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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.

Investigation 09-01-018
(Filed January 29, 2009)

**ADMINISTRATIVE LAW JUDGES' RULING
GRANTING MOTION FOR A CONTINUANCE**

Summary

This ruling grants the motion by the Consumer Protection and Safety Division to extend the due date for its reply testimony to April 11, 2011. Southern California Edison Company, Verizon Wireless, Sprint Communications Company LP, NextG Networks of California, Inc., and AT&T California and AT&T Mobility LLC may submit surrebuttal testimony, if appropriate, on a date to be determined in accordance with the procedures set forth in this ruling.

Background

On October 21, 2007, strong winds in Malibu Canyon broke three utility poles, resulting in a fire that burned nearly 4,000 acres. In January 2009, the California Public Utilities Commission (Commission) instituted this proceeding to formally investigate whether Southern California Edison Company (SCE),

Verizon Wireless, Sprint Communications Company LP, NextG Networks of California, Inc., and AT&T California and AT&T Mobility LLC (together, “the Respondents”) violated any provisions of the Public Utilities Code, Commission general orders or decisions, or other rules with respect to their facilities involved in the ignition of the Malibu Canyon fire.

Consumer Protection and Safety Division (CPSD) served its direct written testimony on May 3, 2010, and the Respondents served their rebuttal testimony on November 18, 2010. CPSD was scheduled to serve its reply testimony sometime in January 2011, with the exact date to be determined by the parties.

CPSD’s Motion for a Continuance

On January 3, 2011, CPSD filed a motion to extend the due date for its reply testimony to April 11, 2011. CPSD states that a continuance is necessary for several reasons. First, CPSD alleges that its reply testimony has been delayed by the Respondents’ failure to cooperate. For example, CPSD sent an email on November 30, 2010, requesting depositions from all of SCE’s testifying witnesses. However, as of the date of CPSD’s motion, only one witness had been deposed.

Second, CPSD represents that it has been delayed by budget constraints. The preparation of deposition transcripts takes two to four weeks unless one of the parties requests and pays for expedited transcripts. No party has requested expedited transcripts. In addition, CPSD must rely on the Commission’s court reporters to record depositions, which causes further delay because of the court reporters’ busy schedule.

Third, CPSD needs more time to review the large volume of data it has received. Specifically, after receiving the Respondents’ rebuttal testimony, CPSD sent data requests on November 29, 2010. The Respondents began a rolling response on December 10, 2010. On December 21 and 22, 2010, the Respondents

provided a flash drive with 5 gigabits (GB) of data, an external hard drive with over 250 GB, and a CD and DVD.

Fourth, CPSD states that it needs additional time to analyze the computer model provided by the Respondents between December 10 and December 22. CPSD sent a data request pursuant to Rule 10.3 of the Commission's Rules of Practice and Procedure (Rule) that sought computer model data and documentation. The response was due on January 3, 2011.

Finally, CPSD did not learn until December 2010 that Respondents had failed to preserve certain physical evidence. CPSD states that it will need more time to pursue discovery on the issue of spoliation¹ and to prepare related testimony and recommendations.

Respondents' Response

The Respondents filed a response on January 10, 2011. The Respondents urge the Commission to deny CPSD's motion. They assert that CPSD seeks a continuance so that it can pursue the newly raised issue of spoliation. The Respondents claim that the issue of spoliation is not a proper subject for CPSD's reply testimony because this matter was not addressed in CPSD's direct testimony or in the Respondent's reply testimony.

The Respondents contend that CPSD's allegation of spoliation of evidence is reckless and unfounded. The Respondents represent that they discarded only a few pieces of equipment, none of which has any relevance to CPSD's

¹ "Spoliation" is the destruction, alteration, or failure to preserve evidence for another's use in pending or future litigation.

testimony. The Respondents further contend that CPSD has always had access to all pertinent information about the discarded equipment.

The Respondents state that they have made every effort to respond in a timely manner to CPSD's discovery requests. For example, the Respondents replied to CPSD's data request dated November 29, 2010, within nine working days and produced expert work papers shortly thereafter. The Respondents also purchased an external hard drive to provide requested data to CPSD, and have paid for CPSD's expert witness fees and deposition transcripts.

If the Commission grants CPSD's motion for a continuance, and CPSD submits reply testimony that addresses matters that are beyond the scope of the Respondents' rebuttal testimony, the Respondents assert that the Commission must either strike CPSD's testimony or provide the Respondents with an opportunity for discovery and surrebuttal.

CPSD's Reply

CPSD filed a reply on January 12, 2011, pursuant to Rule 11.1(f). In its reply, CPSD reiterates many of the arguments in its motion for a continuance.

CPSD disputes the Respondents' contention that the discarded equipment is irrelevant to CPSD's direct case, and that CPSD has had access to all pertinent information regarding the discarded equipment. CPSD states that it has sought evidence relevant to wind-load calculations since the beginning of this proceeding, but the Respondents have refused to provide much of the evidence. The first six chapters of CPSD's direct testimony contain several references to the Respondents' refusal to provide evidence relevant to wind-loading calculations.

Discussion

CPSD has shown good cause for a continuance. In particular, CPSD has demonstrated that it needs additional time to (1) conduct discovery on the computer model and 255 GB of data that the Respondents provided to CPSD in December 2010 (CPSD Reply at 4), and (2) depose witnesses who sponsored parts of the Respondents' rebuttal testimony and other persons who might possess information that is material and relevant. (CPSD Motion at 6 - 7)

CPSD may pursue the issue of whether there has been spoliation of evidence. CPSD was not aware of the full extent of this issue until very recently (CPSD Motion at 8 - 10), and CPSD should have an opportunity to conduct discovery and assess the implications of this issue. If CPSD's reply testimony addresses spoliation, the Respondents will have an opportunity to submit surrebuttal testimony.

For the preceding reasons, CPSD's motion for a continuance is granted. As requested by CPSD, the due date for its reply testimony is extended to Monday, April 11, 2011 (CPSD Motion at 1). If the Respondents believe surrebuttal testimony is needed, they shall meet and confer with CPSD as soon as possible after CPSD serves its reply testimony for the purpose of reaching an agreement on the schedule for surrebuttal testimony. The Respondents should then file a motion that seeks approval of the agreed-upon schedule.

This ruling does not address whether spoliation actually occurred and, if so, whether the spoliation was intentional and affected CPSD's case. These matters will be considered after the parties have had an opportunity to develop a thorough record and to brief the legal issues based on that record.

Good cause appearing, **IT IS RULED** that:

1. Consumer Protection and Safety Division's motion for a continuance is granted. Consumer Protection and Safety Division may serve reply testimony no later than April 11, 2011.

2. If Southern California Edison Company, Verizon Wireless, Sprint Communications Company LP, NextG Networks of California, Inc., and AT&T California and AT&T Mobility LLC believe surrebuttal testimony is needed, they shall meet and confer with Consumer Protection and Safety Division as soon as possible after Consumer Protection and Safety Division serves its reply testimony for the purpose of reaching an agreement on the schedule for surrebuttal testimony. Southern California Edison Company, Verizon Wireless, Sprint Communications Company LP, NextG Networks of California, Inc., and AT&T California and AT&T Mobility LLC shall then file a motion that seeks approval of the agreed-upon schedule.

Dated January 26, 2011, at San Francisco, California.

/s/ JACQUELINE A. REED

Jacqueline A. Reed
Assistant Chief
Administrative Law Judge

/s/ TIMOTHY KENNEY

Timothy Kenney
Administrative Law Judge

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Dated January 26, 2011, at San Francisco, California.

/s/ GLADYS M. DINGLASAN
Gladys M. Dinglasan

N O T I C E

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