July 13, 2020

By Email (Sophia.Park@cpuc.ca.gov)

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Re: Draft Resolution ALJ-381 – Joint Comments of Southern California Gas Company and San Diego Gas & Electric Company on amendments to the Rules of Practice and Procedure, specifically Rules 1.13, 1.14, 8.2, 10.1, 12.1, 13.6 and Proposed New Rules 1.18, 2.9.[1]

INTRODUCTION

In accordance with the requirements set forth in Public Utilities Code Section 311(h) and Government Code Section 11351, Southern California Gas Company ("SoCalGas") and San Diego Gas & Electric Company ("SDG&E") (collectively, the "Joint Utilities") submit these opening comments on draft Resolution ALJ-381 (the "Draft Resolution"), issued May 14, 2020, proposing modifications to the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission").

The Draft Resolution sets forth several proposed modifications to the Commission's Rules of Practice and Procedure that are intended to "implement statutory amendments . . . reflect changes in the Commission's administration, streamline procedures, promote transparency and accessibility, and provide greater clarity."[2] The proposed revisions to the Commission's procedural rules are subject to review to ensure compliance with the California Administrative Procedure Act ("APA"), codified at California Government Code Section 11340,

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[1] The Joint Utilities have concurrently submitted in separate comments their proposed revision of draft Rule 3.6(i) included in Draft Resolution ALJ-381.

[2] Draft Resolution, p. 1.

et seq.[3] Procedural rules adopted by the Commission must be deemed by the California Office of Administrative Law ("OAL") to comply with the applicable requirements of the Gov. Code and standards set forth therein, and filed with the Secretary of State to be enforceable by the Commission.[4]

As discussed in more detail below, the Joint Utilities propose limited revisions to the proposed modifications set forth in the Draft Resolution. Specifically, the Joint Utilities recommend the following changes:

- Clarify that the proposed modification to Rules 1.13 and 1.14 regarding filing documents at the Commission's Los Angeles office only applies to formal filings but not informal submittal or other filings outside of a proceeding.

- Eliminate the addition of new Rule 1.18 that requires informal comments be entered into the record and considered by the presiding officer when arriving at a decision as it violates the Administrative Procedure Act (APA)'s evidentiary standards and "necessity" principle and interferes with the integrity of the Commission's decision making process.

- Modify the proposed new Rule 2.9 regarding requests for expedited schedules to allow for in certain circumstances resolving the application earlier than 12 months.

- Modify Rule 8.2 to require the scheduling of a Ratesetting Deliberative Meeting (RDM) to be noticed to the service list of the relevant proceeding(s).

- Add flexibility to proposed Rule 10.1 for distribution of discovery to parties to be achieved via service, posting online, or other delivery method, and clarify that the rule would only apply to non-confidential information.

- Clarify that requirements in proposed Rule 12.1 to disclose material external settlements and financial relationships should be directly related to and material to issues in a proposed settlement in a proceeding.

- Preserve existing language in proposed Evidence Rule 13.6 as deletion of the phrase "substantial rights of the parties shall be preserved" would dilute the integrity of evidence and protection of rights of the parties.

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[3] Gov. Code § 11351(a) provides that Gov. Code §§ 11340-11342.610 apply generally to regulations promulgated by the Commission, and that §§ 11343-11345 and § 11346.4 apply to rules of procedure adopted by the Commission. Pub. Util. Code § 311(h) requires the Commission to submit amendments, revisions, or modifications to the Rules of Practice and Procedure to the Office of Administrative Law for prior review in accordance with Gov. Code §§ 11349, 11349.1(a) and (b), 11349.3-11349.6, and 11350.3.

[4] Gov. Code § 11340.5.

ADMINISTRATIVE PROCEDURE ACT

The APA establishes basic minimum procedural requirements for adoption, amendment, or repeal of administrative regulations by California state agencies.[5] It is intended to promote "bureaucratic responsiveness and public engagement in agency rulemaking."[6] The APA has limited application to the Commission, affecting only the rules of procedure promulgated by the Commission. The rationale for the limited applicability of the APA to regulations adopted by the Commission may rest in the fact that the Public Utilities Code includes comprehensive protections that are intended to operate in a manner similar to the APA to protect procedural due process rights.[7] The Supreme Court of California has observed that where comprehensive procedural protections of the sort set forth in the Public Utilities Code exist, "the Legislature no doubt concluded that compliance with the APA would be largely redundant and might create confusion as to which procedures applied in a particular circumstance."[8]

Thus, the APA applies only to the rules proposed for inclusion in the Commission's Rules of Practice and Procedure. Gov. Code Section 11340.5 makes clear that such rules must comply with the applicable requirements of the Gov. Code and be filed with the Secretary of State in order to be enforceable by the Commission: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Gov. Code] Section 11342.600, ***unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter***." Gov. Code Section 11342.595 defines a regulation as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

The OAL reviews the Commission's proposed procedural rules for compliance with the standards set forth in the APA.[9] The OAL will consider, among other factors: the "necessity" of the regulation – *i.e.*, the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account

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5 Decision ("D.") 04-05-017, pp. 23-24.

6 *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 333.

7 *See, e.g.*, Pub. Util. Code §§ 311, 1701, *et seq.*; Section 20(e), Title 1, California Code of Regulations ("CCR").

8 *Tidewater Marie Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 569.

9 Gov. Code § 11349.1; *see also* Pub. Util. Code 311(h).

the totality of the record; the "consistency" of the regulation – *i.e.*, whether the proposed regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law;" and the "clarity" of the regulation.[10] If the proposed regulation is approved, the OAL will transmit it to the Secretary of State for publication in the CCR. The Commission's procedural rules are set forth in Title 20 of the CCR.

In accordance with the APA's factors, the Joint Utilities provide the following comments to ensure necessity, consistency, and clarity of the proposed rule changes.

1. Filing Documents at the Commission's Los Angeles Office (Rules 1.13 and 1.14)

SoCalGas's Regulatory Tariffs group has submitted advice letters at the Los Angeles CPUC office for many years, including on behalf of both SoCalGas and SDG&E. The submittal of advice letters does not involve the Docket Office. Consistent with the CPUC's Rules of Practice and Procedure's applicability to formal proceedings, the proposed modification to Rule 1.13 appears to apply the modification only for formal filings (*e.g.*, applications and complaints), not informal submittals or other filings outside of a proceeding (*e.g.*, advice letters).

However, if an indirect consequence of this modification would result in discontinuing the submittal of advice letters or other filings outside a proceeding at the Los Angeles CPUC office, this may be inconsistent with the next business day delivery service requirements. This would not align with the "consistency" factor under the APA. SoCalGas employs a courier service to provide next day delivery service for each business day of the week to its San Francisco office for the submittal of advice letters and other informal documents at the San Francisco CPUC office. SoCalGas has experienced courier delivery issues of lost or delayed deliveries beyond the next business day. Due to the importance of submitting no later than the required submittal date and courier delivery issues, critical submittals are made at the Los Angeles office. The elimination of SoCalGas's ability to submit such documents at the Los Angeles office increases the risk that it may not be able to submit within the required date. Presumably, this may also affect other utilities in the Los Angeles area.

2. Public Participation in Proceedings (New Rule 1.18)

Proposed Rule 1.18 suggests new requirements for informal comments included in the record of Commission proceedings that are "designed to promote public engagement."[11] Specifically, the proposed Rule would require that informal comments that are not formally filed

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[10] Gov. Code §§ 11349(a), (c) and (d); Gov. Code §§ 11349.1(a) and (b); *see also* Pub. Util. Code 311(h).

[11] Draft Resolution, p. 5.

with the Commission in a ratesetting or quasi-legislative rulemaking "be entered into the record of that proceeding and considered by the Presiding Officer in arriving at a decision."[12] The proposed Rule further provides that parties may cite to and respond to public comments in their formal filings made in the proceeding, but does not appear to provide a right to discovery regarding statements made in public comments, or to cross-examination as to material facts cited in public comments that are subject to dispute.

The Joint Utilities object to Proposed Rule 1.18. As a threshold matter, the plain language of Pub. Util. Code Section 1701.1(g) conflicts with proposed Rule 1.18. Specifically, Section 1701.1(g) provides that public comments entered into the record of a proceeding "shall not be treated as evidence." This important limitation is not reflected in the text of proposed Rule 1.18. Indeed, the draft Rule appears to grant statements included in public comments the status of evidence, providing that parties may cite to such statements in their formal submissions in Commission proceedings, that parties may be required to respond to such statements in the context of a proceeding, requiring that such comments be summarized in the final decision, and requiring the Presiding Officer to review and consider all informal public comments in rendering a decision. California Government Code § 11349(a)'s "necessity" requirement means that "the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion." While the need for this proposed modification to Rule 1.18 is driven by the desire for more public engagement, there are already means for such informal public comments to be encouraged and considered by the Commission in a manner that does not conflict with the evidentiary standards noted in the APA's necessity factor – *e.g.*, facts, studies, and expert opinion constitute evidence in order to preserve due process rights of the parties. Indeed, as mentioned at the December workshop on these proposed changes, the Public Advisor's Office has recently instituted tools to make public engagement more accessible and transparent, including the submission through an online form.

More broadly, it is a fundamental tenet of administrative law that each decision of the Commission must be adequately supported by evidence contained in the record of the underlying proceeding. Inviting parties to rely on informal public comments, which do not constitute evidence and have not been tested by cross-examination, to support their arguments presented in a proceeding violates this principle and interferes with the integrity of the Commission's decision-making process. Including non-evidentiary content in the body of a decision would also call into question the viability of the court's approach of relying on the Commission's factual findings in reviewing Commission decisions on appeal. Proposed Rule 1.18 dramatically lowers the bar for what information may be relied upon by the Commission in promulgating new regulations. This will harm rather than promote the public interest.

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[12] *Id.*

Moreover, basic procedural fairness requires that stakeholders to a proceeding have equal protections under the Commission's rulemaking process. Parties to Commission rulemaking proceedings are subject to procedural rules intended to protect the rights of all parties, as well as the integrity of the record developed in each proceeding. For example, the Commission's established rulemaking procedures allow for discovery and cross-examination in order to safeguard parties' rights and the ability of the Commission to rely on the record developed in a given proceeding. Requiring stakeholders who are parties to a proceeding to abide by procedural guidelines while stakeholders who are not parties are free to ignore them in submitting their informal comments is plainly inequitable and unreasonable.

Finally, adoption of Rule 1.18, as proposed, could have the unintended effect of *dis*incenting formal participation in Commission proceedings. Any interested person may formally participate in a Commission proceeding, but formal participation involves various procedural constraints and verification requirements that can be burdensome. The ability to simply prepare informal comments that may be submitted without the need to defend any statement on cross-examination, submit to discovery or attest to the accuracy of any statement made – while still enjoying the certainty that the comments submitted will be carefully considered by the Commission, summarized in the adopted decision, and relied upon by parties in the proceeding – could cause stakeholders to forgo party status in favor of this much easier route to presenting their arguments to the Commission.

Thus, the Commission should revise proposed Rule 1.18 to eliminate sub-sections (a) through (d), and to add the statement "Comments appearing in the 'Public Comments' category of the record will not be treated as evidence." These changes will ensure alignment with Pub. Util. Code Section 1701.1(g), satisfaction of the "consistency" and "necessity" requirements of the APA, and will serve to protect parties' procedural rights and the integrity of the Commission's rulemaking process.

3. Requests for Expedited Schedule (New Rule 2.9)

New Rule 2.9 establishes a streamlined process to ensure that applications that concern time-sensitive matters with public safety or major financial implications can be resolved expeditiously. Among other things, the proposed rule gives flexibility for the assigned Commissioner to deviate from this standardized expedited schedule, and to extend the proceeding beyond 12 months. Flexibility under this new rule should be maximized for different circumstances where warranted to resolve the application longer than 12 months or earlier than 12 months. Thus, the Joint Utilities request that proposed Rule 2.9 specify that the expedited schedule can not only result in a proposed decision to be issued within 12 months from the date of the application, but can be issued earlier than 12 months. If a public safety threat or a major direct financial impact is at issue, an earlier decision may be prudent and necessary, particularly where not contested. The APA's "clarity" factor in this regard is instructive so that there is no ambiguity about the flexibility in providing for an earlier expedited timeline for a proposed decision's issuance where warranted.

For similar flexibility reasons, under the APA's "necessity" and "nonduplication" factors, it appears unnecessary to specify in proposed subpart (d) that requests for an expedited schedule shall be granted "only in exceptional circumstances." The special circumstances are already specified in subpart c so that clause in subpart (d) should be deleted as duplicative.

4. Ratesetting Deliberative Meetings and Ex Parte Prohibitions (Rule 8.2)

Proposed Rule 8.2 would update the Commission's *ex parte* rules to align with the requirement set forth in Pub. Util. Code Section 1701.3(h)(6)(A) related to "quiet periods" in ratesetting proceedings.[13] The Joint Utilities agree that the proposed revision is reasonable and offer a minor modification intended to improve parties' ability to comply with the "quiet period" requirement for Ratesetting Deliberative Meetings ("RDMs").

The Joint Utilities recognize that RDMs are a key tool used by the Commission to facilitate well-reasoned and timely decisions. The recent increase in frequency of RDMs has highlighted inconsistencies and confusion as to how these meetings are noticed to the parties and to the public. While the Commission has in some instances provided courtesy notification of RDMs, it is not clear that the Commission will do so in every instance. Thus, it falls on parties to be aware that a RDM may be scheduled (and "quiet time" imposed) and to proactively search the Commission's website in an attempt to locate the relevant notice.

The Joint Utilities propose that the Commission modify proposed Rule 8.2 to provide that when the Commission schedules an RDM, the notice and agenda shall be served electronically on the service list of the relevant proceeding(s). This approach is similar to the Commission's planned modification of Rule 14.2 to require electronic service of revised proposed decisions. The Joint Utilities believe that this proposed modification creates no material burden on the Commission, will greatly improve transparency, improve the decision-making process by minimizing potential delays, and will help to ensure compliance with (and avoid inadvertent violations of) the Commission's Rules of Practice and Procedure. This proposed modification is also consistent with the goal of "clarity" set forth in the APA.

5. Discovery from Parties (Rule 10.1)

The Joint Utilities support the proposed Rule 10.1 option for parties to request a process whereby discovery requests and non-confidential responses from parties are distributed to other parties in a proceeding. However, to maximize flexibility and not unduly burden parties, we suggest that distribution can be achieved via either service or posting the responses online or via another electronic discovery portal. This will meet the stated needs for efficiency and transparency while not unduly expending additional resources during the course of a proceeding, particularly given voluminous discovery primarily propounded on the utilities as respondents.

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[13] Draft Resolution, p. 10.

Additionally, under APA's "clarity" factor, the Discussion section of the Draft Resolution should match the proposed language in the rule that this requested process only applies to non-confidential information.

6. Settlements Outside of a Commission Proceeding (Rule 12.1)

Proposed Rule 12.1 would require parties to a settlement presented for Commission approval to disclose outside settlements and/or financial relationships that "may be material to the Commission's evaluation of a proposed settlement . . ."[14] The proposed text of the draft Rule frames the requirement a little differently, however, requiring parties to disclose "any separate agreements or financial relationship between parties outside the scope of the proposed settlement but related to issues in the proposed settlement," and omitting the materiality standard included in the Draft Resolution's description of the proposed Rule.

As a threshold matter, the disconnect between the description of proposed Rule 12.1 contained in the Draft Resolution and the text of the proposed regulation violates the "clarity" requirement set forth in the APA, which requires that the intent of the regulation be clearly conveyed by the text of the adopted rule.[15] Moreover, while the Joint Utilities support the proposal to require disclosure of material external settlements and financial relationships, they are concerned that the proposed rule, as drafted, is unduly broad and vague. The standard established in the proposed Rule – that disclosure must be made of all agreements and financial relationships "related to" issues in a proposed settlement, unbounded by time or materiality – could implicate transactions that are not material to the settlement. For example, SDG&E participates in the markets for energy, Resource Adequacy ("RA") and Renewable Energy Credit ("RECs"). Thus, a settlement in the RA or Renewables Portfolio Standard ("RPS") proceeding could require it to list all market transactions it has ever entered into with parties to a proposed settlement who are market participants. Since many, if not most, market participants involved in RA and REC sales are involved in the Commission's energy procurement-related proceedings, the list of agreements and financial relationships for all settlement parties could get very long very quickly. This would greatly burden all parties to a settlement and would likely provide little value to the Commission.

To avoid this unintended consequence, the Joint Utilities suggest modification of proposed Rule 12.1 to require parties to advise the Commission of agreements and financial relationships that are (i) "directly related" to; and (ii) "material" to issues in a proposed settlement agreement. This will ensure that the Commission can easily focus on and evaluate those transactions that are relevant to the settlement and avoid the need to sift through potentially hundreds of transactions that are not relevant.

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[14] Draft Resolution, p. 11.

[15] Gov. Code §§ 11349 (c) and 11349.1(a)(3).

7. Evidence (Rule 13.6)

In seeking to clarify the applicability of the technical rules of evidence to Commission proceedings, proposed Rule 13.6 strikes existing language providing that "the substantial rights of parties shall be preserved." The Joint Utilities strongly oppose elimination of the current protection of parties' substantial rights; proposed Rule 13.6 should be revised to preserve the language proposed for deletion. As appropriately noted in the Discussion section of the Draft Resolution, the modifications are not intended to dilute the "integrity of evidence and protecting the rights of the parties." Nonetheless, the actual language proposed – *i.e.*, deletion of the phrase "substantial rights of the parties shall be preserved" – would produce exactly this outcome.

As discussed above, rules proposed for inclusion in the Commission's Rules of Practice and Procedure must satisfy the "consistency" standard of the APA. In other words, proposed regulations must be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." The proposal to remove the Commission's obligation to protect the substantial rights of parties is directly at odds with its requirements under the law; the language of the existing rule must be retained in order to ensure that the version of Rule 13.6 ultimately adopted reflects the Commission's existing legal obligation to protect the substantial rights of the parties who appear before it. Accordingly, the proposal to delete this language should not be adopted.

Likewise, the proposal to delete the requirement to protect parties' substantial rights conflicts with the APA's "necessity" standard, discussed above. Similar to the discussion above regarding proposed new Rule 1.18, this deletion conflicts with the evidentiary standards noted in the APA's "necessity" factor where facts, studies, and expert opinion subject to the opportunity for cross-examination constitute evidence in order to preserve due process rights of the parties. This would impair parties' due process rights and opportunity to be heard, which are fundamental constitutional rights that preempt any administrative modifications regarding application of the technical rules of evidence.

Additionally, while the intent of the proposed rule appears to be to encourage further participation and consider "public policy protections," this can and does still occur without unnecessarily diluting what constitutes evidence under the CPUC's rules and the weight that should be afforded to non-evidence. As just one example, hearsay may be admissible in CPUC proceedings, but it rightfully cannot form the basis for the substantial evidence standard for the Commission to render its findings and decisions.[16] As noted in the 2014 PG&E Oakley Decision

[16] *See, e.g.*, *The Utility Reform Network v. Pub. Util. Comm'n*, 223 Cal. App. 4th 945, 949 (2014)(annulling D.12-12-035, as modified by D.13-04-032)("[T]he commission's finding of need is unsupported by substantial evidence, because it relies on uncorroborated hearsay materials the truth of which is disputed and which do not come within any exception to the hearsay rule.") (citing *Investigation on the Commission's Own Motion Into the Fitness of the Officers, Directors, Owners and Affiliates of Clear World Communications Corporation* (Cal.P.U.C., June 16, 2005) Dec. No. 05-06-033 [2005 Cal. PUC LEXIS 221,at *81 ("While hearsay is admissible in our administrative

by the Court of Appeals, because the CAISO hearsay materials at issue were not corroborated by other competent evidence, they did not constitute substantial evidence to support the Commission's decision. Thus, whatever evidentiary weight is due the CAISO hearsay materials, the Court of Appeals deemed that they could not alone support the Commission's finding of need for the Oakley Project.[17]

CONCLUSION

For the reasons set forth above, the Commission should revise the Draft Resolution in a manner consistent with the comments provided herein.

Respectfully submitted this 13th day of July, 2020.

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hearings, it cannot be the basis for an evidentiary finding without corroboration where the truth of the out-of-court statements is at issue. (Gov. Code § 11513(d).)") Consequently, hearsay is admissible in Commission proceedings, but it "may not be solely relied upon to support a finding[.]" (citing *Re Communication TeleSystems International* (1996) 66 Cal.P.U.C.2d 286, 292, fn. 8.)

[17] *See id.*