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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Revise and Clarify Commission Regulations Relating to the Safety of Electric Utility and Communications Infrastructure Provider Facilities.

Rulemaking 08-11-005
(Filed November 6, 2008)

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING IN PART AND DENYING IN PART THE MOTION TO (1) MODIFY ISSUE 20 IN THE ASSIGNED COMMISSIONER'S SCOPING MEMO, AND (2) PROHIBIT EX PARTE COMMUNICATIONS ON CERTAIN MATTERS

This ruling grants in part and denies in part the motion that was jointly filed by AT&T Mobility LLC and several other parties. The motion is granted to the extent it seeks to modify Issue 20 in the Assigned Commissioner's Ruling and Scoping Memo dated November 5, 2009. The motion is denied to the extent it seeks to prohibit ex parte communications in this proceeding on certain matters. This ruling was made after consulting with the Assigned Commissioner.

1. Background

The scoping memo for Phase 2 of this proceeding that was issued on November 5, 2009 ("the Phase 2 Scoping Memo") lists 25 issues that are within the scope of Phase 2. Issue 20 addresses pole-loading rules.

On December 4, 2009, AT&T Mobility LLC and Pacific Bell Telephone Company d/b/a AT&T California filed a motion on behalf of themselves and Southern California Edison Company, Cellco Partnership LLP d/b/a Verizon Wireless, Sprint Nextel, and NextG Networks of California, Inc. (hereafter, "the

Joint Parties”). The Joint Parties’ motion seeks to modify Issue 20 and to prohibit ex parte communications in this proceeding on certain matters.

Responses were filed by the California Cable & Telecommunications Association jointly with Comcast Phone of California, LLC; the Commission’s Consumer Protection and Safety Division; CoxCom, Inc. jointly with Cox California Telecom, L.L.C.; Pacific Gas and Electric Company; and San Diego Gas & Electric Company (together, “the Responding Parties”). The Joint Parties filed a reply on January 8, 2010.

2. Motion to Modify Issue 20

2.1. Summary of the Motion

The scope of Issue 20 includes “what is the proper interpretation of the pole-loading standards in [General Order (GO) 95]” and “what constitutes overloading.”¹ The Joint Parties assert that these issues are also being litigated in Investigation 09-01-018 where the Commission is investigating whether the named respondents overloaded three utility poles in Malibu, causing the poles to fall and ignite a wildfire (hereafter, “the Malibu Fire Investigation”).² Several of the Joint Parties are named respondents.

To avoid overlap between the two proceedings, the Joint Parties propose that Issue 20 be modified so that it focuses only on promulgating new pole-loading rules and does not interpret existing pole-loading rules. The interpretation of existing rules would be left to the Malibu Fire Investigation. The proposed modifications to Issue 20 are as follows:

¹ Phase 2 Scoping Memo at 7.

² Order Institution Rulemaking 09-01-018 at 7, Ordering Paragraph 1.

20. Loading Standards. The scope of Phase 2 includes (i) ~~what is the proper interpretation of the pole loading standards in GO 95, including~~ (a) what should be the safety factors in Rule 44 and (b) what should be the design, construction, and performance requirements in the first paragraph of Rule 48; (ii) ~~what constitutes overloading;~~ (iii) identifying who should be the party responsible for determining how strong the pole is at the time an attachment is requested; and (iii) ~~how long to retain~~ information regarding facilities added to a pole and related pole loading calculations or exemptions should be retained; and (iv) whether it would be useful to add a third loading condition to Rule 43, to be entitled “Loading Conditions for Fire Prone Areas.” These conditions would encompass those encountered in fire prone areas such as dry vegetation, high temperatures, strong winds, etc. The actual conditions will be specified, discussed, and vetted in the workshops.

In addition to modifying Issue 20, the Joint Parties ask the Commission to take other steps to avoid deciding issues in this rulemaking proceeding that could prejudice the Malibu Fire Investigation. Specifically, the Joint Parties ask the Commission to affirm that the rulemaking proceeding will not (1) address current pole-loading rules; (2) make any findings regarding carriers’ obligations under current pole-loading rules; (3) describe carriers’ current practices under current pole-loading rules; and (4) make any findings, conclusions, or decisions regarding other matters in the Malibu Fire Investigation.

2.2. Summary of Responses

All of the Responding Parties support the proposed modifications to Issue 20 except the Consumer Protection and Safety Division (CPSD). CPSD argues that because this is a quasi-legislative rulemaking proceeding, there is no need to modify Issue 20 to ensure that this proceeding stays focused on forward-looking rule changes, as this is already required by Rule 1.3(d) of the Commission’s Rules of Practice and Procedure (Rule).

Both CPSD and San Diego Gas & Electric Company (SDG&E) oppose the Joint Parties' motion to exclude from this proceeding all consideration of existing pole-loading rules to avoid prejudging the Malibu Fire Investigation. While CPSD and SDG&E agree that this rulemaking proceeding should not prejudice the Malibu Fire Investigation, they also believe the Commission's decision in this rulemaking proceeding on whether to adopt new pole-loading rules may need to describe and discuss the current rules.

2.3. Ruling

The motion to modify Issue 20 is granted. The purpose of the modifications is to limit the scope of Issue 20 to the potential adoption of new pole-loading rules. This purpose is consistent with the quasi-legislative category of this rulemaking proceeding.

The motion to remove from this proceeding any matters pertaining to existing pole-loading rules is denied. In order to determine if new pole-loading rules are needed, the Commission will likely need to assess the merits of the existing rules. This assessment will not affect the Malibu Fire Investigation, however. The issues in the two proceedings are separate and distinct.

The overarching issue in the Malibu Fire Investigation is whether the named respondents violated any statutes or Commission general orders. Thus, the Malibu Fire Investigation is concerned about past events. In contrast, this rulemaking proceeding is forward looking and will not address, let alone decide, whether the named respondents in the Malibu Fire Investigation violated any of the existing pole-loading rules. Indeed, the Commission made it clear in Order Instituting Rulemaking (OIR) 08-11-005 and two Scoping Memos that "this [rulemaking] proceeding will not determine the cause of particular wildfires or

resolve issues that will be addressed in pending investigations of wildfires³ including the Malibu Fire Investigation.

3. Motion to Prohibit Ex Parte Communications on Certain Issues

3.1. Summary of the Motion

The Malibu Fire Investigation is an adjudicatory proceeding. Rule 8.2(b) prohibits parties in an adjudicatory proceeding from engaging in ex parte communications with decisionmakers about the proceeding.⁴ Most of the Joint Parties are respondents in the Malibu Fire Investigation.

In their motion, the Joint Parties request that ex parte communications be prohibited in this rulemaking proceeding regarding (1) pole-loading rules, and (2) any other issues in the Malibu Fire Investigation. The Joint Parties state that because these issues are present in both the Malibu Fire Investigation and this rulemaking proceeding, they cannot communicate with decisionmakers about these issues in the rulemaking proceeding. In order to level the playing field, the Joint Parties argue that all parties in the rulemaking proceeding should be prohibited from communicating with decisionmakers about these issues.

If the prohibition is adopted, the Joint Parties recognize that it will be more difficult for all parties to advocate their positions on new pole-loading rules in this rulemaking proceeding. Consequently, the Joint Parties ask the Commission to delay the consideration of new pole-loading rules until after the Malibu Fire Investigation is complete. A decision in that case is expected in December 2010.

³ See the OIR at 4, the Phase 2 Scoping Memo at 5, and the Phase 1 Scoping Memo dated January 6, 2009, at 5-6.

⁴ Rule 8.2(b) states that “[i]n any adjudicatory proceeding, ex parte communications [with decisionmakers] are prohibited.”

3.2. Summary of Responses

All of the Responding Parties oppose the motion to prohibit ex parte communications and to delay consideration of new pole-loading rules.

3.3. Ruling

The motion to prohibit ex parte communications is denied because it is contrary to Rule 8.2(a), which allows ex parte communications in quasi-legislative proceedings such as this one. This long-standing policy should not be discarded without good cause. The Joint Parties have not shown good cause.

The motion is based on the erroneous assumption that there are overlapping issues between the Malibu Fire Investigation and this rulemaking proceeding. As discussed previously, this rulemaking proceeding will not address any issues that will be decided in the Malibu Fire Investigation.⁵ Because there is no overlap, there is no reason to prohibit ex parte communications in this rulemaking proceeding.

Recent experience in Phase 1 demonstrates that there is no need to prohibit ex parte communications in this rulemaking proceeding. In Phase 1, the Commission adopted new rules to help prevent pole overloading.⁶ The Commission did so without prohibiting ex parte communications, without affecting the Malibu Fire Investigation, and without disadvantaging any party.

Importantly, this ruling does not preclude the parties in the Malibu Fire Investigation from making ex parte communications in this rulemaking proceeding about existing pole-loading rules as long as they do not link it to the

⁵ The modification of Issue 20 previously in today's ruling eliminates any overlap between the two proceedings.

⁶ Decision 09-08-029 at 3, 4, 21, 37-40, 48, 51, 53, and 54.

matters being litigated in the Malibu Fire Investigation. Although this may take some preparation and forethought, it is not unduly burdensome.⁷

The motion to defer consideration of new pole-loading rules until after the Malibu Fire Investigation is complete is also denied. Any new rules adopted in this rulemaking proceeding will be prospective in their application and have no bearing on the Malibu Fire Investigation, which involves a retrospective investigation of alleged violations. In addition, a number of parties have already submitted proposed changes to the existing pole-loading rules in Phase 2. Several of these proposals have the potential to enhance pole safety. If consideration of these proposals is delayed until after the Malibu Fire Investigation is complete, improvements to pole safety could be delayed by at least a year, since a final decision is not scheduled in the Malibu Fire Investigation until December 2010.

IT IS RULED that:

1. The Assigned Commissioner's Ruling and Scoping Memo dated November 5, 2009, is modified to read as follows at page 7, Issue 20:

Loading Standards. The scope of Phase 2 includes (i) what should be the safety factors in Rule 44 and what should be the design, construction, and performance requirements in the first paragraph of Rule 48; (ii) identifying who should be the party responsible for determining how strong the pole is at the time an attachment is requested; (iii) how long information regarding facilities added to a pole and related pole loading calculations or exemptions should be retained; and (iv) whether it would be useful to add a third loading

⁷ Today's ruling does not authorize ex parte communications in this rulemaking proceeding by the parties to the Malibu Fire Investigation regarding matters in that Investigation. Such ex parte communications are prohibited by Rule 8.2(b).

condition to Rule 43, to be entitled "Loading Conditions for Fire Prone Areas." These conditions would encompass those encountered in fire prone areas such as dry vegetation, high temperatures, strong winds, etc. The actual conditions will be specified, discussed, and vetted in the workshops.

2. The motion that was filed jointly by AT&T Mobility LLC, Pacific Bell Telephone Company d/b/a AT&T California, Southern California Edison Company, Cellco Partnership LLP d/b/a Verizon Wireless, Sprint Nextel, and NextG Networks of California, Inc. is granted to the extent it seeks to modify Issue 20 at page 7 of the Assigned Commissioner's Ruling and Scoping Memo dated November 5, 2009. The motion is denied in all other respects.

Dated January 15, 2010, at San Francisco, California.

/s/ TIMOTHY KENNEY
Timothy Kenney
Administrative Law Judge

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Dated January 15, 2010, at San Francisco, California.

/s/ LILLIAN LI

Lillian Li

N O T I C E

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