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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 2020 (U 39 M).	Application 18-12-009 (Filed December 13, 2018)

JOINT RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) AND SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) TO PETITION FOR MODIFICATION OF DECISION 20-12-005 TO REQUIRE PACIFIC GAS AND ELECTRIC COMPANY TO PRESENT AN INFLATION-CONSTRAINED ALTERNATIVE PROPOSAL IN ITS UPCOMING GENERAL RATE CASE

Laura M. Earl
Counsel for:
SAN DIEGO GAS & ELECTRIC COMPANY
SOUTHERN CALIFORNIA GAS COMPANY
8330 Century Park Court, CP32D
San Diego, CA 92123
Telephone: (858) 654-1541
Facsimile: (619) 699-5027
E-mail: learl@sdge.com

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I. INTRODUCTION

In accordance with Rule 16.4 of the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission" or "CPUC"), Southern California Gas Company ("SoCalGas") and San Diego Gas & Electric Company ("SDG&E") (collectively, "Sempra Utilities"), hereby submit their Response to The Utility Reform Network's ("TURN") March 24, 2021, Petition for Modification ("PFM") of Decision ("D.") 20-12-005 ("PG&E 2020 GRC Decision") to require Pacific Gas and Electric Company ("PG&E") to present an inflation-constrained alternative proposal in its upcoming general rate case ("GRC"). Consistent with Rule 16.4(f), this Response is timely filed within 30 days of the date that the PFM was filed.

For all of the reasons discussed herein, TURN's PFM requesting that the Commission modify the PG&E 2020 GRC Decision "to direct PG&E to submit testimony in its upcoming GRC proceeding that presents an alternative GRC proposal in which total GRC expenditures increase by no more than the rate of inflation"[1] should be rejected. Preliminarily, there is

[1] PFM at 13.

nothing in the PFM to suggest that the issue described in TURN's request was considered in and within the scope of the above-captioned proceeding (*e.g.,* citations to the record or decision), or that there is any legal or evidentiary basis for TURN's request. The Commission has held that its broad authority to modify a decision "should be exercised with great care and justified only by extraordinary circumstances to protect parties from endless re-litigation of the same issues."[2] The Commission's "decisions establish that [it] may only modify a decision if: (1) new facts are brought to the attention of the Commission, (2) conditions have undergone a material change, or (3) the Commission proceeded on a basic misconception of law or fact."[3]

> Rule 16.4(b) requires an evidentiary basis for factual allegations that are raised in a PFM:
>
> Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.

Here, the PFM is based on allegations that TURN does not support with factual citations to the evidentiary record or to an "appropriate declaration or affidavit." The PFM cites no legal authority in support of its request. The PFM cites only a CPUC Energy Division staff White Paper[4] and makes no claim that it represents a change in relevant facts or circumstances or that it "may be officially noticed," as Rule 16.4 requires.[5] The White Paper amounts to hearsay that

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2 D.17-12-006 at 9 (denying a petition to modify that failed to meet the requirements of Rule 16.4).

3 *Id.* at 11 (citing D.97-04-049, 1997 Cal. PUC LEXIS 427, *17).

4 PFM at 2 (citing CPUC, *Utility Costs and Affordability of the Grid of the Future: An Evaluation of Electric Costs, Rates and Equity Issues Pursuant to P.U. Code Section 913.1*, Feb. 2021 ("White Paper")).

5 *See* D.20-02-008 at 2 (denying a TURN petition for failing to comply with Rule 16.4, which "requires that any factual allegations in a PFM must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed."); *see also* Resolution T-17599 (April 26, 2018) at 3 (rejecting a declaration that did not identify new or changed facts "as required by Rule 16.4(b)").

may not be solely relied upon to support the PFM.[6] But even considering the White Paper on its merits, its content in no way directly supports the radical departure from cost-based ratemaking and established Commission procedures TURN proposes (as discussed below), such that it could be considered a new fact warranting the PFM's consideration under Rule 16.4 – nor does the PFM even make this claim. The PFM's reference to the White Paper does not "persuasively demonstrate … a material change in fact or condition" that would create '"a strong expectation that [the Commission] would make a different decision based on these facts or circumstances' or demonstrate 'extrinsic fraud or other extraordinary circumstances'" – as it must, under Section 1708 and Rule 16.4.[7] The PFM does not even suggest that D.20-12-005 addressed the issue it raises, such that a change in fact could have resulted in a different decision. In sum, the PFM is procedurally deficient and should be rejected on that basis alone.

The PFM also ignores the ongoing Affordability Rulemaking,[8] which is considering and addressing affordability impacts on residential customers. The PFM amounts to an end-run around the Affordability Rulemaking's important work toward addressing residential customer affordability issues.

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[6] *See* California Public Utilities ("Pub. Util.") Code Section 1701.1(e)(8) ("The commission shall render its decisions based on the law and on the evidence in the record."); *see also TURN v. CPUC*, 223 Cal. App. 4th 945, 962 (2014) ("[U]nder California statutory and decisional law, as well as the Commission's own decisions, uncorroborated hearsay cannot constitute substantial evidence to support an agency's decision absent specific statutory authorization."). All statutory references herein are to the California Public Utilities Code, unless otherwise stated.

[7] D.17-12-006, Conclusions of Law 1-3 at 14.

[8] Rulemaking ("R.") 18-07-006, Order Instituting Rulemaking to Establish a Framework and Processes for Assessing the Affordability of Utility Service (July 12, 2018) at 2 ("The purpose of this proceeding is to develop a common understanding and tools to assess … the impacts on affordability of individual Commission proceedings and utility rate requests.").

Moreover, as more fully discussed below, TURN's request is inconsistent with the important legal principles that form the foundation of regulatory ratemaking and longstanding Commission precedent. The PFM is also inconsistent with PG&E's First Amendment speech and Fifth Amendment due process rights, running afoul of the Commission's procedures that protect the interests and rights of the parties and facilitate fair and equitable proceedings. TURN and other litigants are free to propose whatever they wish in PG&E's GRC, conducting discovery under the Commission's rules and using their own experts. But PG&E and other utilities[9] should not be required to present testimony on other parties' behalf in its direct GRC case – as granting the PFM would impose.

Therefore, the PFM should be rejected, as more fully set forth below.

II. DISCUSSION

A. Law and Commission Precedent Require an Examination of Utility Costs to Determine Just and Reasonable Rates.

TURN's PFM should be denied because it would require PG&E to propose an examination of costs separate from the well-established legal and risk-based decision-making GRC framework through which the Commission determines "just and reasonable" cost-based utility rates.[10] The United States Supreme Court has reasoned that, because public utilities'

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[9] The PFM at 3, n.5, states that "TURN intends to make a similar request for California's other large energy utilities in an appropriate docket." The Commission should reject TURN's request out of hand here to avoid unnecessary additional litigation and expense of parties' and the Commission's resources.

[10] *See* R.13-11-006, Order Instituting Rulemaking to Develop a Risk-Based Decision-Making Framework to Evaluate Safety Improvements and Revise the General Rate Case Plan for Energy Utilities (November 14, 2013), D.20-01-002, Decision Modifying the Commission's Rate Case Plan for Energy Utilities ("Rate Case Plan Decision"), *discussion at* 8-19; *see also* D.14-12-025 at 16 (stating that the Commission's adoption of a risk-based decision-making GRC framework "is consistent with … the policy of this state that … the 'commission shall take all reasonable and appropriate actions necessary to carry out the safety priority policy of this paragraph consistent with *the principle of just and reasonable cost-based rates*.' (§ 963(b)(3).)"(emphasis added).)

"assets are employed in the public interest," but the companies are "owned and operated by private investors," the status of their property "creates its own set of questions under the Takings Clause of the Fifth Amendment."[11] When the government regulates the rates a public utility may charge for serving the public, the utility must be justly compensated. Just compensation requires state regulators to establish a rate that will permit the utility to recover both its reasonable operating costs and expenses, as well as a reasonable rate of return on the value of the property that is devoted to public use.[12] The Commission sets "just and reasonable" rates[13] based on the well-established principle that a "utility is entitled to all of its reasonable costs and expenses, as well as an opportunity to earn a rate of return on the utilities' rate base,"[14] consistent with the utility's Fifth Amendment rights.[15] While an unregulated company is able to react to cost changes closer to real-time, subject to market forces, regulated public utilities instead must rely on the litigated process set forth via regulatory proceedings to establish and prove their forecasted business costs in legal regulatory proceedings before the Commission.

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11 *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

12 *See Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692 (1923) (requiring regulators to give a "fair and just consideration of all the facts" when evaluating a utility's costs and expenses).

13 *See* Pub. Util. Code Section 451.

14 D.03-02-035 at 6; *see also* D.14-08-011 at 31 ("'[T]he basic principle [of ratemaking] is to establish a rate which will permit the utility to recover its cost and expenses plus a reasonable return on the value of the property devoted to public use[,]' (quoting *Southern California Gas Company v. Public Utilities Commission,* (1979) 23 Cal. 3d 470, 476)").

15 U.S. Const. amend. V. ("No person shall be … deprived of … property, without due process of law; nor shall private property be taken for public use, without just compensation."); *see, e.g., Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n,* 262 U.S. 276, 290 (1923) (Brandeis, J., concurring) ("The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return."); *see also* Cal. Const. Art. I § 7 ("A person may not be deprived of life, liberty, or property without due process of law.").

The Commission requires California utilities to use a forecasted test year methodology for their GRCs, to provide the Commission with a "snapshot in time" of all their forecasted costs over the test year period, for every aspect of the business.[16] As the Commission recently confirmed, in a decision modifying the GRC Rate Case Plan by extending the GRC cycle term to four years:

> [A] GRC is a proceeding in which the Commission authorizes an investor-owned utility to recover through rates the reasonable capital investment costs and annual expenses necessary to operate and maintain its facilities and equipment in a safe and reliable manner. […]The GRC application provides detailed forecasts of the applicant's capital investment expenses and its operating and maintenance (O&M) expenses for a designated 'test year' as well as forecasts for two subsequent post-test years, or 'attrition years.' The Commission's decision is based on its extensive review of the test year forecasts. The post-test year revenue requirements are typically determined by (1) escalating the test year O&M expenses, and (2) authorizing capital expenditures at a level determined by either (i) applying additional escalation factors, or (ii) further review of the applicant utility's actual capital budgets for those years.[17]

The forecasted test year ratemaking process is designed to provide utility management with the flexibility to make important resource allocation decisions within the rate case cycle, to provide safe and reliable service, as well as to provide incentives for the utility to maintain reasonable efficiency in serving customers.[18] Any efficiency gains are captured in the next rate case, to become ratepayer benefits in the next rate case and beyond.[19] The Rate Case Plan Decision reaffirmed in detail the Commission's continued use of the "the same ratemaking

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[16] *See* Rate Case Plan Decision at 12 ("[T]he Commission's role is not to merely pass utility cost estimates on to ratepayers, but rather to independently determine the just and reasonable level of costs necessary for the utility to meet its obligations.").

[17] Rate Case Plan Decision at 8 (citation omitted).

[18] Rate Case Plan Decision at 37 (citing TURN Comments on the Proposed Decision at 4, '"[T]he utility has a financial incentive to reduce costs during the rate case cycle through process improvements, cost-cutting measures, and increases in efficiencies or productivity.'").

[19] *Id.*

principles that guide [… GRC] expectations ..."[20] within the Rate Case Plan's new four-year GRC cycle structure.

On its face, the PFM's requested relief is at odds with this well-established legal framework and Commission process. TURN argues against the legal standard confirmed in the Rate Case Plan Decision, stating that "[t]he consumer-focused CPI should be used, *rather than projections of utility cost increases,* in order to better reflect changes in ratepayer purchasing power as a gauge of affordability impacts."[21] But the Commission's statutory mandate is to determine that "[a]ll charges demanded or received by any public utility …[are] just and reasonable,"[22] and the Commission has long held that a "utility is entitled to all of its reasonable costs and expenses"[23] – which leaves no room for TURN's alternative theory. SDG&E and SoCalGas are unaware of any legal authority that would require just, reasonable, and necessary utility expenditures to be capped at a CPI-based rate of increase – and the PFM does not cite one. On the contrary, the Commission has recently and routinely rejected the use of CPI escalators in post-test-year ratemaking mechanisms, as it is a broad wholesale pricing index that "does not reflect how utilities incur costs."[24] Nor does the PFM even acknowledge the applicable legal

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[20] Rate Case Plan Decision at 38.

[21] PFM at 6 (emphasis added).

[22] Pub. Util. Code Section 451.

[23] D.03-02-035 at 6; *see also* D.14-08-011 at 31 ("'[T]he basic principle [of ratemaking] is to establish a rate which will permit the utility to recover its cost and expenses plus a reasonable return on the value of the property devoted to public use[,]' (quoting *Southern California Gas Company v. Public Utilities Commission*, (1979) 23 Cal. 3d 470, 476 ").

[24] *See, e.g.,* Application ("A.") 17-10-007/-008 (cons.) (In re SoCalGas and SDG&E's TY 2019 GRC), D.19-09-051 at 707 ("We also find that applying a percentage increase that is based on the Consumer Price Index (CPI) does not reflect how utilities incur costs."); A.16-09-001 (In re Southern California Edison's ("SCE") TY 2018 GRC), D.19-05-020 at 285-86; A.12-11-009 (In re PG&E's TY 2014 GRC), D.14-08-032 at 653, 655-56, 659-60; A.13-11-003 (In re SCE's TY 2015 GRC), D.15-11-021 at 557-558; A.10-11-015 (In re SCE's TY 2012 GRC), D.12-11-051 at 608-09.

standard or the Commission's recent reaffirmation of ratemaking principles in the Rate Case Plan Decision;[25] nor does TURN make any attempt to reconcile its proposal with the applicable law. Because there is no connection between TURN's CPI-constrained proposal and the evidence a utility applicant must provide to meet its burden in a GRC, there is no reason for a utility to provide such evidence in its direct case, and no reason for the Commission to consider it. TURN's claim that the requested information "would be extremely useful to include in the Commission's decision-making record"[26] is thus plainly untrue. The evidence TURN requests that PG&E be required to provide in its direct case would be irrelevant and serve only to burden the record, as it is inconsistent with the applicable legal standard governing GRC proceedings; therefore, the PFM must be rejected.

B. TURN's Proposal, if Adopted, Would Infringe on PG&E's First and Fifth Amendment Rights.

Utilities have the right and often the duty to petition the Commission and to zealously advocate their positions in legal and regulatory proceedings.[27] The PFM proposes a new process that would violate PG&E's First Amendment free speech and Fifth Amendment due process rights,[28] as it would require PG&E to submit testimony in a CPUC proceeding that it does not

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[25] The PFM essentially constitutes an impermissible collateral attack on the legal and procedural standards regarding GRCs that were recently affirmed in the Rate Case Plan Decision. *See* Pub. Util. Code Section 1709 ("In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.").

[26] PFM at 10.

[27] *See, e.g.,* Pub. Util. Code Section 454 ("[A] public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, *except upon a showing before the commission and a finding by the commission that the new rate is justified*." (emphasis added)).

[28] *See* U.S. Const. amend. I ("Congress shall make no law… abridging the freedom of speech…."), amend. V ("No person shall be … deprived of … property, without due process of law; nor shall private property be taken for public use, without just compensation."), and amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law….").

support. As TURN is aware, the U.S. Supreme Court has held that the First Amendment does not allow the Commission to compel a utility to "to provide a forum for views other than its own."[29] Moreover, due process requires the Commission to proceed in a manner required by law and to follow its own procedures and rules[30] – including (but not limited to) procedures set forth in the GRC Rate Case Plan.[31] The Rate Case Plan does not accommodate requiring a utility to sponsor alternative proposals that contradict its right "to recover the reasonable costs of providing safe and reliable service, and to have an opportunity to earn a fair return on its investments"[32] or its duty to respond to emergent safety issues, among other important responsibilities.[33] TURN's proposal violates both free speech and due process principles, as shown below.

1. PG&E's First Amendment Rights Protect It from Being Required to Present Evidence on TURN's Behalf, as the PFM Requests.

In *PG&E v. CPUC*, the Court held that a Commission order forcing PG&E to disseminate TURN's speech in bill inserts violated the First Amendment, stating: "Such forced association with potentially hostile views burdens the expression of views different from

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[29] *PG&E v. CPUC,* 475 U.S. 1 (1986).

[30] *See Southern Cal. Edison Co. v. PUC*, 140 Cal. App. 4th 1085, 1106 (2006) (annulling the Commission's decision where the Commission failed to proceed in the manner required by law, in departing from the scoping memo and violating its own procedures); *cf.* Cal. Const., Article XII, Section 2 ("Subject to statute and due process, the commission may establish its own procedures.").

[31] *See* Rate Case Plan Decision at 9 (noting that "a typical GRC proceeding at the CPUC … 'is … *designed to provide due process to all affected parties* (*e.g.*, the utility, investors, customers) and produce rates which are just and reasonable.'" (emphasis added) (internal citation omitted)).

[32] *See* Rate Case Plan Decision at 35.

[33] *See Id.* at 35-36 (explaining some of the main goals behind the efficiency improvements provided in the Rate Case Plan Decision); *see also id.* at 22 ("Pub. Util. Code § 451 requires us to ensure that utility rates are 'just and reasonable.'") and *id.* at 10-11 (describing rights and responsibilities in accordance with the "regulatory compact").

TURN's and risks forcing [PG&E] to speak where it would prefer to remain silent."[34] Here, the PFM devotes several pages to providing instructions on precisely what TURN wants the Commission to order PG&E to say in its next GRC application and how to say it[35] – which is exactly the type of compelled speech the Supreme Court in *PG&E v. CPUC* has deemed unconstitutional.

Requiring PG&E to present a "compelled" direct case that it *does not* support would dilute the effect of the case that it *does* support and would require PG&E to rebut its own statements. The Supreme Court recognized this type of harm in *PG&E v. CPUC,* stating: "Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set."[36] Thus, TURN's empty claim that "PG&E would not be required to endorse the CPI-constrained alternative and would be free to explain why it advocates its preferred proposal"[37] does nothing to cure the First Amendment harm that would be caused by granting TURN's proposal. Under the Supreme Court's rationale, requiring PG&E to present evidence of TURN's choosing would be unconstitutional, because it would compel access to PG&E's speech.

In its recently filed reply regarding a "virtually identical request" [38] in PG&E's RAMP proceeding, TURN concedes that it seeks an order compelling PG&E to speak against its own

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[34] *PG&E v. CPUC,* 475 U.S. 1 at 18.

[35] *See* PFM at 4-7 and Appendix A; *see, e.g.,* PFM at section III.A., "Description of the Alternative CPI-Constrained Submission that PG&E Should Be Required to Provide."

[36] *PG&E v. CPUC,* 475 U.S. 1 at 9.

[37] PFM at 3.

[38] PFM at 12.

will and interest.[39] And, the PFM admits that diluting the impact of PG&E's speech is just the type of prejudicial result TURN seeks, stating: "TURN's Petition is also an attempt to mitigate to some extent the problem of "anchor bias" in utility rate applications… 'where an individual depends too heavily on an initial piece of information (considered to be the 'anchor') to make subsequent judgments during decision making.'"[40] The PFM thus attempts to improperly gain a competitive litigation advantage by requiring PG&E to enhance the relative status of evidence TURN would like to provide in its direct testimony. The Supreme Court has forbidden this type of unconstitutional burden on PG&E's speech, stating:

> [PG&E] does not, of course, have the right to be free from vigorous debate. *But it does have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents.*[41]

Here, the PFM's request is an even more egregious example of a First Amendment violation than the facts addressed in *PG&E v. CPUC*. The *PG&E v. CPUC* Court found a First Amendment violation in a bill insert's compelled speech; but here, TURN seeks to compel speech in PG&E's GRC application, which would also impact PG&E's Fifth Amendment due process right for its GRC request to be considered in a fair proceeding,[42] as discussed below.

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[39] *See, e.g.,* A.20-06-012, Reply of [TURN] Regarding Motion to Require [PG&E] to Present an Inflation-Constrained Alternative Proposal in Its Upcoming [GRC] (April 19, 2021) ("TURN's RAMP Reply") at 15 ("While PG&E *may not want* to provide such information, the Commission can have no doubt that the showing *must be made* by PG&E." (emphasis added)).

[40] PFM at 10-11 (quoting Wikipedia).

[41] *PG&E v. CPUC,* 475 U.S. 1 at 14 (emphasis added).

[42] The PFM also requests relief that would impact PG&E's Fifth Amendment right to just compensation, as discussed in section III.A, *supra*.

2. Due Process Requires Fair and Equitable Commission Proceedings Consistent with the Commission's Own Rules and Procedures.

As noted above, due process requires the Commission to proceed in a manner required by law and to follow its own rules and procedures.[43] TURN's request is completely inconsistent with the Commission's established procedures that protect a utility's due process rights, for example, a utility's right to present its own direct case in a GRC proceeding.[44] As the party with the burden of proof in a GRC proceeding, a utility applicant has the right and duty to present its case first, before intervenor testimony is submitted, in accordance with the Rate Case Plan.[45] TURN's "anchor bias" rationale[46] and its expressed intent to change its own "starting point" in the GRC schedule[47] ignore the Rate Case Plan's schedule of testimony presentation and the due process principles on which it is founded. The Commission has stated that, as the party with the burden of proof, a utility applicant bears "the primary burden" to present evidence sufficient "to make a prima facie case to support its position."[48] Once a prima facie case has been shown,

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[43] *See Southern Cal. Edison Co. v. PUC*, 140 Cal. App. 4th 1085, 1106 (2006) (annulling the Commission's decision where the Commission failed to proceed in the manner required by law, in departing from the scoping memo and violating its own procedures); *cf.* Cal. Const., Article XII, Section 2 ("Subject to statute and due process, the commission may establish its own procedures.").

[44] *See generally,* Rate Case Plan Decision at 49, Table 3, and Appendix A, Table 1, "Adopted Revised GRC Application Filing Schedule Effective June 30, 2020."

[45] *See id.* (recently affirming a GRC Rate Case Plan schedule that allows for utility testimony to be submitted 215 days prior to opening testimony of the Public Advocates Office and other intervenors).

[46] PFM at 11 (quoting Wikipedia).

[47] TURN's RAMP Reply at 5 (suggesting the Rate Case Plan's schedule of testimony presentation is unreasonable, stating: "The ongoing recitation of perceived threats to PG&E's ability to continue to pursue the programs and projects necessary to provide safe and reliable service and help implement the state's policy goals is *merely an indirect attempt to have the Commission embrace the notion that only the utility's preferred forecasts would serve as a reasonable starting point for purposes of adopting a GRC revenue requirement*." (emphasis added)).

[48] D.11-03-049 at 9.

however, "any party opposing such a request then has a burden of going forward to present evidence to raise a reasonable doubt and show a different result was warranted."[49]

The PFM essentially requests a shifting of TURN's own oppositional evidentiary burden to PG&E. But due process requires that the litigant with the burden of proof bears the burden of presenting evidence in the first instance to support its prima facie case[50] – not to submit opening alternative evidence in support of opposing viewpoints.[51] This is true regardless whether a litigant has an "obvious information advantage,"[52] as TURN complains.[53] PG&E should not be required to also shoulder the primary burden of presenting TURN's case on its behalf,[54] as granting the PFM would accomplish. TURN's arguments also ignore the fact that, as the party with the burden of proof, a utility applicant has the discretion to present evidence of its own

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[49] *Id.* (citation omitted)*; see also* D.92-04-059 at 3-4 ("Once [SCE] has provided reasonable support for its proposals, however, *it is up to opposing parties to demonstrate the superiority of their own proposals or provide evidence which rebuts the applicant's position.*" (emphasis added)); *see also* D.87-10-078 at 25 (citation omitted) (in attorney fee request, "the burden shifts to the party opposing fees to present equally specific countervailing evidence.").

[50] D.11-03-049 at 9 ("We recognize that the proponent of a request has *the primary burden* to make a prima facie case to support its position." (emphasis added)).

[51] *Id.* ("However, any party opposing such a request then has a burden of going forward to present evidence to raise a reasonable doubt and show a different result was warranted."); *see also* Cal. Evid. Code Section 550(b) ("The burden of producing evidence as to a particular fact … [rests] on the party with the burden of proof as to that fact.").

[52] *Id.*; *cf. Sargent Fletcher, Inc. v. Able Corp.,* 110 Cal. App. 4th 1658, 1671 (2003) ("Greater access to relevant evidence does not mandate that a defendant bear the burden of proof on the issue.").

[53] *See* PFM at 10.

[54] *See, e.g.,* A.06-12-009/-010 and Investigation ("I.") 07-02-013 (cons.). August 2, 2007 ALJ Ruling (declining to grant a motion to compel SDG&E to present a witness to sponsor testimony regarding philanthropy in its GRC proceeding, noting (at 3): "Greenlining's witnesses must justify on their own merit and rely on their own analysis for any recommendations regarding executive compensation, or any other cost, reasonably includable in test year revenue requirements for 2008 inclusive of all operating expenses and capital costs.").

choosing to meet that burden.[55] Indeed, the PFM makes no claim that requiring PG&E to present a CPI-constrained evidentiary showing would help PG&E to meet its burden of proof in any way, nor can it.

TURN's request is also inconsistent with the Commission's procedures regarding discovery, as it would essentially require PG&E to present evidence and analysis in its direct case on TURN's behalf that TURN would otherwise be required to request in discovery and analyze using its own witnesses – without the need for TURN to issue a single discovery request, without giving PG&E an opportunity to object, and without the need for TURN to hire witnesses to conduct the analysis. Granting TURN's proposal would essentially turn discovery on its head – which may be the point of TURN's request.[56]

As TURN knows, the Commission's discovery Rule 10.1 is not without limitation. Discovery requests must be limited to matters that are, among other things: (1) relevant to the subject matter of the proceedings, (2) admissible in evidence (or reasonably calculated to lead to the discovery of admissible evidence), and (3) not unduly burdensome, expensive, or intrusive, such that it "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence."[57] On its face, TURN's instructions read like a discovery

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[55] *See, e.g.,* A.10-12-005, January 20, 2012, ALJ Ruling (declining to compel a witness of an intervenor's choosing to provide evidence in SDG&E's GRC where no compelling reason existed, stating at 5-6: "[S]ince the Applicants have the burden of proof in applications involving rate relief, that burden includes allowing the Applicants to select which witnesses have the requisite knowledge and experience to sponsor testimony and to testify at the evidentiary hearings.").

[56] *See* TURN's RAMP Reply at 15 (suggesting the Commission's discovery processes are insufficient to suit TURN's purpose, stating: "PG&E cannot seriously believe that any amount of discovery would provide TURN, Cal Advocates or any other intervenor the information that would be needed to demonstrate how PG&E would respond to such a constraint.").

[57] Rule 10.1.

request that is unduly burdensome and otherwise objectionable.[58] But rather than being afforded an opportunity to object, as in discovery, the PFM's requested relief would instead require PG&E to present evidence in its direct case in the exact manner TURN envisions, or risk TURN's claims of non-compliance.

Administrative Law Judges have declined to require parties to create new analysis, documents, and exhibits on a requesting party's behalf in discovery.[59] Courts considering the issue have agreed that a discovery request cannot compel a responding party to create documents that do not exist.[60] The PFM thus sidesteps well-established discovery procedures and common-sense rules regarding fairness by requesting that PG&E be required to create a wide assortment of analysis, documents, and exhibits on TURN's behalf, to present in PG&E's direct case, with no opportunity to raise legitimate discovery objections.

TURN thus offers no bright side in its claim that "this Petition is not asking the Commission to decide now that PG&E's GRC spending should be constrained by the rate of inflation. That decision should be based on the GRC record."[61] The mere act of requiring PG&E

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[58] *See instructions at* PFM at 4-7 and Appendix A.

[59] *See, e.g.,* A.20-06-001, October 8, 2020, E-Mail Ruling Regarding Motion to Compel Responses at 2 ("SDG&E shall not be required to create a document to respond to the data request or present responsive data in a format that does not exist."); A.05-04-020, Aug. 5, 2005 ALJ Ruling Addressing Qwest Motion to Compel Responses, at p. 7 ("Under this ruling, Verizon is not required to create new documents responsive to the data request."); A.05-02-027, June 8, 2005, ALJ Ruling Regarding ORA's Second Motion to Compel at 23 (ordering that SBC Communications "shall not be required to produce new studies specifically in response to this DR.").

[60] *See, e.g., Kindred v. Bigot*, No. 1:14-cv-01652-AWI-JDP, 2018 U.S. Dist. LEXIS 181919, at *8 (E.D. Cal. Oct. 23, 2018) ("requests for production cannot compel defendants to create documents that do not exist"); *Medlock v. S.Pac. Fin. Corp.,* No. CV 11–5313–GW (SPx), 2012 U.S. Dist. LEXIS 200341, at *6 (C.D. Cal. Apr. 23, 2012) ("But while a subpoena may command a person to produce existing documents in that person's possession, it may not command a person to create a new document.").

[61] PFM at 10.

to create and sponsor evidence in the record that is inconsistent with the applicable law, and with which PG&E disagrees, would upend the Commission's discovery and litigation procedures and prejudice PG&E.

As the Supreme Court in *PG&E v. CPUC* recognized, PG&E "does not, of course, have the right to be free from vigorous debate."[62] Nevertheless, a utility litigant does have the right not to be required to create and present evidence in a CPUC proceeding on TURN's behalf.[63] TURN is free to propose whatever it wishes in PG&E's GRC, conducting discovery under the Commission's rules and using its own experts. But TURN should not be allowed to commandeer PG&E's direct GRC case and witnesses[64] to present testimony on TURN's behalf – as granting the PFM would accomplish. TURN's proposal must not be adopted.

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[62] *PG&E v. CPUC,* 475 U.S. 1 at 14.

[63] *See id.* ("But it does have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents.").

[64] The compelled testimony TURN seeks presents challenges to witnesses that cannot be overstated. Every PG&E witness would be required to create and present testimony regarding two separate analyses and would be subject to cross-examination – even by a PG&E attorney – on testimony it could not support.

III. CONCLUSION

For all of the above reasons, the PFM is inconsistent with the applicable law and must be rejected.

Respectfully submitted,

/s/ *Laura M. Earl*

Laura M. Earl
Counsel for:
SAN DIEGO GAS & ELECTRIC COMPANY
SOUTHERN CALIFORNIA GAS COMPANY
8330 Century Park Court, CP32D
San Diego, CA 92123
Telephone: (858) 654-1541
Facsimile: (619) 699-5027
E-mail: learl@sdge.com

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