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Comments of The Utility Reform Network on Draft Resolution ALJ-381

Introduction and Summary

Pursuant to the June 1, 2020 email of Administrative Law Judge (ALJ) Sophia Park, The Utility Reform Network (TURN) submits these comments on Draft Resolution ALJ-381, which proposes amendments to the Commission's Rules of Practice and Procedure (Rules).

For the most part, the proposed amendments will improve the Commission's Rules and facilitate more meaningful participation by a diversity of persons and organizations in CPUC proceedings. However, TURN has serious concerns with two of the proposals.

First, TURN strongly opposes new proposed Rule 13.9 which would impose on the parties a mandatory meet and confer requirement within 10 days of the submission of rebuttal testimony. As discussed in more detail below, this new Rule would impose an unfair burden on parties with less resources than the utilities and other relatively well-resourced parties. In almost all proceedings initiated by application, it is the utilities that submit rebuttal testimony. The non-utility parties already face significant challenges to simultaneously analyze the rebuttal testimony and prepare for evidentiary hearings, which are often scheduled two weeks or less after the rebuttal testimony is served. Most non-utility parties simply do not have the resources to both engage in a meet and confer process of the rigor described in Rule 13.9 and meaningfully prepare for evidentiary hearings. Accordingly, TURN recommends that, if such a Rule is adopted, it should be made discretionary and not a default requirement. Alternatively, at least two weeks should be added to the schedule between any mandated meet and confer and the start of evidentiary hearings, meaning that in a case that would ordinary allow two weeks between rebuttal and the start of hearings, that period would be extended to at least four weeks.

TURN also recommends modifications to new Rule 2.9, which allows parties submitting Applications, again almost always utilities and other regulated entities, to request that the proceeding be expedited to require the proposed decision be issued within 12 months. As drafted, the Rule would allow the assigned Commissioner to decide the request before allowing persons who may wish to oppose an expedited schedule to have any formal opportunity to be heard. It is antithetical to basic principles of fairness and due process to make such an important decision, which could determine whether non-utility parties have sufficient time to conduct

discovery and prepare their case, without hearing from those parties. Below, TURN recommends changes to address this serious shortcoming, as well as another problem, in proposed Rule 2.9.

Finally, TURN recommends a change to amended Rule 8.2 to harmonize existing language with the new language in Rule 8.2(c)(4).

Proposed New Rule 13.9 Would Impose Unfair and Disproportionate Burdens on Parties that Lack the Resources of the Utilities and Other Well-Heeled Parties[1]

TURN strongly opposes proposed Rule 13.9. This Rule would make a rigorous meet and confer process mandatory, as a matter of default, and require that this process be conducted *within 10 days of the service of rebuttal testimony.* TURN cannot emphasize strongly enough how disproportionately burdensome this Rule would be on non-utility parties, particularly those who lack the resources of the utilities -- which is most parties.

Most evidentiary hearings take place in application proceedings initiated by utilities, which have the burden of proof and therefore the privilege of submitting rebuttal testimony. Based on TURN's experience, general rate cases (GRCs) are good examples of application proceedings for which evidentiary hearings are the norm. As the Commission well knows, GRCs are huge and complex cases addressing scores of issues. Rebuttal testimony is often the first time that non-utility parties learn the nature and details of the utilities' response to their testimony. In addition, utilities often present significant new information in support of their request, and all too frequently, include information that should have been presented in their case-in-chief.

As a result, for the non-utility parties, the usually short period (often two weeks or less) between the service of rebuttal testimony and the start of evidentiary hearings, is by far the busiest and most demanding time of the case. In this short window of time, the non-utility parties must: review and analyze often extensive rebuttal testimony; issue discovery on the rebuttal testimony and address any attendant discovery disputes, including drafting any necessary motions to compel; prepare any necessary motions to strike rebuttal testimony or seek the opportunity to submit sur-rebuttal testimony; prepare cross-examination, which in TURN's experience usually focuses on the rebuttal testimony, and is extremely time-consuming; negotiate with the utility regarding stipulations to admit testimony or exhibits without cross-examination;

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[1] TURN notes that it raised concerns with the substance of proposed Rule 13.9 at the December 6, 2019 Policy and Governance (P&G) Committee meeting. Because of time and resource limitations, TURN did not reiterate those concerns in its April 29, 2020 written comments after the April 22, 2020 P&G meeting, No inference should be made that TURN's silence on this Rule in the informal P&G process in April 2020 somehow indicated that TURN had changed its view regarding proposed Rule 13.9. Consistent with the assurances of the P&G Committee, TURN chose to reserve its detailed comments on this proposed Rule to this formal comment opportunity.

and join with the utility in preparing a proposed schedule for the appearance of witnesses for cross-examination. The Commission does not see much of this activity, but needs to know that it is a very challenging time for the non-utility parties, particularly parties such as TURN that often address many or most issues in a case.

Proposed Rule 13.9 would, as a matter of course, add many new and time-consuming responsibilities as part of a mandatory meet and confer process. In particular, in complex cases – which is most of the cases TURN participates in -- items (2), (3), and (4) of proposed Rule 13.9(a) would require significant time in order to be done competently. TURN's experience is that the parties often require multiple days, if not weeks, to agree on the phrasing of stipulated or disputed facts or issues. Parties on all sides do not want to disadvantage their position by insufficient consideration and attention to the details of such matters. The upshot is that the mandated meet and confer process would be all-consuming and would not allow time for most of the work described in the previous paragraph.

For these reasons, proposed Rule 13.9 would disproportionately and unfairly affect TURN, the Public Advocates Office and other intervenors who participate in rate cases and other large and complex cases initiated by application. The impact could be even more adverse for newer or less experienced parties, particularly those not represented by experienced (or any) counsel, who would find it challenging enough to try to prepare for evidentiary hearings. Thus, this Rule is at odds with this Commission's commendable efforts to try to be more inclusive in both its formal and informal proceedings. Newer parties often seek the advice of TURN's attorneys on navigating CPUC procedure, which TURN is happy to provide as it is able. But the Commission should not expect TURN to be able to assist such parties when it would already be overtaxed by the overwhelming demands of preparing for evidentiary hearings and competently complying with Rule 13.9.

TURN's objection is not to the notion of adding a meet and confer process like the one described in Rule 13.9 <u>in an appropriate case where the Commission and parties believe the time would be well spent</u>. And, it is true that after the service of rebuttal testimony is often the first time parties have an opportunity to meaningfully assess the facts and issues that are in agreement and dispute. However, for the reasons discussed above, it is not reasonable to expect that non-utility parties can participate in a meet and confer process at the same time they are preparing for evidentiary hearings. For this reason, TURN's experience is that, when parties engage in meaningful settlement talks after the submission of rebuttal testimony, they often request a postponement of the evidentiary hearings precisely because holding such meetings to assess opportunities for stipulations and settlement cannot coincide with preparation for evidentiary hearings.

TURN's preferred approach would be for the Commission to either remove proposed Rule 13.9 from ALJ-381 or to rewrite the Rule to make it suggestive and discretionary, rather than a default requirement. The Commission already has the discretion to incorporate such a process into its schedule in appropriate cases, so that a new rule is not necessary. However, if

the Commission is intent on adding a rule that addresses this concept in some fashion, TURN would suggest modifying proposed Rule 13.9 along the following lines, to make clear that, if such a meet and confer process is to be required in an appropriate case, the scheduling of the case will take into account the additional demands such a process imposes on the parties' time and resources:

13.9. (Rule 13.9) Duty to Meet and Confer.

(a) ~~Unless~~ The assigned Commissioner or assigned Administrative Law Judge may direct that, ~~orders otherwise, no later than 10 calendar days~~ after the submission of rebuttal testimony, the parties must meet and confer, in person or via remote participation. Any such order, including the scheduled date by which the meet and confer discussion must take place and the date for the start of evidentiary hearings, shall take into account the need of parties to prepare for evidentiary hearings through such efforts as analyzing and conducting discovery on the rebuttal testimony, preparing cross-examination, and preparing their witnesses to be cross examined. At the direction of the assigned Commissioner or assigned Administrative Law Judge, the meet and confer discussion may ~~to~~ consider matters such as the following:

(1) Identifying and, if possible, informally resolving any anticipated motions;

(2) Identifying the facts and issues in the case that are uncontested and may be the subject of stipulation;

(3) Identifying the facts and issues in the case that are in dispute;

(4) Determining whether the contested issues in the case can be narrowed; and

(5) Determining whether settlement is possible.

(b) Notice of the date, time, and place shall be served on all parties in advance of the meet and confer, unless all parties stipulate to waive the need for service. Parties shall notice the service list after the meet and confer has been held.

Alternatively, if the Commission is intent on a default meet and confer requirement, Rule 13.9 should be revised to require that at least two weeks be added to the schedule to accommodate the process described in the rule. This means that, if absent the meet and confer process, the schedule would allow two weeks between service of rebuttal testimony and the start of evidentiary hearings, this period would be extended to four weeks to accommodate the parties' new meet and confer responsibilities.

Proposed Rule 2.9 Should Be Modified to Provide a Meaningful Opportunity to Be Heard for Parties Opposing an Expedited Case Schedule

Proposed new Rule 2.9 would allow the Assigned Commissioner to grant a request for expedited schedule included in an application "in exceptional circumstances" that meet the requirements of proposed Rule 2.9(c). If the Assigned Commissioner so determines, the prehearing conference must be held no later than 30 days (instead of 45 to 60 days in most cases) of the date of preliminary categorization and the proposed decision must be issued within one year of the filing of the application, unless such date is later extended by the Assigned Commissioner.

As noted above, applications are almost always submitted by utilities or other regulated entities, who are usually in possession of most, if not all, of the information that is needed to address the requested relief. TURN is concerned that, in a complex case in which the non-utility parties require significant information from the applicant to analyze and respond to the request, the applicant could use this proposed Rule to support an effort to withhold information they would prefer not to share and "run out the clock" on parties who need such information. It is not uncommon in application proceedings for intervenors to successfully point out that the utility has not been sufficiently forthcoming in their initial showing and that significant additional information is needed.

While TURN does not necessarily oppose proposed Rule 2.9 and appreciates the modification to Rule 2.9(d) to make explicit that such requests may only be granted in exceptional circumstances, TURN seeks two changes to the proposed Rule.

First, and most important, the Rule should provide a formal opportunity for any person to submit an opposition to a request for expedited schedule, before the Assigned Commissioner makes a decision on the request. The current language affords no such opportunity, and instead provides a potential (not even assured) opportunity at the prehearing conference, after the decision has already been made, for parties to offer their comments regarding "the designation of the proceeding as expedited." Allowing parties to complain about a decision that has already been made is not a meaningful opportunity to be heard, compared to comments that are received and reviewed before a decision is reached. Draft ALJ-381 provides no reason why the Commission would wish to make such a potentially important decision without first hearing from all interested persons, not just the party filing the application.

Significant care should be taken to ensure that the decision to require an expedited schedule is made thoughtfully and based on the best possible information. Interested persons are likely to have important information and views that should be considered in deciding whether the circumstances justify an expedited schedule. For instance, one of the standards in Rule 2.9(c) is whether the requested relief concerns a "major direct financial impact to customers." In TURN's experience, utilities often make unfounded claims that impacts that may only affect their bottom line – such as costs to remedy their mistakes and imprudence -- have a financial impact on

customers. In such an instance, the Commission should hear countervailing views from customer representatives before deciding the utility's request.

Accordingly, in the proposed amendments below, TURN recommends that any person should be allowed to respond to a request for an expedited schedule, within 7 days of notice in the daily calendar.[2] This is expeditious and challenging timing, particularly for a pleading at the outset of a proceeding, but is better than no pre-decision opportunity at all. Allowing such responses will enable the Commission to make a better-informed decision on the request.

Second, TURN views the language in Rule 2.9(d) that such requests shall be granted "at the sole discretion" of the Assigned Commissioner as potentially in conflict with the explicit and detailed requirements in subsections (c) and (d) that must be met. The "sole discretion" language suggests that the Assigned Commissioner has unbridled discretion to grant the request, whether or not the standards in subsections (c) and (d) are satisfied, which TURN believes is not the Commission's intent. If the purpose is to indicate that this decision is reserved to the Assigned Commissioner, the Rule can so state without using the word "discretion." TURN's recommended changes below correct this problem.

2.4. (Rule 2.9) Requests for Expedited Schedule

(a) An application may be submitted to the Commission with a request for an expedited schedule.

(b) Notwithstanding Rule 1.7(a), the title page of an application requesting an expedited schedule shall contain the caption "Request for Expedited Schedule" below the title of the application. Such application shall include an attachment, not exceeding 3 pages, titled "Request for Expedited Schedule."

(c) Any person may file a response to a request for expedited schedule within 7 days of the date the notice of the filing of the request for expedited schedule first appears in the Daily Calendar. Pursuant to Rule 1.10(a), the response shall be served on the Chief Administrative Law Judge if an administrative law judge has not yet been assigned.

(d) The assigned Commissioner may grant a request for an expedited schedule if the attachment demonstrates, referencing specific facts, that special circumstances necessitate expedited action by the Commission, and that the requested relief concerns a threat to public safety or a major direct financial impact to customers that justifies an expedited schedule.

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[2] TURN's language is patterned on Rule 2.6, which allows "any person" to file a protest or response to an application and which starts the clock on the deadline for such responsive pleadings with the first daily calendar notice.

(e) Requests for an expedited schedule shall be ~~granted~~ decided by ~~at the sole discretion of~~ the assigned Commissioner, and only granted in exceptional circumstances.

(f) In an expedited proceeding, the assigned Commissioner and/or Administrative Law Judge shall notice a prehearing conference no later than 20 days from the date of preliminary categorization of the proceeding under Rule 7.1(a), and hold a prehearing conference no later than 30 days from the date of preliminary categorization. The notice shall inform parties that the proceeding has been designated as expedited and the assigned Commissioner may take comments from parties regarding the designation of the proceeding as expedited at the prehearing conference. In an expedited proceeding, a scoping memo shall be issued no later than 45 days from the date of preliminary categorization.

(g) The assigned Commissioner may, at their discretion, provide a different schedule.

(h) In an expedited proceeding, the scoping memo shall include a date for issuance of a proposed decision which is no later than 12 months after the application was filed.

(i) The assigned Commissioner may extend the date for issuance of a proposed decision in an expedited proceeding

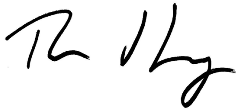
A Conforming Change to Rule 8.2(c)(3) Is Needed

Draft ALJ-381 would amend Rule 8.2(c)(4) to provide that no oral or written ex parte communications may occur during a quiet period. However, the current language of Rule 8.2(c)(3)(A) states that written ex parte communications are permitted “at any time.” To prevent a conflict and to harmonize the rules, the words “at any time” should be removed from Rule 8.2(c)(3)(A).

Conclusion

For the reasons set forth above, TURN urges the Commission to modify Draft ALJ-381 as described in these comments.

Respectfully submitted,



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