



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

R.08-11-005
(Filed November 6, 2008)

**MOTION TO MODIFY ISSUE 20 SET FORTH
IN THE ASSIGNED COMMISSIONER'S RULING
AND SCOPING MEMO FOR PHASE 2 AND TO CLARIFY
APPLICABILITY OF EX PARTE RULES**

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On Behalf of Joint Moving Parties

Date: December 4, 2009

Pursuant to Rule 11.1 of the Commission’s Rules of Practice and Procedure (“the Commission’s Rules”), AT&T Mobility LLC¹ and Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) on behalf of themselves and Southern California Edison Company (“SCE”), Cellco Partnership LLP d/b/a Verizon Wireless (“Verizon Wireless”), Sprint Nextel,² and NextG Networks of California, Inc. (“NextG”), (hereinafter, the “Joint Moving Parties”) respectfully submit this motion to modify and postpone consideration in this rulemaking³ of certain problematic portions of Issue 20 in the Assigned Commissioner’s November 11, 2009 Ruling and Scoping Memo for Phase 2 (“Phase 2 Scoping Memo”).⁴

Additionally, as an integral part of this motion, we seek to clarify the application of the Commission’s ex parte rules⁵ in this proceeding, given that the same core issue posed by parts of Issue 20 is already present in another Commission proceeding, Order Instituting Investigation (I.) 09-01-018 (“Malibu Investigation” or “the OII”).⁶ The relief sought in this motion is imperative to ensure that parties do not inadvertently violate the Commission’s ex parte rules.⁷ This relief is also essential to ensure that all parties have the same rights to communicate with Commission decisionmakers in this rulemaking. Without such relief, some parties in this

¹ New Cingular Wireless PCS, LLC (U 3060 C).

² Sprint Nextel Corporation, on behalf of the following wholly owned companies: Sprint Communications Company, L.P. (U 5112 C), Sprint Spectrum, L.P. as agent for WirelessCo, L.P. (U 3062 C) and Sprint Telephony PCS, L.P. (U 3064 C), and Nextel of California, Inc. (U 3066 C) (collectively, “Sprint Nextel”).

³ This rulemaking is sometimes referred to herein as “the OIR.”

⁴ Issue 20 in the Phase 2 Scoping Memo provides as follows: “**Loading Standards.** The scope of Phase 2 includes (i) what is the proper interpretation of the pole loading standards in GO 95, including (a) the safety factors in Rule 44 and (b) the design, construction, and performance requirements in the first paragraph of Rule 48; (ii) what constitutes overloading; (iii) identifying the party responsible for determining how strong the pole is at the time an attachment is requested; and (iv) how long to retain information regarding facilities added to a pole and related pole loading calculations or exemptions; and (v) 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.”

⁵ See Rules of Practice and Procedure, Article 8, Communications with Decisionmakers and Advisors, Rule 8.1 *et seq.* (“the Commission’s ex parte rules”).

⁶ I.09-01-018, initiated on January 29, 2009, involves an examination of the October 21, 2007 Malibu Canyon Fire and has been categorized as an adjudicatory proceeding.

⁷ In particular, in light of Rule 8.1(c), which states the meaning of an ex parte communication, and Rule 8.2(b), which provides that, “[i]n any adjudicatory proceeding, ex parte communications are prohibited,” *any substantive ex parte communication* in this proceeding concerning issues in I.09-01-018 and made to a decisionmaker in I.09-01-018 that is not also made “in a public hearing, workshop, or other public forum established in the proceeding,” or “on the record” in I.09-01-018 could constitute a violation of the Commission’s ex parte rules.

proceeding that are not parties to I.09-01-018 will have greater input to decisionmakers than the parties that are also parties in I.09-01-018.

Although it is somewhat cumbersome to do so, in order to comply with the Commission's ex parte rules, we are simultaneously filing a motion in the Malibu Investigation similarly seeking clarification of application of the ex parte rules in that proceeding. Pursuant to the Commission's rules, a copy of this motion is attached as "Exhibit A" to that motion, and a copy of that motion is attached as an exhibit to this motion, so that all communications relative to the relief sought in this motion are "on the record" of both proceedings.⁸ We request that the Commission provide the parties with a coordinated response to these motions.

I. AS FRAMED IN THE PHASE 2 SCOPING MEMO, ISSUE 20 CREATES A SUBSTANTIAL OVERLAP BETWEEN THIS PROCEEDING AND I.09-01-018.

The purpose of this rulemaking is to consider measures to reduce fire hazards associated with: (1) electric transmission and distribution facilities, and (2) communications infrastructure providers ("CIPs") facilities in close proximity to overhead electric power lines. Most of the Commission's rules regarding the construction, operation, and maintenance of utility facilities are in General Orders ("GOs") 95, 128, and 165. The scoping memo dated January 6, 2009 divided this proceeding into two phases. In Phase 1, the Commission adopted measures to reduce fire hazards for the 2009 autumn fire season in Southern California. Phase 1 concluded with the issuance of Decision (D.) 09-08-029 on August 20, 2009.

The purpose of Phase 2 is to address measures that require more time to consider and implement. Prehearing conference statements regarding the scope, schedule, and other matters pertaining to Phase 2 were filed on October 6, 2009, and a prehearing conference for Phase 2 was held on October 9, 2009. The Scoping Memo for Phase 2 sets forth 25 issues to be addressed in Phase 2. These issues will be evaluated in the context of whether there should be prospective modifications of existing rules or adoption of new rules.

⁸ We are serving both motions (with their exhibits) on all parties in *both* proceedings. Because the motions are "on the records" in both proceedings, the motions do not constitute ex parte communications under Commission Rule 8.1(c). See Rule 8.1(c)(3).

In contrast, Issue 20 in the Phase 2 Scoping Memo expressly includes a potential Commission ruling establishing the “proper” interpretation of the existing pole loading rule. Although Issue 20 actually comprises a number of distinctly different issues, Issue 20 literally asks, “. . . what is the proper interpretation of the pole loading standards in GO 95 . . . ?” As stated in Issue 20, this question does not have only prospective application. Its scope is indicated by the use of the present tense “is.” However, the same core question, namely, the meaning and interpretation of the existing GO 95 rules governing pole loading, is at the heart of the Malibu Investigation. The overlap between the two proceedings is substantial and could not possibly be clearer. In short, the Commission is poised to resolve the same issue in two different proceedings, each with different parties, different procedural rules, and different schedules. Thus, what will be the subject of formal briefs and a strictly circumscribed record in the OII will likely be a workshop topic in the OIR, as well as the subject of innumerable – *and unreported* – ex parte communications in the OIR.⁹ This problem poses the risk of unfairness to all parties and leads to irresolvable procedural conflicts.

Issue 20 should therefore be modified to reflect that, in this rulemaking proceeding, the Commission only seeks to evaluate *prospective* changes to GO 95 (whether characterized as modification or “clarification”) and does not aim to interpret existing pole loading rules. The core issue in the Malibu Investigation should not be collaterally litigated in this rulemaking. To resolve the plain overlap of issues in the two proceedings, we have set forth below specific revisions to Issue 20 and also ask the Commission to affirm that it will make no finding or issue any decision with respect to the *existing* GO 95 rules governing pole loading or any other matter which is at issue in the OII. We also ask for clarification of the applicable ex parte rules in this proceeding regarding the issue of pole loading, given that the interpretation of existing pole

⁹ The Joint Moving Parties are concerned that supposed “facts” imparted during ex parte communications to decisionmakers or advisors in connection with the OIR that directly or indirectly touch upon matters at issue in the OII could prejudice the Commission’s decision in I.09-01-018 against the Joint Moving Parties, who would not have any notice or knowledge of, much less an opportunity to respond to, such alleged “facts” regarding, for example, pole loading matters. The potential for a denial of due process is both obvious and unfair.

loading rules is currently pending in the Malibu Investigation, where it is subject to a ban on ex parte communications.¹⁰

Even with such a clarification, it will likely be difficult for parties to fully explore the issue of changing pole loading rules or creating entirely new pole loading rules in this proceeding without having the opportunity to freely discuss existing pole loading practices during their otherwise proper ex parte communications with decisionmakers regarding the matters at issue in this rulemaking. Consequently, the Commission should also consider delaying the problematic portions of Issue 20 identified above relating to pole loading until after the Malibu Investigation has been concluded. A decision in that case is expected in December 2010.

II. ISSUE 20 SHOULD BE MODIFIED TO CONSIDER RULE CHANGES RELATED ONLY TO PROSPECTIVE CHANGES REGARDING POLE LOADING REQUIREMENTS.

The purpose of this rulemaking proceeding is to draft forward-looking rules; the goal is not to evaluate and come to factual and legal conclusions regarding the interpretation the existing rules in GO 95. Issue 20 as drafted, however, states that the scope of Phase 2 includes “what is the proper interpretation of the pole loading standards in GO 95” as well as “what constitutes overloading.”¹¹ The exact same issues are at the heart of the Malibu Investigation. The Order that initiated the Malibu Investigation states that it will conduct an investigation to determine whether respondents violated any provision of the Public Utilities Code, general orders, other rules, or requirements by overloading three Malibu utility poles and thus failing to comply with the loading and other requirements set forth in GO 95.¹² The Assigned Commissioner's Ruling and Scoping Memo reiterate that this is the purpose of the OII.¹³

The question of whether respondents overloaded the poles in the Malibu Investigation necessarily involves interpretation of the pole loading rules and what constitutes overloading

¹⁰ See n. 5, *supra*.

¹¹ Phase 2 Scoping Memo, p. 20.

¹² See I.09-01-018, *Order Instituting Investigation*, p. 7 (OP 1) (Jan. 29, 2009).

¹³ See I.09-01-018, *Assigned Commissioner's Ruling and Scoping Memo*, pp. 5-6, 9 (OP 2) (Oct. 22, 2009).

pursuant to those rules. Issue 20 in the Phase 2 Scoping Memo involves and intends to resolve in this rulemaking the exact same issue. If that issue were first considered in this rulemaking, resolution of that issue in this rulemaking would unavoidably contaminate and prejudice how the issue of pole overloading is determined in the Malibu Investigation. Moreover, given that the express purpose of this proceeding is to consider changes needed to the rules to increase safety of facilities, there is not a need to include, as a separate issue, a Commission interpretation of the rule as written. Given this overlap and the respective scopes of this proceeding and the Malibu Investigation, we request modification of Issue 20 as set forth below to ensure that it only seeks to explore the issue of adopting new pole loading rules on a prospective basis. This clarification is necessary to ensure that the Commission does not seek to collaterally interpret existing pole loading rules in this proceeding.

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 (iiiiv) ~~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, in order to ensure that the Commission’s decision in the rulemaking does not inadvertently include text or findings that could impact the OII, this motion also seeks clarification that no decision in the rulemaking will (1) interpret the existing GO 95 pole loading rules; (2) make any finding with respect to carriers’ obligations under the current pole loading rules; (3) describe carriers’ current practices under the pole loading rules; and (4) make any other finding or include any discussion of the existing pole loading rules in the rulemaking.

III. EX PARTE CONTACTS REGARDING CURRENT POLE LOADING REQUIREMENTS SHOULD BE PROHIBITED.

Given that the issue of interpretation of pole loading rules is pending in the Malibu Investigation (which is categorized as an adjudicatory proceeding), it is also necessary that there be a ruling clarifying that all ex parte contacts with the decisionmakers¹⁴ on the issue of existing pole loading requirements are prohibited in this proceeding as well. Many of the parties in this proceeding are involved in the Malibu Investigation, and those parties must abide by such an ex parte ban. Those parties include AT&T Mobility, SCE, NextG, and the Commission's Consumer Protection and Safety Division ("CPSD") (collectively referred to as the "OII Parties").¹⁵ The simultaneous pendency of the proceedings and the common issue (posed in Item 20) could be interpreted to meet the "linkage" criteria established by the Commission in D.07-07-020¹⁶ and thus to trigger liability on the part of the OII Parties that undertake ex parte communications in the OIR. In light of the prohibition in Commission Rule 8.2(b), while other parties in this proceeding may openly discuss all issues surrounding current pole loading requirements, it appears that the OII parties would (under the Commission's interpretation of the ex parte rules in D.07-07-020) be banned from doing so whenever Commission decisionmakers are present. This prohibition applies to any form of communication (whether written or oral) on issues in the Malibu Investigation unless the communication occurs "in a public hearing, workshop, or other public forum" in that proceeding, or "on the record" of that proceeding.¹⁷

The OII parties will be severely prejudiced if they are unable to participate in this proceeding on the same grounds and to the same extent that other parties may do so. At present,

¹⁴These decisionmakers include each Commissioner, the Chief ALJ, the Assistant Chief ALJ, the ALJ assigned to I.09-01-018, and the Law and Motion ALJ. *See* Rule 8.1(b). Commissioners' personal advisors are also treated as decisionmakers for purposes of the Commission's ex parte rules. *See* Rule 8.5.

¹⁵ Other parties in I.09-01-018 (Verizon Wireless, Sprint Nextel) have participated in this rulemaking through CTIA, the Wireless Association. Sprint Nextel requested party status in this proceeding on December 3, 2009.

¹⁶ "[O]ur Decision [07-07-020] does indicate the types of linkages that should be considered by entities when contemplating their own future ex parte communications. Such circumstances might include: (1) temporal proximity between an ex parte communication and a relevant adjudicatory proceeding; (2) the degree of overlap between the issues and parties; and (3) the potential that relief sought via the ex parte communication could detrimentally impact parties in a related adjudicatory proceeding." D.08-06-023, p. 20 (fn. omitted), *citing* D.07-07-020, pp. 19-21.

¹⁷ *See* Commission Rule 8.1(c)(3).

the OII parties are necessarily constrained by concerns that any communications with decisionmakers and the Commissioners' advisors in this proceeding, if not also made "in a public hearing, workshop, or other public forum" or "on the record" in I.09-01-018, might violate Commission Rule 8.2(b). There should not be two sets of ex parte communications rules for this rulemaking proceeding. Parties in this proceeding should not be subject to different ex parte rules depending on whether they are parties in I.09-01-018 or not. Accordingly, a ruling should be issued in both this proceeding and the Malibu Investigation to clarify how all parties in both proceedings can safely conduct themselves without facing any risk of inadvertently engaging in impermissible ex parte communications. Given that some parties cannot discuss current pole loading requirements with decisionmakers present, we recommend that the Commission issue a ruling in both this proceeding and the OII, delineating the following ex parte rule so that all parties are treated equally:

All parties are banned from having any ex parte communications with Decisionmakers or Commissioner's personal advisors in I.09-01-018 and R.08-11-005 regarding the issue of existing pole loading requirements in GO 95 or any other issues that are now before the Commission in I.09-01-018.

IV. CONCLUSION

For the reasons set forth above, we respectfully request that the Commission adopt the above proposed revisions to Issue 20, and ban all parties from having ex parte communications regarding the issue of existing pole loading requirements in GO 95 or any other issues that are now before the Commission in I.09-01-018. Furthermore, the Commission should take up the

issue of prospective rules for pole loading after the Malibu Investigation in I.09-01-018 has been concluded.

Dated at San Francisco, California, this 4th day of December 2009.

Respectfully submitted,



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On Behalf of Joint Moving Parties

EXHIBIT A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Edison Company, Cellco Partnership LLP d/b/a Verizon Wireless, Sprint Communications Company LP, NextG Networks of California, Inc. and Pacific Bell Telephone Company d/b/a AT&T California and AT&T Mobility LLC Regarding the Utility Facilities and the Canyon Fire in Malibu of October 2007.

I.09-01-018
(Filed January 29, 2009)

**MOTION FOR CLARIFICATION OF THE COMMISSION'S RULES
ON EX PARTE COMMUNICATIONS**

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On Behalf of Joint Respondents

December 4, 2009

Pursuant to Rule 11.1 of the Commission’s Rules of Practice and Procedure (“the Commission’s Rules”), Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) and AT&T Mobility LLC¹ (“AT&T”) on behalf of itself and the following parties in the above-captioned proceeding (Southern California Edison Company, Cellco Partnership LLP d/b/a Verizon Wireless, Sprint Nextel,² NextG Networks of California, Inc. (hereinafter, the “Joint Respondents”) respectfully submits this motion for clarification of the Commission’s Rules on ex parte communications³ with regard to issues in the instant proceeding that have recently been slated for simultaneous consideration in Phase II of the Commission’s rulemaking, R.08-11-005.

I. INTRODUCTION

There is an urgent need for the Commission to clarify the operation of the ex parte rules where the same core issue is simultaneously present in this adjudicatory proceeding (where no ex parte communications are permitted⁴) and in the related quasi-legislative rulemaking proceeding, R.08-11-005 (where “ex parte communications are allowed without restriction or reporting requirement”⁵), in which the joint respondents are also participating, either directly or indirectly.⁶ This “overlapping proceedings” situation has arisen because of the inclusion of Issue No. 20 in the recently issued Assigned Commissioner’s Ruling and Scoping Memo for Phase 2 of R.08-11-005, issued November 11, 2009. Issue No. 20 provides as follows:

Loading Standards. The scope of Phase 2 includes (i) what is the proper interpretation of the pole loading standards in GO 95, including (a) the safety factors in Rule 44 and (b) the design, construction, and performance requirements in the first paragraph of Rule 48; (ii) what constitutes overloading; (iii) identifying the party responsible for determining how

¹ New Cingular Wireless PCS, LLC (U 3060 C).

² Sprint Nextel Corporation, on behalf of the following wholly owned companies: Sprint Communications Company, L.P. (U 5112 C), Sprint Spectrum, L.P. as agent for WirelessCo, L.P. (U 3062 C) and Sprint Telephony PCS, L.P. (U 3064 C), and Nextel of California, Inc. (U 3066 C) (collectively, “Sprint Nextel”).

³ See generally Article 8 (Communications with Decisionmakers and Advisors), Rule 8.1 *et seq.*, of the Commission’s Rules.

⁴ See Rule 8.2(b); see also California Public Utilities Code Section (“PU Code §”) 1701.2(b).

⁵ See Rule 8.2(a); see also PU Code § 1701.4(b).

⁶ Verizon Wireless, Sprint Nextel, and NextG are participating in the OIR through CTIA, the wireless association.

strong the pole is at the time an attachment is requested; and (iv) how long to retain information regarding facilities added to a pole and related pole loading calculations or exemptions; and (v) 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.

Because the core issue in this adjudicatory proceeding, namely, interpretation of the requirements for overhead support facilities in Commission General Order No. (“GO”) 95, is substantially overlapped by Issue 20 in R.08-11-005, the joint respondents request that the Commission clarify the application of the ex parte rules when participating in R.08-11-005.

II. RELEVANT BACKGROUND

The purpose of R.08-11-005 is to consider measures to reduce fire hazards associated with: (1) electric transmission and distribution facilities, and (2) communications infrastructure providers (“CIPs”) facilities in close proximity to overhead electric power lines.⁷ The scoping memo dated January 6, 2009 divided that proceeding into two phases. In Phase 1, the Commission adopted measures to reduce fire hazards for the 2009 autumn fire season in Southern California. The purpose of Phase 2 in R.08-11-005 is to address measures that require more time to consider and implement. The Scoping Memo for Phase 2 of R.08-11-0005 sets forth 25 issues that evaluate whether there should be prospective modifications of existing rules or adoption of new rules.

In contrast, Issue No. 20 in the Phase 2 Scoping Memo expressly addresses the “proper” interpretation of existing pole loading rules and requirements under GO 95. This issue, namely, the meaning and interpretation of the existing GO 95 rules governing pole loading is at the heart

⁷ Most of the Commission's rules regarding the construction, operation, and maintenance of utility facilities are in General Orders 95, 128, and 165.

of this investigation. The overlap between the two proceedings is substantial and could not be clearer.

Accordingly, in R.08-11-005, the Joint Respondents have moved for modification of Issue 20 to reflect that, in that proceeding, the Commission only seeks to evaluate *prospective* changes to GO 95 (whether characterized as modification or “clarification”) and does not aim to interpret existing pole loading rules. The Joint Respondents also have suggested that the Commission may want to delay its consideration of Issue 20 until its investigation in I.09-01-018 is complete. The motion,⁸ attached hereto as Exhibit A, also seeks to ban all parties from having ex parte communications regarding any issue in I.09-01-018, including the issue of current pole loading requirements, in the presence of a decisionmaker.

III. REQUESTED RELIEF

Given that the issue of interpretation of pole loading rules is pending in this investigation, it is necessary that there be concurrent rulings clarifying that all ex parte communications with decisionmakers⁹ regarding current pole loading requirements or any other issues in the instant proceeding and R.08-11-005 are prohibited. We hereby request that the Commission issue the following order to clarify how the ex parte rules are applied to parties when participating in R.08-11-005:

All parties are banned from having any ex parte communications with decision makers or Commissioner’s personal advisors in I.09-01-018 and R.08-11-005 regarding the issue of existing pole loading requirements in GO 95 or any other issues that are now before the Commission in I.09-01-018 that may also be at issue in R.08-11-005.

⁸ We are serving both motions on all parties in *both* proceedings in accordance with Rule 8.1(c)(3).

⁹ These decisionmakers include each Commissioner, the Commissioners’ personal advisors, the Chief ALJ, the Assistant Chief ALJ, the ALJ assigned to I.09-01-018, and the Law and Motion ALJ. *See* Rule 8.1(b) and Rule 8.5.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **MOTION TO MODIFY ISSUE 20 SET FORTH IN THE ASSIGNED COMMISSIONER'S RULING AND SCOPING MEMO FOR PHASE 2 AND TO CLARIFY APPLICABILITY OF EX PARTE RULES** in **R.08-11-005** by electronic mail, U.S. mail, and/or by hand-delivery to the person on the official Service List.

Executed this 4^h day of December 2009, at San Francisco, California.

AT&T CALIFORNIA
525 Market Street, 20th Floor
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A handwritten signature in blue ink that reads "Michelle K. Choo". The signature is written in a cursive style with a horizontal line underneath it.

Michelle K. Choo



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