

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Integrate and Refine
Procurement Policies and Consider Long -Term
Procurement Plans

Rulemaking 12-03-014
(Filed March 22, 2012)

**MOTION FOR COMMISSION RECONSIDERATION OF THE ALJ'S DENIAL OF
POC'S MOTION TO SET ISSUANCE DATE FOR DECISION 14-03-004**

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I. INTRODUCTION

Pursuant to Rules 11.1 and 16.1 of the Commission's Rules of Practice and Procedure, the Protect Our Communities Foundation ("POC") submits the following Motion for Commission Reconsideration of the ALJ's Denial of POC's Motion to Set Issuance Date for Decision 14-02-016. This Motion sets forth the following grounds on which the ALJ's June 6, 2014 Ruling denying POC's Motion to Set Issuance Date for Decision 14-03-004 is unlawful or erroneous and must be reversed by the Commission: (1) the Ruling is based on the factually erroneous statement that POC received notice and service of D.14-03-004 from a Notice of Availability document mailed by the Commission; (2) the Ruling is further based on the factually erroneous statement that POC received notice of D.14-03-004 from "other sources;" and (3) the Ruling commits a significant error of law in finding that a Notice of Availability or the "other sources" of notice cited in the Ruling constitute valid notice and sufficient service to establish an

issuance date for the Decision. In order to expeditiously correct these legal and factual errors, this Motion to Reconsider should be granted, POC's Motion to Set Issuance Date should be reheard, and the June 6, 2014 ALJ Ruling denying POC's Motion should be reversed.

Additionally, POC should be permitted to file the Application for Rehearing of Decision D.14-03-004 that POC previously attempted to file, concurrently with its Motion to Set Issuance Date, but which the Commission's docketing office refused to accept for filing. If POC's Motion to Set issuance date had not been erroneously rejected, POC's Application for Rehearing would have been timely filed under Rule 16.1(a).

II. BACKGROUND

POC is a small public interest organization based in San Diego, California.¹ Because of the significant cost and burden of traveling to the Commission in San Francisco, POC practices before the Commission by electronic means as much as possible, and is not often physically present at the Commission.² POC instead relies on the Commission's service of its Decisions for notification as to when a Decision has been issued.³

POC has been a party to the Commission's 2012 Long Term Procurement Plan proceeding, R.12-03-014, since August 4, 2013.⁴ POC has been on the R.12-03-014 service list since at least that date.⁵ POC's contact information on the service list is correct and up to date.⁶ Prior to D.14-03-004, POC received official email service of filings and Commission Decisions in R.12-03-014 without any problems.⁷ For instance, on March 4, 2014 POC received notice of

¹ Attachment A, *Declaration of David Peffer in Support of Motion for Commission Reconsideration*, p. 1, para. 1

² Decl., p. 1, para. 2

³ Id.

⁴ Decl., p. 1, para. 3

⁵ Id.

⁶ Id.

⁷ Decl., p. 2, para 4

the Decision for Track 3 of the 2012 LTPP proceeding in the form of an email from the ALJ Star Division titled “Official Email Service” and containing a link to the Decision.⁸

On March 13, 2014, the Commission voted on and approved Decision 14-03-004, the Final Decision resolving Track 4 of the 2012 Long Term Procurement Plan (“LTPP”) proceeding. The issuance date printed on the Decision is March 14, 2014. The Commission did not send out “Official Email Service” of the Decision to the Service list as has been its usual practice in the various phases of the LTPP proceeding.⁹

POC did not receive any form of service or notice of D.14-03-004 from the Commission at any time prior to April 24, 2014.¹⁰ POC was not aware that the Decision had been issued until April 22, 2014, when POC’s attorney inadvertently came across the Decision while searching the R.12-03-014 online docket card for another document.¹¹ POC did not receive any form of service or notice of the Decision from the Commission until April 24, 2014, when in response to an email inquiry from POC, an employee with the Commission’s ALJ Star Division emailed POC a link to the Decision.¹²

On May 22, 2014, POC submitted a Motion seeking to set an issuance date of April 24, 2014 for Decision (D.) 14-03-004. This Motion explained that the March 14, 2014 issuance date currently printed on the Decision was incorrect, as POC had never received notice or service of the Decision.¹³ The Motion further explained that because the Commission failed to serve D.14-03-004 on all parties to the proceeding as required by Public Utilities Code Section 1731(b)(2) prior to April 24, 2014, the date of issuance stamped on the Decision is in error, as under Public Utilities Code 1731(b)(3) a Decision’s date of issuance is the date the Decision is mailed or

⁸ Id.

⁹ See POC Motion to Set Issuance Date, p. 3 and accompanying Declaration.

¹⁰ Decl., p. 2, para. 5

¹¹ Id.

¹² Id.

¹³ POC Motion to Establish Issuance Date, p. 2 ¶¶ 17-18

electronically transmitted as required by Section 1731(b)(2).¹⁴ Because the Decision was not noticed and served on all parties in accordance with Section 1731(b)(2) until (at least) April 24, 2014, the correct issuance date for D.14-03-004 is April 24, 2014, not March 14, 2014.¹⁵

Concurrently with its Motion to Set Issuance Date (and within 30 days of learning of the decision's issuance), POC also attempted to file an Application for Rehearing of Decision 14-03-004.¹⁶ However, the Commission's docketing office refused to accept POC's Application for Rehearing for filing on the ground that the Application was untimely (i.e., not filed within 30 days of March 14, 2014).¹⁷

On June 6, 2014, the ALJ issued a Ruling ("the Ruling") denying POC's Motion to Set Issuance Date based on the assertion that POC received service and notice of the Decision. The Ruling asserts that POC received notice and service of the Decision in two ways. First, the Ruling asserts that POC received notice and service of the Decision through a Notice of Availability document sent to the parties.¹⁸ This assertion is based entirely on a single piece of evidence – the Proof of Service for D.14-03-004.¹⁹ Second, the Ruling incorrectly asserts that POC received notice of the Decision in "other ways."²⁰ As set forth below, both of these assertions are factually erroneous, and neither is legally sufficient to support the Denial of POC's Motion. Moreover, had POC's Motion to Set Issuance Date been properly granted, then POC's attempted filing of its Application for Rehearing on May 22, 2014 would have been timely.

¹⁴ POC Motion to Establish Issuance Date, p. 4


¹⁵ Id.

¹⁶ Decl., p. 2, para. 6

¹⁷ Id.

¹⁸ Administrative Law Judge's Ruling on Issuance Date of Decision 14-03-004, p. 2

¹⁹ Id.

²⁰ Id. 

III. THE RULING ERRS FACTUALLY IN ASSERTING THAT POC RECEIVED NOTICE

The June 6 Ruling dismisses POC's Motion to Set Issuance Date based on two grounds: (1) that "POC did receive notice of and service of D.14-03-004 through the NOA [Notice of Availability];" and (2) that "POC and other parties received notice of the decision in other ways." Each of these findings is inaccurate, and as such constitutes a significant error of fact. Further, in relying on these findings to dismiss POC's motion, the Ruling commits a significant error of law, as neither the NOA nor the "other notice" meets the mandatory statutory notice requirements set forth in Public Utilities Code Section 1731(b)(2), and as such neither the NOA nor the "other notice" is sufficient to establish a valid issuance date for D.14-03-004 under Public Utilities Code Section 1731(b)(3). Because the Ruling is based on errors of fact and law, this Motion to Reconsider should be granted, the Ruling denying the Motion to Set Issuance Date should be rejected, POC's original request to set the issuance date for D.14-03-004 should be granted, and POC's Application for Rehearing should be accepted as timely filed.

a. POC did not receive notice and service through a Notice of Availability

The June 6 Ruling errs in claiming that POC received notice of D.14-03-004 through a Notice of Availability. The Ruling states:

I determine that POC did receive notice of and service of D.14-03-004 through the NOA.²¹

To support this conclusion, the Ruling relies on a single piece of evidence – the Commission's Process Office proof of service:

The Commission's Process Office proof of service shows that notice of D.14-03-004 was sent by U.S. mail on March 14, 2014 to the service list for R.12-03-

²¹ Ruling, p. 2

014... While POC claims to have not received this NOA, it was nonetheless mailed properly and timely mailed to POC and the entire service list. The Process Office has no indication that the NOA sent to POC was returned.²²

As POC clearly stated in its Motion and accompanying Declaration, POC did not received a NOA for D.14-03-004 at any time prior to April 24, 2014.²³ The Ruling's claim that the Process Office Proof of Service shows that a NOA was sent to the parties on March 14, 2014 is incorrect. POC has confirmed with the Commission's Docket Office that there is no Proof of Service document for the NOA for D.14-03-004.²⁴ While there is a Proof of Service document for the Decision itself, this Proof of Service provides no evidentiary support for the Decision's assertion that POC was served a NOA. The cover sheet for the Proof of Service²⁵ clearly refers to a full copy of the Decision, and makes no mention of a Notice of Availability:

DECISION: 14-03-004
MAIL DATE: 3/14/14

Copy of **"DECISION AUTHORIZING LONG-TERM PROCUREMENT FOR LOCAL CAPACITY REQUIREMENTS DUE TO PERMANENT RETIREMENT OF THE SAN ONOFRE NUCLEAR GENERATIONS STATIONS"** mailed to the following:

SEE ATTACHED LIST FOR APPEARANCES, STATE SERVICE

²² Ruling, p. 2

²³ POC Motion, p. 3

²⁴ Decl., p. 2, para. 7

²⁵ Attachment B

Similarly, the first page of the proof of service document declares, under penalty of perjury, that “On 3/14/14, I deposited in the mail at San Francisco, California, *a copy of D.14-03-004*... in a sealed envelope, with postage prepaid, addressed to the last known address of each of the addressees in the attached list.”²⁶ (*Emphasis added*).

The ALJ Ruling is in error. No Proof of Service exists for the NOA for D.14-03-004. The Proof of Service on which the ALJ relies states, under penalty of perjury, that a *copy of the Decision itself* was mailed to the parties, and makes no mention of a Notice of Availability document.

Further, and importantly, the Proof of Service document itself is in error and defective, as the Commission did not mail full hard copies of the Decision to the parties. POC never received a hard copy of D.14-03-004 in the mail from the Commission.^{27 28} The ALJ Ruling does not claim that POC was mailed a hard copy of D.14-03-004. POC has contacted several other parties to R.12-03-014 (CEJA, Vote Solar, and CEERT) all of whom confirmed that they did not receive a full copy of D.14-03-004 in the mail from the Commission.²⁹ This makes sense because it is not the normal practice of the Commission to serve full copies of its decisions by regular mail.³⁰ Rather, the Commission typically serves its decisions by email and only mails a NOA by regular mail.³¹ While POC has regularly received email service of Commission Decisions, POC has never received notice and service of a Commission Decision by way of a full copy of the Decision in the mail.³²

²⁶ Attachment C

²⁷ Decl., p. 3, para. 8

²⁸ POC did eventually receive a hard copy of the Decision and Proof of Service in response to a June 9, 2014 request for the Decision and Proof of Service that POC made to the Commission’s Central Files office. Decl. p. 3, para. 8

²⁹ Decl., p. 3, para. 9

³⁰ Decl., p. 3, para. 10

³¹ Id.

³² Id. ~~¶¶¶¶¶~~ □η

b. POC did not receive notice or service of D.14-03-004 in other ways

The Ruling further errs in claiming that “POC and other parties received notice of the decision in other ways.” The Ruling identifies five “other ways” that POC and other parties purportedly received notice of D.14-03-004:³³

1. A proposed decision was issued on February 11, 2014. POC (and all parties) were notified on that date that the Commission would consider the proposed decision no less than 30 days after the issuance of the proposed decision, i.e. no earlier than March 13, 2014.
2. On March 3, 2014, POC filed comments on the proposed decision; POC filed reply comments on March 10, 2014.
3. Ten days in advance of the meeting, the Commission mailed its Agenda for the Meeting of March 13, 2014, which indicated that the proposed decision that became D.14-03-004 would be considered by the Commission at that regularly scheduled business meeting.
4. In the public meeting of March 13, 2014, the Commission approved D.14-03-004, which was issued on March 14, 2014.
5. On March 14, 2014, D.14-03-004 appeared on the Commission’s website, where it has been available to the public since that date.

None of these claims suffices to show that POC received notice of the Decision. First, the fact that Parties were notified that a Decision would be issued *no earlier* than March 13, 2014 merely informed parties that a Decision would be issued at some unspecified time after that date.

³³ Ruling, p. 2

This is a far cry from specific notice that a Decision has been issued and service of that Decision.³⁴

Second, the fact POC filed Comments on the Proposed Decision on March 3, 2014, and filed Reply Comments on March 10, 2014, does not in any way support the claim that POC was provided notice of the Decision. In fact, POC's Comments clearly demonstrate that POC was not provided notice of the Decision. On March 12, 2014, the day before the Commission approved D.14-03-004, POC emailed ALJ Gamson to ask how POC would go about correcting its Reply Comments, which had accidentally been filed without the inclusion of an attachment referenced therein.³⁵ The same day, ALJ Gamson responded:

You would need to file a Motion to Late-file Amended Reply Comments, since the filing deadline has passed.³⁶

On March 24, 2014, 11 days after the Decision had been approved by the Commission, POC (not knowing of the approval) followed ALJ Gamson's advice and filed a Motion to Late-File Corrected Reply Comments. The Docket Office accepted this filing, and neither the ALJ nor any Commission employee responded to that filing that the Decision was already voted out and final.³⁷

Obviously, if POC had received notice and was aware that the Commission was scheduled to vote on the Track 4 Decision on March 13, it would have made no sense to contact ALJ Gamson about the procedure for filing amended Reply Comments. If POC had received any form of notice that D.14-03-004 had been approved by the Commission on March 13, POC would have had no reason to submit Motion to Late-File Corrected Reply Comments on March

³⁴ As the Commission itself is aware, the fact that a Proposed Decision is placed on the Agenda for consideration on a particular date does not equate to proof that the Commission acted on that Agenda Item on the first date it appeared on the Agenda for Commission consideration

³⁵ Decl., p. 3, para. 11

³⁶ Id.

³⁷ Decl., p. 3, para. 12

24, as the arguments supported by the Attachment would have been mooted by the issuance of the Decision.

Third, POC did not receive the Agenda for the Commission's March 13 meeting by mail or email.³⁸ POC has never received in a copy of a Commission meeting agenda by mail or email.³⁹

Fourth, POC did not attend or monitor the Commission's March 13, 2014 meeting.⁴⁰ POC had not received any notice that the Track 4 Decision would be voted on at that meeting.⁴¹ No obligation exists that parties must attend or monitor commission meetings. As a small nonprofit located in San Diego, California, POC lacks the resources to regularly attend or monitor all Commission meetings.⁴² POC instead relies on its statutory right as a party listed on the service list to receive service of Decisions.⁴³

Fifth, because POC did not receive any notice that the Track 4 Decision had been issued, POC did not check the Commission's website for the Decision.⁴⁴ No rule or procedure requires parties to regularly survey the Commission's website to check for new decisions and filings, and POC lacks the resources to do so. POC instead relies on its statutory right as a party listed on the service list to receive service of filings and Decisions.⁴⁵

IV. THE RULING ALSO ERRS AS A MATTER OF LAW

As a matter of law, neither the Ruling's finding that POC received notice and service of

³⁸ Decl., p. 4, para. 13

³⁹ Id.

⁴⁰ Decl., p. 4, para. 14

⁴¹ Id.

⁴² Decl., p. 1, para. 2

⁴³ Id.

⁴⁴ Decl., p. 4, para. 15. POC first became aware of the decision when POC's attorney accidentally came across the decision on the Commission's website while looking for something else.

⁴⁵ Id. ~~██████████~~ □η

D.14-03-004 through a Notice of Availability, nor the finding that POC was provided “other sources” of notice is sufficient to support the validity of the Decision’s issuance date or the rejection of POC’s Motion. As such, in dismissing POC’s Motion, the Ruling commits a significant error of law.

a. *Neither the NOA nor the “other sources” constitutes valid statutory service*

Public Utilities Code Section 1731(b)(2) requires that the Commission notify the parties to a proceeding when a Decision in that proceeding is issued. This Section further requires that the Commission provide this notice in one of three ways:

(A) By mailing the order or decision to the parties to the action or proceeding;⁴⁶

(B) By emailing an electronic copy of the official version of the order or decision to the party;⁴⁷

(C) Or by emailing a link to an Internet Web site where the official version of the order or decision is readily available to the party.⁴⁸

Neither the Notice of Availability nor the other forms of notice relied upon by the Ruling constitutes statutory notice as required by Section 1731(b)(2). This Section requires that the Commission provide notices of decisions and clearly defines this required notice as one of three forms of notice listed above. Nowhere does Section 1731(b)(2) allow the Commission to meet satisfied its obligation to provide statutory notice by mailing a one-page “Notice of Availability.” Nor does Section 1731(b)(2) allow the Commission to substitute “other ways” of noticing parties of Decisions for its clear obligation to provide statutory notice.

⁴⁶ Pub. Util. Code Section 1731(b)(2)(A)

⁴⁷ Pub. Util. Code Section 1731(b)(2)(B)

⁴⁸ Pub. Util. Code Section 1731(b)(2)(C)

b. The NOA and “other ways” are not sufficient notice to establish a valid issuance date

Because neither the Notice of Availability nor the “other ways” relied upon by the Ruling constitutes statutory notice as defined under Section 1731(b)(2), neither is sufficient to establish a valid issuance date for D.14-03-004. Public Utilities Code Section 1731(b)(3) defines “date of issuance” as follows: “For the purposes of this article, “date of issuance” means the mailing or electronic transmission date that is stamped on the official version of the order or decision.” (Emphasis added). The use of the phrase “for the purposes of this article” makes clear that Section 1731(b)(3) is intended to be read in the context of the other provisions of the article. Read in the context of the Section 1731(b)(2) requirement that official notice be provided to the parties in the form of mailing pursuant to Section 1731(b)(2)(A), or electronic transmission pursuant to Sections 1731(b)(2)(B) and 1731(b)(2)(C), it is clear that Section the “mailing or electronic date” referenced in Section 1731(b)(3) refers to the date that the Decision is mailed or electronically transmitted to the parties in conformity with Section 1731(b)(2). To interpret it otherwise would defeat the clear intent and the language of the service and date of issuance statutes, when read in harmony.

V. POC WAS WRONGLY PREVENTED FROM FILING ITS APPLICATION FOR REHEARING OF D.14-03-004

POC filed its Motion to Set Issuance date on May 22, 2014. This original filing included as an attachment POC’s Application for Rehearing of D. 14-03-004.⁴⁹ On May 23, 2014, the Commission’s Docket Office rejected the filing, requiring that the Motion to Establish Issuance

⁴⁹ Decl. p. 4, Para. 16

Date and the Application for Rehearing be filed as two separate documents.⁵⁰ POC re-filed the Motion and Application separately as required by the docketing office on May 23, 2014.⁵¹ This time, the Docketing Office accepted the Motion for filing, but refused to accept the Application for Rehearing on the ground that the Application was untimely (i.e., not filed within 30 days of the Decision's issuance on March 14, 2014).⁵²

Had POC's Motion to Set Issuance Date of April 24, 2014 been properly granted, however, then POC's attempted filing of its Application for Rehearing on May 22, 2014 would have been timely. Accordingly, after the Commission reconsiders and reverses the ALJ's denial of POC's Motion to Set Issuance date, POC should be granted an opportunity to file its Application for Rehearing and that Application should be heard.

CONCLUSION

For the foregoing reasons, the Commission should grant this Motion to Reconsider the ALJ's denial of POC's Motion to Set Issuance Date of April 24, 2014 for D. 14-03-004. The ALJ's denial of the Motion to Set Issuance Date should be reversed, the issuance date for Decision D.14-03-004 should be set as April 24, 2014 as requested in POC's Motion, and POC should be permitted to file the Application for Rehearing of D. 14-03-004 that POC previously attempted to file on May 22, 2014.

⁵⁰ Attachment D; Decl., p. 4, para. 16

⁵¹ Decl., p. 4, para. 16

⁵² Attachment E; Decl., p. 4, para. 16

Respectfully Submitted,

Dated: July 7, 2014

/S/

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