

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-171
Administrative Law Judge Division
March 18, 1997

R E S O L U T I O N

RESOLUTION 171. Approves draft of final rules implementing requirements of SB 960; draft to be published in the California Regulatory Notice Register, commencing notice-and-comment process leading to formal adoption and codification of SB 960 rules in the Commission's Rules of Practice and Procedure.

SUMMARY

The appendix to this resolution contains a draft of final rules implementing the requirements of Senate Bill (SB) 960 (Leonard, ch. 96-0856). SB 960 becomes effective on January 1, 1998; in the draft, the final rules are designated to become effective on the same date.

The draft rules derive from but also modify the "experimental" rules contained in Resolution (Res.) ALJ-170 (adopted January 13, 1997), under which the Commission is gaining experience by applying SB 960's requirements to a selected sample of proceedings. The modifications are necessary in order to (1) convert the experimental rules into rules of general application, and (2) remove overlap, duplication, or inconsistency between the SB 960 rules and the Commission's existing Rules of Practice and Procedure. (These existing rules are codified in Title 20 of the California Code of Regulations; they will be referred to below as the Title 20 rules.) Further modifications may be proposed, depending on comments on the draft as well as the results of the "experiment;" however, the notice-and-comment process should be

started as soon as possible to ensure timely implementation.

BACKGROUND

Res. ALJ-170 explains the genesis of the Commission's SB 960 experiment and discusses the major issues in designing the experiment. Res. ALJ-170 also notes the need to start the notice-and-comment process leading to adoption of final rules to implement SB 960. The Commission's stated goal for the finalization process is to achieve "internal consistency in a single set of procedural

rules that ultimately will apply to all Commission proceedings." (Id., page 2.)

The discussion below describes what changes to the experimental rules and to the Title 20 rules are proposed in the draft, and how these changes serve the stated goal. The concluding portion of this resolution describes the next steps the Commission plans in furthering SB 960 and other procedural reform efforts.

DISCUSSION

1. Deletion of Rules on Experimental "Sample" Several experimental rules address the process by which a representative sample of proceedings is identified, categorized, and ultimately included in or excluded from the experiment. These rules are unnecessary when SB 960 becomes effective; consequently, they are deleted from the final rules.

2. Proceedings to Which SB 960 Requirements Apply SB 960 becomes effective on January 1, 1998. At a minimum, the final rules implementing SB 960 should apply its requirements to all proceedings that are opened (or conceivably reopened) after January 1, 1998, and that go to hearing. However, SB 960 does not say explicitly whether all or any of its requirements apply to proceedings pending at the Commission on or before January 1, 1998. The draft would implement SB 960 by applying its requirements only to "new" proceedings (those started after January 1, 1998) and to any proceedings included in the experiment that are still open as of that date. The rationale for this implementation approach follows.

Under SB 960 as written, there are three possible implementation approaches for this issue regarding "old" proceedings (those started before January 1, 1998): (1) apply all SB 960 requirements both prospectively and retrospectively to all formal proceedings that have been or will be to hearing and that are open at the Commission on or after January 1, 1998; (2) apply SB 960 requirements only on a "going forward" basis to those open proceedings started before January 1, 1998; and (3) apply SB 960 requirements only to open proceedings that were included in the experiment. The draft follows this third approach.

The first approach has the benefit of creating a "flash cut" to a single set of rules for all formal Commission proceedings after

SB 960 becomes effective. However, the disadvantages outweigh the benefit. The Commission would have to categorize hundreds of old proceedings pending as of January 1, 1998. Depending on the categorization of any particular old proceeding, the newly applicable procedural rules could be inconsistent with the rules under which the proceeding was handled before January 1, 1998. There is a strong likelihood that some parties will argue for repeating portions of the proceeding or even dismissal and refile; and even if the procedural wrangles are handled to everyone's satisfaction, delay and uncertainty are probably unavoidable.

The second approach seems intended to avoid arguments over the prior handling of proceedings, but the Commission still would have to categorize hundreds of proceedings solely to determine what requirements of SB 960 should apply on a "going forward" basis. Debate is also likely over the "going forward" concept itself.¹ Part of the Commission's experience with the experiment to date, in trying to include "previously filed" proceedings, is that there is great resistance and confusion among parties to importing a large number of new rules into a proceeding that is well under way. Thus, both the first and second approaches seem likely to result in much procedural wrangling.

The third (recommended) approach seems simpler and easier than either of the others. The third approach also smoothes the transition to SB 960, as the Commission will not have to perform a massive categorization exercise for old proceedings. The disadvantage of the third approach is that two sets of procedural rules will govern different Commission proceedings based on the vintage of the proceedings. However, the number of proceedings

¹ Consider the example of a quasi-legislative proceeding that has been to hearing and that as of January 1, 1998, is under submission awaiting issuance of a proposed decision. Under Section 10 of SB 960, the assigned Commissioner is supposed to "prepare the proposed rule or order" but the assigned Commissioner may not have been "present for formal hearings" in the proceeding, as required by SB 960. In situations like this, where the SB 960 requirements seem tied to parts of a proceeding completed before the effective date of SB 960, it is not easy to decide how the "going forward" concept would work.

conducted under pre-SB 960 rules will diminish steadily, and any proceeding that is reopened after January 1, 1998 would be handled under the SB 960 rules regardless of the original filing date of the proceeding. On balance, the third approach seems best and is followed in the draft final rules.

3. Exclusion of Cases Under Expedited Complaint Procedure

SB 960 does not say explicitly how it affects the Commission's expedited complaint procedure (ECP). The ECP is designed to follow

both the simplified process of a small claims court trial (see Rule 13.2 of the Title 20 rules) and the small claims court jurisdictional limit on the amount in dispute (see Public Utilities Code { 1702.1). An ECP case, from filing to final decision, should take only a little over two months, as described in Res. ALJ-163. Applying SB 960 requirements to the ECP would add complexity for complainants (who are typically individual residential and small business consumers), and largely turn the ECP into the Commission's regular complaint procedure. Such an outcome seems contrary to the legislative intent underlying SB 960.

The draft therefore does not apply the final rules to every complaint.² Instead, they would apply only (1) to the Commission's regular complaint procedure, and (2) any ECP case that is converted to the regular procedure either before trial of the case or after the Commission grants an application for rehearing in the case. A complainant that wants to have the case heard under the SB 960 rules can do so simply by choosing the regular complaint procedure rather than the ECP when filing the case.

4. Changes to Current Law Several provisions of SB 960 are not implemented in the experimental rules because these provisions conflict with current law and thus can be implemented only after the effective date of SB 960. Examples of such provisions include liberalization of the Commission's ability to deliberate in closed session (see Section 9 of SB 960) and delegation of expanded decisionmaking authority to Administrative Law Judges in adjudicatory proceedings (see Section 8 of SB 960). Also, SB 960 makes the assigned Commissioner responsible for preparing the proposed decision in quasi-legislative proceedings and in ratesetting proceedings in which the assigned Commissioner is the principal hearing officer. (*Id.*, Sections 9 and 10.) The draft would implement these provisions, effective January 1, 1998.

5. Applicability to Proceedings Without Hearings SB 960 applies by its terms to proceedings that go to hearing. However, at least the SB 960 procedures regarding categorization should apply to all formal proceedings at the Commission, since the need

² However, the draft would make the procedures for challenging an assigned Administrative Law Judge available in all complaint cases, not just those following the regular complaint procedure. See Section 6 below.

for and scope of hearings in a given proceeding may not be clear until the proceeding is well under way. In addition, some processes may not depend on whether or not a hearing is held. For

example, it may be appropriate for the assigned Commissioner to prepare and present the proposed decision in a quasi-legislative proceeding, regardless of whether a formal hearing was held. Finally, to further the Commission's goal of achieving a single set of procedural rules, it makes sense to apply the SB 960 rules to all formal proceedings, with the exception of those rules that clearly are specific to proceedings in which hearings are held.³ The draft would implement this concept of applying SB 960 procedures to proceedings without hearings to the extent appropriate.

6. Codification As discussed in Section 2 above, there will be a transition period during which a steadily dwindling number of "old" proceedings will be handled under pre-SB 960 rules. During the transition period, it seems best to codify the bulk of the SB 960 rules in a single article in Title 20, so that the SB 960 rules can be easily distinguished from the pre-SB 960 rules. Under the draft, codification would be in a new article following the existing Article 2 ("Filing of Documents") in the Title 20 rules.

The exception to this codification approach is the SB 960 rules on challenges to the assigned Administrative Law Judge. Under the draft, all of the Commission's procedures for challenges (both peremptory challenges and challenges for cause) would be consolidated in Article 16 and would apply to all proceedings at the Commission (including ECP cases) that are filed or pending after January 1, 1998. The draft would supersede existing Rule 63.4(c) (peremptory challenges) and would revise existing Rule 63.2 ("Grounds for Disqualification") to bring that rule into conformity with SB 960.

NEXT STEPS

The Chief Administrative Law Judge shall send the attached draft of final rules to the Office of Administrative Law for publication in the California Regulatory Notice Register. This publication starts

³ Advice Letters are not considered formal proceedings in either the experimental rules or the draft of final rules. ECP cases often go to hearing, but the hearing process in those cases is very informal; as discussed in Section 3 of this resolution, SB 960 requirements should not apply to the ECP.

the 45-day notice-and-comment process, which is the first stage leading to adoption and codification (in the California Code of Regulations) of rules implementing SB 960. For purposes of such publication, the Chief Administrative Law Judge is authorized to propose nonsubstantive changes (e.g., new numbering, new headings for articles and individual rules) to the draft and to the existing Title 20 rules, wherever such nonsubstantive changes will improve the clarity, organization, or consistency of the Commission's Rules of Practice and Procedure.

The Chief Administrative Law Judge and General Counsel should hold further workshops, both to receive feedback regarding practice under the experimental rules and to discuss the necessary changes proposed in today's draft. Accomplishing the changes described in the above Discussion requires careful thought, in order to achieve a complete and internally consistent set of Title 20 rules. The

implementation process should start now, well before January 1, 1998, because revisions to the draft proposed today may be necessary before final adoption.

THEREFORE, IT IS ORDERED that the Chief Administrative Law Judge shall submit all required forms to the Office of Administrative Law preparatory to publishing in the California Regulatory Notice Register the attached draft of final rules implementing SB 960. For purposes of such publication, the Chief Administrative Law Judge is authorized to propose nonsubstantive changes to the draft and to the existing Title 20 rules, wherever such nonsubstantive changes will improve the clarity, organization, or consistency of the Commission's Rules of Practice and Procedure.

I hereby certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting on March 18, 1997. The following Commissioners approved it:

WESLEY M. FRANKLIN
Executive Director

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

See formal file for attachments or you can print from PC DOC. ID. 2521 (proposed rules), 2488 (Rule 13.2), and 2362 (Article 16).