

Decision 09-05-020

May 7, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Union Pacific Railroad
Company and BNSF Railway Company for
Rehearing of Resolution ROSB-002.

Application 08-12-004
(Filed December 10, 2008)

ORDER MODIFYING RESOLUTION ROSB-002
AND DENYING REHEARING OF RESOLUTION, AS MODIFIED

I. INTRODUCTION

In this Order we dispose of the application for rehearing of Resolution ROSB-002 (“Resolution” or “ROSB-002” or “citation program”), filed by Union Pacific Railroad Company (“UP”) and BNSF Railway Company (“BNSF”).

On November 11, 2008, the Commission issued ROSB-002 which approved a citation program under the administration of the Director of the Consumer Protection and Safety Division (“CPSD”) for enforcing compliance with certain General Orders (“GOs”) and other requirements for rail carriers operating in California. Specifically, the citation program will enforce compliance with requirements for walkways, clearances, and certain railroad operating rules agreed to by UP and BNSF. ROSB-002 further authorized the Staff to draft and issue citations for specific violations and levy penalties in specified amounts. (See ROSB-002, p. 1.)

UP and BNSF filed a timely application for rehearing of ROSB-002. They allege the following legal error: (1) ROSB-002 is an improper delegation of Commission authority to Staff; (2) ROSB-002 is an unprecedented delegation of Commission authority to Staff; and (3) ROSB-002 does not give effect to the policy enunciated in *Order Instituting Investigation Into Southern California Edison Company’s Electric Line*

Construction, Operation and Maintenance Practices (“Edison OIF”) [D.04-04-065] (2004) __ Cal.P.U.C.3d__. UP and BNSF also make a request for oral argument pursuant to Rule 16.3.

We have carefully considered each and every argument raised in the application for rehearing and are of the opinion that good cause has not been established to grant rehearing. However, we modify the Resolution for clarification purposes only on the issue involving the appeals process, and deny rehearing of ROSB-002, as modified.

II. DISCUSSION

A. ROSB-002 lawfully authorizes the Staff to issue enforcement citations.

UP and BNSF contend that ROSB-002 errs because it represents an unprecedented and improper delegation of authority to Staff. (See Rehearing App., pp. 2-14.) Specifically, UP and BNSF argue that ROSB-002 is improper in that it exceeds the Commission’s authority to delegate its ministerial enforcement, and instead represents a delegation to Staff over substantive matters. (See Rehearing App., p. 5.) UP and BNSF further contend that ROSB-002 is improper in that the Commission has in effect delegated to Staff the authority to commence enforcement proceedings using an Order Instituting Investigation (“OII”) at its own instance, and that ROSB-002 will abdicate most of the Commission’s policy making authority over the statutes and General Orders subject to the program. (See Rehearing App., p. 12.) These claims lack merit.

Generally, the Commission has stated that powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of a public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24; *California School Employees Association v. Personnel Commission* (1970) 3 Cal.3d 139, 144; *Schechter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 396.) Public agencies, however, may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action (*California School Employees, supra*, at p. 144), functions relating to the application of standards

(*Bagley, supra*, at p. 25), and the making of preliminary recommendations and draft orders (*Schechter, supra*, at p. 397).¹ Moreover, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself. (*California School Employees, supra*, at p. 145.)

As the Commission pointed out in *California Association of Competitive Telecommunication Companies* [D.02-02-049], *supra*, at pp. 6-7 (slip. op.), cases such as *California School Employees* and *Schechter* follow the general rule that agencies cannot delegate discretionary duties in the absence of statutory authority. However,

they really stand for the narrower principle that while agencies cannot delegate the power to make fundamental policy decisions or "final" discretionary decisions, they may act in a practical manner and delegate authority to investigate, determine facts, make recommendations, and draft proposed decisions to be adopted or ratified by the agency's highest decision makers, even though such activities in fact require Staff to exercise judgment and discretion.

(*Id.* at pp. 6-7.) Thus, in determining whether a delegation of authority is unlawful, the question is whether the Commission has delegated its power to make fundamental policy decisions or final discretionary decisions.

We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that "truly fundamental issues [will] be resolved by the Legislature" and that a "grant of authority [is] . . . accompanied by safeguards adequate to prevent its abuse." [Citations.]

(*Kuglar v. Yocum* (1968) 69 Cal.2d 371, 376, original alterations.)

In the instant case, the Commission properly authorized the Staff to administer citations with specified fines. We have not delegated our power to make fundamental policy decisions or final discretionary decisions. Rather, we have made the

¹ Furthermore, legislative bodies must be able to delegate broadly, because without such delegation, the wheels of government would grind to a halt. (See *California Association of Competitive Telecommunication Companies* [D.02-02-049] (2002) __ Cal.P.U.C.2d __, citing *Gaylord v. City of Pasadena* (1917) 175 Cal. 433, 436-437 and *Union Bridge Co. v. United States* (1907) 204 U.S. 364.)

policy decision to allow Staff to issue citations with specific fines for certain types of violations.

First, the citation program simply authorizes the Director or Deputy of CPSD a ministerial task to issue citations for established specified violations and scheduled penalty amounts, to rail carriers for violations of specified Public Utilities Code sections and Commission General Orders.² The fact that each General Order in Appendix A has a fixed penalty amount further establishes a Commission authorization of a ministerial act without the exercise of any significant discretion on the part of Staff, although the ability of an agency to delegate does not depend on whether Staff must actually exercise judgment and discretion. (See ROSB-002, p. 8.)³ This does not represent the delegation of the Commission's power to make fundamental policy decisions or final discretionary decisions.⁴ Those types of decisions are reserved for the Commission especially if the rail carrier seeks appeal of the ALJ's determination in the matter.

For example, a railroad issued a citation may accept the fine imposed or contest it through a process of appeal. The Director or Deputy Director will issue citations only after a notice of defect or violation has been given to the railroad by the

² Contrary to UP and BNSF's claim, a proper authorization of authority does not depend on whether the citation program involves ministerial violations. (See Rehearing App., p. 9.) Lawful delegations of authority are determined by whether the Commission authorizes a ministerial act or a fundamental policy decision or final discretionary decision. Authority to assess a predetermined fine for specific established violation constitutes the performance of a ministerial act. (See *California School Employees, supra*, at p. 145.)

³ See Application of *California Association of Competitive Telecommunication Companies* [D.02-02-049], *supra*, at pp. 5-6 (slip op.) which states "they may act in a practical manner and delegate authority to investigate, determine facts, make recommendations, and draft proposed decisions to be adopted or ratified by the agency's highest decision makers, even though such activities in fact require staff to exercise judgment and discretion." Moreover, "Public Utilities Code sections 308 and 309, relating to the Executive Director, contemplate delegation of duties by the Commission. These provisions clearly authorize the delegation of responsibilities that involve some exercise of judgment and discretion." (*Id.* at pp. 5-6 (slip op.).)

⁴ Contrary to UP and BNSF's allegation, ROSB-002 does not designate discretionary Staff enforcement of the bulk of statutory and regulatory requirements for railroad facilities and operations, and thus there is no unlawful authorization of authority. Instead, authorizing to Staff the ability to issue citations for violations of General Orders and statutes is ministerial and consistent with our authority and other Commission authorized citation programs. (See Section IIB below.)

inspection Staff, the railroad has had an opportunity to correct the defect or violation, and the railroad has failed to correct the defect or violation in a timely manner. (See ROSB-002, pp. 2-3.) If a railroad does not agree with the citation, they can contest it and they have the opportunity to serve a Notice of Appeal on CPSD. If appealed, an ALJ will then be designated and the matter will be set for evidentiary hearing, where CPSD will bear the burden of proof in establishing a violation, and the ALJ will issue a proposed resolution resolving the appeal. While Staff may be able cite the railroad for a violation, if the railroad appeals, the matter will be set for evidentiary hearing and heard before an ALJ. (See ROSB-002, p. 8.)⁵ Moreover, a fine would only be imposed and collected if the ALJ finds an alleged violation actually existed. And, the fine would not be imposed and collected unless the Commission, at a publicly and regularly scheduled conference, agrees with the findings of the ALJ. (See ROSB-002, p. 8.)

Notwithstanding the fact, we note a slight and inadvertent inconsistency with our description of the appeals process. We therefore modify page 8 of the Resolution for consistency, and to reflect our intent with respect to the procedures regarding the appeal of a citation.

Second, UP and BNSFs allegation that ROSB-002 confers on Staff the authority to issue an OII at its own instance is equally without merit. In fact, nowhere does ROSB-002 delegate to Staff the power to institute and OII, nor can it be construed to do so. By its definition, an OII enables the Commission at any time to institute investigations on its own motion. (Rule 5.1 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20 §5.1.) This power is specifically reserved for the Commission and ROSB-002 acknowledges this fact, stating: "In enforcing compliance with railroad safety requirements or in response to any Specified Violation, the Commission may initiate any formal proceeding authorized by the California

⁵ This process cannot be construed as a delegation to Staff the power to make policy decisions or final discretionary decisions, or an abdication of our authority over statues and General Orders, nor does UP and BNSF offer any evidence which would support such claim.

institution...,” while further noting that the citation program adopted herein acts as “additional enforcement mechanism that may be used in addition to, or in lieu of, a formal proceeding.” (See ROSB-002, pp. 16-17.) The citation program, however, is designed to enable Staff to draft and issue citations for specific violations, and levy penalties in specified amounts set forth in Appendix A of ROSB-002 in an effort to enforce compliance with certain requirements for walkways, clearances, and certain railroad operating rules agreed to by UP and BNSF. (See ROSB-002, p. 1, citing *Union Pacific Railroad Co. v. CPUC*, Case No.07-cv-001 (E.D. Cal. June 1, 2007) (“AB 3023 Suit”).) Further, this program limits Staffs ability to issue citations for only certain types of violations (i.e., things that are readily determined, pre-established), and thus there is arguably no discretionary decision making involved in that task.⁶

Third, we find without merit UP and BNSF’s allegation that “what follows from a citation is an appeal before an ALJ that is similar to the adjudicatory hearing that would follow an OII.” What follows an actual citation is the railroad carrier pays the fine and is absolved. Failure to pay the fine results in a default of the right to appeal the fine. The appeal process is not automatic, requiring the railroad carrier to request an appeal if they choose to contest a fine. This is not Staff initiated, and instead, is available only assuming the rail carrier makes such request.

Fourth, ROSB-002 makes clear that the citation program will more efficiently utilize limited resources, while ensuring safety. Specifically, in the past, inspection Staff would make repeated site visits, or contact with the railroad carrier in an effort to achieve compliance, or in the alternative, consider recommending an OII to the Commission, placing further strain on the Staff’s already limited resources. (See ROSB-002, p. 2.) The citation program resolves this issue, allowing Staff to document and issue citations for persistent non-compliant conditions, which if contested, will be set

⁶ The exercise of discretion and/or judgment itself does not render the delegation unlawful. (See *California Association of Competitive Telecommunications Company* [D.02-02-049], *supra*, at pp. 5-6 (slip op.).)

for evidentiary hearings before an ALJ. This program also allows prompt action by Staff to protect the public and fulfill the objectives of the Commission's rail safety responsibilities.

Fifth, ROSB-002 does not improperly delegate powers or shift burden, strip the Commission "from the power to review the Staff's decision to commence enforcement proceedings," or take the Commission's "power to control the Staff's decision about the scope of a proceeding." UP and BNSF fail to offer any evidence which would support such claims. (See Rehearing App, pp. 11-12.) Rather, the citation program provides a reasonable procedure that protects the rights of each party. (See *Rulemaking to Implement the Provisions of Public Utilities Code Section 761.3* [D.08-11-009] (2008) __ Cal.P.U.C.3d __, pp. 6-7; see also ROSB-002, pp. 2-11.) Staff's authority is limited to issuing scheduled fines for specified violations, which are fully appealable, and where the Commission, not Staff, retains final approval of any contested fine. ROSB-002 provides the Staff with the necessary guidance to issue citations, and thus, the tasks assigned to the Staff are ministerial.

Moreover, the Legislature has expressly provided for the exercise and performance of certain Commission powers and duties by Staff. Section 7 of the Public Utilities Code states:

Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.

(Pub. Util. Code §7.)

Thus, the Commission may assign certain functions for the Staff to perform, including investigation of facts preliminary to agency action, and the assessment of specific penalties for certain types of violations. (See ROSB-002 p. 2, citing *Rulemaking to Implement the Provisions of Public Utilities Code 761.3 enacted by Chapter 19 of the 2001-02 Second Extraordinary Legislative Session* [D.06-01-07] (2006) __ Cal.P.U.C.3d __, at pp. 10-11 (slip op.).)

In sum, we have not delegated our authority to make fundamental policy decisions, final discretionary decisions, or the authority to initiate an OII. The Commission has final approval of any contested fine. As such, we see no unlawful delegation here.

B. ROSB-002 does not make an unprecedented delegation of Commission authority to Staff.

UP and BNSF contend that ROSB-002 is unprecedented in that it exceeds the Commission's "other ministerial" enforcement programs, which focus on requirements related to timely filing and proper contents of documents and records, whereas ROSB-002 covers substantive, technical, safety critical engineering and operating requirements of law that apply to rail carriers. (See Rehearing App., p. 3.) UP and BNSF maintain that the Commission has never before adopted a citation program where Staff could determine facts and issue citations that are presumptively final on substantive safety requirements. (See Rehearing App., p. 7.) UP and BNSF cite UEB-001, E-4017 and ALJ-187 in support of its argument that the Commission, in the past, has only adopted citation programs which address ministerial requirements. (See Rehearing App., p. 7.) These contentions have no merit.

Specifically, UP and BNSF's arguments are premised on the unsupported and erroneous assertion that ROSB-002 adopts a wide ranging program that goes far beyond any other Commission ordered citation program. The citation program approved in ROSB-002, however, is consistent with other Commission approved programs in that it focuses on ministerial tasks assigned to Staff. As discussed in Section A, Public Utilities Code section 7 allows the Commission to delegate certain tasks to Commission Staff. The Commission may lawfully delegate to its Staff the performance of certain functions, including the investigation of facts preliminary to agency action, and the assessment of specific penalties for certain types of violations. (See ROSB-002, p. 2.)

For example, in GO 167, the Commission approved a citation program 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 facilities are maintained and operated, and to ensure electrical service reliability and adequacy.⁷ In ROSB-002, the types of violations that Staff may enforce by citation, and the citation procedures are similar to those approved in GO 167 for the operation and maintenance standards for electric generation facilities. The amounts of the proposed penalties are also similar to those approved in GO 167. While UP and BNSF are correct that GO 167 violations pertain to filing requirements, whereas ROSB-002 does not, it is within the Commission's authority to delegate ministerial tasks. The authority to issue citations with scheduled fines for specified violations, other than filing requirements, falls within the category of permissible ministerial tasks.⁸

In Resolution UEB-001, dated August 24, 2006, we adopted a citation program authorizing Staff to issue citations for violations of the Public Utilities Code sections concerning third party verification requirements, and acknowledged that the

⁷ UP and BNSF request that the Commission modify the procedures of ROSB-002 to mirror those of GO 167 (prior to our modification of GO 167 by *Rulemaking to Implement the Provisions of Public Utilities Code section 761.3* [D.08-11-009] (2008) __ Cal.P.U.C.3d __), where a rail carrier could consent to a fine proposed by Staff, but if the rail carrier and Staff were unable to agree, Staff would revert to using traditional enforcement tools, such as a Commission-issued OII. In D.08-11-009, we modified GO 167, adding further procedural details to the enforcement mechanisms in GO 167. These modifications included specification of the form and content of citations, and clarification of the process for issuance and review of citations. (*Id.* at p. 2.) Through D.08-11-009, we specified our intent to streamline the administrative process for hearing contested matters consistent with other citation programs, stating with greater specificity the remedy we expect CPSD to use, that which does not include an OII. (*Id.* at p. 7.) As we previously stated, this provides clarity and efficiency in a parallel manner to other similar programs. Thus, the citation program as modified in D.08-11-009, is the program in place, and UP and BNSF's arguments that the Commission's citation program be like the program prior to its modification by D.08-11-009, carries no weight. (See Rehearing App., pp. 8-9.) Nor is the fact that we approved GO 167's modification at the same time it adopted ROSB-002 bootstrapping to a point of a contemporaneous revision of one citation program as precedential support for another." (See Rehearing App., p. 9.)

⁸ Specifically, UP and BNSF argue that what the Commission did is a departure given that our other citation programs authorize Staff authority to issue citations for ministerial violations (i.e., failing to file certain documents). The ability to issue citations is what is considered a ministerial task, not the subject matter or what is covered by the specific order or statute in the citation program. Moreover, UP and BNSF acknowledge the similarities in programs concerning other subject matters, stating "the analogy between the railroads' systems and the electrical utilities systems is striking," and as such, UP and BNSF's allegation that the citation program in GO 167 for electrical utilities is not precedent for the present case, is without merit. (See Rehearing App., p. 16.)

Commission has, in the past, given such authority to its staff in an effort to enforce compliance with various regulatory requirements.

Similarly, in Resolution E-4017, dated October 5, 2006, we approved a citation program under the Director of Energy Division for enforcing compliance with certain system and local resource adequacy filing requirements that apply to all load-serving entities, enforcing compliance with the requirements for submission of load data and forecasts, and other resource adequacy compliance filings and responses to requests for information by the California Energy Commission. Like ROSB-002, Staff in Resolution E-4017 was delegated authority to draft and issue citations for specific violations and levy penalties in specified amounts, which contradicts UP and BNSFs claim that the Commission has never before adopted a citation program where Staff could determine facts and issue citations. (See Resolution E-4017, pp. 1-2.)

Also, in Resolution ALJ 187, dated November 22, 2005, the Commission developed a program under which authorized CPSD to issue citations to various classes of carriers for violation of the Public Utilities Code or Commission Orders, and where a carrier issued a citation may accept the fine or contest it through a process of appeal, which is similar to ROSB-002. (See Resolution ALJ-187, pp. 1-4.)

ROSB-002 reasonably and lawfully found that the citation program is consistent with other approved citation programs in that all of the citation programs outlined above.² ROSB-002 is further consistent in that the citation process, response to citation, payment of fine, default, and appeal process mirrors those adopted in the programs identified above. Regardless of subject matter, these citations program are uniform in the sense that they all seek to achieve compliance with various general orders and statutes; seek to streamline the administrative process for hearing contested matters

² Infact, ROSB-002 points out that in the last several years “the Commission has developed and enhanced its citation programs in numerous areas, including household good movers, charter party carriers, passenger stage corporations, maintenance and operation of power plants, slamming by telecommunications providers, and compliance with resource adequacy requirements for electric power.” (See ROSB-002, p. 2.)

for ensuring public safety; efficiently utilize limited resources; properly authorizes the Staff to perform certain functions; and provide reasonable procedures that protects the rights of each party. However, in all of these programs, the Commission has not delegated its authority to make fundamental policy decisions, and the Commission retains the final approval of any contested fine.

Accordingly, the citation program approved in ROSB-002 is not unprecedented, and instead, is consistent with other Commission authorized citation programs. It is also reflective of the Commission's overall intent that "[W]hile different industries, entities and Commission Divisions may be involved, our goal is to make the Commission's various enforcement processes as similar as is reasonable and feasible.... [S]uch consistency provides an opportunity to increase efficiency for both the Commission and stakeholders." (See D.08-11-009, pp. 5-6.)

ROSB-002 further addressed the Commission's authority and justification for the citation program, citing points made by both railroads that:

"The Commission's Office of Governmental Affairs (OGA) did recommend that the citation program be included in AB 1935 (Bermudez) (2006). OGA pointed out that a citation program would be more efficient than issuing an OII for every minor violation of state rail safety rules. OGA did not ask for the authority from Legislature to create the citation program, ... noting the [Commission] already has established precedent for this type of citation process in the Transportation Enforcement Branch of CPSD [Consumer Protection and Safety Division] Authority to institute the citation program was not required because the Commission already has the authority...."

(See ROSB-002, p. 9 citing Ex. A to UP and BNSF Comments.)

The citation program is further justified by the fact that it is designed to more efficiently utilize limited resources and improve overall railroad safety in California. Specifically, ROSB-002 states:

"Typically, Staff will verify reported unsafe conditions during an on-site visit, then notify the railroad of the need for corrective action. Generally the Staff inspector and railroad

agree to a timeframe for remediation informally. However, it has been Staff's experience that the railroad sometimes fails to meet its commitments. Consequently, CPUC inspection Staff must make repeated site visits, or contact with the railroad carrier, in an effort to achieve compliance, or, in the alternative, consider recommending a formal investigation (OII) to the Commission. This places a further strain on Staff's limited resources."

(See ROSB-002, p. 2.)

The adoption this citation process will allow Staff to document persistent non-compliant conditions and provide a more certain timeframe for remediation, and fulfill the objectives of the Commission's rail safety responsibilities. We also made clear our intent that penalties serve one purpose; the remediation of unsafe conditions, and are not considered a revenue source for the State. (See ROSB-002, p. 11.)

Equally without merit is UP and BNSFs contention that ROSB-002 adopts a program where Staff can determine facts and issue citations that are presumptively final. Under ROSB-002, Staff is merely authorized ministerial duties to draft and issue citations for specific violations and levy penalties in specified amounts as set forth in Appendix A. (See ROSB-002, p. 1.) This authorization involves only the performance of ministerial tasks. Unlimited prosecutorial discretion and fact-finding are not vested in the Staff. The Resolution makes clear this point. Nor is Staff interpretation of the GO or violation binding on the Commission. (See ROSB, p. 9.) In fact, the prosecutorial discretion afforded by this program is carefully circumscribed and is fully reversible on appeal. (See ROSB-002, p. 8.) Like the programs identified above, ROSB-002 does not delegate authority over substantive matters. Instead, ROSB-002 gives the Staff the authority to perform ministerial tasks involving the remediation of any violations of specified Public Utilities Code and General Orders. Most of the General Order prohibitions and state statutory prohibitions incorporated in the resolution have existed for years, and the railroads have not expressed difficulty in general in compliance with such requirements. (See ROSB-002, p. 10.)

Lastly, UP and BNSF argue that the Commission fails to provide a reasoned explanation for its departure from precedent in allegedly delegating authority over substantive requirements, citing Rules 4.51(i), 12.5 and 16.3 in support of this argument. (See Rehearing App., p. 10.) UP and BNSF further cite *Int'l Union v. NLRB*, (D.C. Cir. 1972) 459 F.2d 1329 to stand for the proposition that an unexplained departure from longstanding Commission precedent regarding the proper scope of a citation program would be grounds for judicial invalidation of the program. (See Rehearing App., p. 10.) These claims are without merit.

As stated above, ROSB-002 does not represent a departure from other Commission approved citation programs. Although the General Orders and statutes covered by the program outlined in ROSB-002 vary slightly from others covered in other programs, UP and BNSF repeatedly stray from the quintessential point in their delegation arguments. Again, in determining whether a delegation of authority is unlawful, the question is whether the Commission has delegated its power to make fundamental policy decisions or final discretionary decisions. (See *Rulemaking to Implement the Provisions of Public Utilities Code 761.3 enacted by Chapter 19 of the 2001-02 Second Extraordinary Legislative Session* [D.06-01-047], *supra*, at pp. 10-11.) Giving the Staff the ability issue citations for a violation of General Orders or statute does not fall within that category, and is consistent with other citation programs. ROSB-002 makes clear this point, stating: “[W]e need not review, here, our comprehensive prior analyses of the law governing delegation of ministerial functions by this Commission to its [S]taff. It is well established that Commission [S]taff may apply scheduled fines for specified violations when we authorize them to.” (See ROSB-002, p. 8.) Accordingly, there is no error.

C. UP and BNSFs reliance on *Edison OII* is misplaced.

UP and BNSF contend that the Commission should rescind ROSB-002 given that it is inconsistent with policy enunciated in *Edison OII* [D.04-04-065], *supra*. (See Rehearing App, pp. 14-16.) Specifically, UP and BNSF argue that ROSB-002 is inconsistent with *Edison OII* in that under *Edison OII*, the Commission reserves its most vigorous enforcement tool-monetary fines-for statutory and regulatory violations that

threaten public or worker safety, or that compromise the integrity of the utility's system. (See Rehearing App, pp. 3, 14-15.) They further contend that by assigning all violations a specific penalty, the Resolution implies that any observed violation of a GO or statute requires a fine, which *Edison OII* expressly rejected, and which is fundamentally inconsistent with Commission policy. (See Rehearing App., pp. 16-17.) In the alternative, UP and BNSF request that ROSB-002 be modified to give voice to the *Edison OII* policy. (See Rehearing App., p. 16.) These contentions lack merit.

ROSB-002 is not inconsistent with, nor does it challenge any principle established by *Edison OII*. Specifically, *Edison OII* does not involve a Commission imposed citation program. Instead, the case involved the Commission's investigation ("OII") of Edison's electric line construction, operation, and maintenance practices, investigating whether or not any violation occurred, and ultimately fining Edison for 30 violations. In that decision, the Commission fined Edison \$20,000 per violation on the grounds that Edison knew or should have known of the violation and failed to cure it in a timely fashion. Accordingly, UP and BNSFs reliance on *Edison OII* is misplaced."¹⁰

ROSB-002, however, involves the implementation of a citation program, and the Commission's authorizing the Staff the authority to issue citations for violations of established GOs and statutes with fixed penalty amounts. As such, *Edison OII* simply does not apply. Moreover, assuming it did apply, ROSB-002 complies with *Edison OII* in that by assigning violations a specific penalty amount, the Resolution does not imply that a violation of a GO or statute requires a fine in all cases.¹¹ The Resolution is further

¹⁰ *Edison OII*, [D.04-04-065] *supra*, at pp. 15-16 (slip. op.) *Edison OII* does not, however, say that the Commission must reserve its enforcement solely for violations which pose a threat to public safety or integrity of the utility's system, as argued by UP and BNSF. *Edison OII* also enables the Commission when a violation is found, the power to do more than issue a fine; such as giving notice of the violation and time to cure the violation.

¹¹ Specifically, the Director or Deputy Director will issue citations only after a notice of defect or violation has been given to the railroad by the inspection Staff, the railroad has had an opportunity to correct the defect or violation, and the railroad has failed to correct the defect or violation in a timely manner. (See ROSB-002, p. 2.) Thus, the rail carrier can avoid payment of a fine altogether assuming it corrects the defect or violation within the specified timeframe. This is consistent with *Edison OII* wherein the Commission affirmed the Commission's practice of graduated enforcement measures ranging
(footnote continued on next page)

consistent with *Edison OII* in that the citation program is consistent with fundamental principles of due process providing adequate notice to the rail carrier for alleged violation and the ability of the rail carrier to appeal any and all of the proposed citations.

UP and BNSF's remaining arguments largely reiterate their disagreement with a Commission imposed citation program applicable to rail carriers. For example, UP and BNSF assert that, "prior to this new citation program, the policy of this Commission has followed with rail carriers is [w]e assess penalties for serious [i.e., safety-or integrity-critical] violations that *Edison* failed to cure on a timely basis... . For less serious violations, we do not assess penalties here." (See Rehearing App., p. 16.) The fact that a Commission authorized citation program is now applicable to the rail carriers does not constitute a revocation of the policy enunciated in *Edison OII*. Instead, it reflects UP and BNSF's overall disagreement with the Commissions decision to assess rail carriers specified penalty amounts for alleged violations. The fact that UP and BNSF are not satisfied with our determination does not, however, constitute legal error.

Moreover, prior to ROSB-002, there was no forbearance for less serious violations. The Commission (i.e., CPSD) had to file an OII for any violation that the Division wanted to pursue against a railroad. ROSB-002 avoids this large undertaking for each and every violation and/or penalty CPSD might want to seek against a rail carrier. Thus, UP and BNSF essentially argue that since each violation required an OII, only the serious violations were worth the trouble.

Further, even if *Edison OII* was applicable, it cannot be construed to invalidate the Commissions authority to implement such citation program. In fact,

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from warnings with an opportunity to make corrections, to substantial fines for serious breaches of our rules. (See *Edison OII* [D.04-04-065], *supra*, at p. 15 (slip op.)) Under ROSB-002, the rail carrier is also given the opportunity to correct the defect or violation, which echos statements made in *Edison OII* that "the system of notices and fines we have historically employed to accomplish that goal balances encouragement to the utility to correct violations in order to avoid fines, on the one hand, with fines for failures to act, on the other." (*Id.*)

Edison OII makes clear our authority which would support the citation program established in ROSB-002 program, stating:

“the Commission has broad regulatory authority over the safety of utility facilities and operations. (See Pub. Util. Code §§701, 761 and 768.) Utilities are required to provide reasonable service, equipment and facilities as necessary to promote the safety, health, comfort, and convenience of their patrons, employees, and the public. (See Publ. Util. Code §451.) In implementing its regulatory responsibilities, the Commission has adopted regulations governing safety in the form of GOs, has issued decisions giving guidance regarding safety policy” and has implemented citation programs to enforce various GOs and statues. A utilities failure to comply with these statutes, GOs may give rise to related Commission enforcement actions or other compliance related regulatory proceedings.”

(*Edison OII*, [D.04-04-065], *supra*, at pp. 10-11 (slip. op.).)

Like *Edison OII*, the purpose of the citation program is to improve overall railroad safety in California while more efficiently utilizing limited resources. The purpose is not “to create an enforcement regime where every failure to comply, no matter how minor, no matter what its cause, no matter whether it has been corrected, puts a utility in jeopardy of substantial daily fines.” (*Id.* at p. 13 (slip op.).) As in *Edison OII* and ROSB-002, it is within the Commission’s “broad discretion ... to establish enforcement regimes that achieves this purpose in a flexible and cost-efficient way, in cooperation with the utility, and in full recognition that improvements are always possible and fines are sometimes necessary.” (*Id.*) The citation program adopted in ROSB-002 is consistent with this rationale.¹²

¹² Nor are the potential fines substantial as argued by UP and BNSF. These fines are reasonably calculated, in light of the harm of the misconduct that they are intended to deter and correct. The fines range between \$500 per incident and \$50 per day for continuing violations and \$1,000, along with the added safeguard that any and all citations are appealable. (See ROSB-002, p. 7.)

D. Request for oral argument.

Lastly, UP and BNSF request oral argument pursuant to Rule 16.3 in that ROSB-002 raises issues of major significance such that oral argument would be appropriate. (See Rehearing App., p. 18.) UP and BNSF contend oral argument is warranted given that ROSB-002 fails to apply the *Edison* policy, makes an unprecedented delegation to the Staff, raises issues of considerable controversy, raises issues of great public interest, and raises issues which will have precedential impact on future citation programs. (See Rehearing App., pp. 18-19.)

The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. (See Rule 16.3(a) of the Commission's Rules of Practice and Procedure, Cal. Code of Regs., tit. §20, 16.3, subd. (a).) Rule 16.3 states:

- (a) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:
 - (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;
 - (2) changes or refines existing Commission precedent;
 - (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or
 - (4) raises questions of first impression that are likely to have significant precedential impact.

(Rule 16.3 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, § 16.3.)

UP and BNSF, however, did not meet the requirements listed above. Specifically, UP and BNSF failed to demonstrate how oral argument will materially assist the Commission in resolving the application, and failed to show how ROSB-002 departs from Commission precedent, requires an evidentiary hearing in light of material

disputed facts, or presents issues of public importance and first impression. Instead, UP and BNSF relitigate arguments previously raised and rejected by the Commission. (See ROSB-002, p. 15.)¹³ Accordingly, there is no basis to conclude oral argument will benefit disposition of the application for rehearing.

III. CONCLUSION

For the reasons discussed above, rehearing of ROSB-002, as modified, is denied.

THEREFORE, IT IS ORDERED that:

1. We modify page 8 of the Resolution, lines 7 through 10, beginning with the words “be imposed” to read as follows:

“be imposed and collected unless an ALJ finds an alleged violation actually existed. The ALJ shall issue a proposed resolution resolving the appeal no later than 60 days after the appeal is submitted, and the proposed resolution shall be placed for Commission consideration on the first available agenda, consistent with the Commission’s applicable rules.”

¹³ The Commission adopted the Staff’s recommendations as embodied in ROSB-002. Their recommendation demonstrated that the Staff carefully reviewed and considered comments on all versions of the Draft Resolution, and made revisions where appropriate. Staff met with UP and BNSF to discuss concerns, hosted an all parties meeting where railroads presented their concerns, and Staff addressed questions and concerns presented by the group. (See ROSB-002, p. 15.) Moreover, due process does not require a full evidentiary hearing in all instances. (See *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 62; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1247.) In many situations, we may dispense with many features of formal evidentiary hearings, such as evidentiary rules and objections, formal transcripts, and cross-examination, while still providing an ample opportunity to be heard.

2. Rehearing of ROSB-002, as modified, is hereby denied.
3. Application 08-12-004 is hereby closed.

This order is effective today.

Dated May 7, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners