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COMMENTS OF THE UTILITY REFORM NETWORK REGARDING PROPOSED PILOT PROGRAM ON EX PARTE COMMUNICATIONS

Introduction and Summary of TURN's Views

The Utility Reform Network (“TURN”) submits these comments in response to the proposed Pilot Program on Ex Parte Communications (“Proposed Pilot” or “Pilot”) that was unveiled at the August 12, 2015 meeting of the Commissioner Committee on Policy and Governance. As discussed below, TURN believes the Proposed Pilot is ill-conceived both at the big picture level and in its details. From the big picture perspective, a pilot to test whether banning private communications is a good idea fails to recognize the screaming headline of the Strumwasser Report that, after 15 years of experience with the current rules, private communications are fundamentally unfair. Moreover, the Pilot will not provide objectively measureable results to meet the stated objectives and thus will not provide factual information to help resolve any debates. From the detail perspective, many of the specifics of the Pilot are seriously flawed and will lead to undesirable outcomes.

At this time, rather than pursue the unsatisfactory and temporary Proposed Pilot, the Commission should support meaningful and comprehensive reform by promptly endorsing Senate Bill (SB) 660 (Leno and Hueso) and championing its enactment into law.

The Time for Study Has Passed: As the Strumwasser Report Recognizes, Private Communications Are Corrosive to Fair Decision-Making and Need to Stop

The Proposed Pilot is styled as an experiment designed to test whether a prohibition on ex parte communications in ratesetting cases would allow the Commissioners to obtain the information they desire. In light of the considered and uncontroversial findings of the Strumwasser Report, this is the wrong approach. The Commission has had 15 years of experience with ex parte communications in both ratesetting and quasi-legislative proceedings. The clear lesson from this experience is that private communications are “fundamentally unfair to the parties” and “fundamentally undermine record-based decision-making.”¹ These are devastating findings that should be a wake-up call for the Commission. The time for studies and experiments about whether private communications should continue has passed – the secrecy must stop.

Ending private communications does not mean the Commission should not try other ways of gathering information to inform decision-making. As discussed at the August 12, 2015 meeting, Commissioner Sandoval is using new methods of building a record that involve, among other things, combining on-site workshops and public hearings. TURN fully encourages this kind of innovation, as long as the new methods do not involve private, back-room communications. And TURN continues to support informal all-party meetings as a way for commissioners to obtain information in a format of their design and preference.

However, the Commission now has all the information it needs to know that real reform that puts a halt to private communications is necessary -- without delay. The best thing the

¹ Strumwasser and Palmer, *Report to the California Public Utilities Commission Regarding Ex Parte Communications and Related Practices* (“Strumwasser Report”), June 22, 2015, p. 4.

Commission could do to address the findings in the Strumwasser report and to begin to restore confidence in the Commission's decision-making process is to endorse SB 660 and advocate for its passage by the Legislature and signature by the Governor.

The Proposed Pilot Will Not Achieve Its Stated Objectives Because It Will Not Produce Measurable or Objective Results

The outline of the Proposed Pilot takes pains to explain that, as is usually the purpose of pilots, the goal would be to gather information for a period of time and then to assess that information to help inform future decisions about ex parte reform. On the surface, this may sound like a good approach, but just a little probing shows that the effort would not produce particularly useful results. Section VII of the outline, called "Assessment," claims that assessment should be made "using quantitative and qualitative measures." Again, this sounds promising, but the assessment questions listed in Section VII show that there are no objective criteria – quantitative or qualitative – that can be used to assess the success of the pilot. All of the listed questions boil down to the subjective opinions of the commissioners and other stakeholders. For example, question #1 asks commissioners to opine on whether they are receiving the information "they believe they need." Similarly, question #2 asks "smaller" parties (whoever they are) to state whether they "believe they have had adequate opportunity" to be heard. Opinions regarding these and the other listed questions may be somewhat interesting, but they will not provide the kind of measurable or objective information that the Commission correctly expects from a pilot.² The Pilot thus has little chance of providing factual information

² TURN's point is not that the outline lists the wrong questions, but rather that there are no such questions, i.e., no objective criteria, that could be developed to meaningfully assess the success of the Pilot.

to inform the longstanding debate on ex parte communications and thus will not serve its stated purpose.

Given the entirely subjective nature of the assessment criteria, the efforts to introduce scientific rigor to the Proposed Pilot amount to lipstick on a pig. Ensuring the pool of cases is crafted to avoid “contamination of the study” or is “rigorously random to preserve the validity of the findings”³ ignores the reality that, because the import of the information gained will be based on the eye of the beholder, the “findings” will not be rigorous or statistically valid in any sense.

The Design of the Pilot Would Encourage Gaming By the Utilities

Having addressed the fundamental problems with the Proposed Pilot, in this and following sections, TURN will point out some of the more significant problems with the details of the Pilot.

Under the Pilot, the prohibition on ex parte communications in ratesetting cases would not apply until after the issuance of the proposed decision (“PD”). In other words, ex parte communications would be permitted as allowed under the current rules up to the date of the PD’s issuance. The apparent reason for this provision is that, now, most ex parte communications take place after the PD is issued. However, the Proposed Pilot fails to take into account how current behavior would change under the different rules of the Pilot.

The obvious main change in behavior would be that utilities and others that feel they benefit from private communications would seek private meetings as close to the issuance of the PD as possible. TURN can predict with some confidence that, under the Pilot as proposed, the

³ Proposed Pilot, Sections IV.A.2.b) and IV.A.3.

utilities would devote considerable time and effort to finding out (from staff not covered by ex parte rules) when the PD will be issued and what it will say. With their resource advantages and carefully cultivated contacts with Commission staff, TURN expects these efforts will be successful in many cases.⁴ In this respect, the Proposed Pilot could result in tilting the currently unfair playing field even further in favor of the utilities. Indeed, it is not hard to envision a scenario under which the utility secures supposedly equal time meetings with commissioners before the PD, but the other parties are not able to get their meetings scheduled until after the PD, when the ex parte door is closed.

Moreover, the effort to exclude from the Pilot pending ratesetting cases with more than 5 ex parte communications in the prior 12 months⁵ seems at odds with allowing potentially numerous ex parte communications in Pilot proceedings prior to the issuance of the PD. If the idea is that the cases with multiple ex parte communications would somehow “contaminate” the study, then one would expect the same to be true of cases in which ex parte communications occurred before the PD.

As indicated above, although TURN believes the Pilot is based on a faulty foundation, if anything like the Pilot were to be implemented, the prohibition on ex parte communications should apply throughout the entirety of the case. Moreover, TURN sees no good reason why the prohibition should not apply to all pending and future ratesetting cases, regardless of how many ex parte communications may have occurred in a case in the past. As discussed in the previous section, the hope that the Pilot would produce methodologically rigorous findings is an illusion.

⁴ TURN and other intervenors would of course have a similar incentive, but we lack the utilities’ resources and time to cultivate contacts with CPUC staff.

⁵ Proposed Pilot, Section IV.A.1.a).

En Banc Hearings Should Not Be Allowed to Be a Vehicle to Augment the Record After the Record of the Case Has Closed

The Pilot proposes that “on-the-record” en banc hearings be held in lieu of ex parte meetings.⁶ TURN believes that this feature of the Pilot would lead to undesirable outcomes for both the Commission and parties, by effectively transforming the en banc hearings into formal oral argument.

By virtue of being on the record, any statement made in the en banc (unless later stricken by Commission order) would become part of the record for purposes of the Commission’s decision and judicial review.⁷ In addition, it is important to recognize that these en banc hearings would take place after the issuance of the PD and thus after the case has been submitted for decision and the evidentiary record has closed under CPUC Rule 13.14. TURN is deeply concerned that parties would use the en banc hearing as a means to augment the record at the last minute by introducing evidence that would not be subject to discovery and cross examination. To illustrate the concern, it takes little imagination to envision a non-attorney utility CEO stating for the first time in the record the claim that a credit ratings agency has told company personnel that, if TURN’s proposal were adopted, the utility’s credit rating would be reduced. If such a claim were made in the utility’s testimony and were available for discovery and cross examination, there would be no problem. But making such a factual assertion -- that could be important to one or more decisionmakers – at the en banc would leave no opportunity for TURN to challenge it. TURN’s only recourse would be to interrupt the utility officer in the middle of

⁶ Section III.D.

⁷ Indeed, the transcripts of the en banc hearings could become particularly important to reviewing courts that are accustomed to using oral argument as a key decisionmaking tool.

her statement and make an oral motion to strike it from the record, which would of course engender responsive arguments from the utility and perhaps other parties.

The upshot is that on-the-record en banc hearings held after the close of the evidentiary record would effectively devolve into attorney-dominated oral arguments in which the parties and Commission would need to police the parties' statements for improper extra-record factual assertions. Because attorneys are trained to recognize the sometimes murky distinction between facts and argument and also would be responsible for knowing which facts are in the record of the case and which are not, TURN expects that most if not all parties would have the attorneys in the case make the en banc presentations. TURN doubts that Commissioners would find attorney-driven oral arguments – complete with back and forth motions to strike and other disputes about extra-record information -- to be an ideal way of getting the information they feel they need.

The way to avoid these problems is to hear from the parties in off-the record all party meetings, as are now commonly used by some commissioners. Because such meetings are off-the-record, parties need not be concerned about making motions to strike or other legal recourse when speakers rely on asserted facts that are not in the record. They can simply point out at the appropriate time that, for example, the utility CEO's claim about potential actions by credit agencies, is not on the record and not a fact on which the decision could be based.⁸ Thus, off-the-record all party meetings allow commissioners to hear from the parties in a more informal,

⁸ TURN hastens to note that offering new facts at all-party meetings would be, at best, a dubious practice, and potentially a violation of Rule 1.1 as an effort to mislead the Commission about what a decision could properly be based upon.

less legalistic way. Moreover, such off-the-record meetings can be shaped and focused by the convening commissioner(s) to address their particular questions and concerns.

En Banc Oral Arguments In All Non-Consent Ratesetting Cases Would Not Be a Good Use of the Commission's and Parties' Time

The Pilot would require en banc oral arguments in all non-consent ratesetting cases, unless all parties and commissioners waive the hearing. TURN does not believe holding en banc oral arguments in all or most non-consent ratesetting cases would be a good use of the Commission's and parties' time. As indicated above, oral arguments may not provide the commissioners the content they desire in a format they like. TURN notes that the Commission can now convene an en banc oral argument whenever it wants,⁹ and rarely does so, instead usually choosing off-the-record all party meetings as the preferred vehicle for hearing from all the parties at one time. Similarly, parties now have a right to request oral argument in all ratesetting cases with hearings,¹⁰ and rarely take advantage of this right. TURN suspects this is because preparing for oral arguments is time-consuming, and most parties believe oral arguments are not worth the time and expense, particularly since the Commission does not seem to find them desirable or useful.

Given this history, if the Pilot were to be implemented as now outlined, TURN expects that, at its conclusion, Commissioners would find that the en banc hearings were not a good way of receiving information from the parties, and the parties would also opine that oral arguments were not particularly valuable from their perspective. Such an outcome could be incorrectly interpreted as showing that private communications are the best way to hear from the parties

⁹ CPUC Rule 13.13(a).

¹⁰ CPUC Rule 13.13(b).

when, in reality, all that would have been demonstrated is that no one likes en banc oral arguments.

Temporary Half-Way Measures Are Not Real Reform

The foregoing has shown that the Proposed Pilot cannot be justified as a productive way to test the stated objectives. Nor can it be justified as meaningful reform because it is unduly restrictive both in scope and time.

The Pilot states that it would be limited to only a subset of ratesetting cases. As explained above, these restrictions do not cure any of the serious methodological defects with the Pilot, and probably make them worse. In any event, each ratesetting case that would be excluded from the Pilot would be another case in which the current unfair rules would be allowed to persist. In addition, the Pilot does not address at all the current problem that private communications in quasi-legislative cases now occur without any restriction and even without any reporting that such private communications have occurred. As a result, there is now no data on how pervasive such communications are. Furthermore, the changes in the Pilot could disappear whenever the Commission deemed the Pilot to be concluded.

Short of endorsing SB 660, as urged above, if the Commission wants to begin to move down the path toward real reform, the Commission should change its Rules of Practice and Procedure with respect to ratesetting cases to stop taking any private meetings at any time, and to instead allow the following non-private means for decisionmakers to hear from parties informally:

- Allow all party meetings

- Allow written communications simultaneously served on all parties
- As is the case today, neither of these informal vehicles should be part of the record on which a decision can be based.

In addition, the Commission should amend its Rules to require reporting by decisionmakers of all contacts with decisionmakers in quasi-legislative cases.

While such changes would not be comprehensive reform, they would be a step in the right direction.

While Welcome, This Comment Opportunity Does Not Afford a Sufficient Opportunity to Be Heard Prior to Changing the Commission's Rules of Practice and Procedure

TURN doubts the Commission intends to move ahead with the Proposed Pilot without providing other and more formal opportunities for comment, but just in case, TURN notes the following. As the proposal states, the Pilot would require changing the commission's procedures. (Section III.D). As the Commission knows, before changing its Rules of Practice and Procedure, the Commission needs to provide notice to all potentially interested parties and an opportunity to comment. Here, meeting this requirement would not be just a formality. Not all persons or parties who may be affected by the proposed changes may be aware of this relatively new Commission committee and the Proposed Pilot that first surfaced only 9 days ago. There needs to be broader notice, including to all persons who have asked to be notified of any proposals to change the Commission's Rules.

Finally, all comments submitted today should be posted on the Commission's website.

Conclusion

While these comments are highly critical of the Proposed Pilot, they are intended to be constructive. TURN hopes they will be received in that spirit.

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Respectfully submitted,

By: _____/s/_____
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