MAIL DATE
5/28/98

Decision 98-05-063 May 21, 1998

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)

ORDER DENYING REHEARING OF DECISION 97-12-043

Senate Bill ("SB") No. 960 (Leonard; Stats. 1996, ch. 856), which contains many new requirements regarding how the Commission manages its proceedings, became operative on January 1, 1998. In order to gain experience under the statute prior to its operative date, the Commission adopted Resolution ("Res.") ALJ-170 on January 13, 1997, which established experimental rules and procedures under SB 960 which were applied to the management of certain selected Commission proceedings during 1997. Meanwhile, aided by additional workshops and comments submitted by interested parties, the Commission continued to refine what would ultimately become the final SB 960 rules. We adopted those rules in Decision ("D.") 97-12-043, the decision here being challenged.

Two parties, The Utility Reform Network ("TURN") and the Southern California Edison Company ("Edison"), have filed applications for rehearing of D.97-12-043. Both parties have participated extensively in the development of both the experimental and the final rules. Edison, the Pacific Gas and Electric Company ("PG&E"), and Pacific Bell have filed responses in opposition to TURN's application. In addition, PG&E's response partially supports Edison's application.

We have considered each and every allegation of error raised in the two applications for rehearing, and the arguments presented in opposition thereto, and are of the opinion that no grounds for granting rehearing have been shown. We discuss the parties' arguments below.

TURN. TURN alleges only one instance of legal error in D.97-12-043. TURN contends that adopted Rule 63.2(b), which would allow parties to obtain the automatic reassignment of the assigned ALJ in ratesetting cases, is inconsistent with both the letter and intent of SB 960. TURN argues that a comparison of section 1701.2 and section 1701.3 of the Public Utilities Code[1], both enacted as part of SB 960, demonstrates that *automatic* reassignment was only intended to apply to adjudicatory cases and not ratesetting cases. These two code sections read identically, with one exception. Both provide that parties are entitled to unlimited peremptory challenges to an ALJ who has "within the previous 12 months served in any capacity in an advocacy position at the commission, been employed by a regulated public utility, or has represented a party or has been a party of interest in the case."

However, the following sentence appears *only* in section 1701.3(a), which covers adjudicatory cases: "The regulation shall provide that all parties are entitled to one peremptory challenge of the assignment of the administrative law judge in all cases." The reference to "all cases" means "all adjudicatory cases." TURN argues that because the peremptory challenge authority is contained in one statutory provision and not the other, its omission is a statement by the Legislature that the Commission does not have the authority to adopt it in the ratemaking context.

Despite the omission of this sentence from section 1701.3(b), which covers ratesetting cases, we stated in D.97-11-021:

> Finally, although SB 960 only provides a limited peremptory in adjudicatory proceedings, our rules also allow such a peremptory in ratesetting proceedings. However, because

[1] All statutory references are to the Public Utilities Code unless otherwise specified.

> ratesetting proceedings often have many parties and many different sides, our rule provides that there will be not more than two reassignments pursuant to such peremptories in the same ratesetting proceeding. D.97-11-021, pp. 10-11.

TURN argues that by adopting a rule that is inconsistent with the statute, we have exceeded our authority to establish our own procedures under Article XII, section 2 of the California Constitution. This authority, while broad, is "subject to statute;" thus TURN argues that since SB 960 is a statute specifically designed to define and delimit the Commission's authority to establish its own procedures, it logically follows that the Commission's rules adopted under SB 960 must be consistent with any limitations set forth by that statute.

Edison, as well as Pacific Bell and PG&E in much briefer statements, oppose TURN's argument. We find Edison's views more persuasive than TURN's on this issue. Both sections 1701.2 and 1701.3 contain language directing the Commission to provide by regulation for peremptory challenges of the ALJ. However, the difference is that in adjudicatory proceedings, where the number of parties is normally quite limited, the Legislature thought it appropriate to provide for one peremptory challenge per party. In the ratesetting context, where there are often numerous parties, such a provision would be completely unworkable and was not required by the Legislature. The fact that the Legislature did not *require* a limited peremptory in ratesetting cases does not indicate that the Legislature intended to bar the Commission from implementing a somewhat different and workable peremptory in ratesetting cases.

TURN has not demonstrated that the statute limits our ability to provide for peremptory challenges in ratesetting proceedings, or that there is any inconsistency between the statutory provisions and our regulations. Our rules are concededly different than the statute, but this does not, by itself, prove TURN's point.

EDISON. In large part, we have seen Edison's arguments before, in comments it has filed on drafts of both the experimental and final rules, in its application for rehearing of Res. ALJ-170, and in its comments filed on ALJ-175, adopted on

February 4, 1998, which set forth draft protocols for implementation of the "quiet time" provisions of SB 960. Edison claims that in several respects, the final rules are inconsistent with the terms or intent of SB 960 and thus the Commission has not regularly pursued its authority. Edison further contends that in order to adopt any new rules, the Commission must follow the applicable notice, comment, and publication provisions of the California Administrative Procedures Act ("APA," Gov't Code §§ 11343-11343.8, 11344-11344.9, 11346.4(a)(5), 11351). While conceding the Commission did follow the requirements of the APA in many respects, Edison argues that we did not follow these requirements with respect to our conflict of roles guidelines[2] and our protocols on closed sessions, or quiet time.

A. Consistency with the Statute

Ratesetting as the Default Category. Substantively, Edison alleges inconsistency with SB 960 on the matters of 1) the determination that the ratemaking category will be the default category for proceedings not clearly fitting into any of the three named categories; 2) the applicability of the ex parte restrictions to the Office of Ratepayer Advocates ("ORA") as compared with the applicability of those restrictions to other parties; and 3) in quasi-legislative proceedings, the definition of Commissioner "presence" and the role of the assigned Commissioner versus the assigned ALJ as presiding officer.

Edison's first specific concern relates to the ratesetting category as the "default" category. Edison has consistently contended in the workshops and in its comments that the Legislature intended that if there was to be a default category, it should be the quasi-legislative category. Other stakeholders have consistently expressed the view that the Legislature intended the default category to be the ratesetting category The basis for our determination is discussed in detail in Res. ALJ-170; Res. ALJ-171 (which adopted the first draft of the final rules); in D.97-03-054 (which denied Edison's

[2] Edison incorrectly refers to these guidelines as the conflict of interest code. See App.Rhg, p. 10.

application for rehearing of Res. ALJ-170); in our March 31, 1997 report to the Legislature on categorization issues and in our follow-up letter of July 25, 1997; in D.97-06-071 (which denied Edison's appeal of our categorization decision in Application (A.) 97-03-045, discussed below); and in D.97-11-021. We will not repeat our oft-stated rationale here.

However, Edison does raise one new issue in its application for rehearing related to its categorization argument, which it had not raised in prior comments[3] or its prior application for rehearing. Edison correctly states that SB 960 provides for the Commission to meet in closed session to deliberate on ratesetting matters (the quiet time), but does not provide for this with regard to quasi-legislative matters. Since Edison also believes we have erred in making the ratesetting category the default category, Edison argues we run the risk of violating the Bagley-Keene Act (Govt. Code §§ 11120 et seq.) every time we meet in closed session to deliberate on matters which are ratesetting matters under the Rules, but are not ratesetting matters under the statute, particularly if those matters are included in the ratesetting category by default

It is true that in the Bagley-Keene Act, the Legislature has very clearly set forth its policy that aside from certain specified exceptions, state agencies must meet in public. However, as long as the requirements of one of these exceptions are met, a closed session is legitimate. SB 960 contains yet another exception, only unlike many of the exceptions contained in the Government Code, this exception applies only to this Commission. Moreover, the ratesetting category was not spelled out in complete specificity in SB 960; it was necessary for the Commission to do that, and in fact such was invited by the Legislature (section 11 of the statute provides that by a certain date, "the Public Utilities Commission shall submit a report to the Legislature containing its recommendations on the categorization of cases, procedures for dealing with cases that may fit into multiple categories, and procedures for dealing with those cases that may

[3] Edison does raise this issue in its comments to Res. ALJ-175.

change nature after hearings commence.") We informed the Legislature of our definition of ratesetting and that we intended to use ratesetting as the default category. Essentially, the scheme put in place in the experimental rules, which we communicated to the Legislature in March of 1997, has been carried through to our final rules.

Moreover, although the statutory definition of ratesetting may lack some specificity, the other requirements that must be met in order for there to be a closed deliberative session in such cases are clearly set out. Thus we can deliberate in closed session *if* ex parte contacts are carefully controlled during the course of the proceeding, and *if* we establish a quiet time prior to the deliberative closed session during which *no* ex parte contacts may occur. Every time we invoke the closed session deliberative process, these clear requirements of the Bagley-Keene exception must and will be met.

Edison presents four examples of cases it contends the Commission wrongly categorized as ratesetting which according to Edison are clearly not ratesetting according to SB 960. As the following discussion will show, all four are misleading, if not outright wrong.

The first two cases, our intervenor compensation OIR (R.97-01-009) and our utility affiliate OIR (R.97-04-011), were part of our 1997 SB 960 experiment. Both were placed in dual categories because both cases were joint rulemakings and investigations. The rulemaking portion was categorized as quasi-legislative, and the investigation as ratesetting. Both began (and continued) as quasi-legislative; the ratesetting category would come into play only if the investigation required evidentiary hearings. We later determined that such dual categorization did not provide the flexibility we had hoped for, and in fact led to confusion as to which rules applied. We thus informed the Legislature that in the future, we would not be continuing such a practice, but would most likely categorize rulemakings and accompanying investigations as quasi-legislative. (See letter from P.Gregory Conlon to members of the Legislature supplementing March 31, 1997 SB 960 Report, dated July 25, 1997, p. 3.)

Edison's other two examples, called by Edison "two DSM OIR cases" (App.Rhg, p. 3), are A.97-03-045 and A.96-11-048, which involved bidding procedures and contract issues for Southern California Gas Company and Edison. Both involved mixed questions of policy implementation and of fact. Among the issues to be considered were the reasonableness of specific contracts entered into by the two utilities. These two cases did not clearly fall within a single category, and after considering the specifics of the cases, we decided they were best handled under the procedures covering ratesetting. (See Conlon letter, *supra*, at 3.) Particularly in A.97-03-045, we viewed the ratesetting elements as predominating over what were likely to be largely incidental policy-setting aspects. Indeed, it appeared that the proceeding could involve a reasonableness review and a ratemaking disallowance. See D.97-06-071, which denied Edison's appeal of the ratesetting categorization of A.97-03-045.

Edison's central issue in its categorization argument has always been, do the Commission's Rules or SB 960 control, in terms of just which cases the Commission may consider to be ratesetting, and in turn, may deliberate on in closed session. We do not disagree with Edison that generally, a statute takes precedence over regulations. However, where a statute is unclear or ambiguous, the Commission may legitimately attempt to refine that ambiguity, as discussed above. We have repeatedly taken the position that in choosing the default category, SB 960 gives us the discretion to factor in and balance all of the policies we saw expressed in SB 960, and to implement those policies within the framework of our other regulatory responsibilities. We find Edison's arguments to be wholly unpersuasive.

Ex Parte Restrictions and ORA. Edison's second issue, that of the differential application of the ex parte restrictions to the Office of Ratepayer Advocates vis a vis other parties, is also without merit. SB 960 provides:

> The Commission shall develop appropriate procedures to ensure that the existence of the [Office of Ratepayer Advocates] does not create a conflict of roles for any employee or his or her representative. The procedures shall

> include, but shall not be limited to, the development of a code of conduct and procedures for ensuring that advocates and their representative on a particular case or proceeding are not advising decisionmakers on the same case or proceeding. (Section 309.5(d).)

On January 27, 1997, our Executive Director issued a document to the Commission staff and to the public entitled "Conflict of Roles: Guidelines & Procedures." This document ensures that all of the requirements of the above code section are met. It provides in no uncertain terms that staff assigned to ORA may *not* serve in an advisory capacity to decisionmakers in any adjudicatory matter in which they were personally involved, or in any adjudicatory matter closely related factually to one in which they were personally involved. In addition, ORA staff may not serve in an advisory role to decisionmakers in any non-adjudicatory matter they have worked on. Finally, ORA staff may not serve as advisors to decisionmakers in non-adjudicatory cases they have *not* worked on unless they are reassigned to a unit other than ORA, the assignment is approved by the Executive Director, and their prior work assignments for ORA have been evaluated and determined not to cause any possible conflict.

In fact, ORA personnel are subject to the exact same ex parte communication restrictions as other parties are. As long as such personnel are named participants, or acting as agents for, or on behalf of, ORA, the same ex parte rules apply to them as would apply to any other party. The difference arises in the rare instance when an ORA staff member, through reassignment, serves in an advisory capacity to a decisionmaker. In that instance, communications between the two are not ex parte communications as defined either in SB 960 or in our rules. The staff member is not acting as an agent for, or on behalf of, ORA, and his/her communications are not for the purpose of influencing the decisionmaker to reach the result favored by ORA. Other parties are not Commission employees, and so *cannot* be called upon to serve as advisors to decisionmakers. We do not find Edison's arguments persuasive.

Commissioner "Presence;" Formal Hearings in Quasi-Legislative Proceedings. Edison's third issue relates to the definition of Commissioner "presence" at hearings and the role of the ALJ versus assigned Commissioner in quasi-legislative proceedings. Edison contends that "the SB 960 Rules contain a contorted definition of 'presence' that renders the statutory mandate that the Commission be present completely meaningless." (App.Rhg., p. 12.) SB 960 does not define "present" or "presence." The standard set forth in Rule 8(f)(4) of the final rules is that "present" or "presence" at a hearing or argument means physical attendance in the hearing room, 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. Edison has apparently not read this rule carefully, as its application for rehearing still refers to the proposed rule, which has been changed materially. (App.Rhg, p. 11.)

Edison further objects to the Commission's definition of "formal hearing" in quasi-legislative proceedings as a hearing in which legislative facts, but not adjudicative facts, are determined. This definition, Edison contends, ends up requiring the assigned Commissioner's presence at formal hearings in situations (i.e., rulemakings) where hearings need not be held at all, but fails to require such presence at "true" formal hearings, i.e., those which are held "on the record," with sworn testimony and cross examination. Instead, according to Edison, if an evidentiary hearing is needed in a quasi-legislative proceeding, that type of hearing may be presided over by an ALJ, which Edison contends is contrary to the terms of SB 960. However, Edison itself has admitted that only rarely is this type of hearing called for in quasi-legislative proceedings.

We are of the view that SB 960 gives us the discretion to decide what "formal hearing" means in the context of quasi-legislative proceedings, as delineated by the statute. In exercising this discretion, we have determined that in quasi-legislative cases, the most important hearings in terms of having a Commissioner present are

hearings which deal with legislative facts.[4] It is those types of hearings in which policy will be argued; thus it is over those types of hearings that parties should want a Commissioner presiding. It is also those types of hearings which have been and are expected to continue to be by far the most prevalent in quasi-legislative cases. Edison's argument that federal agencies (and federal courts) use the category of "legislative facts" to determine that no hearings *at all* are required is not relevant to practice before this Commission. As Edison full well knows, we often hold hearings on legislative facts. If we hold an *evidentiary*-type hearing on *legislative* facts, our rules still require the assigned Commission's presence. Edison's argument has no merit.

B. Compliance with APA Regulations

Edison goes through a litany of the different statutory requirements in the 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. Edison asserts that because the Commission adopted its conflict of roles guidelines and its quiet time rules without strictly satisfying those requirements, those rules are void. The crux of Edison's argument seems to be that parties have not, and will not, get sufficient notice of these rules, they will thus not be legally required to follow them, and chaos will result. Following the requirements of the APA on the other hand, Edison argues, will assure that such notice will have been provided, and presumably an orderly process will result. For the following reasons, we reject Edison's argument that D.97-12-043 committed legal error because the conflict of roles guidelines and the quiet time rules were not adopted according to APA rulemaking procedures.

In the first place, D.97-12-043 does not adopt conflict of roles guidelines or quiet time protocols. Indeed, our decision to adopt a portion of our quiet time protocols

[4] Legislative facts are "the general facts that help the tribunal decide questions of law and policy and discretion." Rule 8(f)(3). They are distinguished from adjudicative facts, which "answer questions such as who did what, where, when, how, why, with what motive or intent." Rule 8(f)(1).

without going through the APA rulemaking process was made in Res. ALJ-175.[5] Edison did not apply for rehearing of that resolution, and the time to do so is past. Edison is barred from raising that issue in this application for rehearing of an entirely different decision.

While Edison's instant application for rehearing is not the proper place to raise its concerns about how the conflict of roles guidelines were promulgated, we will take this opportunity to explain why it was entirely proper. The APA is applicable only to rules and regulations of general application, and not to guidelines and protocols which apply only to limited situations. The APA is also not applicable to rules and procedures governing internal Commission management. (See Govt. Code §§ 11342(g), 11343(a)(3).) Our conflict of roles guidelines are internal procedures; they do not affect third parties and are not required by the APA to be published. Despite this, these guidelines were the subject of at least one public workshop and interested parties were given the opportunity to submit comments on them.

For the foregoing reasons, we find all of the arguments raised in Edison's application for rehearing to be without merit.

///

///

///

[5] Res. ALJ-175, which adopted most of the draft protocols, specifically stated that the two generally applicable protocols were being forwarded to OAL for notice and publication before adoption, and invited all interested parties to file comments with the Commission. There has been no "attempt to avoid any public comment and input on critical rules of general applicability," on our part or our staff's part, as alleged by Edison (see especially App.Rhg, p. 10, n. 21). A final version of those generally applicable protocols has been on our business meeting public agenda since March 26, and will be under consideration for adoption at our meeting of June 4.

Therefore, **IT IS ORDERED** that rehearing of Decision 97-12-043 is denied.

This order is effective today.

Dated May 21, 1998, at San Francisco, California.

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