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September 16, 2020

Sophia Park, Administrative Law Judge
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 91402

Submitted via e-mail to
Sophia.Park@cpuc.ca.gov

Re: CCTA Comments on Draft Resolution ALJ-381

Dear Administrative Law Judge Park:

The California Cable & Telecommunications Association (“CCTA”) submit these Comments on Draft Resolution ALJ-381 consistent with the directions set forth in the Notice of Revisions dated September 1, 2020 by Chief Administrative Law Judge Anne E. Simon.

It is a fundamental principle of administrative law that parties to a proceeding are afforded the opportunity to opine on information presented into the record of a proceeding.¹ This principle is evident in the California Public Utilities Code,² the current version of the Commission’s Rules of Practice and Procedure,³ and long-standing Commission practice.⁴ However, the adoption of Proposed Rule 1.18 would depart from that principle. Specifically, Proposed Rule 1.18 allows members of the public to submit written comment electronically on the Commission’s website and those public comments would automatically be entered into the record, *without an expressly established opportunity for parties to respond*. CCTA, and the many of those that filed comments on the previous version of Draft Resolution 381,⁵ assert that if

¹ See generally U.S. CONST. amend. XIV; CAL. CONST. art. 1, § 7(a). *Traverso v. People ex rel. Dep’t of Transportation*, 6 Cal. 4th 1152, 1164 (1993) (“The fundamental requisite of due process of law is the opportunity to be heard”) (quoting *Goss v. Lopez* (1975) 419 U.S. 565, 579)).

² See, e.g., Pub. Util. Code § 1701.1 (affording the “parties to the proceeding a reasonable opportunity to respond to any public comments. . .”).

³ See, e.g., Rule 12.2 (ensuring the opportunity for parties reply to comments on a proposed settlement); Rule 11.1 (affording parties the opportunity to respond to motions); Rule 6.3 (allowing parties the opportunity to respond to petitions for rulemaking);

⁴ As a common practice, whenever an assigned Commissioner or Administrative Law Judge issues a ruling in a proceeding, in almost all cases parties are afforded the opportunity to reply opening comments.

⁵ See, e.g., Comments of Southwest Gas Corporation on Draft Resolution No. ALJ-381 Agenda ID#18447 at 2 (“The proposed Rule further appears to conflict with California Public Utilities Code section 1701.1(g), which provides that public written comments included in the record of a proceeding shall not be treated as evidence”); Comments of AT&T on Draft Resolution ALJ-381 at 2 (“AT&T suggests that Rule 1.18(d) be modified to provide that before written public comments are considered in a final decision, parties will be invited to comment on submitted written public comments.”); Comments of Goodin, MacBride, Squeri & Day on Draft Resolution ALJ-381 at 2 (“Since the persons submitting the

the Commission is going to adopt Proposed Rule 1.18, it must ensure parties are granted the opportunity to respond to public comments. Such a modification is necessary to avoid legal error, and an incomplete record in future Commission proceedings.

The Commission can ensure both legal compliance and a more fulsome record on which to make informed decisions through a minor modification to Proposed Rule 1.18 as follows:

(c) Parties shall be provided the opportunity, upon reasonable notice, to respond to all written public comments entered into the record, prior to the submission of the record. Parties may ~~respond to,~~ and cite to; any public comment submitted in a ratesetting, catastrophic wildfire, or quasi-legislative proceeding in their submissions to the Commission in that proceeding.

Below, CCTA explains further the legal and practical basis for modifying Proposal Rule 1.18.⁶

1. Public Utilities Code § 1701.1(g) Mandates that the Commission Provide Parties the Opportunity to Respond to Public Comments Included in the Record.

As noted above, the California Legislature was exceptionally clear that the parties must be provided the opportunity to comment on non-party public comments when entered into the record. Public Utilities Code § 1701.1(g) states:

The commission **shall** provide parties to the proceeding a reasonable opportunity to respond to any public comments included in the record of proceedings. (Emphasis added).

The use of the word “shall” makes clear that the directive for the Commission to expressly provide an opportunity for parties to respond to public comment. Accordingly, as a matter of law, parties must be granted sufficient process to respond to all public comments entered into the record, regardless of the medium through which such public comments are entered. Language within Proposed Rule 1.18 should clearly support parties’ “reasonable opportunity to respond,” consistent with the Public Utilities Code.

Additionally, principles of due process require that the Commission expressly afford parties the opportunity to respond to public comments entered into the record.⁷ The Commission

comments are not subject to cross-examination, their written comments may not be employed to satisfy the ‘substantial evidence test’”) (citation omitted).

⁶ While CCTA limits its comments to discrete aspects of Draft Resolution ALJ-381, CCTA continues to stand behind its prior comments filed July 13, 2020 regarding Proposed Rules 1.18, 2.9, and 13.9, and does not waive its rights with regard to advocacy regarding those proposed rules.

⁷ See note 1, above. See also *Application of Pacific Gas & Elec. Co. for 2013 Rate Design Window Proceeding, Order Modifying Decision (D.) 14-12-080 and Denying Rehearing, as Modified*, D.15-06-037 (“It would be unlawful for the Commission to entirely exclude evidence on one side touching on an essential matter at issue, as this would amount to a denial of due process of law.”); *In re Application of Pacific Gas & Elec. Co. to Revise its Electric Marginal Costs, Revenue Allocation and Rate Design, Including Real Time Pricing, to Revise its Customer Energy Statements, and to Seek Recovery of Incremental Expenditures, Order Modifying Decision 11-12-053 and Denying Rehearing of the Decision as Modified*, D.12-08-046 (“Parties are normally entitled to know the subject matter of a proceeding, to

itself has recognized: “When a case is conducted in the manner anticipated by the rules, parties have time to review—and an opportunity to respond to—any material...before that material is considered by the Commission.”⁸

2. The Commission Will Lack a Complete Record in Its Proceedings if It Does Not Afford Parties an Express Opportunity to Respond to Public Comments.

Moreover, Proposed Rule 1.18 creates practical issues. As AT&T pointed out in its prior comments, because public written comments are not served on parties, parties will not have notice of such comments.⁹ Not only does this lack of notice hamper parties’ reasonable opportunity to respond, pursuant to Public Utilities Code § 1701.1(g), it also limits relevant input from incorporation into the record. One of many negative outcomes of this scenario is that inaccurate or otherwise flawed information may be entered into the record without parties having been expressly provided the opportunity to correct those inaccuracies. Similarly, public commenters would be incentivized to avoid party status with the understanding that they could build the record without likelihood of rebuttal. These problems would be potentially multiplied across dozens of proceedings which would harm the integrity of the regulatory process.

3. The Draft Resolution’s Assertion that Parties Can Request the Opportunity to Respond to Public Comment Is Inconsistent with State Law and Administratively Inefficient.

Finally, the Draft Resolution ALJ-381 dismisses AT&T comments requesting that Proposed Rule 1.18 ensure parties are invited to public comment. The Draft Resolution states: “parties may request that the assigned Commissioner and/or Administrative Law Judge provide an opportunity to respond to public comment when circumstances warrant it.” However, this statement ignores the plain language of Section 1701.1(g), noted above. The Commission does not have discretion to decide whether parties may respond to public comments—the statute is framed as a mandate, and a response is “warranted” in any circumstance where public comment has been submitted into the record. Moreover, requiring parties to make a request to respond to public comments in a proceeding creates an unnecessary administrative procedure. The Commission adopting a transparent and streamlined process should ensure that all parties to a proceeding know that they have the opportunity to respond to any public comment in a given proceeding.

know what information this Commission will consider when it addresses those subjects, and to have an opportunity to present their views to us.”); *In re Rulemaking on Commission’s Own Motion to Provide for Mitigation of Local Rail Safety Hazards*, 75 Cal.P.U.C.2d 1 (1997) (“[a]ll parties have had the opportunity to offer evidence and to respond to every issue raised, fully satisfying the requirements of due process.”).

⁸ *Application of Velocity Commc’ns, Inc.*, Order Modifying Resolution T-17548 and Denying Rehearing of Resolution T-17548, as Modified, D.18-06-036, 2018 WL 3304526, at *7 (Cal. P.U.C. June 21, 2018).

⁹ Comments of AT&T on Draft Resolution ALJ-381 at 2 (July 13, 2020).

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In sum, CCTA respectfully requests minor modifications to Proposed Rule 1.18, as set forth in Attachment 1 (enclosed), to ensure compliance with state law and ensure the completeness of the record in Commission proceedings.

Respectfully submitted,

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ATTACHMENT 1

Proposed Changes to Draft Resolution ALJ-381

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AT&T further recommends that Rule 1.18 be revised to provide that before written public comments are considered in a final decision, parties will be invited to comment on submitted written public comments. We adopt the recommendation that Rule 1.18(a) be revised to apply up until the submission of the record in the proceeding, as defined by Rule 13.14.(a). ~~We decline to~~ and adopt the recommendation that Rule 1.18 require that before written public comments are considered in a final decision, parties will be invited to comment on submitted written public comments. Section 1701.1(g) provides that the “commission shall provide parties to the proceeding a reasonable opportunity to respond to any public comments included in the record of proceedings.” ~~As such, parties may request that the assigned Commissioner and/or Administrative Law Judge provide an opportunity to respond to public comment when circumstances warrant it.~~

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- (c) Parties shall be provided the opportunity, upon reasonable notice, to respond to all written public comments entered into the record, prior to the submission of the record. Parties may ~~respond to, and~~ cite to, any public comment submitted in a ratesetting, catastrophic wildfire, or quasi-legislative proceeding in their submissions to the Commission in that proceeding.