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June 8, 2011

Commission President Michael Peevey
Commissioner Timothy Alan Simon
Commissioner Michel P. Florio
Commissioner Katherine J.K. Sandoval
Commissioner Mark Ferron
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: TURN's Comments on Draft Resolution L-411A To Correct Internal
Inconsistencies and Other Errors in Resolution L-411

Dear Commissioners:

In Resolution L-411, issued at the April 14, 2011 meeting, the Commission established a memorandum account for certain cost-of-service rate regulated energy and water utilities to track the impacts of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("New Tax Law"). On May 19, 2011, the Legal Division issued for comment Draft Resolution L-411A to correct internal inconsistencies and other errors in Resolution L-411. The Utility Reform Network (TURN) submits these comments on the Draft Resolution L-411A.

TURN has carefully compared Resolution L-411 as adopted with the Draft Resolution L-411A. There are a small number of proposed changes that remedy items that TURN would agree represent internal inconsistencies or minor errors, or provide helpful clarifications. For example, the new sentences explaining how a one-way memorandum account would work (pages 5-6), and the addition of the phrase "If this were a two-way memorandum account" shortly thereafter (page 6) provide important clarification of the differences between these two approaches and could prevent confusion over which approach Resolution L-411 adopted. On a lesser but still helpful level, deleting the words "either of" before "the New Tax Law" (p. 10) would make Resolution L-411 consistent in terms of referring to a single New Tax Law (rather than the two New Tax Laws that some of the earlier versions of the draft of L-411 would have addressed).

But Draft Resolution L-411A would also make a change that seems to modify the outcome adopted in Resolution L-411. The Resolution as adopted had the Commission establish guidelines for the utilities to follow, and "[t]o the extent a utility stays within these guidelines, it would not need to seek pre-approval of the spending (although reasonableness would still be subject to review in a subsequent GRC)." Res. L-411, p. 6. The guidelines described relatively narrow categories of allowable types of infrastructure

replacement projects, with specified examples of projects that would fit within those categories. Draft Resolution L-411A would have the Commission edit the description of the guidelines so that what had been specified examples would now be the only types of projects for which pre-approval is not required.

The approach adopted in Resolution L-411 seems largely based on the proposal TURN described in our letter of April 5, 2011.¹ As TURN further explained in our letter of April 11, 2011, the proposal was not presented as a rigid set of final criteria.² Resolution L-411 as adopted is more consistent with such an approach. The Draft Resolution L-411A would instead limit the examples of projects not needing pre-approval to those specified in the text of the resolution. TURN assumes that the proposed revision is intended to address some identified problem or shortcoming of the approach embraced in Resolution L-411 as adopted. However, nothing in the Draft Resolution L-411A identifies such a problem or shortcoming or explains how the revised approach is better.

At this point two other parties have weighed in on the changes proposed in Draft Resolution L-411A. In a letter dated May 26, 2011, PG&E expressed strong opposition to even the issuance of the Draft Resolution. The utility claims that turning the examples of projects that would not need pre-approval into a list of the only types of projects that could go forward without pre-approval would upset its plans for additional spending based on the original guidelines. This suggests that PG&E has in mind using the tax benefits to support additional spending on projects not covered by the specific examples set forth in TURN's April 5 letter, even as modified in PG&E's edits attached as Appendix B to the utility's April 8 letter. PG&E could have identified the potential projects that would have met the pre-approval guidelines of Resolution L-411 as adopted, but not the tighter guidelines of Draft Resolution L-411A. Its failure to do so leaves the Commission to guess as to the effect, if any, that the tighter guidelines under the Draft Resolution L-411A would actually have on PG&E's spending plans.

The California Water Association (CWA) submitted comments to Draft Resolution L-411A on May 31, 2011. CWA seems to be suffering a type of regulatory lag, as the majority of issues it raises in the current comments could have and should have been raised in comments prior to the adoption of Resolution L-411. The cover letter to Draft Resolution L-411A states, "Comments should not reargue issues resolved in Resolution L-411, and comments will do so will not be addressed." On this basis, most of CWA's comments should not be addressed. However, on the off chance that the Commission does not follow through on the admonition included in the cover letter, TURN briefly addresses some of CWA's comments here.

CWA first calls for eliminating the "arbitrary and unjustified 'guideline'" that limits memorandum account treatment to "replacement" projects.³ CWA even goes so far as to

¹ Compare the criteria set forth at page 3 of TURN's April 5, 2011 letter with the discussion of the allowable types of projects at page 6 of the Resolution.

² TURN's April 11, 2011 letter, page 3.

³ CWA's May 31, 2011 letter, page 3.

suggest that a statement in an earlier TURN letter indicates TURN's willingness to respond flexibly to such a proposal. Let's be clear: TURN's earlier letter stated

TURN's proposal was not presented as a rigid set of final criteria, and TURN's experience with PG&E to refine those criteria demonstrates that we understand that our first attempt did not achieve a perfect score. CWA may well be right that water utilities should be permitted use of the tax benefits to pursue such projects without first seeking approval through the advice letter or application process. **But that would be an argument in support of modifying the criteria.**⁴

CWA does not seek to modify the criteria, but rather to eliminate them. This goes far beyond any reasonable modification, and seems more like a back door attempt to achieve the full exemption of the water utilities that CWA unsuccessfully sought in the lead up to Resolution L-411.

CWA then claims to find a "troubling ambiguity" in the Resolution L-411 discussion of the pre-approval needed before investing tax benefits in an area outside of the guidelines set forth in the Resolution.⁵ The relevant language of Resolution L-411 has no such ambiguity:

Should a utility determine that the tax benefits would be best invested in some area outside of the Resolution's guidelines, it would need to file an application or advice letter [sic] seeking Commission approval in order to go forward with the investment.⁶

While CWA suggests that the Resolution "would seem to impose a pre-approval requirement for utility investment decisions of unprecedented breadth,"⁷ the actual language of the Resolution limits that requirement to the use of tax benefits (that would otherwise be used to reduce rates) and then only for investments outside the specified guidelines.

CWA then presents a new argument regarding the purportedly disparate treatment of water utilities with general rate cases likely to be "heard in 2012" and the energy utilities who were exempted from the memorandum account requirement because of their GRCs that would be "heard in 2012."⁸ TURN submits that the relevant factor for the energy GRCs is not when the GRC is scheduled or even likely to be "heard," but rather the test year for each utility's GRC. TURN understood the exemption to apply to the energy utilities with a 2012 test year for their next GRC (the Sempra Utilities and SCE). If any

⁴ TURN Letter April 11, 2011, page 3 (emphasis added).

⁵ CWA Letter May 31, 2011, page 4.

⁶ Resolution L-411, page 6. The misspelling of "letter" could also be corrected if the Commission issues Resolution L-411A.

⁷ CWA Letter May 31, 2011, page 4.

⁸ *Id.*, page 5.

water utility also has a 2012 test year, it would also be exempted.⁹ The Commission may wish to avoid any further confusion on CWA's part by replacing the "will be heard in 2012" phrase with "are for a 2012 test year" on page 8 and in Finding and Conclusion 16 of Draft Resolution L-411A.

Once again, we thank you for your consideration of these matters.

Yours truly,

/s/

Robert Finkelstein
Legal Director

cc: Joel Perlstein, CPUC Legal Division
Paul Clanon, CPUC Executive Director
Frank Lindh, CPUC General Counsel
Michael Galvin, CPUC
Marzia Zafar, CPUC

⁹ Resolution L-411, pp. 7-8, and Finding and Conclusion 17.