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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-177
Administrative Law Judge Division
June 4, 1998

RESOLUTION

RESOLUTION ALJ-177. To adopt in final form, the two generally applicable protocols for closed deliberation of ratesetting proposed decisions that the Commission published for comment in the California Regulatory Notice Register, as described in Res. ALJ-175 (adopted February 4, 1998).

On February 4, 1998, the Commission adopted Resolution ALJ-175 in which it established a protocol for implementing the new authority for closed session discussion Senate Bill (SB) 960 (Leonard, ch. 96-0856) provides in certain ratesetting and adjudicatory proceedings.[1] In that resolution, the Commission, among other things, determined to submit two generally-applicable protocols to the Office of Administrative Law for publication in the California Regulatory Notice Register (Register), and to take comment. In the resolution, the Commission stated that it would review any comments provided and adopt the final rules, after further revisions, as appropriate. In this resolution, we review the comments and adopt, in final form, the two generally-applicable protocols.

The Generally-Applicable Protocols

On February 20, 1998, the following two, generally-applicable protocols were published in the Register as proposed amendments to the Commission's Rules of Practice and Procedure, Rule 7(c)(4):

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[1] For a brief history of the creation of the SB 960 Rules and a summary of the closed session provisions, see Res. ALJ-175, p. 1.

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 this subsection.

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 on 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 this subsection.

Comment

Comments were to be provided in letter form no later than April 6, 1998. The Commission received comment only from Southern California Edison Company (SCE). SCE makes three arguments to support its conclusion that the Commission should reopen the Rules Revision proceeding (R.84-12-028) for the purpose of making the categories consistent with statute and in order to avoid potential violations of the Bagley-Keene Act.

First, SCE argues that the prohibition on communications in an eligible ratesetting proceeding is in conflict with SB 960.[2] SCE refers to Public Utilities Code § 1701.3(c) where it states that a Commissioner may hold a meeting with all parties at any time. Second, SCE argues that the prohibition on communications unlawfully discourages a Commissioner from communicating with all parties. It cites to the recently amended Bagley-Keene Act, Government Code § 11130. Third, SCE argues that the Commission may violate the Bagley-Keene Act were the Commission to conduct closed deliberations on an eligible ratesetting proposed decision when that proceeding was categorized as ratesetting because it did not clearly fit into any of the three categories (adjudicatory, ratesetting, and quasi-legislative) as defined in SB 960.

[2] By "eligible ratesetting proceeding" we mean those proceedings in which SB 960 authorizes us to hold closed deliberations on a proposed decision and/or alternate. Those proceedings are ratesetting proceedings in which a hearing was held.

Discussion

We understand the ratesetting closed deliberation requirements to strike a balance between public decision making and the ability to discuss and test our understanding of a proposed decision and alternatives with parties, and the potentially improved quality and timeliness of decisions that closed deliberation may provide. In striking this balance, the Legislature prohibits ex parte communications in ratesetting proceedings unless certain restrictions are met. The restrictions, which limit allowable ex parte meetings to those occurring either in all-party meetings or in serial one-on-one meetings of substantially equal length, provide all parties equal access to decision makers throughout the proceeding. In addition, SB 960 prohibits all communications with parties when closed deliberations are underway. We developed this understanding from a plain reading of SB 960, § 9 (1701.3(c)), which states in whole (emphasis added):

> Ex parte communications are prohibited in ratesetting cases. However, *oral ex parte communications may be permitted at any time by any commissioner if all interested parties are invited and given not less than three days' notice.* Written ex parte communications may be permitted by any party provided that copies of the communication are transmitted to all parties on the same day. If an ex parte communication meeting is granted to any party, all other parties shall also be granted individual ex parte meetings of a substantially equal period of time and shall be sent a notice of that authorization at the time that the request is granted. In no event shall that notice be less than three days. 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 calendered for final decision. The commission may meet in closed session for the second half of that interval. (Emphasis added.)

In its first argument, SCE focuses on the above italicized text, and ignores the prohibition on oral and written ex parte communications which predicates the

discretionary authority to conduct closed deliberations (the text that is underlined). In short, SB 960 prohibits ex parte communications, unless certain restrictions are met. One of those restrictions is that, if the Commission chooses to meet in closed session, ex parte communications are absolutely prohibited during the established time period.[3] This is where SCE appears to disagree with the interpretation of § 1701.3(c) that forms a basis for our proposed protocols.

SCE's reading gives a more limited meaning to the sixth sentence (the text that is underlined), especially to the clause "no oral or written ex parte communications shall be permitted." SCE interprets this sentence, given the italicized language, to mean that only one-on-one oral ex parte communications are prohibited, rather than all oral ex parte communications. SCE argues that the statute allows all-party ex parte meetings to occur during the established time period when closed deliberations are occurring, or could be occurring.

We disagree. Had the Legislature intended only one-on-one meetings to be prohibited when the Commission chose to conduct closed deliberation, it could have so stated. Closed deliberation is "closed" only if no oral or written ex parte communications are permitted. The clear language of SB 960 confirms this common-sense conclusion.

In its second argument, SCE states that the prohibition on communications during the established time period unlawfully discourages a Commissioner from communicating with all parties. SCE suggests that Rule 1.6, which provides that the assigned Commissioner may issue an ex parte communication ruling tailored to the needs of a specific proceeding, should continue to be followed to allow each Commissioner to allow ex parte communication as he or she sees fit, within the bounds of the statute.

When we adopted Res. ALJ-175, we considered a case-by-case approach to exercising closed deliberations and the associated ex parte prohibitions.[4] That approach did not receive the support of a majority of the Commission. The fact that the Bagley-Keene Act has been amended to provide that the Attorney General, District Attorney, or any interested person may bring a civil action against a State body to determine if it has adopted rules that unlawfully

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[3] Under the protocol, the established period is the three or four days prior to the Business Meeting, perhaps longer if the proposed decision is held.

[4] Invoking closed deliberations and the associated ex parte prohibition on a case-by-case basis was considered by the Commission at its Business Meeting on February 4, 1998, as item HALJ-1b.

discourage the expression of one of its members does not persuade us to reconsider that approach. (Government Code § 11130.) Under SCE's argument, any ex parte prohibition put in place (through an adopted protocol or on a case-by-case application of Rule 1.6) without a unanimous vote would be subject to a civil action. However, the Commission must observe the statutory requirements of § 1701.3(c). SCE's reading of Bagley-Keene would result in violation of SB 960 requirements. We decline to read one statute as allowing, without restriction, conduct that another statute would forbid.

SCE's third argument is the same argument SCE raised in its January 7, 1998, comments on the closed deliberation protocols, in its comments on the proposed SB 960 rules, in its application for rehearing of interim decisions proposing these rules for comment, and in its application for rehearing of our final adoption of the SB 960 Rules and Procedures, Article 2.5, in D.97-12-043. On May 21, 1998, we considered SCE's application for rehearing and concluded in D.98-05-063 that all of the arguments it raised were without merit.

IT IS RESOLVED that:

Having considered all comments that were provided, we adopt, in final form and without substantive modification, the two generally-applicable protocols that were published by the Commission on February 4, 1998, and in the California Regulatory Notice Register on February 20, 1998, as amendments to Rule 7(c)(4).

Rule 7(c)(4) shall now read, in whole:

> 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 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 this subsection.

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 on 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 this subsection.

The Chief Administrative Law Judge shall take all appropriate action to submit the newly adopted rules to the Office of Administrative Law, and may make such format changes as are appropriate for printing of the newly adopted rules in the California Code of Regulations.

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 closed deliberation protocol in place, this resolution becomes effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on June 4, 1998, the following Commissioners voting favorably thereon:

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