July 13, 2020

VIA ELECTRONIC MAIL

Administrative Law Judge Sophia Park,
Sophia.Park@cpuc.ca.gov

Comments of Goodin, MacBride, Squeri & Day on Draft Resolution ALJ-381

Dear Judge Park:

Pursuant the May 14, 2020, letter from Chief ALJ Simon, Goodin, MacBride, Squeri & Day submits below comments on Draft Resolution ALJ-381 which proposes modifications to the Rules of Practice and Procedure ("Rules"). The proposed modifications improve the rules and we offer comments on only four of the new or modified rules. Notice in the Daily Calendar indicates that comments are to be submitted to you by July 13, 2020. These comments are timely submitted.

Rule 1.18 (New)

The proposed new rule on Public Participation in Proceedings states:

1.18. (Rule 1.18) Public Participation in Proceedings.

Any member of the public may submit written comment in any Commission ratesetting or quasi-legislative proceeding using the "Public Comment" tab of the online Docket Card for that proceeding on the Commission's website.

(a) All written public comment submitted in a ratesetting or quasi-legislative proceeding will be entered into the record of that proceeding, and reviewed and considered by the Presiding Officer.

(b)Relevant written comment submitted in a ratesetting or quasi-legislative proceeding will be summarized in the body of the final decision issued in that proceeding.

(c) Parties may respond to, and cite to, any public comment submitted in a ratesetting or quasi-legislative proceeding in their submissions to the Commission in that proceeding.

(4) The Assigned Commissioner and Administrative Law Judge may invite parties to a proceeding to comment on any matter identified in public comment filed in that ratesetting or quasi-legislative proceeding.

"Written public comment" should not become part of the record of a proceeding. Since the persons submitting the comments are not subject to cross-examination, their written comments may not be employed[1] to satisfy the "substantial evidence test" appellate courts apply to findings in Commission decisions. [2]

That said, nothing prevents the Commission from including a summary of relevant comments "in the body of the final decision issued in that proceeding"[3] and discussing the fact that the comments were submitted.

It would be desirable if the Rule permitted the Presiding Officer to strike any "plainly defamatory, offensive and/or inflammatory" comments from the record and/or the "Public Comment" tab on the Docket Card. So long as the Commission permits anyone to post comments on the "Public Comment" tab, however, it will be very difficult for the Commission to prevent the posting of defamatory, offensive and/or inflammatory content on its website without contravening the First Amendment (to which the Commission, unlike Twitter and Facebook, is subject.)[4]

Moreover, it is doubtful that many who post such comments can be deemed to be a "person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission…" The person is not likely to be subject to Rule 1.1 to any meaningful degree and no statute provides the Commission with a readily apparent means by which to curb abuse of the posting opportunity established by Rule 1.18.

Accordingly, the Commission should seriously reconsider whether it is wise to adopt the new rule.

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[1] *Independent Energy Producers Association/Utility Reform Network v. Public Utilities Commission,* 223 Cal.App. 4th 945 2014 Cal.App. LEXIS 119 (February 5, 2014)

[2] Section 1757(a)(4).

[3] Per subdivision (b) of the proposed rule.

[4] See, *Pacific Gas & Electric v. Public Utilities Commission,* 85 Cal. App. 4th 86 (2000). The Court held that the Commission's enforcement of Section 453(d) of the Public Utilities Code violated the First and Fourteenth Amendments to the United States Constitution. ("Thus, we conclude that PUC's May 13, 1999 order improperly enforced the facially unconstitutional statute and must, therefore, be set aside.")

New Rule 2.8 and Modified Rule 4.5

Proposed Rule 2.8 and Modified Rule 4.5 describe the circumstances under which the Executive Director "may" dismiss a complaint or application.

The fact that the Executive Director is given the authority but not the duty to dismiss the application or complaint is problematic. "As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization."[5] Both rules should be modified such that if the circumstances described in the rules are present, the Executive Director "shall" dismiss the application or complaint.

Rule 4.1(a) (Amended)

The proposed new subdivision (4) of Rule 4.1(a) adds to the list of those "Who May Complain:

> *(4) former or current tenants of a mobilehome park, for a finding that the rates charged by the mobilehome park for water service are not just and reasonable or that the water service provided by the mobilehome park is inadequate, pursuant to Public Utilities Code Section 2705.6.*

The following similar provision should be added:

> *(5) former or current tenants of a mobilehome park, apartment building, or similar residential complex, for a finding that the rates charged by the mobilehome park apartment building, or similar residential complex for gas or electric service provided to the tenant through a master-meter exceed the rate level set forth in Section 739.5 of the Public Utilities Code.*

In *Hillsboro Properties v. Public Utilities Commission,* 108 Cal. App. 4th 246 (2003), 2003 Cal. App. LEXIS 632, the Court of Appeal held that the Commission was vested with the jurisdiction to entertain a complaint by a tenant against a mobilehome park alleging that the mobilehome park owner had charged rates in excess of those permitted by Section 739.5.[6]

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[5] *California Sch. Employees Assn. v. Pers. Comm'n*, 3 Cal. 3d 139, 144 (1970).

[6] Senate Bill 1117 would extend the requirements of Section 739.5 to electric service provided to a master-meter by any load serving entity, not just an electric utility.

The underlying Commission decision affirmed by the Court resulted from a complaint filed at the Commission by a mobilehome tenant.[7] The complaint was not filed against a public utility. The defendant was a mobilehome park. The Commission entertains such complaints today[8] and Rule 4.1 should provide that tenants alleging a violation of Section 739.5 are amongst those "Who May Complain." Mandate[9] would likely lie were the Commission to refuse to accept such a complaint.

Respectfully submitted,

GOODIN, MACBRIDE,
SQUERI & DAY, LLP

/s/*Thomas J. MacBride, Jr.*

Thomas J. MacBride, Jr.

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[7] *Robert Hambly, for Himself, and on Behalf of the Residents of Los Robles Mobile Home Park vs. Hillsboro Properties and The City of Novato; refund of excess charges for utility services collected from homeowners* .C.00-01-017. See Docket card at https://apps.cpuc.ca.gov/apex/f?p=401:56:0::NO:RP,57,RIR:P5_PROCEEDING_SELECT:C0001017

[8] P*ioneer Community Energy, Complainant vs. John Doe Mobile Home Park Owners 1-35 Vis-à-vis Park Billing Company, Inc., Defendant. [Alleged violation of Pub. Util. Code Section 739.5* C. 20-01-006. The Complainant in C. 20-01-006 is a community choice aggregator ("CCA") that, as best we understand the matter, alleges that the defendant charged rates based on PG&E's rates rather than that of the CCA. The critical point is that the defendant is neither a public utility nor a mobilehome park alleged to have provided water service improperly; the claim is grounded in Section 739.5

[9] Public Utilities Code Section 1759(b).