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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 JUDGE'S RULING DENYING MOTIONS  
TO EXCLUDE ORAL TESTIMONY FROM PERCIPIENT WITNESSES**

**1. Summary**

This ruling denies the motions by AT&T Mobility LLC and Southern California Edison Company to prohibit percipient witnesses from being called to provide oral testimony at the scheduled evidentiary hearing.

**2. Background**

In preparation for the evidentiary hearing scheduled for March 5 through April 6, 2012, the Commission's Consumer Protection and Safety Division (CPSD) and the five Respondents have each served multiple rounds of prepared written testimony. CPSD's written testimony is sponsored by six witnesses, all of whom are CPSD employees or contractors hired by CPSD. CPSD also intends to

call an additional 10 to 15 witnesses to provide oral testimony at the hearing. All of the additional witnesses are (or were) Respondent employees or contractors.

On December 5, 2011, AT&T Mobility LLC (AT&T) filed a motion to prohibit all parties from calling and examining at hearing additional witnesses for whom no prepared written testimony has been served previously.

On December 5, 2011, Southern California Edison Company (SCE) filed a motion that partially joined in AT&T's motion to prohibit additional witnesses. The joinder is partial because SCE will make two of its employees available to provide oral testimony at the evidentiary hearing.

On December 19, 2011, CPSD filed a response opposing both motions. There were no other responses to the two motions.

### **3. Summary of AT&T's Motion**

AT&T moves to prohibit all parties from calling and examining witnesses at the hearing for whom no prepared written testimony has been served. AT&T argues that allowing oral testimony from additional witnesses conflicts with the Commission's practice of requiring prepared written testimony.

AT&T contends that Rule 13.8(b) of the Commission's Rules of Practice and Procedure (Rule 13.8(b)) prohibits parties from offering direct oral testimony in addition to written testimony without a showing of good cause. AT&T notes that since the Commission instituted this proceeding three years ago, CPSD has issued more than 100 data requests to the Respondents and has deposed 14 persons. AT&T submits that the following schedule established by the two scoping memos for serving written testimony has provided CPSD with ample time to conduct discovery, depose witnesses, and prepare written testimony:

<b>Date</b>	<b>Written Testimony</b>
May 3, 2010	Prepared Direct Testimony of CPSD
Nov. 18, 2010	Prepared Direct Testimony of Respondents
April 29, 2011	Prepared Rebuttal Testimony of CPSD
June 29, 2011	Prepared Sur-rebuttal Testimony of Respondents
August 29, 2011	Prepared Reply Testimony of CPSD and Sur-rebuttal Testimony of Respondents

AT&T notes that each round of CPSD’s prepared written testimony included deposition transcripts from Respondent employees.

CPSD indicated in its Prehearing Conference Statement (PHC) filed on October 21, 2011, that CPSD intends to call 15 witnesses, in addition to the six witnesses whose prepared written testimony was served by CPSD. AT&T states that all 15 witnesses were known to CPSD before the close of discovery and many were deposed by CPSD. The following tables list the additional witnesses that CPSD seeks to examine at the hearing and the date of their deposition or, if no deposition was taken, the date CPSD was informed of the witness:

<b>Additional Witnesses Deposed by CPSD</b>	<b>Deposition Taken</b>
Roger Auchard	December 17, 2009
James Austin	December 28, 2009
Ryan Brown	January 19, 2011
Richard Cromer	December 17, 2009 March 3, 2010
Frederick McCollum	December 20, 2010
Matt Payne	January 25, 2011
Arthur Peralta	March 5, 2010 March 25 and 29, 2011
Joe Rodriguez	January 25, 2011
June Santiago	March 4, 2010

<b>Additional Witnesses Not Deposed by CPSD</b>	<b>When CPSD Was Informed of the Witness</b>
Kirk Bouchard	January 12, 2011
Kathleen Dell	April 20, 2009
Casey Doherty	April 20, 2009
Rodney Lloyd	March 21, 2011
Cory Vandebos	April 20, 2009
Juan Vargas	January 12, 2011

AT&T contends that the Commission should not permit CPSD to supplement its written testimony by calling additional witnesses, particularly when such witnesses have already been deposed or could have been deposed, and the deposition transcripts attached to CPSD's written testimony.

AT&T maintains that if CPSD is permitted to examine additional witnesses at the hearing, then other parties must have an opportunity to conduct discovery and present rebuttal witnesses.

#### **4. Summary of SCE's Partial Joinder in AT&T's Motion**

SCE partially joins in AT&T's motion to exclude oral testimony from witnesses who did not serve prepared written testimony. The joinder is partial because SCE will make two of its employees - Frederick McCollum and Arthur Peralta - available to provide oral testimony at the evidentiary hearing.

SCE will allow McCollum and Peralta to provide oral testimony to affirm, correct, or update their deposition transcripts attached to CPSD's testimony. Thereafter, McCollum and Peralta may be questioned by CPSD and other Respondents. With respect to all other persons not sponsoring written testimony, SCE joins AT&T's motion for the reasons stated therein.

**5. Summary of CPSD’s Response**

CPSD states that although it indicated in its PHC statement that it would call 15 witnesses to provide oral testimony at the evidentiary hearing, CPSD will conditionally waive five of the witnesses. The remaining 10 witnesses that CPSD intends to call for oral testimony are identified below:

<b>Name of Witness</b>	<b>Position</b>	<b>Significance</b>
Arthur Peralta	SCE Employee	Wind loading study
Richard Cromer	Former SCE Employee	Wind loading study
Frederick McCollum	SCE Employee	Destruction of evidence and other matters
Matt Payne	SCE Employee	Cannibalization of KPF switch
Joe Rodriguez	SCE (ECS) Employee	Destruction of ECS cable
Rodney Lloyd	SCE Data Response Witness	Rule 1.1 violation associated with the destroyed ECS cable
Kirk Bouchard	Contractor	Destruction of AT&T cable and alleged destruction of Verizon Wireless cable
Juan Vargas	Contractor	Destruction of AT&T cable and alleged destruction of Verizon Wireless cable
Cory Vandebos	Contractor	Destruction of the NextG cables
Kathleen Dell	AT&T Witness	April 20, 2009 sworn declaration

The witnesses that CPSD will conditionally waive are Roger Auchard, James Austin, June Santiago, Ryan Brown, and Casey Doherty. Subject to the Administrative Law Judge’s approval, the deposition transcripts of Auchard, Austin, Santiago, and Brown will be moved onto the record in lieu of oral testimony. If the transcripts are not admitted due to an objection from another party, CPSD will withdraw its conditional waiver and move to call these witnesses to testify.

CPSD explains there is good cause to call the 15 persons identified previously to provide oral testimony because they are percipient witnesses on matters that are relevant to CPSD's case. CPSD maintains that it could not have provided prepared written testimony from these witnesses pursuant to Rule 13.8 because none of these witnesses is an employee or contractor of CPSD.

CPSD disputes AT&T's suggestion that CPSD should have deposed all witnesses and then moved the deposition transcripts into the record. CPSD asserts that the Commission's court reporters lack the resources for AT&T's suggested approach.

Finally, CPSD states there is no prejudice to the Respondents by calling the disputed witnesses to testify because the Respondents are aware of the views and knowledge of these witnesses.

## **6. Discussion**

### **6.1. AT&T's and SCE's Motions**

The purpose of Commission evidentiary hearings is to provide parties an opportunity to offer evidence, subject to cross examination, regarding contested factual issues. The record developed at evidentiary hearings provides the foundation for informed Commission decisions on contested factual issues. The Commission has authority to call persons to testify at Commission hearings pursuant to Pub. Util. Code § 314(a).

CPSD intends to call 10 to 15 Respondent employees and contractors to provide oral testimony at the evidentiary hearing. CPSD has demonstrated that each of these persons is a percipient witnesses regarding one or more matters that are relevant to CPSD's case. Therefore, CPSD should be allowed to call these witnesses to testify at the scheduled hearing unless AT&T and SCE can show good cause as to why these witnesses should not be allowed to testify.

This ruling finds that AT&T and SCE have not shown good cause. Essentially, they argue that the only method for CPSD to present the testimony of the percipient witnesses is to depose these witnesses and appended the deposition transcripts to the prepared written testimony that is served by CPSD pursuant to Rule 13.8. This argument is unpersuasive for the following reasons.

First, percipient witnesses are often the best evidence available to a litigant. It would be unfair to deny CPSD the opportunity to present its best evidence. Second, the credibility of certain percipient witnesses could become an issue in this proceeding. The Courts have recognized that the demeanor and oral testimony of a witness are useful for determining the credibility of the witness:

Oral testimony of witnesses given in the presence of the trier of fact is valued for its probative worth on the issue of credibility, because such testimony affords the trier of fact an opportunity to observe the demeanor of witnesses. A witness's demeanor is part of the evidence and is of considerable legal consequence. The testimony of witnesses given on direct examination is afforded significant weight at trial in ascertaining their credibility... In a contested hearing, the precise words and demeanor of a witness during direct as well as cross-examination bears on the credibility and weight the trier of fact accords the witness's testimony... Ordinarily, written testimony is substantially less valuable for the purpose of evaluating credibility. A prepared, concise statement read by counsel may speed up a hearing, but it is no substitute for the real thing. Lost is the opportunity for the trier of fact and counsel to assess the witness's strengths and weaknesses, recollection, and attempts at evasion or spinning the facts. (*Elkins v. Superior Court* (2007) 41 Cal. 4th 1337, 1358. Citations omitted.)

Finally, CPSD has accused the Respondents, including AT&T and SCE, of many serious violations of the Commission's rules and regulations pertaining to public safety. In light of the significant public safety implications, it is incumbent upon the Commission to hear the testimony of percipient witnesses.

AT&T and SCE argue unconvincingly that allowing CPSD to call percipient witnesses to provide oral testimony would contravene Rules 13.8(a) and 13.8(b), which state, in relevant part, as follows:

**Rule 13.8(a):** Prepared testimony may be identified and accepted in evidence as an exhibit in lieu of oral testimony under direct examination, provided that copies shall have been served upon all parties prior to hearing and pursuant to the schedule adopted in the proceeding. Prepared testimony shall constitute the entirety of the witness's direct testimony, and shall include any exhibits to be offered in support of the testimony....

**Rule 13.8(b):** Direct testimony in addition to the prepared testimony previously served...will not be accepted into evidence unless the sponsoring party shows good cause why the additional testimony could not have been served with the prepared testimony or should otherwise be admitted.

In Commission proceedings, parties usually present their case through prepared written testimony pursuant to Rule 13.8(a), subject to cross examination. The purpose of Rule 13.8(b) is to prevent parties from offering direct oral testimony in addition to their prepared written testimony. None of the percipient witnesses has served prepared written testimony on behalf of CPSD within the meaning of Rule 13.8(a). Thus, Rule 13.8(b) does not apply to the direct oral testimony of the percipient witnesses. Even if Rule 13.8(b) did apply, there is good cause for the oral testimony of the percipient witness to be heard at the evidentiary hearing for the reasons stated previously in this ruling.

Finally, allowing CPSD to call percipient witnesses to provide oral testimony does not cause undue prejudice to the Respondents. The Respondents have been on notice of CPSD's intent to call these witnesses since CPSD filed its PHC statement on October 21, 2011. By the time the evidentiary hearing starts

on March 5, 2012, the Respondents will have had sufficient time to prepare their own direct examination of the percipient witnesses and/or cross examination.

**6.2. Conclusion**

AT&T's and SCE's motions to prevent CPSD from calling percipient witnesses to provide oral testimony at the evidentiary hearing are denied. CPSD is reminded that five weeks of hearings have been scheduled. It is CPSD's responsibility to manage the witnesses it calls to fit within the hearing schedule.

**IT IS RULED** that the motions by AT&T Mobility LLC and Southern California Edison Company to prevent the Commission's Consumer Protection and Safety Division from calling percipient witnesses to provide oral testimony at the scheduled evidentiary hearing are denied.

Dated February 13, 2012, at San Francisco, California.

/s/ TIMOTHY KENNEY

Timothy Kenney  
Administrative Law Judge