

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking for Purposes of Implementing
Certain Statutory Requirements set forth in
AB 1735 for Extending the Deadline for
Completing Ratesetting or Quasi-Legislative
Proceedings

Rulemaking _____

ORDER INSTITUTING RULEMAKING**I. Summary**

In 2003, the Legislature enacted and the Governor approved Assembly Bill (AB) 1735 (Committee on Utilities and Commerce), Chapter 452 of the 2003 Statutes, which adds Sections 1701.5 and 1701.6 to the Public Utilities Code. Section 1701.5 requires the Commission to resolve issues in ratesetting and quasi-legislative proceedings within 18 months of the issuance of the scoping memo. In such proceedings, the deadline may be extended if (a) the initial scoping memo indicates that more time is necessary and provides reasons for that delay; or (b) during the proceeding, the Commission makes a written determination that the deadline cannot be met, makes findings as to the reasons, and issues an order extending the deadline. In the latter case, no single order may extend the deadline for more than 60 days.

Under the Commission's Rules of Practice and Procedure 77.7 (Title 20, Division 1, Chapter 1 of the California Code of Regulations), a Commission order to extend a deadline as contemplated by AB 1735 would be subject to public review and comment. As applied to deadline extensions contemplated by AB 1735, such public review and comment would complicate and delay the

underlying proceeding. Consequently, we seek to amend Rule 77.7 to exempt Commission orders extending the AB 1735 deadlines from such public review and comment procedures. We are authorized, pursuant to Section 311(g)(3) of the Public Utilities Code, to adopt such an extension.

II. Requirements of AB 1735

In enacting AB 1735, the Legislature added two sections to the Public Utilities Code. New Section 1701.5 provides as follows:

(a) Except as specified in subdivision (b), in a ratesetting or quasi-legislative case, the commission shall resolve the issues raised in the scoping memo within 18 months of the date the scoping memo is issued, unless the commission makes a written determination that the deadline cannot be met, including findings as to the reason, and issues an order extending the deadline. No single order may extend the deadline for more than 60 days.

(b) Notwithstanding subdivision (a), the commission may specify in a scoping memo a resolution date later than 18 months from the date the scoping memo is issued, if that scoping memo includes specific reasons for the necessity of a later date and the commissioner assigned to the case approves the date.

Section 1701.6, the other new provision added by AB 1735 but not addressed by this proceeding, requires the President of the Commission to appear annually before the appropriate committees of the Legislature and report on the Commission's annual work plan and the number of cases where resolution exceeded the time periods prescribed in the scoping memos.

III. Initial Statement of Reasons for Rule Amendment

For formal proceedings before the Commission, the scoping memo is the principal document determining the issues to be resolved and the schedule for doing so. The scoping memo, which is approved and signed by the Commissioner assigned to the particular proceeding, follows a prehearing conference during which the issues and schedule are discussed by the parties and the presiding officer (the assigned Commissioner and/or the assigned Administrative Law Judge).

As new Section 1701.5(a) indicates, the presiding officer and parties can determine at the prehearing conference that a ratesetting or quasi-legislative proceeding will require more than 18 months to complete. In such cases, the scoping memo can include specific reasons why more than 18 months will be required to resolve the issues raised in the proceeding. If the assigned Commissioner approves a scoping memo including specific reasons for such an extended schedule, Section 1701.5 is satisfied.

At the outset, many ratesetting or quasi-legislative proceedings appear likely of being resolved within 18 months; but as the cases progress, it sometimes becomes apparent to the parties and presiding officer that the issues raised in the initial scoping memo will not be resolved within the 18-month timeframe. The reasons vary but they may include the complexity of the proceeding, parties being unprepared to go forward, more pressing Commission priorities, or other factors. New Section 1701.5(a) allows these proceedings to proceed beyond the 18-month deadline, but only if the Commission makes a written determination that the deadline cannot be met, including findings as to the reason, and issues an order extending the deadline.

Public Utilities Code Section 311(g) requires that Commission decisions (other than proposed decisions in formal proceedings involving hearings) be served on the parties and subject to public review and comment for at least 30 days before Commission action. Section 311(g) also authorizes the Commission to adopt rules establishing categories of decisions subject to a waiver or reduction of this time period. Existing Rule 77.7 implements this statute and, among other things, sets forth the circumstances, including emergency situations, that authorize the Commission to reduce or waive the normal public review and comment period.

The proposed amendment to Rule 77.7 adds an additional circumstance authorizing the Commission to reduce or waive the public review and comment period when additional time is necessary for resolving the issues raised in the scoping memo in a ratesetting or quasi-legislative proceeding.

Without the proposed amendment, the 60-day extension orders authorized by Section 1701.5(a) could not be approved by the Commission until a 30-day public review and comment period had transpired. This existing procedural requirement prevents the Commission from complying with Section 1701.5(a) when the need for extension becomes apparent during the last 30 days of the 18-month statutory period. The existing procedural requirement, by allowing comments on scheduling matters that are ancillary to the substantive issues of the underlying proceeding, will also increase paperwork and transaction costs for the parties and Commission. Although we expect that we will rarely exercise our authority to extend by 60 days the 18-month deadline, we also expect that, on occasion and for compelling reasons, such an extension will be requested by the parties themselves or the need for the extension will be clear to all concerned (e.g., the illness of an important witness).

Section 1701.5(a) imposes rigorous requirements on the Commission that will ensure that the proposed authority to reduce or waive the public review and comment period will not be abused. In issuing an extension order, the new statute requires the Commission to make a written determination that the deadline cannot be met and findings as to the reason. Each extension order itself is limited to 60 days.

IV. Text of the Proposed Rule

The Commission proposes to amend existing Rule 77.7, Title 20, Division 1, of the California Code of Regulations, by adding the following subsection to the existing rule:

(f)(10) for a decision extending the deadline for resolving the issues raised in the scoping memo in a ratesetting or quasi-legislative proceeding.

The complete text of Rule 77.7, as modified by this proposed amendment, is set forth in the Appendix.

V. Next Steps

The Chief Administrative Law Judge will submit a Notice of Proposed Rulemaking, the attached draft of the proposed rule amendment implementing AB 1735, and all other required documents to the Office of Administrative Law (OAL) for publication in the California Regulatory Notice Register. This publication starts the 45-day notice and comment period, which is the first stage leading to the adoption and codification (in the California Code of Regulations) of the proposed amendment to Rule 77.7. For purposes of such publication, the Chief Administrative Law Judge is authorized to propose nonsubstantive changes to the draft whenever such nonsubstantive change will improve the clarity or consistency of the rule.

This order, including the text of the proposed rule amendment, and other documents submitted to the OAL will also be published on our web site. During the 45-day period following publication of the Notice of Proposed Rulemaking, written comments on the proposed rule amendment may be filed in this proceeding. We welcome written comments on the proposal.

VI. Scoping

In this part of today's decision, we announce preliminary determinations and scoping, as required by Rule 6(c)(2). This proceeding is quasi-legislative in character. Because of the noncontroversial nature of the proposed procedural amendment, we see no need for a formal hearing. Consequently, our SB 960 rules (Article 2.5) will apply only to the extent indicated in Rule 6.6. The general issue for the proceeding is implementation of certain provisions of AB 1735 as they relate to the Commission's authority to issue orders extending the completion deadline for ratesetting and quasi-legislative cases. The foregoing discussion identifies the issues we see at this time. We project final adoption and submission of the amended rule to the OAL within six months of the publication of the Notice of Proposed Rulemaking in the California Regulatory Notice Register; however, in no event will the time to finally resolve this proceeding exceed 18 months from the effective date of today's decision.

Finding of Fact

Exercising the Commission's authority under Public Utilities Code Section 311(g)(3), the proposed amendment to Rule 77.7, Rules of Practice and Procedure (Title 20, Division 1, Chapter 1 of the California Code of Regulations), will clarify, make specific, and otherwise implement those provisions of AB 1735 authorizing the Commission to issue 60-day orders extending the deadline for completing ratesetting and quasi-legislative cases.

Conclusion of Law

The proposed amendment to Rule 77.7 and other required documents should be sent to the OAL for publication in the California Regulatory Notice Register. In order to begin and complete the adoption process promptly, this order should be effective immediately.

IT IS ORDERED that:

1. This Order Instituting Rulemaking will be served initially on the attached service list. Any interested person may request inclusion on the service list for this rulemaking by writing to the Commission's Process Office by February 6, 2004; the updated service list will be published by ruling and at the Commission's Internet site (www.cpuc.ca.gov). Parties willing to accept service of documents by e-mail shall include their e-mail address with their postal address when they ask to be added to the service list. By asking for e-mail service, a party commits, in turn, to make e-mail service on other parties that so request. If a party does not request e-mail service, or if such service is unsuccessful for any reason, the serving party shall promptly complete service by other means authorized under the Commission's rules.

2. The Chief Administrative Law Judge shall send today's decision and all required forms to the Office of Administrative Law in accordance with applicable provisions of the Government Code. For purposes of publishing the appended proposed rule amendment in the California Regulatory Notice Register, the Chief Administrative Law Judge is authorized to make nonsubstantive changes to the proposed rule amendment as may be required to prepare the rule for publication or to improve the overall clarity or consistency of the proposal.

3. The Chief Administrative Law Judge shall publish the Notice of Proposed Rulemaking, the text of the proposed rule, our initial statement of reasons for the proposed rule amendment to the Commission's Internet site.

4. Comments on the proposed rule amendment appended to this Order will be filed and served on or before April 5, 2004. The comment period, however, may be extended by a ruling of the assigned Administrative Law Judge.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

**Proposed Amendment to Article 19 of the
Commission's Rules of Practice and Procedure**

**Article 19. Submission of Proceedings; Procedures for Comments and Replies
to Comments; Commission Meeting**

**77.7 (Rule 77.7) Public Review and Comment for Draft Decision (Public
Utilities Code Section 311(g))**

This rule implements provisions of Public Utilities Code Section 311(g), as effective January 1, 1999, for public review and comment by parties on Commission decisions and alternates.

(a) **Definitions.** For purposes of this rule, the following definitions apply:

(1) "Decision" is any resolution or decision to be voted on by the Commission except (i) an order, resolution, or decision specified in subsection (e) of this rule, or (ii) a proposed decision that is filed and served pursuant to Public Utilities Code Section 311(d) and Rule 77.1;

(2) "Draft" refers to a decision that has been circulated under this rule but not yet acted upon by the Commission;

(3) "Alternate," with respect to a draft decision, is an alternate as defined in Rule 77.6(a) with respect to a proposed decision;

(4) "Person" includes natural persons and legal entities;

(5) “Party,” with respect to a formal proceeding (i.e., an application, a complaint, or a proceeding initiated by Commission order), includes all of the following: applicant, protestant, petitioner, complainant, defendant, intervenor, interested party who has made a formal appearance, respondent, and Commission staff of record in the proceeding;

(6) “Party,” with respect to a resolution disposing of an advice letter, is the advice letter filer, anyone filing a protest or response to the advice letter, and any third party whose name and interest in the relief sought appears on the face of the advice letter (as where the advice letter seeks approval of a contract or deviation for the benefit of such third party);

(7) “Party,” with respect to a resolution disposing of a request for disclosure of documents in the Commission’s possession, is (i) the person who requested the disclosure, (ii) any Commission regulatee about which information protected by Public Utilities Code Section 583 would be disclosed if the request were granted, and (iii) any person (whether or not a Commission regulatee) who, pursuant to protective order, had submitted information to the Commission, which information would be disclosed if the request were granted;

(8) “Party,” with respect to a resolution disposing of one or more requests for motor carrier operating authority, is any person whose request would be denied, in whole or part, and any person protesting a request, regardless of whether the resolution would sustain the protest;

(9) “Party,” with respect to a resolution establishing a rule or setting a fee schedule for a class of Commission-regulated entities, is any person providing written comment solicited by Commission staff (e.g., at a workshop or by letter) for purposes of preparing the draft resolution.

(b) **Comments and Replies on Decision Other Than Resolution.** Unless otherwise directed by the Commission, the assigned Commissioner, or the assigned Administrative Law Judge or Examiner, Rules 77.2 through 77.5 govern comments and replies to comments on draft decisions other than resolutions, and Rule 77.6 governs comments and replies to comments on alternates to draft decisions other than resolutions.

(c) **Comments and Replies on Resolution With “Party.”** Unless otherwise directed by the Commission division that issued the draft resolution, comments may be filed on any resolution for which “party” is defined, or on any alternate to such resolution, under the procedures in this subsection. No later than ten days before the Commission meeting when the resolution is first scheduled for consideration (as indicated on the first page of the resolution), any person may file comments, not to exceed five pages, with the Commission division that issued the resolution, and shall concurrently serve them on (i) all parties shown on the service list appended to the draft resolution, (ii) all Commissioners, and (iii) the Chief Administrative Law Judge, the General Counsel, or other Division Director, depending on which Commission division issued the resolution. Comments on alternates to resolutions shall be filed and served under the same procedures, but no later than 10 days before the date of the Commission meeting when the alternate is first scheduled for consideration (as indicated on the first page of the alternate). Replies to comments on resolutions or alternates to resolutions may be filed five days after comments are filed and shall be limited to identifying misrepresentations of law or fact contained in the comments of other parties. Replies shall not exceed five pages in length, and shall be filed and served as set forth above. Late-filed comments or replies to comments will not be considered.

(d) **Comments and Replies on Resolution Without “Party.”** With respect to a resolution that would establish a rule or set a fee schedule but that lacks any “party,” as defined in subsection (a)(9) of this rule, any person may file comments and replies to comments on the resolution, or on any alternate to the resolution, under the procedures of subsection (c) of this rule, and shall serve them in accordance with the instructions accompanying the notice of the resolution as an agenda item in the Commission’s Daily Calendar.

(e) **Exemptions.** This rule does not apply to (i) a resolution or decision on an advice letter filing or uncontested matter where the filing or matter pertains solely to one or more water corporations as defined in Public Utilities Code Section 241, (ii) an order instituting investigation or rulemaking, (iii) a categorization resolution under Public Utilities Code Sections 1701.1 through 1701.4, or (iv) an order, including a decision on an appeal from the presiding officer’s decision in an adjudicatory proceeding, that the Commission is authorized by law to consider in executive session. In addition, except to the extent that the Commission finds is required in the public interest in a particular case, this rule does not apply to the decision of the assigned Administrative Law Judge in a complaint under the expedited complaint procedure (Public Utilities Code Sections 311(f) and 1702.1).

(f) **Reduction or Waiver by Commission.** In an unforeseen emergency situation (see Rule 81), or in accordance with a stipulation pursuant to subsection (g) of this rule, the Commission may reduce or waive the period for public review and comment under this rule regarding draft decisions and alternates. In the following circumstances, the Commission may reduce or waive the period for public review and comment under this rule regarding draft

decisions and may reduce but not waive the public review and comment period regarding alternates:

- (1) in a matter where temporary injunctive relief is under consideration;
- (2) in an uncontested matter where the decision grants the relief requested;
- (3) for a decision on a request for review of the presiding officer's decision in an adjudicatory proceeding;
- (4) for a decision extending the deadline for resolving adjudicatory proceedings (Public Utilities Code Section 1701.2(d));
- (5) for a decision under the state arbitration provisions of the federal Telecommunications Act of 1996;
- (6) for a decision on a request for compensation pursuant to Public Utilities Code Section 1801 et seq.;
- (7) for a decision authorizing disclosure of documents in the Commission's possession when such disclosure is pursuant to subpoena;
- (8) for a decision under a federal or California statute (such as the California Environmental Quality Act or the Administrative Procedure Act) that both makes comprehensive provision for public review and comment in the decision-making process and sets a deadline from initiation of the proceeding within which the Commission must resolve the proceeding;
- (9) for a decision where the Commission determines, on the motion of a party or on its own motion, that public necessity requires reduction or waiver of the 30-day

period for public review and comment. For purposes of this subsection, “public necessity” refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment. “Public necessity” includes, without limitation, circumstances where failure to adopt a decision before expiration of the 30-day review and comment period would place the Commission or a Commission regulatee in violation of applicable law, or where such failure would cause significant harm to public health or welfare. When acting pursuant to this subsection, the Commission will provide such reduced period for public review and comment as is consistent with the public necessity requiring reduction or waiver.

- (10) for a decision extending the deadline for resolving the issues raised in the scoping memo in a ratesetting or quasi-legislative proceeding.

(g) **Reduction or Waiver by Parties.** The parties may reduce or waive the provisions of this rule for public review and comment regarding decisions or alternates, where all the parties so stipulate.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference cited: Sections 311(e), 311(g), 1701.5, Public Utilities Code.

(END OF APPENDIX A)

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