ALJ/BAR/jac **

Mailed

FEB 6 1998

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-175
Administrative Law Judge Division
February 4, 1998

RESOLUTION

RESOLUTION 175. To Establish a Protocol for Implementing the New Authority for Closed Session Discussion SB 960 Provides in Certain Ratesetting and Adjudicatory Proceedings.

As of January 1, 1998, the Commission has the authority to discuss, in closed session, certain matters pending for decision. This new authority was provided in Senate Bill (SB) 960 (Leonard, ch. 96-0856). SB 960 contains many requirements regarding how the Commission manages its proceedings which have largely been addressed in our Rules Revision Rulemaking, R.84-12-028 through Decisions (D.) 97-12-043 (December 3, 1997) D.97-11-021 (November 5, 1997) and D.97-07-065 (July 16, 1997), and Resolutions (Res.) ALJ-170 (January 13, 1997) and ALJ-171 (March 18, 1997). In these decisions, the Commission proposed and ultimately adopted rules which govern the establishment, in a ratesetting proceeding, of a period where no oral or written communication on a substantive issue shall be permitted (Rule 7(c)(4)), during which period the Commission may meet in closed session to consider its decision (Rule 8.1(d)). We also adopted rules which govern closed-session discussion of the presiding officer's decision in an adjudicatory proceeding when that decision is under appeal (Rule 8.2(g)). By today's action, we establish our protocol for implementing the new rules and authority for closed-session discussion. We also direct the General Counsel to seek guidance from the Attorney General on whether SB 960 provides a limited exemption from the notice requirements of the Bagley-Keene Open Meeting Act.

Summary of Closed Session Provisions

SB 960 provides two opportunities for discussion of proposed decisions in closed session when proceedings have gone to hearing.[1] For proceedings categorized as adjudicatory, Public Utilities Code § 1701.2(c) states:[2]

---

[1] For matters that are addressed ex parte, that is, without hearing, the provisions of SB 960 do *not* apply. However, in our final rules implementing SB 960, we also require scoping memos for proceedings that do not go to hearing.

[2] All citations are to the Public Utilities Code unless otherwise stated.

> In a ratesetting proceeding where a hearing was held, the Commission may meet in closed session to consider its decision, provided that the Commission has established a period as described in Rule 7(c)(4). In no event shall the period during which the Commission may meet in closed session exceed the period described in Rule 7(c)(4).

Comments on Proposed Protocols

At our December 3, 1997, Business Meeting, we discussed, but did not act on, two resolutions that proposed protocols for implementing the new rules and authority for closed session discussion (ALJ-1 and ALJ-1a on Agenda 2981). After discussion, we directed staff to publish for comment these two resolutions and a memo from Commissioner Neeper to Commissioners and certain staff, dated October 1, 1997. Comments were to be served by January 7 and reply comments were to be served by January 14.

Comments were served by GTE California, Inc. and Pacific Bell, jointly (GTEC/Pacific), MCI Telecommunications Corporation (MCI), Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric and Southern California Gas Companies, jointly (SDG&E/SCG) and Southern California Edison Company (SCE). No reply comments were served. Most of the comments address six issues, each of which is summarized in the remainder of this section. We modify our protocol in response to these comments where appropriate.

Generally, all of the commenters address whether the protocol should provide, as a matter of routine, for no closed deliberation; and the duration of the related prohibition on communications. All commenters, with the exception of MCI, argue that the protocol should assume no closed deliberation will be held unless the Commission, by decision, or the Assigned Commissioner, by ruling, determines that closed deliberation in a particular proceeding is appropriate. They argue that this default to no closed deliberation provides Commissioners with flexibility and maximum access to the parties affected by their decisions. These same parties argue that the related prohibition on communications should be short, from 1 to 4 days. In contrast, MCI states that the Commission should be free to organize and manage its workload and decision-making process as it sees fit, but asks that the Commission establish specific rules, and not deviate from them.

SCE and GTEC/Pacific argue that the protocol should be established through a continuation of the Rules Revision Rulemaking (84-12-028). This was the docket in which we proposed and adopted the SB 960 Rules and Procedures (Article 2.5), including the closed-session rules quoted above. While SCE and GTEC/Pacific agree that a formal Rulemaking is needed, they differ on the scope and comment duration. SCE argues for a minimum of 45 days for comment and a scope that includes the Bagley-Keene Act implications of the SB 960 categories applied in our rules, rules governing review and comment of alternate decisions, rules governing circulation and

CORRECTION !!

THE PREVIOUS DOCUMENT(S) MAY HAVE BEEN FILMED INCORRECTLY .....

RESHOOT FOLLOWS

ALJ/BAR/jac "

Mailed

FEB 6 1998

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-175
Administrative Law Judge Division
February 4, 1998

RESOLUTION

RESOLUTION 175. To Establish a Protocol for Implementing the New Authority for Closed Session Discussion SB 960 Provides in Certain Ratesetting and Adjudicatory Proceedings.

As of January 1, 1998, the Commission has the authority to discuss, in closed session, certain matters pending for decision. This new authority was provided in Senate Bill (SB) 960 (Leonard, ch. 96-0856). SB 960 contains many requirements regarding how the Commission manages its proceedings which have largely been addressed in our Rules Revision Rulemaking, R.84-12-028 through Decisions (D.) 97-12-043 (December 3, 1997) D.97-11-021 (November 5, 1997) and D.97-07-065 (July 16, 1997), and Resolutions (Res.) ALJ-170 (January 13, 1997) and ALJ-171 (March 18, 1997). In these decisions, the Commission proposed and ultimately adopted rules which govern the establishment, in a ratesetting proceeding, of a period where no oral or written communication on a substantive issue shall be permitted (Rule 7(c)(4)), during which period the Commission may meet in closed session to consider its decision (Rule 8.1(d)). We also adopted rules which govern closed-session discussion of the presiding officer's decision in an adjudicatory proceeding when that decision is under appeal (Rule 8.2(g)). By today's action, we establish our protocol for implementing the new rules and authority for closed-session discussion. We also direct the General Counsel to seek guidance from the Attorney General on whether SB 960 provides a limited exemption from the notice requirements of the Bagley-Keene Open Meeting Act.

Summary of Closed Session Provisions

SB 960 provides two opportunities for discussion of proposed decisions in closed session when proceedings have gone to hearing.[1] For proceedings categorized as adjudicatory, Public Utilities Code § 1701.2(c) states:[2]

---

[1] For matters that are addressed ex parte, that is, without hearing, the provisions of SB 960 do *not* apply. However, in our final rules implementing SB 960, we also require scoping memos for proceedings that do not go to hearing.

[2] All citations are to the Public Utilities Code unless otherwise stated.

> Notwithstanding any other provision of law, the commission may meet in a closed hearing to consider the decision that is being appealed. The vote on the appeal shall be in a public meeting and shall be accompanied with an explanation of the appeal decision.

In Rule 8.2(g), we implement this authority:

> In any adjudicatory proceeding in which a hearing is held, the Commission may meet in closed session to consider the decision of the presiding officer that is under appeal pursuant to subsection (c) of this rule. The vote on the appeal or a request for review shall be in a public meeting and shall be accompanied by an explanation of the Commission's decision, which shall be based on the record developed by the presiding officer. A decision different from that of the presiding officer shall include or be accompanied by a written explanation of each of the changes made to the presiding officer's decision.

We believe that "hearing" in § 1701.2(c) is equivalent to "session" as used in § 1701.3(c). For proceedings categorized as ratesetting, § 1701.3(c) states, in relevant part:

> The commission may establish a period during which no oral or written ex parte communications shall be permitted and may meet in closed session during that period which shall not in any circumstance exceed 14 days. If the commission holds the decision it may permit ex parte communications during the first half of the interval between the hold date and the date that the decision is calendared for final decision. The commission may meet in closed session for the second half of that interval.

In Rule 7(c)(4), we implement the ex parte prohibition portion of this new authority:

> In any ratesetting proceeding, the Commission may establish a period during which no oral or written communications on a substantive issue in the proceeding shall be permitted between an interested person and a Commissioner, a Commissioner's personal advisor, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, or the assigned Administrative Law Judge. Such period shall begin not more than 14 days before the Commission meeting date on which the decision in the proceeding is scheduled for Commission action. If the decision is held, the Commission may permit such communications for the first half of the hold period, and may prohibit such communications for the second half of the period, provided that the period of prohibition shall begin not more than 14 days before the Commission meeting date to which the decision is held.

In Rule 8.1(d), we implement the closed-session portion:

> In a ratesetting proceeding where a hearing was held, the Commission may meet in closed session to consider its decision, provided that the Commission has established a period as described in Rule 7(c)(4). In no event shall the period during which the Commission may meet in closed session exceed the period described in Rule 7(c)(4).

Comments on Proposed Protocols

At our December 3, 1997, Business Meeting, we discussed, but did not act on, two resolutions that proposed protocols for implementing the new rules and authority for closed session discussion (ALJ-1 and ALJ-1a on Agenda 2981). After discussion, we directed staff to publish for comment these two resolutions and a memo from Commissioner Neeper to Commissioners and certain staff, dated October 1, 1997. Comments were to be served by January 7 and reply comments were to be served by January 14.

Comments were served by GTE California, Inc. and Pacific Bell, jointly (GTEC/Pacific), MCI Telecommunications Corporation (MCI), Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric and Southern California Gas Companies, jointly (SDG&E/SCG) and Southern California Edison Company (SCE). No reply comments were served. Most of the comments address six issues, each of which is summarized in the remainder of this section. We modify our protocol in response to these comments where appropriate.

Generally, all of the commenters address whether the protocol should provide, as a matter of routine, for no closed deliberation; and the duration of the related prohibition on communications. All commenters, with the exception of MCI, argue that the protocol should assume no closed deliberation will be held unless the Commission, by decision, or the Assigned Commissioner, by ruling, determines that closed deliberation in a particular proceeding is appropriate. They argue that this default to no closed deliberation provides Commissioners with flexibility and maximum access to the parties affected by their decisions. These same parties argue that the related prohibition on communications should be short, from 1 to 4 days. In contrast, MCI states that the Commission should be free to organize and manage its workload and decision-making process as it sees fit, but asks that the Commission establish specific rules, and not deviate from them.

SCE and GTEC/Pacific argue that the protocol should be established through a continuation of the Rules Revision Rulemaking (84-12-028). This was the docket in which we proposed and adopted the SB 960 Rules and Procedures (Article 2.5), including the closed-session rules quoted above. While SCE and GTEC/Pacific agree that a formal Rulemaking is needed, they differ on the scope and comment duration. SCE argues for a minimum of 45 days for comment and a scope that includes the Bagley-Keene Act implications of the SB 960 categories applied in our rules, rules governing review and comment of alternate decisions, rules governing circulation and

comment on all agenda items in advance of a Business Meeting, and rules addressing other concerns relating to the closed deliberation rules. GTEC/Pacific argue for workshops to discuss the Commission proposals and any proposals from parties and detailed briefs discussing the closed session rules, with the entire rulemaking process concluding in 60 days. SDG&E/SCG also support an approach that provides for additional opportunities to develop the protocol, but did not advocate use of a formal rulemaking.

Both PG&E and SCE raise questions about how the protocol works with a parties' right to comment on alternates to proposed decisions. PG&E notes that any alternate decision which may be proposed as the result of closed deliberations would necessitate postponing consideration of the matter so that comments, pursuant to Rule 77.6, could be submitted and considered. SCE questions whether it is appropriate to adopt a closed deliberation protocol without simultaneously addressing the rules on how to comment on alternate decisions.

MCI comments on the notice of the prohibition on communications. MCI advocates notice of the scheduling of a proposed decision for closed deliberation of not less than one month. SCE also comments generally on the notice of and time frame for the prohibition on communications, raising a number of issues. First, it argues that only communications which exclude other parties would be prohibited to allow a closed deliberation. Second, it argues that any prohibition of more than one day need not be consecutive days. Third, SCE argues, as does GTEC/Pacific, that the prohibition need not be in place during the period between the closed session and the Business Meeting where the matter has been noticed for consideration.

SDG&E/SCG is the only party to comment on whether a proposed decision in a ratesetting proceeding should be placed on the Commission's Business Meeting which occurs 45 to 60 or 30 to 60 days from the date of issuance, as proposed in ALJ-1 and ALJ-1a, respectively. SDG&E/SCG argues for the earlier placement of a matter on the agenda to encourage timely issuance of decisions.

Additionally, SCE argues that the definitions of the SB 960 proceeding categories the Commission adopted are different from the definitions contained in the statute. It argues that this difference may cause the Commission to violate the Bagley-Keene Act. SCE asserts that a violation could occur were the Commission to hold a closed-session

discussion of a proposed decision in a "ratesetting" proceeding that is categorized as ratesetting by default, presumably under Rule 6.1(c).[3]

A number of the concerns and arguments SCE raises, some of which are summarized above, reargue points it raised in its comments to the proposed SB 960 rules, in its application for rehearing of interim decisions proposing these rules for comment, and now before the Commission in its application for rehearing of our final adoption of the SB 960 Rules and Procedures, Article 2.5, in D.97-12-043. We will not address in this informal resolution the matters that SCE has placed formally before us in its most recent similar pleading, Application for Rehearing of D.97-12-043. If we are legally required to reconsider our earlier decisions, or if we are convinced to modify them, the process SCE initiated by its application for rehearing provides a more appropriate vehicle for reconsideration or modification of a Commission decision(s).

We will, however, take a moment to address the SCE and GTEC/Pacific argument that we should establish our protocol for implementing our rules on closed session deliberation in a formal rulemaking.

First, we did adopt rules implementing closed session deliberation through the formal rulemaking process. Those rules are cited above, and parties had ample opportunity to raise any concerns with them during the many months, and many rounds, of comment taken then. What we are attempting to establish through this resolution are the administrative details of scheduling and notice that relate to the rules adopted in the rulemaking. Any party that objected, e.g., to the application of a ban on communications in a proceeding of a period of time up to 14 days before a Business Meeting had ample opportunity to inform the Commission already.

Second, we have provided notice and comment through the resolution process we are applying. This process has included a comment period of 35 days, with an additional 7 days for reply (of which none were filed). The ultimate weight of the Commission's decision, whether in the form of a resolution or order, is the same. So it appears that what SCE is asking for from a formal rulemaking approach to notice and comment that includes 45 days for comment, rather than the chosen resolution approach to notice and comment amounts to 10 more days of comment. We are not persuaded that a formal rulemaking is advisable or necessary.

However, as our thinking on the protocol evolves, we find we are, to a limited extent, adopting an approach which requires the parties to abide by the protocol generally.

---

[3] Rule 6.1(c) provides that when a proceeding does not clearly fit into any of the categories, it will be "...conducted under the rules applicable to the ratesetting category unless and until the Commission determines that the rules applicable to one of the other categories, or some hybrid of the rules, are best suited to the proceeding."

Specifically, we are implementing the discretionary language of Rule 7(c)(4) to all eligible ratesetting proceedings; and we are setting the duration of the period described in Rule 7(c)(4) as 3 to 4 days. Therefore, we believe it is advisable to submit these two generally applicable protocols to the Office of Administrative Law for publication in the California Regulatory Notice Register (Register). We invite written comments in letter (rather than pleading) form, addressed to Administrative Law Judge Hale, with 12 copies, no later than 45 days after publication.[4] Comments must be served on parties to the Rules Revision Docket (R.84-12-028). We will review these comments and adopt the final rules, after further revisions, as appropriate.

Proceedings to Which Closed Session Provisions May Apply
As described in new Article 2.5 of our Rules of Practice and Procedure (Rules), the SB 960 reforms will apply to three types of formal proceedings (except for a complaint under Rule 13.2). They are:

1. Such proceedings filed after January 1, 1998.

2. Such proceedings filed before January 1, 1998, that were included in our experimental implementation of SB 960.

3. Such proceedings filed before January 1, 1998, where there has not, as of January 1, 1998, been a prehearing conference held or a determination made to hold a hearing, and there is a later determination that a hearing should be held in that proceeding.

The Commission will have authority to deliberate on a proposed decision in closed session only in a proceeding that fits one of the above criteria, provided hearings have been held in the proceeding and the proceeding is either ratesetting or adjudicatory where an appeal has been filed. However, we will not conduct closed sessions of all matters that fit the second criterion, proceedings included in the experimental implementation of SB 960.

In the experiment, we did not implement some aspects of the SB 960 decision making reforms. For example, in adjudicatory proceedings, we could not implement the provision allowing the presiding officer's decision to become the decision of the Commission. (See § 1701.2(a)) Therefore, since there is no presiding officer's decision (as envisioned by SB 960) in adjudicatory proceedings included in the experiment, there

---

[4] The date of publication depends, in part, on factors beyond our control. The Chief Administrative Law Judge shall also ensure that the publication date and exact due date for comments are posted at the Commission's Internet site (www.cpuc.ca.gov), under the heading "CPUC Reform (SB 960)."

will be no closed session on appeal of such decisions when the underlying adjudicatory proceeding has been included in the experimental implementation of SB 960.

For similar reasons, we will only hold closed-session deliberations on proposed decisions in ratesetting proceedings included in our experimental implementation when the principal hearing officer has been designated prior to any hearings and when the ex parte restrictions applicable to ratesetting proceedings have been in force since the proceeding was initiated.

Scheduling Closed Sessions

Although § 306(a) requires the Commission to meet at least once a month, we usually meet every two weeks. This year we will schedule our Business Meetings so that they will occur typically on a Thursday. These Business Meetings are conducted in three parts: consent agenda, regular agenda, and closed session. During the consent agenda and regular agenda portions of our Business Meetings, we hear public comments; publicly discuss and adopt proposed orders, decisions and resolutions; report in public on recent activities or matters of general concern; and listen to reports from our staff. During the closed session, we may consider institution of enforcement proceedings, pending litigation, and personnel matters. These Business Meetings generally take from three to five hours.

We will now schedule additional closed sessions to provide time for discussion of ratesetting and adjudicatory proposed decisions. The closed-session discussion of ratesetting proposed decisions, i.e., the Ratesetting Deliberative Meetings, will be scheduled separately from the closed-session discussion of adjudicatory appeals. We will schedule a Ratesetting Deliberative Meeting for 1:30 p.m. on the afternoon of the Monday preceding each Business Meeting. We recognize that we may not be able to complete our Deliberative Meeting that afternoon. A carry-over Deliberative Meeting to a second day (which may or may not be the next consecutive day) may be necessary. The Commission's 1998 Business Meeting and Ratesetting Deliberative Meeting Schedule has been established by the Commission and will be published in the Daily Calendar.

We will hold our closed-session deliberations on decisions in adjudicatory proceedings where an appeal is pending during the closed session of the Business Meeting.

SB 960 also provides parties to ratesetting proceedings that have gone to hearing the right to oral argument before a quorum, if timely requested (§1701.3(d)). We will schedule oral argument, to the extent feasible, close to the Deliberative Meeting. Our aim is to most effectively use the oral argument as an educational forum for the Commissioners, and to time the oral argument to be the final opportunity for parties to influence our deliberations. To that end, at least a quorum of Commissioners will set aside on their calendars the morning of Deliberative Meeting days for oral arguments.

Prohibitions on Ex Parte Communications

Since ex parte communication is absolutely prohibited in adjudicatory proceedings, our implementation of closed-session deliberation does not entail any further restriction on ex parte communication in such proceedings. However, for ratesetting proceedings, implementation of closed session deliberations requires a cut-off on communications that would not otherwise occur. This cut-off is established in Rule 7(c)(4).

As provided in SB 960 and our implementing Rules, the Commission may choose to consider in closed session a proposed decision in a ratesetting proceeding that has been heard, but only when it has established a period during which no oral or written ex parte communications in the proceeding are permitted. This period has come to be called the "quiet time." Most of the commenters argue that our protocol should provide for no closed-session deliberation, and therefore no quiet time.

For ratesetting proceedings, SB 960 provides for ex parte communications throughout the proceeding. As the decision point draws near, SB 960 effectively allows the Commission to weight the benefits of continuing to discuss the proceeding and any proposed decision with the parties against the benefits of discussing the proceeding and any proposed decision with each other for a limited time period.

The commenters argue that the Commission should, in most ratesetting proceedings, choose discussion with parties over discussion among Commissioners. They therefore advocate that the protocol should provide for closed session deliberation as an extraordinary, rather than routine, event. That is, that the protocol should default to prohibiting closed deliberative meetings. They differ on how much of the protocol for conducting closed-session discussion of ratesetting matters should be pre-determined, and by whom.

GTEC/Pacific, SDG&E/SCG, MCI and PG&E support a pre-determined protocol for conducting closed-session discussion. GTEC/Pacific state that the purpose of the quiet time is to give Commissioners an opportunity to discuss the issues in a given proceeding before a vote is taken. GTEC/Pacific believe the best use of the quiet time would be before the Commissioners discuss the proceedings, rather than afterwards.[5] Among the proposals issued for comment, GTEC/Pacific, SDG&E/SCG, and PG&E prefer the shorter duration quiet time which would occur during the 3 or 4 days immediately preceding the Business Meeting, as outlined in Commissioner Neeper's memo. SDG&E/SCG would have the Assigned Commissioner be responsible for

[5] It is unclear whether SDG&E/SCG agree that this timing of the quiet time prior to the Ratesetting Deliberative Meeting is preferred. SDG&E/SCG characterize this approach as recommended by Commissioner Neeper. However, his proposal places the quiet time immediately following, rather than preceding, the Ratesetting Deliberative Meeting.

determining whether closed session deliberation is needed, thereby invoking the protocol.

When conducted, SCE advocates that the protocol for noticing the Ratesetting Deliberative Meeting discussion, establishing the communications ban (or quiet time) duration, and the quiet time's proximity to the Business Meeting at which the proposed decision is to be considered should be unique to each proceeding. SCE recommends the protocol be determined by Commission decision, and not be managed by the Assigned Commissioner.

Should We Predetermine How We Will Comply With The Ex Parte Prohibition?

We believe that SCE's approach, under the guise of flexibility, creates, by its absence of protocol, barriers to the Commission exercising its closed deliberation authority. While we do not expect that closed deliberations will be held in every eligible ratesetting proceeding, we do expect to use this authority to improve the timeliness and quality of our decisions. SCE's approach would require the Commission to issue an additional decision on the process of whether to hold closed deliberations and if so, how, in every proceeding that the Assigned Commissioner recommends for closed discussion. And then, unlike any other decision of the Commission, that decision would have to be unanimous to be effective. Each time it wished to conduct closed deliberations, parties and the Commission would have to observe a unique set of protocols. Commissioners would have to scramble from week to week to find a time to meet in closed session that would accommodate their various schedules. SCE's recommendation presents an unduly chaotic approach which invites inadvertent violations of the quiet time ban and unnecessary delays associated with process in order to allow Commissioners the opportunity to discuss privately the substance of a proceeding.

Predetermined protocols applicable to all eligible ratesetting proceedings for which it is determined closed deliberations will be held will assist practitioners and Commissioners in understanding the communications restrictions that will have to be observed. It will allow Commissioners greater certainty around their calendars, much as has been the case with the Commission's Business Meeting schedule for a number of decades.

Should the Protocol Assume Closed Deliberation Will Occur?

Unlike the companies that commented on our proposals, we believe our protocol should default to providing closed deliberation. All parties can then plan to have any desired communications in advance of the quiet time commencing. No party could be disadvantaged by discovering sometime after a proposed decision has been filed and served that quiet time will be invoked before they've had an opportunity for communications. Regardless of our protocol, a party that prudently planned its participation would assume a quiet time will be invoked and schedule communications early.

So that we may regularly exercise this new authority as a matter of routine, we will apply the Rule 7(c)(4) prohibition on communications to all ratesetting proceeding where hearings have been held and a proposed decision has been filed and served. By this prohibition, we will apply the Rule 8.1(d) "quiet time" prior to the Business Meeting at which we intend to vote on the proposed decision. During the quiet time, we will not permit oral or written ex parte communications in the ratesetting proceedings with proposed decisions to be discussed at the Ratesetting Deliberative Meeting.

Who Is Responsible For Invoking the Protocol?

We recognize that conducting closed deliberations is an authority SB 960 provided that is at our discretion to exercise. We agree that closed deliberations will not be needed for every eligible ratesetting proceeding, but we wish to preserve the opportunity to conduct closed deliberations in every eligible ratesetting proceeding. We are invoking the protocol for every eligible ratesetting proceeding. That is why we are establishing a protocol that assumes closed deliberation will occur, and why we are directing the Chief Administrative Law Judge to provide notice as described below. In the event we determine at the closed session that discussion is not needed on a particular ratesetting proposed decision, we recognize that the communications ban will remain in place for the 3 to 4 day period. We are comfortable with that restriction as a consequence of preserving our opportunity for closed session deliberation.[6]

In the event a proposed decision is scheduled for a vote at a Business Meeting but is not voted on by the Commission (the matter is "held"), it will be scheduled for discussion at the next Deliberative Meeting.

Duration of the Ex Parte Prohibition or Quiet Time

The quiet time will commence not more than 14 calendar days prior to the Business Meeting. The first day of the quiet time will be the day of the Deliberative Meeting. Its duration will typically be from 3 to 4 days.

Occasionally, a proposed decision is scheduled for a vote at a Business Meeting but is not voted on by the Commission. Such "held" matters are rescheduled for a vote. SB 960 provides for ex parte communications on ratesetting proposed decisions that have been held. In the event a ratesetting proposed decision is held, we will permit ex parte communications during the first half of the interval between the Business Meeting at which the proposed decision was held and the Business Meeting at which the

[6] Practically speaking, since communications with parties in ratesetting proceedings require 3-day advance notice, no meetings could occur prior to the Business Meeting consideration of the proposed decision.

ratesetting proposed decision is rescheduled for a vote.[7] When the hold is announced at the Business Meeting, we will also announce: (1) the date of the rescheduled vote, (2) the date of the Deliberative Meeting at which the held proposed decision will be discussed, and (3) the interval (a portion of the time) between the Deliberative Meeting and the rescheduled vote during which ex parte communications on the proposed decision will be prohibited.

What Happens When an Alternate Decision is Proposed?

SB 960 requires the Commission to issue its final decision on all proposed decisions in ratesetting proceedings not later than 60 days after the proposed decision was issued. Under extraordinary circumstances, the 60-day deadline may be extended, and when an alternate decision is proposed, is extended for 30 days (for a total of 90 days between issuance and final decision) as described in Rule 8.1(c)[8]. In the event holding a vote on the proposed decision until the next scheduled Business Meeting will result in issuing the final decision later than 60 (or 90) days after the issuance of the proposed decision, we may carry over the Business Meeting at which the proposed decision was held to conduct a Ratesetting Deliberative Meeting and a Business Meeting within the 60 or 90-day deadline for a final decision.

Notice of Closed Sessions

At least for the time being, we will notice our closed session Ratesetting Deliberative Meetings and our closed session consideration of adjudicatory appeals in the same manner in which we presently notice the closed session portion of our Business Meetings. As required in § 306(b), Business Meetings are conducted in accordance with provisions of the Bagley-Keene Open Meeting Act (the Act). Our closed-session Ratesetting Deliberative Meetings and our closed sessions on adjudicatory appeals will also be conducted in accordance with § 306(b).

To provide parties adequate notice of ratesetting proposed decisions that will be discussed at the Ratesetting Deliberative Meeting, and to minimize the need for additional resources to provide the notice, we will mail and post on our Web site (www.cpuc.ca.gov) the agenda notice for each Ratesetting Deliberative Meeting along

---

[7] In the event there is a proceeding-specific limitation or prohibition on ex parte communications in a ratesetting proceeding, a proceeding-specific ruling will address quiet time implementation for that proceeding, consistent with the provisions of SB 960.

[8] The mandatory extension of the deadline by 30 days when an alternate decision is proposed should provide adequate time for the filing of comments pursuant to Rule 77.6. As noted by PG&E, any alternate decision proposed as a result of closed deliberations would necessitate postponing consideration of the matter to a later Business Meeting. At this juncture, we do not believe our Rules governing comments on alternates need to be revisited, as SCE advocates. After some experience with the SB 960 Rules, this aspect of our Rules may be included in our fine-tuning effort. (See D.97-11-021, slip op. p. 15.)

with the Business Meeting agenda mailing and posting that immediately precedes the Ratesetting Deliberative Meeting at which the matters are to be discussed. This procedure will typically provide about two-weeks notice.[9]

However, we believe SB 960 may provide an exception from the notice requirements of the Act for the closed sessions SB 960 authorized. We therefore seek guidance on whether the notice requirements of the Act actually apply to the closed sessions SB 960 authorizes. Therefore, we direct our General Counsel to seek guidance from the state Attorney General's Office on whether SB 960 provides a limited exemption from the notice requirements of the Act. Depending on the Attorney General's advice, we may modify our initial practice of noticing our newly authorized, closed sessions in accordance with § 306(b).

When a proposed decision in a ratesetting proceeding is filed and issued for comment pursuant to Article 19 of our Rules (i.e., published), the Chief ALJ will place the matter on the agenda for the Business Meeting which occurs 30 days or more from the date of issuance, but not more than 60 days from the date of issuance. The proposed decision will also be placed on the agenda for the appropriate Ratesetting Deliberative Meeting. As is our current practice, when a proposed decision is published, the Chief ALJ will indicate the date of the Business Meeting at which the proposed decision is to be considered. The Chief ALJ will also indicate the date of the Ratesetting Deliberative Meeting at which the proposed decision is to be considered, and the related quiet time.

IT IS RESOLVED that:

For those proceedings to which Article 2.5 of the Commission's Rules of Practice and Procedure apply because the proceedings were included in the experimental implementation of SB 960, we will only conduct closed sessions in such a proceeding if it is a ratesetting and when 1) the principal hearing officer has been designated prior to any hearings and 2) the ex parte restrictions applicable to ratesetting proceedings have been in force since the proceeding was initiated. As a result, we may only conduct closed sessions in two ratesetting proceedings included in the experiment: Application (A.) 97-03-002, Pacific Gas & Electric Company 1998 Biennial Cost Allocation Proceeding, and A.97-03-052, California-American Water Company Carmel River Dam and Reservoir Project Proceeding.

---

[9] We agree with MCI and other commenters that maximum notice of closed-session discussion of a proposed decision, and the related ban on communications, is preferred. As noted below, recipients of the proposed decision will receive notice from the Chief Administrative Law Judge (ALJ) that a proposed decision in a ratesetting proceeding is scheduled for discussion at a Ratesetting Deliberative Meeting, and of the related quiet time, when the proposed decision is published for comment. This will provide parties to the proceeding approximately 30-days notice of the ban on communications.

We will schedule an additional closed session, the Ratesetting Deliberative Meeting, for each Business Meeting, to provide time for closed-session discussion of proposed decisions in ratesetting proceedings that have gone to hearing, as authorized by SB 960 and described in Rule 8.1(d).

We will conduct closed-session discussion of proposed decisions in adjudicatory proceedings where an appeal is pending during the closed session portion of the Business Meetings.

No later than 45 days after publication of the two generally applicable protocols in the California Regulatory Notice Register, parties may mail in letter (rather than pleading) form, their comments on these two draft, generally applicable protocols:

> In all ratesetting proceedings where hearings have been held and a proposed decision has been filed and served, there shall be a prohibition on communications as provided in Rule 7(c)(4).
>
> The first day of the prohibition on communications will be the day of the Ratesetting Deliberative Meeting at which the proposed decision is scheduled to be discussed and will continue through the conclusion of the Business Meeting at which a vote of the proposed decision is scheduled. If a proposed decision is held at the Business Meeting, when the hold is announced the Commission will also announce whether and when there will be a further prohibition on communications, consistent with the requirements of Rule 7(c)(4).

Comments on the above protocols should be mailed to Administrative Law Judge Hale, with 12 copies, and served on parties to the Rules Revision Docket (R.84-12-028).

The Chief Administrative Law Judge shall submit all required forms to the Office of Administrative Law preparatory to publishing in the California Regulatory Notice Register to incorporate the two generally applicable protocols noted above into Rule 7(c)(4). For purposes of such publication, the Chief Administrative Law Judge is authorized to propose nonsubstantive changes to the draft and to the existing Title 20 rules, wherever such nonsubstantive changes will improve the clarity, organization, or consistency of the Commission's Rules of Practice and Procedure.

We will notice our closed session Ratesetting Deliberative Meetings and our closed session consideration of adjudicatory matters pursuant to § 306(b).

When a proposed decision in a ratesetting matter is filed and issued for comment pursuant to Article 19 of our Rules, the Chief Administrative Law Judge will place the matter on the agenda for the Business Meeting which occurs 30 days or more from the

date of issuance, but not more than 60 days from the date of issuance. The matter will also be placed on the agenda for the appropriate Ratesetting Deliberative Meeting.

At the time a proposed decision in a ratesetting matter is filed and issued for comment, the Chief Administrative Law Judge will indicate to parties whether the matter has been placed on the agenda for a Ratesetting Deliberative Meeting. If so, the date of the Ratesetting Deliberative Meeting and the date of the Business Meeting at which the proposed decision in a ratesetting proceeding where hearings have been held is to be considered will be indicated. The Chief Administrative Law Judge will also indicate to parties the related dates of the ban on communications provided in Rule 7(c)(4), as provided in this resolution.

The General Counsel shall seek guidance from the state Attorney General's Office on whether SB 960 provides a limited exemption from the notice requirements of the Bagley-Keene Open Meeting Act.

The Executive Director shall cause a copy of this resolution to be (1) mailed to each appearance in the Rules Revision proceeding, Rulemaking 84-12-028, and (2) published in full on the Commission's Web site (www.cpuc.ca.gov) together with the other information regarding our SB 960 implementation.

Due to the need to have our protocol in place, this resolution becomes effective today.

I certify that this resolution was adopted by the Public Utilities Commission at its regular meeting on February 4, 1998, by the following Commissioners:

Wesley Franklin

WESLEY M. FRANKLIN
Executive Director

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

I will file a partial dissent.

/s/ JOSIAH L. NEEPER
Commissioner

Commissioner Josiah L. Neeper, Dissenting in Part:

I was not one of those who strongly believed that it was necessary for the Legislature to grant what is termed "Bagley-Keene relief." I generally believe it is appropriate and beneficial for public agencies to conduct business in the public eye. Nevertheless, we have SB 960, and we are allowed to have deliberative meetings and to impose quiet time under certain circumstances.

This Resolution is generally a reasonable way of complying with SB 960. It allows 3 - 4 days of quiet time, as opposed to up to 14 days as proposed in some versions. I believe that the less quiet time that is required, the better. There is no reason that any Commissioner should not be able to set his own rules regarding meetings. If a Commissioner wants to impose his own quiet time of any number of days, that should be his choice. Personally, I find that I learn better by having meetings with parties. I am disturbed that this Resolution does not give me the option to hold such meetings during the days leading up to a Commission business meeting. As I understand it, this prohibition could be for as many as seven days before a business meeting if a matter is held.

I tend to prefer one-on-one meetings with individual parties. Some provisions of SB 960 appear to make it more difficult to hold such meetings – although I intend to continue to hold such meetings within the confines of the law and our rules. Instead, all-party meetings seem to be preferred under the law and our rules. However, this Resolution also prevents a Commissioner (or even an advisor) from attending all-party meetings during the quiet time period.

For these reasons, I will partially dissent on this Resolution.

Josiah L. Neeper

JOSIAH L. NEEPER
Commissioner

San Francisco, California
February 4, 1998