



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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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)

**REPLY TO CPSD'S RESPONSE IN OPPOSITION TO MOTION
FOR CLARIFICATION OF THE COMMISSION'S RULES
ON EX PARTE COMMUNICATION**

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On Behalf of Joint Respondents

January 8, 2010

Pursuant to permission granted by Administrative Law Judge Jacqueline A. Reed¹ and Rule 11.1(f) of the Commission's Rules of Practice and Procedure, AT&T Mobility LLC² 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,³ and NextG Networks of California, Inc. ("NextG"), (hereinafter, the "Joint Moving Parties") respectfully submit this reply to the Consumer Protection and Safety Division's ("CPSD") response to the December 4, 2009 Motion for Clarification of the Commission's Rules on Ex Parte Communications ("the Motion").

I. REPLY TO CPSD'S OPPOSITION

CPSD's opposition to the Motion is based on the mistaken belief that the only possible overlapping issues between this proceeding and the Rulemaking are possible discussions or analyses of past violations of current rules or regulations.⁴ It asks that parties not concern themselves with that overlap because – even though the Rulemaking will analyze and evaluate the same provisions of GO 95 that are at issue in this proceeding – the Rulemaking will do so only for the purpose of revising or clarifying new rules and not to determine the existence of a violation. This view, however, is superficial because in each proceeding the parties must undertake the very same task, namely, identifying what the current rules require.⁵ CPSD's position reflects an unrealistic representation of the analysis the Commission will be required to undertake as a predicate to modifying GO 95 rules for a prospective application in the Rulemaking. Though the OIR proceeding will not determine violations of law or issues of

¹ In a December 23, 2009 email, Judge Reed granted AT&T's request for permission to file a reply to parties' response to the Motion for Clarification of the Commission's Rules on Ex Parte Communications, pursuant to rule 11.1(f) of the Commission's Rules of Practice and Procedure.

² New Cingular Wireless PCS, LLC (U 3060 C).

³ 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").

⁴ CPSD Response, p. 3.

⁵ See R.08-11-005, Joint Moving Parties' Reply, p. 2, fn. 7, also filed today, concurrently with this Reply.

causation with respect to a particular wildfire,⁶ it will expressly focus on the interpretation of loading rules when tackling Issue 20, as currently written. It is this analysis, *i.e.* the appropriate interpretation of the existing pole loading rules in GO 95, that is at the core of the Malibu Fire Investigation.

Aside from CPSD, all parties that responded to Joint Moving Parties' motion in the Rulemaking agree that Issue 20 overlaps with this Investigation, and should be modified to exclude interpretation of existing GO 95 rules. Given this overlap, it is critical that concurrent rules clarifying that all *ex parte* communications with decisionmakers regarding current pole loading requirements or any other issues in the instant proceeding and R.08-11-005 are prohibited.

Several parties in the Rulemaking have argued in support of an order that *ex parte* communications by any parties regarding issues in the OIR, including pole loading issues, would not constitute a violation of *ex parte* restrictions applicable to this proceeding.⁷ Whether the Commission chooses to ban all *ex parte* communications involving issues being litigated in this proceeding, or rather permits such *ex parte* communications in the Rulemaking for all parties without risk of violating restrictions applicable herein, its ruling must apply consistently to all parties in both proceedings.

Joint Moving Parties' reply filed in the Rulemaking is incorporated herein and attached hereto as Exhibit A. Concurrent rulings in this proceeding and the Rulemaking are necessary to provide proper guidance on how the parties should safely conduct themselves in this proceeding

⁶ Although not the focus of the Rulemaking, we note CPSD's December 16, 2009 pleading in the Rulemaking does include allegations that CIPs have violated certain Commission rules in the past. *See* Consumer Protection and Safety Division's Proposed Rules for Phase 2, p. 13 (Dec. 16, 2009).

⁷ *See* Coxcom, Inc. and Cox California Telcom LLC (U 5684 C) Response to Motion to Modify Assigned Commissioner's Ruling and Scoping Memo for Phase 2, filed December 21, 2009 ("Cox Response"), p. 5. Cox observes that "... the Commission could ... clarify ... that *ex parte* communications regarding issues in the OIR, as modified, including pole loading issues, will not constitute a violation of *ex parte* restrictions applicable to the Malibu OII." *Id.* This observation offers at least one of several ways out of the dilemma posed by Issue 20 as it is currently framed in the Scoping Memo.

Exhibit A

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.

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

**REPLY TO RESPONSES TO 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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I. INTRODUCTION

All parties who responded to the Motion, aside from the Consumer Protection and Safety Division ("CPSD"), agree that modifying Issue 20 in the Scoping Memo,⁴ as proposed by the Joint Moving Parties, is appropriate in light of the overlap of issues in this proceeding and in Investigation (I.) 09-01-018 (the "Malibu Fire Investigation"). These issues involve the interpretation of certain rules in General Order ("GO") 95. CPSD's opposition fails to recognize that if Issue 20 in this proceeding is not modified, the same rules in GO 95 will be interpreted simultaneously in two active Commission proceedings – proceedings that have different parties, varying *ex parte* communications rules, and different schedules. Such circumstances create a significant risk of conflicting rulings. Moreover, for the reasons that the Joint Moving Parties explained in the Motion, these circumstances are unfairly prejudicial to all parties.

In particular, because they are respondents in I.09-01-018, the Joint Moving Parties – when discussing issues in this proceeding that are *also* issues in I.09-01-018 – constantly face the risk that

¹ In a December 24, 2009 email, Judge Kenney granted AT&T's request for permission to file a reply to parties' responses to the Motion to Modify Issue 20, pursuant to Rule 11.1(f) of the Commission's Rules of Practice and Procedure.

² New Cingular Wireless PCS, LLC (U 3060 C).

³ Sprint Telephony PCS, L.P. (U 3064 C) ("Sprint").

⁴ See *Assigned Commissioner's Ruling and Scoping Memo for Phase 2 of this Proceeding* (hereinafter, "Scoping Memo"), p. 7 (Nov. 9, 2009). Issue 20 encompasses the following: "**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 poleloading 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." As framed in the Scoping Memo, Issue 20 substantially overlaps issues already under consideration in I.09-01-018.

the Commission will view their communications *in this proceeding* as improper *ex parte* communications concerning issues *in I.09-01-018*.⁵ This is not an unfounded apprehension, as prior Commission decisions illustrate.⁶ However, *other parties* in this proceeding, *i.e.*, parties that are *not* parties in I.09-01-018, do not face such risks. The vigor with which they defend their desire to engage in *ex parte* communications without restriction in this proceeding is a clear indication of the value that, not surprisingly, they place upon *ex parte* communications made in Commission proceedings. Thus, the right for *all parties* to engage in *ex parte* communications *on an equal basis* is not a trivial matter, and suggests that, at the very least, the Commission should clarify how its *ex parte* rules will be applied so that all parties are on the same footing in this proceeding.

Responding parties also recognize that even with the proposed modification to Issue 20, it will be impossible to conduct this proceeding without discussion and interpretation of current GO 95 rules.⁷ Although the responding parties have varying positions regarding the Joint Moving Parties' proposed ban on *ex parte* communications involving issues concurrently being adjudicated in the Malibu Fire Investigation, they clearly support the Joint Moving Parties' request for a ruling on *ex parte*

⁵ Indeed, in order to comply with the Commission's rules, the Joint Moving Parties are *also* filing a copy of this Reply in I.09-01-018, so that this communication is "on the record" in I.09-01-018. *See* Commission Rules of Practice and Procedure, Rule 8.1(c)(3). Unless the Commission provides the relief sought by Joint Moving Parties in the Motion, it may frequently be necessary to engage in "double filings," *i.e.*, filings in both proceedings, whenever the Joint Moving Parties file anything in this proceeding that overlaps with issues in I.09-01-018.

⁶ As the Joint Moving Parties stated in the Motion (citing D.07-07-020 and D.08-08-023): "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.07-07-020 and thus trigger liability on the part of the OII Parties that undertake *ex parte* communications in the OIR." *See* Motion, p. 7, and n. 16. Here, arguably, all three "linkage factors" identified in D.08-06-023 are at least present, if not literally satisfied.

⁷ *See* PG&E Response, p. 1 ("... discussion of the basis for the changes will necessarily involve what the current rules require."). *See also id.* at SDG&E Response, p. 2 ("It would not make sense for the parties and the Commission to consider changing pole loading rules without fully and freely discussing the existing rules..."). In light of the Responses by PG&E and SDG&E, there can be no doubt that "what the current rules require" – which is one of *the paramount issues* in I.09-01-018 – will be a subject of substantial discussion, both on and off the record, in workshops and *ex parte* communications alike, in this proceeding. This is precisely what compelled Joint Moving Parties to file the instant Motion. *See also* Response of California Cable and Telecommunications Association and Comcast Phone of California, LLC to Motion to Modify Issue 20, etc., p. 2 (Dec. 21, 2009). CCTA and Comcast observe, "If a cable company, for example, wants to explain how it performs its pole loading calculations *under the existing rules* and how it believes changes to interpretation or rule subsections would be warranted *in light of existing practice*, it should not be precluded from bring those matters to the attention of decision-makers in *ex parte* contacts in a quasi-legislative proceeding." *Id.* (emphasis added). The Commission should not fail to see that *how pole loading calculations are performed under the existing rules* is one of the paramount issues in I.09-01-018. CCTA and Comcast seem to believe that, with "some preparation and forethought," it is possible to discuss this issue in R.08-11-005 without it being seen as an improper *ex parte* communication on the *very same issue* in I.09-01-018. CCTA and Comcast are mistaken. It is not possible to do so, though it is easy to understand why they are not as concerned about this risk as the Joint Moving Parties, since they are not respondents in I.09-01-018 and do not face the same risk of violating Commission rules as Joint Moving Parties face.

communications that will apply to all parties in this proceeding, regardless of whether they are also parties to the Malibu Fire Investigation. Whether the Commission chooses to ban all *ex parte* communications involving existing pole loading requirements or any other issue being litigated in I.09-01-018 (as recommended by Joint Moving Parties), or instead permits such *ex parte* communications in this Rulemaking for all parties without risk of violating restrictions applicable to the Malibu Fire Investigation (as recommended by Cox⁸), its ruling must apply consistently to all parties. In short, all parties should be on an equal footing in this proceeding.

Finally, certain responding parties have requested further clarification as to the specific issues in the two proceedings which overlap. As discussed below, the Commission's Order Instituting Investigation 01-09-018 and the subsequent Scoping Memo issued in that proceeding specifically identify the issues to be adjudicated, thereby providing all parties with appropriate notice.

A. CPSD's Opposition Fails to Recognize the Substantial Overlap of Issues between this Proceeding and I.09-01-018.

In its opposition, CPSD mistakenly focuses on its contention that the OIR will not discuss or address violations of current rules or regulations.⁹ Though this statement is correct in a narrow sense, it misses the point and shows a failure to understand that what current GO 95 rules require is at issue in both this OIR and the Malibu Fire OII. Moving parties do not seek modification of Issue 20 in the belief that the adjudication of liability, which is an issue in I.09-01-018, is also at issue in this proceeding. Rather, modification of Issue 20 is necessary because the requirements of existing GO 95 rules concerning pole loading, on which the Commission will issue findings and/or conclusions in this proceeding, are expressly at issue in the OII.

CPSD's position reflects a simplistic and unrealistic representation of the analysis the Commission will be required to undertake as a predicate to modifying GO 95 rules for future application. Though this OIR proceeding will not determine violations of law or issues of causation

⁸ See Coxcom, Inc. and Cox California Telecom LLC (U 5684 C) Response to Motion to Modify Assigned Commissioner's Ruling and Scoping Memo for Phase 2 (Dec. 21, 2009) ("Cox Response"), p. 5. Cox observes that ". . . the Commission could . . . clarify . . . that *ex parte* communications regarding issues in the OIR, as modified, including pole loading issues, will not constitute a violation of *ex parte* restrictions applicable to the Malibu OII." *Id.* This observation offers at least one of several ways out of the dilemma posed by Issue 20 as it is currently framed in the Scoping Memo.

⁹ CPSD Response, p. 3.

with respect to a particular wildfire,¹⁰ it will expressly focus on the correct interpretation of current loading rules when tackling Issue 20. Moreover, no party can logically argue that Rules 44.1 or 44.2, both of which are intricately involved in the adjudication of liability that will be a primary consideration in I.09-01-018, will not be dissected, evaluated, and interpreted as part of a consideration of proposed rule changes in R.08-11-005. It is this analysis, *i.e.*, the appropriate interpretation of the existing pole loading rules in GO 95, that is at the core of the Malibu Fire Investigation.

Thus Issue 20 needs to be modified to exclude interpretation of existing GO 95 rules. Given the widespread recognition that any discussion of prospective changes to the GO 95 rules must necessarily require discussion of existing requirements, the Commission should:

i) modify Issue 20 as Joint Moving Parties have proposed; ii) ban all parties from having *ex parte* communications in this proceeding pertaining to the existing pole requirements in GO 95 (or any other issues now before the Commission in I.09-01-018); and iii) delay consideration of Issue 20 until after the OII is concluded.¹¹ Conceivably, the Commission could fashion an alternative form of relief¹² that clearly and unequivocally permits Joint Moving Parties to participate in this Rulemaking on the exact same unrestricted footing as other parties, without concern of violating the Commission's rules simply because their communications in this proceeding touch on issues that are also before the Commission in I.09-01-018. Absent such a ruling, however, the Commission should grant the relief sought by the Joint Moving Parties in the Motion.

B. Parties Have Had Appropriate Notice of Which Issues in this Proceeding and the Malibu Investigation Overlap.

Cox supports the request to modify the Scoping Memo, but opposes the proposed ban on certain *ex parte* communications on grounds that moving parties fail to identify with specificity the “other issues” in the Malibu Fire Investigation beyond pole loading.¹³ A brief review of the Order Instituting Investigation 09-01-018 demonstrates that all parties in this proceeding have received notice as to exactly which GO 95 rules CPSD contends respondents violated: Rules 12.2, 31.1, 31.2, 43.2,

¹⁰ Although not the focus of the Rulemaking, we note CPSD's December 16, 2009 pleading in the Rulemaking does include allegations that CIPs have violated certain Commission rules in the past. *See* Consumer Protection and Safety Division's Proposed Rules for Phase 2, p. 13 (Dec. 16, 2009).

¹¹ *See* Motion, pp. 8-9.

¹² Joint Moving Parties note that Commissioner Simon is the Assigned Commissioner for both R.08-11-005 and I.09-01-018.

¹³ Cox Response, p. 5.

44.1, and 44.2. Accordingly, in addition to rules governing pole loading standards, the Malibu Fire Investigation will be interpreting other rules as well, including those governing the maintenance, inspection, design, construction, and inspection of lines. The Commission's OII and Scoping Memo clearly provide sufficient notice of possible issue overlaps between this proceeding and I.09-01-018 to the parties to this proceeding.¹⁴

II. CONCLUSION

Aside from CPSD, all parties acknowledge the dilemma faced by the parties involved in both this proceeding and in the Malibu Fire Investigation, I.09-01-018. The core issue in the Malibu Fire Investigation, namely, interpretation of the requirements for overhead support facilities under GO 95, substantially overlaps with Issue 20 in this proceeding. If the Commission does not adopt the Joint Moving Parties' proposed revisions to Issue 20, there will be a substantial risk of contaminating and prejudicing the adjudicatory process in the Malibu Fire Investigation. In addition, as explained above, the Commission should articulate guidelines for *ex parte* communications involving the issues in the Malibu Fire Investigation that will apply *equitably* to all parties in this proceeding, regardless of their participation in the Malibu Fire Investigation.

Given the risk of prejudice to parties in I.09-01-018, Joint Moving Parties believe that the Commission should forbid any *ex parte* communications in this proceeding concerning issues under consideration in I.09-01-018. If the Commission believes that an alternative form of relief would be more appropriate, it should allow all parties to this proceeding, including those which are also parties in the Malibu Fire Investigation, to make *ex parte* contacts without restriction in this proceeding, without fear of violating the Commission's *ex parte* communication rules. Furthermore, to avoid prejudice to any of the parties in either proceeding, the Commission should only take up the issue of prospective rules for pole loading *after* I.09-01-018 has been concluded. By so doing, the Commission

¹⁴ The Joint Moving Parties have requested that the assigned ALJ and Commissioner in I.09-01-018 modify the Scoping Memo issued in that proceeding to eliminate, among other reasons as being beyond the scope of the investigation, the consideration of whether the respondents in that proceeding engaged in "poor technical practices." I.09-01-018, *Assigned Commissioner's Ruling and Scoping Memo*, pp. 5-6, 9 (Oct. 2, 2009). The Commission's Rulemaking does not propose to consider a similar provision in this proceeding and thus the problem of inadvertent *ex parte* communications due to duplicate issues does not exist as to this issue.

**PROCEEDING: I0901018 – MALIBU FIRES
LAST CHANGED: JANUARY 6, 2010**

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