



Carolyn McIntyre  
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October 26, 2020

Rachel Peterson, Acting Executive Director  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, California 94105

**RE: Comments of CCTA on Draft Resolution M-4846 Adopting Commission Enforcement Policy**

Dear Director Peterson:

The California Cable & Telecommunications Association (“CCTA”), pursuant to Section 14.5 of the Rules of Practice and Procedure of the California Public Utilities Commission (“CPUC” or “Commission”), hereby submits comments on Draft Resolution M-4846, which adopts a “Commission Enforcement Policy.”<sup>1</sup>

The proposed Commission Enforcement Policy was developed through the CPUC’s Committee on Policy and Governance (“Committee”) and not through a formal rulemaking process with comments and reply submitted into an evidentiary record. CCTA provided input to the Committee by a letter dated June 30, 2020, and a letter dated July 22, 2020. These CCTA comments included a request that the CPUC conduct a formal rulemaking in order to ensure due process for all parties, particularly in light of the Committee’s proposal delegating broad authority to Commission Staff to impose penalties up to and including revoking a service provider’s authority to operate in California.

The Draft Resolution now under consideration does not reflect any changes to address CCTA’s concerns, especially those relating to the chilling effect of penalties and the revocation of licenses and certificates by CPUC staff. Given that it is unclear whether submissions to the Committee constitute an evidentiary record, CCTA hereby submits to the Commission the CCTA letters submitted to the Committee. CCTA reiterates that all of CCTA’s comments on the Committee proposal apply to the Draft Resolution. Accordingly, for all the reasons stated in these letters, the Commission should not adopt the Draft Resolution without important modifications.

Respectfully submitted,

/S/ JACQUELINE R. KINNEY

Jacqueline R. Kinney, Senior VP and General Counsel, CCTA

cc: Service List, General Order 96-B  
Service List, Commission’s Rules of Practice and Procedure

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<sup>1</sup> These comments are timely filed pursuant to the October 9, 2020, email message from Roscella Gonzalez.



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June 30, 2020

Commissioner Liane M. Randolph  
Commissioner Clifford Rechtschaffen  
Committee on Policy and Governance  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94105

ATTN: Deidre Cyprian ([Deidre.Cyprian@cpuc.ca.gov](mailto:Deidre.Cyprian@cpuc.ca.gov))

**RE: June 17, 2020 Draft Enforcement Policy**

Dear Commissioners Randolph and Rechtschaffen and Ms. Cyprian:

On June 17, 2020, the Commission's Committee on Policy and Governance ("Committee") circulated a document entitled "Draft Enforcement Policy" to the service list for notice of amendments to the Commission's Rules of Practice and Procedure and indicated that this Draft Enforcement Policy would be discussed at the Committee's virtual meeting on July 1, 2020. The Committee's cover email invites recipients to provide questions or feedback on the Draft Enforcement Policy in advance of the July 1<sup>st</sup> meeting.

On behalf of the California Cable & Telecommunications Association ("CCTA")<sup>1</sup> and its members, this letter submits some initial questions for consideration by the Committee regarding the Draft Enforcement Policy. At the outset, CCTA is unclear as to the underlying purpose of the Draft Enforcement Policy or how it will be considered and/or implemented outside of the Committee. CCTA's preliminary questions are as follows:

- ***To the extent the Commission moves forward with the Draft Enforcement Policy, will there be a formal rulemaking in which parties will have an opportunity to comment?***
  - If not, will all stakeholders impacted by the new policy be provided notice and an opportunity to comment?

The policy document was only served on the service list for notice of amendments to the Rules of Practice and Procedure, and many stakeholders that would be impacted by the new policy may not even be aware of the Draft Enforcement Policy. Currently, the Draft Enforcement Policy does not provide a vehicle for formal comment regarding any contemplated modifications to any existing

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<sup>1</sup> Established in 1958 to represent California's cable television industry, CCTA is a trade association of California's incumbent cable television providers. Collectively, those providers have invested more than \$40 billion in California's broadband infrastructure since 1996 and deployed systems that pass 96% of California's homes.

rule. CCTA would appreciate further guidance from the Committee that, if this Draft Enforcement Policy were to move forward and become part of the Commission's enforcement practices, the necessary rule changes would be noticed in a rulemaking proceeding in which interested parties would be afforded a meaningful opportunity for written comments and advocacy.

- ***How does the Draft Enforcement Policy promote consistent application of enforcement authority?***
  - How will the Draft Enforcement Policy be applied to promote, rather than discourage, consistent enforcement practices and procedures?

Under the Draft Enforcement Policy, Staff would be empowered with delegated authority and given broad discretion to pursue enforcement actions, send warning letters, send cease and desist and stop/work orders, determine that a violation has occurred, establish penalty amounts for a violation, send an Administrative Consent Order, and, at the most extreme, "suspend, alter, amend, or revoke the license or certification of a regulated entity as permitted by the Public Utilities Act." CCTA believes clarification would be helpful as to how this process would promote or ensure consistent enforcement practices and be consistent with law.

- ***Would the draft enforcement policy require statutory authorization?***

Although the Commission has delegated authority more narrowly in the past, CCTA is unaware of any existing statutory authority that would support the broad and widespread delegation of the Commission's adjudicatory process as in the Draft Enforcement Policy. CCTA requests clarification of process to address this and related legal issues.

- ***How would the Draft Enforcement Policy, if adopted, ensure due process to entities subject to the policy?***
  - What appeal process would be in place to bring an enforcement proceeding to the full Commission?
  - While a matter is being appealed to the full Commission, what measures can be put in place to prevent accruing penalties during the appeal?

CCTA notes that the Draft Enforcement Policy currently does not provide a meaningful "off ramp" from the Staff enforcement route through a review and appeal process to the full Commission other than to request a hearing of an Administrative Enforcement Order. Even in that process, the party subject to the enforcement action appears to be required to perform corrective actions and would accrue additional penalties on a daily basis during the hearing process. CCTA would appreciate

Commissioner Liane M. Randolph  
Commissioner Clifford Rechtshaffen  
Committee on Policy and Governance  
California Public Utilities Commission  
June 30, 2020  
Page 3

clarification of how due process protections would be provided under a delegated enforcement process pursuant to the Draft Enforcement Policy.

CCTA appreciates the opportunity to raise these initial questions to the Committee.

Respectfully,

*Carolyn McIntyre*

Carolyn McIntyre  
President

**ATTACHMENT B**



**Carolyn McIntyre**  
*President*

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July 22, 2020

Commissioner Liane M. Randolph  
Commissioner Clifford Rechtshaffen  
Committee on Policy and Governance  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94105

ATTN: Deidre Cyprian ([Deidre.Cyprian@cpuc.ca.gov](mailto:Deidre.Cyprian@cpuc.ca.gov))

RE: June 17, 2020 Draft Enforcement Policy

Dear Commissioners Randolph and Rechtshaffen:

The California Cable & Telecommunications Association (“CCTA”)<sup>1</sup> appreciates the opportunity to submit these comments to the California Public Utilities Commission’s (“CPUC” or “Commission”) Committee on Policy and Governance (“Committee”) regarding the document entitled “Draft Enforcement Policy” (“DEP”), which the Committee circulated on June 17, 2020, to the service list for notice of amendments to the CPUC Rules of Practice and Procedure. The Committee indicated that the DEP would be discussed at the Committee’s virtual meeting on July 1, 2020. The Committee’s cover email invited recipients to provide questions or feedback on the DEP in advance of the July 1 meeting. On June 30, 2020, CCTA submitted a letter to the Committee that offered initial feedback and highlighted concerns with the DEP. On July 1, 2020, the Committee met to discuss the DEP. During that meeting, interested parties were invited to submit written comments to the Committee by July 22, 2020.<sup>2</sup>

CCTA’s comments address the following:

- Section A identifies areas in which the DEP significantly impacts service providers subject to CPUC regulation even though the DEP is described as an internal management policy.

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<sup>1</sup> Established in 1958 to represent California’s cable television industry, CCTA is a trade association of California’s incumbent cable television providers. Collectively, those providers have invested more than \$40 billion in California’s broadband infrastructure since 1996 and deployed systems that pass 96% of California’s homes.

<sup>2</sup> During the July 1, 2020 meeting, Commissioner Rechtschaffen extended the deadline for comments from July 15, 2020, as set forth in the DEP PowerPoint presentation, to July 22, 2020.

- Section B identifies three fundamental substantive and legal problems with the DEP.
  - First, the DEP’s broad delegation of the Commission’s enforcement authority to Staff is unlawful. The DEP fails to provide legal support or citations for this delegation of authority, and CCTA is not aware of any statutory authority that would support the process set forth in the DEP. As discussed below, California law does not allow a public body with a clear statutory mandate to assign its authority to others in the absence of statutory authorization. The DEP contains numerous instances of improper delegation without statutory authorization – including the setting of fines -- which goes well beyond the types of “ministerial” tasks that can be lawfully assigned to Staff.
  - Second, the DEP raises serious due process concerns for regulated entities including CCTA’s members. The process outlined in the DEP would deprive regulated entities of fundamental due process rights. Among other adverse effects, regulated entities have no meaningful opportunity to seek timely review of certain weighty Staff actions by the full Commission including cases where the Staff has revoked the operating authority for a regulated entity or imposed penalties.<sup>3</sup>
  - Third, contrary to the DEP’s stated intent, the proposed delegation of enforcement authority to Staff will hamper the Commission’s efforts to achieve consistent enforcement actions.
- Section C discusses significant process and procedural issues that may affect the validity of the DEP. The use of the Committee process to consider and adopt such a consequential enforcement policy changes raises additional due process problems by circumventing express provisions of the Public Utilities Code that contemplate the Commission utilizing notice and comment rulemaking procedures when adopting or amending a rule with impact on entities subject to its jurisdiction. By using this unique Committee process rather than following formal rulemaking requirements to adopt the DEP, the DEP could be deemed invalid as an “underground regulation” that is prohibited by California statutory and case law governing state agencies including the CPUC.

For the reasons set forth in these comments, CCTA respectfully requests that the Commission not move forward with the DEP as currently structured and, instead, to the extent the Commission wishes to establish an enforcement policy, open a properly noticed rulemaking proceeding that meets due process requirements and grants all stakeholders a meaningful opportunity to participate and provide input.

**A. THE DEP WILL HAVE SIGNIFICANT IMPACT ON SERVICE PROVIDERS THAT ARE SUBJECT TO CPUC REGULATION.**

To place these comments in context, CCTA first highlights areas in which service providers that are subject to CPUC regulation could be drastically impacted and harmed by the DEP if adopted.

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<sup>3</sup> See, e.g., DEP, p. 4 § III.12

Overall, the DEP would delegate significant authority to Staff to issue cease and desist orders,<sup>4</sup> issue notices of violation,<sup>5</sup> establish penalties for violations,<sup>6</sup> negotiate an Administrative Consent Order,<sup>7</sup> override parameters of the existing Citations regime,<sup>8</sup> issue Proposed Administrative Enforcement Orders,<sup>9</sup> and recommend the opening of a formal investigation through an Order Instituting Investigation (“OII”)<sup>10</sup> or an Order to Show Cause (“OSC”).<sup>11</sup> Even more extreme, the DEP delegates to Staff the power to “suspend, alter, amend or revoke the license or certification of a regulated entity as permitted by the Public Utilities Act.”<sup>12</sup>

Granting staff an expansive range of proposed enforcement powers would have dramatic impact on service providers that are currently subject to potential enforcement action by the Commission and would even undermine the narrowly tailored citation programs established by the Commission. Given the CPUC’s existing authority to levy significant penalties, the impact of Staff delegated authority could result in regulated entities facing arbitrary and inconsistent enforcement measures without due process safeguards. Moreover, the delegated authority to revoke licenses or certification of a regulated entity would empower Staff to put a company out of business in California. Such delegation, as discussed below, raises significant legal issues that should be addressed in greater detail and with more due process protections than afforded through the existing Committee process<sup>13</sup> or through the issuance of a draft resolution with limited opportunity for stakeholders to participate.

## **B. THE DEP RAISES NUMEROUS LEGAL AND SUBSTANTIVE CONCERNS.**

The DEP, if adopted, would delegate substantial enforcement authority to Commission Staff, which the Commission states is intended to streamline the existing enforcement policy and improve consistency in enforcement standards at the Commission. The asserted Policy Objectives of the DEP “are to promote maximum compliance with Commission rules and to develop a sufficient record that ensures that regulated entities subject to an enforcement action receive due process (e.g., notice and opportunity to be heard).”<sup>14</sup> The DEP also indicates that “[t]he 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

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<sup>4</sup> DEP, p. 8, § III.A.5.

<sup>5</sup> DEP, p. 8, § III.A.6.

<sup>6</sup> DEP, p. 9, § III.A.6(a)(vii); p. 11 § III.A.8(a)(i); p.12 § III.A.9(a)(vii); p. 15, §III.C.

<sup>7</sup> DEP, p. 10, § III.A.7.

<sup>8</sup> DEP, p. 11, § III.A.8.

<sup>9</sup> DEP, p. 12, § III.A.9.

<sup>10</sup> DEP, pp. 13-14, § III.A.10.

<sup>11</sup> DEP, p. 11, § III.A.11.

<sup>12</sup> DEP, p. 14, § III.A.12. The DEP fails to provide a citation to any section of the Public Utilities Act that would authorize Staff to do so rendering the last clause of the quoted sentence meaningless.

<sup>13</sup> Thus far, there has only been one Policy and Governance Committee Meeting (July 1, 2020) at which the DEP was introduced. The Committee received comments from the public prior to the meeting; however, not all comments were published on the Committee’s website by the start of the meeting. Moreover, there was no formal process for commenters or other members of the public to respond to submitted comments. Although the Committee has invited further comments by today’s date, it did not specify whether there would be an opportunity to respond to any submitted comments, nor has it clarified how these comments will affect the Commission’s decision-making process.

<sup>14</sup> DEP, p. 1, §I,B

culture.”<sup>15</sup> However, if adopted, the DEP would inappropriately shift broad delegated authority to Staff away from existing Commissioner-level enforcement action and raise potential due process concerns associated with subjecting regulated entities to inconsistent enforcement practices.

While reform initiatives to advance the application of consistent standards in the Commission’s enforcement policies and procedures are a laudable goal, the current DEP raises numerous legal and substantive concerns as set forth below.

## **1. The Commission Lacks Legal Authority to Delegate Enforcement Power as Contemplated in the DEP.**

The DEP provides no citation to any statute, nor is CCTA aware of any existing statutory authority that would support such widespread delegation of the Commission’s adjudicatory process to Staff. The resulting significant legal issues with the DEP were raised in comments submitted by Thomas MacBride of Goodin, MacBride Squeri & Day and in CTIA’s and CCTA’s June 30 comments. During the July 1 meeting, Commissioner Rechtschaffen briefly noted that these concerns have been considered and rejected by the Commission’s Legal Division, but no analysis has been made publicly available or been subject to any stakeholder notice, comment and further review.<sup>16</sup> Assuming the draft proposal continues to move forward, prior to enacting such a policy, all stakeholders should have the opportunity to review the Legal Division’s analysis, fully brief these legal issues, and have these arguments considered and addressed in a published decision by the full Commission.<sup>17</sup>

California courts have established that “[w]hen the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization.”<sup>18</sup> Ministerial tasks, such as the application of standards established by an agency,<sup>19</sup> fact-finding in investigations *preliminary to agency action*,<sup>20</sup> or the drafting of “proposed decisions to be adopted or ratified by the agency’s highest decision makers,” may be delegated. However, in considering its own authority to delegate tasks that require staff to exercise judgment and discretion, the Commission acknowledges that “agencies cannot delegate the power to make fundamental policy

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<sup>15</sup> *Id.*, (footnote omitted)

<sup>16</sup> Commissioner Rechtschaffen noted during the July 1 meeting that the illegal delegation concerns raised by CCTA, CTIA, and Thomas MacBride have been addressed in recent Commission decisions like the adoption of the Citation Appeals Rules. Policy and Governance Committee Meeting, 37:02, available at [http://www.adminmonitor.com/ca/cpuc/commissioner\\_committee\\_meeting/20200701/](http://www.adminmonitor.com/ca/cpuc/commissioner_committee_meeting/20200701/). Commissioner Rechtschaffen, however, did not elaborate on the limits of the Commission’s delegation authority underlying this decision (resolution).

<sup>17</sup> Similarly, at the July 1, 2020 Committee meeting, Commissioner Shiroma raised a concern regarding the sufficiency of internal “firewalls,” if any, that may need to be adopted to ensure that Bagley-Keene Act restrictions will be followed if the DEP is adopted and that *ex parte* restrictions would be followed between Staff and decisionmakers. In response, Commissioner Rechtschaffen noted that this was a “real concern” and that consultation would occur with Legal Division. Like the analysis of the lack of statutory authority to delegate, the Commission’s legal analysis of these important issues should be made available to stakeholders and opportunities provided to challenge or comment on such analysis prior to adoption of the DEP.

<sup>18</sup> *Bagley v. City of Manhattan Beach* (1976), 18 Cal.3d 22, 24; *California School Employees Association v. Personnel Commission* (1970), 3 Cal.3d 139, 143-44.

<sup>19</sup> *Bagley*, 18 Cal.3d at 25.

<sup>20</sup> *California Sch. Employees*, 3 Cal.3d at 144.



decisions[.]”<sup>21</sup> Although authority to assess a predetermined fine for a specific established violation may constitute the performance of a ministerial act, permitting Staff to set the amount of fine rises to the level of a fundamental policy decision that should not be delegated.<sup>22</sup> In addition, the DEP appears to delegate authority well beyond mere ministerial tasks to Staff by tasking the Commission Staff with identifying violations, imposing enforcement remedies such as deciding on the appropriate amount to fine the respondent, and even revoking licenses and certificates to do business. Although the DEP specifies that certain of these actions require Commission involvement, it appears that for others, including the revocation power, the DEP does not require any Commission action. Nor does the DEP, in many instances, provide a route for redress of Staff action to the full Commission in an appeal.

Finally, as referenced briefly above, even if the delegation is appropriately authorized by statute — which it is not — the DEP fails to provide Staff with sufficient guidelines for application of the delegated authority. Given the lack of standards to limit and guide Staff, the DEP provides Staff far too much discretion.

## **2. The DEP Raises Serious Due Process Concerns.**

Among the DEP’s identified Policy Objectives, the Committee states that the DEP would develop a sufficient record that ensures that regulated entities subject to an enforcement action receive due process.<sup>23</sup> CCTA is concerned that the DEP does just the opposite and would deprive regulated entities of fundamental due process rights, including an opportunity for a hearing before the full Commission. Given the wide range of adjudicatory powers delegated to Staff, one would expect such policy to provide interested parties with ready access to review of Staff actions by the full Commission without negative implications. However, the DEP fails to provide a meaningful “off ramp” from the Staff enforcement route through a review and appeal process to the full Commission other than to seek an appeal of a Cease and Desist order<sup>24</sup> and to request a hearing of an Administrative Enforcement Order.<sup>25</sup> Other actions by Staff, including the power to revoke operating authority for a regulated entity or to impose penalties, also do not have an appeal route.<sup>26</sup>

Notably, even the limited hearing provided for an Administrative Enforcement Order fails to protect regulated entities from arbitrary Staff enforcement measures given that, as drafted, the penalty imposed by Staff would continue to accrue on a daily basis until the violation is corrected or the regulated entity is required to perform corrective actions and would accrue additional

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<sup>21</sup> *In the Matter of the Application of the California Association of Competitive Telecommunications Companies for Rehearing of Resolution M-4801, et al.*, Order Modifying Resolution M-4801 and Denying Rehearing of the Decision as Modified (Feb. 21, 2002) 2002 Cal.P.U.C. LEXIS 162 at pp. \* 9-\* 10; see also Pub. Util. Code § 2101 (expressly identifying the “Commission” (not Commission Staff) as the entity responsible to “see that the provisions of the Constitution and statutes of this State affecting public utilities ... are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected....”).

<sup>22</sup> See, e.g., Decision 09-05-020, 2009 Cal. PUC LEXIS 250, at p. \*4 (clarifying that enforcing a fixed penalty amount, as opposed setting a penalty amount, is a ministerial task).

<sup>23</sup> DEP, p. 1

<sup>24</sup> DEP, p. 8, §III.5.

<sup>25</sup> DEP, pp. 12-13, § III. 9.c.

<sup>26</sup> See e.g., DEP, p. 4 § III.12

penalties on a daily basis during the hearing process.<sup>27</sup> The accrual of daily penalties, especially given the size of some penalties imposed by the Commission, presents a chilling effect on any entity exercising its rights to challenge a finding of a violation. In contrast, CCTA notes that the Commission took a diametrically opposed position in Resolution SED-3 by avoiding accruing penalties during an appeal of a citation of violations.<sup>28</sup>

Regarding other actions delegated to Staff, the DEP simply fails to contemplate any avenue to appeal actions, including, as referenced above, revocation of operating authority. Such changes do not simply enumerate new policies but instead raise serious due process concerns that should be fully vetted in a rulemaking proceeding. Although it is conceivable that this reduction in due process was not contemplated by the DEP, the plain language of the DEP seriously impairs — rather than promotes — the opportunity of a regulated entity subject to an enforcement action to develop a defense and have an opportunity to be heard fully by the full Commission. Furthermore, Commissioner Rechtschaffen suggested at the July 1 Committee meeting that this policy may be intended to handle very minor infractions and that more major investigations would follow traditional adjudicatory practices; however, no provisions in the DEP limit its application in this regard. To the extent that this was in fact the intent of the Committee, then the DEP should be modified to place strict limits on the delegation of staff, set low monetary limits on penalties that are consistent with the existing Citation Program, and draw a clear delineation between the enforcement tools that may be used by Staff and those that require action by the full Commission with full due process provided. At minimum, extreme penalties, such as revocation of licenses and certificates, should be removed from the DEP actions available to Staff such that full due process would be provided to an entity prior to the imposition of such draconian actions.

### **3. Contrary to the Stated Objectives of the DEP, the DEP will Not Promote Consistency in Enforcement.**

Enacting a broad delegation of enforcement authority would jeopardize the Commission’s fundamental objective regarding the consistent application of enforcement and rationalization of the procedures used to enforce violations. Under the DEP, as referenced above, Staff would be empowered with expanded delegated authority and given extremely broad discretion to pursue enforcement actions, send cease and desist and stop work orders, determine that a violation has occurred, establish penalty amounts for such violation, send an Administrative Consent Order, and, at the most extreme, “suspend, alter, amend, or revoke the license or certification of a regulated entity as permitted by the Public Utilities Act.” Such delegation would likely result in inconsistent enforcement and appears to delegate fundamental authority to Staff that was specifically reserved for the Commission without safeguards for meaningful review.

Moreover, while CCTA appreciates that the new “Division Enforcement Teams” would meet once every three months 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,”<sup>29</sup> it is unclear how an “appropriate” enforcement

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<sup>27</sup> DEP, p. 13, § III.9.c.

<sup>28</sup> Resolution SED-3, p. 18, Ordering Paragraph 9 (December 2, 2016).

<sup>29</sup> During the July 1 Committee Meeting, Commissioner Rechtschaffen noted that the Commission Enforcement Team seeks to make sure that the industry divisions are “working from the same script.”

action would be determined through such a process. In fact, such a process could distort the severity of an enforcement action if false equivalence is drawn between two seemingly like cases that may actually be fundamentally disparate. In the same vein, coordinating work amongst division liaisons in the Commission Enforcement Team is unlikely to produce helpful reference points, given the unique regulatory paradigms under which each industry division operates.

Finally, the DEP, as currently drafted, contains are numerous inconsistencies regarding when Staff may act versus when more formal Commission action is required. For example, in Sections III.D.10 and III.D.11, Staff is delegated authority to recommend the issuance of an OII or an OSC, suggesting that the Staff would only serve in an advisory role. But, in Section III.D.12, Staff is seemingly provided unfettered discretion to revoke a license or certificate. In other sections, Staff is given substantial discretion to choose an enforcement action, escalate to Commission-level action, impose penalties or do nothing.<sup>30</sup> Such open-ended discretion of what Staff “may” do lacks sufficient structure to ensure that similar actions would be dealt with in a similar manner by different staff or in actions that impact different entities. While Division Enforcement Teams may meet quarterly to touch base on ongoing enforcement actions, the DEP describes no mechanism by which these teams would ensure uniformity in a meaningful and equitable manner. Similarly, some of the Staff authority would apparently be specifically subject to appeal to the full Commission while other powers appear to lack any opportunity for full Commission review of Staff’s action.

**C. THE USE OF THE COMMITTEE PROCESS TO CONSIDER AND ADOPT THE DEP IS PROCEDURALLY FLAWED AND MAY BE INVALID AS AN “UNDERGROUND REGULATION.”**

**1. The CPUC committee process to develop and adopt the DEP does not afford due process protections that apply in a formal rulemaking.**

As demonstrated in Sections A and B, the DEP will have a significant impact on entities subject to CPUC regulation, including all rate-regulated utilities and other service providers that are subject to any level of CPUC jurisdiction. Indeed, the DEP impact is of the same nature as Commission decisions and orders that are adopted through a formal rulemaking proceeding under the CPUC Rules of Practice and Procedure. The unique committee process used to adopt the DEP is not based in precedent or the CPUC Rules and simply does not provide the same level of due process protections as a formal rulemaking.

For example, a formal rulemaking is initiated with a CPUC decision that appears on the CPUC voting meeting agenda and that designates parties and a service list, and a process for determining the scope of the proceeding, relevant jurisdiction and legal questions, a list of issues to be addressed, and a schedule for a prehearing conference, comments, hearings, and/or workshops. With good reason, the Public Utilities Code expressly envisions that the Commission will use notice and comment rulemaking procedures when adopting or amending a rule.<sup>31</sup> The Public

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Policy and Governance Committee Meeting, 16:30, available at [http://www.adminmonitor.com/ca/cpuc/commissioner\\_committee\\_meeting/202007012/](http://www.adminmonitor.com/ca/cpuc/commissioner_committee_meeting/202007012/).

<sup>30</sup> For example, numerous sections of the DEP indicate that Staff “may” take an action. *See e.g.*, DEP, §§ III.5, III.6, III.9, III.10, and III.12.

<sup>31</sup> *See, e.g.*, Pub. Util. Code § 1708.5 (“[T]he commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures....”).

Utilities Code is especially focused on the right of parties to be heard in the case where prior rules would be amended,<sup>32</sup> which would be the effect of the DEP.

Regarding the DEP, it was stated at the July 1 Committee meeting that work began on the policy in 2018 and that there were “a few public meetings and some discussion” on this topic in the past two years. However, CCTA has been unable to locate any information on the Committee’s web pages with specific information on the origin and background of the DEP or the agenda or minutes of any public meetings on the topic prior to release of the DEP on June 17, 2020. In addition, in early phases of a formal rulemaking, parties have an opportunity to address key threshold issues on jurisdiction, Commission authority and other legal questions. Here, there has been no public disclosure of, or opportunity to comment on, the Legal Division’s legal analysis the Committee is relying on related to key issues on delegation of authority, separation of Staff advisory and enforcement roles, or even identification of statutory provisions that are the basis of provisions of the DEP.

While CCTA appreciates that the July 1 Committee meeting included mention of possible future Committee meetings on the DEP and the potential for comments on a draft resolution adopting the DEP, this Committee process overall simply does not provide the same due process protection and standardized procedures as a formal rulemaking under the CPUC’s Rules of Practice and Procedure.

**2. The DEP is not merely an internal management policy but more akin to an “underground regulation” that is prohibited by California law.**

Even if the CPUC has developed the DEP through the Committee because of a view that the DEP is an internal CPUC management policy, that does not resolve the legal question of whether a formal rulemaking is required to meet due process requirements. It is a cardinal principle of California administrative law that a state agency may not evade formal rulemaking requirements when a purported internal policy actually functions as a “regulation” with respect to its effect on entities subject to the agency’s jurisdiction. This principle is codified in Government Code Section 11340.5, which is part of California’s Administrative Procedure Act (“APA”)<sup>33</sup> and generally referred to as the prohibition on “underground regulations,” and provides as follows:

11340.5(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Government Code Section 11342.600 defines “regulation” as follows:

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<sup>32</sup> See Pub. Util. Code § 1708 (“The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it.”).

<sup>33</sup> The APA is codified as Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code (“Chapter 3.5”). Chapter 3.5 includes Articles 1 through 9. Section 11340.5 is within Article 1.

11342.600 “Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

This statute operates to prevent an agency from evading formal notice and comment procedures when adopting “rules of the agency, denominated variedly as 'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins.”<sup>34</sup> By whatever name an agency may call it — such as a “policy” — if it operates as a regulation, the due process requirements of a formal rulemaking apply.<sup>35</sup> If the agency does not comply with formal rulemaking requirements, a court may deem the policy invalid as an “underground regulation.”<sup>36</sup>

One exception to the prohibition on underground regulations is for a regulation “that relates only to the internal management of the state agency.”<sup>37</sup> But the “internal management” exception is narrow. Even if characterized by the agency as an internal policy on managing the agency’s work, it is effectively a “regulation” requiring formal due process “[w]here the challenged policy goes beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency.”<sup>38</sup> In this regard, as discussed in Sections A and B, the DEP goes well beyond internal CPUC management and will “significantly affect others outside the agency” – namely service providers including CCTA members. Accordingly, to avoid the DEP being deemed invalid, the Commission should engage in the more robust notice and comment procedures in a formal CPUC rulemaking.<sup>39</sup>

While not all of the APA requirements apply to the CPUC, the CPUC is bound by the APA’s prohibition of underground regulations pursuant to Section 11340.5.<sup>40</sup> The APA and Public

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<sup>34</sup> *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 205.

<sup>35</sup> *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333; *Naturist Action Committee v. California State Dept. of Parks & Recreation* (App 4 Dist. 2009) 75 Cal.App.4th 1244.

<sup>36</sup> *Id.*

<sup>37</sup> Government Code Section 11340.9(d).

<sup>38</sup> *California Association for Recreational Fishing (CARF) v. Department of Fish & Wildlife*, 234 Cal.App.4th 214, 262 (App 3 Dist. 2015) (state agency policy “goes beyond the agency’s internal management and is subject to adoption as a regulation under the APA”).

<sup>39</sup> Commissioner Rechtschaffen stated at the July 1 meeting of the Policy and Governance Committee that adopting the DEP will not require the CPUC to make any changes to its Rules of Practice and Procedure. However, CCTA is unclear of the basis for this conclusion and is concerned that it may not recognize the DEP’s significant impact outside the agency’s internal management. In fact, in a formal rulemaking, the question of any required procedural changes could be identified as within scope of the proceeding. *See, e.g.*, pending changes to the CPUC Rules of Practice and Procedure include a new rule to implement the CPUC tribal policy.

<sup>40</sup> The APA and Public Utilities Code Section 311(h) specify that the CPUC is not subject to Articles 5, 6, 7, and 8 of Chapter 3.5, but these provisions do *not* list Article 1 among the Articles that do not apply to the CPUC. Moreover, Government Code Section 11340.5, which is within Article 1, provides that “no state agency” shall adopt an underground regulation. The APA defines agency” in Section 11342.520 as follows:

Utilities Code Section 311(h) provide that amendments, revisions, and modifications to the CPUC’s Rules of Practice and Procedure must be submitted to the Office of Administrative Law in compliance with specified APA requirements.<sup>41</sup> Even if the CPUC is authorized to follow its own formal rulemaking procedures to adopt “general orders, resolutions, or other substantive regulations,”<sup>42</sup> the principle of Government Code Section 11340.5 and the prohibition of underground regulations still apply. In other words, the CPUC’s formal rulemaking procedures are required for adopting an internal management policy such as the DEP that operates as a “regulation.” At a minimum, the provisions of the DEP that have significant substantive impacts on public utilities and service providers and go beyond internal CPUC management should be adopted in a formal rulemaking.

#### D. CONCLUSION

For all the foregoing reasons, CCTA respectfully urges the Commission to address the substantive and procedural flaws in the DEP discussed in these comments in a properly noticed rulemaking proceeding in which all stakeholders would have an opportunity to participate in the development of a policy that will have such a significant impact on them.

Respectfully submitted,

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“Agency’ means state agency”; it does not exclude the CPUC or any other state agency. Thus, the prohibition against underground regulations in Section 11340.5 applies to the CPUC.

<sup>41</sup> Government Code Section 11351 (part of the APA), provides as follows:

“11351 (a) Except as provided in subdivision (b), Article 5 (commencing with Section 11346), Article 6 (commencing with Section 11349), Article 7 (commencing with Section 11349.7), and Article 8 (commencing with Section 11350) shall not apply to the Public Utilities Commission or the Workers’ Compensation Appeals Board, and Article 3 (commencing with Section 11343) and Article 4 (commencing with Section 11344) shall apply only to the rules of procedure of these state agencies.

(b) The Public Utilities Commission and the Workers’ Compensation Appeals Board shall comply with paragraph (5) of subdivision (a) of Section 11346.4 with respect to regulations that are required to be filed with the Secretary of State pursuant to Section 11343.

(c) Article 8 (commencing with Section 11350) shall not apply to the Division of Workers’ Compensation.”

Public Utilities Code Section Code 311(h) provides, in relevant part, as follows:

“(h) Notwithstanding any other provision of law, amendments, revisions, or modifications by the commission of its Rules of Practice and Procedure shall be submitted to the Office of Administrative Law for prior review in accordance with Sections 11349, 11349.3, 11349.4, 11349.5, 11349.6, and 11350.3 of, and subdivisions (a) and (b) of Section 11349.1 of, the Government Code. . . . Nothing in this subdivision shall require the commission to comply with Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code. This subdivision is only intended to provide for the Office of Administrative Law review of procedural commission decisions relating to commission Rules of Practice and Procedure, and not general orders, resolutions, or other substantive regulations.”

<sup>42</sup> Public Utilities Code Section 311(h).