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Decision 91-10-049 October 23, 1991

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 RULE TO GOVERN EX PARTE COMMUNICATIONS IN COMMISSION PROCEEDINGS

Summary

This decision adopts, without modification, the rule governing ex parte communications in Commission proceedings proposed by the Commission in Decision (D.) 91-07-074. The rule will go into effect on January 20, 1992, to allow completion of internal implementation procedures and external outreach including necessary staffing and workshop efforts.

Background

On August 1, 1991, the Commission issued D.91-07-074 outlining a proposed rule to govern ex parte communications in covered proceedings, defined as "any formal proceeding other than a rulemaking or an OII consolidated with a rulemaking to the extent that the OII raises the identical issues raised in the rulemaking." The Commission transmitted its proposed rule to the Office of Administrative Law (OAL) and indicated its intention to consider formal adoption of the rule at the conclusion of the OAL publication process.

Comments Received

Notice of the Commission's consideration of the proposed rule was published in the California Regulatory Notice Register for a 45-day period (August 16, 1991 - October 1, 1991). The notice advised that public comments on or objections to the proposed rule

should be submitted by letter to the Commission no later than October 1, 1991. Letters were received from McCutchen, Doyle, Brown & Enersen, a law firm representing California Water Service Company (CWS) and San Jose Water Company (SJWC), and from Nossaman, Guthner, Knox & Elliott, a law firm representing the California Water Association (CWA).¹

The written comments express concern that members of the Commission Advisory and Compliance Division's (CACD) Water Utilities Branch (Branch), who do not fall within the definition of a "party" under the proposed rule (because they are neither appearances nor advocates), nonetheless may be in a position to unfairly influence Commission decisions involving Class A water utilities. CWS and SJWC request that the Commission add clarifying language to ensure that members of Branch who are neither advocates nor witnesses do not circumvent the ex parte rule. CWS and SJWC acknowledge that the definition of "party" includes "agent" and that the Commission specifically stated that the agency language was designed to avoid the very problem CWS and SJWC raise. However, CWS and SJWC maintain that they are entitled to "firm assurance" that Branch, with its dual advocacy and advisory role, will not circumvent the rule (Letter, p. 6). They suggest that the rule be amended to clarify that all Branch members may communicate with a decisionmaker as long as the necessary reporting mechanisms are followed (i.e., all Branch members would be considered "parties"). Alternatively, CWS and SJWC request that CACD designate a non-branch individual to act as a conduit from Branch to the decisionmaker for purposes of preparing computations and rate schedules and for furnishing advisory support.

¹ Applications for rehearing of D.91-07-074 were filed by the California Trucking Association, MCI Telecommunications Corp. (MCI) and the California Cable Television Association. These appeals are considered in a companion decision issued today (D.91-10-050).

CWA's comments closely parallel those of CWS and SJWC in asserting that the status of all members of Branch should be explicitly addressed in the rule. It too is concerned that the "agency" language contained in the rule is vague and inadequate. CWA requests that the Commission clarify its intent to include within the rule's application those members of the Branch staff who are not appearing as advocates or witnesses in a covered proceeding (Letter, p. 3).

Discussion

We decline to modify the proposed rule to provide the additional assurances sought by CWA, CWS, and SJWC. The choices they present (blanket coverage of Branch or designation of a non-branch conduit) are unnecessary to ensure that the rule operates fairly. It is our clear intention to cover as parties only those members of Branch who are acting in an advocacy role and our specific statements that staff members who cross the line from an advisory capacity to an advocacy posture are covered under the rule as "agents" of a party (D.91-07-074, mimeo. pp. 12-13).

We fail to see how the guidance we have previously provided could be any more definitive or clear-cut. We have attempted to balance our own organizational requirements against the fairness requirements of the ex parte rule. CWS, SJWC, and CWA present no persuasive argument that the solution we have reached or the clear guidance we have provided our staff will fail to promote fair decisionmaking. Naturally we will continue to monitor the effectiveness of this rule in order to ensure that it does promote fair decisionmaking.

There is no further impediment to formal adoption of the rule proposed in D.91-07-074. We will make the provisions of the ex parte rule, attached to this decision as Appendix A, effective on January 20, 1992 in order to allow time for our staff to complete its internal implementation efforts, which have been ongoing since issuance of D.91-07-074. During the time remaining

before this rule becomes effective, the Administrative Law Judge Division will schedule and chair workshops designed to promote understanding of how the Commission's ex parte rule will be administered. Further details about these workshops will be provided by notice to the parties to this rulemaking and via the Commission's Daily Calendar.

Findings of Fact

1. Notice of the Commission's adoption of an ex parte rule was published in the California Regulatory Notice Register during August 16, 1991 through October 1, 1991.

2. Prior to October 1, 1991, CWA, CWS, and SJWC submitted letters to the Commission as part of the OAL publication process.

3. Given the specific statements contained in D.91-07-074 that staff members who cross the line from an advisory capacity to an advocacy posture are covered under the rule as "agents", with all the attendant reporting obligations of a party, there is no need to modify the proposed ex parte rule to cover the entire Commission Advisory and Compliance Division's Water Utility Branch, or to make other related modifications to the rule as suggested in comments of CWA, CWS, and SJWC.

Conclusion of Law

The ex parte rule attached to this decision as Appendix A should be adopted, to be effective January 20, 1992.

ORDER

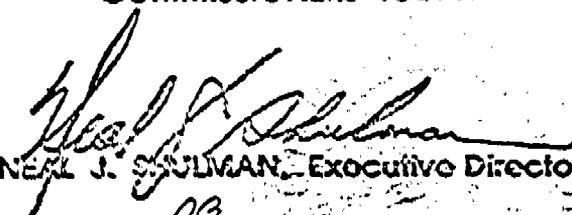
IT IS ORDERED that the ex parte rule attached to this decision as Appendix A is hereby adopted, to be codified as new Article 1.5 in Subchapter 1 of the Commission's Rules of Practice and Procedure, and its provisions shall be effective January 20, 1992 (new Rule 1.7 of the Rules of Practice and Procedure).

This order is effective today.

Dated October 23, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

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


NEAL J. SULMAN, Executive Director
PB

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Article 1.5 Ex Parte Communications
In Commission Proceedings

1.1 Definitions

For purpose of this Article, the following definitions apply:

- (a) "Commencement of a proceeding" is the tender to the Commission of a notice of intention, the filing with the Commission of an application or complaint, or the adoption by the Commission of an order instituting investigation (OII).
- (b) "Commission Staff of Record" means (i) all members of the staff organization or division created pursuant to Public Utilities Code § 309.5, except those temporarily assigned to other staff organizations or divisions; and (ii) members of other staff organizations or divisions not specifically covered under § 309.5, who are appearing as advocates or as witnesses for a particular party in covered proceedings, but excluding other members of such staff organizations or divisions. The Executive Director, General Counsel, and Division Directors (except the director of the staff division created pursuant to § 309.5) are not Commission Staff of Record.
- (c) "Covered Proceeding" is any formal proceeding other than a rulemaking, or an OII consolidated with a rulemaking to the extent that the OII raises the identical issues raised in the rulemaking. An OII is otherwise a covered proceeding. Except for OIIs, if no timely answer or protest or request for hearing is filed in response to a pleading initiating a covered proceeding, the proceeding ceases to be covered. If an answer or protest is withdrawn, the proceeding ceases to be a covered proceeding. However, if there has been a request for hearing, the proceeding remains covered until the request has been denied.

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- (d) "Date of Issuance of a Final Order" is
(i) the date when the Commission mails the decision after rehearing or denying rehearing; or (ii) where the period to apply for rehearing has expired and no application for rehearing has been filed, the last date for filing an application for rehearing under PU Code Section 1731. However, where a decision does not close a docket, there has been no issuance of a final order with respect to any issues that remain pending in the proceeding.
- (e) "Decisionmaker" means any Commissioner, Commissioner's Personal Advisor(s), the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, and any Administrative Law Judge assigned to the proceeding.
- (f) Enforcement-related proceedings are those OIIs and complaint proceedings where (i) the order instituting investigation or (ii) the complaint raises the alleged violation of any provision of law, or of any order or rule of the Commission. Complaints solely challenging the "reasonableness of any rates or charges" pursuant to Public Utilities Code § 1702 are not enforcement-related proceedings.
- (g) "Ex parte communication" means a written or oral communication on any substantive issue in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication.
- (h) "Party" means any applicant, protestant, respondent, petitioner, complainant, defendant, interested party who has made a formal appearance in the proceeding, or Commission staff of record in covered proceedings, and their agent(s) or employee(s). A member of the public who is not acting as the agent or employee of a party is not a party.

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- (i) "Submission of a proceeding" is as described in Rule 77 of the Commission's Rules of Practice and Procedure.

1.2 The Record

The Commission shall render its decision based on the evidence of record. Any notice filed pursuant to Rule 1.4 is not a part of the record of the proceeding. The record is closed for the receipt of evidence after the proceeding is submitted under Rule 77, unless it is reopened under Rule 84.

1.3 Applicable Proceedings

- (a) In any enforcement-related proceeding, no decisionmaker shall have any oral or written ex parte communication with any party to the proceeding concerning any substantive issue involved in the proceeding, unless the communication is reported within three working days in accordance with the reporting requirements set forth in Rule 1.4. Communications limited to the hearing schedule, location, and format, filing dates and identity of parties are procedural inquiries which need not be reported. This rule shall apply from the commencement of such proceeding to its submission to the Commission. After such proceeding has been submitted to the Commission, and until the date of issuance of a final order in such proceeding, ex parte communications between parties and decisionmakers concerning any substantive issue involved in the proceeding are prohibited.
- (b) In all other covered proceedings, any oral or written ex parte communication between a decisionmaker and any party to the proceeding concerning any substantive issue involved in the proceeding, shall be reported within three working days, in accordance with the reporting requirements set forth in Rule 1.4. These reporting requirements shall apply from the commencement of the proceeding to the date of issuance of a final order in that proceeding.

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- (c) Where proceedings covered by subsections (a) and (b) above are consolidated, the ALJ shall by ruling prior to the date of submission determine the extent to which the prohibition provisions of subsection (a) shall apply.

1.4 Reporting Ex Parte Communications

- (a) Reportable communications shall be reported by the party, whether the communication was initiated by the party or the decisionmaker. They shall be reported within three working days of the communication by filing (but not serving) the original and 12 copies of a "Notice of Ex Parte Communication" (Notice) with the Commission's San Francisco Docket Office. Such Notice shall be provided simultaneously to the assigned ALJ. The Notice shall include the following information:
- (1) the date, time and location of the communication, and whether it was oral, written or a combination;
 - (2) the identity of the recipient(s) and the person(s) initiating the communication, as well as the identity of any persons present during such communication;
 - (3) a description of the party's, but not the decisionmaker's, communication and its content, to which shall be attached a copy of any written material or text used during the communication.
- (b) The filing of a Notice will be reported promptly thereafter in the Commission's Daily Calendar.
- (c) Parties may obtain a copy of the Notice and any attachments from the Commission's Central File room or from the filing party, who must provide it to the requesting party without delay.

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1.5 Sanctions

The Commission may impose such penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest.

1.6 Specific Proceedings

In augmentation of the provisions of this Article, the Commission, or the assigned Administrative Law Judge with the approval of the assigned Commissioner, may issue an ex parte communications ruling tailored to the needs of any specific proceeding.

1.7 Applicability

This article applies to all covered proceedings (as set forth in Rule 1.3) pending on the date it is effective, and to all covered proceedings commenced on or after the date it is effective.

(END OF APPENDIX A)