DECISIONMAKING AT THE CALIFORNIA PUBLIC UTILITIES COMMISSION
ALTERNATIVES TO LITIGATION

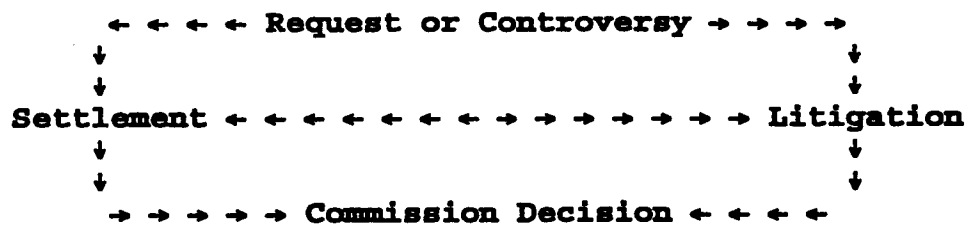
Second Discussion Paper
August, 1993

Last January, at the direction of President Fessler, the Administrative Law Division issued a Discussion Paper on Alternatives to Litigation. In response to that paper, many of those who practice before this agency offered written comments and participated in subsequent workshops. The participants helped identify aspects of current practice before the Commission that encourage or discourage successful settlements. Many of the participants proposed changes that could improve the environment for settlements.

This is a discussion that goes to the very essence of an agency that is responsible for making decisions on behalf of the public interest. We tend to think of alternatives to litigation as a means of resolving issues that usually lead to formal proceedings before the Commission. However, it is important to remember that settlement techniques can be used to create solutions even in instances where litigation is otherwise unlikely. In this paper, we report on the results of a process that has focussed on ideas for change offered by participants in our formal proceedings. This will set the stage for a subsequent full-panel discussion of issues related to alternatives to litigation before this agency.

In some court systems, alternatives to litigation can dramatically reduce the number of cases that need to be brought before a judge. Whether a CPUC matter is settled or goes to hearing, however, the Commission remains charged with protecting the public interest and must make the final decision.

The Decisionmaking Cycle



In addition, the complex nature of many CPUC controversies means that an alternative process may not save much time or money. The primary reason to encourage parties to

CPUC matters to develop their own solutions is the hope that the results will be better and will receive broader support.

The Commission does encourage parties to develop their own solutions. Rule 51 et seq. of the Rules of Practice and Procedure protects the confidentiality of negotiations and explains how to seek the approval of a settlement. The "all party" settlement process, set forth in D.92-12-019 (issued December 5, 1992), is intended to make it easier to receive Commission approval for a settlement that is supported by all active parties to a proceeding. The Commission's Advisory and Compliance Division conducts workshops and provides facilitators. The Consumer Affairs Branch dedicates itself to informal resolution of customer complaints. The Administrative Law Judge Division offers the services of trained mediators to help parties resolve difficult problems. When new cases are directed through the Commission's case management system, it is no longer assumed that any contested matter must be the subject of evidentiary hearings. Instead, staff managers ask whether some other means of solving the problem may be more appropriate.

In order to encourage the successful use of alternatives to litigation, an agency must do more than show enthusiastic support for settlements. When the Commission imposes on the parties its own solution to a problem, it attempts to weigh and balance competing concerns in the way that is most consistent with the public interest. When it is the parties who craft the solution, the Commission must be satisfied that the proposed solution successfully balances competing concerns and is consistent with the public interest. Toward that end, it becomes critical that the parties to an agreement adequately reflect the various interests involved, that the competing concerns are represented by well-informed, adequately funded participants, that no party has an unfair advantage in negotiations, and that no party is compelled to sign a bad deal. Many argue that if the Commission wants to rely on settlements offered by the parties, it bears the responsibility of assuring that each of these critical needs is met.

OBJECTIVES OF A PROGRAM EMPHASIZING ALTERNATIVES TO LITIGATION

The participants identified five objectives of any successful effort to expand the decisionmaking options at the CPUC:

1. To equalize power and access.

The perception is that the current system provides advantages to intervenors that are heavily funded, utilities that have more of the relevant information before them, and large organizations with heavily budgeted litigation teams and lobbyists who can gain direct access to decisionmakers. Many suggest that a well structured program that does not rely so heavily on litigated solutions can give greater influence to seemingly disadvantaged participants and thereby strike an appropriate balance.

2. To allow parties greater control over the results.

When an administrative law judge (ALJ) or the commissioners crafts a solution from an evidentiary record, none of those most directly affected by the outcome can control the result. If the directly affected parties come to the negotiating table, and if they have the money and information needed to fully participate, then they have more control over the outcome.

3. To reflect the marketplace.

It is assumed that Commission decisions are better when they more directly reflect the interests and needs of those who do business as providers or consumers in the relevant marketplace. Some argue that a well structured settlement process allows participants to bring their true interests to bear on the outcome of a proceeding. In addition, compromise and the careful development of ongoing relationships may be more characteristic of the marketplace than of regulation. Thus, the use of settlements may be seen as a means of influencing utility behavior in a way that would be more consistent with the influence that would be provided by a competitive market.

4. To promote good Commission decisionmaking.

The increased use of settlements does not relieve the Commission of its regulatory responsibilities. Instead, a well-developed settlement can improve the information available to the Commission in reaching a given decision. A settlement may offer better information because it should reflect the most fundamental interests of the parties involved.

5. To save time and money.

In a civil or criminal court setting, it would be expected that the use of settlements would save time and money that parties would otherwise spend on litigation. The participants in our workshops hoped that the use of alternatives would often produce similar results before this agency as well. However, it was also acknowledged that the Commission's ongoing regulatory responsibility, the complexity of issues brought before this agency, the importance of adequate preparation for settlement talks, the large number of parties often involved, and the steps necessary for Commission approval all reduce the importance of this objective as a reason for seeking alternatives to litigation before this agency.

Here are the major suggestions offered by the workshop participants for meeting these objectives.

SUGGESTED IMPROVEMENTS TO ENCOURAGE ALTERNATIVES TO LITIGATION

1. In order to rely on the parties to create the solution for a given matter,

   a. All relevant interests must be adequately represented. To assure this, the Commission should address at least three concerns:

      i. Seeking out potentially affected groups becomes a greater responsibility.

      The Commission says that when it reviews all-party settlements, it will be most inclined to support the parties' determination as to whether or not a particular resolution appropriately reflects the public interest. The key to providing such latitude is the assumption that the parties to the settlement

adequately represent the people affected and the interests at stake. The sense of the workshop participants was that, if the Commission intends to defer to the settling parties, the Commission must actively seek competent intervenors to represent significant interests. If the Commission wants to rely on parties to represent and define the public interest through settlements, it is not enough to simply publish a notice and wait to see who steps forward to participate.

Some of the interests at stake may have never been adequately represented before the Commission. To an even greater extent than currently occurs, it may be necessary to teach people about what the Commission does and about what is at stake in a particular proceeding. Instead of waiting for expressions of interest, affected groups would be asked to become involved. In Wisconsin, for instance, the Commission funded an intervenor group simply to perform an outreach function for a major case.

The Public Advisor's Office could be reconsidered, perhaps renamed a Public Advocate's Office. It could be given the resources necessary to find competent representatives for significant interests. In addition to furnishing those participants with important information, the Public Advocate could help participants to plan the most effective way to participate.

Before the early 1980s when various staff sections were given distinct advocacy and advisory missions, the entire staff considered itself to be primarily responsible for balancing public interest concerns. As the Commission departs from its historical emphasis on litigation and places more responsibility in the hands of the parties, the Commission may wish to reconsider these missions to assure that the staff's involvement in alternative solutions facilitates the pursuit of the broader public interest.

ii. Notice must be complete, aggressive and multi-media

When parties express a desire to negotiate, the Commission should immediately respond. Because of its interest in All-Party settlements, the

Commission will want to know that all significant interests are represented at the bargaining table.

The time to assure adequate representation is at the outset of the process. The Commission would work with the parties to identify significant interests and to determine that those interests are well-represented. This may involve rethinking the timing, distribution and content of the public notification about the pending proceeding. A separate notification may need to be issued when settlement is anticipated.

iii. Intervenor Compensation must become more accessible and dependable.

Many workshop participants believe that more effective representatives will not get involved if they think that the recovery of the cost of participation will be a large gamble. It is argued that potential participants cannot even assess the merits of getting involved in a given case without the ability to retain experts who can critically review an application, request or complaint. We may want to explore the use of a trust or other separate entity to parcel out intervenor funds on a prospective basis with a requirement that those funds be expended in good faith. This might allow the utilities and intervenors to more effectively plan their intervenor funding budgets a year at-a-time. Short of that, we may want to find a way to give potential intervenors exploratory funds to allow for initial expert analysis. The burden of carrying the cost of legal assistance could be reduced by allowing ongoing recovery for attorneys' time through monthly or quarterly billings. Any such changes would require revisions of the Commission's rules and may also require statutory changes.

b. Parties must be indifferent to settlement.

The Commission cannot be confident that a settlement is in the public interest if one or more party was economically coerced to sign. This could occur when a party perceives that by contesting a settlement it would

jeopardize its chances of receiving intervenor funding. In effect, such an intervenor might face a conflict between the public interest and the need for compensation. Intervenor compensation rules must make it equally likely that compensation will be awarded whether or not the intervenor signs the deal. In order to ensure a good deal, parties must be empowered to turn down a bad one.

Similarly, the Commission's confidence in a settlement can be undermined if other kinds of coercion are perceived. A party may feel compelled to agree to an unfavorable solution if it thinks it would be in any way punished by the Commission if it fails to settle. In addition, such a fear of failure could cause a party to refuse to negotiate from the outset. The Commission could address this concern by clearly and frequently stating that just as it may be reasonable to settle a case, it also may be reasonable not to settle.

However, while there should be no penalty for trying, some suggest that there may be ways to encourage parties to agree to favorable terms by shifting the costs of litigation to a party that turns down a better deal than is achieved through the hearing process.

c. Those negotiating on behalf of potentially affected groups must be knowledgeable.

Toward that end, information must flow easily between utilities and intervenors. We should more clearly define the discovery rights of intervenors. Many argue that intervenors must be empowered to not only discover data from the utilities, but to request that the data be processed in some way to make it more informative. For instance, rather than allowing the utility merely to provide raw data, this could involve requesting that data be presented in tabular or graphical form or that certain calculations or computer manipulations be performed.

In the past, some have assumed that the right to receive data in a more informative, processed form was reserved for the Commission staff. A problem with this assumption is that intervenors may be left with the inability to constructively use data received from a utility without hiring experts and performing costly, time-consuming studies. This problem could represent a roadblock to effective involvement in a proceeding on any level, but could especially impair the ability to knowledgeably participate in negotiations early in a proceeding.

d. Ex parte communications should be discouraged or eliminated because they make it harder to reach successful agreements.

Most, but not all workshop participants, felt that private communications between parties and decisionmakers interfere with the ability to reach a successful settlement. No matter when they occur, they tend to leave the parties engaging in such discussions with the impression that they know what the likely outcome of a litigated proceeding or negotiated agreement would be. At a minimum, granting some participants the ability to make such a private assessment of litigation risk is unfair, since some parties at the table will believe they have information relevant to the ultimate outcome of the negotiations that may not be available to all parties. Further, the resulting assessments of litigation risk may be inaccurate or incomplete but nonetheless cause the parties involved to become less flexible at the bargaining table or steer negotiations in a new direction.

Some participants, most notably those representing some utilities, feel that ex parte communications are appropriate and helpful even in the context of settlement negotiations. One solution would involve having negotiators agree on rules governing ex parte contacts.

At a minimum, those in favor of removing the influence of ex parte communications during the settlement process would have such contacts banned while settlement negotiations are in progress. Such an approach was

recently adopted in the portion of the Biennial Resource Plan Update Proceeding in which the Commission is considering capacity truncation issues. Many would go further and preclude ex parte communications in all pending cases for two reasons. First, such contacts could unfairly influence negotiations, even if they occur before negotiations have begun. In addition, some perceive that they have a right to lobby decisionmakers and might be hesitant to enter into negotiations if it would cause them to lose that option.

2. To create a better environment for settlement,

a. Discovery rules should be adopted.

Early and complete access to relevant information is seen as a critical component of successful negotiations. The absence of explicit discovery rules has the greatest impact on parties other than the staff. One positive step has been the assignment of a Law and Motion ALJ who is available to provide quick rulings in response to discovery-related disputes. Nonetheless, some argue that discovery rules would make it easier for parties to settle cases.

b. Optional Alternatives to Litigation guidelines should be adopted.

These can provide a framework for parties to protect the confidentiality of negotiations, define the options (facilitation, mediation, arbitration, etc.), and offer some ground rules that, if used, might allow participants to move more quickly into the substance of a negotiation. The optional guidelines could discuss some or all of the following:

i. Alternative methods
ii. The role of a mediator or facilitator
iii. Deciding whether or not to solicit the help of a neutral third party
iv. How to choose a mediator or facilitator
v. Access to in-house mediators and facilitators
vi. Payment of outside mediators and facilitators
vii. Who should be at the table
viii. Assuring that those at the bargaining table have settlement authority
ix. Discovery
x. Initial steps

xi. How to identify issues of importance to the Commission
xii. Confidentiality
xiii. Ex parte contacts

c. Settlement conferences, or more structured portions of prehearing conferences should be used in major proceedings to explore the potential for settlement.

d. In virtually every contested proceeding, parties should be required to agree upon a list of contested issues.

e. The case management system should not send matters to hearing as a matter of default. Instead, it should include a regular review to consider whether or not the use of alternative techniques should be encouraged in a given proceeding.

As part of this process, the Commission will consider adopting rules that would actively involve the parties in the case management process. Parties would be required to meet early and confer on a number of subjects:

1. principle issues and evidence,
2. the utilization of settlement techniques or other alternatives to litigation,
3. the need for additional disclosures of documents or other information,
4. discovery plans and time limits,
5. any motions requiring early resolution, and
6. recommended dates for the completion of discovery, reports and testimony and for holding hearings, if needed.

Prior to the first prehearing conference, the parties would be required to file a Case Management Statement reporting on how the parties have addressed each of these subjects.

f. The Assigned Commissioner or ALJ could issue a ruling to tell the parties what issues need to be resolved.

3. Issues concerning the use of alternatives to litigation for customer complaints should be explored in a separate workshop.

There was universal agreement among participants at the earlier workshops to use this approach. This is because consumer complaints (whether formal or informal) generally are quite different from other CPUC proceedings, usually

involve a small number of parties, and attract participants who often have uneven expertise and understanding of the Commission's formal and informal procedures.

Such a workshop has now been scheduled for September 30, 1993 in San Francisco. The workshop will explore a broad range of issues concerning the treatment of customer complaints, including the appropriate involvement of Consumer Affairs and others, and the appropriate use of expedited complaints, as well as determining when and how to use mediators or arbitrators.

4. The ALJ Division should have a broad role in promoting alternative resolutions.

In addition to employing a case management approach designed to identify cases that are promising candidates for settlement, the division should aggressively advertise and utilize its trained mediators.

There are both advantages and challenges created by the use of in-house mediators. It should be made clear that ALJ-mediators are offered as only one option. Parties are always free to negotiate without assistance or hire an outside mediator. However, ALJ-mediators can be provided without imposing a direct cost on participants and are unusually well-equipped to deal with technical issues and the nuances of CPUC practice. In at least one case, an ALJ-mediator served as a co-mediator with an outside expert who had no prior CPUC experience. An ALJ-mediator cannot be in any way involved as a decisionmaker in the underlying proceeding and must adhere to the same confidentiality protections agreed to by the other participants.

As the program develops, it will be vital that parties grow to acknowledge and trust that the ALJ-mediator separates his or her responsibilities as a mediator from those related to other work functions and other communications within the Division. In addition, the Commission should make it clear that the involvement of an in-house mediator does not imply automatic Commission endorsement of any resulting agreement.

The use of in-house mediators is likely to have a dramatic initial impact on work-load. In many instances, two ALJs will be assigned to cases that normally

only have one. Over the course of time, it is hoped that the increased use of settlements will reduce the amount of hearing time required to support the Commission's decisionmaking process. However, it is likely that the long-term effect of this effort will be some net increase in the workload. The exact effect depends on the success of the program.

5. The Commission's Confidentiality Rule Should Be Strictly Enforced

To ensure successful negotiations, it is important that parties have confidence that statements made at the bargaining table will not be repeated elsewhere without their permission. The Commission's Rule 51.9 offers such protection. It states:

> "No discussion, admission, concession or offer to stipulate or settle, whether oral or written, made during any negotiation on a stipulation or settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to stipulate or settle confidential and shall not disclose them outside the negotiations without the consent of the parties participating in the negotiations.
>
> "If a stipulation or settlement is not adopted by the Commission, the terms of the proposed stipulation or settlement are also inadmissible unless their admission is agreed to by all parties joining in the proposal."

This rule makes it inappropriate to repeat settlement discussions in the context of a hearing or anywhere else without the consent of the parties. However, this rule does not describe sanctions for failure to comply. In an effort to assure compliance with its provisions, the Commission should modify this rule to state the applicable sanctions.

6. The Standard for Commission Review of Settlements Must Be Clearly Defined

The Commission's Rule 51.1 sets a standard of review for settlements. The "all-party" concept explained in D.92-12-019 further refines the standard. Nonetheless, participants in the workshops and in various settlement efforts consistently express uncertainty as to the applicable standard.