

Decision **DRAFT DECISION OF ALJ PRESTIDGE** (Mailed 2/24/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking for the Purpose of Revising Certain Rules of Practice and Procedure to Implement Public Utilities Code Section 1708.5 (Petitions for Rulemaking).

Rulemaking 02-06-040
(Filed June 27, 2002)

**DECISION APPROVING ADDITION OF NEW RULE 14.7 REGARDING
PETITIONS TO AMEND, ADOPT, OR REPEAL A REGULATION
PURSUANT TO PUBLIC UTILITIES CODE SECTION 1708.5**

1. Summary

This decision adopts amendments to the Commission's Rules of Practice and Procedure (Rules) to add a new Rule 14.7 regarding petitions to amend, adopt, or repeal a regulation pursuant to Public Utilities Code Section 1708.5 (petitions)¹ which will be placed in a new Article 3.5, to address rulemaking in general.² These amendments were proposed in our Order Instituting this Rulemaking (OIR).

2. Background

On June 27, 2002, the Commission proposed new Rule 14.7 regarding petitions to amend, adopt, or repeal a regulation pursuant to Section 1708.5, to be

¹ All Code references are to the Public Utilities Code, unless otherwise stated.

² Rule 14.7 is the only rule included in Article 3.5 at present. However, we may add additional rules regarding rulemakings to Article 3.5 in the future.

included in a new Article 3.5 regarding rulemaking in general. Rule 14.7 responds to the requirement of Section 1708.5 that the Commission amend its Rules to provide specific procedures for handling such petitions.

As noted in the OIR, Rule 14.7 allows the public to suggest new or revised regulatory policies to the Commission, but does not apply to proposed changes to the Commission Rules regarding procedural matters. We believe that the legislative intent behind the adoption of Section 1708.5 was to permit regulated utilities and the public to petition the Commission to adopt, amend, or repeal substantive regulations of the Commission.

Under Rule 14.7, a petition must request that the Commission adopt a regulation that has general applicability and future effect. A regulation is generally applicable when it applies to an entire class of entities or activities over which the Commission has jurisdiction. A regulation has future effect when it applies to conduct in the future.

Consistent with the intent of Section 1708.5, as set forth in uncodified Section 1 of Assembly Bill (AB) 301,³ Rule 14.7 does not restrict standing to file a petition. To ensure that potentially affected persons have notice of the petition, Rule 14.7 requires service of the petition broadly. The petitioner, our Public Advisor, and the assigned Administrative Law Judge (ALJ) may use existing Commission service lists and other means to identify “interested parties.” We

³ AB 301 enacted Section 1708.5. The uncodified declarations of legislative intent in AB 301 (Section 1, Stats. 1999, c.1) state that the Legislature did not intend Section 1708.5 to apply to all Commission decisions and orders, and that the Commission has authority to define the term “regulation” more precisely to implement this statute. The uncodified declarations of legislative intent also provide that the Commission may delegate authority to its staff to deny rulemaking petitions, in order to administer Section 1708.5 efficiently.

also promote effective notice by requiring petitions to include concise justification and specific proposed language for the regulation.

In light of our existing rules for review of Commission decisions, Rule 14.7 provides that we will not entertain petitions for rulemaking on issues that we have addressed in the previous year.

Rule 14.7 does not restrict ex parte communications or impose reporting requirements for such communications in the context of petitions. Historically, we have not imposed restrictions on ex parte communications or any reporting requirements in rulemaking proceedings, and we see no reason to impose such restrictions or requirements here. (See Articles 1.5 and 2.5 of the Rules of Practice and Procedure.)

In order to give notice of these proposed Rule changes, we served the OIR on the service list for this proceeding, which generally includes persons interested in Commission procedural rulemakings, and forwarded a Notice of Proposed Regulatory Action (Notice) to the Office of Administrative Law (OAL) for publication in the California Regulatory Notice Register. The Notice specified dates by which interested persons could request a public hearing and could file and serve comments and reply comments. The Notice was published in the California Regulatory Notice Register on July 12, 2002.

The Commission has received timely written comments from Southern California Edison Company (SCE), and Pacific Gas and Electric Company (PG&E), and joint written comments from Southern California Gas Company

(SoCalGas) and San Diego Gas & Electric Company (SDG&E). No one filed reply comments or a request for a public hearing.⁴

3. Discussion

A. SCE's Comments

SCE suggests that we revise Rule 14.7 to include a definition of “regulation” in subsection (b) and to delete the second sentence of subsection (a), as proposed in the OIR. Under this proposal, Rule 14.7 (a) and (b) would read as follows:⁵

- (a) Pursuant to this rule, any person may petition the Commission under Public Utilities Code Section 1708.5 to adopt, amend, or repeal a regulation. ~~*The proposed regulation must apply to an entire class or entities or activities over which the Commission has jurisdiction and must apply to future conduct.*~~ This rule does not authorize petitions to adopt, amend, or repeal the Commission’s Rules of Practice and Procedure.
- (b) Definitions. For purposes of this rule, (1) “industry division” means a division (or its successor, as designated by the Commission) whose function is to advise and otherwise assist the Commission in regulating a particular utility industry;. (2) ~~*Interested parties*~~ means those persons on service lists identified by the Public Advisor’s Office and other persons who have an economic or other interest sufficient to warrant participation in a particular petition. (3) ~~*Regulation*~~ means a rule of general applicability to an entire class of entities or activities over which the Commission has jurisdiction and must apply to future conduct or have future effect.

⁴ The public comment period and the period within which interested persons may request a public hearing have expired.

⁵ Language to be deleted under SCE’s proposal appears above in strike-out format, and proposed new language appears above in italics.

We believe that subsections (a) and (b) are sufficiently clear as proposed in the OIR and Notice and decline to adopt these proposed changes.

SCE also comments that Section 1708.5 parallels Government Code Section 11340.6,⁶ which permits interested persons to petition for the adoption of regulations pursuant to the Administrative Procedure Act (APA) (Govt. Code Section 11340 *et seq.*), and that Government Code Section 11340.9 prohibits petitions to adopt regulations under the APA in order to establish or fix rates, prices or tariffs. Edison recommends that in order to be consistent with Section 11340.9, Rule 14.7 should be amended to prohibit petitions for the adoption of regulations that establish or fix rates, prices, or tariffs.

We reject this suggestion on several grounds. First, APA procedures do not apply to Commission rulemakings, except for limited review of proposed changes to our Rules by OAL. Further, Section 11340.9 does not specifically limit the scope of petitions for rulemakings under the APA, but exempts certain types of state regulations, including those setting or establishing rates, prices or tariffs, from APA procedures. Since Section 1708.5 does not prohibit petitions that

⁶ Government Code Section 11346 states:

Except where the right to petition for adoption of a regulation is restricted by statute to a designated group or where the form of procedure for such a petition is otherwise prescribed by statute, any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation as provided in Article 5 (commencing with Section 11346). The petition shall state the following clearly and concisely:

- (a) The substance or nature of the regulation, amendment, or repeal requested;
- (b) The reason for the request;
- (c) Reference to the authority of the state agency to take the action requested.

address ratemaking issues, we find it inappropriate to include this restriction in Rule 14.7.⁷

B. SDG&E/SoCalGas' Comments

SDG&E and SoCalGas request that we revise Rule 14.7 to change the date for the filing responses to petitions to within 30 days of the date that filing of the petition is noted on the Commission Daily Calendar. As proposed in the OIR, Rule 14.7 requires the filing of responses within 30 days of the date on which the petition was served, unless the assigned ALJ sets a different date.

SDG&E and SoCalGas reason that although under Rule 14.7, the petitioner must confer with the Public Advisor to develop a service list for the proceeding, it may be difficult to identify all persons interested in a particular petition, and some interested persons may not be included initially in the service list. Therefore, if the date for filing a response is based on the date that the filing of the petition is noted on the Daily Calendar, all interested persons will have equal notice of the filing of a petition and an equal period of time in which to file a response. However, we believe that Rule 14.7's requirement that petitioners consult with the Public Advisor in developing the service list should ensure that interested persons receive timely notice of the petition, and therefore decline to make this change.

C. PG&E's Comments

PG&E recommends three revisions to Rule 14.7 as proposed in the OIR and Notice.

⁷ However, the Commission generally establishes rates and tariffs through ratemaking proceedings such as general rate cases, rather than rulemakings.

First, PG&E suggests that we revise Rule 14.7(c) to require petitioners to state whether the issues raised in the petition have, to the best of their knowledge, been previously raised at the Commission. PG&E recommends this change in order to prevent parties from re-litigating issues already addressed by the Commission by filing petitions. We agree with this recommendation and will amend Rule 14.7(c) accordingly. We also amend Rule 14.7(c) to require petitioners to state the case name and number (if known) of any proceeding in which the issue raised in the petition was previously addressed by the Commission.

Second, PG&E suggests that we revise Rule 14.7 to specify criteria to be relied upon by the Commission in granting or denying petitions for rulemaking.⁸ However, our decision regarding whether to grant or deny a petition will depend on the particular issue raised, and we do not believe it is possible to identify all of the criteria that we should consider in acting on petitions. The Commission must be able to exercise broad discretion in determining whether to initiate rulemaking proceedings in order to carry out its responsibilities to the public. Moreover, Section 1708.5 requires the Commission to include a statement of reasons in any decision or order denying a petition, or to identify the

⁸ The criteria suggested by PG&E are:

1. whether the issues raised in the proposed rulemaking have previously been addressed by the Commission and, if so, whether there are changed circumstances that would justify re-litigating the issues;
2. whether the issues raised in the proposed rulemaking are sufficiently problematic to warrant a rulemaking; and
3. whether the benefits of the proposed rulemaking outweigh the burdens.

applicable provisions of law if the Commission finds that it is legally precluded from granting a petition. These requirements ensure that the petitioner and the public will have notice of the grounds on which a petition is denied. We therefore decline to adopt PG&E's recommendation to amend Rule 14.7 to state specific criteria for the grant or denial of petitions.

Third, PG&E suggests that we revise Rule 14.7 to include a new subsection (i), which states that the Commission will generally resolve petitions within six months of the date on which they are filed. We reject this suggestion. The six-month period for resolution of petitions is clearly stated in Section 1708.5, and we need not repeat it here. Further, Section 1708.5 (b)(2) permits the Commission to extend the six-month period to allow for public review and comment pursuant to Section 311(g).

For all of the foregoing reasons, we adopt new Rule 14.7 regarding petitions and a new Article 3 regarding rulemaking in general, with the revisions discussed above, as set forth in Appendix A.

4. Public Review and Comment

Under the APA, the Commission may not adopt a regulation which contains language different from that proposed in the Notice and the OIR unless the changes to the regulation are either: (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original proposal that the public was adequately placed on notice that the change could have resulted from the originally proposed regulation.⁹ A change is nonsubstantial if it clarifies without materially altering the rights, requirements, responsibilities, conditions or

⁹ Govt. Code Section 11346.8

prescriptions contained in the original text.¹⁰ A change is sufficiently related to the originally proposed regulation if a reasonable member of the directly affected public could have determined from the Notice that the proposed change could have resulted.¹¹

The changes discussed above were sufficiently related to Rule 14.7 as originally proposed that the public could reasonably have determined that these changes could be made in response to public comments. Rule 14.7, as originally proposed, included section (g), which states that the Commission will not entertain petitions on issues on which it has acted or decided not to act in the past 12 months. Therefore, a reasonable member of the directly affected public could have determined from the Notice that the Commission might amend Rule 14.7(c) to require petitioners to reference any proceedings in which the issue addressed by the petition had previously been raised before the Commission.

As required by Government Code Section 11346.8, we have made this proposed decision and the text of Rule 14.7, as amended, available for public review and comment for 15 days before the adoption of this decision. The decision, including Appendix A, was mailed to the service list on February 24, 2003. We also posted a copy of the proposed decision, including Appendix A, on our website at www.cpuc.ca.gov to give the public additional notice. No comments were received.

Since the Commission has provided for public review and comment on this rulemaking pursuant to the APA, the otherwise applicable 30-day period for

¹⁰ Code of Regs., tit. 1, section 40.

¹¹ Id., section 42.

public review and comment under our Rules is waived pursuant to Rule 77.7(f)(8).

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Myra J. Prestidge is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Commission is adopting Rule 14.7 to establish procedures for the filing of petitions, as required by Section 1708.5, to be included in a new Article 3.5 regarding rulemakings in general.
2. Rule 14.7 and Article 3.5, as originally proposed, were previously served on persons generally interested in Commission procedural rulemakings, published in the California Regulatory Notice Bulletin, and made subject to public comment, as required by the APA.
3. The amendments to Rule 14.7 and Article 3.5 adopted in this decision have been previously served on the service list, published on the Commission website, and made subject to public comment for at least 15 days before our adoption of this decision, as required by the APA.

Conclusions of Law

1. The Commission is legally required to adopt procedures to implement Section 1708.5 regarding petitions.
2. The Commission has complied with all procedural requirements for adoption of Rule 14.7 and Article 3.5 (which includes Rule 14.7), as set forth in Appendix A.

O R D E R

IT IS ORDERED that:

1. A new Rule 14.7, regarding petitions to adopt, amend, or repeal a regulation, and a new Article 3.5, regarding rulemaking in general, which includes Rule 14.7, as stated in Appendix A, are adopted and added to the Commission's Rules of Practice and Procedure.
2. The Executive Director and Chief Administrative Law Judge shall take all necessary action to submit new Rule 14.7 and Article 3.5, as stated in Appendix A, to the Office of Administrative Law for publication in the California Code of Regulations.

3. The Executive Director and Chief Administrative Law Judge may make format changes as appropriate for printing Rule 14.7 and Article 3.5 in the California Code of Regulations.

4. This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A**Article 3.5****14.7. (Rule 14.7) Petition for Rulemaking**

(a) Pursuant to this rule, any person may petition the Commission under Public Utilities Code Section 1708.5 to adopt, amend, or repeal a regulation. The proposed regulation must apply to an entire class of entities or activities over which the Commission has jurisdiction and must apply to future conduct. This rule does not authorize petitions to adopt, amend, or repeal Commission Rules of Practice and Procedure.

(b) Definitions. For purposes of this rule, (1) “industry division” means a division (or its successor, as designated by the Commission) whose function is to advise and otherwise assist the Commission in regulating a particular utility industry; and (2) “interested parties” means those persons on service lists identified by the Public Advisor’s Office and other persons who have an economic or other interest sufficient to warrant participation in a particular petition.

(c) Form and Content. A petition must concisely state the justification for the requested relief, and if adoption or amendment of a regulation is sought, the petition must include specific proposed wording for that regulation. *In addition, a petition must state whether the issues raised in the petition have, to the petitioner’s knowledge, ever been litigated before the Commission, and if so, when and how the Commission resolved the issues, including the name and case number of the proceeding (if known).* A petition that contains factual assertions must be verified. Unverified factual assertions will be given only the weight of argument. Petitions must comply with all applicable requirements of Article 2 (Filing of Documents) of the Commission’s Rules of Practice and Procedure, and the caption of a petition must contain the following wording: “Petition to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5.”

(d) Service and Filing. Petitions must be served upon the Executive Director, Chief Administrative Law Judge, Director of the appropriate industry division, Public Advisor and all known interested parties. Parties filing petitions must consult with the Public Advisor to identify a service list to be used to give persons generally interested in Commission rulemakings notice of the petition. If a petition would result in the modification of a regulation adopted in a past Commission order or decision, then the petition must also be served on all

parties to the proceeding or proceedings in which the regulation that would be modified was adopted. The assigned Administrative Law Judge may direct the petitioner to serve the petition on additional persons.

(e) Responses and Replies. Responses to a petition must be filed and served on all parties who were served with the petition within 30 days of the date that the petition was served, unless the assigned Administrative Law Judge sets a different date. The petitioner and any other party may reply to responses to the petition. Replies must be filed and served within 10 days of the last day for filing responses, unless the Administrative Law Judge sets a different date.

(f) The Commission's rules restricting ex parte communications and imposing reporting requirements do not apply to petitions for rulemaking.

(g) The Commission will not entertain a petition for rulemaking on an issue that the Commission has acted on or decided not to act on within the preceding 12 months.

Note: Authority Cited: Sections 1701 and 1708.5, Public Utilities Code. Reference: Section 1708.5, Public Utilities Code.

(END OF APPENDIX A)