Decision _____

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)

INTERIM DECISION DENYING APPEALS OF THE CATEGORIZATION AS ADJUDICATORY

Summary

The Commission denies the appeals of Pacific Bell Telephone Company d/b/a AT&T California and AT&T Mobility LLC, and Southern California Edison Company and affirms the categorization of this proceeding as an "adjudicatory" proceeding. The definition of an adjudicatory proceeding, which is an enforcement investigation into possible violations of any provision of statutory law or Commission order or rule, captures the instant investigation.

Background

Under Pub. Util. Code § 1701.1[1] et seq., and Article 7 of the Commission's Rules of Practice and Procedure (Rule), the procedures applicable to a particular

[1] Unless otherwise stated, all statutory references are to the Public Utilities Code.

proceeding depend on how the proceeding is categorized. Pub. Util. Code § 1701.1 and Rule 7.1 define three categories of Commission proceedings, which are each considered in the instant appeals. These categories are adjudicatory, ratesetting, and quasi-legislative.

In the above-captioned Order Instituting Investigation (OII), issued on February 2, 2009, this matter was categorized as adjudicatory. Pacific Bell Telephone Company d/b/a AT&T California and AT&T Mobility LLC (collectively AT&T) and Southern California Edison Company (SCE) filed timely appeals of this categorization on February 13, 2009. The Consumer Protection and Safety Division (CPSD), NextG Networks of California, Inc. (NextG), Cellco Partnership d/b/a Verizon Wireless (Verizon Wireless), the California Association of Competitive Telecommunications Companies (CALTEL), and AT&T[2] responded to the appeals.

Recategorization Arguments

AT&T contends that the instant investigation of the October 2007 Malibu Canyon Fire involves a mix of policy making and fact finding relating to a particular public utility or utilities, and asks the Commission to re-categorize this proceeding from "adjudicatory" to "ratesetting." It argues that although Investigation 09-01-018 will focus on the facts surrounding the 2007 Malibu fires, many of the areas the Commission seeks to investigate call into question AT&T's policies and practices for compliance with General Order 95 (and other Commission regulations). In fact, AT&T maintains, this issue is arguably not limited to it, but possibly a class of utilities, i.e., communications information

[2] AT&T responded to SCE's Appeal of Categorization.

providers. AT&T notes that the Commission previously has determined that such cases raising both factual and policy issues are best handled under the procedures applicable to ratesetting.

SCE urges the Commission to re-categorize this investigation as "quasi-legislative," and to consolidate it with the related Infrastructure Safety Rulemaking 08-11-005[3]. SCE asserts that this OII should be categorized as quasi-legislative because the Commission is investigating the practices of a class of electric and telecommunications utilities with the goal of developing forward-looking changes to the Commission's General Orders. It advises that consolidating this proceeding with the OIR, and addressing the substantive issues of this case through the Rulemaking, will achieve the "full, timely, and effective resolution of the substantive issues" that the Commission is ultimately seeking in both these matters. SCE notes that, pursuant to its rules, the Commission has the discretion to consider and designate the most suitable category for a proceeding.

While AT&T and SCE differ on what they consider to be the appropriate category for the Malibu Canyon Fire OII, they both insist that the adjudicatory categorization of this investigation is having and will have a "chilling effect" on the Infrastructure Safety OIR and its objectives as well as on their full and unfettered participation in the rulemaking process. Each party maintains that it feels constrained in its discussions in the rulemaking workshops and with decisionmakers, and finds it less likely that any new or revised rules developed in the rulemaking will reflect "the appropriate degree of informational input."

---

[3] Initiated by an Order Instituting Rulemaking (OIR) issued on November 6, 2008.

Responses to the Appeals

CPSD opposes the appeals, urging that both be denied and arguing that the current adjudicatory categorization for this investigation is most appropriate. NextG supports AT&T's request that the matter be re-categorized as ratesetting, and reiterates that the proscription on *ex parte* communications attendant to adjudicatory proceedings will impair various parties' abilities to participate in R.08-11-005. Verizon Wireless maintains that based on the description of this proceeding set forth in the OII's preliminary scoping memo, the matter has been incorrectly designated as adjudicatory and should be re-categorized as ratesetting. It points to the Commission's invitation for "interested parties to actively participate in this proceeding as it involves … other policy matters," as support for the contention that the Malibu Fire OII is intended to be a mix of fact and policy. More suitably, according to Verizon Wireless, the case should be categorized as ratesetting.

In its response, AT&T asserts that it does not oppose the OII being re-categorized from adjudicatory to SCE's proposal of quasi-legislative, but it does not support SCE's call for the consolidation of the investigation and rulemaking. CALTEL submits that re-categorizing this investigation is neither appropriate nor the correct solution to the procedural difficulty posed by the concurrent schedules of the Malibu Fire OII and the rulemaking. It asserts that the problem and the solution are matters of "sequencing." CALTEL proposes that the Commission first complete the OII, and then incorporate lessons learned from the specific instance of the Malibu fire into the rulemaking.

Discussion

The purpose of this proceeding is directly stated in the OII, and it is focused and specific: to determine whether any of the five named utilities that

had equipment on three specific poles in Malibu, California "violated any provision or provisions of the Public Utilities Code, Commission general orders or decisions, or other applicable rules or requirements in regards to their facilities which may have caused" the October 21, 2007 Malibu fire. We define adjudicatory proceedings as "enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission[4]." This definition captures the instant investigation. The essence of this proceeding is not altered by this Commission's general invitation for the active participation of interested parties. Consequently, the solicitation of additional expertise, participation, and evidence from these interested parties on the adjudicatory issues does not transform this investigation's adjudicatory "fit." We do not intend to create forward-looking rules in this proceeding. *Ex parte* communications are prohibited in adjudicatory proceedings.

Four of the five respondents herein insist that this proceeding has had or may have a "chilling effect" on their participation in R.08-11-005, the Infrastructure Safety OIR. We note that, at this juncture, there has not appeared to be a significant dampening of enthusiasm in the rulemaking because of the initiation of this, or the other two fire investigations. In fact, the work and active participation of the parties has kept apace of its schedule. Delaying the rulemaking to await the findings of this investigation would be imprudent, given our intent in the rulemaking, to move forward and adopt additional requirements and clarifications requisite to further reducing the risk of hazards,

[4] Rule 1.3(a) of the Commission's Rules of Practice and Procedure.

including fires. Therefore, we deny both AT&T's and SCE's requests, and affirm the adjudicatory categorization of the Malibu Fire OII.

Waiver of Comment Period

In accordance with Pub. Util. Code § 311(g)(3), this is not a decision requiring that the Commission solicit comment from the parties because it relates to the categorization of the proceeding.

Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Jacqueline A. Reed is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The purpose of this proceeding is to determine whether any of the five named utilities violated any statutory law or Commission order, rule or requirement with respect to their facilities which may have caused the October 2007 Malibu Canyon fire.
2. This OII is an enforcement investigation into possible violations of any provision of statutory law or order or rule of the Commission.
3. This proceeding clearly fits within the adjudicatory category.

Conclusions of Law

1. Adjudicatory proceedings are enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission.
2. This proceeding should be categorized as adjudicatory.
3. AT&T and SCE's appeals to the adjudicatory categorization of this proceeding should be denied.

I N T E R I M O R D E R

IT IS ORDERED that the appeals of Pacific Bell Telephone Company, doing business as AT&T California and AT&T Mobility LLC, and Southern California Edison pursuant to Public Utilities Code Section 1701.1(a) and Commission Rule 7.6 of the categorization of this investigation as adjudicatory are denied. This matter shall continue to be categorized as an adjudicatory proceeding.

This order is effective today.

Dated _____, at San Francisco, California.