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Decision 88 04 059 APR 27 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own motion for purposes of compiling the Commission's rules of procedure in accordance with Public Utilities Code Section 322 and considering changes in the Commission's Rules of Practice and Procedure.	)	R.84-12-028 (Filed December 19, 1984)

ORDER ADOPTING AND REVISING RULES FOR SETTLEMENTS AND STIPULATIONS

By Decision (D.) 87-11-053 the Commission sent proposed rules governing settlements and stipulations to all parties to this proceeding and requested that comments be filed by January 25, 1988. The proposed rules were transmitted to the Office of Administrative Law and were published in the California Register on December 4, 1987. Comments were received from Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SoCal), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E), Pacific Bell (Pacific), California Trucking Association (CTA), Toward Utility Rate Normalization (TURN), Industrial Users, and Division of Ratepayer Advocates (DRA).

We have considered all the comments to the proposed rules and have made substantial revisions to reflect the concerns raised. Because these revisions are so extensive, we will republish these rules (Appendix B hereto) and provide for a second round of comments. In doing this, we have postponed by at least 60 days having final settlement rules in place. We are not anxious for delay beyond the required comment period after the rules are republished and we hope that parties' comments will be confined to the changes in the rules and will not repeat arguments made and rejected previously.

We will adopt the rules which have been amended to delete obsolete references to the Commission Secretary and Assistant Secretary since these changes are noncontroversial and we received no comments on the proposed changes (Appendix A hereto).

Because these rules embark on a formalized procedure to carry us through uncharted waters, we wish to reexamine them in their entirety after completing at least one full rate case cycle and are appropriate experimental period. We will ask for comments and review the entire settlement procedure 24 months after we adopt final settlement rules.

General Comments

CTA takes issue with the second paragraph of proposed Rule 51.10, recommending that it be stricken from the final adopted Rule. This paragraph provides that any party in proceedings other than gas, electric, telecommunications or large water proceedings may apply to have these rules apply to settlements and stipulations in a particular matter. Anyone protesting such application must demonstrate that it is not in the public interest to do so. CTA maintains that this paragraph places an unreasonable burden on participants in ratemaking proceedings for the transportation industry. These participants frequently represent themselves and lack the legal expertise that CTA believes is necessary to respond to motions and to set forth legal argument. CTA further objects to what it views as the automatic application of a rigid judicial stipulation and settlement procedure to quasi-legislative transportation proceedings at the request of a single moving party. CTA maintains that this effectively restricts parties' rights to meaningful participation in Commission proceedings that directly affect them and thereby denies their right to hearing.

We are concerned that we have placed a heavy burden on anyone wishing to protest this procedure and will delete the last sentence of the second paragraph of Rule 51.10. We will not, however, strike the remainder of the paragraph. Without the option

of applying these rules to other types of proceedings, we are left in those proceedings with no rules to apply to any stipulation or settlement that might be offered. That situation is exactly what led us to propose these rules for stationary utilities, so that when a stipulation or settlement was offered, there would be a framework within which to proceed. We are not convinced that we should deny parties in transportation proceedings the opportunity to argue that this framework would serve the public interest in specific cases, but by deleting the last sentence, we have placed the burden of demonstrating the public interest on the proponents rather than on the protestants. We will permit protests to such motions either orally or in writing.

TURN and Industrial Users take vigorous exception to the entire concept of contested settlements, arguing that the process set forth in the proposed rules sharply reduces any meaningful participation by the nonagreeing intervenors. They propose specific changes to the rules, including mandatory discovery, equal access to discussions or negotiations involving DRA, retention of the current rate case plan schedule and full hearings with opportunity for any party to present its case and to cross examine other parties on the merits of the issues themselves and not just on the terms of the settlement. A number of these proposals have merit and will be discussed under the individual rule subheadings below.

Of the parties opposing the rules, TURN is the most emphatic in its opposition. Its closing comment reads "This Commission must not adopt a rule that would permit the abridgement of some parties' participation just because some other parties have reached a common position." In response, we repeat the commitment made in D.87-11-053 that in drafting these rules we have tried to keep the process of stipulations and settlements open and accessible to all parties while preserving the efficiencies inherent in disposing of matters without extended hearings. The

modifications we make today to the proposed rules reflect and extend this commitment and respond substantially to the concerns voiced by the opposing parties.

The remainder of the commenting parties generally supported adoption of the rules but suggested modifications which will be discussed under the individual rule subheadings below.

Rule 51(a) - "Party"

PacBell has asked to have the definition of a "Party" clarified by defining the term "indicated intent to participate". Because we are changing the timeframe in which stipulations and settlements may be considered, we no longer find it necessary to include this phrase and will revise the definition of "party" to apply to all those who have filed a formal appearance in the proceeding.

Rule 51(b) - "Commission proceeding"

PG&E proposes to have the definition of "Commission Proceeding" amended to include filed and accepted Notices of Intent, TURN proposes to delete references to Notices of Intent at all as being too early in the proceeding to provide meaningful opportunity for analysis, and PacBell proposes to eliminate complaints from the proceedings to which these rules apply.

We will adopt TURN's suggestion and eliminate the term Notice of Intent altogether. In doing this, we note that there are frequently substantial changes from the Notice of Intent to the Application and recognize that the Application is the document that represents what the utility is asking for and that it is the document noticed to the public. We think all parties and the general public will be best served if the document that is to be the starting place for stipulations and settlements be the document that is actually before the Commission and the public. That document is the Application.

Our resolution of this issue renders moot the suggestions of PG&E and SoCal that we permit the reopening of previously

decided cases to receive stipulations and settlements in lieu of requiring the utility to go through the preparation of a Notice of Intent and an Application. We recognize that this process uses utility resources, however, it gives us, the general public, and all the participants a complete look at a future test year instead of a selective look at certain elements from a prior proceeding. Additionally, should the stipulation or settlement not be adopted, everyone, including the utility, is substantially further ahead in the process if the application has already been filed.

With respect to PacBell's proposal, we are not persuaded that we should remove complaints from the types of proceedings to which these rules will apply. Past experience tells us that most of the complaints that come before us have only two parties. Those two parties can move to waive application of these rules under Rule 51.10, and we suspect that, for the most part, this is what will happen. Pacific's concern about third parties to complaints forcing a hearing on issues that have been settled between the "real parties in interest" is misplaced. When third parties have been granted leave to intervene under Rule 53, they have already had to make averments that are reasonably pertinent to the issues presented in the complaint in support of that intervention. To deny them the opportunity to explore any settlement or stipulation between the "real parties in interest" ignores the showing they have had to make to become parties to the complaint and effectively shuts them out of the process before they ever have an opportunity to present their concerns in a formal setting. We are unwilling to do this and will not adopt PacBell's proposal.

Rule 51(c) - "Settlement"

PG&E objects to the definition of settlement as overbroad, since as presently worded it allows parties other than the moving party to enter into settlement agreements which, if adopted, would terminate the application in a manner potentially adverse to the applicant's interest. Although we think it highly

unlikely that we would be presented a settlement that did not involve the moving party, in an abundance of caution, we will adopt PG&E's suggestion to change the definition. Because PG&E's proposed language requires an additional definition, we will not use it, but will instead add the following sentence to the definition: "In addition to any other parties entering into the agreement, settlements in application proceedings must be signed by the applicant and in complaint proceedings must be signed by the complainant and defendant."

Rule 51.1 - Proposal of Settlements or Stipulations

PG&E proposes that the language in this section be modified to indicate that the comparison exhibit submitted to explain the impact of the proposed settlement is also appropriate when a Notice of Intent, rather than a formal application, has been filed. Since we have decided that we will not consider stipulations or settlements until a formal application is filed, PG&E's suggestion will not be adopted.

PacBell suggests that we clarify who "participating Staff" is. This term was chosen deliberately to avoid cumbersome language pointing out the DRA is the participating Staff in applications under the rate case plan for energy and telecommunications utilities and CACD is the participating Staff in applications under the rate case plan for Class A water utilities. We do not perceive the need for further clarification in the rule itself. We have added a provision, as a caution, that restricts settlements to the issues in the proceeding at hand so that parties do not attempt to extend the settlement to other proceedings or to issues which may come before the Commission at some future date.

Rule 51.2 - Timing

This Rule concerns the timing of the filing of stipulations and settlements. As previously discussed, we will not entertain stipulations and settlements at least until the formal application has been filed. TURN suggests that they not be

entertained before the first prehearing conference (Day 40, usually late January or early February under rate case plan proceedings). DRA suggests that they not be entertained until after distribution of staff exhibits and testimony (unless staff is not a party to the proceeding or has indicated that it will not distribute exhibits and testimony).

The DRA proposal has appeal, since having the DRA position in the public domain before entertaining stipulations or settlements would clearly join the issues for all participants. We are concerned, however, that under the rate case plan for energy and telecommunications applications, such exhibits (including rate spread) are not due until Day 84 (usually mid March). If settlements may not be filed before this date, it places great pressure on other participants, and ultimately on the Commission itself, to act on the settlement hastily. If, for example, a settlement is not filed by the time hearings would normally start (Day 91 or early April), the hearing process which must follow will by necessity be compressed and accelerated if we are to complete the proceeding within one year from the date the application was filed. The timing problems are exacerbated in proceedings which have statutory deadlines under the Permit Streamlining Act. Such pressure serves no one well.

We will instead adopt TURN's suggestion that stipulations and settlements be filed no earlier than the first prehearing conference. Under the current rate case plan this is Day 40 (mid February) and in other proceedings may be substantially earlier. We stress that the rate case plan is undergoing reexamination in R.87-11-012 and any reference in this decision to deadlines or timeframes under the rate case plan refer only to the current plan. We do not necessarily intend to bind ourselves to similar timeframes for the future. We will simply use the prehearing conference, whenever it may occur, as the benchmark for filing proposals of stipulation or settlement.

In discussing timing, neither DRA nor TURN addressed the issue, raised by Industrial Users, of when settlement discussions (as opposed to the formalized settlement proposal) take place and who receives notice of and the opportunity to participate in such discussions. D.87-11-053 specifically did not provide for notice of these discussions to all parties in the interest of facilitating opportunities for agreements. Industrial Users argues that to exclude interested participants from the earliest phase of the stipulation/settlement process gives DRA and any party in agreement with it an inordinate "leg up". Industrial Users believes that the rationale for such exclusion stated in D.87-11-053 gives insufficient weight to the fact that the differences among the participants will surface sooner or later, whether in a subsequent hearing or in some other way. Thus, exclusion of some participants in the early stages of any settlement process does not produce any greater efficiencies and may well be less efficient for want of all viewpoints as the settlement is formulated.

To the extent that inclusion of other participants in the development of the settlement resolves their concerns early in the process it reduces and possibly eliminates subsequent opposition to the settlement when it is formally proposed. Such a result is both efficient and desirable. On the other hand, we are mindful that in the real world, the very preliminary discussions of settlement are much more likely to take place in a "one on one" setting than in a large meeting. At some point initial feelers develop into substantive discussions, give and take begins to occur and a joint agreement starts to jell. After reflecting on Industrial Users' comments, we conclude that somewhere in this continuum it is important that the process be opened up and other parties included but we hesitate to pick an arbitrary point and require notification of all settlement discussions after that point. Accordingly, we will not revise Rule 51.1 to require notice of settlement discussions as of a specific time. We will provide that the

settling parties give at least one notice and convene a settlement conference including all parties prior to filing the settlement document by the settling parties. In requiring only one formal settlement conference we rely on the good faith of the settling parties in not unnecessarily excluding other participants during the formative development of the settlement. We strongly urge their inclusion in the settlement process at the earliest productive point so that their views may be aired, and possibly resolved, in the informal arena without the necessity of protests and subsequent hearing.

In addition to the notice requirement set forth above, we have made a substantial addition to Rule 51.1 by providing that non-parties may not attend stipulation and settlement meetings conducted outside the public forum of the hearing room. Further discussion of this issue appears under Rule 51.9 concerning inadmissibility and confidentiality.

We remind all parties that stipulation and settlement conferences are most successful when all participants discuss frankly and openly the problems involved and where the prevailing climate is conducive to admissions and concessions. We expect all participants to conduct themselves accordingly.

SoCal argues that settlements and stipulations ought to be accepted at any time prior to the issuance of a final Commission decision. We are not convinced that there is any value to a stipulation or settlement presented later than 30 days after the last day of hearing. At this point there are no longer any efficiencies associated with further stipulations or settlements and they only serve to delay or interrupt an orderly decision-making process. We will not adopt SoCal's suggestion. We will, however, clarify an ambiguity that PacBell noted and modify Rule 51.2 to eliminate the confusing reference to submission.

Stipulations and settlements will be accepted up until 30 days following the last day of hearing irrespective of when submission occurs.

Rule 51.5 - Contents of Comments

Industrial Users urges that we remove the requirement that parties specify a provision of law supporting their request for a hearing on a contested stipulation. They argue that the requirement places a burden on any party wishing to contest a stipulation or settlement and that removal of the requirement would reflect a commitment on the Commission's part to provide hearing whenever requested by a contesting party. We believe that the revisions we have made to the proposed rules amply reflect our commitment to an open process involving all parties. There are occasions when hearing, even on a contested issue, is simply not required, for example, when the contested issue is a legal one, or when the contested issue of fact is non-material. We do not think it unreasonable to require any party who asserts that a hearing is required to support that assertion with appropriate citation.

PG&E suggests that we modify the rule to provide that a failure to file comments would constitute a waiver of hearing rights only to the extent that such a right is not otherwise required by statute. We will make this modification.

Rule 51.6 - Contested Stipulations and Settlements

SoCal, SDG&E, PacBell, DRA and TURN all commented on this proposed rule. SoCal proposes that the rule be redrafted to apply only to settlements since stipulations generally occur and are addressed in the normal course of hearing. SDG&E has similar concerns and recommended that the proposed rules authorize the ALJ to waive application of the rules and to accept on the record stipulations of minor significance which do not control the outcome of an issue. We will not remove stipulations from the rule, since it is confusing to have some rules apply to settlements, some to stipulations and some to both. We will, however, revise it along

the lines suggested by SDG&E, which we think will have the same effect SoCal intended.

The much larger issue concerning hearings on contested settlements, whether they should be required in all cases, the scope of the hearing, and the scheduling of discovery, preparation and the hearings were all the subject of extensive comments.

SoCal urges that Rule 51.6 apply only if a settlement is contested on a material issue of fact since legal issues may be disposed of through the briefing process and protests that raise no material issue of fact require no hearing. SDG&E also recommended language to clarify the Commission's authority to decline to hold hearings where a substantial basis for opposition was not presented. PacBell notes that when a settlement or stipulation is entered into after evidentiary hearings have been held, further hearings may not be needed and recommends that Rule 51.6 so state.

TURN recommends that the entire rule be revised to provide that if the stipulation or settlement is contested the established procedural schedule for the proceeding shall remain intact and parties shall be permitted to conduct discovery, present testimony and cross examine witnesses as if the proposed stipulation or settlement had not been offered. This revision would, according to TURN, give objecting parties the same procedural rights, time schedule, and opportunity for participation they would have had absent the stipulation or settlement.

DRA and PacBell both address the scope of hearing on contested agreements. DRA's comments go to the admissibility of discussions of the parties leading up to the agreement and are adequately covered by Rule 51.9 on Admissibility. PacBell suggests that since the purpose of settlements or stipulations is to narrow the scope of hearings and issues before the Commission, any hearings should be limited to the merits of the agreement and not the underlying positions of the parties. It asks that the rule be amended to specify that this is the scope of the hearing.

We will revise the rule to indicate that discovery will, rather than may, be provided when a stipulation or settlement is contested. We caution parties, however, that most discovery should be well underway in any proceeding by the time a settlement or stipulation is proposed, especially since we have modified the rule to provide that a stipulation or settlement will not be considered prior to the first prehearing conference. Further discovery may be necessary once an agreement is proposed but we do not wish to see unnecessary delay because a party waited until a stipulation or settlement was proposed to begin preparing its case.

We will not adopt the TURN proposal to maintain a rate case plan schedule intact if a stipulation or settlement is contested. Once a stipulation or settlement is proposed, we wish to move quickly to examine it, receive parties' comments, hear parties' cases and decide the matter, providing earlier certainty of outcome than would be possible under a year-long rate case schedule and freeing up parties' resources so that they might be used productively in other proceedings. This means that all parties will have to begin preparation of their cases as soon as the Notice of Intent is tendered. This scheduling will undoubtedly create some additional burden on the front end of the process, but it should substantially lighten the burden in the later portion.

TURN and Industrial Users both raise good points about the scope of the hearing and we will revise the rule to provide that when material issues of fact are contested, the Commission will hold hearings on those matters. Stipulating parties will be expected to testify as to their position on the issue(s) in question, and parties may cross examine and may put on a direct case of their own on the contested issue(s). We recognize that this broadens the scope of hearings previously envisioned on contested stipulations or settlements, however we think the additional time well spent in developing the substantial evidence necessary for us to issue a reasoned decision.

We will also revise the rule to make it clear that we need not go to hearing when a material issue of fact is not raised or when the contested portion of a stipulation or settlement involves purely legal issues.

Lastly, SoCal takes issue with the second paragraph of proposed Rule 51.6 which provides that uncontested portions of settlements may be severed and decided without further hearings. SoCal believes that parties to a settlement should be able to include within the terms of the settlement whether issues are severable. It notes that often parties to a settlement will view it as a complete package and would not want to be a party to a settlement if the package were in any way modified. SoCal suggests that the Commission inform the parties that it would accept a settlement only if a specific element is added, deleted or modified. The parties could then indicate whether they wish to proceed with the settlement or withdraw it and proceed on the underlying application. SoCal states that it will not participate in any settlement where the Commission decision "picks and chooses" from a settlement package.

We accept, in basic fairness to the settling parties, that a settlement which was negotiated as a package should be considered as an indivisible whole. We will eliminate that portion of Rule 51.6 which indicates that portions of the settlement or stipulation can be severed and decided separately. We are deeply concerned however, about timing. We can easily foresee a situation where a party will contest one or more material issues of fact in a settlement, hearing will be had on those issues and a substantial record developed that persuades us to adopt something other than what the stipulating parties agreed to. The problem at this juncture is if the stipulating parties want to go to hearing on the entire underlying application with their original litigation positions rather than accept adoption of less than the complete stipulation or settlement, how do we compress a full blown hearing

schedule into the short time likely to remain in the year long rate case schedule or into the time remaining for a Permit Streamlining Act matter?

We invite parties' comments on this problem and request their specific suggestions for procedural vehicles for notifying stipulating parties that the Commission will not accept the entire stipulation or settlement as offered and a timetable for proceeding after that notification. Suggestions must recognize the right of third parties to hearing on contested issues and must provide for reasonable opportunity for further participation, briefing, decision preparation and review, and publication of a proposed decision under PU Code Section 311 thirty days prior to final Commission action. This is a daunting task and we await with interest parties' scheduling suggestions.

Rule 51.7 - Commission Rejection of a Stipulation or Settlement

TURN recommends that we delete the language in the rule following "in the public interest" as unnecessary if we adopt TURN's suggested changes to Rule 51.6. The changes we have made to Rule 51.6 render portions of Rule 51.7 surplus and we will modify it accordingly.

PG&E notes that in its present form Rule 51.7 does not indicate whether parties to a proceeding may request appeal or rehearing of a Commission rejection of a settlement or stipulation and recommends that we indicate that the Commission will make any rejections by formal decision. We will not adopt PG&E's suggestion because of the potential for delay in the underlying proceeding. We think it best, if a stipulation or settlement is not going to be considered, to proceed expeditiously to hearing on the matter itself rather than expend time and resources preparing a formal order, placing it on the agenda, issuing it, and then considering appeals of our decision to reject an agreement, all of which could easily consume two to four months' time. We will, however, modify the language of the rule to indicate that we will decline to

consider stipulations and settlements rather than reject them, which implies a formal action on our part.

Rule 51.9 - Inadmissibility

DRA, SoCal and Edison all raised concerns about this rule, each urging that it be made more specific as to the scope of matters that would be inadmissible under this Rule. SoCal suggested that all such matters be treated as confidential and not be disclosed to any party outside the negotiations as well as being inadmissible at hearing. Edison suggested that the inadmissibility provisions extend to preparation for negotiations in addition to the negotiations themselves. Both Edison and SoCal recommended that discovery of such matters be precluded as well as making them inadmissible at hearing.

We will adopt these suggestions in the interest of providing a climate that will foster open and frank discussions among parties during negotiations without concern that their statements may be used against them later in the proceeding or in any other proceeding. We invite parties' comments on the impact of the inadmissibility provision on conduct of future proceedings and whether they anticipate any problems with discovery or otherwise as a result of this provision.

Addition of the confidentiality condition raises the question, not specifically discussed in any party's comments, which is: should negotiations be open to non-parties? If we open stipulation or settlement conferences to non-parties, such as members of the Commission Advisory and Compliance Division, the administrative law judge, Commissioners or their staffs, the press or the general public, we have serious concerns about our ability to apply a confidentiality rule to such non-parties. Further, the presence of non-parties who are not bound by any confidentiality rules could have a serious "chilling effect" on the negotiations resulting in parties being unwilling to discuss any position except their litigation position. Accordingly, we will revise Rule 51.1

to provide that stipulation and settlement conferences occurring outside the hearing room (which is a public forum) shall not be open to non-parties. We specifically invite comments on this revision since it was not contemplated as part of the original proposal.

Rule 51.10 - Applicability

PacBell suggests that proposed rule apply only to proceedings commenced after the adoption of final rules on settlements and stipulations. Our failure to specify when the rule applied was an oversight. Because we have ongoing proceedings in which settlements and stipulations may well be offered, PacBell's suggestion, if adopted, would leave us with no framework within which to process these agreements. We think it better to make the rules applicable to proceedings pending at the time of their adoption so that parties will know what to expect. We will add the cautionary note, however,that the rules will be applied liberally to cases in progress so as not to create delay in the proceedings which would not have existed absent the rules.

Rule 84 - Petition to Set Aside Submission

PacBell suggests that the modification to this rule is not necessary and is potentially confusing. We think the confusion, if any, comes from the title of the rule rather than from its content. The title and first sentence of the rule imply that submission occurs at the close of hearing rather than at the filing of the last pleading or late filed exhibit. We will address this problem when we do our substantive revision of individual rules and parties have notice of what we propose. For the time being, we will adopt the modification as proposed since we regard it as necessary in the event that a stipulation or settlement is proposed after hearings have been completed.

Findings of Fact

1. Decision 87-11-053 issued proposed rules governing stipulations and settlements in formal proceedings before the

Commission. The proposed rules were transmitted to the Office of Administrative Law, published in the California Register and comments were received from interested parties.

2. Substantial changes to the proposed rules have been made in response to comments and further comments on these changes are necessary before we adopt final rules.

3. Changes to Rules 42, 43, 44.2, 46, 48, 59, 81.5, and 82 received no comments and since they are merely updating the terminology it is appropriate to adopt these changes as final.

Conclusions of Law

1. Rules 42, 43, 44.2, 46, 48, 59, 81.5 and 82 should be adopted as final.

2. The revised rules governing stipulations and settlements should be transmitted to the Office of Administrative Law for republication and additional comments should be sought.

O R D E R

IT IS ORDERED that:

1. Rules 42, 43, 44.2, 46, 48, 59, 81.5 and 82 as set forth in Appendix A are adopted as final rules.

2. The Executive Director, in coordination with the Administrative Law Judge Division, shall transmit a copy of this order and Appendix B setting forth revised rules governing stipulations and settlements to the Office of Administrative Law in accordance with any applicable provisions of the Government Code.

3. Parties who wish to file written comments on the revised rules shall file an original and 12 copies with the Docket Office by June 30, 1988 and shall separately serve copies on the Chief Administrative Law Judge and the Commission staff attorney. Because the service list in this proceeding is long, in lieu of service, parties may notify all other parties that a copy of their comments will be sent on request.

This order is effective today.

Dated APR 27 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director

AG

42. (Rule 42) Generally.

Applications and pleadings relating to matters not specifically mentioned in these rules shall be in compliance with Rules 2 through 8, 15 and 16. Inquiries may be directed to the ~~Secretary~~ Executive Director of the Commission. An application for authorization to modify the subject matter of a previous related proceeding may incorporate such proceeding by reference.

43. (Rule 43) Petitions for Modification or for Extension of Time or Effective Date.

Petitions for modification of a Commission decision, or for an extension of time to comply with a Commission order or for an extension of an effective date of a Commission order shall indicate the reasons justifying relief and shall contain a certificate of service on all parties. Petitions for modification, other than in highway carrier tariff matters, shall only be filed to make minor changes in a Commission decision or order. Other desired changes shall be by application for rehearing or by a new application. Requests for extension of time to comply with decisions or orders may also be made by letter to the ~~Secretary~~ Executive Director. The letter shall indicate that a copy has been sent to all parties.

44.2. (Rule 44.2) Computation of Time.

The time within which any document may be filed, as provided by any rule or statute or direction of the Commission, the ~~Secretary~~ Executive Director, or the presiding officer, shall be so computed as to exclude the first day and include the last day; provided, that when the last day of any such period falls on Saturday, Sunday, or a holiday under the laws of this State, the computation of time shall omit such day and include the first business day thereafter.

46. (Rule 46) Rejection of Documents.

Documents which are not in substantial compliance with these rules, Commission orders, or applicable statutes may be rejected. If rejected, such papers will be with an indication of the deficiencies therein. Tendered documents which have been rejected

shall not be entered on the Commission's docket. Acceptance of a document for filing is not a determination that the document complies with all requirements of the Commission and is not a waiver of such requirements. The Commission, the ~~Secretary~~ Executive Director, or the presiding officer may require amendments of a document and the Commission or the presiding officer may entertain appropriate petitions or motions in connection therewith.

48. (Rule 48) Daily Calendar.

A daily calendar of newly filed proceedings and proceedings set for hearing shall be available for public inspection at the offices of the ~~Secretary~~ Executive Director in San Francisco and Los Angeles. The daily calendar shall indicate the time and place of the next three regularly scheduled Commission meetings. (See Rule 81.5.) Printed copies of such calendar may be obtained by subscription at such price as may be established by the Commission.

59. (Rule 59) Issuance.

Requests for subpoenas and subpoenas duces tecum should be made to the Executive Director in San Francisco or Los Angeles. The subpoena or subpoena duces tecum shall be issued, signed and sealed, but otherwise in blank. In appropriate circumstances requests for subpoenas and subpoenas duces tecum may be made to the Commission, a Commissioner, an ~~Assistant Secretary~~ Assistant Executive Director, or an Administrative Law Judge.

81.5. (Rule 81.5) Commission Meetings.

Commission meetings shall be held on a regularly scheduled basis for the purpose of considering and signing decisions and orders and taking such other action as the Commission deems appropriate. The time and place of these meetings will appear daily in the Commission calendar at least three weeks in advance. The meetings are open to the public. An agenda of the meeting is available from the ~~Secretary~~ Executive Director on request. No unscheduled meeting to take action shall be held, and no matter not on the agenda of a meeting shall be decided, unless there is a determination by the Commission of an unforeseen emergency condition.

82. (Rule 82) Service of Orders.

Decisions and orders shall be served by the ~~Secretary's~~ Executive Director's office by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a copy thereof. When a party to an application proceeding has appeared by a representative, service upon such representative shall be deemed to be service upon the party.

(END OF APPENDIX A)

APPENDIX B
Page 1

The following article is proposed for addition to the Rules of Practice and Procedure:

Article 13.5 - Stipulations and Settlements

51. (Rule 51) Definitions.

The following definitions apply for purposes of this article.

(a) "Party" or Parties" means any person who has filed an appearance in the proceeding.

(b) "Commission Proceeding" means an application, complaint, investigation or rulemaking before the California Public Utilities Commission.

(c) "Settlement" means an agreement between some or all of the parties to a Commission proceeding on a mutually acceptable outcome to the proceedings. In addition to other parties to an agreement, settlements in applications must be signed by the applicant and in complaints, by the complainant and defendant.

(d) "Stipulation" means an agreement between some or all of the parties to a Commission proceeding on the resolution of any issue of law or fact material to the proceeding.

(e) "Contested" describes a stipulation or settlement that is opposed in whole or part, as provided in this article, by any of the parties to the proceeding in which such stipulation or settlement is proposed for adoption by the Commission.

(f) "Uncontested" describes a stipulation or settlement that (1) is filed concurrently by all parties to the proceeding in which such stipulation or settlement is proposed for adoption by the Commission, or (2) is not contested by any party to the proceeding within the comment period after service of the stipulation or settlement on all parties to the proceeding.

51.1. (Rule 51.1) Proposal of Settlements or Stipulations.

(a) Parties to a Commission proceeding may stipulate to the resolution of any issue of law or fact material to that proceeding, or may settle on a mutually acceptable outcome to that proceeding, with or without resolving material issues.

Resolution shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings.

(b) Prior to the formal filing of any stipulation or settlement, the settling parties shall convene at least one conference with notice and opportunity to participate provided to all parties for the purpose of discussing stipulations and settlements in a given proceeding. Written notice of the date, time and place shall be furnished at least seven (7) days in advance to all parties to the proceeding. Notice of any subsequent meetings may be oral, may occur less than seven days in advance and may be limited to prior conference attendees and those parties specifically requesting notice.

(c) Attendance at any stipulation or settlement conference or discussion conducted outside the public hearing room shall be limited to the parties to a proceeding.

Parties may by written motion propose stipulations or settlements for adoption by the Commission in accordance with this article. The motion shall contain a statement of the factual and legal considerations adequate to advise the Commission and parties not expressly joining the agreement of its scope and of the grounds on which adoption is urged.

When a settlement pertains to a proceeding under the Rate Case Plan, the settlement must be supported by a comparison exhibit indicating the impact of the settlement in relation to the utility's application. If the participating Staff supports the settlement, it must prepare a similar exhibit indicating the impact of the proposal in relation to the issues it contested, or would have contested, in a hearing.

(d) Stipulations and settlements should ordinarily not include deadlines for Commission approval, however, in the rare case where delay beyond a certain date would invalidate the basis for the proposal, the timing urgency must be clearly stated and fully justified in the motion.

(e) The Commission will not approve stipulations or settlements, whether contested or uncontested, unless the stipulation or settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

51.2. (Rule 51.2) Timing.

Parties to a Commission proceeding may propose a stipulation or settlement for adoption by the Commission (1) any time after the first prehearing conference and (2) within 30 days after the last day of hearing.

Page 51.3. (Rule 51.3) Filing.

Parties proposing a stipulation or settlement for adoption by the Commission shall concurrently file their proposal in accordance with the rules applicable to pleadings (See Article 2), and shall serve the proposal on all parties to the proceeding.

51.4. (Rule 51.4) Comment Period.

Whenever a party to a proceeding does not expressly join in a stipulation or settlement proposed for adoption by the Commission in that proceeding, such party shall have 30 days from the date of mailing of the stipulation or settlement within which to file comments contesting all or part of the stipulation or settlement, and shall serve such comments on all parties to the proceeding. Parties shall have 15 days after the comments are filed within which to file reply comments. The assigned administrative law judge may extend the comment and/or response period on motion and for good cause.

51.5. (Rule 51.5) Contents of Comments.

A party contesting a proposed stipulation or settlement must specify in its comments the portions of the stipulation or settlement that it opposes, the legal basis of its opposition, and the factual issues that it contests. Parties should indicate the extent of their planned participation at any hearing. If the contesting party asserts that hearing is required by law, appropriate citation shall be provided. Any failure by a party to file comments constitutes waiver by that party of all objections to the stipulation or settlement, including the right to hearing to the extent that such hearing is not otherwise required by law.

51.6. (Rule 51.6) Contested Stipulations and Settlements.

(a) If the stipulation or settlement is contested in whole or in part on any material issue of fact by any party, the Commission will schedule a hearing on the contested issue(s) as soon after the close of the comment period as reasonably possible. Discovery will be permitted and should be well underway prior to the close of the comment period. Parties to the stipulation or settlement must provide one or more witnesses to testify concerning the contested issues and to undergo cross examination by contesting parties. Contesting parties may present evidence and testimony on the contested issues.

(b) The Commission may decline to set hearing in any case where the contested issue of fact is not material or where the contested issue is one of law. In the latter case, opportunity for briefs will be provided.

To ensure that the process of considering stipulations and settlements is in the public interest, opportunity may also be provided for additional prehearing conferences and any other procedure deemed reasonable to develop the record on which the Commission will base its decision.

(c) The Commission may decide the merits of contested stipulation or settlement issues without further application of these rules if the record contains substantial evidence upon which to base a reasoned decision.

(d) Stipulations may be accepted on the record in any proceeding and the assigned administrative law judge may waive application of these rules to the stipulation upon motion and for good cause shown.

51.7. (Rule 51.7) Commission Rejection of a Stipulation or Settlement.

The Commission will decline to adopt a proposed stipulation or settlement without hearing whenever it determines that the stipulation or settlement is not in the public interest. In that event, parties to the stipulation or settlement may either withdraw it or they may offer it as joint testimony at hearing on the underlying proceeding.

51.8. (Rule 51.8) Adoption Binding, Not Precedential.

Commission adoption of a stipulation or settlement is binding on all parties to the proceeding in which the stipulation or settlement is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

51.9 (Rule 51.9) Inadmissibility.

No statements, admissions, or offers to stipulate or settle, whether oral or written, made in preparation for, or during negotiations of stipulations or settlements shall be subject to discovery, or admissible in any evidentiary hearing unless agreed to by all parties participating in the negotiation.

All information obtained during the course of negotiations shall be treated as confidential among the participating parties and their clients and shall not otherwise be disclosed outside the negotiations without the consent of the parties participating in the negotiations.

If a stipulation or settlement is not adopted by the Commission, the terms of the proposed stipulation or settlement are also inadmissible unless their admission is agreed to by all parties joining in the proposal.

51.10. (Rule 51.10) Applicability.

These rules shall apply on and after the effective date of the decision promulgating them in all formal proceedings involving gas, electric, telephone and Class A water utilities.

In proceedings where all parties join in the proposed stipulation or settlement, a motion for waiver of these rules may be filed. Such motion should demonstrate that the public interest will not be impaired by the waiver of these rules.

Any party in other proceedings before the Commission may file a motion showing good cause for applying these rules to settlements or stipulations in a particular matter. Such motion shall demonstrate that it is in the public interest to apply these rules in that proceeding. Protests to the motion may be oral or written.

The following rule is amended to provide for filing settlements or stipulations after the conclusion of hearings:

84 (Rule 84) Petition to Set Aside Submission.

After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additions evidence, or for consideration of a settlement or stipulation under Article 13.5. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

(END OF APPENDIX B)

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own motion for purposes of compiling the Commission's rules of procedure in accordance with Public Utilities Code Section 322 and considering changes in the Commission's Rules of Practice and Procedure.	)	R.84-12-028 (Filed December 19, 1984)

ORDER ADOPTING AND REVISING RULES FOR SETTLEMENTS AND STIPULATIONS

By Decision (D.) 87-11-053 the Commission sent proposed rules governing settlements and stipulations to all parties to this proceeding and requested that comments be filed by January 25, 1988. The proposed rules were transmitted to the Office of Administrative Law and were published in the California Register on December 4, 1987. Comments were received from Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SoCal), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E), Pacific Bell (Pacific), California Trucking Association (CTA), Toward Utility Rate Normalization (TURN), Industrial Users, and Division of Ratepayer Advocates (DRA).

We have considered all the comments to the proposed rules and have made substantial revisions to reflect the concerns raised. Because these revisions are so extensive, we will republish these rules (Appendix B hereto) and provide for a second round of comments. In doing this, we have postponed by at least 60 days having final settlement rules in place. We are not anxious for delay beyond the required comment period after the rules are republished and we hope that parties' comments will be confined to the changes in the rules and will not repeat arguments made and rejected previously. We will adopt the rules which have been amended to delete obsolete references to the Commission Secretary

and Assistant Secretary since these changes are noncontroversial and we received no comments on the proposed changes (Appendix A hereto).

General Comments

CTA takes issue with the second paragraph of proposed Rule 51.10, recommending that it be stricken from the final adopted Rule. This paragraph provides that any party in proceedings other than gas, electric, telecommunications or large water proceedings may apply to have these rules apply to settlements and stipulations in a particular matter. Anyone protesting such application must demonstrate that it is not in the public interest to do so. CTA maintains that this paragraph places an unreasonable burden on participants in ratemaking proceedings for the transportation industry. These participants frequently represent themselves and lack the legal expertise that CTA believes is necessary to respond to motions and to set forth legal argument. CTA further objects to what it views as the automatic application of a rigid judicial stipulation and settlement procedure to quasi-legislative transportation proceedings at the request of a single moving party. CTA maintains that this effectively restricts parties' rights to meaningful participation in Commission proceedings that directly affect them and thereby denies their right to hearing.

We are concerned that we have placed a heavy burden on anyone wishing to protest this procedure and will delete the last sentence of the second paragraph of Rule 51.10. We will not, however, strike the remainder of the paragraph. Without the option of applying these rules to other types of proceedings, we are left in those proceedings with no rules to apply to any stipulation or settlement that might be offered. That situation is exactly what led us to propose these rules for stationary utilities, so that when a stipulation or settlement was offered, there would be a framework within which to proceed. We are not convinced that we should deny parties in transportation proceedings the opportunity

to argue that this framework would serve the public interest in specific cases, but by deleting the last sentence, we have placed the burden of demonstrating the public interest on the proponents rather than on the protestants. We will permit protests to such motions either orally or in writing.

TURN and Industrial Users take vigorous exception to the entire concept of contested settlements, arguing that the process set forth in the proposed rules sharply reduces any meaningful participation by the nonagreeing intervenors. They propose specific changes to the rules, including mandatory discovery, equal access to discussions or negotiations involving DRA, retention of the current rate case plan schedule and full hearings with opportunity for any party to present its case and to cross examine other parties on the merits of the issues themselves and not just on the terms of the settlement. A number of these proposals have merit and will be discussed under the individual rule subheadings below.

Of the parties opposing the rules, TURN is the most emphatic in its opposition. Its closing comment reads "This Commission must not adopt a rule that would permit the abridgement of some parties' participation just because some other parties have reached a common position." In response, we repeat the commitment made in D.87-11-053 that in drafting these rules we have tried to keep the process of stipulations and settlements open and accessible to all parties while preserving the efficiencies inherent in disposing of matters without extended hearings. The modifications we make today to the proposed rules reflect and extend this commitment and respond substantially to the concerns voiced by the opposing parties.

The remainder of the commenting parties generally supported adoption of the rules but suggested modifications which will be discussed under the individual rule subheadings below.

Rule 51(a) - "Party"

PacBell has asked to have the definition of a "Party" clarified by defining the term "indicated intent to participate". Because we are changing the timeframe in which stipulations and settlements may be considered, we no longer find it necessary to include this phrase and will revise the definition of "party" to apply to all those who have filed a formal appearance in the proceeding.

Rule 51(b) - "Commission proceeding"

PG&E proposes to have the definition of "Commission Proceeding" amended to include filed and accepted Notices of Intent, TURN proposes to delete references to Notices of Intent at all as being too early in the proceeding to provide meaningful opportunity for analysis, and PacBell proposes to eliminate complaints from the proceedings to which these rules apply.

We will adopt TURN's suggestion and eliminate the term Notice of Intent altogether. In doing this, we note that there are frequently substantial changes from the Notice of Intent to the Application and recognize that the Application is the document that represents what the utility is asking for and that it is the document noticed to the public. We think all parties and the general public will be best served if the document that is to be the starting place for stipulations and settlements be the document that is actually before the Commission and the public. That document is the Application.

Our resolution of this issue renders moot the suggestions of PG&E and SoCal that we permit the reopening of previously decided cases to receive stipulations and settlements in lieu of requiring the utility to go through the preparation of a Notice of Intent and an Application. We recognize that this process uses utility resources, however, it gives us, the general public, and all the participants a complete look at a future test year instead of a selective look at certain elements from a prior proceeding.

Additionally, should the stipulation or settlement not be adopted, everyone, including the utility, is substantially further ahead in the process if the application has already been filed.

With respect to PacBell's proposal, we are not persuaded that we should remove complaints from the types of proceedings to which these rules will apply. Past experience tells us that most of the complaints that come before us have only two parties. Those two parties can move to waive application of these rules under Rule 51.10, and we suspect that, for the most part, this is what will happen. Pacific's concern about third parties to complaints forcing a hearing on issues that have been settled between the "real parties in interest" is misplaced. When third parties have been granted leave to intervene under Rule 53, they have already had to make averments that are reasonably pertinent to the issues presented in the complaint in support of that intervention. To deny them the opportunity to explore any settlement or stipulation between the "real parties in interest" ignores the showing they have had to make to become parties to the complaint and effectively shuts them out of the process before they ever have an opportunity to present their concerns in a formal setting. We are unwilling to do this and will not adopt PacBell's proposal.

Rule 51(c) - "settlement"

PG&E objects to the definition of settlement as overbroad, since as presently worded it allows parties other than the moving party to enter into settlement agreements which, if adopted, would terminate the application in a manner potentially adverse to the applicant's interest. Although we think it highly unlikely that we would be presented a settlement that did not involve the moving party, in an abundance of caution, we will adopt PG&E's suggestion to change the definition. Because PG&E's proposed language requires an additional definition, we will not use it, but will instead add the following sentence to the definition: "In addition to any other parties entering into the

agreement, settlements in application proceedings must be signed by the applicant and in complaint proceedings must be signed by the complainant and defendant."

Rule 51.1 - Proposal of Settlements or Stipulations

PG&E proposes that the language in this section be modified to indicate that the comparison exhibit submitted to explain the impact of the proposed settlement is also appropriate when a Notice of Intent, rather than a formal application, has been filed. Since we have decided that we will not consider stipulations or settlements until a formal application is filed, PG&E's suggestion will not be adopted.

PacBell suggests that we clarify who "participating Staff" is. This term was chosen deliberately to avoid cumbersome language pointing out the DRA is the participating Staff in applications under the rate case plan for energy and telecommunications utilities and CACD is the participating Staff in applications under the rate case plan for Class A water utilities. We do not perceive the need for further clarification in the rule itself.

Rule 51.2 - Timing

This Rule concerns the timing of the filing of stipulations and settlements. As previously discussed, we will not entertain stipulations and settlements at least until the formal application has been filed. TURN suggests that they not be entertained before the first prehearing conference (Day 40, usually late January or early February under rate case plan proceedings). DRA suggests that they not be entertained until after distribution of staff exhibits and testimony (unless staff is not a party to the proceeding or has indicated that it will not distribute exhibits and testimony).

The DRA proposal has appeal, since having the DRA position in the public domain before entertaining stipulations or settlements would clearly join the issues for all participants. We

are concerned, however, that under the rate case plan for energy and telecommunications applications, such exhibits (including rate spread) are not due until Day 84 (usually mid March). If settlements may not be filed before this date, it places great pressure on other participants, and ultimately on the Commission itself, to act on the settlement hastily. If, for example, a settlement is not filed by the time hearings would normally start (Day 91 or early April), the hearing process which must follow will by necessity be compressed and accelerated if we are to complete the proceeding within one year from the date the application was filed. The timing problems are exacerbated in proceedings which have statutory deadlines under the Permit Streamlining Act. Such pressure serves no one well.

We will instead adopt TURN's suggestion that stipulations and settlements be filed no earlier than the first prehearing conference. Under the current rate case plan this is Day 40 (mid February) and in other proceedings may be substantially earlier. We stress that the rate case plan is undergoing reexamination in R.87-11-012 and any reference in this decision to deadlines or timeframes under the rate case plan refer only to the current plan. We do not necessarily intend to bind ourselves to similar timeframes for the future. We will simply use the prehearing conference, whenever it may occur, as the benchmark for filing proposals of stipulation or settlement.

In discussing timing, neither DRA nor TURN addressed the issue, raised by Industrial Users, of when settlement discussions (as opposed to the formalized settlement proposal) take place and who receives notice of and the opportunity to participate in such discussions. D.87-11-053 specifically did not provide for notice of these discussions to all parties in the interest of facilitating opportunities for agreements. Industrial Users argues that to exclude interested participants from the earliest phase of the stipulation/settlement process gives DRA and any party in agreement

with it an inordinate "leg up". Industrial Users believes that the rationale for such exclusion stated in D.87-11-053 gives insufficient weight to the fact that the differences among the participants will surface sooner or later, whether in a subsequent hearing or in some other way. Thus, exclusion of some participants in the early stages of any settlement process does not produce any greater efficiencies and may well be less efficient for want of all viewpoints as the settlement is formulated.

To the extent that inclusion of other participants in the development of the settlement resolves their concerns early in the process it reduces and possibly eliminates subsequent opposition to the settlement when it is formally proposed. Such a result is both efficient and desirable. On the other hand, we are mindful that in the real world, the very preliminary discussions of settlement are much more likely to take place in a "one on one" setting than in a large meeting. At some point initial feelers develop into substantive discussions, give and take begins to occur and a joint agreement starts to jell. After reflecting on Industrial Users' comments, we conclude that somewhere in this continuum it is important that the process be opened up and other parties included but we hesitate to pick an arbitrary point and require notification of all settlement discussions after that point. Accordingly, we will not revise Rule 51.1 to require notice of settlement discussions as of a specific time. We will provide that at least one notification and settlement conference be held prior to filing the settlement document by the settling parties. In doing this we rely on the good faith of the settling parties in not unnecessarily excluding other participants during the formative development of the settlement and we strongly urge their inclusion in the process at the earliest productive point.

In addition to the notice requirement set forth above, we have made a substantial addition to Rule 51.1 by providing that non-parties may not attend stipulation and settlement meetings

conducted outside the public forum of the hearing room. Further discussion of this issue appears under Rule 51.9 concerning inadmissibility and confidentiality.

We remind all parties that stipulation and settlement conferences are most successful when all participants discuss frankly and openly the problems involved and where the prevailing climate is conducive to admissions and concessions. We expect all participants to conduct themselves accordingly.

SoCal argues that settlements and stipulations ought to be accepted at any time prior to the issuance of a final Commission decision. We are not convinced that there is any value to a stipulation or settlement presented later than 30 days after the last day of hearing. At this point there are no longer any efficiencies associated with further stipulations or settlements and they only serve to delay or interrupt an orderly decision-making process. We will not adopt SoCal's suggestion. We will, however, clarify an ambiguity that PacBell noted and modify Rule 51.2 to eliminate the confusing reference to submission. Stipulations and settlements will be accepted up until 30 days following the last day of hearing irrespective of when submission occurs.

Rule 51.5 - Contents of Comments

Industrial Users urges that we remove the requirement that parties specify a provision of law supporting their request for a hearing on a contested stipulation. They argue that the requirement places a burden on any party wishing to contest a stipulation or settlement and that removal of the requirement would reflect a commitment on the Commission's part to provide hearing whenever requested by a contesting party. We believe that the revisions we have made to the proposed rules amply reflect our commitment to an open process involving all parties. There are occasions when hearing, even on a contested issue, is simply not required, for example, when the contested issue is a legal one, or

when the contested issue of fact is non-material. We do not think it unreasonable to require any party who asserts that a hearing is required to support that assertion with appropriate citation.

PG&E suggests that we modify the rule to provide that a failure to file comments would constitute a waiver of hearing rights only to the extent that such a right is not otherwise required by statute. We will make this modification.

Rule 51.6 - Contested Stipulations and Settlements

SoCal, SDG&E, PacBell, DRA and TURN all commented on this proposed rule. SoCal proposes that the rule be redrafted to apply only to settlements since stipulations generally occur and are addressed in the normal course of hearing. SDG&E has similar concerns and recommended that the proposed rules authorize the ALJ to waive application of the rules and to accept on the record stipulations of minor significance which do not control the outcome of an issue. We will not remove stipulations from the rule, since it is confusing to have some rules apply to settlements, some to stipulations and some to both. We will, however, revise it along the lines suggested by SDG&E, which we think will have the same effect SoCal intended.

The much larger issue concerning hearings on contested settlements, whether they should be required in all cases, the scope of the hearing, and the scheduling of discovery, preparation and the hearings were all the subject of extensive comments.

SoCal urges that Rule 51.6 apply only if a settlement is contested on a material issue of fact since legal issues may be disposed of through the briefing process and protests that raise no material issue of fact require no hearing. SDG&E also recommended language to clarify the Commission's authority to decline to hold hearings where a substantial basis for opposition was not presented. PacBell notes that when a settlement or stipulation is entered into after evidentiary hearings have been held, further hearings may not be needed and recommends that Rule 51.6 so state.

TURN recommends that the entire rule be revised to provide that if the stipulation or settlement is contested the established procedural schedule for the proceeding shall remain intact and parties shall be permitted to conduct discovery, present testimony and cross examine witnesses as if the proposed stipulation or settlement had not been offered. This revision would, according to TURN, give objecting parties the same procedural rights, time schedule, and opportunity for participation they would have had absent the stipulation or settlement.

DRA and PacBell both address the scope of hearing on contested agreements. DRA's comments go to the admissibility of discussions of the parties leading up to the agreement and are adequately covered by Rule 51.9 on Admissibility. PacBell suggests that since the purpose of settlements or stipulations is to narrow the scope of hearings and issues before the Commission, any hearings should be limited to the merits of the agreement and not the underlying positions of the parties. It asks that the rule be amended to specify that this is the scope of the hearing.

We will revise the rule to indicate that discovery will, rather than may, be provided when a stipulation or settlement is contested. We caution parties, however, that most discovery should be well underway in any proceeding by the time a settlement or stipulation is proposed, especially since we have modified the rule to provide that a stipulation or settlement will not be considered prior to the first prehearing conference. Further discovery may be necessary once an agreement is proposed but we do not wish to see unnecessary delay because a party waited until a stipulation or settlement was proposed to begin preparing its case.

We will not adopt the TURN proposal to maintain a rate case plan schedule intact if a stipulation or settlement is contested. Once a stipulation or settlement is proposed, we wish to move quickly to examine it, receive parties' comments, hear parties' cases and decide the matter, providing earlier certainty

of outcome than would be possible under a year-long rate case schedule and freeing up parties' resources so that they might be used productively in other proceedings. This means that all parties will have to begin preparation of their cases as soon as the Notice of Intent is tendered. This scheduling will undoubtedly create some additional burden on the front end of the process, but it should substantially lighten the burden in the later portion.

TURN and Industrial Users both raise good points about the scope of the hearing and we will revise the rule to provide that when material issues of fact are contested, the Commission will hold hearings on those matters. Stipulating parties will be expected to testify as to their position on the issue(s) in question, and parties may cross examine and may put on a direct case of their own on the contested issue(s). We recognize that this broadens the scope of hearings previously envisioned on contested stipulations or settlements, however we think the additional time well spent in developing the substantial evidence necessary for us to issue a reasoned decision.

We will also revise the rule to make it clear that we need not go to hearing when a material issue of fact is not raised or when the contested portion of a stipulation or settlement involves purely legal issues.

Lastly, SoCal takes issue with the second paragraph of proposed Rule 51.6 which provides that uncontested portions of settlements may be severed and decided without further hearings. SoCal believes that parties to a settlement should be able to include within the terms of the settlement whether issues are severable. It notes that often parties to a settlement will view it as a complete package and would not want to be a party to a settlement if the package were in any way modified. SoCal suggests that the Commission inform the parties that it would accept a settlement only if a specific element is added, deleted or modified. The parties could then indicate whether they wish to

proceed with the settlement or withdraw it and proceed on the underlying application. SoCal states that it will not participate in any settlement where the Commission decision "picks and chooses" from a settlement package.

We accept the proposition that parties have a right to have a settlement which was negotiated as a package considered as an indivisible whole and will eliminate that portion of Rule 51.6 which indicates that portions of the settlement or stipulation can be severed and decided separately. We are deeply concerned however, about timing. We can easily foresee a situation where a party will contest one or more material issues of fact in a settlement, hearing will be had on those issues and a substantial record developed that persuades us to adopt something other than what the stipulating parties agreed to. The problem at this juncture is if the stipulating parties want to go to hearing on the entire underlying application with their original litigation positions rather than accept adoption of less than the complete stipulation or settlement, how do we compress a full blown hearing schedule into the short time likely to remain in the year long rate case schedule or into the time remaining for a Permit Streamlining Act matter?

We invite parties' comments on this problem and request their specific suggestions for procedural vehicles for notifying stipulating parties that the Commission will not accept the entire stipulation or settlement as offered and a timetable for proceeding after that notification. Suggestions must recognize the right of third parties to hearing on contested issues and must provide for reasonable opportunity for further participation, briefing, decision preparation and review, and publication of a proposed decision under PU Code Section 311 thirty days prior to final Commission action. This is a daunting task and we await with interest parties' scheduling suggestions.

Rule 51.7 - Commission Rejection of a Stipulation or Settlement

TURN recommends that we delete the language in the rule following "in the public interest" as unnecessary if we adopt TURN's suggested changes to Rule 51.6. The changes we have made to Rule 51.6 render portions of Rule 51.7 surplus and we will modify it accordingly.

PG&E notes that in its present form Rule 51.7 does not indicate whether parties to a proceeding may request appeal or rehearing of a Commission rejection of a settlement or stipulation and recommends that we indicate that the Commission will make any rejections by formal decision. We will not adopt PG&E's suggestion because of the potential for delay in the underlying proceeding. We think it best, if a stipulation or settlement is not going to be considered, to proceed expeditiously to hearing on the matter itself rather than expend time and resources preparing a formal order, placing it on the agenda, issuing it, and then considering appeals of our decision to reject an agreement, all of which could easily consume two to four months' time. We will, however, modify the language of the rule to indicate that we will decline to consider stipulations and settlements rather than reject them, which implies a formal action on our part.

Rule 51.9 - Inadmissibility

DRA, SoCal and Edison all raised concerns about this rule, each urging that it be made more specific as to the scope of matters that would be inadmissible under this Rule. SoCal suggested that all such matters be treated as confidential and not be disclosed to any party outside the negotiations as well as being inadmissible at hearing. Edison suggested that the inadmissibility provisions extend to preparation for negotiations in addition to the negotiations themselves. Both Edison and SoCal recommended that discovery of such matters be precluded as well as making them inadmissible at hearing.

We will adopt these suggestions in the interest of providing a climate that will foster open and frank discussions among parties during negotiations without concern that their statements may be used against them later in the proceeding or in any other proceeding.

Addition of the confidentiality condition raises the question, not specifically discussed in any party's comments, which is: should negotiations be open to non-parties? Industrial Users urges that we include a rule assuring all parties equal access to discussions or negotiations involving DRA. We have provided for this and we intend to bind all parties to the rule with regard to confidentiality. If we open stipulation or settlement conferences to non-parties, such as members of the Commission Advisory and Compliance Division, the administrative law judge, Commissioners or their staffs, the press or the general public, we have serious concerns about our ability to apply a confidentiality rule to such non-parties. Further, the presence of non-parties who are not bound by any confidentiality rules could have a serious "chilling effect" on the negotiations resulting in parties being unwilling to discuss any position except their litigation position. Accordingly, we will revise Rule 51.1 to provide that stipulation and settlement conferences occurring outside the hearing room (which is a public forum) shall not be open to non-parties. We specifically invite comments on this revision since it was not contemplated as part of the original proposal.

Rule 51.10 - Applicability

PacBell suggests that proposed rule apply only to proceedings commenced after the adoption of final rules on settlements and stipulations. Our failure to specify when the rule applied was an oversight. Because we have ongoing proceedings in which settlements and stipulations may well be offered, PacBell's suggestion, if adopted, would leave us with no framework within which to process these agreements. We think it better to make the

rules applicable to proceedings pending at the time of their adoption so that parties will know what to expect. We will add the cautionary note, however,that the rules will be applied liberally to cases in progress so as not to create delay in the proceedings which would not have existed absent the rules.

Rule 84 - Petition to Set Aside Submission

PacBell suggests that the modification to this rule is not necessary and is potentially confusing. We think the confusion, if any, comes from the title of the rule rather than from its content. The title and first sentence of the rule imply that submission occurs at the close of hearing rather than at the filing of the last pleading or late filed exhibit. We will address this problem when we do our substantive revision of individual rules and parties have notice of what we propose. For the time being, we will adopt the modification as proposed since we regard it as necessary in the event that a stipulation or settlement is proposed after hearings have been completed.

Findings of Fact

1. Decision 87-11-053 issued proposed rules governing stipulations and settlements in formal proceedings before the Commission. The proposed rules were transmitted to the Office of Administrative Law, published in the California Register and comments were received from interested parties.

2. Substantial changes to the proposed rules have been made in response to comments and further comments on these changes are necessary before we adopt final rules.

3. Changes to Rules 42, 43, 44.2, 46, 48, 59, 81.5, and 82 received no comments and since they are merely updating the terminology it is appropriate to adopt these changes as final.

Conclusions of Law

1. Rules 42, 43, 44.2, 46, 48, 59, 81.5 and 82 should be adopted as final.

2. The revised rules governing stipulations and settlements should be transmitted to the Office of Administrative Law for republication and additional comments should be sought.

O R D E R

IT IS ORDERED that:

1. Rules 42, 43, 44.2, 46, 48, 59, 81.5 and 82 as set forth in Appendix A are adopted as final rules.

2. The Executive Director, in coordination with the Administrative Law Judge Division, shall transmit a copy of this order and Appendix B setting forth revised rules governing stipulations and settlements to the Office of Administrative Law in accordance with any applicable provisions of the Government Code.

3. Parties who wish to file written comments on the revised rules shall file an original and 12 copies with the Docket Office by June 13, 1988 and shall separately serve copies on the Chief Administrative Law Judge and the Commission staff attorney. Because the service list in this proceeding is long, in lieu of service, parties may notify all other parties that a copy of their comments will be sent on request.

This order is effective today.

Dated _____, at San Francisco, California.

42. (Rule 42) Generally.

Applications and pleadings relating to matters not specifically mentioned in these rules shall be in compliance with Rules 2 through 8, 15 and 16. Inquiries may be directed to the ~~Secretary~~ Executive Director of the Commission. An application for authorization to modify the subject matter of a previous related proceeding may incorporate such proceeding by reference.

43. (Rule 43) Petitions for Modification or for Extension of Time or Effective Date.

Petitions for modification of a Commission decision, or for an extension of time to comply with a Commission order or for an extension of an effective date of a Commission order shall indicate the reasons justifying relief and shall contain a certificate of service on all parties. Petitions for modification, other than in highway carrier tariff matters, shall only be filed to make minor changes in a Commission decision or order. Other desired changes shall be by application for rehearing or by a new application. Requests for extension of time to comply with decisions or orders may also be made by letter to the ~~Secretary~~ Executive Director. The letter shall indicate that a copy has been sent to all parties.

44.2. (Rule 44.2) Computation of Time.

The time within which any document may be filed, as provided by any rule or statute or direction of the Commission, the ~~Secretary~~ Executive Director, or the presiding officer, shall be so computed as to exclude the first day and include the last day; provided, that when the last day of any such period falls on Saturday, Sunday, or a holiday under the laws of this State, the computation of time shall omit such day and include the first business day thereafter.

46. (Rule 46) Rejection of Documents.

Documents which are not in substantial compliance with these rules, Commission orders, or applicable statutes may be rejected. If rejected, such papers will be with an indication of the deficiencies therein. Tendered documents which have been rejected

shall not be entered on the Commission's docket. Acceptance of a document for filing is not a determination that the document complies with all requirements of the Commission and is not a waiver of such requirements. The Commission, the ~~Secretary~~ Executive Director, or the presiding officer may require amendments of a document and the Commission or the presiding officer may entertain appropriate petitions or motions in connection therewith.

48. (Rule 48) Daily Calendar.

A daily calendar of newly filed proceedings and proceedings set for hearing shall be available for public inspection at the offices of the ~~Secretary~~ Executive Director in San Francisco and Los Angeles. The daily calendar shall indicate the time and place of the next three regularly scheduled Commission meetings. (See Rule 81.5.) Printed copies of such calendar may be obtained by subscription at such price as may be established by the Commission.

59. (Rule 59) Issuance.

Requests for subpoenas and subpoenas duces tecum should be made to the Executive Director in San Francisco or Los Angeles. The subpoena or subpoena duces tecum shall be issued, signed and sealed, but otherwise in blank. In appropriate circumstances requests for subpoenas and subpoenas duces tecum may be made to the Commission, a Commissioner, an ~~Assistant Secretary~~ Assistant Executive Director, or an Administrative Law Judge.

81.5. (Rule 81.5) Commission Meetings.

Commission meetings shall be held on a regularly scheduled basis for the purpose of considering and signing decisions and orders and taking such other action as the Commission deems appropriate. The time and place of these meetings will appear daily in the Commission calendar at least three weeks in advance. The meetings are open to the public. An agenda of the meeting is available from the ~~Secretary~~ Executive Director on request. No unscheduled meeting to take action shall be held, and no matter not on the agenda of a meeting shall be decided, unless there is a determination by the Commission of an unforeseen emergency condition.

82. (Rule 82) Service of Orders.

Decisions and orders shall be served by the ~~Secretary's~~ Executive Director's office by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a copy thereof. When a party to an application proceeding has appeared by a representative, service upon such representative shall be deemed to be service upon the party.

(END OF APPENDIX A)

APPENDIX B
Page 1

The following article is proposed for addition to the Rules of Practice and Procedure:

Article 13.5 - Stipulations and Settlements

51. (Rule 51) Definitions.

The following definitions apply for purposes of this article.

(a) "Party" or Parties" means any person who has filed an appearance in the proceeding.

(b) "Commission Proceeding" means an application, complaint, investigation or rulemaking before the California Public Utilities Commission.

(c) "Settlement" means an agreement between some or all of the parties to a Commission proceeding on a mutually acceptable outcome to the proceedings. In addition to other parties to an agreement, settlements in applications must be signed by the applicant and in complaints, by the complainant and defendant.

(d) "Stipulation" means an agreement between some or all of the parties to a Commission proceeding on the resolution of any issue of law or fact material to the proceeding.

(e) "Contested" describes a stipulation or settlement that is opposed in whole or part, as provided in this article, by any of the parties to the proceeding in which such stipulation or settlement is proposed for adoption by the Commission.

(f) "Uncontested" describes a stipulation or settlement that (1) is filed concurrently by all parties to the proceeding in which such stipulation or settlement is proposed for adoption by the Commission, or (2) is not contested by any party to the proceeding within the comment period after service of the stipulation or settlement on all parties to the proceeding.

51.1. (Rule 51.1) Proposal of Settlements or Stipulations.

(a) Parties to a Commission proceeding may stipulate to the resolution of any issue of law or fact material to the proceeding, or may settle on a mutually acceptable outcome to the proceeding, with or without resolving material issues.

(b) Prior to the formal filing of any stipulation or settlement, at least one conference shall be held with notice and opportunity to participate provided to all parties for the purpose of discussing stipulations and settlements in a given proceeding. Written notice of the date, time and place shall be furnished at least seven (7) days in advance to all parties to the proceeding. Notice of any subsequent meetings maybe oral, may occur less than seven days in advance and may be limited to prior conference attendees and those parties specifically requesting notice.

(c) Attendance at any stipulation or settlement conference or discussion conducted outside the public hearing room shall be limited to the parties to a proceeding.

Parties may by written motion propose stipulations or settlements for adoption by the Commission in accordance with this article. The motion shall contain a statement of the factual and legal considerations adequate to advise the Commission and parties not expressly joining the agreement of its scope and of the grounds on which adoption is urged.

When a settlement pertains to a proceeding under the Rate Case Plan, the settlement must be supported by a comparison exhibit indicating the impact of the settlement in relation to the utility's application. If the participating Staff supports the settlement, it must prepare a similar exhibit indicating the impact of the proposal in relation to the issues it contested, or would have contested, in a hearing.

(d) Stipulations and settlements should ordinarily not include deadlines for Commission approval, however, in the rare case where delay beyond a certain date would invalidate the basis for the proposal, the timing urgency must be clearly stated and fully justified in the motion.

(e) The Commission will not approve stipulations or settlements, whether contested or uncontested, unless the stipulation or settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

51.2. (Rule 51.2) Timing.

Parties to a Commission proceeding may propose a stipulation or settlement for adoption by the Commission (1) any time after the first prehearing conference and (2) within 30 days after the last day of hearing.

Page 51.3. (Rule 51.3) Filing.

Parties proposing a stipulation or settlement for adoption by the Commission shall concurrently file their proposal in accordance with the rules applicable to pleadings (See Article 2), and shall serve the proposal on all parties to the proceeding.

51.4. (Rule 51.4) Comment Period.

Whenever a party to a proceeding does not expressly join in a stipulation or settlement proposed for adoption by the Commission in that proceeding, such party shall have 30 days from the date of mailing of the stipulation or settlement within which to file comments contesting all or part of the stipulation or settlement, and shall serve such comments on all parties to the proceeding. Parties shall have 15 days after the comments are filed within which to file reply comments. The assigned administrative law judge may extend the comment and/or response period on motion and for good cause.

51.5. (Rule 51.5) Contents of Comments.

A party contesting a proposed stipulation or settlement must specify in its comments the portions of the stipulation or settlement that it opposes, the legal basis of its opposition, and the factual issues that it contests. Parties should indicate the extent of their planned participation at any hearing. If the contesting party asserts that hearing is required by law, appropriate citation shall be provided. Any failure by a party to file comments constitutes waiver by that party of all objections to the stipulation or settlement, including the right to hearing to the extent that such hearing is not otherwise required by law.

51.6. (Rule 51.6) Contested Stipulations and Settlements.

(a) If the stipulation or settlement is contested in whole or in part on any material issue of fact by any party, the Commission will schedule a hearing on the contested issue(s) as soon after the close of the comment period as reasonably possible. Discovery will be permitted and should be well underway prior to the close of the comment period. Parties to the stipulation or settlement must provide one or more witnesses to testify concerning the contested issues and to undergo cross examination by contesting parties. Contesting parties may present evidence and testimony on the contested issues.

(b) The Commission may decline to set hearing in any case where the contested issue of fact is not material or where the contested issue is one of law. In the latter case, opportunity for briefs will be provided.

To ensure that the process of considering stipulations and settlements is in the public interest, opportunity may also be provided for additional prehearing conferences and any other procedure deemed reasonable to develop the record on which the Commission will base its decision.

(c) The Commission may decide the merits of contested stipulation or settlement issues without further application of these rules if the record contains substantial evidence upon which to base a reasoned decision.

(d) Stipulations may be accepted on the record in any proceeding and the assigned administrative law judge may waive application of these rules to the stipulation upon motion and for good cause shown.

51.7. (Rule 51.7) Commission Rejection of a Stipulation or Settlement.

The Commission will decline to consider a proposed stipulation or settlement without hearing whenever it determines that the stipulation or settlement is not in the public interest. In that event, parties to the stipulation or settlement may either withdraw it or they may offer it as joint testimony at hearing on the underlying proceeding.

51.8. (Rule 51.8) Adoption Binding, Not Precedential.

Commission adoption of a stipulation or settlement is binding on all parties to the proceeding in which the stipulation or settlement is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

51.9 (Rule 51.9) Inadmissibility.

No statements, admissions, or offers to stipulate or settle, whether oral or written, made in preparation for, or during negotiations of stipulations or settlements shall be subject to discovery, or admissible in any evidentiary hearing unless agreed to by all parties participating in the negotiation.

All information obtained during the course of negotiations shall be treated as confidential among the participating parties and their clients and shall not otherwise be disclosed outside the negotiations without the consent of the parties.

If a stipulation or settlement is not adopted by the Commission, the terms of the proposed stipulation or settlement are also inadmissible unless their admission is agreed to by all parties joining in the proposal.

51.10. (Rule 51.10) Applicability.

These rules shall apply on and after the effective date of the decision promulgating them in all formal proceedings involving gas, electric, telephone and Class A water utilities.

In proceedings where all parties join in the proposed stipulation or settlement, a motion for waiver of these rules may be filed. Such motion should demonstrate that the public interest will not be impaired by the waiver of these rules.

Any party in other proceedings before the Commission may file a motion showing good cause for applying these rules to settlements or stipulations in a particular matter. Such motion shall demonstrate that it is in the public interest to apply these rules in that proceeding. Protests to the motion may be oral or written.

The following rule is amended to provide for filing settlements or stipulations after the conclusion of hearings:

84 (Rule 84) Petition to Set Aside Submission.

After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additions evidence, or for consideration of a settlement or stipulation under Article 13.5. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

(END OF APPENDIX B)