

L/cdl

Decision 91-10-050

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)

ORDER DENYING REHEARING

The CALIFORNIA TRUCKING ASSOCIATION (CTA), MCI TELECOMMUNICATIONS, INC. (MCI), and the CALIFORNIA CABLE TELEVISION ASSOCIATION (CCTA) have filed applications for rehearing of Decision (D.) 91-07-074 on grounds of legal error. We have considered all the allegations of error in the application and are of the opinion that good cause for rehearing has not been shown. Accordingly, we deny the applications, although we will modify D.91-07-074 to clarify it.

CTA's application alleges that the ex parte rule stated as Appendix B to D.91-07-074 violates the people's right to petition the government under the First Amendment to the United States Constitution when applied to "legislative proceedings" before us, such as Rulemakings under Rule 14 of our Rules of Practice and Procedure, because it improperly defines "legislative proceeding." We note that the First Amendment's guarantee concerns the right of the people "to petition the Government for a redress of grievances." We have exempted rulemaking proceedings under Rule 14 from coverage under the ex parte rule partly to protect the constitutional right to

petition. If CTA were correct, no ex parte contact would ever be constitutionally permissible before any Legislature in the nation. This allegation does not show good cause for rehearing.

MCI alleges that the decision violates guarantees of due process of law under both the California and United States Constitutions by exempting rulemaking proceedings from the ex parte rule. The company argues that rulemakings and advice letter proceedings should be covered by the notice and disclosure provisions of the rule to safeguard "due process." However, it does not specify how it believes the exemptions will violate due process. Essentially, this argument alleges that all our past proceedings (when no ex parte rule was in place for proceedings of any kind, except in a few specific instances) were violative of due process rights. The argument does not show good cause to order rehearing.

CCTA's application alleges legal error in that (1) the meaning of "rulemaking" as used in the definition of "covered proceeding" in § 1.1 (c) of Appendix B is ambiguous; (2) § 1.3 (c) errs by giving too much power to the assigned ALJ; (3) the ex parte rule "puts the burden on parties to report actual or perceived ex parte communications when that burden should logically fall to [decisionmakers] acting in their impartial role;" (4) § 1.1 (h) defines "party" too narrowly; (5) § 1.2 violates due process in that it fails to make notice of ex parte contact part of the records; and (6) § 1.1 (f) includes a typographical error consisting of the omission of quotation marks around a defined term.

Allegations (2) through (4) do not allege legal error. They are merely suggested changes to the rule. We have considered these suggestions and have concluded that they are based on incomplete understanding of our Rules of Practice and Procedure or on incorrect readings of the ex parte rule, and we decline to adopt them.

The first allegation results from CCTA's unfamiliarity with our Rules. The word "rulemaking" is a term of art, referring to proceedings under our Rule 14. We recognize that many parties appearing before us are likewise unfamiliar with our Rules. Therefore we now clarify D.91-07-074 to reflect our intent in this definition: "Rulemaking" as used therein refers to the rulemaking procedure as outlined in Rules 14.1 et seq. of our Rules of Practice and Procedure.

CCTA's first allegation also points out that our definition of "covered proceeding" appears to signify that if any one answer or protest is withdrawn, the entire proceeding will cease to be covered by the ex parte rule no matter how many other answers, protests, or requests for hearing have been filed. In the context of the rest of the rule that reading would be unjustified. However, we agree that the sentence taken alone may lead to the interpretation CCTA reaches. Today we clarify that our intent was to provide that a proceeding would cease to be covered only if no protest, answer, or request for hearing remains outstanding and the initiating proceeding is uncontested.

CCTA's fifth allegation likewise fails to show good cause for rehearing. If we made the substance of ex parte communications part of the record, the provision in section 1.2 of Article 1.5, requiring us to make our decision based only on the evidence of record, would be meaningless. Again, CCTA's fears are based on incomplete understanding of the procedures to be followed. This contention does not constitute legal error. Those notices which we require to be kept separately will still be subject to state law regarding disclosure of public records, and will be as available to parties and to the public as any other part of the record. We have merely ordered that the substance of such communications cannot serve as a basis for our decisions coequal with those documents and communications which are not brought to us on an ex parte basis.

CCTA's final allegation of legal error consists of the omission of quotation marks surrounding a term in the definition section. While this is error, it is typographical, not legal, and does not show good cause for rehearing or even modification. We will clarify D.91-07-074 to say that we intended to include the quotation marks.

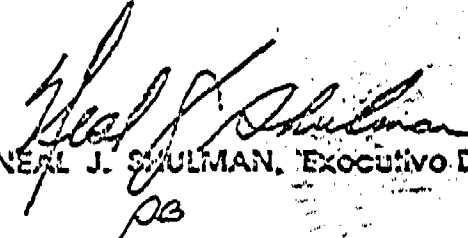
Having considered each and every issue raised by the petitioners we conclude that rehearing should be denied. Therefore, IT IS ORDERED that rehearing of D.91-07-074 is hereby denied.

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. SHULMAN, Executive Director