ALJ/KOT/tcg*

Mailed 1/21/2000

Decision 00-01-053 January 20, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking for Purposes of Implementing Certain Statutory Requirements Regarding Public Review and Comment for Specified Commission Decisions.	Rulemaking 99-02-001 (Filed February 4, 1999)

OPINION ADOPTING NEW AND AMENDED RULES

1. Introduction

In today's decision, we adopt, with various changes, the rules we proposed in the order instituting this rulemaking (OIR). The version of these rules that we adopt today is that set forth in the revised draft decision mailed to the parties on December 17, 1999. These rules (attached as Appendix A to the decision) implement provisions of Senate Bill (SB) 779 (Calderon), which is Chapter 886 of the 1998 Statutes. With the adoption of these rules, Article 19 of our Rules of Practice and Procedure[1] provides comprehensively for public review and comment regarding our decisions, including resolutions.

2. Comments on Initially Proposed Rules

Following issuance of the OIR, the Chief Administrative Law Judge sent our Notice of Proposed Regulatory Action to the Office of Administrative Law, which duly printed the notice in the California Regulatory Notice Register (Register) of February 26, 1999. We held a workshop on March 3 and provided

[1] Unless otherwise indicate, all rules mentioned in this decision are Rules of Practice and Procedure (Title 20, Division 1, Chapter 1 of the California Code of Regulations), and all section citations are to the Public Utilities Code.

for concurrent opening comments (due March 22) and concurrent reply comments (due April 12.)

The following parties filed opening comments: Pacific Bell; Roseville Telephone Company (Roseville); GTE California Incorporated, GTE West Coast Corporation, and GTE Communications Corporation (filing jointly and collectively referred to as GTE); a group of telecommunications utilities calling themselves the "Smaller Independent LECs;"[2] a group of energy utilities calling themselves the "Joint Energy Utilities;"[3] the Commission's Office of Ratepayer Advocates (ORA); Greenlining Institute and Latino Issues Forum (filing jointly and collectively referred to as Greenlining); and The Utility Reform Network (TURN). Four of these parties (GTE, TURN, ORA, and Pacific Bell) also filed reply comments. Lastly, two parties filed reply comments only: AT&T Communications of California, Inc. (AT&T); and MCI WorldCom, Inc. (MWCOM).

2.1 Changes to Initially Proposed Rules

Following the comments listed above, the assigned administrative law judge (ALJ) issued a draft decision on July 14, 1999. The recommendation in the ALJ's draft decision was to adopt the rules as initially proposed. Commissioner Neeper prepared an alternate draft decision (Neeper alternate), which was issued

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[2] The Smaller Independent LECs (i.e., local exchange carriers) include Calaveras Telephone Company, Cal-One Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., The Ponderosa Telephone Co., and Sierra Telephone Company, Inc.

[3] The Joint Energy Utilities include Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Southern California Gas Company (SoCalGas), and Southern California Edison Company (Edison). SDG&E and SoCalGas are represented by Sempra Energy (Sempra), with which they are affiliated. Elsewhere in today's decision, we simply refer to Sempra.

on August 25, 1999, and in which Commissioner Neeper solicited comment on certain specific changes to the rules as initially proposed. One such change was a broader definition of "alternate" in Rule 77.6(a). Commissioner Neeper indicated that the Commission wanted further input from the parties on the interpretation of SB 779 before deciding whether to adopt this definition of "alternate" or the definition initially proposed.

A further alternate draft decision, sponsored jointly by Commissioners Bilas and Neeper, was issued on October 6, 1999 (Bilas/Neeper alternate). It solicited comment on the changes proposed in the Neeper alternate (which it superseded) and on additional specific changes. Among the latter was a proposed rule that would allow parties commenting on a decision to provide a "redlined" version of the decision as part of their comments.[4]

On October 21, 1999, Commissioner Duque issued a further alternate draft decision (Duque alternate). Commissioner Duque recommended that the Commission not make any change in its "rules or practices...concerning the practice of redlining." In all other respects, the Duque alternate is consistent with the changes in the Bilas/Neeper alternate. The Commission adopted the Duque alternate, which was then issued as Decision (D.) 99-11-052. Because D.99-11-052 proposes changes to the rules as initially proposed in the OIR and announced in the Register, the Commission provided another 15-day comment period (to December 3, 1999), pursuant to Gov. Code § 11346.8(c).

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[4] The Bilas/Neeper alternate defines "redlining" as a "convention for highlighting language that someone wants to add to or delete from a document. Typically, the added language is underlined and the deleted language is stricken through. We follow this redlining convention to show the changes we are proposing to our Rules of Practice and Procedure."

The draft decision, the successive draft alternate decisions, and D.99-11-052 were each made available for public review and comment. ORA, Roseville, and three energy utilities (PG&E, Sempra, and Edison) commented on the ALJ's draft decision. The same parties commented on the Neeper alternate.[5] Edison, TURN, and the City and County of San Francisco commented on the Bilas/Neeper alternate, while PG&E and Sempra filed joint comments. TURN and PG&E commented on the Duque alternate. Finally, Edison, GTE, and Sempra commented on D.99-11-052.

Much of the comment on the Bilas/Neeper alternate, the Duque alternate, and D.99-11-052 concerned the merits of "redlining," as discussed above. However, pursuant to D.99-11-052, the Commission is not taking up in this proceeding any rulemaking proposals on redlining. Therefore, we do not discuss in today's decision any of the comments relating to redlining.

3. Discussion

3.1 Decisions Subject to Waiver or Reduction of Comment Period

In general, parties make only limited suggestions or criticisms regarding the proposed rules. In keeping with the Administrative Procedure Act, Appendix B to today's decision contains a point-by-point response to each suggestion or criticism made by the commenters. The strongest point of disagreement, however, is not with the proposed rules but with SB 779 itself.

The disagreement concerns the statute's provisions for waiver or reduction of the review and comment period, and specifically the meaning of the following sentence from Section 311(g)(3):

[5] The three energy utilities commented jointly on the Neeper alternate.

> "Consistent with regulatory efficiency and the need for adequate prior notice and comment on commission decisions, the commission may adopt rules, after notice and comment, establishing additional categories of decisions subject to waiver or reduction of the time period in this section."

In the OIR, we describe and justify six such "additional categories" subject to waiver or reduction. (See OIR mimeo. at 6-8.)[6] Nine of the 10 parties filing comments on the OIR's proposals make no objection to these additional categories, but the Joint Energy Utilities object to all of them and offer no suggestions for improvement (either clarification of the categories or alternative categories). The Joint Energy Utilities would limit waiver or reduction to those situations already spelled out in the statute. In effect, the Joint Energy Utilities would ignore the quoted sentence from SB 779.

In contrast, many of the telephone utilities would use the limited authority in the quoted sentence as the basis for exempting vast numbers of decisions from public review and comment. Most dramatic is the proposal of GTE (supported by Pacific Bell) to waive or reduce the public review and comment period for any resolution that responds to an advice letter filed by a telecommunications service provider. AT&T supports this proposal, with one major qualification: resolutions responding to advice letters filed by an incumbent local exchange carrier (such as Pacific Bell and GTE California Incorporated) would not qualify for waiver or reduction. Pacific Bell, GTE, and AT&T all ignore the fact that where the Legislature intended in SB 779 to broadly exempt a particular utility sector (specifically, water utilities) from the public review and comment

[6] In D.99-11-052, we proposed a seventh "additional category" and also modified the description of one of the categories as initially proposed. (See id. at 8-10.)

provisions, the Legislature expressly stated that those provisions did not apply.[7] Had the Legislature intended to broadly exempt resolutions relating to all or part of the telecommunications industry, SB 779 could easily have so stated.

In short, in SB 779 and other recent statutes concerning this Commission's procedures, the Legislature has tried to balance the need for public review and accountability with the need for a regulatory process that is efficient, dependable, and swift. We are confident that the rules we adopt today to implement the public review and comment provisions of SB 779 accurately reflect this legislative balance.

3.2 Definition of "Alternate"

Turning now to the changes that we set forth in D.99-11-052 to the rules as initially proposed in the OIR, we find the only major controversy concerns which definition of "alternate" to adopt: the definition in the OIR, which reflects historical usage at the Commission; or another definition on which we invited comment in D.99-11-052. Under the latter definition, any substantive change to a decision before the Commission (regardless of who makes the change) would be an "alternate"; under the definition in the OIR, a change made by the presiding

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[7] The first sentence of Section 311(g)(3) creates an express exemption for water utilities. The sentence reads in relevant part: "This subdivision does not apply to advice letter filings or to uncontested matters, that pertain solely to water corporations. ..." The comma following "matters" has led to some confusion over the scope of the exemption. Reading SB 779 as a whole, and considering the legislative history and intent, we conclude that we should read Section 311(g)(3) as consistent with Section 311(g)(1), which expressly subjects resolutions on advice letters to the public review and comment provisions. Thus, we read the first sentence of Section 311(g)(3) to refer to resolutions on advice letter filings only of water utilities, not to all advice letters, and not to uncontested matters of utilities other than water utilities unless the decision grants the relief requested. See Section 311(g)(2).

officer (who placed the decision before the Commission) would not be an "alternate." PG&E, Edison, and Sempra support the more inclusive definition. It was later supported by ORA (comments on Neeper alternate) and GTE (comments on D.99-11-052). TURN (comments on Bilas/Neeper alternate) does not object to the definition advocated by the energy utilities, but TURN strongly disputes the energy utilities' contention that the definition they prefer is compelled by the terms of the statute. Id. at 4. Specifically, TURN agrees with the Commission's discussion of the history and use of "alternate" (see D.99-11-052 mimeo. at 3-4)[8] and asserts that:

> "Everyone involved in the legislative process that resulted in SB 779 knew the Commission's longstanding definition of 'alternate' and the term was used in that traditional context. If the legislature had meant to change that longstanding definition, it would have done so explicitly, but it did not." (TURN, Comments on Bilas/Neeper Alternate at 4.)

[8] The discussion to which TURN refers reads, in part, as follows: "At the time that the term 'alternate' was enacted into the Public Utilities Code [§ 311(e), added in 1994 by Assembly Bill 2850 (Escutia), Ch. 1110 of Stats. 1998], and for many years before the enactment, the Commission used that term in distributing agenda materials internally and in publishing its agenda. Under this Commission practice, to which § 311(e) expressly refers, the Commission has applied the term to a revision not prepared or accepted by the presiding officer who originally prepared the decision to be revised. In contrast, a revision that the presiding officer makes or accepts simply replaces the order as originally proposed, since that order no longer has a sponsor and therefore is not before the Commission or on its agenda. In implementing the statutory term 'alternate,' the Commission followed this established practice...." (D.99-11-052, mimeo. at 3, footnote omitted.) Nothing in SB 779 indicates that the Legislature intended to expand "alternate" beyond this historical usage; rather, the Legislature's intent was to expand the kinds of decisions (including alternates to those decisions) that would be issued for comment.

We have decided to adopt, in those respects relevant to this discussion, the definition of "alternate" we proposed initially.[9] Basically, this definition continues our historical usage. Under that usage, "decision" or "proposed decision" refers to an agenda item offered and supported by the presiding officer for the relevant proceeding, and "alternate" refers to a substantially different version of the agenda item, offered by someone else in preference to the agenda item supported by the presiding officer. We find nothing in SB 779 that compels us to modify this historical usage, and we see much reason to continue it. As we noted in D.99-11-052, our historical usage makes good sense,[10] and avoids unnecessary delay and repetition of arguments.

SB 779 does not require mechanically issuing for public review and comment all versions of an item that may appear on the Commission's agenda. The statute wholly exempts many decisions from public review and comment, allows reduction or waiver of public review and comment in many situations, and authorizes the Commission to subject additional categories of decisions to reduction or waiver. Regarding the latter authorization, the statute directs us to consider "regulatory efficiency and the need for adequate prior notice and comment" (Section 311(g)(3), emphasis added). Thus, efficiency and adequacy of notice are part of the Legislature's express concerns in SB 779; of necessity, the

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[9] D.99-11-052 contains another change relative to "alternate" that we do adopt, as we discuss later.

[10] As we there explained, a presiding officer's change simply replaces the decision as originally proposed by the presiding officer. In other words, the presiding officer's version is not an alternate to the decision being revised, it supersedes that decision. (See D.99-11-052 mimeo. at note 3 and accompanying text.)

Commission must consider how much notice is enough notice in implementing this statute.

We also bear in mind the broader statutory context. SB 779 amends Section 311, as that section was amended in 1996 by SB 960 (Leonard).[11] However, SB 779 does not amend the various provisions of SB 960 directing the Commission to bring its proceedings to a timely resolution and setting specific time periods (12 months for adjudicatory proceedings, 18 months for other proceedings) within which to do so. (See Pub. Util. Code § 1701.2(d) and Section 1 of SB 960, the legislative intent section, which is uncodified.) SB 960 also requires the Commission to issue its "final decision" in a ratesetting proceeding not later than 60 days after issuance of the proposed decision. (See Pub. Util. Code § 1701.3(e).)[12] We cannot possibly meet the directives of SB 960 if we implement SB 779 in such a way as to allow the comment process under the latter statute to become the longest part of the proceeding.[13]

Issuing for public review and comment the presiding officer's revisions, even where (as is usually the case) those revisions have little impact on the presiding officer's recommended outcome, does not serve public policy as set forth in either SB 779 or SB 960. We conclude that SB 779 was enacted in full cognizance of our contemporaneous use of "alternate." Thus, under a fair

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[11] See specifically Section 5 of Chapter 856 of the Statutes of 1996.

[12] The quoted statute provides that the Commission has leeway to extend this deadline "under extraordinary circumstances...for a reasonable period" and must extend the deadline (but only for 30 days) if an alternate is proposed.

[13] Unfortunately, this rulemaking exemplifies the problem, as it appears that "public review and comment" will have consumed more than half the elapsed time between issuance of the OIR (February 1999) and adoption of the rules.

reading of the statute, we should continue to define that term as initially proposed in the OIR,[14] but with the one modification we discuss next.

In D.99-11-052, we proposed the following additional amendment to Rule 77.6(a): "A substantive revision to a proposed decision is not an 'alternate' if the revision does no more than make changes suggested in prior comments on the proposed decision, or in a prior alternate to the proposed decision." Edison opposes this additional amendment, asserting that "[t]he manner in which comments are incorporated merits as much review as other alternates and the proposed decision itself."[15] TURN supports the additional amendment (Comments on Bilas/Neeper Alternate at 4), and GTE appears to support the additional amendment if certain qualifying language is added.[16]

Edison's assertion is not self-evident. Where incorporation of changes requires extensive revision affecting many interrelated parts of a decision, including, e.g., parts of the decision that are not directly the subject of the prior comment or prior alternate, this proposed amendment would not exempt this revision from public review and comment. Where the revision follows easily and directly from the prior comment or prior alternate, we see no public interest

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[14] Nothing in today's decision bars the issuance, for public review and comment, of a presiding officer's revisions where public review and comment might be appropriate, as in the case where those revisions do result in fundamental changes to the recommended outcome.

[15] Edison, Comments on D.99-11-052 at 2; Comments on Bilas/Neeper Alternate at 2.

[16] Specifically, GTE would add "where such prior changes have already been subject to public review and comment." (See Comments on D.99-11-052 at 2.) Since comments must be served on all parties, who may then reply, and since a prior "alternate" already would have been subject to public review and comment, we see no reason to add this qualifying language.

that would be served, under SB 779 or otherwise, by subjecting the revision to yet another round of public review and comment.

3.3 Public Necessity

In D.99-11-052 and in two of the alternates preceding that decision, we put forward, as an additional category of decision for which the Commission might waive or reduce the public review and comment period, those decisions where "public necessity" (as defined in the proposed rule, Rule 77.7(f)(9)) compels the Commission to take action before the full 30-day period has elapsed. TURN, PG&E, and Sempra (the two latter parties commenting jointly) were the only commenters that addressed this proposal. They support it in concept, but TURN urges us not to waive public review and comment entirely.

We appreciate that some public review and comment is preferable to none, and we note that the proposed rule says the Commission "will provide such reduced period for public review and comment as is consistent with the public necessity requiring reduction or waiver." However, we believe we must retain the ability to waive public review and comment where "public necessity" dictates. We will adopt Rule 77.7(f)(9) as proposed in D.99-11-052.

3.4 Schedule for Replies to Comments on Resolutions

In D.99-11-052, we proposed to allow replies to comments on draft resolutions and alternates to draft resolutions; virtually all parties had urged us to make such a change to our initially proposed rules. Roseville has a concern, however, with the schedule for replies set forth in proposed Rule 77.7(c) as modified. We note the schedule in the proposed rule parallels that in existing Rule 77.5 (governing replies to comments on proposed decisions). The due date for replies is five days after the filing of comments. Normally, commenters file on the latest date allowed under the rules, but in the case where all comments are

filed on an earlier date, replies would be due five days from the earlier date. We often are under extreme time pressure in trying to address in our decisions and resolutions all comments and replies that we receive. The schedule for replies removes a disincentive to parties that might be able to file their comments before the deadline, and gives us more breathing room on those occasions where comments, and hence replies, are submitted a little early.

4. Revised Draft Decision and 2nd Neeper Alternate

The ALJ's revised draft decision in this matter was mailed to the parties on December 17, 1999, and comments were filed on January 6, 2000, by PG&E and Edison. Commissioner Neeper offered an alternate to the revised draft decision (2nd Neeper alternate), which was mailed to the parties on December 29, 1999. Comments on the 2nd Neeper alternate were filed by Sempra, PG&E, and Edison on January 13, 2000.

The 2nd Neeper alternate and the revised draft decision differ in only one respect. Both the 2nd Neeper alternate and the revised draft decision contain the same definition of "alternate" as that term is used in SB 779. However, under the 2nd Neeper alternate, even substantive changes that are not "alternates" generally would be made available for public review and comment. The 2nd Neeper alternate also contains separate provisions for reduction or waiver of the comment period for this class of substantive changes.

Consistent with their positions in earlier comments, Sempra, PG&E, and Edison prefer a different definition of "alternate," namely, the variant definition on which we invited comment in D.99-11-052. PG&E supports the variant definition in its entirety; Sempra and Edison dislike even that definition to the extent that it would allow the Commission to bypass a further period of public review and comment if a substantive change "does no more than make changes

suggested in prior comments [or] in a prior alternate...." However, PG&E and Edison make clear that they prefer the 2nd Neeper alternate to the revised draft decision. Sempra says that the 2nd Neeper alternate is "far more consistent with...SB 779" but that the changes made by the 2nd Neeper alternate "add at least as many difficulties as they solve." In short, commenters offer only grudging support for the approach taken in the 2nd Neeper alternate, and then only to the extent that the 2nd Neeper alternate would result, in effect, in public review and comment substantially identical to that provided pursuant to the variant definition of "alternate" in D.99-11-052.

We adopt the revised draft decision in preference to the 2nd Neeper alternate. Our reasons for doing so are basically the same as our reasons for rejecting the variant definition of "alternate" (see Section 3.2 above). Specifically, the rules we are adopting today avoid unnecessary delay and repetition of arguments, thereby enabling us to bring our proceedings to a timely conclusion while giving adequate opportunity for public review and comment in our decisionmaking process.

Findings of Fact

1. The Commission's Rules of Practice and Procedure, as proposed to be amended in the OIR, and with certain modifications proposed in D.99-11-052, would reasonably implement the provisions of SB 779, specifically, Public Utilities Code § 311(g), for public review and comment regarding certain Commission decisions. The proposed amendments are shown in Appendix A to today's decision.

2. Upon review of the comments and replies to comments received in this rulemaking, it is reasonable to adopt the amendments shown in Appendix A.

Conclusions of Law

1. The Commission's Notice of Proposed Regulatory Action was duly submitted to the Office of Administrative Law and printed in the California Regulatory Notice Register dated February 26, 1999 (Register 99, No. 9-Z, p. 406).

2. The modifications proposed and made available in D.99-11-052 are sufficiently related to the original rulemaking proposal that a 15-day comment period is appropriate.

3. The originally proposed amendment to the definition of "alternate" in existing Rule 77.6(a) is consistent with historical usage of the term at the Commission when SB 779 was enacted, and is also consistent with legislative policies expressed in SB 779 (enacted in 1998) and SB 960 (enacted in 1996).

4. The Commission should adopt the amendments to Article 19 of its Rules of Practice and Procedure shown in Appendix A.

5. In order to provide guidance as soon as possible to all persons concerned with the Commission's decision-making process, this decision should be effective immediately.

6. This rulemaking should be closed.

O R D E R

IT IS ORDERED that:

1. The new and amended Rules of Practice and Procedure implementing Senate Bill 779, which rules are shown in Appendix A to today's decision, are adopted.

2. The Chief Administrative Law Judge shall take all appropriate steps to submit the newly adopted rules to the Office of Administrative Law, and may

make such format changes as are appropriate for printing the newly adopted rules in the California Code of Regulations.

3. This rulemaking is closed.

This order is effective today.

Dated January 20, 2000, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
LORETTA M. LYNCH
JOSIAH L. NEEPER
CARL W. WOOD
Commissioners

APPENDIX A

Adopted Amendments to Article 19 of the Commission's Rules of Practice and Procedure

This Appendix contains amendments to Article 19 of the Commission Rules of Practice and Procedure, as those amendments are adopted in the foregoing decision. For the readers' convenience, we reproduce in the Appendix the whole set of interrelated rules, namely, Rules 77-77.7.

Article 19. ~~Decisions,~~ Proposed Decisions, Draft Decisions, and Commission Meetings

77. (Rule 77) Submission of Proceedings.

A proceeding shall stand submitted for decision by the Commission after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the Commission or the presiding officer.

Note: Authority and reference cited: Section 1701, Public Utilities Code.

77.1. (Rule 77.1) Filing Proposed Decision.

The assigned Commissioner or Administrative Law Judge shall prepare a proposed decision, whether interim or final, setting forth the recommendations, findings and conclusions. ~~After discussion with the assigned Commissioner,~~ tThe proposed decision of the assigned Commissioner or of the Administrative Law Judge (after discussion with the assigned Commissioner) shall be filed with the Commission and served on all parties without undue delay, not later than 90 days after submission.

This procedure will apply to all ratesetting or quasi-legislative matters which have been heard, except those initiated by customer or subscriber complaint unless the Commission finds that such procedure is required in the public interest in a particular case.

Applicants in matters involving passenger buses, sewer utilities, or vessels may make an oral or written motion to waive the filing of and comment on the proposed decision. Any party objecting to such waiver will have the burden of demonstrating that such filing and comment is in the public interest.

Note: Authority cited: Section 1701, Public Utilities Code. Reference cited: Sections 311(d), 311(f), 1701.1, 1701.3, 1701.4, Public Utilities Code.

77.2. (Rule 77.2) Time for Filing Comments.

Parties may file comments on the proposed decision within 20 days of its date of mailing. An original and four~~12~~ copies of the comments with a certificate of service shall be filed with the Docket Office and copies shall be served on all parties. The assigned Commissioner and Administrative Law Judge shall be served separately.

An applicant may file a motion for an extension of the comment period if it accepts the burden of any resulting delay. Any other party requesting an extension of time to comment must show that the benefits of the extension outweigh the burdens of the delay.

Note: Authority cited: Section 1701, Public Utilities Code. Reference cited: Section 311(d), Public Utilities Code.

77.3. (Rule 77.3) Scope of Comments.

Except in general rate cases, major plant addition proceedings, and major generic investigations, comments shall be limited to 15 pages in length plus a subject index listing the recommended changes to the proposed decision, a table of authorities and an appendix setting forth proposed findings of fact and conclusions of law. Comments in general rate cases, major plant addition proceedings, and major generic investigations shall not exceed 25 pages.

Comments shall focus on factual, legal or technical errors in the proposed decision and in citing such errors shall make specific references to the record. Comments which merely reargue positions taken in briefs will be accorded no weight and are not to be filed.

New factual information, untested by cross-examination, shall not be included in comments and shall not be relied on as the basis for assertions made in post publication comments.

Note: Authority cited: Section 1701, Public Utilities Code. Reference cited: Section 311(d), Public Utilities Code.

77.4. (Rule 77.4) Specific Changes Proposed in Comments.

Comments proposing specific changes to the proposed decision shall include supporting findings of fact and conclusions of law.

Note: Authority cited: Section 1701, Public Utilities Code. Reference cited: Section 311(d), Public Utilities Code.

77.5. (Rule 77.5) Late-Filed Comments and Replies to Comments.

Late-filed comments will ordinarily be rejected. However, in extraordinary circumstances a motion for leave to file late may be filed. An accompanying declaration under penalty of perjury shall be submitted setting forth all the reasons for the late filing.

Replies to comments may be filed five days after comments are filed and shall be limited to identifying misrepresentations of law, fact or condition of the record contained in the comments of other parties. Replies shall not exceed five pages in length, and shall be filed and served as set forth in Rule 77.2.

Note: Authority cited: Section 1701, Public Utilities Code. Reference cited: Section 311(d), Public Utilities Code.

77.6. (Rule 77.6) Review of and Comment on Alternates.

(a) For purposes of this rule, "alternate" means a substantive revision by a Commissioner to a proposed decision not prepared by that Commissioner, which revision either:

(1) ~~a substantive revision to an Administrative Law Judge's proposed decision circulated under Rule 77.1 that~~ materially changes the resolution of a contested issue, or

(2) makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs. ~~of an Administrative Law Judge's proposed decision circulated under Rule 77.1.~~

A substantive revision to a proposed decision is not an "alternate" if the revision does no more than make changes suggested in prior comments on the proposed decision, or in a prior alternate to the proposed decision.

~~(b) A revision or addition to an Administrative Law Judge's proposed decision will be considered "substantive" for purposes of this rule if the sponsoring Commissioner determines that the revision or addition is substantive. If the sponsoring Commissioner determines that a revision or addition is not substantive, the President of the Commission in consultation with the Chief Administrative Law Judge may nevertheless determine that the revision or addition is substantive, in which case the President's determination is controlling. The President may delegate this review function to another Commissioner and must delegate it when the President is the sponsoring Commissioner.~~

(be) An alternate will be filed and served on all parties to the proceeding and, except as provided in subsection (fg) of this rule, will be subject to public review and comment before the Commission may vote on it. The date of the Commission meeting when the alternate is first scheduled to be considered will be indicated on the first page of the alternate.

(cd) If the alternate is served with the ~~Administrative Law Judge's~~ proposed decision, or if the alternate is served at least 30 days before the Commission meeting at which the ~~Administrative Law Judge's~~ proposed decision is scheduled to be considered, the provisions of Rules 77.1 through 77.5 concerning comments on the proposed decision will also apply to comments on the alternate. The page limits of Rule 77.3 apply separately to comments on the proposed decision and to comments on the alternate.

(de) If the alternate is served less than 30 days, but at least 14 days, before the Commission meeting at which the ~~Administrative Law Judge's~~ proposed decision is scheduled to be considered, parties may file comments on the alternate at least seven days before the Commission meeting. The provisions of Rules 77.3, 77.4, and 77.5 on comments on proposed decisions and replies to comments will also apply to comments on alternates and corresponding replies. Comments and replies must comply with Rules 2, 2.1, 2.2, and 2.5. Comments and replies must be served on all parties in compliance with Rule 2.3, and must be separately served on the assigned Administrative Law Judge and all Commissioners.

(ef) If service of the alternate occurs less than 14 days before the Commission meeting at which the ~~Administrative Law Judge's~~ proposed decision is scheduled to be considered, consideration of the proposed decision and the alternate will be rescheduled to a later Commission meeting. Comments on the alternate will be governed by either subsection (d) or subsection (e) of this rule, depending on the time between the date the alternate is served and the date of the rescheduled consideration of the proposed decision and alternate.

(fg) The assigned Commissioner or Administrative Law Judge may waive or reduce the comment period on alternates in an unforeseen emergency situation (Rule 81), may reduce but not waive the comment period in any of the circumstances described in Rule 77.7(f)(1)-(9), and may extend the comment period in appropriate circumstances. The parties to a proceeding may waive or reduce the comment period on an alternate issued in that proceeding if all of the parties so stipulate.

Note: Authority cited: Section 1701, Public Utilities Code. Reference cited: Section 311(e), Public Utilities Code.

(Rule 77.7) Public Review and Comment Pursuant to SB 779.

(a) **Definitions**. This rule implements provisions of Public Utilities Code Section 311(g), as effective January 1, 1999, for public review and comment by parties on Commission decisions and alternates. For purposes of this rule, the following definitions apply:

(1) "Decision" is any resolution or decision to be voted on by the Commission except (i) an order, resolution, or decision specified in subsection (e) of this rule, or (ii) a proposed decision that is filed and served pursuant to Public Utilities Code Section 311(d) and Rule 77.1;

(2) "Draft" refers to a decision that has been circulated under this rule but not yet acted upon by the Commission;

(3) "Alternate," with respect to a draft decision, is an alternate as defined in Rule 77.6(a) with respect to a proposed decision;

(4) "Person" includes natural persons and legal entities;

(5) "Party," with respect to a formal proceeding (i.e., an application, a complaint, or a proceeding initiated by Commission order), includes all of the following: applicant, protestant, petitioner, complainant, defendant, intervenor, interested party who has made

a formal appearance, respondent, and Commission staff of record in the proceeding;

(6) "Party," with respect to a resolution disposing of an advice letter, is the advice letter filer, anyone filing a protest or response to the advice letter, and any third party whose name and interest in the relief sought appears on the face of the advice letter (as where the advice letter seeks approval of a contract or deviation for the benefit of such third party);

(7) "Party," with respect to a resolution disposing of a request for disclosure of documents in the Commission's possession, is (i) the person who requested the disclosure, (ii) any Commission regulatee about which information protected by Public Utilities Code Section 583 would be disclosed if the request were granted, and (iii) any person (whether or not a Commission regulatee) who, pursuant to protective order, had submitted information to the Commission, which information would be disclosed if the request were granted;

(8) "Party," with respect to a resolution disposing of one or more requests for motor carrier operating authority, is any person whose request would be denied, in whole or part, and any person protesting a request, regardless of whether the resolution would sustain the protest;

(9) "Party," with respect to a resolution establishing a rule or setting a fee schedule for a class of Commission-regulated entities, is any person providing written comment solicited by Commission staff (e.g., at a workshop or by letter) for purposes of preparing the draft resolution.

(b) **Comments and Replies on Decision Other Than Resolution.** Unless otherwise directed by the Commission, the assigned Commissioner, or the assigned Administrative Law Judge or Examiner, Rules 77.2 through 77.5 govern comments and replies to comments on draft decisions other than resolutions, and Rule 77.6 governs comments and replies to comments on alternates to draft decisions other than resolutions.

(c) **Comments and Replies on Resolution With "Party."** Unless otherwise directed by the Commission division that issued the draft resolution, comments may be filed on any resolution for which "party" is defined, or on any alternate to such resolution, under the procedures in this subsection. No later than ten days before the Commission

meeting when the resolution is first scheduled for consideration (as indicated on the first page of the resolution), any person may file comments, not to exceed five pages, with the Commission division that issued the resolution, and shall concurrently serve them on (i) all parties shown on the service list appended to the draft resolution, (ii) all Commissioners, and (iii) the Chief Administrative Law Judge, the General Counsel, or other Division Director, depending on which Commission division issued the resolution. Comments on alternates to resolutions shall be filed and served under the same procedures, but no later than ten days before the date of the Commission meeting when the alternate is first scheduled for consideration (as indicated on the first page of the alternate). Replies to comments on resolutions or alternates to resolutions may be filed five days after comments are filed and shall be limited to identifying misrepresentations of law or fact contained in the comments of other parties. Replies shall not exceed five pages in length, and shall be filed and served as set forth above. Late-filed comments or replies to comments will not be considered.

(d) **Comments and Replies on Resolution Without "Party."** With respect to a resolution that would establish a rule or set a fee schedule but that lacks any "party," as defined in subsection (a)(9) of this rule, any person may file comments and replies to comments on the resolution, or on any alternate to the resolution, under the procedures of subsection (c) of this rule, and shall serve them in accordance with the instructions accompanying the notice of the resolution as an agenda item in the Commission's Daily Calendar.

(e) **Exemptions.** This rule does not apply to (i) a resolution or decision on an advice letter filing or uncontested matter where the filing or matter pertains solely to one or more water corporations as defined in Public Utilities Code Section 241, (ii) an order instituting investigation or rulemaking, (iii) a categorization resolution under Public Utilities Code Sections 1701.1 through 1701.4, or (iv) an order, including a decision on an appeal from the presiding officer's decision in an adjudicatory proceeding, that the Commission is authorized by law to consider in executive session. In addition, except to the extent that the Commission finds is required in the public interest in a particular case, this rule does not apply to the decision of the assigned Administrative Law Judge in a complaint under the expedited complaint procedure (Public Utilities Code Sections 311(f) and 1702.1).

(f) **Reduction or Waiver by Commission.** In an unforeseen emergency situation (see Rule 81), or in accordance with a stipulation pursuant to subsection (g) of this rule, the Commission may reduce or waive the period for public review and comment under this rule regarding draft decisions and alternates. In the following circumstances, the Commission may reduce or waive the period for public review and comment under this rule regarding draft decisions and may reduce but not waive the public review and comment period regarding alternates:

(1) in a matter where temporary injunctive relief is under consideration;

(2) in an uncontested matter where the decision grants the relief requested;

(3) for a decision on a request for review of the presiding officer's decision in an adjudicatory proceeding;

(4) for a decision extending the deadline for resolving adjudicatory proceedings (Public Utilities Code Section 1701.2(d));

(5) for a decision under the state arbitration provisions of the federal Telecommunications Act of 1996;

(6) for a decision on a request for compensation pursuant to Public Utilities Code Section 1801 et seq.;

(7) for a decision authorizing disclosure of documents in the Commission's possession when such disclosure is pursuant to subpoena;

(8) for a decision under a federal or California statute (such as the California Environmental Quality Act or the Administrative Procedure Act) that both makes comprehensive provision for public review and comment in the decision-making process and sets a deadline from initiation of the proceeding within which the Commission must resolve the proceeding.

(9) for a decision where the Commission determines, on the motion of a party or on its own motion, that public necessity requires reduction or waiver of the 30-day period for public review and comment. For purposes of this subsection, "public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment. "Public necessity" includes, without limitation, circumstances where failure to adopt a decision before expiration of the 30-day review and comment period would place the Commission or a Commission regulatee in violation of applicable law, or where such failure would cause significant harm to public health or welfare. When acting pursuant to this subsection, the Commission will provide

such reduced period for public review and comment as is consistent with the public necessity requiring reduction or waiver.

(g) **Reduction or Waiver by Parties.** The parties may reduce or waive the provisions of this rule for public review and comment regarding decisions or alternates, where all the parties so stipulate.

Note: Authority cited: Section 1701, Public Utilities Code. Reference cited: Sections 311(e), 311(g), Public Utilities Code.

(END OF APPENDIX A)

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Response to Comments and Replies on Proposed Rules to Implement Provisions in SB 779

PART I: Response to Comments and Replies on OIR

AT&T Comments/Commission Responses

1. Add to proposed Rule 77.7(f) a provision to reduce or waive the review and comment period for any resolution relating to an advice letter filed by a nondominant interexchange carrier or competitive local exchange service provider. (Reply Comments, p. 2.)

   Response: Reject. A blanket exemption for an entire utility industry or major industry segment appears contrary to the intent of SB 779.

2. Oppose Greenlining's proposal to require that the Commission publish at its Internet site any draft resolution responding to an advice letter at least 45 days before voting on the resolution. (Reply Comments, pp. 2-3.)

   Response: Agree (no change necessary). See Response to Greenlining Comment #2.

3. Support Joint Energy Utilities' proposal to limit the comment process to parties rather than interested persons. (Reply Comments, p. 3.)

   Response: Reject. See Response to Joint Energy Utilities Comment #4.

4. Support commenters proposing to allow reply comments on draft resolutions. (Reply Comments, p. 3.)

   Response: Agree. See Response to ORA Comment #1.

5. Support requiring Docket Office to administer the filing of comments on draft resolutions. (Reply Comments, p. 3.)

Response: Reject. See Response to Roseville Comment #3.

Greenlining Comments/Commission Responses

1. Amend Rule 77.1 to require that, simultaneous with service on parties, a proposed decision be published at the Commission's Internet site. (Opening Comments, p. 4.)

   [TURN supports; GTE opposes.]

   Response: Reject. This suggestion exceeds the scope of this rulemaking. The Commission is now working to expand the features of its Internet site. To the extent such expansion would require additions or amendments to the Rules of Practice and Procedure, the Commission would consider those rules changes in a separate rulemaking.

2. Amend proposed Rule 77.7 to indicate that at least 45 days before adopting a resolution disposing of an advice letter, the Commission will publish the draft resolution on its Internet site; also, explore ways to "push" proposed resolutions to a list of previously identified interested parties via e-mail or similar technologies. (Opening Comments, p. 4.)

   [TURN supports; Pacific Bell supports with modification; AT&T and GTE oppose.]

   Response: Reject. The proposed 45-day advance publication of draft resolutions would significantly lengthen the statutory period for public review and comment. The Commission does not believe that resolutions, as a class, need a substantially longer period for public review and comment than other types of Commission decisions. See also Response to Greenlining Comment #1.

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GTE Comments/Commission Responses

1. Add to proposed Rule 77.7(f) a provision to waive public review and comment for all resolutions related to advice letter filings by all telecommunications service providers (and modify proposed Rules 77.7(a)(i), 77.7(a)(9), 77.7(c), and 77.7(d) to conform with this addition). (Opening Comments, pp. 4, 6-9.)

   [Pacific Bell supports; AT&T supports in part and opposes in part; MWCOM, ORA, and TURN oppose.]

   Response: Reject. Such a waiver would be substantially overbroad. See also Response to AT&T Comment #1.

2. Add to proposed Rule 77.7(f) a provision to waive public review and comment for resolutions responding to advice letters implementing a specific prior Commission decision. (Opening Comments, pp. 8-9.)

   [Pacific Bell supports; TURN opposes]

   Response: Reject. Where a Commission decision gives very precise instructions to a utility, the utility's implementing advice letter typically would not be protested at all, or the protest could be disposed of by Commission staff, in both of which cases there would not need to be a resolution, and hence no delay, as feared by GTE. On the other hand, where a Commission decision gives broad policy direction, the implementing advice letter may fairly (and appropriately) raise specific issues on how to apply the policy direction. In these instances, public review and comment on the draft resolution, as contemplated by SB 779, is both necessary and appropriate.

3. Change definition of "party" in proposed Rule 77.7(a)(6) to state that for resolutions on advice letters, a "party" is one who has filed a meritorious protest or response. (Opening Comments, pp. 6-7.)

   Response: Reject. A protest whose rejection would be ministerial (e.g., it is based on a mathematical error by the protestant or is otherwise defective on

its face) would be subject to disposition by Commission staff, and there would be no need for a Commission resolution (and hence no need for further public review and comment) where an advice letter is protested solely on such basis. If, on the other hand, an exercise of discretion is necessary to determine whether a protest is "meritorious," the Commission itself would have to address the substance of the protest, and the draft resolution presented for the Commission's consideration should be subject to public review and comment.

4. Clarify intended application of provisions in proposed Rule 77.7(d), and the related definition in proposed Rule 77.7(a)(9), regarding resolutions without "party." (Opening Comments, pp. 7-8.)

   Response: No change necessary. See generally OIR at pp. 4-5. The Commission has used "resolution" to label Commission orders issued outside formal proceedings. Formerly, there were no "parties" to resolutions. However, SB 779 requires that, prior to the Commission's voting on a decision (including for these purposes, a resolution), the decision "be served on parties." Section 311(g)(1). In implementing SB 779, the Commission has described how it will identify "parties" to resolutions where such identification is reasonably feasible. Proposed Rule 77.7(d) addresses foreseeable situations involving a resolution where there may be no close analogy to "party" as the term is used in relation to formal proceedings. See also Response to GTE Comment #5.

5. Proposed Rule 77.7(d), regarding resolutions without "parties," seems internally inconsistent with its operative definition, i.e., proposed Rule 77.7(a)(9). (Opening Comments, p. 8.)

   Response: No change necessary. The Commission does not perceive any inconsistency. For example, a resolution establishing a rule or setting a fee schedule may not have any "parties" as contemplated in proposed Rule 77.7(a)(9), either because Commission staff preparing the draft resolution for Commission consideration had not solicited prior comment or had received no response to the solicitation. In such instances, the Commission believes that under the letter and spirit of SB 779, the draft resolution should still be subject to a public review and comment period.

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6. When considering "regulatory efficiency," the first SB 779 criterion for possible waiver or reduction of the public review and comment period, the Commission should note issues raised and proposals submitted regarding the handling of advice letters in the Commission's rulemaking on that subject (R.98-07-038). (Opening Comments, p. 2.)

   Response: Agree (no change necessary). The Commission is aware of the interplay between this OIR and the advice letter rulemaking, and is reviewing the records in both proceedings to ensure policy consistency.

7. When considering "the need for adequate prior notice and comment," the second SB 779 criterion for possible waiver or reduction of the public review and comment period, the Commission should note the opportunities for notice and comment already provided for advice letters. (Opening Comments, p. 3.)

   Response: Agree (no change necessary). However, the focus of review and comment under SB 779 is not primarily on the request for Commission action (e.g., an advice letter, application, or complaint) but on the Commission's proposed disposition of such requests. Thus, the Commission's proposed decision or resolution may need public review and comment even where there has been opportunity for review and comment earlier in the process.

8. The telecommunications market is highly competitive. Undue delay in allowing a tariff to go into effect is harmful to competition. (Opening Comments, pp. 3-4.)

   Response: Agree (no change necessary). To smooth the handling of advice letters and other tariff-related filings, the Commission is closely coordinating this rulemaking with its rulemaking on advice letters. However, the presence of competition is not determinative in considering limitations on public review and comment. For example, there is little if any competition among water utilities, yet it is decisions affecting this industry that the Legislature broadly exempted from public review and comment under SB 779. Furthermore, not all sectors of the telecommunications industry are fully

competitive. Moreover, reasonable people have sometimes disagreed over the correct implementation of some of the Commission's policy directives on competition. In these circumstances, public review and comment on draft Commission orders may alert the Commission to ambiguities or policy implications that might otherwise have to be addressed in later rulemakings or enforcement proceedings. In short, there is no clear correlation between the degree of competition that exists in a utility industry and the need for public review and comment regarding Commission decisions that relate to that industry.

9. Proposed changes to Rule 77.1 provide beneficial clarification and appear reasonable. (Opening Comments, p. 5.)

   Response: Agree (no change necessary).

10. Proposed changes to Rule 77.2 lighten regulatory burdens and are reasonable. (Opening Comments, p. 5.)

    Response: Agree (no change necessary).

11. Proposed changes to Rule 77.6 provide beneficial clarification. (Opening Comments, pp. 6-7.)

    Response: Agree (no change necessary).

12. Use of electronic media in conjunction with advice letter process is beyond the scope of this rulemaking. (Reply Comments, pp. 3-4.)

    Response: Agree (no change necessary).

Joint Energy Utilities Comments/Commission Responses

1. Modify the proposed amendment to existing Rule 77.6(a) such that, as modified, the definition of "alternate" would include substantive revisions to

proposed decisions prepared by the author of the proposed decision. (Opening Comments, pp. 2-3.)

Response: Reject. The Commission has long used "alternate" to refer to a revision not prepared or accepted by the presiding officer (or Commission division in the case of a resolution) responsible for the decision to be revised. The Commission believes this is a common-sense interpretation. The California Supreme Court has summarily denied a petition for writ of review premised, in part, on a challenge to this interpretation. (See Petition of Prime Time Shuttle International, Inc., S. Ct. Docket S057620, denied by minute order dated March 12, 1997.)

2. Modify the proposed amendment to existing Rule 77.6(a) to add a requirement that decisions or alternates, before issuance, be "complete" (i.e., with all list attachments, appendices, reports, or tables included). (Opening Comments, pp. 3-4.)

   Response: Reject. The Commission follows this practice wherever feasible, but there may be circumstances where some information is not available or where the Commission expressly intends to develop additional information in a later phase of the proceeding or in a compliance filing. To the extent a commenter believes a decision or alternate is "incomplete," the commenter may so note and explain the materiality of the omission.

3. Modify the proposed amendment to existing Rule 77.6(a) to prohibit Administrative Law Judges from modifying their proposed decisions once issued unless the modification (1) is not substantive, or (2) is necessary to incorporate a comment on the proposed decision. (Opening Comments, p. 4.)

   [Pacific Bell supports.]

   Response: Reject. The suggestion runs counter to various provisions recently enacted in SB 960. For example, either the assigned Commissioner or the assigned Administrative Law Judge can serve as "principal hearing officer" in ratesetting proceedings (Pub. Util. Code Section 1701.3(a)) or as presiding officer in adjudicatory proceedings (Pub. Util. Code Section 1701.2(a)). In

quasi-legislative proceedings, the assigned Administrative Law Judge provides "assistance" to the Assigned Commissioner. Whether or not presiding, the Administrative Law Judge assigned to a proceeding attends all hearings and prehearing conferences and provides decisionmaking support to the Commission for that proceeding. The Joint Energy Utilities' proposal to limit the timing and nature of that decisionmaking support is unprecedented. There is no analogous limitation on the Commission's other advisory personnel and no basis for the proposal in the Public Utilities Code.

4. Modify proposed Rule 77.7(c) to limit the comment process to all parties rather than interested persons. (Opening Comments, pp. 5-6.)

   [AT&T and GTE support.]

   Response: Reject. Advice letters and other matters that the Commission addresses through resolutions differ from applications and other formal proceedings. Examples of such differences include, typically, less arduous notice requirements, briefer response periods, and no public participation hearings or prehearing conferences when the Commission is dealing with an informal matter. In fact, as noted at page 4 of the OIR, informal matters do not have "parties" in a strict sense of the term. Consequently, the proposed rule is relatively liberal in accepting comments by interested persons. The Commission believes its approach reflects the intent of the Legislature when providing in SB 779 for expanded public review and comment regarding Commission decisions.

5. Modify proposed Rule 77.7(c) to permit replies to comments (so long as such replies are limited in scope, as is the case with reply comments regarding proposed decisions), and adjust filing deadlines accordingly. (Opening Comments, pp. 6-7.)

   [AT&T and GTE support.]

   Response: Agree. See Response to ORA Comment #1.

6. In proposed Rule 77.7(f), it is unclear what the Commission means by the limiting phase "under this Rule." (Opening Comments, p. 7.)

   Response: No change necessary. Throughout Article 19, and elsewhere in the Rules of Practice and Procedure, the Commission observes the following usages: When a rule refers to another rule, the other rule is cited by number (as when Rule 77.5 refers to Rule 77.2). When a rule refers to another part of the same rule, the other part is cited as a subsection (as when Rule 77.7(c) refers to subsection (g) of this Rule). When a rule refers to itself in its entirety, the rule is cited as "this Rule." Thus, "under this Rule" in Rule 77.7(f) means Rule 77.7 in its entirety.

7. It is unclear whether subsection (f) of proposed Rule 77.7 applies only to draft resolutions or also to draft decisions and alternates in more formal proceedings. (Opening Comments, p. 7.)

   Response: No change to proposed Rule necessary; the heading to Article 19 of the Rules of Practice and Procedure, which heading is not itself part of the rules, will be revised to better describe the content of Article 19 as amended. The definitions in subsection (a) of proposed Rule 77.7 are clear. Proposed Rule 77.7 has procedures for comment on decisions, including resolutions, issued pursuant to Public Utilities Code Section 311(g)(1). Existing rules (Rules 77.1-77.6) have procedures for comment on "proposed decisions" issued pursuant to Public Utilities Code Section 311(d). By design, the new and amended rules use "draft" solely in connection with Section 311(g)(1) decisions, and "proposed" solely in connection with Section 311(d) decisions. Consequently, the procedures in Rule 77.7(f) are not redundant, even though some of those procedures parallel those applicable to proposed decisions. As noted in the OIR, the Commission is relying, wherever possible, on existing procedures. However, those procedures do not work for resolutions, which is the reason why most of the new procedures concern resolutions.

8. Modify proposed Rule 77.7(f) so that the Commission may reduce or waive the review and comment period only for situations where SB 779 expressly provides for such waiver or reduction. (Opening Comments, pp. 7-9.)

Response: Reject. SB 779 expressly authorizes the Commission to establish, by rule, additional categories of decisions (besides those categories spelled out in the statute) that are subject to reduction or waiver. The proposed rule describes seven such additional categories. The OIR, at pages 6-8, and D.99-11-052, at pages 8-10, provide both policy and legal justification indicating why these additional categories satisfy the statutory criteria in Section 311(g)(3), namely, (1) regulatory efficiency and (2) adequate prior notice and comment on Commission decisions.

MWCOM Comments/Commission Responses

1. Public review and comment should be implemented for resolutions on advice letter filings, including those filed by telecommunications service providers, and waiver of the review and comment period should not be automatic. (Reply Comments, pp. 1-4.)

   Response: Agree (no change necessary).

2. Comments on a resolution should not be limited to those issues raised in protests regarding the underlying advice letter; among other concerns, the resolution itself may deal with an issue in such a way as to raise a different issue. (Reply Comments, pp. 4-5.)

   Response: Agree (no change necessary).

3. There are "additional categories" of decisions for which waiver or reduction of the review and comment period may be appropriate. An example of such a category is a decision rendered pursuant to the Expedited Dispute Resolution Procedure to which the parties have stipulated in R.97-10-016. (Reply Comments, pp. 5-8.)

   Response: Agree in part and reject (without prejudice) in part. Agree that there are additional categories of decisions for which the Commission may waive or reduce the review and comment period. (See Rule 77.7(f)(3)-(9).) No change necessary.) However, it is premature to decide whether the category

of decision cited by MWCOM is such a category. R.97-10-016 is still in progress; the present rulemaking is not an appropriate forum for considering how public review and comment should or should not be incorporated in the expedited procedure under development in R.97-10-016.

ORA Comments/Commission Responses

1. Modify proposed Rule 77.7(c) to permit reply comments on draft resolutions and alternates to resolutions. (Opening Comments, pp. 2-3.)

   [AT&T and GTE support.]

   Response: Agree. As adopted in today's decision, Rule 77.7(c) allows reply comments on draft resolutions and alternates.

2. The scheduling treatment for alternates to resolutions, which mirrors the scheduling treatment in Rule 77.6(f) for alternates to proposed decisions, should be formalized by explicit inclusion in proposed Rule 77.7. (Opening Comments, pp. 3-4.)

   Response: Reject. As noted in the OIR at page 5, the Commission expects that in general it will serve any alternate resolution at least 14 days before taking action on the alternate and the resolution to which the alternate relates. However, the Commission will not necessarily do so in every such instance. The Commission, in any event, will observe the statutory minimum period (10 days) relating to service and consideration of alternates. See Public Utilities Code Sec. 311(e).

3. Oppose GTE's proposal to waive public review and comment for all resolutions related to advice letters filed by telecommunications service providers. (Reply Comments, pp. 1-2.)

   Response: Agree (no change necessary). See Response to GTE Comment #1.

4. Oppose Pacific Bell's proposal to waive or reduce review and comment period when the Commission deems that the protests to an advice letter are frivolous. (Reply Comments, pp. 2-3.)

   Response: Agree (no change necessary). See Response to Pacific Bell Comment #3.

5. Support TURN's proposal to expand, where appropriate, the page limit on comments. (Reply Comments, pp. 3-4.)

   Response: Reject (no change necessary). See Response to TURN Comment #4.

Pacific Bell Comments/Commission Responses

1. To avoid harm to consumers, the Commission must minimize any added delay to the advice letter process when implementing the intent of the Legislature, in SB 779, to subject Commission decisions on advice letters to public review and comment. (Opening Comments, p. 1.)

   [GTE supports.]

   Response: Agree that undue delay should be avoided (no change necessary). However, the Commission does not believe that public review and comment regarding Commission decisions is harmful to consumers. The proposed rules are consistent both with the intent of the Legislature and with reforms to the advice letter process proposed in R.98-07-038. See also Response to GTE Comment #1.

2. Proposed Rule 77.7(f) should provide that waiver or reduction of the review and comment period is automatic if the specified circumstances are present. (Opening Comments, p. 2.)

   [MWCOM opposes.]

Response: Reject. The Pacific Bell proposal is unclear as to whether there would be an "automatic" waiver, or a reduction, and if the latter, for what period. In practice, whenever any of the circumstances specified in proposed Rule 77.7(f) occur, the Commission plans to give notice if it does not waive the public review and comment period. Such notice may provide, consistent with SB 779, a full or reduced comment period.

3. Waive or reduce the review and comment period on a draft resolution responding to an advice letter if the protests to the advice letter are deemed frivolous by the Commission. (Opening Comments, p. 2.)

   [GTE supports; ORA opposes.]

   Response: Reject. See Response to GTE Comment #3.

4. The scope of comments on draft resolutions responding to advice letters should be limited to those issues raised in protests to the underlying advice letter. (Opening Comments, p. 3.)

   [GTE supports.]

   Response: Reject. The draft resolution may itself raise issues that could not fairly have been anticipated from the advice letter alone.

5. Allow reply comments on draft resolutions and alternates to draft resolutions. (Opening Comments, p. 7.)

   [AT&T and GTE support.]

   Response: Agree. See Response to ORA Comment #1.

6. Add a definition of "resolution." (Opening Comments, pp. 3-4.)

   Response: Reject. The proposed rules are internally consistent, and consistent with SB 779, in treating resolutions as the subset of Commission decisions in

which the Commission addresses and disposes of matters that come before it outside of formal proceedings.

7. Support Roseville's suggestion regarding the schedule for reply comments on draft resolutions. (Reply Comments, p. 1.)

   Response: Rule 77.7(c), as adopted, allows replies to comments on a draft resolution; the schedule for such replies parallels existing Rule 77.5 (replies to comments on proposed decisions).

8. Support GTE's proposals for waiving review and comment period for all draft resolutions (1) responding to advice letters filed by telecommunications service providers, and (2) responding to advice letters implementing prior Commission decisions. (Reply Comments, p. 2.)

   Response: Reject. See Response to GTE Comments #1, 2.

9. Support Joint Energy Utilities' proposal that assigned Administrative Law Judges not be permitted to modify their proposed decisions after issuance except where such modification is not substantive or is necessary to incorporate a comment on the proposed decision. (Reply Comments, p. 2.)

   Response: Reject. See Response to Joint Energy Utilities Comment #3.

10. Support Greenlining's proposal that the Commission publish draft resolutions at its Internet site before voting on them, but require such publication only 30 days before voting, not 45 days. (Reply Comments, p. 3.)

    Response: Reject. See Response to Greenlining Comment #2.

11. Support Roseville's proposal that the Commission's Docket Office administer the filing of comments on draft resolutions. (Reply Comments, p. 3.)

    Response: Reject. See Response to Roseville Comment #3.

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Roseville Comments/Commission Responses

1. Modify proposed Rule 77.7(c) to allow for reply comments on draft resolutions; suggest schedule for such reply comments. (Opening Comments, pp. 2-4.)

   [AT&T, GTE, and Pacific Bell support.]

   Response: Agree. See Response to ORA Comment #1. Adopted schedule parallels existing Rule 77.5 (replies to comments on proposed decisions).

2. Amend existing second paragraph of Rule 77.2 to allow requests for extension of time to comment on a proposed decision to be made orally or by letter to an Administrative Law Judge (under Rule 48) rather than requiring a noticed motion. (Opening Comments, pp. 2, 4-5.)

   [GTE opposes.]

   Response: Reject. The Commission has not proposed to change the long-standing rule regarding extensions of time for comment on proposed decisions. Requiring a motion in these circumstances is appropriate in order to put others on notice of the request for extension. Prompt notice is particularly important, given the tight time constraints for proposed decisions. Requests for extension of time to comment on a draft resolution are governed by proposed Rule 77.7(c), not Rule 77.2.

3. Modify proposed Rule 77.7(c) to require the Commission's Docket Office to administer the filing of comments on draft resolutions. (Opening Comments, pp. 2, 5.)

   [AT&T and Pacific Bell support.]

   Response: Reject. The Docket Office administers filing of documents only in the Commission's formal proceedings. Historically, any filing in connection with a resolution has been administered by the Commission division that prepared the resolution. The proposed Rule 77.7(c) would continue this

practice. In addition, historically, most resolutions have responded to advice letters. The Commission division reviewing an advice letter is also the place within the Commission where protests and replies to protests on the advice letter are filed. It would be confusing and potentially disruptive to have part of the filings relating to an advice letter lodged with a Commission division and another part of such filings lodged with the Docket Office. Finally, the Docket Office currently has neither the staff nor the facilities to undertake additional filing responsibilities.

Smaller Independent LECs Comments/Commission Responses

1. Although Roseville and Smaller Independent LECs filed separately, their comments are substantively identical. Accordingly, the Commission here incorporates by reference its summary of Roseville's comments and its responses.

TURN Comments/Commission Responses

1. Add a definition to proposed Rule 77.7(a) such that a "party" to an advice letter implementing a prior Commission decision would include any party to the proceeding in which the prior Commission decision was issued. (Opening Comments, pp. 1-2.)

   Response: Reject. A party to the underlying proceeding can ensure that it will receive the draft resolution by indicating its position on the implementation advice letter (either filing a protest if the implementation proposal is faulty or a response if the proposal would correctly implement the Commission decision). Note that a response supportive of the advice letter may be useful to alert the Commission to interpretive issues and thus assist the Commission division responsible for preparing the draft resolution.

2. Publish draft resolutions and alternates on the Commission's Internet site. (Opening Comments, pp. 2-3.)

Response: Reject. See Response to Greenlining Comment #1.

3. Allow parties to serve by e-mail their comments on draft resolutions and alternates. (Opening Comments, p. 3.)

   Response: Reject. This suggestion exceeds the scope of this rulemaking. Note, however, that the Commission already endorses e-mail service (see Rule 2.3(b)). The subject of utilization of the Internet for various purposes in connection with advice letters is under consideration in R.98-07-038.

4. The five-page limit on comments is adequate with respect to most Commission resolutions, but the Commission should expand the limit where appropriate (e.g., for unusually long resolutions). (Opening Comments, p. 3.)

   [ORA supports.]

   Response: Reject. Under proposed Rule 77.7(c), the Commission division that prepared the draft resolution may provide for longer comments, as needed.

5. Oppose GTE's proposal to waive public review and comment for all resolutions related to advice letters filed by telecommunications service providers. (Reply Comments, pp. 1-2.)

   Response: Agree (no change necessary). See Response to GTE Comment #1.

6. Support comments by Greenlining, ORA. (See Reply Comments, p. 1.)

   Response: See Responses to Greenlining Comments #1, 2; ORA Comments #1, 2, 3.

7. Oppose proposals by various utilities that for purposes of a draft resolution addressing an advice letter, "party" should be limited to the advice letter filer or someone who filed a "meritorious" protest. (Reply Comments, pp. 2-3.)

   Response: Agree (no change necessary). See Response to GTE Comment #3.

8. While TURN does not necessarily agree with Roseville and Smaller Independent LECs that comments on draft resolutions should be filed with the Docket Office, the Commission should make clear what the filing rules are. (Reply Comments, p. 3.)

   Response: Agree (no change necessary). The Commission expects that divisions issuing draft resolutions will continue to handle filings relating to those resolutions as the divisions have in the past. See also Response to Roseville Comment #3.

PART II: Response to Comments and Replies on Draft Decision of ALJ Kotz, Neeper Alternate, Bilas/Neeper Alternate, Duque Alternate, and D.99-11-052

In this part of Appendix B, we respond (with the exception noted below) to all comments received subsequent to the rounds of opening comments and replies solicited by the OIR itself. Where these later comments appear to repeat those received earlier, we refer back to our relevant response in Part I of Appendix B. We do not summarize or respond to comments (by TURN, the three energy utilities, and the City and County of San Francisco) regarding redlining since (1) the Commission did not propose a rule specific to redlining in the OIR, and (2) pursuant to D.99-11-052, the Commission is not taking up in this proceeding any rulemaking proposals on redlining.

Edison Comments/Commission Responses

1. Definition of "alternate" proposed in OIR is legally erroneous. (Comments on Draft Decision, pp. 2-5.)

   Response: Reject. SB 779 expressly refers to the Commission's listing of an item as an "alternate" on its public agenda. The Commission's use of that

term has at all times been consistent with the definition proposed in the OIR. See also Response to Joint Energy Utilities Comment #1 (Part I of Appendix B).

2. Decisions and Alternates should be "complete" when issued. (Comments on Draft Decision, pp. 5-6.)

   Response: Reject. See Response to Joint Energy Utilities Comment #2 (Part I of Appendix B).

3. Allow replies to comments on draft resolutions and alternates to draft resolutions. (Comments on Draft Decision, p. 6; Comments on D.99-11-052, p. 2.)

   Response: Agree. See Response to ORA Comment #1 (Part I of Appendix B).

4. Do not adopt any of the proposed additional categories of decisions subject to reduction or waiver of the period for public review and comment. (Comments on Draft Decision, pp. 7-8.)

   Response: Reject. See Response to Joint Energy Utilities Comment #8 (Part I of Appendix B).

5. Do not exempt from public review and comment a decision that incorporates changes from prior comment or prior alternate. (Comments on Bilas/Neeper Alternate, pp. 1-2; Comments on D.99-11-052, p. 2.)

   Response: Reject. The proposed rule is limited to substantive revisions that do "no more than make changes suggested in prior comments...or in a prior alternate...." Revisions of this type have already been subject to adequate public review and comment, and the public interest would not be well-served by delay for yet more public review and comment.

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GTE Comments/Commission Responses

1. Supports definition of "alternate" advocated in comments by energy utilities. (Comments on D.99-11-052, p. 1.)

   Response: Reject. See Response to Edison Comment #1.

2. Exempt from public review and comment a decision that incorporates changes from prior comment or prior alternate, provided that those changes had already been subject to public review and comment. (Comments on D.99-11-052, p. 2.)

   Response: Reject. Suggested qualifying language is not needed.

3. When issuing revisions to a decision, Commission should include cover sheet stating "REVISED FROM [insert date] VERSION." Suggestion is solely an internal Commission procedure, and need not be set forth in the Rules of Practice and Procedure. (Comments on D.99-11-052, pp. 2-3.)

   Response: Staff is continuing to work on identification procedures to more clearly mark changed text, pages, and entire versions of decisions. Agree that such identification procedures should not be adopted by rule.

ORA Comments/Commission Responses

1. Allow replies to comments on draft resolutions and alternates. (Comments on Draft Decision, pp. 1-2; Comments on Neeper Alternate, p. 2.)

   Response: Agree. See Response to ORA Comment #1 (Part I of Appendix B).

2. Prefers definition of "alternate" that would include changes made by the presiding officer. (Comments on Neeper Alternate, p. 1.)

   Response: Reject. See Response to Edison Comment #1.

3. Formalize by rule the scheduling treatment for alternates to resolutions. (Comments on Draft Decision, pp. 2-3.)

   Response: See Response to ORA Comment #2 (Part I of Appendix B).

PG&E Comments/Commission Responses

1. Plain language of SB 779 supports Joint Energy Utilities' definition of "alternate." (Comments on Draft Decision, pp. 2-3.)

   Response: Reject. The plain language of SB 779 refers to the Commission's usage in preparing its public agenda. "Alternate" as used by the Commission in so labeling an item on its public agenda is consistent with the definition proposed in the OIR and not with the definition advocated by the Joint Energy Utilities. See also Response to Edison's Comment #1.

2. Decisions and alternates should be "complete" when issued. (Comments on Draft Decision, pp. 3-4.)

   Response: Reject. See Response to Joint Energy Utilities Comment #2 (Part I of Appendix B).

3. Allow replies to comments on draft resolutions and alternates. (Comments on Draft Decision, pp. 4-5.)

   Response: Agree. See Response to ORA Comment #1 (Part I of Appendix B).

4. Decisions on requests for compensation and decisions authorizing disclosure of documents pursuant to subpoena should not be categorically subject to reduction or waiver of public review and comment. Requests for compensation sometimes generate significant opposition, while Commission decisions authorizing disclosure of, e.g., customer information or utility proprietary information should be subject to public review and comment except in unforeseen emergency situations. (Comments on Draft Decision, pp. 6-7.)

Response: Reject. For these two categories of decision, PG&E's argument essentially reiterates the Joint Energy Utilities' argument (in their Comment #8, summarized in Part I of Appendix B) that the Commission may reduce or waive comment only in those situations (such as emergencies or uncontested matters) where SB 779 expressly authorizes such reduction or waiver. These arguments would negate the Commission's authority, under SB 779, to establish additional categories of decisions subject to reduction or waiver of the comment period. With specific regard to decisions on compensation requests and on disclosure of documents pursuant to subpoena, the Commission concluded in the OIR (mimeo. at 6-7) that "waiver of the review and comment period will be appropriate for many, if not all, [such] decisions...." PG&E's argument does not undermine that conclusion. In the unusual case where public review and comment regarding such a decision may be appropriate, the rule adopted today would permit issuance of the decision for that purpose. See also Response to Joint Energy Utilities Comment #8 (Part I of Appendix B).

PG&E/Sempra Comments (filed jointly)/Commission Responses

1. Permit replies to comments on draft resolutions. (Comments on Bilas/Neeper Alternate, p. 1.)

   Response: Agree. See Response to ORA Comment #1 (Part I of Appendix B).

2. Support revisions to proposed Rules 77.6(g) and 77.7(g) to permit reduction or waiver of public review and comment regarding alternates. (Comments on Bilas/Neeper Alternate, p. 1.)

   Response: Agree. The proposed rules, with these revisions as set forth in D.99-11-052, are adopted in today's decision.

3. Support modifying the definition of "alternate" so as to include changes made by the presiding officer. (Comments on Bilas/Neeper Alternate, p. 1.)

   Response: Reject. See Response to Edison Comment #1.

4. Agree with general concept underlying reduction or waiver on account of "public necessity." (Comments on Bilas/Neeper Alternate, pp. 1-2.)

   Response: Agree. Proposed Rule 77.7(f)(9) adopted in today's decision.

PG&E/Sempra/Edison Comments (filed jointly)/Commission Responses

1. Support proposal to permit reply to comment on draft resolutions. (Comments on Neeper Alternate, pp. 1-2.)

   Response: Agree. See Response to ORA Comment #1 (Part I of Appendix B).

2. Support modifying the definition of "alternate" so as to include changes made by the presiding officer. (Comments on Neeper Alternate, pp. 1-2.)

   Response: Reject. See Response to Edison Comment #1.

Roseville Comments/Commission Responses

1. Allow reply to comment on draft resolutions. (Comments on Draft Decision, pp. 1-5; Comments on Neeper Alternate, p. 1.)

   Response: Agree. See Response to ORA Comment #1 (Part I of Appendix B).

2. Deadline for reply to comment should be five days after due date for opening comments, and not five days after date such comments are actually filed. (Comments on Neeper Alternate, pp. 1-2.)

   Response: Reject. The rule on reply to comment on resolutions (Rule 77.7(c)) sets a schedule parallel to that in existing Rule 77.5 regarding reply to comment on proposed decisions. This schedule is helpful to the Commission in responding to comments and replies, while it gives five days for parties to reply to comments in all situations.

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Sempra Comments/Commission Responses

1. Definition of "alternate" that would not subject to public review and comment the presiding officer's substantive revisions is legally erroneous. (Comments on Draft Decision, pp. 1-4.)

   Response: Reject. See Response to Edison Comment #1.

2. Allow reply to comment on draft resolution. (Comments on Draft Decision, pp. 1, 5-6.)

   Response: Agree. See Response to ORA Comment #1 (Part I of Appendix B).

TURN Comments/Commission Responses

1. Allow reply to comment on draft resolution. (Comments on Bilas/Neeper Alternate, p. 4.)

   Response: Agree. See Response to ORA Comment #1 (Part I of Appendix B).

2. Supports reduction of public review and comment period due to "public necessity," but does not support waiver of entire period in those circumstances. (Comments on Bilas/Neeper Alternate, pp. 3-4.)

   Response: Reject in part. Commission must retain ability to entirely waive public review and comment where "public necessity" dictates.

3. Legislature understood the term "alternate" in the sense used by the Commission when Legislature enacted SB 779; the energy utilities' contrary interpretation is not a correct reading of the statute. (Comments on Bilas/Neeper Alternate, p. 4.)

   Response: Agree. See also Response to Edison Comment #1.

4. A change made to a proposed decision in response to comment should not be circulated for comment yet again. (Comments on Bilas/Neeper Alternate, p. 4.)

   Response: Agree. Rule 77.6(a), as amended in today's decision, does not require further public review and comment on account of such a change. See also Response to Edison Comment #5.

PART III: Response to Comments on Revised Draft Decision of ALJ Kotz and 2nd Neeper Alternate

Edison Comments/Commission Responses

1. Definition of "alternate" in Revised Draft Decision would violate Public Utilities Code § 311(e). (Comments on Revised Draft Decision, pp. 2-3.)

   Response: Reject. See Response to Edison Comment #1 (Part II of Appendix B).

2. By adding (g) to proposed Rule 77.6, the 2nd Neeper Alternate would go far to resolve Edison's concerns regarding the definition of "alternate," however, public review and comment under (g) should be mandatory, not permissive. The word "generally" should be stricken from (g), and instead of the provisions in (g) for waiver or reduction of the comment period, the Commission should rely on existing Rule 87, under which the Commission may deviate from its procedures in particular instances. (Comments on 2nd Neeper Alternate, pp. 2-3.)

   Response: Reject. Public review and comment under proposed Rule 77.6(g) applies in situations not covered by SB 779, and consequently the provisions for waiver or reduction of the comment period are more liberal than those in the statute. It is appropriate to include such specific provisions in Rule 77.6(g), as otherwise the parties and other interested persons would not

have guidance from the Commission on how it will exercise its discretion to waive or reduce the comment period in these situations.

3. Adopting Edison's preferred definition of "alternate" would effectively reach the same result as the 2nd Neeper Alternate and would be less confusing. (Comments on 2nd Neeper Alternate, pp. 3-4.)

   Response: Reject. The definition of "alternate" adopted in today's decision, consistent with both the Revised Draft Decision and the 2nd Neeper Alternate, properly construes SB 779 and furthers the public policies underlying the legislation.

PG&E Comments/Commission Responses

1. Limiting "alternate" to a substantive change not suggested in prior comments would effectively remedy potential problems that adopting PG&E's preferred definition (i.e., one that would also define a presiding officer's revision as an "alternate") might create. (Comments on Revised Draft Decision, pp. 2-3.)

   Response: Reject in part. The Commission agrees that substantive changes suggested in prior comments are not alternates under SB 779 (no change necessary). However, the definition of "alternate" should be consistent with SB 779; a more inclusive definition (such as PG&E proposes) would needlessly constrain the Commission in its efforts to bring proceedings to a timely conclusion.

2. PG&E prefers the more inclusive definition of "alternate" circulated for comment by D.99-11-052, but if the choice is between the approach of the Revised Draft Decision and that of the 2nd Neeper Alternate, PG&E prefers the latter, except that PG&E believes the provisions requiring a public review and comment period for substantive revisions incorporating changes suggested in prior comments could be deleted. (Comments on 2nd Neeper Alternate, pp. 1-2.)

Response: The rules adopted in today's decision appropriately implement public review and comment under SB 779, with due recognition of the policies underlying that statute.

Sempra Comments/Commission Responses

1. Use of "generally" in proposed Rule 77.6(g) generates uncertainty. (Comments on 2nd Neeper Alternate, p. 2.)

Response: Reject. The term "generally" is used to signal the more liberal provisions in Rule 77.6(g) for waiver or reduction of the comment period, as compared to those applicable to "alternates." See also Response to Edison Comment #2 (Part III of Appendix B).

2. The 2nd Neeper Alternate and the Revised Draft Decision define "alternate" too narrowly in excluding revisions by a presiding officer and changes that merely incorporate changes suggested in prior comments or in a prior alternate. (Comments on 2nd Neeper Alternate, p. 2.)

Response: Reject. See Response to Edison Comment #1 and #5) (Part II of Appendix B.)

3. The Commission's "historical usage" of "alternate" would be a legitimate tool for interpretation of SB 779 only if the statute provided in its text a formulation of the purported "historical usage." (Comments on 2nd Neeper Alternate, p. 3.)

Response: Reject. As explained in D.99-11-052, Public Utilities Code § 311 clearly refers to the Commission's practice in listing "alternates" on its public agenda. This reference predates SB 779 and is not amended by that statute.

4. SB 779 can and should be harmonized with SB 960. (Comments on 2nd Neeper Alternate.)

   Response: Agree. No change necessary, as the rules adopted in today's decision accomplish this.

(END OF APPENDIX B)