



July 22, 2020

Via Email (PolicyandGovernance@cpuc.ca.gov)

Policy and Governance Committee
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Draft Enforcement Policy (dated June 16, 2020) - Joint Comments of San Diego Gas & Electric Company and Southern California Gas Company

INTRODUCTION

San Diego Gas & Electric Company (“SDG&E”) and Southern California Gas Company (“SoCalGas”) (collectively, the “Joint Utilities”) appreciate the opportunity to submit these opening comments regarding the California Public Utilities Commission’s (“Commission”) Draft Enforcement Policy (dated June 16, 2020) (“Policy”).

The Joint Utilities support the laudable goals set forth in the Policy, including efforts towards increased transparency of Commission enforcement actions, promoting consistent enforcement practices, ensuring due process, and providing a more defined set of guidelines governing the Commission’s general administration of its enforcement policies and practices.

Although the Joint Utilities support the overall objectives underlying the Policy, the Joint Utilities have some notable concerns regarding both the mechanism by which the Commission seeks to adopt the Policy as well as several substantive provisions set forth in the Policy, which are problematic if adopted as written. The Joint Utilities submit this initial comment letter to highlight a few of the more significant procedural, legal and policy concerns that the Commission should consider before taking any additional steps to formally adopt the Policy, and to request that the Commission initiate a formal rulemaking to consider the Policy rather than via the resolution process.

THE NATURE, EXTENT AND COMPLEXITY OF THE POLICY REQUIRES A FORMAL RULEMAKING

As currently stated, the Policy is intended to promote maximum compliance with Commission rules and requirements through the adoption and application of consistent

enforcement practices.¹ The Policy is also aimed at promoting a consistent approach among Commission staff to enforcement actions, to make enforcement a high priority and to promote the Commission's enforcement culture.² The Policy attempts to standardize enforcement procedures to the extent it is appropriate.³ The Policy does this by implementing "progressive enforcement" (*i.e.*, an escalating series of enforcement actions) as a method of promoting consistent and firm enforcement.⁴

The Policy also authorizes staff to pursue settlement of enforcement actions based on a range of general considerations and factors and gives discretion to the Commission and staff to assess financial penalties using the methodology prescribed in Appendix I (Penalty Assessment Methodology).⁵ Notably, the Policy gives the Commission and staff unilateral discretion to decide whether to pursue an alleged violation under an existing Citation and Compliance Program, or pursue different enforcement actions based on a series of enumerated factors.⁶

While at the July 1, 2020 telephonic CPUC Policy and Governance Meeting, the Commission characterized the Policy as merely an "internal guidance" document that does not replace or supersede existing enforcement programs, the Joint Utilities are concerned that the language as currently written provides a more prescribed, broad and wide-reaching policy that would be improper and could potentially cause unintended consequences that would not be in furtherance of the stated goals of such a policy. Adopting the Policy in its current form has the potential to deprive affected parties of their due process rights, and may run afoul of certain procedural requirements and well-established law.

For example, the proposal to establish a progressive enforcement scheme and give the Commission and staff discretion to pursue enforcement actions other than those prescribed in the existing Citation and Compliance Programs -- in addition to allowing staff to assess penalties that are greater than those set forth in existing Citation and Compliance Programs -- is tantamount to establishing *new rules and regulations* governing the Commission's enforcement policies and practices as well as the future administration and exercise of its enforcement powers.⁷

¹ Policy, p. 1.

² *Id.*

³ *Id.*, p. 2.

⁴ *Id.*, pp. 4 & 6-15.

⁵ *Id.*, pp. 15-21.

⁶ *Id.*, p. 11. These factors include whether the appropriate penalty is lesser or *greater* than the administrative limit imposed by the applicable Citation and Compliance Program. *Id.*

⁷ SDG&E and SoCalGas recognize that the Policy expressly limits the amount of a proposed or assessed penalty to an amount that is within the statutory range authorized by the Public Utilities Act. (Policy, p. 16.) However, the fact that the Policy does not allow the Commission to exceed the

Because the Policy can fairly be viewed as an overhaul (or at a minimum a revision) of the Commission's current enforcement practices and standards, and given the complexity of the legal and policy issues arising from the Policy as currently drafted, the Joint Utilities strongly urge the Commission to initiate a formal rulemaking to comprehensively address concerns and potential unintended consequences regarding the Policy and to ensure that all interested parties have the opportunity for meaningful participation, consistent with principles of due process. In fact, well-established case law suggests that these types of policy enactments constitute *quasi-legislative* action requiring adherence to formal rulemaking procedures.⁸ It is only through a formal rulemaking process that the Commission can ensure fairness and satisfaction of due process requirements in its adoption of such a significant and overarching enforcement Policy. Put simply, the adoption and implementation of such a policy should occur only *after* the Commission has conducted a fair proceeding that is consistent with legal and statutory rulemaking requirements and principles of due process.

THE POLICY RAISES SEVERAL IMPORTANT LEGAL ISSUES THAT SHOULD BE ADDRESSED IN A FORMAL RULEMAKING BEFORE A POLICY IS ADOPTED

The Joint Utilities also share significant concerns about various substantive aspects of the Policy, some of which are highlighted below. These substantive concerns and other aspects of the Policy should be examined through the formal rulemaking process in order to fully vet and explore the issues.

For example, the Policy seemingly provides for the widespread delegation of the Commission's adjudicatory powers to its Staff. The Joint Utilities are unaware of any existing statutory authority that would allow Staff to take the enforcement actions for any alleged violation within the purview of the Commission as contemplated by the Policy. In the Commission's other citation programs, the Staff's authority to take enforcement actions is founded in statutory authority, which were subsequently implemented by Commission resolutions and decisions. For example, the Gas Citation and Electric Citation Programs were authorized by Public Utilities Code section 1702.5. Under that statute, the Commission was permitted to develop a safety enforcement program, which specifically allowed for the issuance

penalty range authorized by statute does not mean that the Policy nonetheless seeks to impose new rules and regulations regarding how those penalty amounts are assessed and imposed.

⁸ The Commission's written statement of policy, unrelated to a specific case, which seeks to predict how the Commission will decide future enforcement actions constitutes *quasi-legislative action*, and therefore, warrants a formal rulemaking. See *Alvarado v. Dart Container Corp. of Cal.*, 4 Cal.5th 542, 555 (2018) (“[A] written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law. [] And the formulation of such policy constitutes essentially legislative, as opposed to adjudicative, agency action.”); *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 575 (1996) (finding that rulemaking procedures apply “to the exercise of any quasi-legislative power”).

of citations and fines by Staff.⁹ However, no such express statutory authority is apparent here with respect to the Policy.

Similarly, the Policy's provisions regarding penalties are problematic. The Policy does not identify any statutory authority allowing the Commission to delegate the assessment of monetary penalties for any alleged violation within the purview of the Commission. In instances where Staff is allowed to set the amount of monetary penalties, the authority is limited to specifically identified citation programs, such as the Gas Citation Program. There, Public Utilities Code section 1702.5 specifically allowed the Commission to institute a citation program which permitted the Staff to set monetary penalties.¹⁰ However, the Policy would authorize Staff to circumvent or ignore the very same citation programs from which their authorization to assess monetary penalties is derived. Moreover, the Policy's measure for assessing penalties against potential offenders also may well be contrary to existing law. Appendix I (Draft Penalty Assessment Methodology) sets forth the factors that "shall be used in settlement penalties that are appropriate to a violation."¹¹ Elsewhere, the Policy seems to impose a requirement that any penalties imposed must exceed the amounts required to be refunded or deprived and be guided by statute and the Draft Penalty Assessment Methodology.¹² First, this section requires definitions and additional clarity. For example, it is not clear what categories of remedies would be identified as "amounts required to be refunded or deprived" and which would be "penalties." Second, depending on how the Commission clarifies the language used in this section, a requirement that penalties must exceed amounts refunded or deprived could be a significant deviation from prior Commission investigation and enforcement actions.¹³ Finally, to the extent this section of the policy is inconsistent with other precedent, this approach cannot stand.¹⁴

In addition, the Policy likely implicates due process concerns for the regulated utilities. The essence of due process, a right guaranteed by both the United States and California Constitution, is that the government may not deprive an individual of life, liberty, or property

⁹ See also *e.g.* Core Transport Agent Citation Program (Public Utilities Code section 985(h) authorized the Commission to "adopt additional core gas consumer protection standards that are in the public interest" and the Commission subsequently adopted Resolution UEB-003 and Decision 18-02-002 which allowed CPED to issue citations and fines.)

¹⁰ Public Utilities Code section 1702.5(a)(3).

¹¹ Policy, p. 16-21.

¹² Policy, p. 3.

¹³ See *e.g.*, D.08-09-038 (order requiring regulated utility to refund \$80MM, to forego \$35MM previously requested, and to pay a \$30MM fine).

¹⁴ See *e.g.*, Public Utilities Code section 2104.5 (for violations involving safety standard for pipeline facilities or the transportation of gas, the amount of the penalty must be determined by "the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation.")

without notice and opportunity to respond, in a manner appropriate to the nature of the case.¹⁵ Under the Policy, the Commission is allowing the Staff to serve both adjudicative and investigative functions. At a minimum, the lack of clarity on how the Policy would function with the same staff members investigating an alleged wrongdoing, initiating and adjudicating an enforcement action and imposing fines creates the potential for bias and due process issues.¹⁶

Similarly, the substantive provisions of the Policy implicate other due process concerns. For example, the Policy does not allow regulated entities to conduct discovery or subpoena staff which hinders the entities ability to respond or defend itself in the enforcement actions contemplated under the Policy. Similarly, the Policy seemingly creates an evidentiary presumption that the regulated utilities' managers, "absent clear evidence to the contrary," condoned the day-to-day actions of their subordinates.¹⁷ Such a presumption would be contrary to the existing requirements that the burden of proof lies with the Staff who must prove management's knowledge of wrongdoing by a preponderance of evidence.¹⁸ Finally, the Policy contains the troubling statement that "nothing in this policy document shall be used as the basis of a regulated entities' defense to any enforcement action."¹⁹ Thus, on its face, the Policy binds the regulated entities, but does not allow them to defend themselves by relying on its provisions or the Staff's failure to adhere to it. These examples show that implementation of the Policy potentially will deprive the regulated entities of their due process rights.

CONCLUSION

The proposed Policy raises several complex legal and policy issues that must be addressed in an open and comprehensive manner. To achieve the laudable goals underlying the Policy in a manner that satisfies due process requirements and fully accounts for potential unintended negative consequences, the Commission should initiate a formal rulemaking that allows all interested parties to participate meaningfully in the development of a robust record comprehensively addressing the legal and policy issues arising from the Policy. The Commission also should re-issue a draft Policy addressing these concerns (and those expressed by other affected parties) before a formal rulemaking is initiated.

¹⁵ See *Coleman v. Department of Personnel Administration*, 52 Cal.3d 1102, 1108, 1112 (1991).

¹⁶ See *Brown v. City of Los Angeles*, 102 Cal.App.4th 155, 177-178 (2002) ("The instant order also violates the requirement that the decision-maker be neutral because the Chief of Police initially authorized the punitive action and is also the final decisionmaker on the administrative appeal"); *Applebaum v. Bd. of Directors*, 104 Cal.App.3d 648 (1980) (a lack of procedural fairness exists where nearly half the members of a review panel were members of the committee which made the original decision to suspend); *Agric. Labor Relations Bd. v. Superior Ct.*, 4 Cal.App.5th 675, 693-94 (2016).

¹⁷ Policy, p. 18.

¹⁸ See D.16-08-020 (burden of proof in investigatory proceeding lies with Staff and must be met by a preponderance of evidence).

¹⁹ *Id.*, p. 1.

