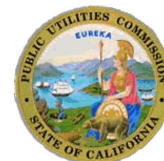

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of CALIFORNIA COMMUNITY CHOICE ASSOCIATION for Rehearing of Resolution E-5258.	Application 23-05-___

CALIFORNIA COMMUNITY CHOICE ASSOCIATION'S
APPLICATION FOR REHEARING OF RESOLUTION E-5258

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SPECIFICATION OF ERROR

- × Resolution E-5258 (Resolution) exceeds the Commission's limited jurisdiction over community choice aggregator (CCA) implementation plans and fails to act as required by Public Utilities Code Section 366.2(c)(8) by (1) failing to provide a firm "earliest possible date" for the launch of East Bay Community Energy's (EBCE's) expansion to the City of Stockton and Central Coast Community Energy's (CCCE's)[1] expansion to the City of Atascadero, and (2) basing the "earliest possible date" only on the impact on a utility's "annual procurement plan" as required by Section 366.2(c)(8).

- × The Resolution exceeds the Commission's limited jurisdiction to address cost shifts and fails to act in the manner required by law by adopting a "new and distinct" cost shift policy that does not comply with Section 366.2(a)(4) and Section 366.3.

- × The Commission fails to act as required by Section 380(e) by applying Resource Adequacy (RA) enforcement in a discriminatory manner.

- × The Resolution does not contain findings that support the order; it is devoid of any findings that (1) RA noncompliance caused increased reliability costs and shifted those costs to the investor-owned utilities' bundled customers or (2) permitting the CCAs to expand service on January 1, 2024 will cause increased reliability costs and shift those costs to the investor-owned utilities' bundled customers; consequently the Resolution constitutes an abuse of discretion.

- × The Commission fails to support its findings with substantial evidence demonstrating that the CCAs' RA noncompliance caused increased reliability costs and shifted those costs to the investor-owned utilities' bundled customers and, consequently the Resolution constitutes an abuse of discretion.

- × The Commission denies affected parties due process by not providing notice and an opportunity to be heard, and thereby fails to proceed in accordance with law, by adopting material, new policy affecting important issues – RA penalties and cost-shifting – in the context of an enforcement action against particular parties.

- × The Commission prematurely enforces a pending regulation currently being considered in the RA rulemaking, thereby denying the CCAs' due process to participate in the enactment of such regulation;

- × The Commission fails to act in a manner consistent with its own enforcement procedures, thereby failing to proceed in the manner required by law and denying parties' due process.

- × The Commission's retroactive application of a new regulation to the CCAs' pending implementation plans is unlawful and contravenes due process.

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[1] EBCE and CCCE are referred to collectively as the CCAs.

- The Resolution imposes a double penalty for RA noncompliance on the CCAs through the suspension of the CCAs' expansion plans after the CCAs already paid the penalties assessed for RA noncompliance.

Application of CALIFORNIA COMMUNITY CHOICE ASSOCIATION for Rehearing of Resolution E-5258.	Application 23-05-___

CALIFORNIA COMMUNITY CHOICE ASSOCIATION'S APPLICATION FOR REHEARING OF RESOLUTION E-5258

Pursuant to Rule 16.1 of the California Public Utilities Commission (Commission) Rules of Practice and Procedure (Rules), Section 8.1 of General Order 96-B, and Public Utilities Code Section 1731,[2] California Community Choice Association[3] (CalCCA) submits this Application for Rehearing of Resolution E-5258[4] (Resolution) issued April 28, 2023, which addressed the implementation date for service area expansions proposed by Central Coast Community Energy (CCCE) and East Bay Community Energy (EBCE) (jointly "CCAs"). Section 1731 requires that any application for rehearing of Resolution E-5258 be filed within 30 days of its date of issuance. This application for rehearing is timely filed.

I. INTRODUCTION AND SPECIFICATION OF ERROR

In issuing the Resolution, the Commission exceeded its jurisdiction and statutory authority, failed to proceed in the manner required by law, failed to issue findings in support of

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[2] All subsequent code sections cited herein are references to the California Public Utilities Code unless otherwise specified.

[3] California Community Choice Association represents the interests of 24 community choice electricity providers in California: Apple Valley Choice Energy, Central Coast Community Energy, Clean Energy Alliance, Clean Power Alliance, CleanPowerSF, Desert Community Energy, East Bay Community Energy, Energy For Palmdale's Independent Choice, Lancaster Choice Energy, Marin Clean Energy, Orange County Power Authority, Peninsula Clean Energy, Pico Rivera Innovative Municipal Energy, Pioneer Community Energy, Pomona Choice Energy, Rancho Mirage Energy Authority, Redwood Coast Energy Authority, San Diego Community Power, San Jacinto Power, San José Clean Energy, Santa Barbara Clean Energy, Silicon Valley Clean Energy, Sonoma Clean Power, and Valley Clean Energy.

[4] Resolution E-5258, *Effective Dates for the Expansions of Community Choice Aggregators: Central Coast Community Energy and East Bay Community Energy* (Apr. 27, 2023): https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M507/K472/507472501.PDF.

its order, issued key findings without substantial evidence in light of the whole record, discriminated in its application of penalties, violated Constitutional due process, and abused its discretion.[5] The extensive legal error permeating the Resolution compels its rehearing.

First, the Resolution fails to proceed in the manner required by law and exceeds the Commission's very limited jurisdiction over community choice aggregator (CCA) implementation plans by failing to confine its actions to the Legislature's directive in Section 366.2(c)(8). The statute requires the Commission to set the "earliest possible date" for CCAs to expand their service upon certification of their implementation plans, allowing CCAs certainty in planning their expansion launch.[6] Rather than providing the CCAs with certain implementation dates, the Commission adopted January 1, 2025, as the "earliest possible date" but left the date subject to future modification. The Commission's action violates the requirements of the statute and leaves the CCAs unable to adequately coordinate with the local governments and the customers which approved and desire the proposed expansions and sets troubling precedent for future CCA expansions.

Second, the Resolution exceeds the Commission's statutory authority to address potential cost shifts. It adopts a "new and distinct"[7] cost shift policy not previously considered in any formal proceeding and outside the scope of the legislative directives in Section 366.2 and 366.3.

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[5] While the term "abuse of discretion" (Section 1757(a)(5)) is not defined in the Public Utilities Code, Code of Civil Procedure (CCP) Section 1094.5 (administrative mandamus) defines the term to embrace error described in other portions of Section 1757 including Section 1757(a)(2) (failure to proceed as required by law), Section 1757(a)(3) (inadequate findings), as well as Section 1757(a)(4) (absence of substantial evidence to support the findings). Courts have reversed Commission decisions for an "abuse of discretion" in instances where the error might have also been described by reference to another subdivision of Section 1757. *See Calaveras Tel. Co. v. Pub. Util. Comm'n,* 5 Cal. App. 5th 972 (2019); *City of Huntington Beach v. Pub. Util. Comm'n* (2013) 214 Cal. App. 4th 566 (2013); *The Utility Reform Network v. California Pub. Util. Comm'n*, 166 Cal. App. 4th 522 (2008).

[6] § 366.2(c)(8).

[7] Resolution at 10.

The Commission employs its new cost shift policy in an unprecedented fashion to slow CCA expansion to two new communities.

Third, the Resolution fails to proceed as required by Section 380(e) by applying Resource Adequacy (RA) enforcement in a discriminatory manner. The remedy penalty the Resolution imposes on the CCAs cannot be applied to other load-serving entities (LSEs).

Fourth, the Resolution fails both to provide the findings necessary to support the order and to support its central findings with substantial evidence that the CCAs' RA noncompliance shifted costs to investor-owned utility (IOU) bundled customers. The Resolution is premised on an assumption that the CCAs' RA non-compliance actually and directly caused an increase in reliability costs and that those costs were shifted to IOU bundled customers; it does not, however, make such findings or identify substantial evidence supporting that assumption and therefore constitutes an abuse of discretion.

Fifth, the Commission denies interested parties' due process rights to adequate notice and an opportunity to be heard, and thereby fails to proceed in accordance with law, by:

- adopting material new policy affecting important issues – cost shifting and RA penalties – without any process to gain input from interested parties. It adopts these new policies not in a generic proceeding, where all interested parties would have adequate notice that the issues are being considered, but in a narrow enforcement action against two parties;
- enforcing an RA policy currently being considered in the RA rulemaking, thereby prematurely enforcing a pending regulation and denying the CCAs' due process to participate in the enactment of such a regulation;
- failing to utilize any of the enforcement mechanisms prescribed by Resolution M-4846[8] and thus implementing a new procedure without notice;
- retroactively applying a new regulation to the CCAs which was adopted after the CCA Implementation Plans were filed; and

[8] *Resolution Adopting Commission Enforcement Policy* (Nov. 5, 2020) (Resolution M-4846): https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M350/K405/350405017.PDF.

- imposing an additional, double penalty for RA noncompliance on the CCAs through the suspension of the CCAs' expansion plans after the CCAs already paid the penalties assessed for noncompliance.

For these and other reasons stated herein, CalCCA requests rehearing of the Resolution.

II. BACKGROUND

The Resolution effectively suspends indefinitely CCCE's and EBCE's implementation plans to expand their current service to the Cities of Stockton and Atascadero, respectively. To justify this action, the Commission relies on a <u>potential</u> condition that it purports to redress through a newly minted remedy for RA noncompliance currently under consideration in the Commission's RA Rulemaking (R.) 21-10-002.

A. Commission Involvement in CCA Expansion

As recognized by the Resolution, Commission authority over CCA Implementation Plans derives exclusively from Sections 366.2 and 366.3.[9] Section 366.2 mandates a very limited role for Commission involvement in CCA implementation and expansion to:

(1) receive from the CCA the implementation plan detailed in Section 366.2(c)(4) to allow the Commission to develop the cost recovery mechanism required by subdivisions (d), (e), and (f);[10]

(2) notify any electrical corporation serving the customers proposed for aggregation that an implementation plan initiating community choice aggregation has been filed, within 10 days of filing;[11]

(3) certify within 90 days after the CCA files the implementation plan that the Commission has received the plan, including any additional information necessary to determine a cost-recovery mechanism;[12]

(4) after certification of receipt of the plan, provide its findings regarding any cost recovery that must be paid by customers of the CCA to prevent shifting of costs as provided for in Section 366.2, subdivisions (d) (Department of Water Resources' (DWRs') electricity purchase costs and contract obligations), (e) (bond related costs

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9 Resolution at 1 ("[t]his Resolution is issued pursuant to Public Utilities Code Sections 366.2 and 366.3").

10 § 366.2(c)(5).

11 § 366.2(c)(6).

12 § 366.2(c)(7).

between the Commission and DWR and any additional DWR costs), (f) (the electrical corporation's unrecovered past under-collections and contract costs attributable to the customer departing for CCA service, which are now recovered in the Power Charge Indifference Adjustment (PCIA)), and (h) (specifying that the Commission establish the mechanisms necessary to ensure the charges payable to DWR and the electrical corporations are promptly remitted);[13]

(5) designate the "earliest possible date" for implementation of a CCA program, taking into consideration the impact on any annual procurement plan of the electrical corporation that has been approved by the Commission;[14]

(6) provide for registration by CCAs with the Commission, "which may require additional information to ensure compliance with basic customer protection rules and other procedural matters";[15] and

(7) authorize community choice aggregation only after it imposes the cost-recovery mechanism pursuant to subdivisions (d), (e), (f), and (h).[16]

Section 366.3 also limits the Commission's authority to ensuring that "bundled retail customers . . . shall not experience any cost increase as a result of the implementation of a community choice aggregator program," and that departing load shall not "experience any cost increases as a result of an allocation of costs that were not incurred on behalf of the departing load."[17]

B. CCCE and EBCE Implementation Plan and Expansion Processes

EBCE submitted an amended implementation plan on September 22, 2022 to expand service to the City of Stockton as of January 1, 2024.[18] CCCE submitted an amended

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[13] § 366.2(c)(7), and (d)-(f).
[14] § 366.2(c)(8).
[15] § 366.2(c)(17).
[16] § 366.2(i).
[17] § 366.3.
[18] *EBCE Addendum No. 2 to the Community Choice Aggregation Implementation Plan and Statement of Intent to Address EBCE Expansion to the City of Stockton* (Dec. 8, 2022): https://res.cloudinary.com/diactiwk7/image/upload/v1670611946/EBCE_Addendum_2_CCA_Implementation_Plan_120822_e2sqja.pdf.

implementation plan on December 8, 2022 to expand service to the City of Atascadero as of January 1, 2024.[19]

In letters dated March 8, 2023, the Commission certified that CCCE's and EBCE's implementation plans are complete and compliant with the requirements of Section 366.2(c). The letters denied, however, the effective dates requested by CCCE and EBCE without setting an alternative date. The letters gave no information on why Energy Division was denying the requested effective dates, stating only that "Energy Division will provide further guidance on the matter." In response, on March 10, 2023, CCCE and EBCE requested pursuant to Section 366.2(c)(8) that the Commission confirm April 1, 2024, and January 1, 2024, respectively as the earliest possible implementation dates for their expansions.

C. Commission Resolution E-5258

On March 27, 2023, Energy Division issued Draft Resolution E-5258[20] (Draft Resolution), suspending implementation of CCCE's and EBCE's service expansions indefinitely. While the Resolution purported to set January 1, 2025 as the earliest possible effective date for the expansions of service for both CCAs, it left the date "subject to modification by further Commission Order."[21]

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[19] *Addendum No. 4 to the Community Choice Aggregation Implementation Plan and Statement of Intent Addressing Central Coast Community Energy's Expansion to Include the City of Atascadero* (Sept. 22, 2022): https://3cenergy.org/wp-content/uploads/2022/12/Addendum-No.-4-to-the-CCCE-Community-Choice-Aggregation-Implementation-Plan-.pdf.

[20] Draft Resolution E-5258, Rev. 1, *Effective Dates for the Expansions of Community Choice Aggregators: Central Coast Community Energy and East Bay Community Energy* (Mar. 27, 2023): https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M507/K306/507306274.PDF.

[21] Draft Resolution at 2.

CalCCA submitted comments on the Draft Resolution on April 17, 2023, identifying legal error in the Draft Resolution.[22] CalCCA concluded that the Draft Resolution was "beyond repair" and requested its withdrawal.

On April 27, 2023, the Commission adopted the Resolution, and the final Resolution was issued on April 28, 2023. The final Resolution failed to address the concerns raised in CalCCA's April 17, 2023 comments. The conditional nature of the January 1, 2025 implementation date leaves (1) the implementation plans suspended indefinitely, (2) the Cities of Stockton and Atascadero with no date certain as to when their City Council approved CCA service will begin, and (3) the CCAs unable to plan the launch of the service sought by Stockton and Atascadero with certainty.

D. Pending RA Proceeding

In parallel with this expansion implementation planning, the Commission was considering, but has not yet adopted, changes to the remedies for RA noncompliance in Rulemaking (R.) 21-10-002. The Commission's RA program, governed by Section 380, places requirements on all LSEs – CCAs, Electric Service Providers (ESPs), and IOUs. The RA program has a clear compliance and penalty framework[23] developed over the years since its initial adoption. The Resolution describes those penalties, including administrative penalties and penalties for deficiencies.[24] An LSE that fails to meet its requirements must pay a pre-

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[22] CalCCA notes that comments on Resolutions are not published on the Commission's website for reference.

[23] *See* D.21-06-029, *Decision Adopting Local Capacity Obligations for 2022-2024, Flexible Capacity Obligations for 2022, and Refinements to the Resource Adequacy Program*, R.19-11-009 (June 24, 2021) (current RA penalty framework): https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M389/K603/389603561.PDF.

[24] Resolution at 7.

determined penalty, which increases by multiples as penalties accumulate.[25] The current RA framework does not provide the Commission authority, however, to delay expansions approved by local governments as a penalty for a CCA's failure to meet its RA requirements.

To address this perceived gap, the Energy Division Staff proposed on January 20, 2023, a potential new remedy in R.21-10-002. Staff explains:

> To address the potential reliability issues that arise with continued expansion of LSEs that are failing to meet their current summer RA obligations, ED staff propose that a [CCA] or [ESP] must be in good standing in meeting its RA requirements in order to take on new customers. Specifically, ED staff proposes that any CCA or ESP with a deficiency of greater than 2.5% of its system RA requirement on a month ahead RA filing during the previous two calendar years should not be able to expand and take on new any new customer load for the following year. For example, any LSE with RA requirement deficiencies in 2021 or 2022, would not be eligible to expand to serve new load in 2023 for service in 2024.[26]

If this proposal sounds familiar, it is; it is precisely what Energy Division effectuates in the Resolution. The Commission has not, however, issued a decision adopting this new remedy nor does it explain how it falls within the Commission's limited authority under Section 366.2. In fact, the Commission's recent proposed decision in the RA proceeding, issued May 25, 2023, states clearly that: "Energy Division's proposal is not a modification of D.05-12-041 but a new requirement for CCAs planning to implement an expansion in their service territory or CCAs increasing their number of customers."[27] By skipping over the necessary procedural hoops in

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[25] The frequent references herein to the Commission's current RA Program are for context only and should not be regarding as an expression of CalCCA's position on the soundness of that program either legally or from a policy perspective.

[26] R.21-10-002, *Administrative Law Judge's Ruling on Energy Division's Phase 3 Proposals* (Jan. 20, 2023), Appendix A, Energy Division Proposals for Proceeding R.21-10-002, at 34.

[27] R.21-10-002, Proposed *Decision Adopting Local Capacity Obligations for 2024-2026, Flexible Capacity Obligations for 2024, and Program Refinements* (May 25, 2023), at 38.

the RA proceeding and *sua sponte* applying the mechanism, the Resolution skirts an on-going rulemaking process.

III. RESOLUTION E-5258 CONSTITUTES ENFORCEMENT AND RATEMAKING BY THE COMMISSION AND MUST BE REVIEWED UNDER THE STANDARDS SET FORTH IN SECTION 1757

Section 1701.1(a) requires the Commission to "determine whether each proceeding is a quasi-legislative, an adjudication, a ratesetting, or a catastrophic wildfire proceeding…." The Resolution arose not from a formal, categorized proceeding with a public process but as a recommended action by Energy Division Staff without public process. The Commission's failure to proceed as required by Section 1701.1(a) leaves the standard of public review subject to interpretation.

The Public Utilities Code provides two alternative standards for judicial review of Commission decisions. Section 1757 establishes the judicial review standard for "a complaint or enforcement proceeding, or in a ratemaking or licensing decision of specific application that is addressed to particular parties…." Alternatively, Section 1757.1 establishes the review standard for "any other proceeding." While the Resolution stems from a deeply flawed process without categorization, the Resolution squarely falls within the definition of both "enforcement" and "ratemaking" proceedings, bringing it within the Section 1757 standard of review.

A. The Resolution is an Enforcement Action Against Particular Parties

The Resolution represents an enforcement or adjudication action against particular parties – CCCE and EBCE. Rule 1.3 defines "adjudicatory proceedings" as:

> (1) enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission; and (2) complaints against regulated entities, including those complaints that challenge the accuracy of a bill, but excluding those complaints that challenge the reasonableness of rates or charges, past, present, or future.[28]

[28] Commission Rules of Practice and Procedure (Commission Rules), Rule 1.3.

The Resolution is an "enforcement investigation" related both to the Commission's enforcement rights under Section 380 and its cost shift authority under Sections 366.2(a)(4) and 366.3.

The Commission's indefinite suspension of the implementation plans is unambiguously rooted in noncompliance by CCCE and EBCE with the Commission's RA program requirements, promulgated under Section 380, for 2021 and 2022.[29] The Commission took this action based on its finding that "payment of a Resource Adequacy violation does not fully redress harms caused by a failure to meet Resource Adequacy program requirements…."[30] Even though the RA program already has distinct financial penalties prescribed for RA noncompliance (which were already paid by CCCE and EBCE as recognized in the Resolution[31]), the Commission here expressly and unexpectedly presents an additional RA enforcement action through its Resolution. Indeed, given the harm created by the planning uncertainty for the CCAs and the Cities of Stockton and Atascadero the Resolution created, the Commission's action can only be viewed as a penalty.[32]

Energy Division Staff's proposal in the generic RA proceeding, R.21-10-002, reinforces the conclusion that the Resolution is an enforcement action effecting an additional penalty against particular parties for RA non-compliance. Suspension of an implementation plan in response to RA non-compliance is not a current remedy under the existing RA enforcement mechanism. As noted above, however, Energy Division Staff have proposed precisely this mechanism in R.21-10-002.[33] In other words, Energy Division Staff, which also initiated the

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[29] *See* Resolution at 7-10.
[30] *Id.* at 7.
[31] *Id.*, and Finding 10 at 15.
[32] "Penalty" is defined as a "disadvantage, loss, or hardship due to some action." Merriam-Webster Dictionary.
[33] *See supra,* n. 26.

Resolution, undeniably view implementation plan suspension as an appropriate enforcement tool to address RA non-compliance.

Likely because the Commission has not yet adopted implementation plan suspension as a formal RA enforcement mechanism, the Resolution cloaks its aim in its authority to prevent cost shifting from CCA customers to IOU bundled customers pursuant to Sections 366.2(a)(4) and 366.3. It suggests further action to consider whether the CCAs' actions violated these provisions.[34]

The Resolution comports with the definition of an adjudicatory or enforcement action, whether the action is aimed at enforcement under Section 380, Section 366.2(a)(4), or Section 366.3. The appropriate standard of review is therefore Section 1757.

B. The Resolution Involves Matters the Commission Has Characterized as Ratemaking

The Resolution also represents a ratemaking action, for which the appropriate standard of review is also Section 1757. The action rests on a new cost shift theory, which the Commission concludes arises under Section 366.2(a)(4) or Section 366.3. The purpose of identifying cost shifts is to avoid them by developing new charges for customers leaving the IOU to be served by a CCA or ESP (departing load).[35]

Rule 1.3 defines "ratesetting proceedings" as:

> proceedings in which the Commission sets or investigates rates for a specifically named utility (or utilities), or establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities)….[36]

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[34] Resolution at 2, 10, Finding 15 at 16, O¶ 2 at 16.

[35] *See generally,* Section 366.2(a)(4), (d), (e), and (f).

[36] Commission Rules, Rule 1.3.

The Resolution establishes a mechanism – a new and distinct cost shift policy – that could form the basis of a new non-bypassable charge or penalty, and therefore can be classified as ratesetting.

The generic rulemaking on cost shifts, the Power Charge Indifference Adjustment (PCIA) proceeding (R.17-06-026), supports this conclusion. This rulemaking is the primary proceeding in which the Commission adopts non-bypassable charges for departing load[37] and has been appropriately categorized by the Commission as "ratesetting."[38] The Resolution is premised on a finding of a cost shift from the CCAs to IOU bundled customers and, therefore, can also be considered a ratemaking action for which the standard of Review is under Section 1757.

C. Review of the Commission's Action in the Resolution Under Section 1757 Warrants Rehearing

As set forth in detail below, review of the Commission's action in Resolution E-5258 under the standards set forth in Section 1757 warrants rehearing. Section 1757 requires a Court, and thus the Commission on rehearing, to determine whether "on the basis of the entire record" any of the following occurred:

(1) The Commission acted without, or in excess of, its powers or jurisdiction;

(2) The Commission has not proceeded in the manner required by law;

(3) The decision of the Commission is not supported by the findings;

(4) The findings in the decision of the Commission are not supported by substantial evidence in light of the whole record;

(5) The order or decision of the Commission was procured by fraud or was an abuse of discretion; and

(6) The order or decision of the Commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

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[37] *See* R.17-06-026, *Scoping Memo and Ruling of Assigned Commissioner* (Sept. 25, 2017) at 13; *see also* Power Charge Indifference Adjustment (ca.gov).

[38] *Id.* at 25.

In this case, the only possible record is the CCAs' submitted Implementation Plans, and the Commission's letter in response. While parties were able to file Comments on the Draft Resolution, no fact finding, evidentiary hearing, or other materials exist to support the Commission's decision. None of the speculative findings in the Resolution were premised on proffered factual assertions subject to cross-examination.[39] Therefore, given that "no new or additional evidence shall be introduced" upon review, the Resolution must be reviewed in that context.

IV. THE RESOLUTION EXCEEDS THE COMMISSION'S LIMITED JURISDICTION OVER CCA IMPLEMENTATION PLANS AND FAILS TO ACT IN THE MANNER REQUIRED BY LAW

The Commission in issuing the Resolution has exceeded its statutory authority granted by the Legislature over CCA Implementation Plans and thereby failed to act in the manner required by law. The Commission is a state agency created by the California Constitution, which grants it broad authority to regulate utilities.[40] In addition, the Legislature has plenary power to confer additional authority and jurisdiction upon the Commission.[41] When the Legislature has provided express legislative directions or restrictions on the Commission's power, the Commission is not permitted to act outside of the authority explicitly granted.[42]

The CCAs and the Cities of Stockton and Atascadero are not utilities, but rather public agencies, and thus the Commission is limited to actions expressly authorized by the Legislature.[43] The Legislature, through Assembly Bill (AB) 117 and as set forth in Section

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39 *See Independent Energy Producers Assoc./Utility Reform Network v. Pub. Util. Comm'n*, 223 Cal. App. 4th 945 (2014).

40 *San Diego Gas & Electric Co. v. Superior Court,* 13 Cal. 4th 893, 914 (1996).

41 *Id.*

42 *Pacific Tel. and Telegraph Co. v. Pub. Util. Comm'n*,62 Cal. 2d 634, 653 (1965) ("[w]hatever may be the scope of regulatory power . . ., it does not authorize disregard by the commission of express directions to it, or restrictions upon its power found in other provisions of the act or elsewhere in general law," and finding that if the commission wants to expand its power, "[s]uch arguments should be addressed to the Legislature, from whence the Commission's authority derives, rather than to this court").

43 *Monterey Peninsula Water Mgmt. Dist. v. Pub. Util. Comm'n,* 62 Cal. 4th 693, 698 (2016); *County of Inyo v. Pub. Util. Comm'm,*26 Cal. 3d 154, 166-167 (1980).

366.2, did give the Commission a very narrow scope of oversight in the implementation and operation of a CCA. When, as here, the Commission restricts the activity of a public agency in a manner not expressly authorized by the Legislature, the Commission's error is not simply procedural; it is an act in excess of its subject matter jurisdiction.[44]

A. The Commission's Role in Overseeing CCA Implementation Planning is Narrowly Defined by Statute

The Commission has concluded that AB 117 does not confer authority for "general regulatory oversight of CCAs."[45] The Commission has further clarified: "we do not believe that AB 117 intended to give this Commission broad jurisdiction over CCAs."[46] In focusing specifically on the regulatory process for considering CCA implementation, it found that: "AB 117 does not provide us with authority to approve or reject a CCA's implementation plan or to decertify a CCA."[47] Importantly, it also concluded that its jurisdiction was limited by the express terms of the statute: "We assume that if the Legislature intended for us to regulate the CCA's implementation plan in other ways, the Legislature would have included explicit language in the statute with regard to its intent."[48]

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44 In the case of government bodies, express language is required. *Monterey,* 62 Cal.4th at 698; *see also* Section 1757(a)(1). The Commission may not acquire subject matter jurisdiction by consent, waiver, or estoppel. *Sullivan v. Delta Airlines,* 15 Cal. 4th 288, 307, fn.9 (1997); *Summers v. Superior Court,* 53 Cal. 2d 296, 298 (1959). Nor may the Commission rely on broadly worded text in statutes applicable to public utilities described in Section 3 of Article XII of the California Constitution, such as Section 701.

45 D.05-12-041, *Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters,* R.03-10-003 (Dec. 15, 2005), Conclusion of Law (COL) 2, at 60; *see also id.,* COL 1, at 60 and Finding of Fact (FOF) 2, at 56.

46 *Id.* at 16; *see also* D.12-09-021, *Order Denying Rehearing of Resolution E-4250,* Application of Pacific Gas and Electric Company for Rehearing of Resolution E-4250, A.10-05-015 (Sept. 13, 2012) (the Commission acknowledges its "limited jurisdiction over CCAs" in contrast to its "general jurisdiction" over IOUs).

47 D.05-12-041, at 4; *see also id.,* at 14 ("we find nothing in the statute that directs the Commission to approve or disapprove an implementation plan or modifications to it. Nor does the statute provide explicit authority to "decertify" a CCA or its implementation plan").

48 *Id.* at 15.

The Resolution exceeds the narrow grant of jurisdiction of AB 117 by recasting the phrase "earliest possible date." Instead of interpreting the phrase as a directive to approve a plan as soon as possible after the clear statutory requirements are met, the Resolution treats its authority to set the "earliest possible date" as a vehicle (not heretofore employed) to enforce RA compliance by burdening local government with an indefinite and uncertain date on which that government may offer CCA benefits to its citizens. By adopting that construction of Section 366.2, the Commission exceeds its jurisdiction and fails to act in the manner required by law.

The statutory limitations on the Commission's role exist for a reason, as they are necessary to support the planning and coordination between the expanding CCA and the local governments included in the expansion. The process for offering CCA service in a new jurisdiction is complex and requires local government bodies develop and adhere to a strict timeline based on the Commission's designated "earliest possible date" set pursuant to Section 366.2(c)(8). The Resolution frustrates implementation planning by failing to set a clear "earliest possible date" for launch.

In the case of an expansion, the local governments that have formed an existing CCA work with the new local jurisdiction long before launching service. The process requires the local government joining the existing CCA to pass an ordinance authorizing its action[49] and then requires extensive, ongoing coordination between the CCA and the local government.[50] The Legislature has directed that new customers be provided clear notice of the change in service; amongst the information to be included in that notice perhaps the most critical is notice of the timing of the transition.[51] In addition, CCAs must work with the IOU in whose territory the CCA

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[49] § 366.2(c)(12).
[50] *See* § 366.2(c).
[51] § 366.2(c)(15).

will provide the new service to both notify the IOU of the planned commencement of service, and to plan for the transfer of applicable accounts within a quick 30-day period after CCA notification of its service commencement.[52] Also necessary for launch or expansion of service is the procurement of electricity to serve customers. The timing of customer notice and procurement are, by necessity, based entirely on the "earliest possible date" set by the Commission and must be established well in advance of a CCAs launch or expansion of service.

The statute anticipated this extensive process in Section 366.2(c)(8). The statutory requirement that the Commission "shall designate" the earliest possible launch date gives the CCA the date certain it needs to notify customers, plan its launch or expansion, procure electricity, and provide all relevant notices to the IOU. As a result, the Commission's clear establishment of the "earliest possible date" within the confines of the statute is not only required, but necessary to provide certainty for an effective implementation or expansion. In setting an earliest possible effective date, the statute permits the Commission to "tak[e] into consideration the impact on any annual procurement plan of the electrical corporation that has been approved by the commission."[53]

In this case, the Commission (1) set no firm date, and (2) rejected the date set forth in the CCAs' implementation plan based on the CCAs' RA compliance history. The Resolution therefore fails to set the earliest possible date in the manner required by law.

B. The Resolution Exceeds the Commission's Jurisdiction and Fails to Proceed in a Manner Required by Law by Basing the "Earliest Possible Date" on a CCA's Resource Adequacy Compliance History

The Commission's performance of its duty under Section 366.2(c)(8) to "establish the earliest possible date" for a CCA to launch or expand, while ministerial, is a critical element of

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[52] § 366.2(c)(18)-(19).

[53] § 366.2(c)(8).

the framework for implementation or expansion of CCA service adopted in AB 117. In establishing this date, the Commission may consider "the impact on any annual procurement plan of the electrical corporation."[54] By, instead, basing the "earliest possible date" for the expansion on the CCAs' RA compliance history, the Resolution violates Section 366.2(c)(8).

Nowhere does the Resolution state that its tentative January 1, 2025, date for expansion is based on an annual procurement plan – the IOU's bundled procurement plan[55] – of any IOU. It instead explains the date is needed "to allow the Commission to take further actions to ensure expansion of these CCAs will not cause impermissible cost shifting onto IOU customers."[56] It concludes, without providing any evidence, that "[g]iven the history and pattern of Resource Adequacy deficiencies by CCCE and EBCE, we find they contributed to cost shifting onto IOU bundled customers."[57] It further explains that the Commission "has concerns regarding their ongoing ability to meet Resource Adequacy requirements."[58]

The Resolution therefore turns on RA compliance, not on an IOU annual procurement plan. By basing its action on factors other than the impact of an IOU's annual procurement plan, it contravenes Section 366.2(c)(8)'s limited, express authorization.[59] The Commission therefore steps beyond its limited statutory authority and fails to act in the manner required by law.

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54 *Id.*

55 *See* § 454.5 (IOU procurement plan requirements).

56 Resolution at 10, and Finding 15 at 16.

57 *Id.* at 9, and Finding 11 at 15.

58 *Id.* at 9-10.

59 In addition, long-standing principles of statutory interpretation require that a statute that provides explicit guidance implies a limitation on any other exercise of authority. This doctrine, "*expressio unius est exclusio alterius*" (expression of the one is the exclusion of the other), remains a foundational statutory interpretation principle today. In utilizing the doctrine to interpret Section 366.2(c), the Commission stated:

> A general rule of statutory interpretation suggests that where a statute provides specific guidance – in this case on the Commission's role and authority – its silence in a related section or on related issues implies a limit on that role and authority. Here, the statute does require the CCA to

C. The Resolution Exceeds the Commission's Jurisdiction and Fails to Proceed in the Manner Required by Law by Leaving the "Earliest Possible Date" Subject to Future Modification

Section 366.2(c)(8) provides that "[t]he commission shall designate the earliest possible effective date for implementation of a community choice aggregation program."[60] The Resolution does not do so. Instead, it sets a date subject to modification without limitation, stating:

> The earliest effective date for Central Coast Community Energy and East Bay Community Energy's proposed expansions is January 1, 2025, unless the date is modified by further order of the Commission.[61]

The Resolution leaves the Cities of Stockton and Atascadero with no idea when CCA service will be available – an outcome inconsistent with the Legislature's directive that the Commission promptly set "[t]he earliest possible effective date for implementation of a [CCA] program . . . ."

The Resolution also states that the date is conditioned on "further actions to ensure the expansions will not cause impermissible cost shifting."[62] However, no further process or schedule is described that would provide a date certain as required by the statute, or that would give the local governments a secure milestone upon which to ground their planning. Section 366(c)(8) requires the Commission to designate the "earliest possible date." By failing to set a firm date (and not one subject to modification), the Commission has exceeded its jurisdiction and failed to proceed as required by law.

> file the plan here and gives the Commission authority to request information about the plan and to register the CCA. We assume that if the Legislature intended for us to regulate the CCA's implementation plan in other ways, the Legislature would have included explicit language in the statute with regard to its intent.

D.05-12-041, at 15 (citations omitted).

60 § 366.2(c)(8) (emphasis added).

61 Resolution, Ordering Paragraph (O¶) 2, at 16 (emphasis added).

62 *Id.*, Finding 15, at 16.

V. THE RESOLUTION EXCEEDS THE COMMISSION'S STATUTORY AUTHORITY TO ADDRESS POTENTIAL COST SHIFTS BETWEEN CCA AND IOU BUNDLED CUSTOMERS IN THE CONTEXT OF CCA IMPLEMENTATION

The Commission attempts to justify its foray outside the existing implementation and RA enforcement frameworks and its failure to provide a certain "earliest possible date" for the expansions by reaching for Sections 366.2(a)(4) and 366.3.[63] Again, these sections provide limited authority for the Commission to prohibit cost shifting between CCA customers and IOU bundled customers as a result of the implementation of a CCA program. Contrary to the Commission's suggestion otherwise, the Resolution's "new and distinct type of cost shift" does not fall within the Commission's express authority. Further, the Commission failed to take the steps required by Section 366.2(c)(7) regarding cost shifts in issuing its certifications that would be required to address any alleged cost shifts.

A. The Commission's Implementation Plan Certification Did Not Address Cost Shifting or Require Further Information to Determine Cost Recovery as Required by Section 366.2(c)(7)

Section 366.2(c)(7) provides clear requirements for addressing potential cost shifts resulting from implementation of a new CCA or expansion. The statute requires the Commission to certify receipt of an implementation plan within 90 days of submission. At the time it certifies the plan, it must also certify that it has received "any additional information necessary to determine a cost-recovery mechanism." It must then use the information "to provide the community choice aggregator with its findings regarding any cost recovery that must be paid by customers of the community choice aggregator to prevent a shifting of costs." Notably, the statute specifies that the cost recovery should be "as provided for in subdivisions (d), (e), and (f)." The letters certifying the CCAs' expansions did not address potential cost shifts, however,

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[63] *Id.* at 2.

and nor did Energy Division Staff request further information from the CCAs to determine whether a cost shift occurred.

B. The Resolution's "New and Distinct" Cost Shift Policy Exceeds the Express Statutory Authority Provided to the Commission Pursuant to Subdivisions (d), (e), and (f) of Section 366.2

In addition to addressing the certification process, Section 366.2(c)(7) defines the scope of cost shifts the Commission is authorized to address in CCA implementation in subdivisions (d), (e), and (f). These costs currently are addressed in the Commission's PCIA proceeding, R.17-06-026. The Resolution, by its own admission, goes beyond these categories and adopts a "new and distinct" cost shift policy.[64]

Section 366.2 permits recovery of several categories of costs as defined in subdivisions (d), (e), and (f). Subdivisions (d) and (e) require recovery from CCA customers of the DWR costs stemming from the 2000-2001 energy crisis. Subdivision (f) requires recovery of the IOU's "past undercollections" for energy purchases and:

> …the share of the electrical corporation's estimated net unavoidable electricity purchase contract costs attributable to the customer, as determined by the commission, for the period commencing with the customer's purchases of electricity from the community choice aggregator, through the expiration of all then existing electricity purchase contracts entered into by the electrical corporation.

The statute provides no other express categories of cost recovery in the CCA implementation process.

The types of cost shift addressed by the Resolution go beyond the scope of this express authority. Indeed, unable to rest on the express text of Section 366.2(c)(8), the Commission finds it "necessary to address a new and distinct type of cost shifting that is resulting from LSEs who fail to procure their required capacity under the Resource Adequacy program."[65] The Resolution

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64 *Id.* at 10.

65 *Id.*(emphasis added).

identifies certain "reliability" costs, including "incremental excess procurement resource procurement" by the IOUs and the costs of the Emergency Load Reduction Program (ELRP).[66] These costs do not fall within the scope of subdivisions (d), (e), or (f) and, critically, the Resolution does not claim that otherwise.

In addition, unlike the categories of costs permitted to be recovered under Section 366.2, the Commission has already authorized recovery of these costs from CCA customers to the extent they are "attributable to" CCA customers.[67] CCA customers are already paying and will continue to pay these costs as an element of their distribution charge under the existing Cost Allocation Mechanism.[68]

The Resolution, for these reasons, goes beyond the statutory authority granted to the Commission under Section 366.2(d), (e), and (f).

C. Section 366.2(a)(4) Alone Does Not Provide Authority for the Commission's Action

The Commission claims authority for the Resolution under Section 366.2(a)(4), which provides that "[t]he implementation of a community choice aggregation program shall not result in a shifting of costs between the customers of the community choice aggregator and the bundled service customers of an electrical corporation." Subdivision (a)(4) relies on later subdivisions (d), (e), and (f), as discussed above, to provide the explicit mechanisms to prevent such cost

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66 *Id.* at 9.

67 *See* D.21-12-015, *Phase 2 Decision Directing Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company to Take Actions to Prepare for Potential Extreme Weather in the Summers of 2022 and 2023*, R.20-11-003 (Dec. 2, 2021) at O¶ 11 at 163-64; *see also* D.21-03-056, *Decision Directing Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company to Take Actions to Prepare for Potential Extreme Weather in the Summers of 2021 and 2022*, R.20-11-003 (Mar. 25, 2021) at COL 14 at 82.

68 *Id.*

shifting. Therefore, Section 366.2(a)(4) cannot be viewed in a vacuum as a broad grant of authority to the Commission to generally prevent cost shifting.

Fundamental rules of statutory construction require harmonization of sections within a statute. In construing the statutory authority provided to the Commission, "significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose."[69] In addition, "the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole."[70]

Harmonizing the subsections of Section 366.2, the legislative intent is clear: subdivisions (d), (e), and (f) are the methodologies provided by the Legislature to prevent the cost shifting identified in subsection (a)(4) that may result from the implementation of the CCA program. In other words, subdivision (a)(4) was not enacted in a vacuum and does not alone provide the Commission authority to prevent cost shifting outside of Section 366.2's parameters.

D. Section 366.3 Does Not Provide Authority for the Commission's Action

The Resolution also points to Section 366.3 to justify its suspension of the CCAs' implementation plans.[71] Section 366.3 provides:

> Bundled retail customers of an electrical corporation shall not experience any cost increase as a result of the implementation of a community choice aggregator program. The commission shall also ensure that departing load does not experience any cost increases as a result of an allocation of costs that were not incurred on behalf of the departing load.

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69 *Select Base Materials v. Bd. of Equalization,* 51 Cal. 2d 640, 645 (1959).

70 *Moyer v. Workmen's Comp. Appeals Bd.,* 10 Cal. 3d 222, 230-31 (1973) (citing *Select Base Material,* 51 Cal. 2d at 645).

71 Resolution at 2, 3, 10, 14, Finding 13 at 15.

The cost shift theory adopted in the Resolution is inconsistent with the express language of this provision. In fact, even if the Commission had demonstrated a cost shift as a result of RA non-compliance, which it has not, such a cost shift cannot be grounded in Section 366.3.

The statute addresses cost increases "as a result of the implementation of a community choice aggregator program." In this case, the alleged cost shift, to the extent it occurred at all, is not "as a result of implementation of a [CCA] program" but, according to the theory espoused in the Resolution, is as a result of the CCAs' noncompliance with RA requirements. Indeed, the RA noncompliance giving rise to the Commission's actions was for 2021 and 2022 – years before the implementation of the proposed expansions. Any such noncompliance could not have been as a result of the Cities of Stockton and Atascadero planned expansions.

If, instead, the Commission means to rest its action on the possibility that the CCAs will be non-compliant for the Cities of Stockton and Atascadero in future years, such a conclusion is speculative and, most importantly, has not been proven by substantial evidence.

VI. THE RESOLUTION FAILS TO PROCEED IN THE MANNER REQUIRED BY LAW BY APPLYING RA ENFORCEMENT IN A DISCRIMINATORY MANNER PROHIBITED BY SECTION 380(E)

Section 380(e) requires the Commission to apply its RA program rules even-handedly. Each LSE must be subject to the same RA program requirements. Similarly, "[t]he commission shall implement and enforce the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner."[72] The Resolution, however, results in the Commission's discriminatory enforcement of its RA program requirements. Therefore, the Commission has not proceeded in the manner required by law.

[72] § 380(e).

As explained in Section II, the Resolution is effectively an enforcement action for two CCAs' RA program deficiencies. The "cure" for the RA program failures in the Resolution is to intentionally delay a CCA's ability to expand. However, that cure by its very nature is discriminatory as it cannot neatly be applied to IOUs or ESPs.

IOU service territories do not expand, and they are required under their grant of a franchise to serve any new customer who requests service. The Commission thus could not prevent an IOU who has failed to meet its RA requirements from serving new customers. Similarly, the mechanism also cannot be applied to IOUs as central procurement entities (CPEs) for their RA procurement deficiencies – a critical point since PG&E as the CPE came up short for compliance year 2023.[73]

The mechanism is also ill-suited as a penalty for ESPs. The Commission in 2020 recommended against the expansion of the Direct Access program at that time.[74] Consequently, the scope of existing ESP customers cannot legally be expanded.

The enforcement action applied by the Resolution cannot, for these reasons, be applied evenly to all LSEs. For this reason, the Resolution violates Section 366.2(c)(8)'s requirement that the Commission apply RA enforcement "in a nondiscriminatory manner."

VII. THE RESOLUTION IS AN ABUSE OF DISCRETION, DOES NOT CONTAIN THE REQUISITE FINDINGS TO SUPPORT ITS ORDER, AND IS NOT BASED ON SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING THAT THE CCAS' RA NONCOMPLIANCE SHIFTED COSTS TO BUNDLED CUSTOMERS

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[73] Advice Letter 6706-E, Pacific Gas and Electric Company ("PG&E") Central Procurement Entity ("CPE") Annual Compliance Report 2022 Annual Compliance Report (Sept. 19, 2022) at Attachment A – PG&E CPE Aggregate Procurement Summary (2022 PG&E CPE Compliance Report): https://www.pge.com/tariffs/assets/pdf/adviceletter/ELEC_6706-E.pdf.

[74] *See generally* D.21-06-033, *Decision Recommending Against Further Direct Access Expansion*, R.19-03-009 (June 24, 2021), *reh'g denied,* D.22-12-058, *Order Denying Rehearing of Decision 21-06-033* (Dec. 19, 2022).

The Resolution summarily finds that the CCAs have shifted the costs of incremental excess procurement and ELRP resources to bundled customers.[75] Specifically, the Commission finds:

> 8. Due to Resource Adequacy program procurement deficiencies in 2022, incremental excess resources, paid for by all Load Serving Entity customers, functioned in part as backfill to make up for specific Load Serving Entity deficiencies, rather than being available to provide the full system reliability benefit that was intended, which caused a cost shift.
>
> 9. Community Choice Aggregator Resource Adequacy procurement failures in 2022 during stressed electricity system conditions required greater reliance on expensive and extraordinary measures, and thereby contributed to cost shifting onto bundled Investor-Owned Utility customers.
>
> 10. While Central Coast Community Energy and East Bay Community Energy paid fines for their Resource Adequacy program violations, the fines do not reflect the cost to other ratepayers when an entity fails to procure as required to maintain reliability, nor do the fines reimburse ratepayers for cost shifting that may be caused by an entity failing to meet its Resource Adequacy requirements.
>
> 11. Based on the history and pattern of Central Coast Community Energy and East Bay Community Energy's Resource Adequacy deficiencies, and how Resource Adequacy deficiencies can lead to cost shifting, Central Coast Community Energy and East Bay Community Energy have contributed to cost shifting onto Investor-Owned Utility bundled customers.
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> 14. Because the Commission cannot conclude that Central Coast Community Energy and East Bay Community Energy's planned expansions will not cause further cost shifting, it would be unreasonable to confirm the proposed effective dates in 2024.

The Resolution does not present findings necessary to support the Commission's action. Further, it presents no evidence to support any of these findings, skipping critical analytical steps and lacking the substantial evidence needed to sufficiently demonstrate the impact. The Resolution thus constitutes an abuse of discretion.

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75 Resolution, Findings 8, 9, 11, and 14 at 15-16.

Decisions of the Commission must be based on "substantial evidence in light of the whole record,"[76] meaning "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value."[77] Key among the steps to reach the conclusions in the Resolution are analysis demonstrating: (1) the CCAs' RA noncompliance – not market conditions, weather, or other factors – caused increased costs to the system, (2) the CCA's noncompliance caused a shift of increased costs of the incremental excess procurement and ELRP to the IOU's bundled customers, and (3) the CCAs' past noncompliance will result in their future RA noncompliance for the expanded load and, consequently, future cost shifts. The Resolution leaps over factual review and analysis directly to findings, without record development or substantial evidence.

The Resolution does not and cannot demonstrate that the CCAs caused excess incremental resource and ELRP costs, only that deficiencies could possibly have been caused by the CCAs.[78] In fact, the Resolution states that "some of the expensive measures paid for by all customers" that were utilized during the September 2022 heat wave to avoid blackouts "might have been avoided" if each deficient CCA had met its RA obligations.[79] A statement that a situation might have been avoided, however, does not rise to the level of certainty necessary to prove that a CCA caused harm, nor provide the substantial evidence necessary to prove such harm. Indeed, there is no evidence presented anywhere in the Resolution to support the conclusion that a cost shift actually has occurred.

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[76] § 1757(a)(4); *The Utility Reform Network v. Pub. Util. Comm'n*, 223 Cal. App. 4th 945, 959 (2014) (citations omitted) (applying "familiar principles to review for substantial evidence, including all relevant evidence in the record").

[77] *Los Angeles County Dept. of Children & Family Services v. Superior Court,* 222 Cal. App. 4th 149 (2013) (describing the "substantial evidence" standard under California law).

[78] Resolution at 9.

[79] *Id.*

The Commission directed the IOUs to procure the resources to remedy the inadequacy of existing resources "to maintain reliability of the grid during extreme weather events."[80] D.21-12-015 makes clear that the net costs associated with the IOU supply side procurement "shall be passed through to all benefitting customers consistent with the existing Cost Allocation Mechanism."[81] Similarly, ELRP costs are recovered through distribution rates from all customers.[82] There is no evidence in the Resolution or Decision 21-12-015 that RA deficiencies drove or even influenced this procurement or the associated costs. In addition, the Commission has not demonstrated that if higher costs were caused by the CCAs, those costs were shifted to the IOUs' bundled customers. Again, <u>all</u> customers, including CCA customers, pay their share of excess incremental procurement and ELRP.

The Commission also did not demonstrate that the CCAs' RA noncompliance for 2021-2022 demonstrates their future noncompliance. The Resolution implicitly acknowledges the lack of evidentiary support. The Commission states that it "cannot conclude at this time that the implementation of CCCE and EBCE's planned expansions will not cause further cost shifting in 2024.[83] Stated another way, the Commission cannot determine that the CCAs will comply and thereby not shift costs to bundled customers.

The Resolution further undermines its findings. It states: "[i]t is reasonable to set an earliest effective date of January 1, 2025 for Central Coast Community Energy and East Bay Community Energy's planned expansions in order to allow the Commission to take further actions <u>as warranted</u> to ensure the expansions will to ensure the expansions will not cause

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80 D.21-12-015, O¶ 2 at 160.

81 *Id.*, O¶ 11 at 163.

82 *See* PG&E Advice Letter 6805-E (Dec. 29, 2022), Tables 1 and 2, at 4-5. Demand Response Expense Balancing Account (DREBA) balance is quantified and identified as being included in distribution revenue requirements. *Id.*

83 Resolution at 2, 10, Finding 14 at 16.

impermissible cost shifting."[84] The Commission cannot determine whether its allegations are supported by facts – and its actions "warranted" – without hearing further evidence.

The Commission provided neither the specific findings necessary to support its actions nor substantial evidence to support any such findings. The Resolution thus constitutes an abuse of discretion.

VIII. THE RESOLUTION DENIES DUE PROCESS TO AFFECTED PARTIES AND FAILS TO PROCEED IN THE MANNER REQUIRED BY LAW

The Draft Resolution, to most parties, came out of the blue effecting a significant policy change on March 27, 2023. Not only did the Draft Resolution propose a significant change in RA enforcement policy, but it also proposed a "new and distinct" cost shifting policy. While the action focused solely on the CCAs, the Commission's findings and conclusions will impact all CCAs, and potentially other parties. The Commission took these significant actions without a public process, or developing a record, to develop the new policy. Despite the Commission's broad view of its own powers, it is squarely subject to the due process requirements set forth in both the United States[85] and California Constitutions.[86]

The California Supreme Court has ruled on the due process requirements in Commission actions: "due process as to the [California Public Utilities Commission's] . . . action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made."[87] The Commission itself has recognized that "an elementary and fundamental

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[84] *Id.,* Finding 15, at 16 (emphasis added).
[85] U.S. Constitution, Amendment 14.
[86] Cal. Constitution, Art. 1, § 7.
[87] *People v. Western Air Lines,* 42 Cal.2d 621, 632 (1954).

requirement of due process is notice reasonably calculated to apprise interested parties of the content and pendency of the action and afford them an opportunity to present their objections."[88]

Courts have also concluded that due process requires that a party have fair notice of a penalty available for particular conduct.[89] "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him [or her] to punishment but also of the severity of the penalty that a State may impose."[90] The lack of notice of the policies and penalties resulting from the Resolution denied due process to the CCAs and parties subject to the Resolution's precedent.

A. The Commission Adopted Broad, Significant New Policy in a Resolution Addressing the Conduct of Two Parties

The Resolution was an enforcement action with conclusions and orders directed at only two parties. Embedded in the Resolution, however, are material new rules related to RA enforcement and the prohibition of cost shifts.[91] In light of these factors, the Commission's process was inadequate, failing to provide actual notice of the potential impact of the Resolution on interested parties.

The Commission's first formal notice of the Draft Resolution to any party, including the CCAs, was its issuance on March 27, 2023. At the time, the Draft Resolution was served on the CCAs along with numerous parties from various Commission service lists, including R.17-06-

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[88] D.21-11-035, *Order Denying Rehearing of Resolution E-5150,* Application of California Solar & Storage Association, Solar Energy Industries Association and Vote Solar for Rehearing of Resolution E-5150, A.21-07-013 (Nov. 18, 2021), at 3 (emphasis added).

[89] *See, e.g., De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates,* 94 Cal.App.4th 890, 912 (2001).

[90] *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 574.

[91] *See supra,* Sections IV. and V.

026 and R.21-10-002. No proceeding or process preceded the resolution, and the Commission's process left only 20 days for comments on the draft, with five days for reply comments.[92]

The Commission's process fails to provide affected parties adequate notice and time to be heard. Due process requires, "at a minimum . . . notice and opportunity for hearing appropriate to the nature of the case."[93] In addition, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[94]

Serving an enforcement resolution directed at the CCAs was not sufficient to give other parties notice of the potential impacts of the new rules on those parties' interests; some parties may not have given the Draft Resolution a second thought, believing it was an action to enforce existing rules on specific parties rather than to make new rules. In addition, the Commission's process failed to provide "a reasonable time" to engage in a public process, limiting their participation to comments on the Draft Resolution. Given the impactful nature of the new rules created through the Resolution, notice and opportunity "appropriate to the nature of the case" requires a far more robust process than what the Resolution process provided.

For example, the Commission has previously defined cost-shifting and adopted regulations in formal proceedings with notice to all parties and an opportunity to be heard. The PCIA, which is the most significant measure to avoid cost-shifting, was adopted after nearly <u>two years</u> of rulemaking.[95] Each time the Commission modifies the PCIA methodology, it provides notice and an opportunity to be heard, with extensive opportunity to address the content of the action,

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[92] Commission Rules, Rule 14.5.

[93] *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 652, 656-57 (1950).

[94] *Id.* at 657 (citations omitted).

[95] *See generally*, D.18-10-019.

affording all parties opportunities to present their objections.[96] Establishing the Resolution's "new and distinct" cost shift should have been no different. Had the Commission intended to develop this impactful new rule, it should have conducted the assessment in R.17-06-026, starting with an Administrative Law Judge's ruling establishing a process for considering a new charge.

In addition, the establishment of a new RA enforcement mechanism should occur in the existing RA rulemaking, which as discussed above is actually considering through its formal processes the exact RA enforcement mechanism that the Commission imposed in the Resolution.[97]

Addressing these issues in the appropriate proceedings would have given parties both the opportunity and reasonable time to develop facts and recommendations to inform this important policy shift. By initiating a process with a Draft Resolution, applicable to only two parties, the Commission denied parties their due process rights afforded under ratemaking proceedings.

B. The Resolution Unlawfully Enforces a Regulation Pending in a Current Proceeding

There is no Commission decision that authorizes suspending a CCA implementation plan as a penalty for RA noncompliance or determination of cost shifts, an absence that is unsurprising since no statute authorizes such a step. Instead, and as previously discussed, this new rule is pending as an Energy Division Staff proposal in the RA rulemaking, R.21-10-002.[98]

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[96] *See, e.g.,* D.21-05-030, *Phase 2 Decision on Power Charge Indifference Adjustment Cap and Portfolio Optimization,* R.17-06-026 (May 24, 2021) (issuing a Decision on portfolio optimization after a working group process, reports, comments, and rulings); *see also* D.20-08-004, *Decision Adopting a Framework and Evaluation Criteria for the Power Charge Indifference Adjustment Prepayment Agreements,* R.17-06-026 (Aug. 12, 2020); D.20-03-019, *Decision Considering Working Group Proposals on Departing Load Forecast and Presentation of Power Charge Indifference Adjustment Rate on Bills and Tariffs,* R.17-06-026 (Apr. 6, 2020); D.19-10-001, *Decision Refining the Method to Develop and True up Market Price Benchmarks,* R.17-06-026 (Oct. 17, 2019).

[97] *See supra,* n.26.

[98] *Id.*

The Commission regularly denies party requests for relief regarding issues being addressed in a pending proceeding, citing the need for due process in the existing proceeding.[99] California courts have also refused to compel party compliance with requirements being contemplated for adoption in the future.[100] By enforcing a policy pending in an existing rulemaking, the Commission has denied the due process rights of the CCAs to adequately address the pending policy in the existing formal rulemaking, including any rights to judicial review of the decisions made therein.

C. The Commission Failed to Follow Its Own Rules and Procedures for Enforcement Thereby Denying Parties Due Process

The Commission's Rules and its own detailed enforcement policy, Resolution M-4846 (Enforcement Policy), underscore the problem with the lack of process underlying the Draft Resolution. First, Commission Rule 14.2(d)(1)-(5) prescribes the method of service of a draft resolution. In each of the directives, the Rule presumes a prior action, whether an "advice letter," "request for disclosure of documents," "requests for motor carrier operating authority," or comments "solicited by Commission staff…for purposes of preparing the draft resolution." None of these prior actions preceded the Draft Resolution.

Resolution M-4846 establishes enforcement guidelines and authorizes Commission staff to pursue particular forms of enforcement mechanisms beyond the applicable citation and

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[99] *See, e.g.,* D.03-02-035, *Order Modifying Decision 02-07-032, for Purposes of Clarification, and Denying Rehearing, as Modified,* Application of Pacific Gas and Electric Company for Verification, Consolidation, and Approval of Costs and Revenues in the Transition Revenue Account, A.98-07-003 (Feb. 13, 2003) ("[b]ecause these issues are currently being considered in this pending proceeding, we need not and do not address these rehearing issues in today's order").

[100] *See Gabric v. City of Rancho Palos Verdes,* 73 Cal. App. 3d 183, 202 (1977) (reversing a City decision that a homeowner must comply with a new rule enacted after a permit to build a house was submitted when "the record is clear that the City denied the permit in an effort to prevent Gabric building under the existing ordinance and to compel compliance with an ordinance not yet then in effect but which the City contemplated enacting in the future").

penalty programs. [101] Because suspension of the CCAs' expansions is not currently a part of the RA citation and penalty program, the Resolution can only be viewed as an alternative form of enforcement. The Commission's issuance of Resolution E-5258, however, conforms to none of the alternatives for enforcement described in Resolution M-4648 and thus violates its own Enforcement Policy.

One of the mechanisms that may be initiated by Staff in an Administrative Enforcement Order serves as "an alternative to a citation and could be issued if a case does not necessitate an [Order Instituting Investigation] OII."[102] Importantly, the Enforcement Policy addresses "due process requirements for the implementation of the Policy" including specific requirements for an Administrative Enforcement Order.[103] Resolution E-5258 could be viewed as an attempted exercise of Staff's authority to propose an Administrative Enforcement Order. Of the alternatives, an Administrative Enforcement Order comes closest to the process used to suspend the CCAs' implementation plans. The process for an Administrative Enforcement Order involves a Resolution initiated by staff and a Commission vote on the Resolution[104] – the same process leading up to the issuance of Resolution E-5258.

While Resolution E-5258 resembles an Administrative Enforcement Action, if this is what Staff intended, it failed to follow the due process requirements of this mechanism. Staff are required to deliver a proposed Administrative Enforcement Order to the regulated entity with proof of service. It must also include nine specific categories of information.[105] Key among the

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[101] As is the case with respect to the RA Program, CalCCA expresses no view with respect to the statutory support for Resolution M-4846.

[102] *Id.* at 3, 11.

[103] *See id.*, Attachment, *California Public Utilities Commission Enforcement Policy* (Enforcement Policy) at 12-13.

[104] *Ibid.*

[105] *Id.*, Attachment, at 12.

requirements is "[i]nformation about how to request a hearing on the proposed Administrative Enforcement Order."[106] In this case, Staff did not provide verified delivery of any document designated as an "Administrative Enforcement Order" and most certainly did not give the CCAs notice of their right to request a hearing. This right is critical, particularly in light of the lack of evidentiary support for the Resolution's findings, as discussed in more detail below.[107]

Another potential authorized enforcement mechanism that Staff might have used, which is one lying on a considerably firmer statutory base, is the OII. The Commission explained the purpose of an OII in Resolution M-4846:

> 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.

The Resolution was undertaken precisely because the situation the Commission's staff identified is "not currently covered by an existing citation program." Under the circumstances, Staff could have sought an OII where, again, the CCAs and other interested parties would have had an opportunity to respond to the staff's allegations. However, Staff did not seek an OII.

While the Enforcement Policy also allows the Commission to "suspend … the certification of a regulated entity,"[108] any such suspension must be "consistent with existing Commission decisions and orders" and "permitted by the Public Utilities Act."[109] As noted above, there is no Commission decision that authorizes suspending a CCA certification; again, this fact is evidenced by the Staff's proposal in R.21-10-002 to adopt this mechanism.[110] Neither

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106 *Ibid.*
107 *See supra,* Section VII.
108 Resolution M-4846 at 12.
109 *Ibid.*
110 *See supra,* Section II.D.

is the Commission authorized by statute to take such an action; indeed, the Commission has acknowledged its limited role in implementation plans.[111] Moreover, application of this mechanism does not square with the facts; Energy Division Staff actually issued letters certifying the expansions on March 8, 2023 – 19 days prior to the issuance of the Resolution. This leaves little possibility that Staff intended to exercise this enforcement alternative.

The suspension of the CCAs' implementation plans can only be viewed as a means of enforcing RA requirements that is not embraced in an existing citation program nor, more importantly, been authorized by the Legislature. The process used to deny service to the Cities of Stockton and Atascadero conforms to none of the authorized mechanisms. Accordingly, the issuance of Resolution E-5258 violates the Commission's own Enforcement Policy, thereby failing to proceed in the manner required by law.[112]

D. The Commission's Retroactive Application of a New Regulation to the CCAs' Already Submitted Implementation Plans is Unlawful and Contravenes Due Process

Even if the Commission's new cost-shift and RA enforcement policies are deemed lawful – which they are not – the Commission proceeds in a manner not in accordance with law and contravenes due process by retroactively applying these new regulations to the CCAs' Implementation Plans. When the Implementation Plans were submitted, the CCAs had no notice that the Commission planned to issue a new policy/regulation and retroactively apply it. Courts have found that such retroactive application is unlawful,[113] and the Commission should not be permitted to deny the CCAs' due process rights in this manner.

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111 *See supra,* Section IV.A.

112 *Calaveras Tel. Co. v. Pub. Util. Comm'm,* 5 Cal. App. 5th 972 (2019); *Southern California Edison v. California Pub. Util. Comm'm,* 140 Cal. App. 4th 1085 (2019).

113 *McKeon v. Hastings College* 185 Cal. App. 3d 877, 887 (1986) ("[t]he general rule that statutes will not be given retroactive operation has been followed from the earliest days of California's statehood

E. The Resolution Imposes a Double Penalty on the CCAs Contrary to Due Process

As set forth above, the CCAs have already been subject to, and paid, significant penalties under the RA program for their deficiencies. The imposition of previously unknown penalties on top of the RA penalties not only deprives parties with notice of potential penalties associated with failure to the regulatory process, but imposes a double penalty that is contrary to principles of due process and fundamental fairness.[114]

IX. CONCLUSION

For the foregoing reasons, the Commission should grant rehearing to correct each of the legal errors specified in this Application for Rehearing of Resolution E-5258.

Respectfully submitted,

Evelyn Kahl,
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to the present.… It being the rule that administrative regulations are subject to the same treatment as statutes, a comparable disinclination to apply regulations retroactively has also evolved.”).

[114] *See Troensegaard v. Silvercrest Indus.,* 175 Cal. App. 3d 218, 227 (1985) (citing *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.,* 526 F. Supp. 887, 899 (1981) (vacated on other grounds, *In re N. Dist. Of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982)) (double penalties “violate that sense of ‘fundamental fairness’ which lies at the heart of constitutional due process).