BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation Rulemaking to Develop a Risk-Based Decision-Making Framework to Evaluate Safety and Reliability Improvements and Revise the General Rate Case Plan for Energy Utilities.	Rulemaking 13-11-006 (Filed November 14, 2013)

OPENING COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES REGARDING THE REFINED STRAW PROPOSAL ON A RISK-BASED DECISION-MAKING FRAMEWORK TO EVALUATE SAFETY AND RELIABILITY IMPROVEMENTS AND REVISE THE GENERAL RATE CASE PLAN FOR ENERGY UTILITIES

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I. INTRODUCTION

Pursuant to the Administrative Law Judge's (ALJ) Ruling Regarding Refined Straw Proposal issued April 17, 2014 and the Scoping Memo and Ruling of the Assigned Commissioner and Administrative Law Judge (ALJ) issued May 15, 2014, the Office of Ratepayer Advocates (ORA) submits these Comments to respond to issues described in those rulings and some of the questions posed in this Order Instituting Rulemaking (OIR or Rulemaking).

ORA has the statutory duty to represent and advocate on behalf of ratepayers within the Commission's jurisdiction with the goal of obtaining the lowest possible rate for service consistent with reliable and safe service levels.[1] To this end, ORA has supported, and continues to advocate for policies, rules and programs promoting safety by treating the goal of safety as

[1] Public Utilities Code §309.5. On September 26, 2013, Governor Edmund G. Brown signed Senate Bill (SB) 96 into law. Among other things, SB 96 amends Section 309.5 changing the name of the Division of Ratepayer Advocates to the Office of Ratepayer Advocates. The goal is still: "…to obtain the lowest possible rate for service consistent with reliable and safe service levels."

integral to any cost-effectiveness and rate case analyses.[2]

Below are ORA's comments on the refined straw proposal, based on the agenda provided by ALJ Wong on April 25, 2014 in advance of the April 29, 2014 Prehearing Conference.

II. DISCUSSION

A. (c.1) Position on the Refined Straw Proposal.

ORA generally supports the refined straw proposal. It provides an appropriate framework for the Commission to develop and review, on an ongoing basis, the methodologies used by the energy utilities to assess risk for their assets and within their organizations.

However, one core portion of the refined straw proposal that should be revised is the role of parties and staff in the review of the utilities' Risk Assessment and Mitigation Phase (RAMP). As currently defined, Commission Staff (Staff) provides the central role with other parties when responding to their findings. This Staff-centric approach violates the *participatory inclusivity* principle. By the very nature of advisory Staff's relationship with the Commission, there is the potential that any Staff opinion may outweigh those of other participants, all else being equal. Therefore, if Staff will be developing a report that they wish to be considered as evidence, then their role is essentially one of advocacy. Due to Staff's expertise and resources, their report should be due 2 weeks before other parties provide their reports. This should allow sufficient record development, while also making clear Staff's later obligation to testify in evidentiary hearings in the GRC. Any party could then move any final reports or analysis as evidence in the GRC.

B. (c.3) Will the risk based framework that is adopted provide the CPUC with the right tools for evaluating the safety and reliability issues that are in the rate case proceedings of the energy utilities?

ORA is hopeful that the risk-based framework the Commission adopts will provide it with the right tools for evaluating the safety and reliability issues that are in the rate case proceedings of the energy utilities. But the Commission already has some tools to achieve those goals in its authority under the Public Utilities Code, and through its application of the appropriate standard of proof.

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[2] *See, e.g.*, The Division of Ratepayer Advocates Comments Regarding Proposed Changes to General Order 112-E.

In past GRCs, the Commission has variously held that the standard of proof the Applicant must meet is "clear and convincing evidence"[3] or "preponderance of the evidence."[4] Beginning in at least 1952, the standard the Commission applied was "clear and convincing evidence." Then, in 2009, the Commission began applying the lower "preponderance of the evidence" standard. For reasons set forth in Appendix A to these Comments, ORA recommends that the Commission specify that the appropriate standard of proof for GRCs is that of "clear and convincing evidence."[5]

Applying the clear and convincing standard of proof when it evaluates rate case proceedings would go a long way towards enabling the Commission "…to effectively consider the prioritization of safety and reliability matters in the Commission's ratemaking proceedings, and the revenue requirements underlying any safety programs requested for approval in a GRC…."[6]

C. (c.4) Proposals for revising various elements of the Rate Case Plan.

ORA supports the current division of the review of PG&E's costs between the General Rate Case, and the Gas Transmission and Storage Application. While there are similar elements between natural gas transmission and distribution, they generally have significantly different threats and risks to maintain this split. Further, the division of these two proceedings has evolved such that controversial cost allocation and operational issues can be efficiently addressed in the Gas Transmission and Storage case.

ORA proposes that the Notice of Intent (NOI) be maintained as a tool that allows for greater efficiency and streamlining of the GRC process. The schedule for GRC Phase 1 need not be modified as only the activity for two dates in the schedule needs to be refined. The activity for September 1 should be modified to state "Utility tenders its Notice of Intent to file the GRC application". The activity for November 1 would be modified to include that "Utility files GRC application." The intervening 2 months can be utilized by ORA and other parties to review the

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[3] *Alternate Decision of President Peevey on Test Year 2009 General Rate Case for Southern California Edison Company (*3/17, 2009*)* D.09-03-025, p. 8 (SCE TY 2009 GRC).

[4] *Application of PG&E for Authority to Increase Rates and Charges for Electric and Gas Service (PG&E TY 1999 GRC)* (2000) 2000 Cal. PUC LEXIS 239; D.00-02-046, mimeo, p. 36

[5] The appropriate standard of proof is still an issue in the pending PG&E GRC (A.12-11-009) and in other proceedings as well.

[6] GRC OIR, p. 4.

NOI for deficiencies and for utility responses to deficiencies. This process will provide for a more stream-lined processing of the GRC application. The lack of an NOI process may result in less transparency and a potential increase in motions to compel which have been very infrequently utilized in recent GRCs. If the Commission decides to remove the NOI process, then the Commission should be prepared to exercise its ability to reject any applications that are incomplete or lacking proper information that would have been included had the NOI process been retained. Elimination of the NOI process may serve to lengthen the GRC process rather than enhance its efficiency.[7]

ORA reiterates its Opening Comments that the Commission should move to a 4 year GRC cycle.[8] The increased complexity of the GRCs envisioned by having an adequate level of safety review necessitates the need for more time between each utility's GRC.

During the April 29, 2014 pre-hearing conference (PHC), the Sempra Utilities' attorney stated, "…before you know whether the GRC should be every three years or four years, you have to know whether the revised straw proposal is going to add nine months onto the [rate case] plan. If the plan is going to be nine months longer, then we think that maybe a four-year cycle makes sense, as opposed to a three-year cycle…"[9]

Even without adding a safety review into the GRC process, utilities' GRC filings have already become complex and voluminous. For example, in its Test Year 2014 GRC, PG&E submitted approximately 4,800 pages of direct testimony, about 12,900 pages of workpapers, and over 5,400 pages of rebuttal testimony. Additionally, the total increase requested by PG&E was approximately $1.1 billion. This level of revenue increase necessitates a very thorough review by ORA, other intervening parties, and the Commission.

The current process can lead to overlapping GRCs, as evidenced by SCE and the Sempra Utilities both having Test Year 2012 GRCs. With a 3-year GRC cycle, test years of the initial case serve as base years for the following rate case, which presents a problem because recorded

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[7] For example, if parties are forced to file motions to compel to receive information that would otherwise have been addressed through the deficiency review, filing dates may need to be extended. Additionally, the NOI process allows for a less formal review of the utility filing, which in turn allows the utility to provide a cleaner filing for the Commission and other parties to review. In the absence of this process, discovery may take longer and filings may become more difficult to review.

[8] See ORA Opening Comments, January 15, 2014 at pages 6-7.

[9] See R.13-11-006 PHC Reporter's Transcript, April 29, 2014, at pages 18-19.

test year costs may not be representative of future costs, as the utilities are often initiating new programs during its test year and initial costs may not reflect a more stable or steady-state level of expenses or expenditures. A 4-year GRC cycle may allow for better utility financial and operational management of spending and investment. For small and mid-sized utilities, the interval should be no less than 4 years between rate cases and should maintain the option for an extension beyond the 4-5 year timeframe.

The parties and the Commission possess the skill, aptitude, and regulatory capabilities to develop fair and equitable post-test year ratemaking methodologies to accommodate a four year rate case cycle.

D. (c.4) Additional Related Issues.

If the Safety-Model Assessment Proceeding (S-MAP) process is adopted, there should be workshops conducted after the Commission opens the proceeding, but ahead of any Prehearing Conference or Scoping Memo. Since this will be a brand new type of proceeding, having an initial straw proposal by advisory staff, followed by workshops and comments can help clarify expectations and set the Commission and parties on a better path towards the resolution of the proceeding.

While developing common risk assessment elements and models is a laudable objective, ORA believes that this step is premature for the first S-MAP proceeding. Parties and the Commission would benefit the most from understanding the strengths and weaknesses of a variety of approaches before beginning to narrow down solutions to a single mechanism or way of assessing risk.

Staff should be involved in both the S-MAP and the RAMP processes. For the S-MAP process, Staff can serve entirely in an advisory role. As in the Long-Term Procurement Plan (LTPP) process, Staff can both help guide and focus the stakeholder process and provide their own expertise and knowledge, so long as the Commission adopts the final process and result(s). For the RAMP process, ORA recommends the steps detailed in section II.A above.

III. CONCLUSION

For all the foregoing reasons, and for the reasons set forth in ORA's other submissions in this proceeding, ORA asks that the Commission adopt its recommendations.

Respectfully submitted,

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APPENDIX A

STANDARD OF PROOF FOR GENERAL RATE CASES

The Public Utilities Code charges the Commission with the responsibility of ensuring that all rates demanded or received by a public utility are just and reasonable; "no public utility shall change any rate… except upon a showing before the Commission, and a finding by the Commission, that the new rate is justified."[10]

There should be no argument that, in rate case proceedings, the burden of proof is on the applicant utility. There is, however, disagreement on the appropriate standard of proof. ORA recommends that the decision that resolves this Rulemaking set forth specifically that, in rate case proceedings, the standard of proof is "clear and convincing evidence." Clear and convincing evidence is "proof by evidence that is clear, explicit and unequivocal; that is so clear as to leave no substantial doubt; or that is sufficiently strong to demand the unhesitating assent of every reasonable mind."[11]

The last thorough analysis of the rationales for the different standards that ORA is aware of was included in a decision the Commission issued in the TY 2000 PG&E General Rate Case. That analysis included a detailed review of previous Commission decisions on rate increase requests going back to 1941.[12] In the course of this review, the Commission found that, since at least 1952, the Commission has held that "... a utility seeking an increase of rates has the burden of showing by clear and convincing evidence that it is entitled to such increase."[13]

D.00-02-046 was challenged on rehearing by both TURN and PG&E on grounds relating to the clear and convincing standard of proof. TURN challenged a Conclusion of Law that said a utility only had to "generally support its application through clear and convincing evidence," when it should have said that a "utility must support every part of its application with clear and

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[10] Public Utilities Code Sections 451, 454.

[11] *Application of Pacific Gas and Electric Company* (2000) D.00-02-046, mimeo, p. 38 quoting from *Application of PT&T Col. For A General Rate Increase* (1970) 2 CPUC 2d 89, pp. 98-99, D. 90642.

[12] *Application of PG&E to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 1999* (PG&E TY 1999 GRC) (2000) D. 00-02-046, §4.4.4, "Burden of Proof and Evidentiary Standard."

[13] *Southern Counties Gas Company of California* (1952) 51 CPUC 533, 534; D.46876.

convincing evidence."[14] PG&E argued that the appropriate standard of proof was "a preponderance of the evidence."

D. 01-10-031 modified the Conclusion of Law consistent with TURN's position noting that:

> [W]e have historically, although not wholly consistently, applied the clear and convincing burden of proof to utilities seeking general rate increases. We applied the clear and convincing standard to PG&E in this case. This standard is applicable to all aspects of PG&E's showing.[15]

In so doing, the Commission said:

> We must insist upon PG&E demonstrating for each component of its proposed revenue requirements, that it produce clear and convincing evidence. To the extent it fails do, we cannot grant the requested revenue increase.[16]

D.01-10-031 appears to be the last time the Commission included a thorough legal analysis of the standard of proof in a General Rate Case decision, and in that decision, the Commission concluded that the proper standard is clear and convincing evidence. The Commission affirmed this long-standing rule in its 2004 decision in SCE's TY 2003 GRC:

> ORA reminds us that SCE must meet the burden of proving by clear and convincing evidence that it is entitled to the relief it is seeking in this proceeding, and that the burden is not on ORA or other intervenors to demonstrate that SCE's request is unreasonable. We intend to hold SCE to this standard as we examine individually myriad components of SCE's request.[17]

In a 2008 decision addressing arguments on rehearing in the Sunrise Powerlink case, the Commission decided not to apply the clear and convincing standard to that Certificate of Public Convenience and Necessity proceeding, but said:

> Moreover, we adequately explain in the Decision that *the clear and convincing standard has generally been limited to* <u>*general rate*</u>

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[14] *Order Granting Rehearing of and Modifying Decision 00-02-046* (2001) D.01-10-031, 2001 Cal LEXIS 917 *3.

[15] *Order Granting Rehearing of and Modifying Decision 00-02-046* (2001) D.01-10-031, 2001 Cal LEXIS 917 *6.

[16] D.01-10-031, 2001 Cal LEXIS 917 *6.

[17] D.04-07-022, p. 10.

> *cases and reasonableness reviews which are specialized proceedings.*[18]

But then, in 2009, the Commission inexplicably departed from this long line of precedent, and applied a "preponderance of the evidence" standard to an SCE General Rate Case. No explanation was given in the decision for this change except to say that the Commission had, "at times incorrectly referred to [the standard of proof] as 'clear and convincing' evidence."[19]

In its decision in SCE's TY 2012 GRC,[20] the Commission again declared "preponderance of the evidence" to be the standard, quoting from the Evidence Code definition of proof as "the establishment of evidence of a requisite degree of belief."[21] But nothing in that definition justifies lowering the standard of proof. To ORA's knowledge, the Commission has never provided any legal analysis explaining why, as utilities' applications become more complex, their standard of proof should be lower.

When the Commission held in 2000 that a clear and convincing standard should be applied to rate increase proceedings, the Commission quoted from a treatise first published in 1926 which described the advantage utilities have in ratemaking litigation:

> Successful regulation of great public utility corporations, with their properties and their services ramifying in every direction, with vast revenues flowing in continuously, with nationwide alliances, and clearing-houses of technical information and expert service, is no simple and easy matter. The utilities …. stand ready to produce all the facts which they themselves declare to be pertinent and to explain them to the Commission, and to tell the Commission what its duty is.
>
> … If the Commission depends upon the consumers or the municipalities to present the public side of the controversy, the evidence in most cases will be heavily one-sided.
>
> … Financial resources, experience, inside knowledge, expert affiliations, great things at stake and continuity of interest,

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[18] *Order Modifying Decision 08-12-058 and Denying Rehearing of Decision as Modified* (2009) D.09-07-024, mimeo, p. 3, emphasis added.

[19] D.09-03-025, mimeo, p. 8. The citations were to *In the Matter of the Application of California Water Company* (D.03-09-021, pp. 17-19), which referred to "clear" evidence, and Section 190 of the Evidence Code.

[20] *Decision on Test Year 2012 General Rate Case for Southern California Edison Company,* D. 12-11-051, mimeo, p. 9.

[21] D.12-11-051, p. 9.

> combine to give the utilities an overwhelming advantage in the presentation of their cases before Commission and Courts.[22]

In its 2000 decision, this Commission noted that the problems identified in 1926 – utility control through "inside" information and ratepayer funding of their efforts to "defeat the consumers" -- still exist.[23] In that decision, the Commission concluded that:

> The natural litigation advantage enjoyed by utilities, and the fact that we must rely in significant part on their experts, combine to reinforce the importance of placing the burden of proof in ratemaking applications on the applicant.[24]

Large energy utility GRCs have steadily gotten more complex and more voluminous since 2000. Incorporating a risk assessment process into the already complex GRC proceedings makes the "natural litigation advantage" of the utilities even more pronounced.

As the Commission recognizes in the Order Instituting this Rulemaking, "… the Commission has the ability to extend our core principles for safety to utilities by assuring that safety programs and measures are appropriately funded. As part of that funding process, the Commission also has the role of assuring that the overall safety of the utilities and the grid is cost-effectively achieved, i.e., the costs allocated to safety, at any level, achieves the maximum safety benefit per dollar spent."[25]

Holding the utilities to the clear and convincing standard of proof would be one way to achieve those goals.

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[22] D.00-02-046, p. 34.

[23] D.00-02-046, p. 35.

[24] D.00-02-046, p. 36.

[25] GRC OIR, p. 8.