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Direct Access Proceeding Rulemaking (R.) 07-05-025 Redlined Decisions

From: L. Jan Reid

To: Commission Advisors Carol Brown, Bishu Chatterjee, Damon Franz,
Stephen St. Marie, and Sarah Thomas

Dear Commission Advisors,

On September 30, 2011, a written ex-parte communications was sent to you via email by Daniel Douglas on behalf of the Direct Access Parties (DAP). The written communication consisted of a redlined alternate decision to the proposed decision of ALJ Pulsifer. DAP timely filed and served their ex-parte notice on October 5, 2011.

DAP has violated the Commission prohibition concerning the redlining of proposed decisions by parties. The Commission has a longstanding practice of prohibiting parties from including redlined text changes as part of their comments on a proposed or alternate decision or as part of an ex-parte meeting.

In 1999, the Commission found that: (1999 WL 33597215, CPUC Decision (D.) 99- 11-052, at 2-3)

Rule 77.3 [now Rule 14.3] permits commenters to submit proposed finding of facts, and conclusions of law as an appendix to comments on a proposed decision. These 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.^{FN8} 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.^{FN9} *7 In that decision [D.92-06-065], 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.’

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.^{FN10}

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.'^{FN11}

The Commission has continued to enforce its' anti-redlining rules, even when only a minor amount of material has been redlined. On May 21, 2009, I filed comments to the proposed decision of ALJ Burton Mattson in Rulemaking 08-08-009. My comments include an appendix composed of redlined text changes. On May 27, 2009, I received an email from the CPUC's Docket Office informing me that they had received a directive from ALJ Mattson. The directive ordered the Docket Office to strike the appendix to my comments submitted on May 21, 2009 and to refile my comments with the appendix omitted. I filed amended comments on May 29, 2009.

Therefore, I recommend that the Commission take the following actions:

1. The Commission should ignore the redlined decision proposed by DAP.
2. The Commission should modify ALJ Pulsifer's proposed decision and indicate that parties may not use redlined proposed or alternate decisions in an ex-parte contact.

Sincerely,

/s/ _____

L. Jan Reid