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Ms. Hallie Yacknin
Administrative Law Judge
California Public Utilities Commission
505 Van Ness Avenue, Room 5005
San Francisco, CA 94102

Proposed Amendments to Rule 14 Would Deny Due Process and Create Inefficiencies

Dear ALJ Yacknin,

The Greenlining Institute ("Greenlining") hereby submits the following comments on Resolution ALJ-260, issued October 7, 2010, Amend[ing] the Rules of Practice and Procedure ("Resolution") ("Rules"). The Resolution was published in the California Regulatory Notice Register on October 22, 2010.

Generally speaking, Greenlining supports the proposed changes to the Rules. In particular, we support the proposed amendment to Rule 1.13 dictating protocol for the event that the CPUC's servers are unable to accept filings, and the proposed amendment to Rule 14.2 stipulating that Alternate Decisions will now be filed and served. These will make practice before the CPUC a much more clear and navigable process for intervenor parties.

However, there is one proposed amendment to which Greenlining is *strongly* opposed: that to Rules 14.3 and 14.5 which would limit comments on Alternate Decisions and Resolutions. This proposed amendment would restrict the ability of parties to comment on findings, conclusions or resolutions adopted in the Alternate Decision ("AD") that were in a Proposed Decision ("PD") previously issued for comment.

It should be noted at the outset that this change is described on page 7 of Resolution ALJ-260, but at least upon our reading it is not reflected in the attached redlined version of the applicable rules. Therefore, these comments are based on the description, rather than on the redline changes, to err on the side of caution.

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The Problem

From the Commission's perspective, Greenlining understands the rationale behind this proposal, or at least what we presume to be the rationale. Presumably, the Commission figures that the opportunity to comment on a particular aspect of a Proposed Decision is sufficient to preserve the parties' rights, and allowing parties to comment on the same aspect in a later-issued alternate decision would be inefficient. However, from a party's perspective, there is a sizeable loophole in the proposed rule that will result in either a denial of due process or a greater inefficiency than the one the Commission is trying to prevent.

Often, parties do not comment on findings, conclusions or resolutions in a Proposed Decision that they find favorable, choosing instead to focus their limited time and page allocation on the portions of the decision with which they take issue. At the time parties are commenting on the PD, they have no way of knowing whether the aspect they choose not to comment on will later be taken out of the PD, as this proposal contemplates.

However, under the proposal, if the aspect the party favored but did not comment on is later removed from the PD but retained in a subsequently-issued AD, the party would be prevented from commenting on that aspect of the AD. Recall, the party did not comment because the PD originally resolved the issue in a manner favorable to the party, but now the aspect is very much at issue, having been removed from the PD but retained in the AD. In sum, under the proposed rule parties would lose the opportunity to comment on an aspect that was not initially at issue *just when it becomes at issue.*

This exact sequence of events has happened to Greenlining in previous proceedings. A position favorable to it was originally included in a PD, then removed from the PD but retained in an AD. The opportunity to comment on the position that was initially a given but soon became a hotly-debated issue was quite simply vital. Granted, it is a rare proceeding in which this occurs, but when it does it is almost always in the more complex, significant proceedings in which the stakes are high and the political spotlight is particularly bright. It is in these situations that the Commission must take the utmost care to ensure that parties have the opportunity to state their positions, but this proposed amendment would do just the opposite.

Alternately, when set in the context of the PD and its other findings, conclusions and resolutions, a particular aspect may be favorable to a party and thus comment may not seem necessary at the time. However, if the AD changes the context surrounding the aspect in question, and the aspect

becomes a significant and contentious issue as a result of the changes to its context, under the proposed rule the party would not have the opportunity to comment at the AD stage. This prohibition, again, would arise just at the time the party most needs the opportunity to comment. Under this scenario, the revised rule would prevent not a second opportunity to comment on a particular issue, but the *first* opportunity to comment on a particular issue, since findings, conclusions and resolutions can change meaning depending on the other findings, conclusions and resolutions made in conjunction with them.

The Solution Creates More Inefficiencies than the Problem

The only way a party could protect itself against the chain of events described above would be to comment on each and every aspect of the PD, even the ones with which the party fully agrees, in order to preserve the right to address the issue should the decisions evolve as described above. In the hotly-contested, high-stakes proceedings in which this situation is most likely to arise, party comments are already lengthy. The proposed change would impel a party to further expand its comments by parroting back every aspect of the PD's reasoning with which the party agrees, as this would be the only way the party could preserve its right to comment on any aspect that may be removed from the PD and brought back in an AD. Again, this sequence of events is probably relatively rare, but it is impossible to know when it might occur, so parties will need to compose all PD comments under the assumption that it *will* occur, in order to preserve their rights *if* it does occur.

Similarly, a party may feel compelled to comment on a particular issue in a PD that it does not currently view as contentious, addressing contexts and circumstances that may change at some point in the future, under which that issue may become contentious. The party would be compelled to do so because the proposed rule change would bar the party from commenting on the issue in a different context presented later on in an AD.

In short, this remedy creates far more inefficiencies than it prevents. The current Rule creates only occasional inefficiency: first the party must elect not to comment on a favorable aspect of the PD, then the PD must remove that aspect, then an AD must be issued which includes that aspect. Even under these rare circumstances, the party is not making duplicate comments, since it did not elect to comment at the first opportunity, only at the second (which is the more important opportunity, since the aspect has now become at issue). As such, the inefficiency is greatly minimized.

However, under the proposed amendment, parties will need to protect themselves against this occurrence in each and every proceeding, even though it will only arise in a few. This will result in needlessly lengthy comments from each and every party, in each and every proceeding in which a PD is issued. This is clearly the less efficient option of the two, yet it would be necessary in order for parties to protect their positions against unknowable future events.

Though this circumstance will not occur very often, Greenlining knows all too well that it *does* occur. When it does, the opportunity to comment on a finding, conclusion or resolution that has suddenly become at issue *could not be more crucial.* As such, Greenlining *strongly and unequivocally* urges the Commission not to adopt this proposed amendment.

Should you have any questions on what Greenlining realizes has been a somewhat complex and convoluted argument on this point, please do not hesitate to contact me.

Sincerely,

/s/ Stephanie Chen
Stephanie Chen
Senior Legal Counsel
The Greenlining Institute