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Via E-Mail

Rachel Peterson, Acting Executive Director
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Draft Resolution M-4846: Comments of Shell Energy North America (US), L.P.

Dear Acting Director Peterson:

Shell Energy North America (US), L.P. ("Shell Energy") submits its comments on the above-referenced Draft Resolution, which was circulated on October 2, 2020. The Draft Resolution proposes a "Commission Enforcement and Penalty Assessment Policy" ("Enforcement Policy") that is intended to apply to undefined "regulated entities." If this proposed Enforcement Policy is intended to apply to non-utility load-serving entities ("LSE"), the proposed Enforcement Policy should be rejected or withdrawn.

Because all LSEs are subject to detailed existing "citation" protocols, the proposed Enforcement Policy is redundant and confusing, and could produce inconsistent and arbitrary results. Any proposed changes to the Commission's existing citation procedures should be made to the citation procedures themselves. There is no legitimate reason to establish a new, parallel enforcement protocol.

I.
INTRODUCTION

As a marketer of natural gas and electricity to retail customers throughout California, Shell Energy is subject to existing citation programs established by the Commission. As a registered electric service provider ("ESP"), Shell Energy is subject to citation procedures for the Resource Adequacy ("RA") (Resolution E-4195), Renewables Procurement Standard ("RPS") (Resolution E-4720), and Integrated Resource Planning ("IRP") (Resolution E-5080) programs. As a registered Core Transport Agent ("CTA"), Shell Energy is subject to the citation program

established in Resolution UEB-003. All of these Commission-adopted citation programs include an administrative process and potential penalties for noncompliance with performance and/or reporting obligations. The proposed Enforcement Policy unnecessarily overlaps with (and in some areas duplicates) the administrative processes approved under these citation programs. The proposed Enforcement Policy is unnecessary and should be rejected or withdrawn.

The Draft Resolution states that 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." Draft Resolution at p. 11. Yet the proposed Enforcement Policy creates an alternative structure through which Commission staff may choose to address potential noncompliance with the Commission's reporting and performance obligations.

The proposed alternative structure, if adopted, would create uncertainty for "regulated entities" and would provide Commission staff with undue discretion to apply one or another set of protocols, leading to potentially inconsistent (and unreasonable) results. If the existing citation programs must be modified or updated to achieve one or more additional efficiency or flexibility goals, the citation programs should be modified accordingly. The Commission should not adopt a separate, parallel Enforcement Policy to address the same compliance issues.

In addition, the Draft Resolution and the draft Enforcement Policy ("DEP") fail to define "regulated entities." If the Commission adopts some version of the proposed Enforcement Policy, the Commission should clarify that the Enforcement Policy applies exclusively to the investor-owned utilities ("IOU"), which are directly "regulated" by the Commission.

An IOU is properly classified as a "regulated entity" because the Commission oversees an IOU's terms and conditions of service to its customers, approves its energy and capacity procurement contracts, and guarantees cost recovery. An ESP or a CTA is not a "regulated entity" because the Commission does not regulate the terms under which an ESP or a CTA serves its customers, the Commission does not approve an ESP or a CTA's procurement costs, and the Commission does not guarantee recovery of an ESP or CTA's costs. If the Commission adopts some form of the proposed Enforcement Policy, the Commission should clarify that the Enforcement Policy applies exclusively to "public utilities," rather than to all entities that are subject to the reporting and compliance requirements under existing citation programs.

II.
THE PROPOSED ENFORCEMENT POLICY PRESENTS THE POTENTIAL FOR ARBITRARY APPLICATION OF PROTOCOLS AND PENALTIES BY COMMISSION STAFF

The Draft Resolution states that "[n]o existing citation programs are altered by this Resolution and Enforcement Policy." Draft Resolution at p. 11. The Draft Resolution continues: "This Policy merely provides additional enforcement tools for staff to use in lieu of, or in conjunction with, existing citation programs." Id. Based on the discussion in the Draft Resolution, the proposed Enforcement Policy is intended to provide Commission staff with the ability to "pick and choose" the procedures, protocols and penalties to be applied to individual "regulated entities" in the event of alleged noncompliance with reporting or performance obligations.

The proposed Enforcement Policy improperly provides Commission staff with unfettered discretion, leading to the potential for arbitrary application of the rules. The Draft Resolution states that the "goal of having consistent enforcement practices would be supported by the adoption of the Policy . . . ." Draft Resolution at p. 11. To the contrary, adoption of the proposed Enforcement Policy would likely lead to inconsistent and unreasonable results, depending on the administrative process employed by Commission Staff.

The Draft Resolution states: "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." Draft Resolution at p. 12. This statement is not correct. Commission Staff's ability to rely on either the citation program rules or the Enforcement Policy rules, or some combination of both, creates the very conditions for inconsistent (and arbitrary) treatment of similarly situated LSEs. Staff's ability to apply different sets of rules to the same conduct would create uncertainty and confusion among "regulated entities," and would grant too much discretion to Staff.

For example, if Commission staff were to allege that an IOU failed to satisfy the RPS reporting requirements, Commission staff would have discretion whether to apply the citation protocols established in Resolution E-4720, or the Enforcement Policy, or some combination of both. The proposed Enforcement Policy (in the DEP) sets forth "factors," but not "standards," for determining whether to apply the citation procedures rather than the Enforcement Policy. DEP at p. 11. The Draft Resolution fails to provide any assurance that a "regulated entity" (an IOU) will be treated comparably to another IOU that is also alleged to have failed to meet the RPS reporting requirements. In the event of an IOU's alleged noncompliance, Commission staff should not be allowed to decide which set of rules to apply.

The Draft Enforcement Policy provides that "[i]n carrying out the Commission's mandate, staff may pursue different levels of enforcement action." DEP at p. 5 (III. Enforcement). The Draft Resolution also states that "[t]he Policy [gives] 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." Draft Resolution at p. 11.

These proposals both offer improvements to the current citation protocols. An entirely new and alternative "Enforcement Policy" is not necessary, however, to provide Commission staff with the option to pursue different levels of enforcement action or to settle a matter through an "Administrative Consent Order." The Commission should simply amend the existing citation procedures to enable Commission staff to pursue different levels of enforcement action or to enter into an Administrative Consent Order in appropriate circumstances.

III.
"REGULATED ENTITIES" SUBJECT TO THE ENFORCEMENT POLICY SHOULD BE LIMITED TO THE INVESTOR-OWNED UTILITIES

The Draft Enforcement Policy ("DEP") states that "The Commission shall provide clear and consistent information about its enforcement actions and which entities it regulates." DEP at p. 4 (F. Transparency). Yet the Draft Resolution fails to provide clarity regarding the "regulated entities" to which the proposed Enforcement Policy applies.

The Draft Resolution states that "[t]he Commission has affirmed its jurisdiction over regulated entities and its authority to establish enforcement mechanisms in numerous past decisions." Draft Resolution at p. 5. To support this statement, the Draft Resolution references statutes (Public Utilities Code sections) that address the Commission's jurisdiction over "public utilities." The Draft Resolution does not cite to any statute that provides a basis for the Enforcement Policy to apply to non-IOU LSEs. If the Commission adopts any version of the proposed Enforcement Policy, the Commission should make it clear that the Enforcement Policy applies exclusively to the IOUs.

The Commission should clarify, therefore, that "regulated entities" means "public utilities." The proposed Enforcement Policy should not apply to non-IOU LSEs. Non-IOU LSEs are subject to limited Commission authority, as implemented under specific citation programs. Non-IOU LSEs should not be subject to the overlapping, redundant and arbitrary provisions of the proposed Enforcement Policy.

IV.
CONCLUSION

The proposed Enforcement Policy is redundant, duplicative and confusing, and could produce inconsistent and arbitrary results. If adopted, the proposed Enforcement Policy would create uncertainty for "regulated entities" and would provide Commission staff with undue discretion to apply one or another set of protocols, leading to potentially inconsistent, arbitrary and unreasonable results.

Any proposed improvements to existing citation procedures should be made to the citation procedures themselves. The Commission should not establish a separate, parallel compliance enforcement protocol for the RPS, RA, IRP programs, or for the CTA program.

If the Commission adopts the proposed Enforcement Policy, the Commission should clarify that the Enforcement Policy applies exclusively to the IOUs. The Commission should clarify that "regulated entities" means "public utilities."

Respectfully submitted,

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