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Decision 97-03-054 March 18, 1997

ORIGINAL

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)
In the Matter of the Application of Southern California Edison Company (U-338-E) for Rehearing of Resolution ALJ-170.	A.97-02-011 (Filed February 13, 1997)

ORDER DENYING REHEARING OF RESOLUTION ALJ-170

On January 13, 1997, the Commission adopted Resolution ("Res.") ALJ-170, which established experimental rules and procedures to gain experience, where practicable, with management of Commission proceedings under the requirements of Senate Bill ("SB") No. 960 (Leonard; Stats. 1996, ch. 856). SB 960 contains many new requirements governing the procedures under which the Commission manages its proceedings. These requirements take effect on January 1, 1998, the effective date of SB 960. However, by applying to a carefully selected sample of proceedings as many of SB 960's requirements as is legally possible prior to January 1, 1998, the Commission will gain important experience under the statute prior to its actual implementation date.

The Southern California Edison Company ("Edison"), an active participant throughout the process of developing the experimental rules, has filed an application for

rehearing of Res. ALJ-170. Edison alleges two basic categories of legal error in its application: It alleges that the Commission's experimental rules are not consistent with the provisions of SB 960, and it alleges that the Commission has not followed the notice and opportunity for comment requirements set forth in the California Administrative Procedures Act (see Government Code §§ 11342, 11343-11343.8, 11344-11344.9, 11346.4(a)(3), 11351) in adopting its rules.

We have considered all of the allegations of legal error raised in Edison's application, and are of the opinion that grounds for granting rehearing have not been shown. Therefore, we will deny the application. We discuss our reasons for this disposition below.

Background

In Res. ALJ-170, we set forth with some specificity our reasons for wanting to gain experience with the requirements of SB 960 before the statute becomes effective. Briefly, we first and foremost wanted to improve the efficiency and accountability of our decisionmaking process, consistent with the legislative intent expressed in Section 1 of SB 960. We also wanted to enhance our ability to make sound recommendations to the Legislature pursuant to the statute's directive that several reports on different aspects of SB 960 be made to that body before January 1, 1998. Further, it was our understanding that the Legislature intended us to gain experience with the changes required under SB 960 through some form of experimental implementation program.

In order to further these goals, we undertook an effort to put into place such an experimental program as early in 1997 as possible. Commission staff held two public workshops, on November 25, 1996, and December 6, 1996, to present and discuss an initial and a revised draft set of experimental rules. Interested persons were able to comment on both drafts. A further revision was published on December 23, 1996 for additional comment. The experimental rules adopted by Res. ALJ-170 on January 13, 1997 reflect the formal comments of the parties filed in our rules revision docket (R.84-

12-028), as well as feedback received at the workshops and our own discussion held at our business meeting of December 20, 1996.

The experimental rules we have adopted will apply to a representative sample of proceedings. The sample, only about 5% of the Commission's proceedings, is being selected from candidates identified by both parties and Commissioners, to reflect the range of proceedings before us and to enable us to gain as much experience with the new procedures called for by SB 960 as is practicable and legally permissible prior to January 1, 1998. Our selection process gives all of those concerned with a particular proceeding an opportunity to voice any objections to inclusion of that proceeding in the experiment. While the filing of objections will not be enough by itself to disqualify a candidate proceeding from inclusion, any objections filed will be very carefully considered before a determination is made.

With this preamble, we go on to Edison's allegations.

There is No Impermissible Inconsistency Between the Experimental Rules and SB 960.

Edison first puts forth the general proposition that regulations must be consistent with their underlying statutory authority. Edison then contends that because our experimental rules are inconsistent with SB 960, we have committed clear legal error which should immediately be corrected.

While we do not disagree with the general proposition, we do disagree that our experimental rules are inconsistent with SB 960. Before addressing Edison's substantive arguments on this issue, we first note that many of Edison's concerns regarding inconsistency assume that SB 960 has already become effective. This is not the case; the statute does not take effect until January 1, 1998. Therefore, any existing law in conflict with SB 960's new requirements will continue to control until that date. Moreover, while the purpose of the experiment is to gain as much experience as possible under the provisions of the statute before it becomes effective (and thus inconsistency with the

statute would make no sense from a policy perspective), there is no legal requirement that the Commission's experimental rules must completely reflect the provisions of a statute which has not yet become law.

Edison alleges three areas of unlawful inconsistency between SB 960's requirements and our experimental rules. First, Edison states that SB 960 requires the assigned Commissioner to be present at formal hearings in quasi-legislative cases, and the assigned ALJ to act as an assistant to the assigned Commissioner in quasi-legislative cases.

On the presence issue, Edison contends that "the Experimental Rules contain a confusing and contorted definition of 'presence' that renders the statutory mandate that the Commissioner be present completely meaningless." (App. Rhg., p. 3.) Edison objects that the rules do not require physical presence, but allow an assigned Commissioner to be "present" through teleconferencing or through other electronic means, such as monitoring a real-time transcript from a location (presumably the Commissioner's office) other than the hearing room. Edison objects that the standard for what constitutes "presence" is "so ambiguous that a Commissioner who had been present for one hour out of a five hour hearing day could be counted as present for the entire day, at the Commissioner's discretion." (App. Rhg., p. 4.)

SB 960 does not define "present" or "presence." The standard set forth in Experimental Rule 9(f) of the experimental rules is that "present" or "presence" means either physical or remote attendance "sufficient to familiarize the attending Commissioner with the substance of the evidence, testimony, or argument for which the Commissioner's presence is required or requested." Res. ALJ-170 discusses the basis for our determination that a rule of this nature is the best way to satisfy the "presence" requirements of SB 960 while at the same time ensuring that we are able to continue meeting our many other responsibilities. In this era of technological capability and innovation, we believe it is a proper exercise of our discretion to establish this kind of

standard. In addition, in the course of our experiment, we will be evaluating Experimental Rule 9(f) and reporting to the Legislature on the degree to which we believe it has been successful. Moreover, we fully expect that parties commenting on the draft of our final rules will express their views on this important point; we will give all comments our fullest consideration.

Edison further notes that the rules preclude the assigned Commissioner from acting as the Principal Hearing Officer in almost all proceedings.[1] Edison contends that this also is contradictory to the requirements of SB 960, particularly with respect to quasi-legislative proceedings. We point out that existing Public Utilities Code Section 311 requires the assigned ALJ to act as presiding officer and to prepare the proposed decision in most proceedings that go to hearing; until SB 960 takes effect, that law controls.

Edison secondly contends that the experimental rules are inconsistent with SB 960 because they fail to use the definitions for case categories set forth in the statute. Edison alleges: "In an apparent effort to avoid the Commissioner presence requirement, the Experimental Rules provide that when a proceeding does not clearly fit into a category, it will be classified as a ratesetting proceeding by default." (App. Rhg., p. 4.) According to Edison, the Commission has in effect given itself the discretion to create new case categories "by using hybrid rules not contained in S.B. 960, leaving parties to the Commission's proceedings unable to know the rules that will be applied to them." (Id.)

These arguments are completely without merit. SB 960 creates only three case categories: adjudicatory, ratesetting, and quasi-legislative. Virtually every participant in the process of developing the experimental rules, including members of the Legislature, recognized that many proceedings do not fit clearly into one or another of these

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[1] Experimental Rule 1(k) states: "Until Sections 5, 8, 9, and 10 of SB 960 become effective, 'presiding officer' means the Administrative Law Judge assigned to an included proceeding, and the decision of the presiding officer shall constitute the 'proposed decision' if one is required under Public Utilities Code Section 311(d)."

categories, and that some proceedings fit into more than one. As indicated by the discussion in Res. ALJ-170, participants in the workshop and comment process came up with four different ways to resolve the problem of proceedings which do not clearly fit one or another category, including administratively defining many more categories of proceedings. We fully considered these options, and concluded that in our judgment, using the ratesetting category as the default category would best reflect the intent of SB 960.

All parties to every proceeding included within the experiment will receive notice of our determination on categorization, including any determination that a particular proceeding should be governed by some hybrid of the rules. Such notice will necessarily inform the parties as to which rules are applicable to that proceeding.

We note that on March 31, 1997, pursuant to Section 11 of SB 960, we will be submitting a report to the Legislature on our experiences to date. That report will address the categorization process and associated issues. The Legislature will consider the report, and we will supplement the report as the experiment progresses. Our final SB 960 rules will also be developed with this issue, and the parties' input, in mind. Thus the final outcome of the categorization issue raised by Edison will be addressed at a future time. For the moment, for the purposes of our experiment, we have lawfully exercised our discretion.

Edison finally argues that since, in its view, SB 960 will be applicable to all pending proceedings on January 1, 1998, it is even more essential that the experimental rules be consistent with the statute. Otherwise, Edison asserts, "the application of the rules will create ambiguity and uncertainty in all proceedings before the Commission after January 1, 1998. This could create chaos." Edison posits the example of a case being categorized one way under the experimental rules, and because the default category in the experimental rules is the wrong one, having to be re-categorized as of January 1, 1998.

We first address the argument that on January 1, 1998, all Commission proceedings will be subject to the requirements of SB 960. Edison refers with concern to a February 3, 1997 ALJ Ruling Requesting Comments which, among other things, asked for comments on the question of to what extent, if any, proceedings commenced under the existing procedural rules should be "grandfathered". Edison argues that the Commission cannot apply SB 960 only prospectively, and cites several cases which it contends support its position that changes in procedural rules apply retroactively to pending cases.

This issue is prematurely raised. The experimental rules are structured such that each case to be included in the experiment, whether new or pending, will be scrutinized individually for the purpose of determining whether it is an appropriate case for inclusion. Because of this individual scrutiny, there is presently no issue of whether these rules should be applied prospectively only, or retroactively as well. Edison raises no valid ground for rehearing on this point.

This issue does arise, however, in the context of the Commission's final rules. In the resolution issued today, which directs the Chief ALJ to take the steps necessary to transmit the draft of the Commission's final rules to the Office of Administrative Law for notice and publication (Res. ALJ-171), a preliminary determination has been made to apply the final rules prospectively only, with the exception of cases which have been included in the experiment. Parties, including Edison, will have ample opportunity to comment on the Commission's draft, both in writing and in additional workshops.

Because the Experimental Rules Are Not Rules of General Applicability, There Is No Legal Requirement that the Commission Must Follow the Provisions of the Government Code Concerning Notice and Publication of These Rules.

Edison contends that the Commission, in order to adopt any new rules, must follow the applicable rulemaking provisions of the California APA, including satisfying the requirements for notice in the California Regulatory Notice Register, opportunity for interested parties to comment on the proposal, and publication in the California Code of

Regulations[2]. Failure to follow these provisions, Edison argues, renders our experimental rules without legal force and effect.

Edison recites various different statutory requirements in the APA, asserting that because we adopted our experimental rules without strictly satisfying those requirements, our rules are void. The crux of Edison's argument seems to be that parties have not, and will not, get sufficient notice of our experimental rules, they will thus not be legally required to follow those rules, and chaos will result. Following the requirements of the APA on the other hand, Edison argues, will assure that proper notice will have been provided, and an orderly process will result.

Edison asserts that in prior decisions, the Commission itself has acknowledged that it must follow the dictates of the APA when it revises or modifies its procedural rules. Edison claims that in Res. ALJ-170, however, we have stated that our experimental rules are not subject to the APA because of our constitutional plenary authority to make our own rules. (App. Rhg, p. 10.)

Edison has not read our resolution carefully. We begin the discussion of our jurisdiction to adopt the experimental rules with a clear acknowledgment that "we will go through the entire process of adopting into the California Code of Regulations our rules implementing SB 960 at such time as it is appropriate to adopt and put into effect rules of general applicability. Indeed, we are starting the adoption process concurrently with the experiment . . . ." (Res. ALJ-170, pp. 5-6.) The key phrase is "of general applicability."

Government Code Section 11342(b) defines "regulation" in relevant part as "every rule, regulation, order, or standard <u>of general application</u> or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the

[2] Mistakenly referred to by Edison as the California Administrative Code.

state agency . . . ." (Emphasis added.) Government Code Section 11343(a)(3) further provides that every state agency shall transmit to the Office of Administrative Law for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which "is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."

What Edison never acknowledges is that the experimental rules are not a generalized revision of our Rules of Practice and Procedure; they are very specific exceptions to only certain of these rules, which will never apply in their experimental form to more than a sample of about 5% of our proceedings, with those being individually selected for inclusion in the experiment. As noted above, we have stated from the beginning that promulgation of final rules to implement SB 960 will be done in full satisfaction of the requirements of the APA. In fact, in Res. ALJ-171, approved today, we have authorized the ALJ Division to send a draft of our final rules to the Office of Administrative Law for publication in the California Administrative Notice Register.

In Faulkner v. California Toll Bridge Authority (1953) 40 C.2d 317, the California Supreme Court construed virtually the same sections of the Government Code (although numbered differently then) to exempt from the definition of "regulation" several resolutions adopted by the California Toll Bridge Authority. Those resolutions related specifically to approval or disapproval of the recommendation of the Department of Public Works that the Richmond-San Rafael bridge be constructed, and to authorization of the issuance of revenue bonds if the recommendation was approved. The Court found that these resolutions were not of general application, and related to "only one particular bridge, and solely to the specific project described, and . . . [did] not purport to treat generally . . ., for instance, all bridges or all toll bridges or any open class under the jurisdiction of the authority . . . ." Faulkner, supra, at pp. 323-324. The Court also found that the resolutions at issue were not intended to "implement, interpret, or make specific the law enforced or administered by" the toll authority, but rather,

"constituted steps in the performance of a statutory duty [the mandate that the authority act one way or the other on such resolutions] . . . ." Id. at p. 324.

Res. ALJ-170 does go on to discuss our constitutional and statutory authority to establish our own procedures, and to conduct our proceedings and adopt such rules as are necessary and appropriate in the exercise of our power and jurisdiction. (Res. ALJ-170, p. 6; citing Article XII, Section 2 of the California Constitution, and Public Utilities Code Sections 701 and 1701(a).) However, this discussion is in the context of our authority to apply rules on a limited basis where we have found compelling reasons to do so, and not in the context of adopting rules of general applicability. Rule 87 of our Rules of Practice and Procedure, which provides in part that "[i]n special cases and for good cause shown, the Commission may permit deviations from the rules", acknowledges that the need for limited case-by-case exceptions to the rules may arise.

Our experimental rules are not rules of general application; they do not apply generally to the Commission's proceedings, but to only a very few hand-picked cases. In their present form, they will never apply to any additional cases. While our final rules will be derived from the experimental rules, and while our final rules will "implement, interpret, or make specific" the requirements of SB 960, the experimental rules do not do so. They constitute just a step in the direction of adopting rules that will apply to the vast majority of the Commission's proceedings. The experimental rules will give us valuable experience which we hope to use in the course of the process of adopting final rules – a process which will be carried out in full satisfaction of the requirements of the APA.

Edison expresses concern that the process we have followed in adopting the experimental rules will not give parties sufficient notice either of the existence of those rules, or that they may be subject to them. We believe both of those concerns are groundless. The process we undertook included two public workshops prior to the adoption of the rules, three opportunities for public comment on each draft of the rules, a

public workshop following the adoption of the rules, and the assurance that notice will be provided to all parties as individual proceedings are chosen for inclusion in the experiment. The workshop and comment notices were sent to the extensive service list in our rules revision docket (R.84-12-028), and were posted on the Commission's Daily Calendar and Internet site.

THEREFORE, IT IS ORDERED that the application for rehearing filed by Southern California Edison Company of Resolution ALJ-170 is hereby denied.

This order is effective today.

Dated March 18, 1997, at San Francisco, California.

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