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STATE OF NEVADA
PUBLIC UTILITIES COMMISSION

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Executive Director

March 31, 2014

George Taylor, Esq.
Senior Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Re: Open Meeting Law Complaint of Angel De Fazio; A.G. File No. 14-008.

Dear Mr. Taylor:

I received your letter notifying the Public Utilities Commission of Nevada ("Commission") of Ms. Angel De Fazio's complaint alleging an Open Meeting Law ("OML") violation by the Commission, and specifically by General Counsel (the "Complaint"). I understand that in this instance, a written response is not required of each Commissioner, for no Commissioner has personal knowledge of my decision process underlying the Complaint. Accordingly, this letter by General Counsel shall constitute the formal response of the Commission.

Introduction.

The Complaint includes numerous documents, including my e-mail correspondence with Ms. De Fazio regarding a request for accommodation at the Commission's agenda meeting of March 14, 2014 (the "Agenda"). Ms. De Fazio apparently believes that I made a determination that she was not disabled. As our e-mail correspondence shows, this is untrue. While Ms. De Fazio's request came to me as an ADA issue, it is an OML issue. The accommodation provided to Ms. De Fazio is reasonable under NRS 241.020 and consistent with past Commission practice. At the crux of the Complaint, Ms. De Fazio believes that the Commissioners do not read written comments. This belief is unfounded.

I understand that Ms. De Fazio frequently appears before the Commission at agenda meetings. I have personally witnessed her give comments at a few agenda meetings since my employment began last August. What is clear from the Complaint is that time and time again, the Commission makes reasonable accommodations for Ms. De Fazio or at her request without question. In addition to honoring her requests related to chemical sensitivities, the Commission has consistently allowed Ms. De Fazio an extended comment period. Of note, the Commission has a reasonable and content neutral time limitation on public comment of two minutes, due to the large number of citizens who regularly attend agenda meetings. Based upon Ms. De Fazio's assertion that she represents three

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different organizations, the Commission consistently allows Ms. De Fazio the opportunity to speak for eight minutes: two minutes for herself and two minutes for each organization.¹ During the agenda meetings at which I have witnessed Ms. De Fazio speak, she reads into the record a single eight-plus minute comment from a prepared written statement to the benefit of herself and each organization.

Factual History.

On March 13, 2014, Ms. De Fazio contacted Breanne Potter, Assistant Commission Secretary, regarding the agenda meeting scheduled for March 14, 2014 (the "Agenda"). Ms. Potter advised me that Ms. De Fazio was seeking an "ADA accommodation" for the Agenda because she was sick and could not attend. Ms. Potter stated that Ms. De Fazio did not tell her the nature of her illness, and only that she was "having a flare up." Ms. Potter did not query Ms. De Fazio as to what a "flare up" meant. She offered Ms. De Fazio the opportunity to present her comments in writing to the Commission before the Agenda. Ms. De Fazio insisted that she be allowed to be available by telephone, and the matter was referred to the Office of General Counsel.

On March 13, 2014, at 11:17 am, I sent Ms. De Fazio an e-mail regarding her ADA request. I noted that she had not specified her illness. But, regardless, this matter fell under NRS Chapter 241. I advised her that she could submit her comments in writing, and that these would be filed with the Agenda materials. Ms. De Fazio clearly took offense to this response, but her offense is not relevant to the issue of reasonable access under NRS Chapter 241. Ms. De Fazio asserts that I determined that her medical condition is "non-chronic". I did not. Neither I nor anyone at the Commission is qualified to diagnose or affirm Ms. De Fazio's various medical issues.²

Public comments submitted in writing are filed with the applicable agenda materials in the Commission database. They are posted on the Commission website upon filing. Ms. De Fazio has utilized this process without issue in the past. Exhibit A, attached hereto, is illustrative of the process she has followed: On July 25, 2013, the Commission held Agenda 17-13. The agenda items are posted on the Commission website and accessible by a hyperlink. Agenda 17-13 Item 1A is the initial public comment period. As you can see, Ms. De Fazio submitted as public comment correspondence between her and former General Counsel, Jan Cohen. The document is listed as a "miscellaneous item" and clearly indicates that it is in reference to Item 1A. Of note, all written comments submitted become a permanent record to the agenda and are micro-filed as such after the retention period.

Ms. De Fazio was not denied the right to comment at the Agenda. Rather, she was denied the opportunity to do it in the manner that she demanded. She was given a reasonable accommodation that makes her comments available to the Commission and to the public and allows them to be memorialized in the same fashion as an oral comment. Ms. De Fazio's primary complaint with the accommodation offered is her belief that the Commissioners do not read these agenda materials. This is completely unfounded. Of note, despite the fact that Ms. De Fazio's writing ability does not

¹ Upon information and belief, these organizations are National Toxic Encephalopathy Foundation, Functional Needs Working Group, and PUCWatchDogs.com.

² Ms. De Fazio repeatedly refers to Commission General Counsel attempting to "silence her" about future litigation allegedly related to smart meters. Again, Ms. De Fazio's allegations are baseless, and no content restriction was placed upon her.

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appear to be diminished by her condition, she elected not to make any public comment at all on March 14, 2014, nor did any other member of the three organizations that she asserts she represents. Ms. De Fazio could have requested that her statement be read into the record. Instead, she refused any accommodation but the telephone.

The Commission provides the public with the opportunity to comment at agenda meetings both in person and in writing. The Commission has not allowed public comment at agenda meetings via telephone. As Ms. De Fazio's Complaint makes clear, Commission agenda meetings can be lengthy, crowded and contentious. Ms. De Fazio's particular issue smart meters is one that has concerned many citizens. There are occasions where the Commission hearing rooms are filled to capacity with members of the public desiring to give comments. The Commission cannot accommodate such a volume of public comment via telephone. While Ms. De Fazio is correct that *parties to contested proceedings and rule makings* may be allowed telephone access, the Commission has never done so for the general public at agenda meetings.

Argument.

The accommodation offered to Ms. De Fazio on March 13, 2014, is reasonable under Nevada's Open Meeting Law. The Office of the Attorney General's Open Meeting Law Opinions are persuasive. A public body has the "discretion to determine whether the use of an electronic device will interfere with the conduct of their meeting, and, presumably, the power to forbid such a device's use in appropriate circumstances." OMLO2000-43 (December 11, 2000) (addressing the restriction of every kind of electronic device that may be used to audio or video record a public meeting). Allowing telephonic participation by the public during public comment periods would be particularly disruptive to a busy public body such as the Commission.

Further, the Office of the Attorney General agrees that the term "comment" in NRS 241.020 means both oral and written comment. *See In the Matter of Cold Springs Citizen Advisory*, OMLO 04-053 (December 7, 2004) at 3. However, in *In the Matter of Cold Springs Citizen Advisory Board*, the Attorney General found that despite its technical compliance, the Board's restriction that all public comment on one agenda item be in the form of written questions may have violated the spirit of the OML. *Id.* This finding was based upon the fact that the Board did not notify the public of the written question limitation and it was an unfair surprise, that the written question-only format discourages those who cannot write from participating, that not all comments can be posed in the form of a written question, and that the legislative history discussed that the public comment portion of the meeting would resemble that of a town hall meeting. *Id.* At 3 – 4.

In the Matter of Cold Springs Citizen Advisory is distinguishable from this matter. The accommodation offered to Ms. De Fazio came at her request the day before the scheduled hearing, and she has utilized this process in the past. There was no surprise. Ms. De Fazio does not appear to have any difficulty writing, and she generally prepares written comments that she reads into the record. There was no content or format restriction placed upon Ms. De Fazio in the submission of comments. While discussion with the Commission is allowed during public comment, it is not required. *See* NRS 241.020(2)(d)(3). Ms. De Fazio elected not to appear at the Agenda (or send anyone from her organizations in her stead), she elected not to submit any written comments, and

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she now complains that she failed to do so because of her unfounded belief that no one would read them.³

Conclusion.

I respectfully request that you find that the Commission did not violate the Nevada Open Meeting Law by providing Ms. De Fazio with the opportunity to provide written comments when she was too ill to appear at the Commission's March 14, 2014, agenda meeting. Should you require any additional information, please do not hesitate to contact me.

Sincerely,


Carolyn E. Tanner
General Counsel

Encl.

cc: Hon. Alaina Burtenshaw, Chairman
Hon. Rebecca Wagner, Commissioner
Hon. David Noble, Commissioner
Crystal Jackson, Executive Director
Ms. Angel De Fazio ✓

³ Ms. De Fazio includes a letter by Mr. Fred Voltz in her supporting documentation. In his letter, Mr. Voltz also asserts the Commission "is not aware of these comments unless the individual Commissioners re-read dockets just before meetings." This assertion is unsupported by any evidence. Upon information and belief, the Commissioners, like Mr. Voltz, are well aware of how to access supporting documentation for their agendas, including late-filed documentation. Curiously, Mr. Voltz also claims that I have refused to allow the posting for chemical sensitivities. Again, this assertion is baseless and false. I have never spoken to Mr. Voltz about this or any other issue.

EXHIBIT A



State of Nevada
Public Utilities Commission



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17-13 Agenda Items

	View	<u>Agenda Date</u>	<u>Item</u>	<u>Description</u>	<u>Pages</u>		
<u>Utility Agendas</u>	View	17-13	2013-07-25	00	AGENDA NOTICE	5	
	View	17-13	2013-07-25	1A	MISCELLANEOUS ITEM	2	
<u>Administrative Agendas</u>	View	17-13	2013-07-25	2A	DRAFT ORDER	13	
	View	17-13	2013-07-25	2A	DRAFT ORDER	13	
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	<u>Tentative Schedule</u>	View	17-13	2013-07-25	2E	DRAFT ORDER	12
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		View	17-13	2013-07-25	2H	DRAFT ORDER	4
		View	17-13	2013-07-25	2I	DRAFT ORDER	4
View		17-13	2013-07-25	2J	DRAFT ORDER	4	
View		17-13	2013-07-25	3A	GENERAL COUNSEL BRIEFING MEMO	12	
View		17-13	2013-07-25	3B	GENERAL COUNSEL BRIEFING MEMO	4	
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View		17-13	2013-07-25	YY	AUDIO RECORDING OF AGENDA MEETING	1	
View	17-13	2013-07-25	Z1	AGENDA MEETING MINUTES	5		
View	17-13	2013-07-25	Z2	AFFIDAVITS OF POSTING	3		
View	17-13	2013-07-25	Z2	AFFIDAVITS OF POSTING	1		