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Decision 97-02-015 February 5, 1997

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 20, 1984)

O P I N I O N

Introduction

By this decision, we direct the Administrative Law Judge Division to prepare and transmit to the Office of Administrative Law (OAL) a set of proposed rules (see Appendix) regarding oral argument in applications for rehearings. Publication of the proposal by OAL in the California Administrative Notice Register (Register) will start the notice-and-comment process leading to adoption of a final set of rules on this subject in our Rules of Practice and Procedure.

We anticipate that the proposal can be published in the February 21 Register, which means that under the statutory 45-day comment period, comments will be due on April 7. We will review the comments and adopt the proposal as appended to this decision or revise the proposal, soliciting additional comment if the nature of the revisions makes such additional comment appropriate.

Discussion

In Vision 2000: A Report on Our Progress Toward Change, we stated our desire to strengthen Commissioner involvement in the rehearing process by holding oral arguments before the full Commission on selected applications for rehearing that raise the

most significant and precedential issues.¹ Commissioner Fessler asked for comment on an earlier draft of the proposed rules, and the current proposal incorporates several changes resulting from the comments we received. We discuss here some general considerations to aid parties in reviewing our proposed rules and in understanding the kinds of applications for rehearing we are likely to select for oral argument.

Applications for rehearing are intended to bring to the Commission's attention any instances of unlawful decisionmaking or other error occurring in its decisions, so that the Commission can expeditiously correct the error. See Rule 86.1 of the Commission's Rules of Practice and Procedure. Applications for rehearing that fail to allege legal error may be dismissed summarily or converted to petitions for modification. While not all applications for rehearing raise issues concerning Commission precedent,² we expect that those selected for oral argument often will raise such issues.

Commission precedent can be divided into two general categories. The first category includes matters such as the interpretation of a statute where the Commission performs an essentially judicial role and consistency is especially desired. The second category is what may be called administrative precedent, where the Commission adopts certain policies that it intends to

¹ Oral argument in general is provided for under Rule 76 of the Commission's Rules of Practice and Procedure. The proposed rules add specific procedures for consideration of applications for rehearing; they do not replace or amend Rule 76.

² Because of the Commission's ability to "rescind, alter, or amend" its orders and decisions (Public Utilities Code § 1708), "precedent" is used somewhat more loosely with reference to Commission decisions than for judicial determinations. By "Commission precedent," we mean Commission decisions that the Commission intends to be followed in future proceedings.

follow in similar situations, although it may alter those policies in the future as changing circumstances or priorities require.

The proposed rules recognize that, generally speaking, the consideration of whether to grant an application for rehearing does not involve issues of such precedential character as to make the application appropriate for oral argument.³ The Commission will deliberate carefully on the issues raised by an application for rehearing, whether or not oral argument is granted. The proposed rules are intended to help the Commission and the parties to spot those infrequent applications for rehearing where oral argument would be of substantial benefit to the Commission's deliberations on whether to rehear the matter. Of necessity, the Commission must have complete discretion to determine the appropriateness of granting or not granting oral argument in this context.

To avoid separate pleadings, the proposed rules provide for the rehearing applicant to request oral argument in its application, and for any party responding to the application to include in its response comment on, or its own request for, oral argument. Neither oral argument nor a request for oral argument or response to such request is an opportunity to add to the evidentiary record. Arguments must be based on evidence of record.

Findings of Fact

1. The Commission and parties will benefit from rules on oral argument in applications for rehearing.

³ Senate Bill (SB) 960, effective January 1, 1998, and Resolution ALJ-170 (our experimental rules implementing SB 960 for a selected sample of proceedings), give parties to an adjudicatory proceeding "an opportunity for final oral argument" if rehearing is granted. Today's proposed rules concern possible oral argument on the issue of whether to grant rehearing.

2. Such rules should include a process for proposing and for selecting applications for rehearing where an oral argument would be of substantial benefit to the Commission in deliberating on whether to rehear a particular matter.

Conclusions of Law

1. The proposed rules in the Appendix should be published in the California Administrative Notice Register to start the notice-and-comment process leading to adoption of a final set of rules.

2. The Administrative Law Judge Division should prepare the proposed rules in the Appendix in the appropriate format and should transmit them to OAL for publication.

3. To accommodate expeditious publication, this order should take effect immediately.

O R D E R

IT IS ORDERED that the Administrative Law Judge Division shall prepare the proposed rules in the Appendix in the appropriate format and shall promptly transmit them to the Office of Administrative Law for publication in the California Administrative Notice Register.

This order is effective today.

Dated February 5, 1997, Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

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86.3. (Rule 86.3) Criteria for Oral Arguments.

(a) An application for rehearing will be considered for oral argument if the application or a response to the application (1) demonstrates that oral argument will materially assist the Commission in resolving the application, and (2) the application or response raises issues of major significance for the Commission because the challenged order or decision:

(i) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;

(ii) changes or refines existing Commission precedent;

(iii) presents legal issues of exceptional controversy, complexity, or public importance; and/or

(iv) raises questions of first impression that are likely to have significant precedential impact.

(b) These criteria are not exclusive and are intended to assist the Commission in choosing which applications for rehearing are suitable for oral argument. The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. Arguments must be based only on the evidence of record. Oral argument is not deemed part of the evidentiary record. The evidentiary record will stand as it did at the time of the Commission's decision.

(c) For purposes of this rule, "existing Commission precedent" is a prior Commission decision that the Commission expects to follow.

86.4. (Rule 86.4) Requesting Oral Argument.

A party desiring oral argument should request it in the application for rehearing. The request for oral argument should

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explain why the issues raised in the application meet the criteria stated in Rule 86.3. Any party, in its response to an application for rehearing, may make its own request, or respond to the rehearing applicant's request, for oral argument; if it does either, the party must comment on why the issues raised meet or do not meet the criteria stated in Rule 86.3.

86.5. (Rule 86.5) Selection of Rehearing Applications for Oral Argument.

The Legal Division will evaluate all requests for oral argument. Based on that evaluation, the General Counsel will recommend to the President of the Commission whether or not to hold oral argument on a particular application for rehearing. The President has the discretion to accept, deny, or modify the General Counsel's recommendations. At the request of any other Commissioner, the President's determination will be placed on the Commissioner's meeting agenda for consideration by the full Commission.

86.6. (Rule 86.6) Scheduling and Notice of Oral Argument.

Where oral argument of an application for rehearing is granted, the argument will ordinarily be held before the matter appears on the Commission's closed session meeting agenda for decision. Oral argument will be scheduled in a manner that will not unduly delay the resolution of the application for rehearing. At least ten days prior to the oral argument, the Commission will serve all parties to the proceeding with a notice of the oral argument, which may set forth the issues to be addressed at the argument, the order of presentation, time limitations, and other appropriate procedural matters. Normally, no more than one hour will be allowed for oral argument in any particular proceeding.

86.7. (Rule 86.7) Participation in Oral Argument.

Participation in the oral argument will ordinarily be limited to those parties who have filed or responded to the application for rehearing. Other parties to the proceeding may participate with the permission or at the invitation of the Commission. Requests to participate should be directed to the

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General Counsel, and should be made at least seven days before the date set for oral argument.

(END OF APPENDIX)