Date of Issuance
November 6, 2020

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

EXECUTIVE DIVISION

RESOLUTION M-4846
November 5, 2020

R E S O L U T I O N

Resolution Adopting Commission Enforcement Policy

PROPOSED OUTCOME:

- Approves the Commission Enforcement Policy and its Appendix on Penalty Assessment Methodology
- Establishes enforcement guidelines
- Authorizes staff to draft proposed Administrative Consent Orders and Administrative Enforcement Orders, subject to Commission review and disposition
- Directs staff to form enforcement teams

SAFETY CONSIDERATIONS:

- An effective enforcement program improves compliance with rules and regulations by utilities and other entities subject to Commission jurisdiction, which improves safety for employees, customers and the public

ESTIMATED COST:

- None

SUMMARY

This Resolution adopts the attached Commission Enforcement and Penalty Assessment Policy (Enforcement Policy or Policy). This Policy is part of the Commission's ongoing efforts to ensure compliance with statutes, rules, orders and other requirements and to provide meaningful deterrence to violations through robust enforcement actions. The Policy will:

- establish guiding principles on enforcement approaches, actions, settlements and setting penalties;
- encapsulate and standardize existing enforcement tools;

- authorize staff to propose Administrative Consent Orders and Administrative Enforcement Orders, subject to Commission review and disposition;
- apply the existing citation appellate process of Resolution ALJ-377 to proposed Administrative Enforcement Orders;
- create internal enforcement teams to oversee the efficiency, consistency and effectiveness of Commission enforcement actions; and,
- address other actions to advance the goals of consistent, firm, meaningful, and timely enforcement that is transparent to regulated entities and the residents of California, and tailored to address the needs of disadvantaged communities, while adhering to due process and other legal obligations.

This Enforcement Policy is the latest effort in the Commission's long-standing history of enforcing statutes, rules, orders, and other regulations applicable to regulated entities for the betterment of the residents of California.

Nothing in this Enforcement Policy restricts or reduces the Commission's, and its staff's, ability to use its existing enforcement tools and procedures.

BACKGROUND

This Enforcement Policy builds on the Commission's existing tools and processes, as well as incorporates best practices and legal responsibilities, with the goal of better serving the residents of California through nimble, meaningful and transparent, enforcement of statutes, rules, orders, and regulations over the entities the Commission regulates. This Policy will also assist in the implementation of the Commission's Strategic Directive on Compliance and Enforcement.[1]

The Commission currently uses numerous enforcement tools such as Orders Instituting Investigation (OII), Orders to Show Cause (OSC), citations, subpoenas, stop-work orders, revocations of authority, referrals to other agencies, or court actions. These tools remain unaltered by this resolution.

In addition to the robust and resource intensive actions such as OIIs and OSCs the Commission uses a number of staff-level actions to correct behavior before more serious action is needed. Staff has, and will continue to have, the ability to communicate with regulated entities, issue warning letters, request information, make inspections and apply

[1] See SD-05 (https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Mission_and_Values/Strategic_Directives_and_Governance_Policies_Revised_February%2020%202019.pdf).

numerous other tools to identify and fix violations and potential violations in a quick and effective manner.

The Enforcement Policy seeks to provide more structure around those tools by consolidating and identifying a uniform set of staff level enforcement actions such as: communications with regulated entities, warning letters, requests for information and inspections, and notices of violations.

The Commission also has a long-standing practice of using citation processes, which delegate certain powers and actions to staff to be used in a less formal manner than an OII.

The Commission has numerous citation programs. While these citation programs exist in several industry areas the Commission regulates and continues to be expanded upon and improved,[2] they do not cover all regulated actors and/or actions. Experience has shown that there are circumstances not covered by these citation programs, thus limiting the Commission's ability to respond to instances of non-compliance. Moreover, penalty amounts are pre-determined under the citation programs and cannot be deviated from, no matter what extenuating or inculpative circumstances may exist.

This Policy does not modify any of the Commission's citation programs, nor would it create a disincentive to issuing citations or adding new citation programs.[3] Staff can continue to issue citations if appropriate for the circumstances. The Policy does give staff the option of issuing a proposed Administrative Consent Order or Administrative Enforcement Order instead of issuing a citation or seeking an OII in situations not currently covered by an existing citation program or warranting an OII.

In developing this Policy, staff presented it to the Commission's Policy and Governance Committee for public and Commissioner input on two occasions.

On June 17, 2020, staff distributed a draft version of the Enforcement Policy to solicit comments and to notify the public that the Policy would be presented and discussed at the July 1, 2020 Commission's Policy and Governance Committee meeting. Notice of the draft Enforcement Policy was emailed to those subscribed to the service list for Notice of

[2] For example, the Commission recently adopted Resolution ALJ-377, which modified Resolution ALJ-299 and made permanent the Citation Appellate Rules. Other examples include Resolution E-5080 (August 6, 2020) *Approves a citation program enforcing compliance with the filing requirements of Integrated Resource Plans by Load-Serving Entities*. Resolution T-17601 (June 21, 2018) *Approval of a Citation Program To Enforce Compliance by Telecommunications Carriers With The Commission's Resolutions, Decisions, Orders, and The Public Utilities Code and Authorizes Staff To Issue Citations; Procedures For Appeal Of Citations*.

[3] For example, citations are final if not appealed but an Administrative Enforcement order is only proposed until the Commission adopts it.

Amendments to the Commission's Rules of Practice and Procedure. The July 1, 2020 meeting was noticed on the Daily Calendar.

Prior to the July 1, 2020 meeting, comments were submitted by CA Cable and Telecommunications Association (CCTA), CTIA, William Sherman, and Goodin, MacBride, Squeri and Day LLP. Those comments addressed due process matters pertaining to the Commission's adoption and implementation of this Policy, the consistency of enforcement practices, statutory bases of the Commission's delegation of certain actions to staff, the Policy's connection to audits of water utilities, and included a reiteration of similar comments raised in the processing of Resolution ALJ-377. The substance of those arguments is addressed below.[4]

At the July 1, 2020 meeting, the Commissioners discussed the Enforcement Policy and set a July 22, 2020 deadline for submitting additional public comments to the Policy and Governance Committee. No stakeholders or members of the public made comments during the meeting.

On July 14, 2020, Commission staff notified the service lists for Notice of Amendments to the Commission's Rules of Practice and Procedure and for General Order 96-B of the July 22, 2020 comment due date. On July 21 and 22, 2020, comments were received from Lyft, CCTA, Shell Energy North America, Pacific Gas and Electric Company, and jointly from San Diego Gas & Electric Company and Southern California Gas Company respectively. Those comments addressed delegation authority, due process concerns, the extent to which guidance to staff would promote consistency, the need for internal "firewalls" between enforcement and advisory staff and decision makers and the adoption of this Policy through the Resolution process. The substance of those arguments is addressed below

The Policy and Governance Committee discussed this Policy a second time on September 2, 2020. The meeting was noticed on the Daily Calendar and on August 24, 2020, Commission staff notified the service lists for Notice of Amendments to the Commission's Rules of Practice and Procedure and for General Order 96-B of the September 2, 2020 meeting date. Issues raised by Commissioners and the public included: penalty accrual and interest, enforcement prioritization and vulnerable communities, and the legal authority for the Policy and its implementation. The primary concerns raised in comments on the draft Policy are addressed below.

[4] The Enforcement Policy does not address the matter of audits of water utilities as that is a separate matter unaffected by this Policy. The Policy has a stated objective of promoting a consistent approach among Commission staff to enforcement actions, but the Policy also recognizes that in practice different factual circumstances may require different approaches.

DISCUSSION

To date, the issues raised through the process of drafting this Enforcement Policy can be summarized as:

1. The Commission's jurisdiction and delegation authority
2. Adherence to due process principles in the adoption and implementation of this Policy
3. Internal Enforcement Teams
4. How this Policy will advance enforcement goals and principles
5. How this Policy will interact with existing enforcement tools
6. How this Policy addresses the accrual of penalties and the interest on penalties

1. Jurisdiction and Delegation Authority:

The Commission has affirmed its jurisdiction over regulated entities and its authority to establish enforcement mechanisms in numerous past decisions.[5]

The Commission has broad regulatory authority, as set forth in Article XII of the California Constitution and § 701 of the California Public Utilities (Pub. Util.) Code.[6] Section 701 authorizes the Commission to "supervise and regulate every public utility in the State . . . and do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."[7]

As mandated in § 702:

> Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.

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[5] See, e.g., Resolution ALJ-274; D.14-12-001 (as modified by D.15-05-054); D.16-09-055; Resolution E-4017 (as modified by Resolution E-4195); Resolution E-4550; Resolution W-4799; Resolution TL-19108; Resolution ROSB-002; Resolution SED-3; Resolution T-17601; Resolution ALJ-377 (see Appendix B for a list of citation programs).

[6] All code citations are to the California Public Utilities Code unless otherwise stated.

[7] See also, e.g., Pub. Util. Code § 5381.

Pursuant to § 451 each public utility in California must:

> 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.

The Commission has stated that "[t]he duty to furnish and maintain safe equipment and facilities is paramount for all California public utilities."[8]

Pursuant to § 2101, the Commission is directed "to see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected . . ."

Existing law, such as § 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.[9] The acts of delegation within the Enforcement Policy are delegations to Commission staff, who are acting in an enforcement capacity, and are not transferable to other governmental entities. Additionally, the Enforcement Policy does not give the Public Advocate's Office any citation or enforcement powers.

The primary purpose of an effective enforcement program is to deter misbehavior or illegal conduct by utilities and other entities subject to Commission jurisdiction, thereby ensuring that both the employees of the utility and the public it serves are properly protected from the inherent hazards of providing utility services.

The Commission's authority to adopt this Enforcement Policy falls within the same well-established authorities relied upon to adopt the citation programs. The Commission has adopted citation programs in many areas. (See e.g., E-4195 (resource adequacy); ROSB-002 (transportation/railroad); UEB-002 (telecommunications); USRB-001 (propane); and W-4799 (water and sewer). More recently, it established additional citation programs Rulemaking (R.) 14-05-013 (electric and gas citation programs); TL-19102 (household goods carriers); E-4550 (failure to comply with Permits to Construct or Certifications of Public Convenience and Necessity issued pursuant to the

[8] D.11-06-017 at 16.

[9] D.09-05-020 at 8.

California Environmental Quality Act); TL-19108 (charter party carriers); SED ST-163 (rail transit); E-4720 (Renewables Portfolio Standard); SED-3 (communications facilities); T-17601 (telecommunications carriers); and UEB-003 (core transport agent).)

Additionally, the Commission has established an appellate process that works in conjunction with these citation programs. (See Citation Appellate Rules found in Resolution ALJ-187, Resolution ALJ-299 and Resolution ALJ-377.)

This Enforcement Policy builds upon this historical legal and procedural foundation. However, this Policy is different from prior citation programs in that staff have two new tools available to address violations: they can *draft and propose* an Administrative Consent Order or an Administrative Enforcement Order to the full Commission for approval, denial or modification. The legal analysis in past Commission decisions, D.02-02-049, D.06-01-047, and D.09-05-020, explains that allowing staff to issue proposed Administrative Enforcement Orders or Administrative Consent Orders for Commission approval and adoption, is not an improper delegation of authority.

In response to allegations that permitting staff to assess scheduled fines for violations of General Order (GO) 167 (maintenance and operations of electrical generation facilities) is an impermissible delegation of authority, D.06-01-047 cites to portions of D.02-02-049 and analyzes relevant case law:

> As a general rule, 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; *Schecter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 396.) On the other hand, public agencies 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 (*Schecter*, *supra*, at p. 397). 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] (2002) 2002 Cal.P.U.C. LEXIS 162, cases such as *California School Employees* and *Schecter* 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.
> (*California Association of Competitive Telecommunication Companies* [D.02-02-049], supra, 2002 Cal.P.U.C. LEXIS 162 at pp. *9-*10, petn. for writ den. Dec. 4, 2002, *Southern California Edison Company v. Public Utilities Commission*, B157507.)

> 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.)

D.09-05-020 includes the same analysis when it rejects claims that staffs' ability to issue fines over engineering and operating safety of rail carriers via Resolution ROSB-002, is improper. The analysis of principles found in the *Schecter* and *California School Employees* line of cases and articulated in D.02-02-049, D.06-01-047 and D.09-05-020 all confirm that the Commission can delegate authority to staff to draft proposed orders to be adopted or ratified by the Commission, even though drafting such orders require staff to exercise some level of judgment and discretion. The Commission's subsequent approval or ratification of an Administrative Enforcement Order or Administrative Consent Order proposed by staff, validates the order, which becomes an act of the Commission itself.

2. Due Process Matters:

This Enforcement Policy was adopted following several notice and comment opportunities and, as such, its adoption complies with necessary due process requirements. In addition to two rounds of public notice and comment in the Commission's Policy and Governance Committee process, this Resolution was issued for notice and comment pursuant to Article 14 of the Commission's Rules of Practice and Procedure.

This Resolution was served on the mailing list for the Notice of Amendments to the Commission's Rules of Practice and Procedure as well as the GO 96-B service lists for Pacific Gas and Electric (PG&E), Southern California Edison (SCE), Southern California Gas Company (SoCalGas), and San Diego Gas and Electric (SDG&E). Comments on the draft resolution were requested pursuant to Rule 14.5 of the Commission's Rules of Practice and Procedure. Comments were posted on the Commission's website for the public to view.

The Commission has consistently adopted citation programs through the resolution process and doing so in this instance does not violate any due process requirements. While some citation programs have been adopted through the Order Instituting Rulemaking process, the majority of citation programs, including programs addressing complex matters, have been adopted through the resolution process.

Not only is the Policy adopted in a manner that meets due process principles, the implementation of this Policy will also supply due process through the processes established within the Policy.

Due Process requirements for the implementation of the Policy are included in the Policy itself. These requirements include: (1) the right to request an evidentiary hearing before an Administrative Enforcement Order becomes final; (2) the submitting for public notice and comment of a draft Resolution regarding the disposition of any proposed Administrative Enforcement Order or proposed Administrative Consent Order; (3) a Commission vote before any Administrative Enforcement Order or Administrative Consent Order becomes final; (4) the traditional rehearing and court review processes of any Commission vote on the matter.

A requested evidentiary hearing would be before an Administrative Law Judge (ALJ) and held in accordance with the Citation Appellate Rules found in Resolution ALJ-377 or any successor order. Pursuant to those rules, an ALJ drafted Resolution is presented to the Commission for approval and adoption. The adopted Commission Resolution is subject to rehearing pursuant to Pub. Util. Code section 1731 and to judicial review pursuant to Pub. Util. Code section 1756. The due process provided following issuance of an Administrative Enforcement Order is identical to the due process provided following the issuance of a traditional citation except for the extra due process step of requiring a Commission vote before an Administrative Enforcement Order becomes final, which is not a requirement for an un-appealed citation.

As the Commission discussed in Resolution ROSB-002, this ability to seek an evidentiary hearing removes the concern that a private interest could be erroneously deprived of property (e.g., fine), nor are the fiscal or administrative burdens on the private interest significant. (See Resolution ROSB-002, pp.7-8.)

Lastly, nothing in this Policy shifts any burden of proof, evidentiary standards, or otherwise applicable procedural requirements.

3. Internal Enforcement Teams

The Enforcement Policy directs staff to form two internal enforcement teams: Division Specific Enforcement Teams and a Commission Enforcement Team. The purpose for such teams is to address issues concerning prioritization of resources, consistency, transparency and other managerial concerns.

Commentors have correctly noted that internal "firewalls" must be established to adhere to conflict-of-roles or separation-of-duties prohibitions, ex parte restrictions and Bagley-Keene Open Meeting Act obligations.

The Commission is well-aware that procedural fairness requires internal separation between advocates and decision-makers to preserve the neutrality of decision-makers and equality among advocating entities. The Policy is also subject to the ex parte restrictions found in the Citation Appellate Rules. Lastly, nothing in the Policy would change the Commission's existing obligations under the Bagley-Keene Open Meeting Act.

In the creation and staffing of these teams, staff, in consultation with the Commission Legal Department and others, will ensure that these existing and on-going legal obligations are meet. And while staff may meet to discuss global issues and trends, ultimately every enforcement action will stand on its own evidentiary record.

4. How this Policy will advance enforcement goals and principles

The Enforcement Policy includes nine guiding enforcement principles: ensuring compliance; consistent enforcement; meaningful deterrence; timely enforcement; progressive enforcement; transparency; environmental justice and disadvantaged communities; adaptive management; and, enforcement prioritization.

To advance these goals the Policy includes the creation of internal enforcement teams and also gives staff direction on how to use the various tools in this Policy.

The enforcement teams will help ensure the guiding principles are taken into consideration by staff and will also be responsible for tracking and publishing information in an enforcement database.

The direction given to staff regarding the various tools in the Policy will help ensure the enforcement principles are meet. While many of these tools already exist, the Policy brings these tools into one coordinated policy document and directs the manner of their use.

In total, the Policy will promote maximum compliance with Commission rules and requirements through the adoption and application of consistent enforcement practices and the development of a sufficient record that ensures that regulated entities subject to an enforcement action receive due process. The purpose of these goals is to ensure that regulated entities provide services and facilities to the public in a manner that is safe, reliable, non-discriminatory and just and reasonable. The Commission intends for this Policy to promote a consistent approach among Commission staff to enforcement actions, to make enforcement a high priority and to promote the Commission's enforcement culture.

5. How this Policy will interact with existing enforcement tools

No existing citations programs are altered by this Resolution and Enforcement Policy. This Policy merely provides additional enforcement tools for staff to use in lieu of, or in conjunction with, existing citation programs. Nor does this Resolution and Enforcement Policy alter the Citation Appellate Rules.

The Policy does not change or undermine the citation programs, nor does it create a disincentive to issuing citations or adding new citation programs. Staff may continue to issue citations if appropriate for a case. All actions in this Enforcement Policy, whether new or existing, will be performed consistent with the Pub. Util. Code and all other relevant legal authorities.

The Policy does give staff the option of settling a case through an Administrative Consent Order or issuing a proposed Administrative Enforcement Order instead of issuing a citation, both of which would be subject to a vote by the full Commission. The Administrative Enforcement Order is an alternative to a citation and could be issued if a case does not necessitate an OII.

The addition of these tools to the Commission's existing enforcement options brings the Commission's enforcement practices more in-line with the enforcement practices of many other state agencies. The addition of the new tools is also consistent with the recommendations made by an independent third party that reviewed Commission enforcement practices after the San Bruno explosion[10] and advances the Commission's Strategic Directive on Compliance and Enforcement.

The goal of having consistent enforcement practices would be supported by the adoption of the Policy, which delineates a consistent Commission-wide approach to enforcement.

[10] Report of the Independent Review Panel San Bruno Explosion https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Safety/Natural_Gas_Pipeline/News/Final%20Report.pdf

Case facts may suggest the use of different enforcement tools at different times, but that does not mean that the Policy will not promote consistency. Rather, the Policy will promote a consistent approach to each case by establishing the same set of tools to be used Commission-wide. In addition, the Policy requires the formation of Division and Commission Enforcement Teams to support consistency.

Commentors also raised questions about the consistency of this Policy with Pub. Util. Code sections 2107 and 2108. Under the Policy staff can negotiate a proposed Administrative Consent Order or issue a proposed Administrative Enforcement Order, both of which may include fine amounts. All penalty amounts set forth in proposed orders for Commission adoption must be consistent with Pub. Util. Code sections 2107 and 2108.

6. How this Policy addresses the accrual of penalties and the interest on penalties

Regarding accrual the Policy states:

> Corrective action requirements in a proposed Administrative Enforcement Order remain in effect, notwithstanding the filing of a Request for Hearing. Neither payment of the penalty nor filing a timely Request for Hearing shall excuse the regulated entity from curing a violation. … The amount of the penalty shall continue to accrue on a daily basis until the violation is corrected or until the appeal, rehearing, and judicial review process is fully concluded, a penalty is found to be appropriate, and the penalty is paid in full. The requirement that a penalty be paid shall be stayed during the hearing and rehearing process.

This guidance is consistent with past Commission actions, Pub. Util. Code sections 451 and 2108, and the Enforcement Policy principles, especially those related to protecting public health and safety.

Regarding interest, the Commission has charged interest on penalty amounts after the penalty becomes final and the respondent is in default. Generally, the respondent has thirty (30) days from the date of finality to submit payment and unpaid balances accrue interest at the legal rate of interest for judgements. The Commission and its staff may take whatever actions are provided by law to recover unpaid penalties. It is envisioned that interest will be handled in the same manner for enforcement actions made pursuant to this Policy, although staff may tailor to the specifics of each case, as allowable by law.

NOTICE OF COMMENTS

Pub. Util. Code section 311(g)(1) provides that resolutions must be served on all parties and subject to at least 30 days public review. However, given that this resolution is

issued outside of a formal proceeding, interested stakeholders did not need to have party status in order to submit comments on the resolution.

This draft resolution was served on the service list of Notice of Amendments to the Commission's Rules of Practice and Procedure, as well as the GO 96-B service lists for PG&E, SCE, SoCalGas, and SDG&E and posted on the Commission Committee on Policy and Governance website, **www.cpuc.ca.gov/policyandgovernance**, and was placed on the Commission's Business Meeting agenda no earlier than 30 days from the date of service.

On October 6, 2020, timely comments were received from the following: SouthWest Gas Corporation (SouthWest); California Attorney General's Office (AG's Office); CCTA; CTIA; Hanson Bridgett LLP; joint comments from San Diego Gas & Electric Company and Southern California Gas Company (Joint Utilities); and, Shell Energy North America (Shell).

SouthWest recommends that the Enforcement Policy include an option for staff to provide notices to regulated entities that their response satisfies staff's concerns set forth in a Notice of Violation. The Enforcement Policy has been revised to include this request.

The AG's Office recommends refinements to the environmental justice goals and processes in the Policy. We have revised the Policy to refine the term "vulnerable and disadvantaged communities" by referring to the Commission's Environmental and Social Justice Action Plan, and also to include an explicit goal of coordinating enforcement actions with other agencies. We note that the Commission's Strategic Directive, SD-11, requires the Commission to collaborate and coordinate with local, state, federal and tribal entities – as appropriate – to achieve goals that include "effective and efficient regulation"[11] We also reiterate here the Commission's commitment to adequate staff training. Finally, the AG's Office recommends that the CPUC consider its ability to include supplemental environmental projects in its settlements with regulated entities, and how such process would fit within the Enforcement Policy, including providing benefits to disadvantaged communities. We will consider this recommendation in the future as we implement this Policy.

CCTA reiterates its prior comments which we have substantively addressed above.

CTIA states that the accrual of penalties is treated differently here than in Resolution SED-3. As previously stated, this Resolution and Enforcement Policy does not modify any existing citation program. We find the approach taken in the Policy is correct for the

[11] The Commission's Strategic Directives can be found at: https://www.cpuc.ca.gov/strategicplanninginitiative/

implementation of the Policy itself; differences in different programs is not improper. Moreover, similarities between this Policy and Resolution SED-3 do exist; for example, both stay the collection of penalty payment during the appeal process.

Hansen Bridgett discusses jurisdictional demarcations between the Commission and other state agencies. This Policy does not expand or contract the jurisdiction of any governmental agency, nor is it the vehicle to resolve specific or ongoing jurisdictional disputes. Contrary to Hansen Bridgett's arguments, we find the Policy to be a proper and judicious use of Commission resources and not unduly burdensome on regulated entities. As detailed above, we find that the Commission has legal authority to create this Enforcement Policy, it is not an improper delegation to staff, regulated entities' due process rights are respected, and the Commission can enact this Policy through a resolution process.

The Joint Utilities argue that granting staff the ability to use additional enforcement tools is a modification of existing citation programs. We disagree. Most of the enforcement tools in the Policy already exist for staff, with or without a citation program. Just as staff can currently choose to forego a citation program and seek an OII, staff can also forgo a citation program and use a tool in the Enforcement Policy – this does not modify the citation program, nor does it support the proposal of the Joint Utilities to limit the Policy to areas not covered by an existing citation program. The Joint Utilities' argument that the Commission needs express legislative authority for each specific citation program, or Enforcement Policy tool, is addressed above and is not in alignment with long-standing Commission practice. Regarding other arguments raised: the ability of staff to seek a penalty amount in an Administrative Enforcement Order is bound by the relevant Pub. Util. Code sections and is only a proposal subject to full Commission review, similar to any staff proposed penalty in an enforcement OII; staff enforcement roles (e.g., investigating, litigation, and seeking penalties) are no more expansive than their current roles in citations and OIIs; and, the processes detailed in Resolution ALJ-377 address concerns about the record and discovery.

Shell argues that the Policy cannot cover entities that are subject to citations. We disagree. The same authorities that allow the Commission to make entities subject to citation programs, allow the Commission to make those entities subject to the Enforcement Policy. The Enforcement Policy does not expand or restrict any jurisdictional authority the Commission has over an entity pursuant to the Pub. Util. Code or other applicable laws. Also, the existence of various enforcement options for staff's use is not arbitrary or a violation of due process, or a grant of unfettered discretion to staff. Staff already has the discretion to use various tools (e.g., letters, citation, OII, etc.) and the Policy gives staff guidance on how to use those tools, and any non-citation penalty actions (i.e., Administrative Enforcement Orders or Administrative Consent Orders) of staff are proposals subject to Commission disposition. The internal enforcement teams are a measure to promote enforcement consistency.

All other comments were considered and addressed above and/or found not to warrant further discussion or revision to the Enforcement Policy.

FINDINGS AND CONCLUSIONS

1. Pub. Util. Code section 701 authorizes the Commission to supervise and regulate every public utility in the State.
2. Pub. Util. Code section 702 mandates every public utility to obey and promptly comply with every Commission order, decision, direction, or rule.
3. Pub. Util. Code section 451 mandates every public utility to furnish and maintain safe, sufficient and just service, instruments, equipment and facilities.
4. Pub. Util. Code section 2101 mandates the Commission shall ensure that the provisions of the California Constitution and statutes affecting public utilities are enforced and obeyed.
5. Public utilities, corporations and persons are subject to Commission enforcement actions and penalties pursuant to Pub. Util. Code, Division 1, Part 1, Chapter 11.
6. California law, including Pub. Util. Code section 7, authorizes the commission to delegate certain powers to its Staff, including the investigation of acts preliminary to agency action, and the issuance of citations for certain types of violations in specified amounts.
7. The Commission may authorize staff to investigate and draft proposed Administrative Enforcement Orders, subject to review and consideration by the Commission after any requested evidentiary hearing is granted.
8. The Commission may authorize staff to investigate, negotiate, and draft proposed Administrative Consent Orders, subject to review and consideration by the Commission.
9. The Enforcement Policy was subject to two rounds of public notice and comment in the Commission's Policy and Governance Committee.
10. The Commission has long adopted citation programs through the Resolution process.
11. The Enforcement Policy will provide staff with guidance to use existing tools more effectively.
12. The Enforcement Policy will provide staff with new tools to address non-compliance in a prompt and effective manner.
13. The Enforcement Policy will provide staff with guidance regarding the unique concerns of disadvantaged communities.

14. The Enforcement Policy will advance enforcement consistency and meaningful deterrence.
15. The Enforcement Policy will provide the timely remedies necessary to correct ongoing compliance issue while conserving staff resources.
16. The Enforcement Policy will incentivize utilities to prevent non-compliance issues from recurring or continuing.
17. The procedures set forth in the Enforcement Policy will ensure due process, fairness, and efficiency in the application of the Policy.
18. The Enforcement Policy will be implemented in a manner that ensures adherence to legal obligations, including ex parte restraints, the Bagley-Keene Open Meeting Act, and conflict-of-roles prohibitions.
19. Payment of the penalty assessed in an approved Enforcement Order or Consent Order does not excuse a regulated entity from promptly curing cited violations and does not preclude the Commission from taking other remedial measures.
20. Nothing in the Enforcement Policy interferes with the existing requirements that the public utilities must maintain and operate their systems safely, including invoking any necessary emergency response procedures to address immediate safety hazards, or any other procedures necessary to ensure that immediate safety hazards are promptly corrected.
21. Nothing in the Enforcement Policy limits or interferes with the Commission's ability to institute a formal enforcement action.
22. Nothing in the Enforcement Policy limits or interferes with existing authorities staff has to address enforcement concerns.
23. Nothing in the Enforcement Policy modifies or interferes with existing citation programs.
24. The Enforcement Policy does not create a dis-incentive to using existing citation programs.
25. Nothing in the Enforcement Policy modifies or interferes with the existing Citation Appellate Rules.
26. The Penalty Assessment Methodology is reasonable and consistent with previous Commission orders.
27. All penalty amounts must be consistent with Pub. Util. Code sections 2107 and 2108.

THEREFORE, IT IS ORDERED THAT:

1. The Enforcement Policy and its attached Penalty Assessment Policy, attached hereto, is adopted.

2. No other portion of Commission decisions, orders or resolutions are intended to be modified by this resolution.
3. This Resolution is effective today.

I hereby certify that the foregoing Resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California at its regular meeting held on November 5, 2020, the following Commissioners voting favorably thereon:

/s/ RACHEL PETERSON
Rachel Peterson
Acting Executive Director

MARYBEL BATJER
President
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
Commissioners

ATTACHMENT

November 5, 2020

California Public Utilities Commission
Enforcement Policy

I. INTRODUCTION

A. ***Background***

The California Public Utilities Commission (Commission) regulates a broad array of entities and industries, that include privately owned electric, natural gas, telecommunications, water, railroad, rail transit, and passenger transportation entities (regulated entities). The Public Utilities Act (Public Utilities Code § 201 et. seq.) requires the Commission to enforce the laws affecting regulated entities by promptly investigating and prosecuting alleged violations and imposing appropriate penalties.

The Commission considered its existing enforcement policies and practices when developing this Commission Enforcement Policy (Policy). Nothing in this policy document shall be used as the basis of a regulated entities' defense to any enforcement action or as justification for any ratemaking relief, nor in any way relieve regulated entities of any duties and obligations they may have under statutory law.

This Policy does not apply to any violation that, as of the effective date of the Policy, is the subject of a citation, an Order to Show Cause, an Order Instituting Investigation, or a referral to the Legal Division for the filing of a civil or criminal action.

B. ***Policy Objectives***

The goals of the Policy are to promote maximum compliance with Commission rules and requirements through the adoption and application of consistent enforcement practices and to develop a sufficient record that ensures that regulated entities subject to an enforcement action receive due process (e.g., notice and an opportunity to be heard). The purpose of these goals is to ensure that regulated entities provide services and facilities to the public in a manner that is safe, reliable, non-discriminatory and just and reasonable. The Commission intends for this Policy to promote a consistent approach among Commission staff[1] to enforcement actions, to make enforcement a high priority and to promote the Commission's enforcement culture.

[1] As used in this Policy the term "staff" refers to division staff or such other staff as may be designated by the Executive Director or a Deputy Executive Director to carry out the functions involved in taking enforcement action.

The Policy provides guidance on:

1. Achieving a consistent approach to enforcement;
2. Enforcement actions;
3. Settlements; and
4. Setting penalties

C. ***Policy Components***

Guiding Principles
The Commission's enforcement actions will be guided by a standard set of principles, as described in this Policy, within its jurisdictional authority for energy, communications, water and transportation.

Division Specific Enforcement Teams
This Policy creates division-specific enforcement teams made up of staff handling enforcement work. Among other activities, staff will prioritize enforcement cases, recommend appropriate enforcement actions, and ensure that enforcement activities are monitored and documented and that enforcement actions are made public to the extent possible.

Commission Enforcement Team
The Policy also creates a Commission Enforcement Team made up of at least one enforcement liaison from each division. The enforcement liaisons shall meet at least quarterly to discuss enforcement matters and procedures with the goal of promoting consistency and efficiency throughout the Commission.

Consistent Enforcement Actions
To provide a consistent approach to enforcement, the Policy standardizes enforcement documents and procedures to the extent appropriate.

II. **GUIDING PRINCIPLES**

A. ***Ensuring Compliance***

The Commission will strive to ensure compliance with statutes, rules, orders and other requirements and provide a meaningful deterrent to violations through its enforcement actions.

B. ***Consistent Enforcement***

Commission enforcement actions shall be consistent, while considering the differences in the Commission's statutory authority and programs for each particular industry. The Commission's enforcement actions shall be appropriate for each type of violation and shall provide consistent treatment for violations that are similar in nature and have similar safety and/or customer protection impacts. Enforcement actions shall also require a timely return to compliance.

C. ***Firm Enforcement & Meaningful Deterrence***

Enforcement actions should provide a meaningful deterrent to non-compliance. This requires, at a minimum, that the Commission seek adequate remedies, including:

1. Refunding or depriving the economic benefit gained by the noncompliance;
2. Penalties that are higher than the amounts required to be refunded or deprived. In setting the penalty amount, Staff shall be guided by statute and the factors in Appendix I, Penalty Assessment Methodology, which include:
    a. Severity or gravity of the offense (including physical harm, economic harm, harm to the regulatory process, and the number and scope of the violations);
    b. Conduct of the utility (including the regulated entity's prior history of violations and actions to prevent, detect, disclose, and rectify a violation);
    c. The financial resources of the regulated entity (including the size of the business, need for deterrence, and constitutional limitations on excessive fines);
    d. The totality of the circumstances in furtherance of the public interest; and
    e. The role of precedent.

D. ***Timely Enforcement***

The Commission shall pursue timely enforcement, consistent with the needs of each case.

E. ***Progressive Enforcement***

The Commission shall implement progressive enforcement. Progressive enforcement is an important component of consistent and firm enforcement. Progressive enforcement provides an escalating series of actions, beginning with actions such as a warning letter or notification of violation followed by actions that compel compliance and may result in the imposition of penalties or fines (e.g., the issuance of an enforcement order or filing a civil or criminal action). Progressive enforcement may not be an appropriate enforcement response when violations result from intentional or grossly negligent misconduct, where the impacts on ratepayers or other consumers are widespread, or where impacts to safety are significant.

F. ***Transparency***

The Commission shall provide clear and consistent information about its enforcement actions and which entities it regulates. The Commission will monitor and report its enforcement actions in a publicly accessible way, including the extent to which regulated entities return to compliance.

G. ***Environmental Justice and Disadvantaged Communities***

The Commission shall promote enforcement of all statutes within its jurisdictions in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority and low-income populations in the state. This includes tailoring enforcement responses to address the needs of vulnerable and disadvantaged communities, including those communities described as Environmental and Social Justice Communities in the Commission's Environmental and Social Justice Action Plan or subsequent documents.

H. ***Adaptive Management***

The Commission shall continuously monitor and update its enforcement tools, programs and authorities to ensure that they remain protective of customers, ratepayers, and the environment. This includes keeping abreast of new markets, business practices, and consumer abuses that might necessitate changes to the enforcement program and authorities. The Commission will prioritize regular communication among divisions to identify both specific violations and trends.

The Commission should address new consumer issues as they arise. In instances where the Commission lacks jurisdiction, the Commission will work proactively to identify the appropriate local, state or federal agency that

does have jurisdiction and will work with that agency to remedy the harm to consumers.

I. ***Enforcement Prioritization***

It is the policy of the Commission that every violation should result in an appropriate enforcement action consistent with the priority of the violation. In recognition of its finite resources, the Commission shall exercise its enforcement discretion to prioritize enforcement actions. Enforcement prioritization enhances the Commission's ability to leverage its finite enforcement resources and to achieve the general deterrence needed to encourage the regulated community to anticipate, identify and correct violations. In prioritizing enforcement actions, the Commission shall consider the impact of violations on vulnerable and disadvantaged communities.

III. **ENFORCEMENT**

In carrying out the Commission's mandate, staff may pursue different levels of enforcement action. In some cases, an enforcement response, such as an oral communication followed by a Warning Letter or Email or a Notice of Violation, will be enough to notify a regulated entity that staff identified an issue or violation that requires corrective action. Other cases may warrant a stronger enforcement action in lieu of or in addition to a warning or other initial enforcement response. All enforcement actions shall be designed and implemented to ensure that timely action is taken to avoid or correct a violation and return to compliance.

Division Enforcement Teams

Each division that participates in enforcement work shall establish a Division Enforcement Team. The Division Enforcement Team is made up of the managers or their delegates and an attorney[s] from the Commission's Legal Division. The Division Enforcement Teams shall prioritize division cases for enforcement action to ensure the most efficient and effective use of available resources. The Division Enforcement Teams shall meet at least quarterly to prioritize enforcement cases, continuously improve enforcement processes and procedures, and make recommendations about how to proceed with cases, including which enforcement action is appropriate for each case. The Division Enforcement Team is also responsible for tracking and publishing information about division cases in an enforcement database.

Commission Enforcement Team

The Commission Enforcement Team is made up of enforcement liaisons from each division that maintains an enforcement team and attorney(s) from the Commission's Legal Division. The enforcement liaisons and attorney(s) shall meet at least quarterly to discuss enforcement matters of statewide concern with the goal of promoting consistency and efficiency throughout the divisions.

A. ***Enforcement Actions***

Staff may pursue the following enforcement actions:[2]

1. In Person or Telephone Communication

   a. Staff may, but is not required to, inform regulated entities in person or by telephone of violations of violations that must be corrected. Staff may also orally inform regulated entities of weaknesses, safety concerns, or opportunities for improvement that are not violations but should be corrected to avoid a violation or to reduce safety risk. Staff shall keep a detailed written record of such oral communications with the regulated entity in the case file. The minimum requirements for documenting an oral communication with a regulated entity are:

      i. Date and time of the communication;

      ii. The name of the staff member[s] and the representative[s] of the regulated entity involved in the communication;

      iii. The violation, weakness, safety concern, or opportunity for improvement that was discussed;

      iv. Actions for correcting the violation or addressing the weakness, safety concern, or opportunity for improvement that were discussed, including required timeframes for completing such actions;

      v. The regulated entity's response to the communication of the violation, weakness, safety concern, or opportunity for improvement; and

      vi. The evaluation of whether the response is sufficient and/or warrants a follow-up investigation.

[2] Nothing in this Policy shall be construed to constrain staff or the Commission from pursuing actions that are otherwise authorized but are not specifically mentioned in the Policy.

b. All oral communications shall be memorialized in a warning email or letter, Notice of Violation, or other written communication. Oral communications are not required in every case. Staff may issue a Warning Letter or email, citation, Notice of Violation or refer a case for other enforcement in lieu of an oral communication.

2. Warning Letter or Email

Staff may send a regulated entity a letter or an email that identifies program weaknesses, safety concerns, or opportunities for improvement. A Warning Letter or Email should only be sent to a regulated entity to address issues that are not being cited as violations but should be corrected to avoid a citation or Notice of Violation or to reduce a safety risk. Staff shall verify delivery of the Warning Letter or Email using a Proof of Service form. A Warning Letter or Email shall be placed in the regulated entity case file and recorded in the enforcement database and shall include the following:

a. The date the letter or email was sent;
b. The date staff identified the situation or condition at issue;
c. The circumstances under which staff identified the situation or condition at issue (e.g., during an inspection or by consumer complaint); and
d. Actions recommended to address the situation or condition at issue, including any recommended timeframes to complete such actions.

3. Request for Information

Staff are authorized to inspect the accounts, books, papers, and documents of a regulated entity. Staff may request the production of accounts, books, papers, and documents of a regulated entity. Failure to make such records available may lead to the issuance of a subpoena or other enforcement action.

4. Subpoena

Staff may subpoena records from a regulated entity as permitted by the Public Utilities Act. Staff may also subpoena the attendance of a person for deposition or other examination under oath as permitted by the Public

Utilities Act. The issuance of a subpoena is not a prerequisite for the exercise of Commission authority under Public Utilities Code section 313 or any appropriate powers under the California Constitution and the Public Unities Code.

5. Cease and Desist/Stop Work Order

Commission or staff may issue an order to cease and desist an activity or an order to stop work to a regulated entity consistent with existing Commission decisions and orders and as permitted by the Public Utilities Act. Nothing in this Policy is intended to modify existing procedures concerning such actions, including any right to appeal such actions.

6. Notice of Violation

a. When a violation is identified, staff may issue a Notice of Violation to a regulated entity. Staff shall use a Notice of Violation form. Staff shall verify delivery of the Notice of Violation using a Proof of Service form. A Notice of Violation shall be placed in the regulated entity case file and recorded in the enforcement database and shall include:

    i. The law or Commission order, decision or rule violated by the regulated entity;
    ii. The facts that form the basis for each violation;
    iii. Information related to the potential for additional or ongoing violations;
    iv. A directive to correct each violation to avoid additional enforcement action;
    v. A date by which the regulated entity must submit a plan for correcting each violation if a plan is appropriate;
    vi. A date by which the regulated entity must certify that each violation has been corrected;

vii. A penalty amount if the Notice of Violation includes a penalty;[3]

viii. Staff contact information; and

ix. Information about how to respond to the Notice of Violation.

b. A regulated entity that receives a Notice of Violation shall be given an opportunity to respond in writing to that Notice of Violation. The response shall be provided to the enforcing division within 30 days[4] from the date the Notice of Violation was served upon the regulated entity. The response time may be extended or shortened by staff, depending on the exigencies of a case. The response shall include:

i. If the regulated entity disputes that a violation has occurred, a statement of the facts upon which the dispute is based;

ii. A plan to correct any undisputed violations;

iii. Confirmation that the regulated entity will correct any undisputed violations by the date(s) specified in the Notice of Violation or a proposal for a later date with an explanation of the need for additional time; and

iv. Confirmation that a penalty assessed will be paid within 30 days of the issuance of the Notice of Violation or a proposal for a lower penalty amount with an explanation of why the lower amount is appropriate.

c. Staff shall review the regulated entity's response to a Notice of Violation and consider the regulated entity's explanation or defenses. Staff shall determine whether to accept the response or proceed with additional enforcement. The reasons for a determination that the regulated entity's explanation or defenses lack merit should be included in the regulated entity case file. After

[3] 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. Administrative violations do not involve immediate safety implications. Examples of "administrative" violations include: Inadvertent omissions or deficiencies in recordkeeping that do not prevent staff from determining compliance; records not physically available at the time of the inspection, provided the records exist and can be produced in a reasonable amount of time; and inadvertent violations of insignificant administrative provisions that do not involve a significant threat to human health, safety, welfare, or the environment. A recurring "administrative" violation may warrant a penalty.

[4] When referred to in this policy, "days" means calendar days.

reviewing the response, staff may take any appropriate action including any of the following actions:

i. Send the regulated entity a draft Proposed Administrative Consent Order and negotiate a proposed settlement for Commission review;

ii. Request that the regulated entity provide additional information;

iii. Take the next appropriate enforcement action; or

iv. Notify the regulated entity that the response resolved one or more violations identified in the Notice of Violation.

7. Administrative Consent Order

a. A negotiated proposed settlement shall be memorialized in a proposed Administrative Consent Order, prepared using an Administrative Consent Order form. The proposed Administrative Consent Order shall become final upon review and approval by the Commission. All proposed and final Administrative Consent Orders shall be placed in the regulated entity case file and recorded in the enforcement database and shall include:

i. The law or Commission order, resolution, decision, or rule violated by the regulated entity;

ii. The facts that form the basis for each violation;

iii. The number of violations, including the dates on which violations occurred;

iv. Information related to the potential for additional or ongoing violations;

v. An agreement by the regulated entity to correct each violation;

vi. A date by which the regulated entity must certify it corrected all violations;

vii. An agreement by the regulated entity to pay any penalty by a date specified.

b. The Commission's Executive Director shall designate Commission management at the Deputy Director level or higher (or designee) to negotiate a proposed Administrative Consent Order.

c. If a regulated entity does not respond to a Notice of Violation within the required time frame, or if a proposed Administrative Consent Order is not negotiated, staff shall take the next appropriate enforcement action.

8. Citation and Compliance Programs

a. If staff discover a violation that can be addressed under an existing Citation and Compliance Program, staff shall determine whether to issue a citation as allowed under the Citation and Compliance Program or take a different enforcement action. Factors to consider in determining whether a different enforcement action is appropriate include, but are not limited to:

i. Whether more flexibility in determining the penalty is appropriate for the circumstances, including whether the appropriate penalty is lesser or greater than the administrative limit imposed by the Citation and Compliance program (the remaining factors below may be relevant to this determination);
ii. The culpability of the regulated entity – e.g., whether the violation was negligent, knowing, willful, or intentional;
iii. Whether the regulated entity benefitted economically from noncompliance, either by realizing avoided or reduced costs or by gaining an unfair competitive advantage;
iv. Whether violations are chronic, or the regulated entity is recalcitrant;
v. Whether violations can be corrected within 30 days;
vi. Whether the actual or potential harm from a violation is substantial;
vii. Whether the case warrants specific corrective action requirements that cannot be included in a citation; and
viii. Whether the case warrants a recommendation for an Order Instituting Investigation or civil or criminal action.

b. If staff discover a violation that cannot be addressed through a pre-existing Citation and Compliance program, staff should take the next appropriate enforcement action.

c. Prescriptive and Proscriptive Requirements – All requirements (including, but not limited to, complaint procedures, an action or failure to act identified as a violation in a Citation and Compliance Program, and requirements to report actual or potential violations to any entity, e.g. local authorities or the Commission), that are otherwise applicable to a regulated entity shall continue to apply and remain enforceable, regardless of whether staff choose to issue a citation for a violation under a Citation and Compliance Program or pursue a different enforcement action.

9. Administrative Enforcement Order

a. Staff may issue a proposed Administrative Enforcement Order to a regulated entity, prepared using an Administrative Enforcement Order form. Staff shall verify delivery of the proposed Administrative Enforcement Order to the regulated entity using a Proof of Service form. Proposed Administrative Enforcement Orders shall be placed in the regulated entity case file and recorded in the enforcement database and shall include:

i. The law or Commission order, resolution, decision, or rule violated by the regulated entity;

ii. The facts that form the basis for each violation;

iii. The number of violations, including the dates on which violations occurred;

iv. Information related to the potential for additional or ongoing violations;

v. A directive to correct each violation;

vi. A date by which the regulated entity must certify that it corrected all violations;

vii. A directive to pay a penalty by a date specified;

viii. Staff contact information; and

ix. Information about how to request a hearing on the proposed Administrative Enforcement Order.

b. The Commission's Executive Director shall designate Commission management at the Deputy Director level or higher (or designee) to transmit a proposed Administrative Enforcement Order to a regulated entity.

c. The regulated entity may request a hearing on the proposed Administrative Enforcement Order by filing a Request for Hearing form within 30 days of the date the proposed order is served on the entity. The right to a hearing is forfeited if a Request for Hearing is not timely filed. If a timely Request for Hearing is not filed, the proposed Administrative Enforcement Order shall become final upon adoption by the Commission. Corrective action requirements in a proposed Administrative Enforcement Order remain in effect, notwithstanding the filing of a Request for Hearing. Neither payment of the penalty nor filing a timely Request for Hearing shall excuse the regulated entity from curing a violation. The hearing shall be conducted by an ALJ in accordance with the hearing provisions in the Citation Appellate Rules. A draft ALJ resolution approved by the Commission is subject to rehearing pursuant to Public Utilities Code section 1731 and to judicial review pursuant to Public Utilities Code section 1756. The amount of the penalty shall continue to accrue on a daily basis until the violation is corrected or until the appeal, rehearing, and judicial review process is fully concluded, a penalty is found to be appropriate, and the penalty is paid in full. The requirement that a penalty be paid shall be stayed during the hearing and rehearing process.

10. Order Instituting Investigation

Staff may recommend that the Commission issue an Order Instituting Investigation. Factors that may be considered in determining whether to recommend an Order Instituting Investigation include, but are not limited to:

a. The appropriate penalty for the case exceeds limits set by resolution or decision;
b. The matter is complex;
c. The violations caused fatalities, substantial injuries, and/or involved significant property damage in a widespread area;

d. The matter includes allegations of fraud or knowing, intentional or willful behavior;

e. The regulated entity's potential explanation or defenses; and

f. The entity has repeatedly violated the law or Commission rules and orders.

11. Order to Show Cause

Staff may recommend that the Commission issue an Order to Show Cause - an order that requires a regulated entity to show cause why a specified Commission action should not be taken. In deciding whether to recommend that the Commission issue an Order to Show Cause, Staff shall consider:

a. Whether the regulated entity failed to comply with a Commission order, general order, ruling, rule, data request, or statute; and

b. If the regulated entity failed to comply, whether the failure is a Rule 1.1 violation, a violation of Public Utilities Code section 2107, or its actions meet the criteria for a finding of contempt.

12. Suspension, Alteration, Amendment, and Revocation/Receivership

Commission or staff may suspend, alter, amend, or revoke the license or certification of a regulated entity consistent with existing Commission decisions and orders and as permitted by the Public Utilities Act. Nothing in this Policy is intended to modify existing procedures concerning such actions, including any right to appeal such actions.

13. Civil or Criminal Action

Staff may request that the Commission refer the matter to the Legal Division for the filing of a civil or criminal action, including requests for injunctive relief. Factors staff may consider in determining whether to refer the matter for civil or criminal action include, but are not limited to:

a. The matter includes allegations of criminal behavior;

b. Any of the factors for recommending an Order Instituting Investigation exist; or

c. Referral is appropriate given resource availability.

14. Referral to or from and Coordinating With Other Agencies

In some circumstances it may be appropriate to refer a case to another local, state or federal agency for consideration of enforcement action. If another agency refers a case to the CPUC, enforcement actions considered and/or taken will be in accordance with this Policy. The Commission and staff will coordinate enforcement actions with other agencies as appropriate.

B. ***Settlement of Enforcement Actions***

The Policy does not list the full range of considerations that may be relevant to negotiating a proposed settlement. However, the following general considerations should be evaluated as part of any proposed settlement to be submitted for Commission review:

1. Equitable factors;
2. Mitigating circumstances;
3. Evidentiary issues; and
4. Other weaknesses in the enforcement action that the division reasonably believes may adversely affect the ability to obtain the calculated penalty.

C. ***Penalties***

The Commission and staff that choose not to take enforcement action under a Citation and Compliance Program, shall calculate an appropriate penalty using the methodology set forth in Appendix I (Penalty Assessment Methodology).

D. ***Monitoring Compliance with Orders, Decisions, and Resolutions***

Staff is responsible for monitoring compliance with all final orders (including administrative consent orders), decisions, and resolutions. Staff shall document compliance in the enforcement database and the regulated entity's case file.

Appendix I
Penalty Assessment Methodology

When a regulated entity violates the Public Utilities Act or Commission rules, decisions, or orders, Commission staff may propose, and the Commission may assess a penalty against the regulated entity. The penalty amount for each violation may be proposed or assessed at an amount that is within the statutory range authorized by the Public Utilities Act. This Penalty Assessment Methodology sets forth the factors that staff and the Commission must consider in determining the amount of a penalty for each violation. The factors are consistent with those that the Commission previously adopted and has historically relied upon in assessing penalties and restates them in a manner that will form the analytical foundation for future decisions that assess penalties.

The purpose of a penalty is to go beyond restitution to the victim and to effectively deter further violations by the perpetrator or others. Effective deterrence creates an incentive for regulated entities to avoid violations. Deterrence is particularly important against violations that could result in public harm and other severe consequences. The following factors shall be used in setting penalties that are appropriate to a violation:

I. Severity or Gravity of the Offense

The evaluation of the severity or gravity of the offense includes several considerations:

- Economic harm to victims
- Physical harm to people or property
- Threatened physical harm to people or property
- Harm to the integrity of the regulatory processes, including disregarding a statutory or Commission directive
- The number of violations
- The number of consumers affected

Economic harm reflects the amount of expense that was imposed upon victims. In comparison, violations that cause actual physical harm to people or property are generally considered the most severe, followed by violations that threaten such harm. The fact that the economic harm may be difficult to quantify does not itself diminish the severity or the need for sanctions. For example, the Commission has recognized that deprivation of choice of service providers,

while not necessarily imposing quantifiable economic harm, diminishes the competitive marketplace and warrants some form of sanction.

Many potential penalty cases do not involve any harm to consumers but are instead violations of reporting or compliance requirements. Such violations harm the integrity of the regulatory processes. For example, state law requires all California public utilities to comply with Commission directives:

> "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the Commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees." (Public Utilities Code § 702).

Such compliance is essential to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.

The number of the violations is a factor in determining the severity. A series of temporally distinct violations can suggest an on-going compliance deficiency that the regulated entity should have addressed after the first instance. Similarly, a widespread violation which affects a large number of consumers is a more severe offense than one that is limited in scope. For a "continuing offense", Public Utilities Code section 2108 counts each day as a separate offense.

II. Conduct of the Regulated Entity

The evaluation of the conduct of the regulated entity includes several considerations:

- Degree of culpability
- Actions taken to prevent a violation
- Actions taken to detect a violation
- Actions taken to disclose and rectify a violation, including voluntary reporting of potential violations, voluntary removal or resolution efforts undertaken, and the good faith of the regulated entity in attempting to achieve compliance after notification
- Actions taken to conceal, hide or coverup a violation
- Prior history of violations

This factor recognizes the important role of the regulated entity's conduct in: (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation. The regulated entity is responsible for the acts of all its officers, agents, and employees:

> "In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his [or her] official duties or employment, shall in every case be the act, omission, or failure of such public utility." (Public Utilities Code § 2109).

Prior to a violation occurring, prudent practice requires that all regulated entities take reasonable steps to ensure compliance with Commission directives. This includes becoming familiar with applicable laws and regulations, and most critically, the regulated entity regularly reviewing its own operations to ensure full compliance. In evaluating the regulated entity's advance efforts to ensure compliance, the entity's past record of compliance with Commission directives should be considered.

The Commission expects regulated entities to diligently monitor their activities and operations. When staff determines that regulated entities, for whatever reason, failed to monitor and improve substandard operations, staff will continue to hold the regulated entity responsible for its actions. Deliberate as opposed to inadvertent wrong-doing will be considered an aggravating factor. Staff will also look at the management's conduct during the period in which the violation occurred to ascertain the level and extent of involvement in or tolerance of the offense by management personnel. Staff will closely scrutinize any attempts by management to attribute wrong-doing to rogue employees. Managers will be considered, absent clear evidence to the contrary, to have condoned day--to-day actions by employees and agents under their supervision.

When a regulated entity is aware that a violation has occurred, staff expects the regulated entity to promptly bring it to the attention of Commission staff. The precise timetable that constitutes "prompt" will vary based on the nature of the violation. Violations that physically endanger the public must be immediately corrected and thereafter reported to the Commission staff. Reporting violations should be remedied at the earliest administratively feasible time.
Prompt reporting of violations and expeditious correction promotes transparency and public trust and furthers the public interest. For this reason, steps taken by a regulated entity to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

III. Financial Resources of the Regulated Entity, Including the Size of the Business

Effective deterrence also requires that staff recognize the financial resources of the regulated entity in setting a penalty that balances the need for deterrence with the constitutional limitations on excessive penalties. Some California regulated entities are among the largest corporations in the United States and others are extremely modest, one-person operations. An accounting rounding error to one company is annual revenue to another. If appropriate, penalty levels will be adjusted to achieve the objective of deterrence, without becoming excessive, based on each regulated entity's financial resources.

IV. Totality of the Circumstances in Furtherance of the Public Interest

An evaluation of the totality of the circumstances in furtherance of the public interest includes several considerations:

- Establishing a penalty that effectively deters further unlawful conduct
- Consideration of facts that tend to mitigate or exacerbate the degree of wrongdoing
- Harm from the perspective of the public interest
- Ensuring that a regulated entity does not have incentives to make economic choices that cause or unduly risk a violation

Setting a penalty at a level that effectively deters further unlawful conduct by the regulated entity and others requires that staff specifically tailor the package of sanctions, including any penalty, to the unique facts of the case. Staff will review facts that tend to mitigate the degree of wrongdoing as well as any facts that exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.

An economic benefit amount shall be estimated for every violation. Economic benefit includes any savings or monetary gain derived from the act or omission that constitutes the violation. In cases where the violation occurred because the regulated entity postponed improvements, failed to implement adequate control measures, failed to obtain required Commission authority or did not take other measures needed to prevent the violations, the economic benefit may be substantial. Economic benefit should be calculated as follows:

- Determine those actions required to comply with a permit, decision, or order of the Commission, an enforcement order, or that were necessary in the exercise of reasonable care, to prevent a violation. Needed actions include obtaining regulatory authority or coverage, capital improvements, staff training, plan development, or the introduction of procedures to improve facility management.
- Determine when and/or how often the regulated entity should have taken these actions as specified in the permit, decision, or order, or as necessary to exercise reasonable care, in order to prevent the violation.
- Evaluate the types of actions that the regulated entity should have taken to avoid the violation and estimate the costs of these actions. There are two types of costs that should be considered; delayed costs and avoided costs. Delayed costs include expenditures that should have been made sooner (e.g., for capital improvements such as plant upgrades, training, development of procedures and practices), but that the regulated entity implemented too late to avoid the violation and/or is still obligated to perform. Avoided costs include expenditures for equipment or services that the regulated entity should have incurred to avoid the incident of noncompliance, but that are no longer required. Avoided costs also include ongoing costs such as needed additional staffing from the time the costs should have been incurred to the present.
- Calculate the present value of the economic benefit. The economic benefit is equal to the present value of the avoided costs plus the "interest" on delayed costs. This calculation reflects the fact that the regulated entity has had the use of the money that should have been used to avoid the instance of noncompliance.
- Determine whether the regulated entity gained any other economic benefits. These may include income from unauthorized or unpermitted operations.

The economic benefit should not be adjusted for expenditures by the regulated entity to abate the effects of the unauthorized conduct, or the costs to achieve or return to compliance.
The economic benefit amount should be compared to the penalty amount calculated using the other factors set forth in this appendix.

The penalty amount should be at least 10 percent higher than the economic benefit amount so that regulated entities do not construe penalties as the cost

of doing business and that the assessed penalty provides a meaningful deterrent to future violations. Absent express findings of exceptional circumstances or other factors as justice may require, if the penalty amount is lower than the economic benefit amount plus 10 percent, the economic benefit amount plus 10 percent shall be the penalty. It would be unfair to regulated entities that voluntarily incur the costs of regulatory compliance to impose a lower amount absent exceptional circumstances.

V. The Role of Precedent

Penalties are assessed in a wide range of cases. The penalties assessed in cases are not usually directly comparable. Nevertheless, when a case involves reasonably comparable factual circumstances to another case where penalties were assessed, the similarities and differences between the two cases should be considered in setting the penalty amount.