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ALJ/LTC/gab **

Decision 95-08-050 August 11, 1995

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

INTERIM OPINION REQUESTING WRITTEN COMMENTS ON PROPOSED RULES GOVERNING EX PARTE COMMUNICATIONS IN COMMISSION PROCEEDINGS

Summary

Today we request written comments from parties to our ongoing rules revision docket on proposed revisions to portions of Article 1.5 of the Rules governing ex parte communications in Commission proceedings. Written comments on the proposed revisions are due for filing on or before September 11, 1995.

Background

Since adding Article 1.5 to its Rules of Practice and Procedure on January 20, 1992, the Commission has done a great deal of work internally to assess whether the rules are working, and how they might be improved. In reviewing the efficacy of the new rules, a special staff group interviewed all sitting Commissioners, the Executive Director, division directors, utility regulatory managers, and consumer groups. As a result of its efforts, the staff group proposed that the Commission consider adopting a rule eliminating the "sunshine" reporting requirement, and in its place impose a prohibition on ex parte communications in all proceedings at some

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point after a proceeding is submitted for decision! The staff group also suggested several ways of improving Commissioner access to "on-the-record" information, in order to minimize the perceived need for "off-the-record" communications.

Similar recommendations are contained in the "Report of Advisory Working Group on CPUC Reforms to the Senate Subcommittee on Public Utilities Commission Reforms of Senate Committee on Energy and Public Utilities," submitted June 1, 1994 (The "Vial Advisory Group Report"). That report suggests the Commission design and adopt different variations on the ex parte rule for three distinct types of proceedings:

1. A complete prohibition on ex parte communications, in enforcement related proceedings (as defined in the Commission's Rule 1.1(f)).
2. A sunshine reporting requirement in applications, investigations, and nonenforcement related proceedings until reply comments to the ALJ's Proposed Decision are filed -- after which ex parte communications would be prohibited until a final Commission decision.

Where investigations are consolidated with rulemakings and identical issues are raised in both the investigation and Rulemaking, a "sunshine" reporting requirement would be applicable only after comments have been submitted, with no ex parte limitation prior to that time.

At the August 3, 1994 Commission meeting, the staff reported to the Commission on a timetable for drafting proposed revisions to the existing ex parte rules to address the various proposals outlined above in the existing rules revision docket (R.84-12-028). After requesting written comments on the proposed revisions, the Commission hopes to adopt final revisions to its

R.84-12-028 ALJ/LTC/gab **

the commencement of an enforcement-related proceeding... ex parte rules later this year and send those final rules to the Office of Administrative Law (OAL) for the required 45-day publication period. If no additional changes are required following the OAL publication period, the new rules would thereafter take effect after a formal vote of the Commission.

The Proposed Revisions

The Attachment to this order contains the complete text of Article 1.5, and details the Commission's proposed deletions (interlined text) and additions (shaded text). The key revisions are designed to strengthen the current ex parte rule by prohibiting off the record communications: 1) in enforcement-related proceedings; 2) in all other covered proceedings at a point after release of the proposed decision; 3) whenever applications for rehearing are pending before the Commission; and 4) during settlement negotiations held pursuant to Article 13.5 of the Commission's Rules (an ex parte ban between the negotiating parties and decisionmakers). Other revisions address reporting requirements when methods and materials other than written text are used during ex parte communications (Rules 1.1(g), 1.4(a)(1), 1.4(a)(3), and 1.4(c)).

Specific Revisions to Rule 1.3

Existing Rule 1.3(a) prohibits ex parte communications after submission of an enforcement-related proceeding (as defined in Rule 1.1(f)). In response to our own experience with Article 1.5 and suggestions from various sources, including the Vial

Advisory Group, we recognize that the purely adjudicatory nature of the decisionmaking process in enforcement-related proceedings requires a significant strengthening of the ex parte rule. To that end, we propose amending Rule 1.3(a) to eliminate the provisions which are subject to the General Rate Case plan would be subject to this modification in order to retain our existing schedule for the processing of general rate cases.

submission reporting requirement, and impose a prohibition from the commencement of an enforcement-related proceeding until issuance of a final order in such proceeding.

Similarly, in all other covered proceedings (as defined in Rule 1.1(c)), we propose a continuation of the applicable reporting requirement, except that in proceedings subject to PU Code Section 311(d), ex parte communications would be prohibited from the day of the mailing of the initial Commission agenda containing the ALJ's Proposed Decision until issuance of a final order in the proceeding. This will allow a minimum of 10 days for the Commission's deliberative process to be conducted without interruption. The Commission seeks comment from parties on the timing and scheduling impacts (especially on ratesetting proceedings) of alternative proposals which will advance the timing of the mailing of the ALJ's Proposed Decision by five or 10 days, as set forth below. Administratively the Commission will time the mailing of the ALJ's Proposed Decision to ensure that opening comments, due 20 days after the mailing pursuant to Rule 77.2, will be filed and served at least five days (alternative: 10 days) prior to the date the public agenda is to be mailed. Thus the parties' opening comments will be in the public domain at least five days (alternative: 10 days) prior to the onset of the prohibition. We propose to modify Rule 1.3(b) accordingly. The proposed revisions to Rule 1.3(b) do not

is and suggestions from various sources, including the Staff Advisory Group, we recognize that the purely advisory nature

In proceedings in which timing constraints make it difficult to mail the proposed decision sufficiently in advance of the mailing of the public agenda, the Commission can adopt a more restrictive ban on ex parte prohibitions for these specific proceedings under existing Rule 1.3(b). It is expected that most of our proceedings which are subject to the General Rate Case plan would be subject to this modification in order to retain our existing schedule for the processing of general rate cases.

bring rulemakings within the ambit of the ex parte rule, as Rule 1.3(d) Rulemakings are not "covered proceedings" under Rule 1.3(d). In recognition of the appellate function with discharge when considering applications for rehearing of its decisions, the Commission proposes new Rule 1.3(d) which would apply to any formal proceeding, including a rulemaking or an OII consolidated with a rulemaking as well as to informal matters appearing on the Commission's agenda, as described below. Under new Rule 1.3(d) ex parte communications would be prohibited immediately after the Commission votes on any matter on its public agenda until the time for filing applications for rehearing on the agenda item has elapsed. Furthermore, this new rule would prohibit ex parte communications after an application for rehearing is filed in order to insulate the Commission's appellate decisionmaking process from extra record influences. The prohibition would remain in effect until the date of issuance of a final order in such proceeding (as defined in Rule 1.1(d)). This is the only instance where the Commission extends its ex parte rules to rulemakings and to certain informal matters. It does so after careful consideration and in the interest of ensuring the complete fairness of the rehearing process, from the moment the Commission votes on the matter until it is finally resolved. The Commission proposes two options for a new Rule 1.3(e) which would prohibit, or, in the alternative, govern certain ex parte communications during ongoing stipulation/settlement negotiations. conforming changes to the Commission's Settlement rules are proposed in two versions of new Rule 51.11. Both proposed Rules 51.11 require negotiating parties to notify the ALJ immediately when they have begun settlement discussions. Pursuant to Rule 51.11 and Rule 1.3(e) this mandatory requirement triggers a prohibition on ex parte communications between the negotiating parties and decisionmakers. Pursuant to

Alternative Rule 51.11 and Alternative Rule 1.3(e) is a mandatory requirement triggers a conference between the Administrative Law Judge and Assigned Commissioner to consider whether, and to what extent, ex parte communications should be prohibited. The rationale for a prohibition is the Commission's desire to further settlements by creating an environment conducive to the free exchange of information by all parties participating in the settlement discussions. It reflects the concern that parties should not bring decisionmakers into the negotiating process or attempt to gain advantage by contacting decisionmakers (who must pass on the merits of the settlement) during the period of ongoing negotiations. The rationale for Alternative Rules 1.3(e) and 51.11 is for the Commission to consider the necessity for a prohibition on contacts on a case-by-case basis. The alternative rules allow the Commission to retain the flexibility and discretion to continue to have contacts if the Assigned Commissioner believes the value of contacts outweighs any benefits of improving the environment for settlement embodied in a prohibition on ex parte contacts.

Specific Revisions to Rule 1.4

The Commission proposes to revise reporting provisions of Article 1.5 to recognize the fact that nonwritten materials may be provided to decisionmakers during ex parte communications. The proposed revision to Rule 1.4(a)(3) is designed to ensure that the use of audiovisual and other nonwritten materials during ex parte communications is reported. Similarly, Rule 1.4(c) is revised to ensure that such nonwritten materials are provided to requesting parties by the filing party upon request.

Finding of Fact

The proposed revisions to Article 1.5 of the Commission's Rules of Practice and Procedure detailed in the

Attachment of this decision are designed to strengthen the procedural protections found in the existing ex parte rules.

Conclusion of Law

After requesting and reviewing written comments on the proposed revisions contained in the Attachment, the Commission should adopt final revisions to Article 1.5, and submit them to the Office of Administrative Law for the required publication period prior to final adoption.

INTERIM ORDER

IT IS ORDERED that parties wishing to comment on the proposed revisions detailed in the Attachment to this Order shall file an original and four copies of their written comments, with certificate of service, on or before September 11, 1995. A copy of the current service list (R.84-12-028) is attached to this Interim Order to assist parties in complying with this Order.

This order is effective today.

Dated August 11, 1995, at San Francisco, California.

DANIEL Wm. FESSLER
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
Commissioners

I abstain.

/s/ P. GREGORY CONLON
Commissioner

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

Wealey Franklin
Acting Executive Director

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Article 1.5 Ex Parte Communications in
Commission Proceedings
1.1. (Rule 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:

(1) All members of the staff organization or division created pursuant to Public Utilities Code Section 309.5, except those temporarily assigned to other staff organizations or divisions; and

(2) Members of other staff organizations or divisions not specifically covered under Section 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 Section 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.

(d) "Date of Issuance of a Final Order" is:

(1) The date when the Commission mails the decision after rehearing or denying rehearing; or

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(2) 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.

For purpose of this Article, the following definitions

(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, or the adoption of an application or complaint, or the adoption of an application or complaint.

(f) Enforcement-related proceedings are those OIRs 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 Section 1702 are not enforcement-related proceedings.

(g) "Ex parte communication" means a written, electronic, 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.

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

HISTORY: This section was added to the Code of Public Utilities in 1992, effective 1-20-92 (Register 91, No. 51).

New section submitted to OAL for filing with the Secretary of State pursuant to Government Code Section 11351 filed 12/4/91; operative 1-20-92 (Register 91, No. 51).

(b) "Date of Issuance of a Final Order" is:

(1) The date when the Commission mails the decision after rehearing or denying rehearing; or

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1.2. (Rule 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.

HISTORY:

New section submitted to OAL for filing with the Secretary of State pursuant to Government Code Section 11351 filed 12-4-91; operative 1-20-92 (Register 91, No. 51).

1.3. (Rule 1.3) Applicability 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. However, where the ALJ's Proposed Decision has been filed and served in a proceeding subject to this subsection, ex parte communications are prohibited from the day of the mailing of the initial Commission agenda containing the ALJ's Proposed Decision, until the issuance of a final order in such 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.

(d) In any covered proceeding, including a rulemaking or an OIL consolidated with a rulemaking, and in any informal matter appearing on the Commission's public agenda, ex parte communications are prohibited from the date the Commission votes upon a matter until the time for filing applications for rehearing of the Commission's resolution or decision has elapsed; if an application for rehearing is filed, ex parte communications are prohibited from the date of such filing until the date of issuance of a final order.

(e) Where one or more parties have filed a Notice That Parties Are Engaged In Stipulation/Settlement Negotiations, pursuant to Rule 51.11, ex parte communications, as defined in Rule 1.1(g), shall be prohibited between the negotiating parties and decisionmakers. The prohibition shall remain in effect until (i) one or more parties file a Notice That Parties Have Abandoned Stipulation/Settlement Negotiations, or (ii) the Commission has adopted, in a final decision, the memorialization of an agreement among the parties.

Alternative Rule 1.3(e)

Where one or more parties have filed a Notice That Parties Are Engaged In Stipulation/Settlement Negotiations, pursuant to Alternative Rule 51.11, ex parte communications, as defined in Rule 1.1(g), shall be governed by Alternative Rule 51.11. Any prohibition shall remain in effect until (i) one or more parties file a Notice That Parties Have Abandoned Stipulation/Settlement Negotiations, or (ii) the Commission has adopted, in a final decision, the memorialization of an agreement among the parties.

HISTORY:

New section submitted to OAL for filing with the Secretary of State pursuant to Government Code section 11351 filed 12-4-91; operative 1-20-92 (Register 91/5 No 51).

proceeding shall be reported within three working days, in accordance with the reporting requirements set forth in Rule 1.4. Any prohibition shall remain in effect until (i) one or more parties file a Notice That Parties Have Abandoned Stipulation/Settlement Negotiations, or (ii) the Commission has adopted, in a final decision, the memorialization of an agreement among the parties.

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1.2 (Rule 1.2) Sanctions

1.4. (Rule 1.4) Reporting Ex Parte Communications.

The Commission may impose such penalties and sanctions as

(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 electronic, 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, textual, audiovisual, or other material 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. Copies of any material, other than written material, attached to a Notice shall be obtained from the filing party.

HISTORY:

: YR0T2IH

1. New section submitted to OAL; for filing with the Secretary of State pursuant to Government Code Section 11351 filed 12-14-91; State pursuant to (15, No. 91) Register 11-20-92; (12, No. 91) Register 11-20-92

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1.5 (Rule 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.

HISTORY:

1. New section submitted to OAL; for filing with the Secretary of State pursuant to Government Code Section 11351 filed 12-4-91; operative 1-20-92 (Register 91, No. 51)

1.6 (Rule 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.

HISTORY:

1. New section submitted to OAL; for filing with the Secretary of State pursuant to Government Code Section 11351 filed 12-4-91; operative 1-20-92 (Register 91, No. 51)

1.7 (Rule 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.

HISTORY:

1. New section submitted to OAL; for filing with the Secretary of State pursuant to Government Code Section 11351 filed 12-4-91; operative 1-20-92 (Register 91, No. 51).

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Article 13.5 Stipulations and Settlements

51.11. (Rule 51.11) Ex Parte Communications During Stipulation/Settlement Negotiations.

Where two or more parties have entered into negotiations to reach a stipulation or settlement, those parties must immediately notify the Administrative Law Judge and other parties that negotiations are in progress by filing with the Docket Office and serving on all parties a Notice That Parties Are Engaged In Stipulation/Settlement Negotiations. Once the Notice is filed and served, ex parte communications, as defined in Rule 1.1(g), shall be prohibited between the negotiating parties and decisionmakers, pursuant to Rule 1.3(e).

Alternative 51.11

Where two or more parties have entered into negotiations to reach a stipulation or settlement, those parties must immediately notify the Administrative Law Judge and other parties that negotiations are in progress by filing with the Docket Office and serving on all parties a Notice That Parties Are Engaged In Stipulation/Settlement Negotiations. Once the Notice is filed and served, the Administrative Law Judge will confer with the Assigned Commissioner to consider whether and to what extent ex parte communications, as defined in Rule 1.1(g), shall be prohibited thereafter between the negotiating parties and decisionmakers, pursuant to Alternative Rule 1.3(a).

(END OF ATTACHMENT A)

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FOR FURTHER INFORMATION
PLEASE REFER TO THE
REVERSE INDEX

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