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Decision 97-06-065 June 11, 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.

ORIGINAL

Rulemaking 84-12-028
(Filed December 20, 1984)

O P I N I O N

1. Summary

In today's decision, we adopt certain new Rules of Practice and Procedure, which were published for comment in the March 7, 1997, California Regulatory Notice Register. These new rules concern the use of oral argument in our deliberations on what action to take (grant, deny, or otherwise respond) as to an application for rehearing.¹

2. Comment on Rulemaking Proposal

The rules we adopt today, specifically, Rules 86.3 to 86.7, were initially proposed in Decision 97-02-015. Three parties filed comments on the proposal. These comments generally supported the proposal, and we are adopting the rules as proposed. We discuss the comments below insofar as they suggested substantive changes or requested clarification.

2.1. Southern California Gas Company (SoCalGas)

SoCalGas made two suggestions. First, SoCalGas felt that the rules should expressly apply to all kinds of Commission proceedings, not just adjudicatory proceedings. However, the rules, on their face, do not contain any limitation on the kind of proceeding affected. We note, also, that we sometimes entertain applications for rehearing for Commission actions (e.g., resolutions) occurring outside a formal

¹ The rules do not concern procedure *after* a rehearing has been granted.

proceeding. On balance, clarity is best served by having the rules refer, as they now do, simply to applications for rehearing, without any discussion of kinds of proceeding.

Second, SoCalGas asks for clarification regarding what issues the oral argument can or should address. In some instances, according to SoCalGas, oral argument should address the ultimate outcome of the matter, not just whether the matter should be reheard.² In other instances, it might be appropriate for the Commission to preclude oral argument regarding the ultimate merits of the proceeding. We believe SoCalGas' concern is addressed by Rule 86.6, where we indicate that the notice of the oral argument may set forth, among other things, "the issues to be addressed at the argument."

2.2. *The Utility Reform Network (TURN)*

TURN urges us to ban ex parte contacts on all applications for rehearing. However, this suggestion goes far beyond the scope of the current rulemaking proposal.

Also, TURN suggests that "Commissioners should have discretion to ask for assistance from Legal Division staff during oral arguments." Commissioners can consult and utilize, as needed, advisory staff from any of the Commission divisions; it is neither necessary nor appropriate to create such "discretion" by rule.

2.3. *Southern California Edison Company (Edison)*

Edison offers the following suggestions:

"Under the Rules of Court for the California Courts of Appeal, parties are allowed to waive argument and indicate that they are willing to respond to questions. The Rules of Court also provide the opportunity for the Court to grant requests for additional letter briefings on new issues or new authority cited in oral argument. The Commission may want to consider similar rules. We suggest the Commission request comments on other rules that would

² SoCalGas says such an instance might be where a rehearing applicant argues that a statute required a substantive outcome different from that reached by the Commission in the underlying decision.

generally improve the quality of the oral argument and make the process smoother. For example, presenting documents to be used in oral argument to the other parties prior to argument will discourage surprise tactics. In addition, providing an appropriate period of time between the notice and the date of oral argument will improve the quality of the arguments."

Edison's suggestions are constructive; however, we consider it premature to adopt generic rules on things like the format of oral argument. The ruling or order setting oral argument can address such matters in specific instances (cf. Rule 86.6).

3. Conclusion

We adopt the rules in the Appendix for inclusion in our Rules of Practice and Procedure (California Code of Regulations, Title 20, Division 1, Chapter 1).

Findings of Fact

1. The Commission and parties will benefit from rules on oral argument in applications for 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 what action to take (grant, deny, or otherwise respond) as to an application for rehearing in a particular matter.

Conclusions of Law

1. The rules in the Appendix should be adopted.
2. The Administrative Law Judge Division should prepare the adopted rules in the Appendix in the appropriate format and should transmit them to the Office of Administrative Law to be printed in the California Code of Regulations.
3. To accommodate expeditious completion of the rulemaking process, this order should take effect immediately.

O R D E R

IT IS ORDERED that:

1. The rules in the Appendix are adopted as Rules 86.3 through 86.7 of the Commission's Rules of Practice and Procedure.
2. The Administrative Law Judge Division shall prepare the adopted rules in the Appendix in the appropriate format and shall promptly transmit them to the Office of Administrative Law to be printed in the California Code of Regulations.
3. This order is effective today.

Dated June 11, 1997, at San Francisco, California.

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

APPENDIX

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.

NOTE: Authority cited: Section 1701, Public Utilities Code; Section 2, Article XII, California Constitution.

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 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.

NOTE: Authority cited: Section 1701, Public Utilities Code; Section 2, Article XII, California Constitution.

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.

NOTE: Authority cited: Section 1701, Public Utilities Code; Section 2, Article XII, California Constitution.

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.

NOTE: Authority cited: Section 1701, Public Utilities Code; Section 2, Article XII, California Constitution.

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

NOTE: Authority cited: Section 1701, Public Utilities Code; Section 2, Article XII, California Constitution.

(END OF APPENDIX)