repeal Rule 18 because Rule 18 compromises the minimum safety standards that GO 95 provides. The consequences of Rule 18 include difficulties by the Commission's SED to enforce the safety rules contained in GO 95 because Rule 18 allows utilities to be in violation of GO 95.¹ Instead of enhancing safety, Rule 18 has had and continues to have adverse effects on public and worker safety.

The Commission issued an Order Instituting Rulemaking (OIR) R.08-11-005 in 2008 in response to the immediate need to change and add new GO 95 regulations to avert utility or communication facility caused disasters that could lead to personal injury

¹ See Appendix B, SED's Report, page (p.) 1.

or death and property damage and destruction. Indeed, in October 2007, strong Santa Ana winds swept across Southern California and caused dozens of wildfires.

The resulting conflagration burned more than 780 square miles, killed 17 people, and destroyed thousands of homes and buildings. Hundreds of thousands of people were evacuated at the height of the fire siege. Transportation was disrupted over a large area for several days, including many road closures. Portions of the electric power network, public communication systems, and community water sources were destroyed.²

The purpose of R.08-11-005 was to ensure safer facilities in light of those devastating disasters caused by the electric and communication facilities. In Phase 1, the Consumer Protection and Safety Division (CPSD)³ proposed a new Rule 18 for the reporting and resolution of safety hazards discovered by the CIPs. The proposal was based on principles such as Southern California Edison Company's (SCE) Memorandum of Understanding (MOU) with SED regarding the prioritization of corrective actions.

Rule 18 was proposed in R.08-11-005 to be applicable to the CIPs. The CIPs vehemently opposed Rule 18. Indeed, the CIPs argued that their facilities do not pose any substantial risk and that there "has been no compelling reason to change the rules to include a record keeping obligation regarding inspections."⁴

The Commission adopted Rule 18 in D.09-08-029, and later amended Rule 18 in D.12-01-032. It is important to note that the subsequent amendment removed violation and substituted the term with "nonconformance." Rule 18 was adopted "to establish an auditable utility maintenance program, provide a framework for notification of safety hazards involving equipment owned by one company and discovered by another

² Decision (D.) 12-01-032, Order Instituting Rulemaking to Revise & Clarify Comm'n Regulations Relating to the Safety of Elec. Util. & Communications Infrastructure Provider Facilities (Jan. 12, 2012) 2012 WL 252537.

³ The Commission's Consumer Protection and Safety Division (CPSD) is now the Commission's SED.

⁴ The CIP Coalition Opening Comments on Proposed Rules of the Consumer Protection and Safety Division, pages (pp.) 2 and 20 (March 27, 2009).

company, and prioritize corrective actions for General Order 95 violations.”⁵ Rule 18A was titled, “Resolution of Safety Hazards and General Order 95 Violations” and the term “violation” was used throughout. In D.12-01-032, the term “violation” was replaced with “nonconformance” throughout Rule 18. While most parties either supported this proposed change or did not address it during the proceeding, CPSD took a neutral position, stating that it did not matter which word was used, because the Commission had determined in D.04-04-065 that a “nonconformance” is a “violation.”⁶

Certain utilities and CIPs have abused Rule 18 such that it undermines SED’s enforcement of the Commission’s GO 95 regulations⁷. While Rule 18 was modified to substitute “nonconformance” for “violation,” the Commission had already found that any “nonconformance” that violates or contradicts GO 95 is a violation. Yet, certain utilities and CIPs now make a distinction between the two words, which has resulted in continued GO 95 violations.

As a result, certain utilities and CIPs are using the current Rule 18 to shield themselves from having to correct a GO 95 violation or nonconformance, such that they are in noncompliance with safety regulations. SED’s routine directives to correct safety hazards pursuant to GO 95 regulations are being dismissed because of the language contained in Rule 18.⁸ Verizon Wireless (Verizon) refuses to comply with SED’s directives to correct GO 95 violations by using the prioritization levels in Rule 18.⁹ The Commission should repeal Rule 18 from GO 95 because it has become an impediment, instead of a means, to adherence with safety standards.¹⁰ SED notes further that neither GO 128 (which contains safety regulations regarding underground electric and

⁵ D.09-08-029, p. 17.

⁶ D.12-01-032, pp. 14-15, *citing* D.04-04-065. 2004 Cal. PUC LEXIS 207 at *18.

⁷ *See* Appendix B.

⁸ *Id.*

⁹ *See Supra* III(B)(1), Appendix A, and Appendix B p. 3.

¹⁰ Appendix B, pp. 1 and 3.

communication facilities) nor any natural gas GOs contain provisions similar to GO 95's Rule 18.

Citing Rule 18, certain utilities and CIPs have notified SED that a violation of a GO 95 safety rule is not a violation until 1) the entity learns of the nonconformance; and 2) the entity has had an opportunity to correct the violation.¹¹ A situation that is counter to GO 95 is a violation and the term "nonconformance" within GO 95 is being used as an excuse to not comply with the rules. Certain utilities and CIPs are essentially using Rule 18 to ignore their responsibility to comply with, and to defy SED's authority to enforce, GO 95¹². However, the Commission has already concluded "that a failure to comply with a GO is a violation. To hold otherwise could adversely impact our regulatory efforts, since we expect compliance with our GOs."¹³

Indeed, in Phase 1 of R.08-11-005, the Commission issued new regulations to supplement, not to supplant, the safety requirements that already exist in GO 95. The Commission was clear in D.09-08-029 that it would adopt a "new rule, Rule 18, for General Order 95 to establish an auditable maintenance program, a notification procedure for safety hazards, and a method to prioritize corrective actions for General Order 95 violations."¹⁴ Instead, Rule 18 now is being interpreted in a way that allows utilities and CIPs to be in violation of GO 95.

This interpretation of Rule 18 also contravenes or negates safety obligations of the CIPs and utilities under several statutes, Commission decisions, and GO 95. Rule 18, as interpreted, removes responsibility of the CIPs and/or utilities to work with SED to prevent safety hazards or to ensure that corrective action is taken for safety hazards.¹⁵ D.09-08-029 defines a "safety hazard" as a "condition that poses a **significant threat to**

¹¹ Appendix B, p. 1.

¹² *Id.*

¹³ D.04-04-065 In Re S. California Edison Co. (Apr. 22, 2004) 2004 WL 1150966; *See also* Appendix B, p. 1.

¹⁴ D.09-08-029 (Aug. 20, 2009) 2009 WL 2910747.

¹⁵ Appendix B, pp. 1-2.

life or property, including, but not limited to the ignition of a wildland or structure fire.”¹⁶

This Petition to repeal Rule 18 of GO 95 is justified. Therefore, SED respectfully requests the Commission to repeal Rule 18.

II. BACKGROUND

A. The Commission has Exclusive Jurisdiction to Create Rules and Regulations to Ensure Public Safety

The Commission has comprehensive jurisdiction over questions of public health and safety arising from utility operations and is charged with ensuring that electric utilities operating in California comply with the provisions of the Pub. Util. Code and relevant laws and regulations.¹⁷

Pub. Util. Code § 451 requires “[e]very public utility [to] furnish and maintain service, instrumentalities, equipment, and facilities... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.”¹⁸ The Commission also has broad **responsibility** and authority to protect public health and safety.¹⁹ The California Constitution and the Pub. Util. Code provide the Commission with broad jurisdiction to adopt regulations regarding the safety and reliability of public utility facilities.²⁰ Public utilities must “obey and comply” with such regulations pursuant to Pub. Util. Code § 702.²¹

Commission safety standards apply to communication facilities. The Federal Communications Commission (FCC) has not preempted California and other states from

¹⁶ (Emphasis added) D.09-08-029 2009 WL 2910747.

¹⁷ *San Diego Gas & Electric v. Superior Court* (1996), 13 Cal. 4th 893, 923-24.

¹⁸ Pub. Util. Code § 701; D.14-02-015 2014 Cal. PUC LEXIS 83, *87.

¹⁹ (Emphasis added) R.13-02-008, 2013 Cal. PUC LEXIS 40, at *3 (Cal. PUC 2013)

²⁰ D.15-01-005 2015 Cal. PUC LEXIS 30, pp. *17-*18 (Cal. PUC 2015) *citing* Cal. Constitution, Art. XII, §§ 3 and 6; Pub. Util. Code §§ 216, 701, 761, 768, 770, and 1001; and *SDG&E v. Cal. Super.* (1996) 13 Cal.4th 893, 923-924.

²¹ *See also* Pub. Util. Code §§ 761, 762, 767.5, 768, and 770.

regulating the construction, maintenance, or operations of cable plant and equipment in a safe manner.²² D.15-01-005 states:

The Commission's broad jurisdiction over the safety and reliability of utility facilities extends to communication infrastructure providers [CIPs]. Specifically, 47 U.S.C. § 224 provides that the Federal Communications Commission (FCC) does not have 'jurisdiction [under 47 United States Code (U.S.C.) § 224] with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) for pole attachments in any case where such matters are regulated by a State.' The Commission has certified to the FCC that the Commission regulates such matters.²³ Further, under 47 U.S.C. § 253(b) the Commission may adopt regulations to protect public safety and welfare.

Likewise, 47 U.S.C. § 556(a) specifically grants states jurisdiction over cable service in safety matters. The California Legislature asserted such jurisdiction in Pub. Util. Code § 768.5, which gives the Commission authority to regulate cable companies with respect to the safe operation, maintenance, and construction of their facilities.²⁴

The Commission has many approaches to ensure the safe operations of utilities. The Commission's GO 95 provides regulations that require safe and reliable overhead electric and communication facilities. While this is the preferred enforcement tool, it is important to note that the Commission has the authority to use other mechanisms described above to facilitate safe operations of utility and communication facilities.

B. General Order 95 is an Important Mechanism for The Commission to Ensure Public Safety

GO 95 is a thorough and important regulatory instrument that the Commission has established in order to protect the public from unsafe conditions. GO 95 provides "requirements for overhead line design, construction, and maintenance, the application of

²² D.09-08-029, 2009 Cal. PUC LEXIS 433, p. *14.

²³ D.98-10-058, 82 CPUC2d 510, 531, as modified by D.00-04-061, 6 CPUC3d 1, 5.

²⁴ D.15-01-005 pp. 12-13; OIR 08-11-005 at 6; D.09-08-029 at 8 - 9 and Conclusion of Law 3.

which will ensure adequate service and secure safety to persons engaged in the construction, maintenance, operation or use of overhead lines and to the public in general.”²⁵ Any violation of GO 95 endangers the lives of utility workers and public safety in general.

GO 95 has been a forward-looking general order that led the nation in developing safety standards for construction of overhead utility facilities. Indeed, for more than 95 years, the Commission has regulated clearances between electric wires and telephone wires in California, recognizing that contact between electric wires and telephone wires may result and has resulted in fires. GO 95 has been evolving with new technology and infrastructure with one goal, to ensure safe utility operations.²⁶

In order to protect the general public and the workers of the utilities from safety hazards, such as fires and electrocution, Rule 31.1 of General Order 95 requires electrical supply and communications systems to be designed, constructed, and maintained in a way that provides safe and reliable service.²⁷ Rule 31.2 of GO 95 requires electrical supply and communications lines to be inspected frequently and thoroughly to ensure that they are in good condition and do not create a hazard. Also, Rule 12.2 requires utilities to maintain their lines and portions of lines in conformity with GO 95 regulations.²⁸

The Commission has been clear in many decisions that its amendments to GO 95 rules have been adopted in the interest of public safety.²⁹ Indeed, R.08-11-005

²⁵ GO 95, Section I, Rule 11. *See Also* D.09-12-044 In the Matter of the Application of S. California Edison Co. (U 338-e) for A Certificate of Pub. Convenience & Necessity Concerning the Tehachapi Renewable Transmission Project (Segments 4 Through 11). (Dec. 17, 2009) 2009 WL 5172271 *stating* GO 95 provides ‘for the State of California, uniform requirements for overhead electrical line construction, the application of which will insure adequate service and secure safety to persons engaged in the construction, maintenance, operation or use of overhead electrical lines and to the public in general

²⁶*See, e.g., Morris v. Sierra and San Francisco Power Co.* (1922) 57 Cal. App. 281, 289-290

²⁷ Appendix B, p. 1.

²⁸ *Id.*

²⁹ *See e.g.* D.08-10-017 Order Instituting Rulemaking to Establish Unif. Constr. Standards for Pole-Top Antennas. (Oct. 2, 2008) 2008 WL 4516408.

recognized this by stating that GO 95 provides the minimum safety requirements, which the utilities and CIPs are supposed to supplement with additional safety precautions when local conditions warrant. The Commission recognized that conditions³⁰ existed warranting R.08-11-005 to further refine or add new regulations to GO 95.

The Commission's SED investigates incidents and performs audits to determine compliance with GO 95. The Commission stated in R.08-11-005:

The CPSD is charged with investigating utility-related incidents and accidents pursuant to the mandate of Pub. Util. Code § 315. If utilities fail to promptly report incidents to CPSD, and/or fail to provide meaningful access to information and evidence, then the critical public safety intent of the statute is frustrated. Regardless of pending litigation and other investigations, which may be related to a CPSD investigation, a utility's obligation to cooperate with CPSD under applicable law should be reinforced.³¹

Thus, the Commission directed SED in R.08-11-005 to propose and update GO 95 safety regulations. The Commission stated "the scope of Phase 1 will be limited to measures proposed by the CPSD."³²

III. DISCUSSION

A. The Commission Adopted Rule 18 and Similar Rules to Enhance Safety and Ensure Immediate Cooperation with Commission Staff

The Commission stated in OIR 08-11-005 that there may be potential problems associated with the electric utilities' and communications infrastructure providers' facilities, which may necessitate additional Commission safeguards. The Assigned Commissioner's Scoping Ruling (ACR) for Phase 1 directed SED to recommend GO 95 rule modifications concerning the following six issues:

1. Immediate reporting of fire-related incidents and full cooperation with Commission staff. This proceeding will

³⁰ *Infra* pp. 1-2 (discussing the devastating wildfires).

³¹ OIR 08-11-005 at 11 *citing* Pub. Util. Code §§ 313, 314, 315, 581, 582, 584, 701, 702, 771, 1794, 1795.

³² Assigned Commissioner's Scoping Ruling, p. 3 (January 6, 2009).

not consider the extent that entities may deny access to documents, information, and witnesses that they deem protected by attorney-client privilege and/or the attorney work-product doctrine.

2. Applying GO 165 or similar maintenance and inspection requirements to all electric transmission and CIP facilities, including CIP facilities located on poles owned by publicly owned utilities.
3. Overloading of utility poles.
4. Prompt reporting and resolution of hazards/violations that one pole occupant may observe in another pole occupant's facilities, including ways to improve (i) safety-related communications between pole occupants (e.g., marking CIP facilities with contact information), and (ii) the process used by CPSD to determine if the hazard/violation reported by one pole occupant to another has been resolved.
5. Vegetation management in high-risk fire areas.
6. Mitigating high speed wind dangers.³³

The ACR stated that the "scope of Phase 1 is limited to measures proposed by CPSD following input from the parties."³⁴ As a result of the Commission's directions with issues 2 and 4 above, SED submitted several Proposed Rule Changes (PRCs) for the Commission to consider.³⁵ SED hosted at least eight workshops for Phase 1 and parties filed several rounds of comments and briefs to vet SED's PRCs. SED proposed PRC 3, "Reporting and Resolution of Safety Hazards Discovered."³⁶ PRC 3 was to create a new rule, Rule 18, for GO 95 to establish an "auditable maintenance program, a notification procedure for safety hazards, and a method to prioritize corrective actions for **General**

³³ Assigned Commissioner's Scoping Ruling, p.3 (January 6, 2009).

³⁴ *Id.* at 8.

³⁵ CPSD's Proposed Rules to be Implemented in Time for the 2009 Fall Fire Season (March 9, 2009).

³⁶ D.09-08-029, Order Instituting Rulemaking to Revise and Clarify Commission Regulations Relating to the Safety of Electric Utility and Communications Infrastructure Provider Facilities 2009 Cal. PUC LEXIS 433 at *17 (August 20, 2009).

Order 95 violations.³⁷ SED proposed Rule 18 to clarify minimum maintenance and inspection cycle requirements for utilities and CIPs. SED was clear that PRC 3 would not change the CIPs' obligation to ensure that their facilities are in good condition to conform to Commission safety regulations.³⁸

Requirements similar to Rule 18 were already in place for many of the utilities such as SCE.³⁹ Many parties, including San Diego Gas & Electric Company (SDG&E), echoed SED's concerns that the CIPs may need additional guidance in performing inspections of overhead facilities installed on electric infrastructure, and the Commission adopted Rule 18 in D.09-08-029 on that basis. SED and the Commission believed that Rule 18 would provide for a priority structure for remediation of GO 95 violations.

Rule 18, as amended by D.12-01-032, now allows utilities and CIPs to assert that they have the authority to 1) determine whether they have violated GO 95 and 2) make corrections as they please.⁴⁰

Up until recently, if a safety audit found a pole or pole attachment, or any other electric or communication facilities, that did not comply with GO 95 or other regulations, SED would seek fines and other remedies.⁴¹ This was especially true if the noncompliance or violation resulted in an accident or outage, regardless of whether the utility or CIP remediated their facilities within a reasonable time.⁴² The Commission has recognized that "the failure to cooperate with the Commission or its staff can result in

³⁷ (Emphasis added) D.09-08-029, pp. 151-153, Lexis pp *154 -*157.

³⁸ CPSD's Proposed Rules to be Implemented in Time for the 2009 Fall Fire Season at 31.

³⁹ *Infra* p. 2.

⁴⁰ *See* Appendix B.

⁴¹ Investigation on the Commissions Own Mot. into the Operations and Practices of S. California Edison Co., Cellco Partn. LLP d/b/a Verizon Wireless, Sprint Commun. Co. Lp, Nextg Networks of California, Inc. and P. Bell Tel. Co. d/b/a at&t California and at&t Mobility LLC, Regarding the Util. Facilities and the Canyon Fire in Malibu of October 2007, D.13-09-026, 2013 WL 5488505, at *1 (Cal.P.U.C. Sept. 19, 2013)

⁴² *Id.*

monetary, evidentiary, and even criminal sanctions."⁴³ Rule 18 threatens safety because it allows safety violations to continue to exist, depending on whether the violator deems them to be “non-immediate” or “acceptable.” It does not make sense that a utility or CIP can determine on its own when or whether to correct Safety Hazards per Rule 18, when Rule 18 itself defines a Safety Hazard as a condition that "poses a significant threat to human life or property."⁴⁴ Rule 18 created this contradiction in GO 95.⁴⁵

Under their interpretation, the authority to determine a violation and the timing of corrective action now lies with the utilities and CIPs. This was not the case prior to Rule 18, when SED could discover a safety violation, order the utility or CIP to take corrective action, and possibly seek fines. Rule 18 has had a perverse consequence of preventing SED from seeking fines, issuing citations (now that SED has that authority), investigating, ordering corrective action, or even learning about existing safety hazards. If SED does not have the ability to investigate, issue citations, or seek fines for GO 95 violations, it has no leverage to require a utility to take corrective actions.

B. Utilities Are Misusing Rule 18

1. Verizon has rejected Commission staff efforts to enforce GO 95 even though it admits to being in nonconformance or noncompliance in Belmont Heights

The flaws in Rule 18 started becoming apparent less than two years after the Commission changed it in D.12-01-032, when Verizon explicitly refused to be in compliance or conformance with GO 95.⁴⁶

In the Belmont Heights area in Long Beach, in southern California, many residents and members of the public notified SED of potential violations.⁴⁷ After

⁴³ D.09-08-029, 2009 Cal. PUC LEXIS 433, at *38.

⁴⁴ GO 95, Rule 18

⁴⁵ Appendix B, p. 1.

⁴⁶ See Appendices A and B.

⁴⁷ Appendix B, p. 2.

conducting an investigation, the Commission's enforcement staff found several violations concentrated within a few blocks.⁴⁸ SED informed Verizon on April 7, 2014 of these safety violations and directed Verizon to provide the Commission Staff the date Verizon would correct the safety violations.⁴⁹ One of SED's important functions is to respond to utility customer safety complaints.⁵⁰ SED staff has a duty grounded in PU Code § 315 to investigate, inform, and direct utilities and CIPs to comply with the Commission's GO 95 safety regulations.

After receiving no response from Verizon, the Commission Staff contacted Verizon again on April 18, 2014 and directed Verizon to correct its safety violations, and provide the Commission with pertinent information regarding the violations. In its response, nearly a month after the first communication on April 30, 2014, Verizon refused to provide the information sought by the Commission Staff.⁵¹ Verizon referenced Rule 18A of GO 95 as a basis for denying the Commission the safety information and refused to comply with the Commission Staff's directive to Verizon to remedy the safety violations.⁵²

Verizon is a public utility and subject to the Commission's Constitutional, statutory and regulatory power and authority over the safety violations of public utilities.⁵³ SED has been unable to require correction of a safety violation of GO 95 because of Verizon's interpretation of Rule 18. This is unacceptable, especially in light of the Commission's emphasis on correcting safety problems as soon as possible. Verizon's response brought significant concern to SED not only because Verizon had

⁴⁸ *Id.*

⁴⁹ Appendix B.

⁵⁰ *Id.* at p. 2.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See* D.12-09-019, 2012 Cal. PUC LEXIS 427 *59.

already been in violation of GO 95 for nearly a month, but also because Verizon’s interpretation of Rule 18 has resulted in SED being unable to do its job.⁵⁴

Rule 18 cannot shield Verizon from other statutes and regulations requiring Verizon to keep its facilities safe. Verizon's explicit refusal to provide information to the Commission staff violates several statutes and regulations. For example, by failing to correct the safety violations that SED directed Verizon to correct, Verizon is clearly in violation of Pub. Util. Code § 451, requiring each public utility in California to “furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, . . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.” Verizon's safety violations could potentially cause serious injury or damage, which the Commission's regulations were designed to prevent.

Moreover, Verizon's refusal to provide the necessary information to the Commission staff also violates Pub. Util. Code § 314:

- (a) The commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility. . . .

While Verizon may think it does not have to comply with GO 95 because of the unintended loophole of Rule 18, Verizon is in violation of at least Pub. Util. Code §§ 314 and 451 and subject to Commission fines and penalties. Verizon’s response for Belmont Heights GO 95 violations is a prime example of why the Commission should repeal Rule 18.

2. To avoid citations, electric utilities attempt to make an artificial distinction between the terms nonconformance and violation

Certain utilities are using Rule 18 to argue that they should not receive citations or fines for safety violations. The Commission commenced R.14-05-013 to meet a statutory

⁵⁴ Appendix B, p. 1.

mandate and implement an electric citation program to ensure safety enforcement. In R.14-05-013, certain electric utilities are using Rule 18 as an argument to the Commission that a “nonconformance” should not be subject to a citation if the “nonconformance” is “scheduled to be addressed” per Rule 18.⁵⁵

The Commission has already found that any “nonconformance” that violates or contradicts GO 95 is a violation.⁵⁶ Further, the Commission adopted Rule 18 specifically through the Fire Safety Rulemaking. Yet, electric utilities are using Rule 18 in an attempt in R.14-05-013 to exempt themselves from any and all safety violations that warrant a citation, including grounding, wire failures, worker accidents and deaths, surge arrestor issues, and so on. The Commission must repeal Rule 18 to prevent the slippery slope that is occurring.

3. Verizon refused to comply with a Commission order during the Verizon/Frontier merger proceeding

In the recent proceeding considering the proposed merger of Verizon and Frontier, the Commission ordered Verizon to continue its obligations, including those related to GO 95 in D.15-02-005.⁵⁷ Similar to the Belmont Heights example, Verizon violated the Commission's order again by using "nonconformance" to mean something distinctive from a violation.⁵⁸ With this type of rationale, the CIPs and utilities can violate the Commission staff's directions and argue that they are not violating a Commission order, but are rather in nonconformance. Rule 18 has caused a slippery slope that will only continue decreasing SED's and the Commission's safety enforcement powers.

⁵⁵ Appendix B, p. 3

⁵⁶ D.04-04-065 In Re S. California Edison Co. (Apr. 22, 2004) 2004 WL 1150966.

⁵⁷ Appendix B, p. 3.

⁵⁸ *Id.*

C. The Commission Has Already Held There Are No Acceptable Violations of GO 95

In R.08-11-005, D.12-01-032 made modifications to GO 95 regulations, including revising Rule 18 to replace “violation” with “nonconformance.”⁵⁹ SED did not oppose this amendment to Rule 18 because the Commission had already held that a nonconformance of GO 95 is equal to a violation of GO 95.⁶⁰ However, certain utilities and CIPs are now using the language to be in continued violation of GO 95.

Utilities have numerous times tried to distinguish between a violation and a nonconformance without success. For example, in R.01-10-001, a proceeding to review and update GO 95, they proposed a PRC whereby they would be given a “reasonable” amount of time to fix a violation before it was deemed a violation. The Commission rejected that rule change proposal in D.05-01-030, stating:

Commission enforcement has taken a variety of forms over many years. In particular, we have enforced compliance with electrical system maintenance obligations in part by notifying the utility from time to time of observed violations and giving it a reasonable period of time within which to make corrections, similar to the “fix-it” ticket that most police departments issue. Illustrative of this practice is the tree-trimming settlement we approved in D.99 07-029 in which we allowed PG&E 14 days to trim trees that were closer to power lines than our GOs permit. This has been our informal practice for many years and was again recognized in Edison’s case in D.04-04-065.

We continue to believe that this practice provides a utility with realistic flexibility to maintain its facilities and do not find it necessary to adopt the proposed changes to Rule 12.2 of GO 95.

Before D.12-01-032 substituted “nonconformance” for “violation,” the Commission had already determined that a nonconformance is a violation. Replacing

⁵⁹ Appendix B, p. 1.

⁶⁰ D.04-04-065. In Re S. California Edison Co. (Apr. 22, 2004) 2004 WL 1150966; 2004 Cal. PUC LEXIS 207 at *18.

“violation” with “nonconformance” has unfortunately prevented SED from requiring correction of safety hazards. The Commission has already litigated and found that any “nonconformance” that violates or contradicts GO 95 is a violation. This matter has been previously litigated several times and the Commission concluded that, "if a utility fails to comply with a GO, it is violating that GO."⁶¹ Certain utilities and CIPs have distinguished and continue to distinguish between the terms “nonconformance” and “violation.” They argue that if they are in nonconformance, they are not in violation of GO 95.⁶²

The Commission should emphasize that under Pub. Util. Code section 2107, any violation of a Commission General Order is punishable by fines and penalties, and should find that Rule 18 is being misused if it results in violations that are deemed acceptable and allowed to continue. In addition, the Commission should affirm that Commission staff may direct utilities to take corrective action, regardless of whether the utility determines that the violation is merely a “non-immediate high to low” safety risk, or an “acceptable” safety risk.

It is neither the Commission’s nor SED's safety policy to allow safety violations to remain uncorrected until a suitable time for the utility. Indeed, by the time the utility finds a suitable time to either inform Commission staff of a violation or have the violation corrected, the time delay could have catastrophic impacts on public safety. The Commission staff should have the ability to enforce the immediate correction of GO 95 violations.

IV. CONCLUSION

The Commission has jurisdiction over the safety and reliability of utility facilities. The Commission has delegated some aspects of its safety authority to its staff in SED. To ensure public safety, SED must be able to enforce GO 95 at all times when there is a violation or nonconformance. Rule 18 prevents SED from protecting the public against

⁶¹ D.04-04-065 In Re S. California Edison Co. (Apr. 22, 2004) 2004 WL 1150966.

⁶² See Appendix B.

safety violations. SED respectfully requests that the Commission repeal Rule 18 for public safety.

Respectfully submitted,

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