CONCEPTUAL DISCUSSION OF PROPOSED CHANGES OR ADDITIONS TO THE COMMISSION'S DISCOVERY RULES APPLICABLE IN FORMAL COMMISSION PROCEEDINGS; REQUEST FOR WRITTEN COMMENTS; AND NOTICE OF WORKSHOP

Summary

The Commission is considering a possible rulemaking to revise the Commission's discovery rules applicable in formal Commission proceedings. Before the Commission does so, it seeks to obtain the comments of interested persons on the scope of the rulemaking. To that end, this document contains a conceptual discussion of changes or additions to the Rules that the Commission may propose. This document also invites interested persons to comment (by writing no later than July 6, 2000, or at a workshop commencing at 9:30 a.m. on Friday, July 21, 2000, in the Commission's Hearing Room at 505 Van Ness Avenue, San Francisco, California) on the scope of these issues and whether they are sufficiently inclusive. The Commission will review this material before starting the rulemaking.

The Need for Discovery Rules

Several factors have increased the pressure on the discovery phase of Commission proceedings from what it has been in the past. The first is that deregulation has brought many changes to the Commission, including a change in the nature of Commission proceedings. Even with the increased focus on alternative dispute resolution, proceedings before the Commission have become more adversarial, with utilities challenging utilities more frequently, and a greater diversity of parties, including more consumer groups and a multitude of competitors. Second, the Commission also has a legislative obligation to rapidly resolve matters heard by the Commission (within 12 months for adjudicatory matters, 18 months for other matters.)

Commission discovery is currently conducted largely through the use of data requests, with some depositions. Provisions of the California Code of Civil Procedure (CCP), and Commission and judicial decisions interpreting the CCP, are the main source of guidance for practitioners. Commission procedural rules do not delineate all appropriate vehicles for conducting discovery or for regulating the scope of permitted discovery.

Many discovery issues in Commission proceedings have been addressed case-by-case, so that parties and the Commission must deal with discovery disputes as they arise. In part, this approach reflects the fact that Commission proceedings are less formal than a court, and are unique with respect to other administrative agencies. The Commission wants to encourage the parties to exchange information, if possible, without the use of expensive discovery tools which may impede full participation in a proceeding, especially for parties of limited means, and to preserve appropriate flexibility in discovery matters.

In the past several years, the Commission has also conducted an experimental law and motion program, which includes resolution of discovery disputes pursuant to an Administrative Law Judge (ALJ) ruling.

The discovery rulemaking may consider rules of general applicability suggested by the body of Commission common law. The intended benefits of this rulemaking are to create consistent rules for discovery in Commission proceedings and to provide parties with a procedure for resolving discovery disputes, while attempting to preserve necessary flexibility in conducting Commission-specific administrative, as opposed to judicial, proceedings. Providing a consistent, efficient, and updated, yet flexible, procedure for discovery in Commission proceedings should expedite the discovery phase of the proceeding and thus promote a more efficient and timely resolution of Commission proceedings.

Among the issues this rulemaking may address are the following:

Beginning and Ending Discovery

Summary: The proposed rule would clarify that any interested party may commence discovery at any time after the proceeding has been filed. The presiding officer would have the discretion to impose a discovery cut-off.

In the past, some parties have been uncertain as to when discovery begins in Commission proceedings. For example, Rule 49, which addresses prehearing conferences, states that the ALJ might require the parties to meet and confer on certain topics prior to the first prehearing conference. One of these topics is a plan for conducting discovery. Some parties have interpreted this rule to mean that discovery should not commence until after the first prehearing conference.

The proposed rule should clarify that any interested party may commence discovery at any time after the proceeding has been filed, unless the presiding officer determines otherwise. This provision is different from the CCP, which does not permit start of certain discovery directed to a defendant until either 10 or 20 days after service of the complaint. (See generally CCP §§ 2025 and 2030.) Applying the specific CCP rules in this instance is unworkable, given the Commission's legislative mandate to complete proceedings expeditiously. It would also be inappropriate, since the large majority of the Commission's proceedings are not complaints or other quasi-adjudicatory matters, and many parties to Commission proceedings cannot be categorized as complainants or defendants.

The proposed rule does not set a discovery cut-off, but would grant the presiding officer the discretion to do so for efficient and fair management of the proceeding. Such a provision may be appropriate because the presiding officer should be able to tailor the discovery cut-off to the specific needs of the

proceeding. This is in contrast to CCP § 2024, which sets discovery cut-off dates, but is mainly tailored to complaint cases. Persons may also comment on whether they believe the rule should impose a discovery cut-off date, the reasons therefor, and what that date should be.

The Commission recognizes that staff, including the Office of Ratepayer Advocates, has the ability to make certain inquiries from regulated utilities whether or not a proceeding exists. However, this proposed discovery rule would address formal discovery within the context of a particular proceeding, and is not intended to address or limit the Commission's staff broader authority to obtain information. (See, e.g., Pub. Util. Code § 314.)

Some persons may believe that discovery is necessary in some instances prior to the filing of a formal proceeding. These instances may include, for example, discovery at the Notice of Intent stage of a General Rate Case, or prior to a request for arbitration pursuant to the federal Telecommunications Act of 1996 (see Resolution ALJ-178). Persons may comment on whether extending the applicability of these discovery rules outside of the formal process is appropriate in limited situations, and if so, in which limited situations such an extension is appropriate.

Rules Governing the "What" and "How" of Commission Discovery

Summary: The proposed rule would provide that the Commission may consult the discovery rules found in the CCP, and California case law resolving disputes over scope and methods of discovery, unless a Commission-specific statute or rule requires otherwise.

No statute or Commission rule defines the scope of discovery, that is, what is discoverable in Commission proceedings. Similarly, no statute or Commission rule describes how discovery is conducted at the Commission. Such direction as exists is general and permissive. For example, Pub. Util. Code § 1794 addresses

and permits the taking of depositions under certain circumstances "in the manner prescribed by law for like depositions in civil actions in superior courts…." Pub. Util. Code §§ 1791 through 1795 address a witness' appearance before the Commission. Rules 59 through 61.1 of the Commission's Rules of Practice and Procedure address subpoenas, including their issuance, contents and service, motions to quash or for protective orders. But no rule sets forth all permissible means of conducting discovery in formal Commission proceedings.

In addressing the permissible scope and methods of discovery, the proposed rule would provide that the Commission may consult the discovery rules found in the CCP (which list many ways to conduct discovery), unless a Commission-specific statute or rule requires otherwise. Because discovery at this Commission is handled, in large part, through informal data requests, and no specific provision for data requests exists in the CCP, the proposed rule would specifically permit the use of the more informal data request as well. The proposed rule would also encourage the parties to exchange information through even less formal means (e.g., meeting and conferring, telephone conferences, etc.).

In resolving discovery disputes to date, the Commission has similarly followed the discovery rules that are found in the CCP, unless a Commission-specific statute or rule requires otherwise. (See generally *Re Alternative Regulatory Frameworks for Local Exchange Carriers*, Decision (D.) 94-08-028, 55 CPUC2d 672, 677.) The proposed rule would continue this practice, and would provide that in a discovery dispute, the Commission, in addition to its own precedents, may consult the California case law resolving discovery disputes.

This process makes sense and is more efficient than crafting a lengthy new body of discovery rules for the Commission. Many practitioners before the Commission are familiar with California's discovery statutes and their judicial

interpretation. Moreover, this body of law is comprehensive, already in place, easily researched, and has served a variety of courts well. Developing a lengthy new body of Commission-specific discovery rules would be time-consuming, and its usefulness is unclear. Also, there is much case law in California interpreting the discovery statutes, and the Commission has been guided by this law in the past. Even if the Commission were to develop wholesale new discovery rules, in all probability, it would still be guided by California discovery cases, at least until it developed a body of precedents.

Under the proposed rule, the Commission would continue to follow Commission-specific discovery statutes and rules. (See e.g., Article 17.1 of the Commission's Rules of Practice and Procedure, implementing Pub. Util. Code § 1821 et seq. regarding access to computer models.) The proposed rule would also state that the Commission and practitioners may consult the CCP and California case law regarding discovery. Accordingly, this proposed rule would also be consistent with Pub. Util. Code § 1701, which states, in part, that the technical rules of evidence need not be applied to Commission proceedings, and would give the Commission needed flexibility in conducting its administrative proceedings.

Designation of Expert Witnesses

Summary: The proposed rule would require the parties to disclose their expert witnesses at the time they serve their testimony.

CCP § 2034 addresses the designation and exchange of expert witness information. CCP § 2034 provides that after the initial trial date is set for the action, a party may serve a demand that all parties simultaneously exchange information concerning each other's expert witnesses. In courts, setting the initial trial date usually occurs many months after the proceeding has

commenced, and after substantial discovery has taken place. In Commission proceedings, hearing dates are sometimes set quite early in the proceeding in the scoping memo. A party may not know at that time who its expert witnesses will be. Therefore, the specific provisions of CCP § 2034 addressing a demand for exchange of expert witness information may not be useful in Commission proceedings.

However, once a party has served its testimony, the party has identified its witnesses. At this juncture, it may be important to know the party's intention with respect to the witness' expertise, because certain evidentiary rules follow from a witness' designation. Therefore, the proposed rule will require parties to disclose the identity of their expert witnesses at the time they serve their testimony.

Law and Motion

Summary: The proposed rule would codify the experimental law and motion program (as generally set forth in Resolution ALJ-164) with some modifications derived from practical application of the program.

For the past several years, the Commission has resolved many law and motion matters by means of an experimental law and motion program embodied in Resolution ALJ-164, a copy of which is attached. Resolution ALJ-164 instituted the experimental procedure in order to determine whether such procedure would promote uniformity of outcomes in formal proceedings, build a body of rulings to guide parties on discovery practices at the Commission, and improve predictability and timeliness in the disposition of motions. The results of the experiment have largely confirmed these anticipated benefits. Therefore, the proposed rules would codify the law and motion procedure, with minor modifications and clarifications outlined below, into the Rules of Practice and Procedure.

The following modifications and clarifications are made principally based on practical experience under Resolution ALJ-164.

? Instead of invoking the law and motion procedure by request (see Experimental Rule 2.b.), all discovery matters arising in formal Commission proceedings would be handled through the law and motion procedure.

? The procedure would apply to all motions specifically designated in the rules (currently Experimental Rule 2.b), and other procedural motions at the discretion of the presiding officer. (See Experimental Rule 3.) Additionally, motions to quash subpoenas, for access to computer models or data bases, and for protective orders regarding such modeling information are usually discovery-related, and these motions would be added to the list contained in Experimental Rule 2.b if they arise in the context of a formal proceeding.

? Experimental Rule 2.e would be clarified to state that the Docket Office will refer motions raising discovery disputes to the law and motion ALJ, but that the presiding officer retains the discretion to handle the matter in lieu of the law and motion ALJ.

? The procedure would clarify that whether or not the presiding officer or the law and motion ALJ handles the matter, parties would follow the law and motion procedures (for example, respond to discovery motions within 10 days, unless the time is shortened.) Rule 45 would be amended to require responses to discovery motions within 10, not 15, days after the discovery motion is filed and served.

? The procedure would also clarify that the law and motion ALJ or the presiding officer may hold oral argument, either in person or by telephone, before ruling on the discovery motion. The procedure would clarify how notice of oral argument will be given (i.e., telephonic notice to the moving and responding party, or posting on Daily Calendar, etc.) Instead of requiring oral argument no earlier than 5 days after the date set for responses (see Experimental Rule 9), the procedure would clarify that oral argument will be set as soon as possible after the responses have been filed.

Protective Orders and Confidentiality

Summary: The proposed rule would set more specific rules on obtaining protective orders and for confidential treatment of information. The rule would confirm that the party seeking confidential treatment has the burden of proof in justifying the request, which request must be made with specificity. The proposed rule would also encourage the disclosure of confidential material used in a Commission proceeding to other parties in that proceeding under an appropriate protective order, or according to Pub. Util. Code § 583, as appropriate. The proposed rule would describe how the party seeking confidential treatment should tender its material to the Commission for filing. The proposed rule would indicate a very strong preference for public hearings, even when confidential material is included in the testimony.

The California Public Records Act (Government Code § 6250 et seq.) provides that "the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Government Code § 6250.) Although the Commission sometimes files documents under seal under appropriate circumstances, a party seeking confidential treatment has the burden of proof justifying its request under a specific exception to the general requirement that public records be accessible.

Pub. Util. Code § 583 and the Commission's General Order No. 66-C set forth grounds for confidential treatment. General Order No. 66-C provides, for example, that information that would place a regulated company at an unfair business advantage can be kept confidential.

As the industries the Commission regulates become more competitive, more parties before the Commission, including regulated utilities and their competitors, are requesting confidential treatment of certain documents. Conversely, more parties are also seeking access to other parties' allegedly confidential material. This proposed rule would address confidentiality and

protective orders in the context of formal Commission proceedings. The proposed rule would clarify that before any material is deemed confidential and placed under seal in a formal Commission proceeding, the party seeking confidential treatment must make a motion pursuant to the Law and Motion rules.

The party seeking confidential treatment would have the burden to justify its request. Furthermore, the party seeking confidential treatment would have to specifically justify why each and every portion of a specific document should be kept confidential. Blanket requests for confidential treatment of an entire document, or boilerplate justification language would not satisfy a party's burden of proof. For example, if a party believes certain numbers in a report should be kept confidential, the party should specifically target its motion to the numbers in question, and should not request that the entire report be kept confidential. Also, a party seeking confidential treatment would not meet its burden merely by reciting that disclosure of the information would place it at an unfair business advantage. The party would have to explain the facts demonstrating how disclosure would do so.

The proposed rule would also state that a party should, whenever possible, disclose to other parties information that it believes to be confidential if the other parties sign an appropriate protective order. A party refusing to reveal information under an appropriate protective order would have to demonstrate, among other things, why it is unable to do so, and how the failure to disclose such information to all but Commission employees would not unfairly prejudice other parties.

The proposed rule would also direct how the party seeking confidential treatment should tender its material to the Commission for filing. The party must comply with all filing requirements in terms of number of copies tendered,

the format of the document, etc. If the party believes portions of a filed document should be confidential, the party should file a motion for confidential treatment of the parts of the document which are allegedly confidential, appending to the motion copies of the document in both redacted and unredacted versions. The cover page and each page of the unredacted document that contains allegedly confidential material should be clearly marked as confidential (i.e., stamped at the top of the page), tendered under seal (i.e., in a sealed envelope), and the sealed envelope should be clearly marked with the document's title, date and sponsoring party.

This proposed rule would also provide that the Commission staff, including the Office of Ratepayer Advocates, does not need to sign a nondisclosure agreement order to have access to certain utility confidential information, because Pub. Util. Code § 583 addresses this point. In order to obtain access to information which a non-utility may allege is confidential, staff would have to make other arrangements, such as signing a nondisclosure agreement, similar to other parties.

This proposed rule would make clear the Commission's preference for open public hearings. A discovery ruling placing information under seal would not automatically affect that preference even if such information was considered in the hearings. The rule would urge the parties to develop alternative arrangements whereby the hearings can remain open, and clarify that any party who seeks to close public hearings has a high burden in demonstrating that there is not a less drastic means to achieve the same purpose.

This rule might also address when or whether confidential materials in a Commission proceeding can be destroyed and removed from the record after the decision becomes final and not subject to any further appeals. However, a general rule stating such information would automatically be destroyed within a

certain period of time may be unworkable, because Government Code § 14755(a) prohibits a state agency from disposing of a record "unless it is determined by the director that the record has no further administrative, legal, or fiscal value and the Secretary of State has determined that the record is inappropriate for preservation in the State Archives." To comply with this, as well as other laws, the Commission has established a records retention policy under which it will retain records of formal files for 30 years. This policy allows individual division directors to request that particular files be retained for a longer period of time.

The passage of time diminishes or eliminates the need for confidential treatment of most documents. For example, the competitive reasons underlying a determination that a 1999 business plan should be sealed in 1999 would probably diminish rapidly with each passing year. Therefore, this proposed rule would permit a party, after having sought and obtained two successive rulings extending the confidential treatment of a document, to request by motion that this document be destroyed or returned to the moving party. At the time of this motion, the party should articulate grounds why continued confidential treatment of the document is necessary, as well as why Commission retention of this document is of no further value. Also, a party could not make such a motion until after the underlying decisions become final and are not subject to any further appeals.

Discovery Sanctions

Summary: The proposed rule would clarify that the trier of fact has the inherent authority to rule on discovery motions and to impose sanctions for discovery abuse.

The proposed rule should codify the Commission's holding in D.98-03-073, and recognize the inherent authority of the trier of fact to rule on discovery motions and to impose sanctions for discovery abuse. The sanctions which could

be imposed include both monetary and non-monetary sanctions. The latter might include: (1) an issue sanction either drawing inferences adverse to the offending party, directing that designated facts be established according to the claim of the adversely affected party, or prohibiting the offending party from supporting designated claims or defenses; or (2) dismissing all or part of a proceeding. For example, CCP § 2023(b) provides for monetary, issue, evidence, terminating, and contempt sanctions for abuse of the discovery process.

It is critical for the trier of fact to have this authority in order to effectively manage the proceeding in a fair, efficient, and timely manner. The Commission reasoned in D.98-03-073 that if the presiding officer did not have this authority, it would defeat the purpose of Rules 62 and 63, which permit the presiding officer to preside over and control the course of the hearings. Also, if the trier of fact does not have the authority to impose sanctions, material evidence may be withheld, or delay in proceedings may result. This outcome is unacceptable, because the Commission has a legislative obligation, with a few exceptions, to decide adjudicatory cases within 12 months of filing and other matters within 18 months. As we recognized in D.98-03-073, "an impotent presiding officer faced with an intransigent litigant could not manage the case expeditiously, resulting, perhaps, in actual harm to other participants."

Similarly, a menu of sanction options is a necessary tool in effective case management, especially in a situation where a monetary sanction may serve as punishment but would not make the other parties whole. The discovery rules should deter parties from using strategic misbehavior as a tool. A variety of sanction options would enable the trier of fact to expeditiously manage cases in order for the Commission to carry out its statutory duties in issuing timely decisions, as well as to protect all affected parties.

Next Steps

A copy of this document will be served on the service list of Rulemaking (R.) 99-11-021, the Commission's Rulemaking revising the settlement rules. It will also be posted on the Commission's web site.

Interested persons may serve comments on the issues discussed above no later than Thursday, July 6, 2000. To that end, persons may comment on the scope of these issues, and whether they are sufficiently inclusive, both in writing and also at a workshop. For instance, persons may believe that different discovery rules should apply to our proceedings, such as the discovery rules in Government Code §§ 11507.5 et seq., or the discovery rules of another governmental agency. Or, persons may believe that other issues should be addressed in the rules. To the extent persons suggest alternatives, they should do so with specificity.

Comments should NOT be filed with the Commission in any docket, but should be served on the service list of R.99-11-021. Additionally, Assigned Commissioner Duque and ALJ Janet A. Econome should also be served with the comments. Please serve ALJ Econome with ***two*** copies.

Each person serving comments should also bring at least 10 copies of those comments with them to the workshop, which is scheduled to commence on Friday, July 21, 2000, at 9:30 a.m. in the Commission's Hearing Room, 505 Van Ness Avenue, San Francisco, California. At the workshop, interested persons will have an opportunity to discuss further their views on the above issues, and to hear the concerns of others. Following the workshop, interested persons will have the

opportunity to submit additional comments as more fully discussed at the workshop.

Dated June 9, 2000, at San Francisco, California.

Henry M. Duque Commissioner	Janet A. Econome Administrative Law Judge