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Decision 99-11-052 November 18, 1999

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 PROPOSING CHANGES TO ORIGINAL PROPOSAL FOR NEW AND AMENDED RULES ON PUBLIC REVIEW AND COMMENT

Introduction

In this proceeding, we have proposed and received several rounds of comment on amendments to our Rules of Practice and Procedure. The amendments will implement provisions of Senate Bill (SB) 779 (Calderon) (Ch. 886 of Stats. 1998), which make new requirements for public review and comment regarding certain of our decisions.

On July 14, 1999, the assigned administrative law judge (ALJ) issued a draft decision for our consideration. If we approve his draft decision, we would adopt the amendments as set forth in our original proposal.

Five parties commented on the ALJ's draft decision.[1] We have reviewed their comments, and we have decided to propose several substantive changes (described below) to the amendments as originally proposed. Because these are

[1] The parties commenting on the ALJ's draft decision are: Roseville Telephone Company; the Commission's Office of Ratepayer Advocates (ORA); and three energy utilities, namely, Pacific Gas and Electric Company, Sempra Energy, and Southern California Edison Company.

substantive changes, we give parties the opportunity to comment further. We also propose two changes that we believe to be nonsubstantive but that parties may also address if they wish. All these changes are reflected in full in the Appendix to today's decision.

Definition of "Alternate"

The three energy utilities have commented throughout this proceeding that our proposed amendment to Rule 77.6(a) misinterprets Pub. Util. Code § 311(e).[2] The statute says, in part, that the Commission must serve on the parties "[a]ny item appearing on the ...public agenda as an alternate item to" proposed and certain other decisions, as set forth in Pub. Util. Code §§ 311(d) and 311(g). Pursuant to § 311(e), the Commission also must adopt rules governing review, comment, and rescheduling of the "item" following service of the "alternative item" on all parties. The Commission met this requirement in 1995 through the adoption of Rule 77.6. The controversy today concerns our proposed amendment to Rule 77.6(a) to clarify "alternate" as we had defined the term in 1995.

Here is the proposed amendment from our order instituting this rulemaking (new language is underlined; language to be deleted is stricken through):

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

[2] The three energy utilities earlier submitted joint comments, but they commented separately regarding the ALJ's draft decision. Whether commenting separately or jointly, they take the same view regarding the definition of "alternate."

(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.~~

It is specifically the new (underlined) language to which the three energy utilities object. They argue strenuously that "alternate" has no relation to the author of a revision: Any revision that is substantive should be considered an "alternate" for purposes of § 311(e). Their reading of § 311(e) attaches no significance to the statute's language, mentioned earlier, regarding "[a]ny item appearing on the commission's public agenda as an alternate item." As we explain below, we read this language as referring to the Commission's practice regarding alternates when § 311(e) was enacted.

At the time that the term "alternate" was enacted into the Public Utilities Code, 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.[3] In implementing the statutory term "alternate," the Commission followed this established practice, which the Commission

[3] In other words, the presiding officer's revision is not an alternate to the decision being revised, it supersedes that decision.

believes is a reasonable interpretation of the statute. The proposed amendment to existing Rule 77.6(a) would clarify that rule by making explicit the established practice.

However, the three energy utilities argue that the statutory term "alternate" refers, in essence, to any major revision to a proposed decision, even if the author of the revision is the presiding officer, and even if the revision does nothing more than incorporate a comment by a party on the proposed decision. Our adoption of the energy utilities' interpretation frequently would lead to unnecessary delay in the case of noncontroversial revisions, and to repetition of arguments already made in the case of controversial revisions. Nevertheless, the energy utilities' interpretation is a plausible reading of "alternate" in § 311(e), insofar as their interpretation is consistent with the general intent of the statute to "sunshine" major changes to previously distributed agenda items.

We have decided to propose another amendment to existing Rule 77.6(a) to incorporate the three energy utilities' interpretation of "alternate." After further comment, and due consideration, we will adopt either the amendment that we originally proposed or the amendment set forth in today's decision.

Under any reading of SB 779, we believe that the Legislature intended us to reach finality in our decision-making process in a timely and predictable manner. The statute should not be construed in a way that would require us to allow further rounds of review and comment when the only change we are making to a decision is to incorporate commenters' suggestions or language that previously had been subject to public review and comment. Thus, we also propose to add the following sentence 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."

In addition, we propose to repeal Rule 77.6(b)[4] This subsection sets forth a process whereby an individual Commissioner would determine whether a particular revision to a proposed decision would be considered substantive for purposes of Rule 77.6. The process is strictly internal to the Commission, and thus does not belong in the Commission's Rules of Practice and Procedure. Moreover, the process is unduly rigid. Accordingly, repeal of the subsection would remove extraneous matter from the Commission's rules and allow the Commission's internal processes to develop as circumstances and experience dictate.

Reply Comments on Resolutions

Under proposed Rule 77.7(c) and (d), the Commission would allow comments, but not reply comments, regarding resolutions issued for public review and comment. The proposed rule also would authorize the Commission division responsible for issuing a draft resolution to vary the comment procedure for purposes of that particular resolution; such authority would encompass allowing reply comments in appropriate instances.

All five parties commenting on the ALJ's draft decision find fault with this proposal. Many additional parties that commented earlier also urge us to allow reply comments on resolutions. In general, these parties say that, even though resolutions deal with less controversial matters than decisions, there will be occasions where reply comments are appropriate. On these occasions, both time and effort would be saved if there were no requirement to get prior permission before submitting reply comments. Also, several parties believe that proposed

[4] Other subsections in Rule 77.6 would be appropriately recodified.

Rule 77.7(c) should be clarified if the Commission intends that Commission divisions have authority to allow reply comments under the rule.

On further reflection, we have concluded that we should allow reply comments on resolutions. The weight of opinion favors that conclusion. In addition, whatever efficiencies might be gained by generally not allowing reply comments likely would be lost in the scramble that would result in those instances where the need for reply comments becomes clear only late in the public review period. We therefore revise our proposed Rule 77.7(c) and (d) to allow reply comments.

Nonsubstantive Change to Rule 77.1

Our existing Rule 77.1 concerns preparing and filing a proposed decision. We proposed originally to amend the rule to reflect the fact that assigned Commissioners as well as assigned ALJs now prepare proposed decisions. We also proposed originally to delete the phrase "After discussion with the assigned Commissioner," since that phrase makes no sense when the assigned Commissioner is the person filing the proposed decision. We did not intend, however, to suggest any change to our practice where the assigned ALJ is the person filing the proposed decision. To clarify, we now propose not to delete the phrase we just quoted but instead to enclose the phrase in parentheses and move the phrase, so that the second sentence of the first paragraph would read as follows:

> "The 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."

Reduction or Waiver of Comment Period for Alternates

For alternates to proposed decisions (see § 311(d) and (e)), our current Rule 77.6(g) (which would be recodified due to the repeal of Rule 77.6(b) discussed earlier) does not authorize reduction or waiver of the public review and comment period upon the stipulation of all parties. New Rule 77.7(g), as originally proposed, would expressly preclude such reduction or waiver in the case of alternates to decisions covered by § 311(g). It is possible to read subsections (d), (e), and (g) of § 311 as barring this kind of stipulated reduction or waiver. We question, however, whether this reading makes sense as a matter of law or policy. Accordingly, for reasons discussed below, we propose an amendment to recodified Rule 77.6(f), and an alternative version of new Rule 77.7(g), under which we could reduce or waive the comment period for alternates upon the stipulation of all the parties.

As a matter of law, we note that the Legislature, in § 311(g)(3), has allowed us to enlarge upon the statutory categories of "decisions" that are subject to reduction or waiver of the public review and comment period. We invite comment on whether this provision, or other provisions of SB 779, can be construed as authorizing us to adopt these amendments to allow stipulations to reduce or waive the public review and comment period for alternates.

As a matter of policy, we see no reason to wholly preclude a stipulated waiver or reduction of the comment period on alternates, particularly where the same parties are expressly empowered by the same statute to stipulate to waiver or reduction of the comment period for the original decision. So long as all parties stipulate, there is no obvious interest served by the delay inherent in a further public review and comment period. We invite comment on these policy considerations.

For similar reasons, the Commission should be able to reduce the comment period for alternates, even in the absence of a stipulation by all of the parties. For example, an alternate may relate to a decision that was itself subject to a reduced comment period. There is no obvious interest served by lengthening the comment period as a proceeding approaches its end, particularly where, as generally in the case of alternates, the parties have had prior opportunities to comment on a proposed or draft decision. Also, some proceedings have so many parties that even an informal canvas is infeasible under severe time constraints. In such proceedings, the intent of SB 779 is better served by immediately announcing a reduced period for public review and comment. Accordingly, we solicit comment on proposed changes to recodified Rule 77.6(f) and new Rule 77.7(f), under which the Commission could reduce but not waive the comment period for alternates, even if all parties do not so stipulate.

Reduction or Waiver of Comment Period due to Public Necessity

The Commission occasionally confronts circumstances that may not qualify as an "unforeseen emergency situation" under § 311(g)(2) but that clearly compel a decision sooner than the full statutory period for public review and comment. For example, for lack of timely authorization or other required direction from the Commission, a regulatee may be unable to comply with a legal deadline and consequently face fines or other sanctions for noncompliance. Lack of timely action by the Commission could also harm public welfare, as we have seen recently.[5]

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[5] Earlier this year, the Federal Energy Regulatory Commission (FERC) approved the California Power Exchange's (PX) proposal to offer block forwards in the electricity market as a hedging opportunity to prevent or mitigate summer prices spikes. In order to participate in the program once the FERC approval was obtained by the PX, the regulated utilities had to file advice letters with the Commission. These advice letters

Footnote continued on next page

We therefore propose, as an additional category of decision subject to reduction or waiver of the public review and comment period, those decisions where "public necessity" requires reduction or waiver. In putting forward this concept, we are aware of the need to establish sufficiently rigorous standards for its implementation. We believe our proposed rule contains such standards. Also, under our proposed rule, we would allow a reduced period for public review and comment wherever possible. We believe this concept to be consistent with the letter and spirit of SB 779, but we would also welcome suggestions from the parties so that the rule may be narrowly crafted to accomplish its intent.

Reduction or Waiver Pursuant to Proposed Rule 77.7(f)(8)

We want to add a further example to our proposed Rule 77.7(f)(8). This new rule, as originally proposed, would allow us to reduce or waive the public review and comment period for statutes that both provide comprehensively for such review and comment and set a deadline by which the Commission must resolve the proceeding. We cited as an example of such a statute the California Environmental Quality Act. However, this very rulemaking reminds us of another important example, namely, proceedings in which we consider changes to our Rules of Practice and Procedure. These proceedings are conducted under the Administrative Procedure Act (APA), which has extensive provisions for public review and comment, and which requires an agency to complete its rulemaking within one year of publishing its "notice of proposed action." The pancaking of APA requirements on top of SB 779 produces absurd results, such

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were approved by resolution, but only after a significant delay to allow for the full 30-day public review and comment period. The inability of the regulated utilities to participate in the block forwards market during this period reduced the potential benefits to California ratepayers from such participation.

as public review and comment regarding a decision that itself provides for further public review and comment. We will modify our proposed rule to cite the APA as an additional example. This modification is not substantive.

Comments on Changes to Original Proposal

The Appendix to today's decision contains the text of the changes, described above, to our original proposal. All text that would be affected by today's decision is shaded; language that we propose to add to the original proposal is shaded and underlined, while language that we propose to delete from the original proposal is shaded and stricken through.

These changes are sufficiently related to our original proposal that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. Accordingly, we make these changes available for a further 15-day comment period, as provided in Government Code § 11346.8(c).

We invite parties to comment on these changes. Comments shall be filed and served no later than Friday, December 3, 1999. Commenters are strongly urged to e-mail their comments to the assigned ALJ, Steven Kotz, [kot@cpuc.ca.gov]. We will respond to these comments in our final statement of reasons accompanying our adoption order.

Comments on Draft Alternate Decision

A previous draft alternate decision of Commissioner Neeper in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure on August 25, 1999. Comments were received on September 9, 1999, from the three energy utilities (filing jointly), ORA, and Roseville. To the extent that these comments differ from or augment other comments received or to be received, we will respond in our final statement of reasons.

Comments on Bilas/Neeper Alternate

The draft alternate decision jointly sponsored by Commissioners Bilas and Neeper, was mailed to the parties on October 6, 1999. This alternate superseded the previous alternate mailed on August 25. We received comments on October 14 from Southern California Edison; The Utility Reform Network (TURN); the City and County of San Francisco (CCSF); and Pacific Gas and Electric and Sempra Energy (filing jointly). Since the Bilas/Neeper alternate would allow further comments by all parties, we will not respond in detail to these initial comments. However, we think the parties would be helped in considering their further comments if we briefly respond to TURN.

Regarding the definition of "alternate" (see pp. 2-4 above), TURN strongly supports our reading of SB 779 as referring to the Commission's established agenda practice. TURN believes that we are too generous in saying that the energy utilities' contrary interpretation is even "plausible." Nevertheless, TURN says that it "does not necessarily object to the proposed revision to Rule 77.6(a) [in the Bilas/Neeper alternate]. This proposed language offers a reasonable compromise between the need for a timely decisionmaking process and the need to allow parties an opportunity to comment on truly new material that appears in a revised PD or alternate."

TURN, in effect, reminds us that our proposed Rule 77.6(a) raises questions both of policy and of statutory interpretation. We invite parties who choose to comment on proposed Rule 77.6(a) to expressly address both of these questions.

Redlining Issue

"Redlining" refers to 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. By the "practice of redlining," we refer to a policy that would:

1. allow parties submitting comments on a draft, proposed or alternate decision to provide an entire redlined version of the decision in an attached appendix; or
2. allow parties engaging in a permissible ex parte communication to proffer an entire redlined version of the decision.

Thus, the practice of redlining refers to actions taken both in and outside of the formal record of a proceeding.

The practice of redlining is not the current policy of the Commission. Rule 77.3 of the Commission's Rules of Practice and Procedure is explicit and limiting. The comments themselves are limited as to content:

> "Comments shall focus on factual, legal, or technical errors in the proposed decision and in citing such errors shall make specific reference to the record. Comments which merely reargue positions taken in briefs will be accorded no weight and are not to be filed."[6]

Comments are further restricted in number of pages. Comments are limited to 15 pages in most decisions, and to 25 pages in major decisions.[7] Although there is no direct prohibition on the submission of a "redlined" proposed decision in comments, the comments must conform to both the content and page limitations in Rule 77.3. In general, the submission of a complete new decision, with or without redlining of the changed parts, comports neither with the restrictions on content (limiting comments to factual, legal, or technical errors) nor with the restrictions on pages.

Rule 77.3 permits commenters to submit proposed finding of facts, and conclusions of law as an appendix to comments on a proposed decision. These

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[6] Calif. Code of Regulations, Title 20, Division 1, Rule 77.3.

[7] Ibid.

proposed findings of facts and conclusions of law may be submitted in a redlined form, but this submission of redlined material is limited to the findings and conclusions.

The rejection of redlined documents that fail to comply with Rule 77.3 has been our regulatory practice for some time. In an April 1999 ruling, the Chief Administrative Law Judge issued a ruling concerning the submission of redlined documents.[8] The ruling rejected the submission of attachments to comments by Pacific Gas and Electric and San Diego Gas and Electric of complete redlined decisions and the attachment to comments by Southern California Edison of redlined ordering paragraphs.

Moreover, the Commission has previously disapproved of parties circumventing our Rules concerning briefing by attempting to submit additional briefs and materials as ex parte communications.[9] In that decision, the Commission quoted an Assigned Commissioner's ruling which said:

> "All parties participating in the Commission's proceedings do so under the ground rules specified in the Commission's Rules of Practice and Procedure. It is unfair to effectively change these rules in midstream by failing to apply the rules governing briefing . . . [and] the filing of comments . . . evenhandedly."

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[8] Re Pacific Gas and Electric Company, to establish the eligibility and seek recovery of certain electric industry restructuring implementation costs as provided for in Public Utilities Code Section 376, et al., Application 98-05-004, Chief Administrative Law Judge's Ruling, dated April 8, 1999.

[9] Re Pacific Bell, D.92-06-065, 44 CPUC 2d 694, 724-725. See also Rule 1.2 of the Commission's Rules of Practice and Procedure, which provides in relevant part that "The Commission shall render its decisions based on the evidence of record."

Consistent with this statement, the Commission through the Chief ALJ has prohibited parties from submitting in ex parte communications extensive material in excess of that permitted in the formal comment process.[10]

These decisions and rulings have direct consequences for the submission of a complete redlined decision in an ex parte communication. In particular, since our rules, as discussed above, generally prevent the submission of full redlined decisions in formal comments as inconsistent with both content and page restrictions, the submission of such materials in ex parte communications would also be inconsistent with our current rules and practice. Since such materials could not become part of the formal record because they go beyond what is permissible in the process for commenting on a proposed decision, the materials should not be part of an "informal record."[11]

In comments filed in this proceeding, several parties urge that the public interest is well-served by our prohibition of the submission of complete redlined decisions or of materials that fail to comply with Rule 77.3. For example, CCSF argues:

> "It is hard to imagine a more burdensome addition to the Commission's processes than to allow for entire decisions to be rewritten in accordance with one party's comments."

CCSF further points out that permitting the practice of redlining to occur at the time of filing comments on a decision would lay an impossible task on parties wanting to reply to the redlined version:

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[10] See, e.g., Investigation on the Commission's own motion into the Pacific Telesis Group's spin-off proposal, I.93-02-028, Chief Administrative Law Judge's Ruling, October 1, 1993.

[11] The same analysis would apply to submission of a lengthy redlined portion of a decision.

> "[It is] unrealistic to expect parties to find room in five pages of reply comments (and within the five day time limit) to address any distortions or misrepresentations included in any of a myriad of redlined versions submitted by parties, in addition to Conclusions of Law and Findings of Fact."

The unfairness arguments of CCSF apply with even more force to a policy permitting redlined versions as part of ex parte communications. For example, by statute ex parte communications are permitted without restriction and our ex parte rules do not require general distribution of materials handed out during ex parte meetings in quasi-legislative proceedings. Thus, in such proceedings, parties may not even be aware that a redlined decision was submitted to a decision-maker. Even in ratesetting, where notice of the ex parte meeting and distribution of ex parte materials is required, practical considerations, such as the timing of the publication of ex parte notices, may effectively limit the ability of other parties to provide a rebuttal.

Most importantly, we believe that our current prohibition of the practice of redlining helps instill public confidence in Commission decisionmaking. It is the task of the Commission to articulate the reasons justifying the actions that the Commission orders. It is not the task of the Commission to edit a version of the decision provided by a winning party. Indeed, a practice of redlining could have substantial adverse consequences for the perceived legitimacy of the Commission's actions. Those failing to prevail in a proceeding could, with reason, accuse the Commission of adopting a party's redlined submission without an independent weighing facts and the law. Moreover, if the redlined version comes to the Commission through an ex parte communication – a private meeting – an accusation that a party exercised undue influence would prove even more credible, and adopting the redlined decision could seriously undermine confidence in formal Commission processes.

Accordingly, the Commission proposes no change in either our rules or practices today concerning the practice of redlining.

Comments on Duque Alternate

On October 28, 1999, TURN and Pacific Gas and Electric filed brief comments on Commissioner Duque's draft alternate decision. Consistent with these parties' positions in previous comments, TURN opposes redlining, while Pacific Gas and Electric supports it.

Findings of Fact

1. The originally proposed amendment to the definition of "alternate" in existing Rule 77.6(a) follows the Commission's consistent practice in preparing the public agenda.

2. A broader definition of "alternate" than that originally proposed would frequently result in unnecessary delay and duplicative comments but would be consistent with the general policy of "sunshining" major changes to proposed and other decisions.

3. Further rounds of review and comment are not needed for changes to a decision that merely incorporate (1) commenters' suggestions or (2) language that previously had been subject to public review and comment.

4. A process that is strictly internal to the Commission does not need to be codified in the Commission's Rules of Practice and Procedure.

5. Reply comments on resolutions are generally unnecessary, but not allowing reply comments on resolutions could significantly complicate the process in those instances where reply comments are appropriate.

6. The Commission intends to continue the current practice under which the proposed decision of an assigned ALJ is filed after discussion between the assigned Commissioner and ALJ.

7. Where all parties stipulate to reduction or waiver of the review and comment period for an alternate, there is no obvious interest served by the delay inherent in such a period. Also, the Commission should be able, in many circumstances, to reduce but not waive the comment period for alternates even if all parties do not so stipulate.

8. Public necessity that may not qualify as an "unforeseen emergency situation" under SB 779 may nevertheless compel the Commission to act sooner than allowing the full statutory period for public review and comment would otherwise dictate.

9. The APA is an example of a statute that both provides extensively for public review and comment, and sets a deadline for agency action.

10. It is reasonable to publish for further comment the revisions (explained in today's decision) to the original rulemaking proposal, so that parties can specifically address these revisions.

Conclusions of Law

1. The Commission should publish the revisions, shown in the Appendix, to the original rulemaking proposal.

2. The revisions are sufficiently related to the original rulemaking proposal that a 15-day comment period is appropriate.

3. In order to conclude this proceeding promptly and create a complete set of rules implementing the public review and comment provisions of SB 779, this decision should be effective immediately.

ORDER

IT IS ORDERED that no later than Friday, December 3, 1999, parties may file and serve, and should concurrently e-mail to Administrative Law Judge Steven Kotz [kot@cpuc.ca.gov], their comments on the revisions, shown in the Appendix, to the original rulemaking proposal set forth in Rulemaking 99-02-001.

This order is effective today.

Dated November 18, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners

APPENDIX

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

This Appendix contains several proposed changes to the amendments to Article 19 of the Commission Rules of Practice and Procedure, as those amendments were originally proposed in the order instituting this rulemaking. The originally proposed amendments are indicated by underlined and stricken through text without shading; the proposed new changes are indicated by [redacted]. The changes are as follows: The originally proposed amendment to existing Rule 77.1 would be revised. A new amendment to existing Rule 77.3 is proposed. The originally proposed amendments to existing Rule 77.6(a) and (g) would be revised. Existing Rule 77.6(b) would be repealed. For new Rule 77.7, the original proposal would be revised by adding new subsection (f)(9) and by changes to subsections (c), (d), (f), (f)(8), and (g). 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.~~

(bc) 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 seven 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 seven 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. ~~and replies to comments are not permitted.~~

(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, but not regarding 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)