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Decision 88-09-060 September 28, 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	ORIGINAL R.84-12-028 (Filed December 19, 1984)

OPINION ADOPTING RULES FOR SETTLEMENTS AND STIPULATIONS

Decision (D.) 88-04-059 dated April 27, 1988 revised the proposed rules governing settlements and stipulations and requested an additional round of comments from all parties to this proceeding. The proposed rules were transmitted to the Office of Administrative Law and were published in the California Regulatory Notice Register on May 13, 1988. Comments were received from Pacific Bell (PacBell), GTE California Incorporated (General), Southern California Edison Company (Edison), Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), William M. Bennett and Robert M. Teets (Bennett and Teets), California Trucking Association (CTA), California Department of General Services (General Services), Graham & James, Industrial Users, Utility Consumers' Action Network (UCAN), Toward Utility Rate Normalization (TURN), and the Commission's Division of Ratepayer Advocates (DRA).

At the outset, we note that the comments of Bennett and Teets and, to a lesser extent, TURN, address the issue of applying these settlement rules to the Diablo proceeding. That issue should be pursued in Application 84-06-014 and the parties should raise it there by separate motion. We will not address the comments as they relate to a specific proceeding in this generic rulemaking. Bennett and Teets are filing comments for the first time on these

rules and they state that they adopt TURN's January 25, 1988 comments which generally opposed the use of settlements.

For the most part, parties heeded our plea in D.88-04-059 and confined this round of comments to the changes in the proposed rules. To the extent that prior comments were reiterated or new comments were filed simply expressing agreement with changes, parties should not look for detailed discussion of such comments in this decision.

PacBell repeats its suggestion that settlement rules not be applied in complaint cases. PacBell notes that complaint cases are often resolved without any need for the Commission to adopt the settlement. In most of these cases, the parties simply announce that they have resolved the matter and file a written request to have the complaint dismissed. In cases such as the one PacBell describes, where the parties are not asking the Commission to adopt the settlement, we would not expect to see the settlement rules apply. In addition, Rule 51.10 provides that where all parties agree to settle, they may file for a waiver of these rules.

Our concern, and the reason we will not adopt PacBell's recommendation to exclude complaints entirely from these rules, is that some complaints address issues that are not limited to the complainant and defendant. Frequently such complaints include multiple parties. Examples are the complaints relating to 976 matters, the cellular resellers' complaint in Case 86-12-023, and the complaints involving privately owned pay telephones. We can envision many opportunities to stipulate or settle in such cases, and the existence of a formal structure in which to present such agreements will serve to protect the due process interests of all parties to the proceeding.

The remainder of this second round of comments will be discussed under the individual rule subheadings below.

Rule 51(a) - "Party"

Graham and James has commented on the definition of "party" stating that the definition is at variance with the common understanding of the term as being a person on whose behalf an appearance has been filed. In addition, Graham and James notes that the definition is inconsistent with use of the term "party" in other rules, notably Rule 82. We will correct the definition to read, "'Party' or 'Parties' means any person or persons on whose behalf an appearance has been entered in the proceeding." This change will necessitate clarifying changes in Rules 51.1(c) and 51.9 which also refer to parties.

Rule 51.1 - Proposal of Settlements or Stipulations

Bennett and Teets comment that in view of the Commission's stated intention in D.88-04-059 to allow settlement between less than all parties, it is a reasonable safeguard to require settling parties to demonstrate their good faith efforts to include all parties as a precondition to their being entitled to file any proposed settlement. Bennett and Teets did not make any specific suggestions for this demonstration. We think the provision in Rule 51.1(b) for convening at least one settlement conference with notice and opportunity to participate provided to all parties before formally filing the settlement documents addresses these concerns adequately.

In this connection, TURN comments that a much better form of Rule 51.1(b) would be to require holding the settlement conference to be held before any agreement is signed. This would give parties an opportunity to persuade participants to consider their views. This is consistent with our intent and we will modify the rule accordingly.

Bennett and Teets also comment on our addition to Rule 51.1(a) providing that settlements shall be limited to the issues in a specific proceeding and shall not extend to substantive issues which may come before the Commission in other or future

proceedings. They contend that the Diablo Canyon's proposed settlement does exactly that, barring PG&E from raising certain kinds of substantive issues until after the year 2016. In lieu of any specific changes Bennett and Teets suggest that several courses should be explored: (1) better definition of the term "issues in that proceeding," (2) definition of the phrase "substantive issues," and/or (3) an exception which permits future proceedings to be limited or barred based on some kind of factual and legal showing.

Our intent in inserting this additional language was to preclude parties from trying to bind the Commission for the future (or in another proceeding with a different utility) on issues that it had not had an opportunity to consider in the settled proceeding. We will not comment here on the Diablo Canyon's proposed settlement since it is being considered elsewhere. No other party addressed this addition to Rule 51.1(a) and we are inclined to leave it as written for the time being. If it creates problems in the interim before we reevaluate these settlement rules, parties may petition to waive application of that portion of the rule.

DRA supports Rule 51.1(c) (as do a number of other commenters) which provides that only parties and their representative may attend settlement conferences. DRA notes that there may be occasions when the attendance of a nonparty is advisable and recommends that we include a provision in the rule which allows participating parties to waive the attendance limitation where there is unanimous consent. We are reluctant to do this because we see the potential application as relatively remote and rules should not be designed to cover every conceivable eventuality. Additionally, attendance of nonparties at settlement conferences raises questions about the applicability of Rule 51.9 covering confidentiality and disclosure. This question arises especially if the Commission Advisory and Compliance Division

attends settlement conferences since we believe that nondisclosure is inconsistent with their advisory duties to the Commission. If there is a real need for a nonparty to attend settlement conferences (for example, the independent moderator that DRA suggests), parties can always file a motion to waive the limitation on attendance for good cause shown.

DRA also comments on the provision of Rule 51.1(c) requiring a comparison exhibit where a Rate Case Plan proceeding is involved. It notes that a settlement agreement may be reached before DRA has completed its evaluation of the case and that in order to comply with the rule, DRA must create and produce its report early, possibly leading to incomplete or inaccurate results. DRA recommends that if settlement is reached before DRA has distributed its report, the comparison need only include the applicant's position and the position stipulated to by parties. We will not adopt this suggestion. In the first place we would be surprised if a party were willing to settle a major matter without having developed its own position first. Secondly, the position DRA would have taken at hearing is important for third-party intervenors to know in assessing their own position on the settlement. The rule does not require the complete showing, including testimony, that DRA would have made, it only requires a comparison exhibit. Under the circumstances we do not find the requirement burdensome.

DRA also notes that some settlements involve broad areas rather than an account-by-account determination, and the comparison should be required only for those areas specifically stipulated to with the provision for application of updates or indices necessary for final determination in the proceeding. We will provide that the comparison show the account-by-account positions of DRA and the applicant but need only include the account-by-account settlement results where it is possible to identify them in that fashion.

Obviously, the bottom line comparison of the applicant's position, DRA's position, and the settlement results will still be required.

DRA also believes that the requirement of a comparison exhibit should not be limited to Rate Case Plan proceedings but should be extended to other proceedings where comparison exhibits are ordinarily submitted, such as offset proceedings. We agree and will amend the rule to provide for this.

General commented that Rule 51.1(d) should be revised to provide an outside limit of 90 to 180 days for Commission action on a proposed stipulation or settlement in lieu of the motion presently required justifying inclusion of a time limit for the Commission to act on a settlement. We are also concerned that settlements not languish without action, and commit to prompt disposition of them consistent with our other workload. We are not convinced that automatic deadlines provide any greater protection for parties than the rule as presently drafted and, accordingly, will not make the change that General suggests.

Rule 51.2 - Timing

PG&E, DRA, and Edison all proposed changes to this rule in their comments. PG&E suggests a change to make it clear that motions to approve a settlement may be filed at the prehearing conference. Since we have modified the rules to provide that a settlement conference inviting all parties be called before any settlement agreement is signed, and since the first time that all parties will be identified is the prehearing conference, it is not possible to comply with that requirement and still file the motion at the prehearing conference. Accordingly, we will not adopt PG&E's proposed change.

Edison also expressed concerns with the timing, noting that Rate Case Plan cases had a prehearing conference on a date certain but that other cases did not. It recommended that parties be permitted for good cause shown to file prior to the prehearing conference in Rate Case Plan cases and in all other proceedings to

file as soon as a matter is accepted for filing and a docket number is given.

We are not convinced that the absence of a date certain for a prehearing conference is a serious impediment to the proper functioning of these rules. Parties can, and commonly do, request that a prehearing conference be set in a matter for any number of reasons - to establish schedules, to resolve discovery disputes, and to identify interested parties. If a prehearing conference has not been set and parties wish to start the settlement process under these rules, they may ask the administrative law judge (ALJ) to set a prehearing conference for that purpose. Such requests are currently made orally and in almost all cases are granted routinely.

We will not provide for filing motions to accept settlements before the first prehearing conference because it has the potential for effectively eliminating the participation of too many third-party intervenors in the process. We have gone to great lengths in our compensation program to encourage such intervenors to participate, and we have tried to structure these settlement rules to continue that participation. It would be counterproductive to permit the settling parties to contravene those considerations with a signed, sealed, and delivered settlement before the process has even had an opportunity to work.

Both DRA and Industrial Users emphasized in their comments that all parties must commit sufficient resources to actively review the notice of intent or application and to prepare for evidentiary hearings under the applicable procedural schedule pending the outcome of settlement negotiations. DRA suggests that the rules contain a strong statement to this effect. Exhortations to parties do not really belong in rules of practice so we will not make any additions to the rule. Parties should be aware, however, that we strongly support early preparation for hearing and we will not look favorably on requests for delay to prepare cases that

should have been well underway before stipulations or settlements were filed.

Lastly, DRA expressed agreement with Southern California Gas Company's (SoCal) January 25, 1988, comments that settlements should be permitted, as in civil court, any time prior to the final decision. We have addressed this issue in D.88-04-059 by authorizing the filing of settlements up to 30 days after the close of hearings. Beyond that point further stipulations or settlements would only delay or interrupt an orderly decision-making process. By that point too, a complete record has been developed on which to base our decision and parties have been afforded an opportunity for the meaningful participation that will result in the best and fairest outcome. Further opportunities to settle are not necessary for this, and the slender hope that such late-filed settlements might preclude later filing of petitions to modify is too tenuous to justify any changes in the rule.

Rule 51.4 - Comment Period

Bennett and Teets suggest that in the interests of aiding and furthering public participation, and because settlements will never be commonplace matters, parties should reasonably be entitled to at least one extension of time of 15 days without having to show any cause. If we were to grant this request, we fear that the extension would become the "floor" and that we will effectively have provided for a 45-day comment period and a 15-day reply, or a total of two months after the stipulation or settlement is mailed. In view of the potential for routine delay, we do not think the requirement of showing cause for extending the comment period is unreasonable and, accordingly, we will not change the rule.

Rule 51.5 - Contents of Comments

Bennett and Teets state that they have no objection to the first portion of this rule concerning the content of the comments so long as the Commission requires that proposed settlements be accompanied by a fully articulated presentation of

legal and factual points and authorities which substantiate the basis for the settlement. We have done this in Rule 51.1(c) which requires in part: "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 the grounds on which adoption is urged." We think this is adequate to address the Bennett and Teets concerns, and we are confident that parties recognize the obvious, that is, the more specific the proposed settlement is in its terms, the less likely it is that parties will feel compelled to contest it because of misunderstanding or uncertainty.

Bennett and Teets also suggest that the last sentence of the rule, regarding waiver of objections because of failure to comment, be eliminated. They argue that the rule is unfair to protesting parties since there is no corresponding waiver penalty placed on the settling parties. We disagree. The purpose of the waiver rule is to tell parties that if they are going to contest the settlement, this is the time and place to do it, they may not remain silent now only to raise their concerns later when the process is coming to a conclusion. This is consistent with orderly processing of complex matters while providing for the participation of myriad parties with different interests. To allow objections or protests at any time would be unwieldly at best and chaotic at worst. The rule as drafted is consistent with the Federal Energy Regulatory Commission waiver rule set forth in 18 CFR 385.602 and we are not persuaded that it should be changed.

Rule 51.6 - Contested Stipulations and Settlements

In its comments on this rule, UCAN raised the issue of funding intervenors "up front," noting that it had exhausted its entire budget for the SDG&E general rate case participating in the settlement process and absent further funding, would be hard pressed to participate further if the settlement is rejected. Comments on the second round of the proposed settlement rules are

not the appropriate way to raise such broad concerns as these and we will not consider them here, particularly since no other party was on notice that this was to be an issue.

We asked parties specifically for comments on the revisions to this rule because of the timing problems we envisioned if we could not accept the complete settlement as offered. We also asked for specific scheduling suggestions under such circumstances. The response to the latter request was disappointingly general. PacBell suggested that we adopt a rule giving precedence over all other matters in calendaring and resolution of settlements or stipulations in rate case proceedings. DRA believes that this issue will seldom present repeatedly serious problems and suggests that this issue be addressed on a case-by-case basis. Department of General Services asks for further opportunity to comment on any proposed rule before the Commission adopts it, noting that this is a critical feature of the settlement rules since it determines how much pressure there will be on parties, the utilities, DRA, and the Commission to accept proposed settlements. Edison notes that it is possible to file a settlement or stipulation late enough in any proceeding to interfere with the timely completion of the case on the original schedule but notes that this is a risk which the applicant proposing a settlement or stipulation should bear. For lack of any more specific suggestions from the parties, we concur with Edison's observation and adopt DRA's recommendation to handle this ad hoc without a specific rule. We do not perceive a problem arising from either calendaring or resolving settlements or stipulations and, accordingly, we will not lengthen the rules further by adding a provision for granting the precedence that PacBell suggests. We do intend to treat such matters expeditiously and, as discussed below, expect all parties to prepare accordingly.

Industrial Users recommended that all parties be required to adhere to the applicable procedural schedule and to prepare for evidentiary hearings pending the outcome of settlement

negotiations. We endorse this recommendation heartily. While this may result in some additional effort for the parties, it should minimize the disruptions in scheduling that will certainly occur if all preparation is suspended during negotiations.

In connection with early preparation, UCAN states that additional discovery by contesting parties is essential after a settlement is proposed and asks that priority be given to discovery requests from these parties. We are concerned that discovery and preparation not bog down and we do not expect to see nonsettling parties "stonewalled" in their attempt to gather information to prepare their case; however, we will not include specific response times in the rules at this point, in the hope that such micromanagement of the process will prove unnecessary. We will consider such a provision when we reexamine these rules if parties' experience in the interim demonstrates a need for it.

Edison recommended that settlements and stipulations under the Rate Case Plan be considered within the framework of that plan. In D.88-04-059 we rejected TURN's proposal to maintain the Rate Case Plan schedule intact if a stipulation or settlement is contested, setting out our reasons for doing so. We are not persuaded to change our views as a result of parties' comments. However, we strongly encourage parties to submit stipulations and settlements early in the proceeding since it will be easier to keep to a predetermined schedule if the agreement is extensively contested or if we reject it. PacBell suggests that the Rate Case Plan may need to be amended to take into account the hearings on settlements or stipulations and to extend the time frames for the hearings of the underlying case. We will address the timing problems on an ad hoc basis and will reserve for the future consideration of major modifications to the Rate Case Plan.

For those cases in which we decide that a settlement can be approved only if modifications are made, TURN supports SoCal's original comments to the effect that we should inform the parties

of our views and either allow them to accept modification or withdraw from the settlement and proceed with their original cases. TURN suggested using an assigned Commissioner's ruling, reflecting the concerns of the Commission as a whole, for this purpose. We will provide in Rule 51.7 for this notice, where some of the options available to the Commission after rejection of a settlement are listed. However, we will not commit in the rule to the vehicle we will use, since various procedures may be appropriate depending on what stage of the proceeding we are in and the extent of the modification proposed.

PacBell takes issue with our revision to Rule 51.6 to provide for hearing on any contested issues of fact arguing that for settlements or stipulations to be useful, the rule must provide that the hearing be limited to the merits of the settlement or stipulation whether the dispute is on an outcome or a fact expressly agreed upon by the settling parties. PacBell raised this same concern in prior comments and it was considered and rejected when we made the revisions set for in D.88-04-059. In the interest of providing nonsettling parties the broadest opportunity to address contested issues through the hearing process, we will leave the rule in its present form (except for the specific modifications discussed below in response to parties' comments). Our experience with the contested issues in the settlement in SDG&E's current general rate case indicated that, although hearing was required, there was a substantial saving in hearing time.

TURN also repeats an argument advanced in its earlier comments and rejected in D.88-04-059, namely, that settlements simply be considered the joint testimony of the settling parties. While TURN may be correct that this would create an incentive to include as many parties as possible in the agreement, we are not convinced that the converse is true, that is, that the existing rule encourages the moving party to limit the settlement to as few parties as possible to minimize the need for concession and

compromise. TURN argues that the current rule favors the utilities' interests, because they are able to "settle" the case without coming to terms with the objections of those parties most adverse to them. We frankly did not see this phenomenon at work in the settlement in the SDG&E general rate case or in the settlement in Phase I of the telecommunications regulatory flexibility investigation, both of which had large numbers of signatories. If anything, we would expect settling parties to induce as many parties as possible to enter into the agreement to reduce the potential for protracted hearings on contested issues.

Both DRA and UCAN raised concerns about who would testify and be available for cross-examination on contested issues and whether the witness would be required to provide a detailed breakdown of each separate issue. We think the answer depends on what the contesting party is challenging. If it is the substantive issue being contested, then obviously the witness(es) sponsoring the underlying testimony on the issue will be required to testify. If it is the reasonableness of the settlement on that issue, then a witness sponsoring the settlement documents is in order. UCAN urges that we incorporate this provision in the rule in some way.

This is another case of the point being valid, but its incorporation in the rules would involve a level of micromanagement that we are trying to avoid. We would suggest in the alternative that contesting parties identify the witnesses they wish to cross-examine, either by name or by issue, and present this information to the ALJ for use in scheduling the hearings on the contested issues. An estimate of the amount of time for cross-examination would be helpful at the same time.

Graham and James comments, and General Services agrees, that paragraph (c) of this rule is confusing and offers opportunity for abuse. It asks that the paragraph be deleted from the rules. By including this language, we intended to alert parties that when settlement was reached after evidentiary hearing had been held, and

the settlement was contested, we could decide it on the record already created without a second round of hearings. On reflection, it is not necessary for such a statement to appear in the rules of practice and since it causes concern there, we will eliminate it.

Rule 51.7 - Commission Rejection of a Stipulation or Settlement

We have modified this rule slightly in response to parties' concerns about Rule 51.6. We alert the parties to the fact that a hearing on the stipulation or settlement is not required before the Commission rejects a proposal which it determines is not in the public interest. It further indicates some of the regulatory options available to the Commission if a proposal is not adopted. The Commission is to make a binary choice, that is, to either "accept" or "reject" the settlement as proposed. The indication of alternatives acceptable to the Commission complements that binary system, as the rejected settlement could in appropriate cases be used as a reference point for subsequent hearings or negotiations between the parties. The Commission will suggest alternate terms to the settlements as a means of promoting resolution of the case in only the most extreme cases, however.

Rule 51.8 - Adoption Binding, Not Precedential

DRA recommends that we clarify this rule by adding language that indicates that Commission adoption of a stipulation or settlement has the same status as any other Commission decision. This simply states the obvious and since the additional language will simply clutter the rule unnecessarily we will not add it.

Rule 51.9 - Inadmissibility

We specifically invited comment on our revisions to this rule, particularly on the impact of the inadmissibility provision on conduct of future proceedings and on discovery. TURN, Industrial Users, and DRA all raised concerns in these areas, in particular with the broad language of the first and second paragraphs.

Bennett and Teets discuss this rule and Rule 51.6 together as they relate to discovery, maintaining that such a sweeping rule is contrary to the statutory purposes of this Commission in that it favors utilities. Bennett and Teets propose discovery by those contesting the settlement on certain specific grounds, at least one of which goes to discussions conducted during the settlement process, which is why their comments are relevant under this rule. We will not prescribe the specific detail of discovery available because we suspect this would be viewed by all parties as a limitation on discovery rather than an assist in obtaining information. Our discussion below will clarify the extent of the confidentiality rule as it pertains to discovery and to admissibility. We do not perceive that it favors utilities and we note that even the parties who expressed concerns about the language of the rule did not deny the need for the rule in some form.

Industrial Users opposes extension of confidentiality to the factual information underlying a party's settlement position if such information would otherwise be subject to discovery under our rules. It notes the potential for abuse, observing that parties who wished to keep facts confidential need only raise them in the course of settlement negotiations, whether relevant or not and thereafter rely on Rule 51.9 to preclude discovery. This result would seriously impede a nonparticipating party's ability to obtain and review factual information to evaluate the proposed settlement or to prepare for hearing.

TURN echos these concerns, arguing that protecting "all information" raised at settlement is probably not possible as a practical matter and not desirable as a policy matter since it would frustrate the Commission's stated desire to obtain a complete factual record as the basis for its decisions.

Both DRA and TURN take the position that confidentiality protections should not extend to information developed in

preparation for negotiations. DRA notes that it would be impossible to segregate and distinguish between information that was developed in preparation for negotiations from that used in the preparation for litigation.

Industrial Users, TURN, and DRA all support the need for an inadmissibility rule but suggest that this need can be fulfilled with much more precise terminology. Our intent in modifying the language was to foster a climate of open negotiation among parties without fear that the concessions offered in the give and take of negotiation could be used against them if no agreement were reached. Edison's comments on the rule are pertinent here:

> "Edison respects and supports the need for parties who do not participate in settlement negotiations to obtain sufficient information to allow them to evaluate any proposed settlement. Information which bears on the reasonableness of the result produced by the settlement may be produced on discovery and admitted into evidence. However, information bearing solely on the negotiating process, position papers or similar materials produced to support the negotiating process, drafts of the stipulation or settlement, and similar materials are protected by the strong public policy in favor of encouraging negotiations and settlement." (Emphasis supplied.)

Our intent was to create a forum where free and open discussions could take place during the settlement negotiations themselves. To clarify this we will eliminate the phrase "in preparation for" from the rule since this function ordinarily occurs outside of the negotiation process. We will also revise the rule to reflect more accurately what is being protected, which is the discussion of the parties, including admissions and concessions, with respect to any offer to stipulate or settle. Lastly, we will amend the rule to provide that such matter will be inadmissible in evidence against any party who objects to its admission, bringing our rule in line with a similar provision in

the Federal Energy Regulatory Commission rule, and eliminating the potentially cumbersome process of having to obtain consent or waiver from multiple parties. These changes should narrow the application of the rule sufficiently to ease the concerns of the parties, but still provide the protection from discovery and admission into evidence essential to encourage fruitful negotiation.

Rule 51.10 - Applicability

Two parties, PacBell and CTA, raised questions about the application of these rules to an entire class of proceedings. CTA's concerns about the application of settlement rules in transportation proceedings were discussed in D.88-04-059 where we made an adjustment that spoke to these concerns. We are not persuaded by the additional comments to exclude use of these rules in transportation proceedings categorically. As we announced in D.88-04-059, we will be reexamining these rules in their entirety 24 months after we adopt final settlement rules. If CTA has found the rules unworkable in the interim, it will have the opportunity to raise those concerns again.

Edison asks that Rule 51.10 be amended to indicate clearly that joint exhibits accepted on the record need not be subject to these rules as a stipulation. This will encourage parties to resolve issues during a hearing without having to apply lengthy procedural rules. We will amend the rule to reflect this.

Conclusion

In examining the settlement rules as they were originally proposed and as we adopt them today, we see that they have grown considerably in length. This is in part a reflection of our concern that the comments of all parties be addressed, and where possible, accommodated. We are seriously concerned about both the length and the specificity of the rules and we hope parties do not end up tripping over either. The purpose of establishing these rules was to provide an organized framework within which to address

settlements and stipulations so that all parties would know, from the beginning, what to expect procedurally. That is generally the purpose of rules of practice and we are mindful that rules themselves are seldom the answer to all the problems that arise in matters as complex as the ones we deal with. We commend the rules to parties in this spirit. We expect that when questions of interpretation arise, they will be resolved in a manner that encourages full participation by the parties and provides the Commission adequate information with which to make a reasoned decision.

Findings of Fact

1. Formal rules for stipulations and settlements will provide notice and opportunity to all parties to address stipulations and settlements, to raise and explore concerns in a formal setting, and to develop a record on which the Commission may render an informed decision on the stipulation or settlement.

2. Appendix A attached sets forth proposed Rules of Practice and Procedure to implement rules governing stipulations and settlements.

3. The rules set forth in Appendix A have been published twice in the California Notice Register and parties have commented on both forms of the proposed rules.

4. Minor modifications have been made to the proposed rules in response to parties' comments. Those modifications have been discussed in the body of this decision.

Conclusions of Law

1. The Commission should adopt the rules set forth in Appendix A governing stipulations and settlements

2. The Commission should transmit the adopted rules to the Secretary of State for filing.

O R D E R

IT IS ORDERED that:

1. The rules governing stipulations and settlements set forth in Appendix A are adopted.

2. The Executive Director, in conjunction with the Administrative Law Judge Division, shall transmit the adopted rules to the Secretary of State for filing.

This order is effective today.

Dated September 28, 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

Victor Weisser, Executive Director

PB

The following article is added 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 on whose behalf an appearance has been filed 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. 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 signing 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 and their representatives.

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 or other proceeding in which a comparison exhibit would ordinarily be filed, 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.

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, pursuant to Rule 51.4, 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) 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 may reject a proposed stipulation or settlement without hearing whenever it determines that the stipulation or settlement is not in the public interest. Upon rejection of the settlement, the Commission may take various steps, including the following:

1. Hold hearings on the underlying issues, in which case the parties to the stipulation may either withdraw it or offer it as joint testimony,
2. Allow the parties time to renegotiate the settlement,
3. Propose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief.

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 discussion, admission, concession or offer to stipulate or settle, whether oral or written, made during any negotiation on a stipulation or settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to stipulate or settle confidential and shall not disclose them 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.

Exhibits may be sponsored by two or more parties in a Commission hearing as joint testimony without application of these rules.

(END OF APPENDIX A)

ALJ/MCC/jt

Decision 88 09 060 SEP 28 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)

ORIGINAL

OPINION ADOPTING RULES FOR SETTLEMENTS AND STIPULATIONS

Decision (D.) 88-04-059 dated April 27, 1988 revised the proposed rules governing settlements and stipulations and requested an additional round of comments from all parties to this proceeding. The proposed rules were transmitted to the Office of Administrative Law and were published in the California Regulatory Notice Register on May 13, 1988. Comments were received from Pacific Bell (PacBell), GTE California Incorporated (General), Southern California Edison Company (Edison), Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), William M. Bennett and Robert M. Teets (Bennett and Teets), California Trucking Association (CTA), California Department of General Services (General Services), Graham & James, Industrial Users, Utility Consumers' Action Network (UCAN), Toward Utility Rate Normalization (TURN), and the Commission's Division of Ratepayer Advocates (DRA).

At the outset, we note that the comments of Bennett and Teets and, to a lesser extent, TURN, address the issue of applying these settlement rules to the Diablo proceeding. That issue should be pursued in Application 84-06-014 and the parties should raise it there by separate motion. We will not address the comments as they relate to a specific proceeding in this generic rulemaking. Bennett and Teets are filing comments for the first time on these

rules and they state that they adopt TURN's January 25, 1988 comments which generally opposed the use of settlements.

For the most part, parties heeded our plea in D.88-04-059 and confined this round of comments to the changes in the proposed rules. To the extent that prior comments were reiterated or new comments were filed simply expressing agreement with changes, parties should not look for detailed discussion of such comments in this decision.

PacBell repeats its suggestion that settlement rules not be applied in complaint cases. PacBell notes that complaint cases are often resolved without any need for the Commission to adopt the settlement. In most of these cases, the parties simply announce that they have resolved the matter and file a written request to have the complaint dismissed. In cases such as the one PacBell describes, where the parties are not asking the Commission to adopt the settlement, we would not expect to see the settlement rules apply. In addition, Rule 51.10 provides that where all parties agree to settle, they may file for a waiver of these rules.

Our concern, and the reason we will not adopt PacBell's recommendation to exclude complaints entirely from these rules, is that some complaints address issues that are not limited to the complainant and defendant. Frequently such complaints include multiple parties. Examples are the complaints relating to 976 matters, the cellular resellers' complaint in Case 86-12-023, and the complaints involving privately owned pay telephones. We can envision many opportunities to stipulate or settle in such cases, and the existence of a formal structure in which to present such agreements will serve to protect the due process interests of all parties to the proceeding.

The remainder of this second round of comments will be discussed under the individual rule subheadings below.

Rule 51(a) - "Party"

Graham and James has commented on the definition of "party" stating that the definition is at variance with the common understanding of the term as being a person on whose behalf an appearance has been filed. In addition, Graham and James notes that the definition is inconsistent with use of the term "party" in other rules, notably Rule 82. We will correct the definition to read, "'Party' or 'Parties' means any person or persons on whose behalf an appearance has been entered in the proceeding." This change will necessitate clarifying changes in Rules 51.1(c) and 51.9 which also refer to parties.

Rule 51.1 - Proposal of Settlements or Stipulations

Bennett and Teets comment that in view of the Commission's stated intention in D.88-04-059 to allow settlement between less than all parties, it is a reasonable safeguard to require settling parties to demonstrate their good faith efforts to include all parties as a precondition to their being entitled to file any proposed settlement. Bennett and Teets did not make any specific suggestions for this demonstration. We think the provision in Rule 51.1(b) for convening at least one settlement conference with notice and opportunity to participate provided to all parties before formally filing the settlement documents addresses these concerns adequately.

In this connection, TURN comments that a much better form of Rule 51.1(b) would be to require holding the settlement conference to be held before any agreement is signed. This would give parties an opportunity to persuade participants to consider their views. This is consistent with our intent and we will modify the rule accordingly.

Bennett and Teets also comment on our addition to Rule 51.1(a) providing that settlements shall be limited to the issues in a specific proceeding and shall not extend to substantive issues which may come before the Commission in other or future

proceedings. They contend that the Diablo Canyon's proposed settlement does exactly that, barring PG&E from raising certain kinds of substantive issues until after the year 2016. In lieu of any specific changes Bennett and Teets suggest that several courses should be explored: (1) better definition of the term "issues in that proceeding," (2) definition of the phrase "substantive issues," and/or (3) an exception which permits future proceedings to be limited or barred based on some kind of factual and legal showing.

Our intent in inserting this additional language was to preclude parties from trying to bind the Commission for the future (or in another proceeding with a different utility) on issues that it had not had an opportunity to consider in the settled proceeding. We will not comment here on the Diablo Canyon's proposed settlement since it is being considered elsewhere. No other party addressed this addition to Rule 51.1(a) and we are inclined to leave it as written for the time being. If it creates problems in the interim before we reevaluate these settlement rules, parties may petition to waive application of that portion of the rule.

DRA supports Rule 51.1(c) (as do a number of other commenters) which provides that only parties and their representative may attend settlement conferences. DRA notes that there may be occasions when the attendance of a nonparty is advisable and recommends that we include a provision in the rule which allows participating parties to waive the attendance limitation where there is unanimous consent. We are reluctant to do this because we see the potential application as relatively remote and rules should not be designed to cover every conceivable eventuality. Additionally, attendance of nonparties at settlement conferences raises questions about the applicability of Rule 51.9 covering confidentiality and disclosure. This question arises especially if the Commission Advisory and Compliance Division

attends settlement conferences since we believe that nondisclosure is inconsistent with their advisory duties to the Commission. If there is a real need for a nonparty to attend settlement conferences (for example, the independent moderator that DRA suggests), parties can always file a motion to waive the limitation on attendance for good cause shown.

DRA also comments on the provision of Rule 51.1(c) requiring a comparison exhibit where a Rate Case Plan proceeding is involved. It notes that a settlement agreement may be reached before DRA has completed its evaluation of the case and that in order to comply with the rule, DRA must create and produce its report early, possibly leading to incomplete or inaccurate results. DRA recommends that if settlement is reached before DRA has distributed its report, the comparison need only include the applicant's position and the position stipulated to by parties. We will not adopt this suggestion. In the first place we would be surprised if a party were willing to settle a major matter without having developed its own position first. Secondly, the position DRA would have taken at hearing is important for third-party intervenors to know in assessing their own position on the settlement. The rule does not require the complete showing, including testimony, that DRA would have made, it only requires a comparison exhibit. Under the circumstances we do not find the requirement burdensome.

DRA also notes that some settlements involve broad areas rather than an account-by-account determination, and the comparison should be required only for those areas specifically stipulated to with the provision for application of updates or indices necessary for final determination in the proceeding. We will provide that the comparison show the account-by-account positions of DRA and the applicant but need only include the account-by-account settlement results where it is possible to identify them in that fashion.

Obviously, the bottom line comparison of the applicant's position, DRA's position, and the settlement results will still be required.

DRA also believes that the requirement of a comparison exhibit should not be limited to Rate Case Plan proceedings but should be extended to other proceedings where comparison exhibits are ordinarily submitted, such as offset proceedings. We agree and will amend the rule to provide for this.

General commented that Rule 51.1(d) should be revised to provide an outside limit of 90 to 180 days for Commission action on a proposed stipulation or settlement in lieu of the motion presently required justifying inclusion of a time limit for the Commission to act on a settlement. We are also concerned that settlements not languish without action, and commit to prompt disposition of them consistent with our other workload. We are not convinced that automatic deadlines provide any greater protection for parties than the rule as presently drafted and, accordingly, will not make the change that General suggests.

Rule 51.2 - Timing

PG&E, DRA, and Edison all proposed changes to this rule in their comments. PG&E suggests a change to make it clear that motions to approve a settlement may be filed at the prehearing conference. Since we have modified the rules to provide that a settlement conference inviting all parties be called before any settlement agreement is signed, and since the first time that all parties will be identified is the prehearing conference, it is not possible to comply with that requirement and still file the motion at the prehearing conference. Accordingly, we will not adopt PG&E's proposed change.

Edison also expressed concerns with the timing, noting that Rate Case Plan cases had a prehearing conference on a date certain but that other cases did not. It recommended that parties be permitted for good cause shown to file prior to the prehearing conference in Rate Case Plan cases and in all other proceedings to

file as soon as a matter is accepted for filing and a docket number is given.

We are not convinced that the absence of a date certain for a prehearing conference is a serious impediment to the proper functioning of these rules. Parties can, and commonly do, request that a prehearing conference be set in a matter for any number of reasons - to establish schedules, to resolve discovery disputes, and to identify interested parties. If a prehearing conference has not been set and parties wish to start the settlement process under these rules, they may ask the administrative law judge (ALJ) to set a prehearing conference for that purpose. Such requests are currently made orally and in almost all cases are granted routinely.

We will not provide for filing motions to accept settlements before the first prehearing conference because it has the potential for effectively eliminating the participation of too many third-party intervenors in the process. We have gone to great lengths in our compensation program to encourage such intervenors to participate, and we have tried to structure these settlement rules to continue that participation. It would be counterproductive to permit the settling parties to contravene those considerations with a signed, sealed, and delivered settlement before the process has even had an opportunity to work.

Both DRA and Industrial Users emphasized in their comments that all parties must commit sufficient resources to actively review the notice of intent or application and to prepare for evidentiary hearings under the applicable procedural schedule pending the outcome of settlement negotiations. DRA suggests that the rules contain a strong statement to this effect. Exhortations to parties do not really belong in rules of practice so we will not make any additions to the rule. Parties should be aware, however, that we strongly support early preparation for hearing and we will not look favorably on requests for delay to prepare cases that

should have been well underway before stipulations or settlements were filed.

Lastly, DRA expressed agreement with Southern California Gas Company's (SoCal) January 25, 1988, comments that settlements should be permitted, as in civil court, any time prior to the final decision. We have addressed this issue in D.88-04-059 by authorizing the filing of settlements up to 30 days after the close of hearings. Beyond that point further stipulations or settlements would only delay or interrupt an orderly decision-making process. By that point too, a complete record has been developed on which to base our decision and parties have been afforded an opportunity for the meaningful participation that will result in the best and fairest outcome. Further opportunities to settle are not necessary for this, and the slender hope that such late-filed settlements might preclude later filing of petitions to modify is too tenuous to justify any changes in the rule.

Rule 51.4 - Comment Period

Bennett and Teets suggest that in the interests of aiding and furthering public participation, and because settlements will never be commonplace matters, parties should reasonably be entitled to at least one extension of time of 15 days without having to show any cause. If we were to grant this request, we fear that the extension would become the "floor" and that we will effectively have provided for a 45-day comment period and a 15-day reply, or a total of two months after the stipulation or settlement is mailed. In view of the potential for routine delay, we do not think the requirement of showing cause for extending the comment period is unreasonable and, accordingly, we will not change the rule.

Rule 51.5 - Contents of Comments

Bennett and Teets state that they have no objection to the first portion of this rule concerning the content of the comments so long as the Commission requires that proposed settlements be accompanied by a fully articulated presentation of

legal and factual points and authorities which substantiate the basis for the settlement. We have done this in Rule 51.1(c) which requires in part: "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 the grounds on which adoption is urged." We think this is adequate to address the Bennett and Teets concerns, and we are confident that parties recognize the obvious, that is, the more specific the proposed settlement is in its terms, the less likely it is that parties will feel compelled to contest it because of misunderstanding or uncertainty.

Bennett and Teets also suggest that the last sentence of the rule, regarding waiver of objections because of failure to comment, be eliminated. They argue that the rule is unfair to protesting parties since there is no corresponding waiver penalty placed on the settling parties. We disagree. The purpose of the waiver rule is to tell parties that if they are going to contest the settlement, this is the time and place to do it, they may not remain silent now only to raise their concerns later when the process is coming to a conclusion. This is consistent with orderly processing of complex matters while providing for the participation of myriad parties with different interests. To allow objections or protests at any time would be unwieldly at best and chaotic at worst. The rule as drafted is consistent with the Federal Energy Regulatory Commission waiver rule set forth in 18 CFR 385.602 and we are not persuaded that it should be changed.

Rule 51.6 - Contested Stipulations and Settlements

In its comments on this rule, UCAN raised the issue of funding intervenors "up front," noting that it had exhausted its entire budget for the SDG&E general rate case participating in the settlement process and absent further funding, would be hard pressed to participate further if the settlement is rejected. Comments on the second round of the proposed settlement rules are

not the appropriate way to raise such broad concerns as these and we will not consider them here, particularly since no other party was on notice that this was to be an issue.

We asked parties specifically for comments on the revisions to this rule because of the timing problems we envisioned if we could not accept the complete settlement as offered. We also asked for specific scheduling suggestions under such circumstances. The response to the latter request was disappointingly general. PacBell suggested that we adopt a rule giving precedence over all other matters in calendaring and resolution of settlements or stipulations in rate case proceedings. DRA believes that this issue will seldom present repeatedly serious problems and suggests that this issue be addressed on a case-by-case basis. Department of General Services asks for further opportunity to comment on any proposed rule before the Commission adopts it, noting that this is a critical feature of the settlement rules since it determines how much pressure there will be on parties, the utilities, DRA, and the Commission to accept proposed settlements. Edison notes that it is possible to file a settlement or stipulation late enough in any proceeding to interfere with the timely completion of the case on the original schedule but notes that this is a risk which the applicant proposing a settlement or stipulation should bear. For lack of any more specific suggestions from the parties, we concur with Edison's observation and adopt DRA's recommendation to handle this ad hoc without a specific rule. We do not perceive a problem arising from either calendaring or resolving settlements or stipulations and, accordingly, we will not lengthen the rules further by adding a provision for granting the precedence that PacBell suggests. We do intend to treat such matters expeditiously and, as discussed below, expect all parties to prepare accordingly.

Industrial Users recommended that all parties be required to adhere to the applicable procedural schedule and to prepare for evidentiary hearings pending the outcome of settlement

negotiations. We endorse this recommendation heartily. While this may result in some additional effort for the parties, it should minimize the disruptions in scheduling that will certainly occur if all preparation is suspended during negotiations.

In connection with early preparation, UCAN states that additional discovery by contesting parties is essential after a settlement is proposed and asks that priority be given to discovery requests from these parties. We are concerned that discovery and preparation not bog down and we do not expect to see nonsettling parties "stonewalled" in their attempt to gather information to prepare their case; however, we will not include specific response times in the rules at this point, in the hope that such micromanagement of the process will prove unnecessary. We will consider such a provision when we reexamine these rules if parties' experience in the interim demonstrates a need for it.

Edison recommended that settlements and stipulations under the Rate Case Plan be considered within the framework of that plan. In D.88-04-059 we rejected TURN's proposal to maintain the Rate Case Plan schedule intact if a stipulation or settlement is contested, setting out our reasons for doing so. We are not persuaded to change our views as a result of parties' comments. However, we strongly encourage parties to submit stipulations and settlements early in the proceeding since it will be easier to keep to a predetermined schedule if the agreement is extensively contested or if we reject it. PacBell suggests that the Rate Case Plan may need to be amended to take into account the hearings on settlements or stipulations and to extend the time frames for the hearings of the underlying case. We will address the timing problems on an ad hoc basis and will reserve for the future consideration of major modifications to the Rate Case Plan.

For those cases in which we decide that a settlement can be approved only if modifications are made, TURN supports SoCal's original comments to the effect that we should inform the parties

of our views and either allow them to accept modification or withdraw from the settlement and proceed with their original cases. TURN suggested using an assigned Commissioner's ruling, reflecting the concerns of the Commission as a whole, for this purpose. We will provide in Rule 51.6 for this notice but will not commit in the rule to the vehicle we will use, since various procedures may be appropriate depending on what stage of the proceeding we are in and the extent of the modification proposed.

PacBell takes issue with our revision to Rule 51.6 to provide for hearing on any contested issues of fact arguing that for settlements or stipulations to be useful, the rule must provide that the hearing be limited to the merits of the settlement or stipulation whether the dispute is on an outcome or a fact expressly agreed upon by the settling parties. PacBell raised this same concern in prior comments and it was considered and rejected when we made the revisions set for in D.88-04-059. In the interest of providing nonsettling parties the broadest opportunity to address contested issues through the hearing process, we will leave the rule in its present form (except for the specific modifications discussed below in response to parties' comments). Our experience with the contested issues in the settlement in SDG&E's current general rate case indicated that, although hearing was required, there was a substantial saving in hearing time.

TURN also repeats an argument advanced in its earlier comments and rejected in D.88-04-059, namely, that settlements simply be considered the joint testimony of the settling parties. While TURN may be correct that this would create an incentive to include as many parties as possible in the agreement, we are not convinced that the converse is true, that is, that the existing rule encourages the moving party to limit the settlement to as few parties as possible to minimize the need for concession and compromise. TURN argues that the current rule favors the utilities' interests, because they are able to "settle" the case

of our views and either allow them to accept modification or withdraw from the settlement and proceed with their original cases. TURN suggested using an assigned Commissioner's ruling, reflecting the concerns of the Commission as a whole, for this purpose. We will provide in Rule 51.7 for this notice, where some of the options available to the Commission after rejection of a settlement are listed. However, we will not commit in the rule to the vehicle we will use, since various procedures may be appropriate depending on what stage of the proceeding we are in and the extent of the modification proposed.

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convinced that the converse is true, that is, that the existing rule encourages the moving party to limit the settlement to as few parties as possible to minimize the need for concession and compromise. TURN argues that the current rule favors the utilities' interests, because they are able to "settle" the case

without coming to terms with the objections of those parties most adverse to them. We frankly did not see this phenomenon at work in the settlement in the SDG&E general rate case or in the settlement in Phase I of the telecommunications regulatory flexibility investigation, both of which had large numbers of signatories. If anything, we would expect settling parties to induce as many parties as possible to enter into the agreement to reduce the potential for protracted hearings on contested issues.

Both DRA and UCAN raised concerns about who would testify and be available for cross-examination on contested issues and whether the witness would be required to provide a detailed breakdown of each separate issue. We think the answer depends on what the contesting party is challenging. If it is the substantive issue being contested, then obviously the witness(es) sponsoring the underlying testimony on the issue will be required to testify. If it is the reasonableness of the settlement on that issue, then a witness sponsoring the settlement documents is in order. UCAN urges that we incorporate this provision in the rule in some way.

This is another case of the point being valid, but its incorporation in the rules would involve a level of micromanagement that we are trying to avoid. We would suggest in the alternative that contesting parties identify the witnesses they wish to cross-examine, either by name or by issue, and present this information to the ALJ for use in scheduling the hearings on the contested issues. An estimate of the amount of time for cross-examination would be helpful at the same time.

Graham and James comments, and General Services agrees, that paragraph (c) of this rule is confusing and offers opportunity for abuse. It asks that the paragraph be deleted from the rules. By including this language, we intended to alert parties that when settlement was reached after evidentiary hearing had been held, and the settlement was contested, we could decide it on the record already created without a second round of hearings. On reflection,

it is not necessary for such a statement to appear in the rules of practice and since it causes concern there, we will eliminate it.

Rule 51.8 - Adoption Binding, Not Precedential

DRA recommends that we clarify this rule by adding language that indicates that Commission adoption of a stipulation or settlement has the same status as any other Commission decision. This simply states the obvious and since the additional language will simply clutter the rule unnecessarily we will not add it.

Rule 51.9 - Inadmissibility

We specifically invited comment on our revisions to this rule, particularly on the impact of the inadmissibility provision on conduct of future proceedings and on discovery. TURN, Industrial Users, and DRA all raised concerns in these areas, in particular with the broad language of the first and second paragraphs.

Bennett and Teets discuss this rule and Rule 51.6 together as they relate to discovery, maintaining that such a sweeping rule is contrary to the statutory purposes of this Commission in that it favors utilities. Bennett and Teets propose discovery by those contesting the settlement on certain specific grounds, at least one of which goes to discussions conducted during the settlement process, which is why their comments are relevant under this rule. We will not prescribe the specific detail of discovery available because we suspect this would be viewed by all parties as a limitation on discovery rather than an assist in obtaining information. Our discussion below will clarify the extent of the confidentiality rule as it pertains to discovery and to admissibility. We do not perceive that it favors utilities and we note that even the parties who expressed concerns about the language of the rule did not deny the need for the rule in some form.

Industrial Users opposes extension of confidentiality to the factual information underlying a party's settlement position if

it is not necessary for such a statement to appear in the rules of practice and since it causes concern there, we will eliminate it.

Rule 51.7 - Commission Rejection of a Stipulation or Settlement

We have modified this rule slightly in response to parties' concerns about Rule 51.6. We alert the parties to the fact that a hearing on the stipulation or settlement is not required before the Commission rejects a proposal which it determines is not in the public interest. It further indicates some of the requlatory options available to the Commission if a proposal is not adopted. The Commission is to make a binary choice, that is, to either "accept" or "reject" the settlement as proposed. The indication of alternatives acceptable to the Commission complements that binary system, as the rejected settlement could in appropriate cases be used as a reference point for subsequent hearings or negotiations between the parties. The Commission will suggest alternate terms to the settlements as a means of promoting resolution of the case in only the most extreme cases, however.

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DRA recommends that we clarify this rule by adding language that indicates that Commission adoption of a stipulation or settlement has the same status as any other Commission decision. This simply states the obvious and since the additional language will simply clutter the rule unnecessarily we will not add it.

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Industrial Users opposes extension of confidentiality to the factual information underlying a party's settlement position if

such information would otherwise be subject to discovery under our rules. It notes the potential for abuse, observing that parties who wished to keep facts confidential need only raise them in the course of settlement negotiations, whether relevant or not and thereafter rely on Rule 51.9 to preclude discovery. This result would seriously impede a nonparticipating party's ability to obtain and review factual information to evaluate the proposed settlement or to prepare for hearing.

TURN echos these concerns, arguing that protecting "all information" raised at settlement is probably not possible as a practical matter and not desirable as a policy matter since it would frustrate the Commission's stated desire to obtain a complete factual record as the basis for its decisions.

Both DRA and TURN take the position that confidentiality protections should not extend to information developed in preparation for negotiations. DRA notes that it would be impossible to segregate and distinguish between information that was developed in preparation for negotiations from that used in the preparation for litigation.

Industrial Users, TURN, and DRA all support the need for an inadmissibility rule but suggest that this need can be fulfilled with much more precise terminology. Our intent in modifying the language was to foster a climate of open negotiation among parties without fear that the concessions offered in the give and take of negotiation could be used against them if no agreement were reached. Edison's comments on the rule are pertinent here:

> "Edison respects and supports the need for parties who do not participate in settlement negotiations to obtain sufficient information to allow them to evaluate any proposed settlement. Information which bears on the reasonableness of the result produced by the settlement may be produced on discovery and admitted into evidence. <u>However, information bearing solely on the negotiating process, position papers or similar materials produced to support the negotiating process, drafts of</u>

the stipulation or settlement, and similar materials are protected by the strong public policy in favor of encouraging negotiations and settlement." (Emphasis supplied.)

Our intent was to create a forum where free and open discussions could take place during the settlement negotiations themselves. To clarify this we will eliminate the phrase "in preparation for" from the rule since this function ordinarily occurs outside of the negotiation process. We will also revise the rule to reflect more accurately what is being protected, which is the discussion of the parties, including admissions and concessions, with respect to any offer to stipulate or settle. Lastly, we will amend the rule to provide that such matter will be inadmissible in evidence against any party who objects to its admission, bringing our rule in line with a similar provision in the Federal Energy Regulatory Commission rule, and eliminating the potentially cumbersome process of having to obtain consent or waiver from multiple parties. These changes should narrow the application of the rule sufficiently to ease the concerns of the parties, but still provide the protection from discovery and admission into evidence essential to encourage fruitful negotiation.

Rule 51.10 - Applicability

Two parties, PacBell and CTA, raised questions about the application of these rules to an entire class of proceedings. CTA's concerns about the application of settlement rules in transportation proceedings were discussed in D.88-04-059 where we made an adjustment that spoke to these concerns. We are not persuaded by the additional comments to exclude use of these rules in transportation proceedings categorically. As we announced in D.88-04-059, we will be reexamining these rules in their entirety 24 months after we adopt final settlement rules. If CTA has found the rules unworkable in the interim, it will have the opportunity to raise those concerns again.

Edison asks that Rule 51.10 be amended to indicate clearly that joint exhibits accepted on the record need not be subject to these rules as a stipulation. This will encourage parties to resolve issues during a hearing without having to apply lengthy procedural rules. We will amend the rule to reflect this.

Conclusion

In examining the settlement rules as they were originally proposed and as we adopt them today, we see that they have grown considerably in length. This is in part a reflection of our concern that the comments of all parties be addressed, and where possible, accommodated. We are seriously concerned about both the length and the specificity of the rules and we hope parties do not end up tripping over either. The purpose of establishing these rules was to provide an organized framework within which to address settlements and stipulations so that all parties would know, from the beginning, what to expect procedurally. That is generally the purpose of rules of practice and we are mindful that rules themselves are seldom the answer to all the problems that arise in matters as complex as the ones we deal with. We commend the rules to parties in this spirit. We expect that when questions of interpretation arise, they will be resolved in a manner that encourages full participation by the parties and provides the Commission adequate information with which to make a reasoned decision.

Findings of Fact

1. Formal rules for stipulations and settlements will provide notice and opportunity to all parties to address stipulations and settlements, to raise and explore concerns in a formal setting, and to develop a record on which the Commission may render an informed decision on the stipulation or settlement.

2. Appendix A attached sets forth proposed Rules of Practice and Procedure to implement rules governing stipulations and settlements.

3. The rules set forth in Appendix A have been published twice in the California Notice Register and parties have commented on both forms of the proposed rules.

4. Minor modifications have been made to the proposed rules in response to parties' comments. Those modifications have been discussed in the body of this decision.

Conclusions of Law

1. The Commission should adopt the rules set forth in Appendix A governing stipulations and settlements

2. The Commission should transmit the adopted rules to the Secretary of State for filing.

O R D E R

IT IS ORDERED that:

1. The rules governing stipulations and settlements set forth in Appendix A are adopted.

2. The Executive Director, in conjunction with the Administrative Law Judge Division, shall transmit the adopted rules to the Secretary of State for filing.

This order is effective today.

Dated SEP 28 1988, at San Francisco, California.

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

The following article is added 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 on whose behalf an appearance has been filed 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. 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 signing 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 and their representatives.

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 or other proceeding in which a comparison exhibit would ordinarily be filed, 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.

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, pursuant to Rule 51.4, 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) If the Commission decides that a settlement can be approved only if modifications are made to it, the Commission will inform the parties of this and allow them to either accept the modification or withdraw from the settlement and proceed with their original cases. Such election must be made within 15 days of the date of the notice.

(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 discussion, admission, concession or offer to stipulate or settle, whether oral or written, made during any negotiation on a stipulation or settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to stipulate or settle confidential and shall not disclose them outside the negotiations without the consent of the parties participating in the negotiations.

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) 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 may reject a proposed stipulation or settlement without hearing whenever it determines that the stipulation or settlement is not in the public interest. Upon rejection of the settlement, the Commission may take various steps, including the following:

1. Hold hearings on the underlying issues, in which case the parties to the stipulation may either withdraw it or offer it as joint testimony,
2. Allow the parties time to renegotiate the settlement,
3. Propose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief.

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.

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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.

Exhibits may be sponsored by two or more parties in a Commission hearing as joint testimony without application of these rules.

(END OF APPENDIX A)