DECISIONMAKING AT THE CALIFORNIA PUBLIC UTILITIES COMMISSION
ALTERNATIVES TO LITIGATION

A Discussion Paper for the
Workshops on Alternatives to Litigation
January, 1993

The adversarial process does not provide the most constructive way to solve most problems. Yet, the standard mechanism for setting Commission policy, allocating cost or assigning responsibility involves having the Commission choose a solution among the polar positions of litigating parties. Although we cannot avoid litigation in each instance, we can continually seek ways to allow parties to avoid taking extreme positions and, instead, express their interests. By working things out among themselves, parties might find a solution that changes what was a win-or-lose difference into something that produces mutual gain. By avoiding litigation, time may be saved and costs may be reduced, as well.

When a complaint can be avoided or dismissed, or when parties can agree among themselves on an acceptable resolution, everyone involved stands to benefit. Settling parties in a complaint proceeding may save time and money, improve their working relationship, and develop a lasting solution to their problem with which all the parties can live. Similarly, in an application, investigation or rulemaking, solutions developed by the parties themselves can produce many benefits.

When parties communicate "off the record", they can be less combative and more likely to express their underlying interests. The resulting solutions can be more productive and creative, more likely to be enthusiastically adopted, and more likely to withstand the test of time. When parties offer joint solutions, they improve the information available to decisionmakers. The decisionmakers are provided with a better sense of what is most important to the parties. Because a solution that is not litigated need not be dominated by lawyers (with the associated costs), access to government can be improved. In any type of proceeding, a well-structured, party-driven solution may save time and cut costs for both litigants and government.

unnecessary. Four years ago, the Commission officially sanctioned and encouraged the use of settlements and stipulations in virtually every type of proceeding by adding Section 51 et seq. to its Rules of Practice and Procedure (see Appendix "A"). Since the rules took effect, parties have presented the Commission with settlements in dozens of proceedings. Those settlements include the multi-billion dollar agreement struck in the Diablo Canyon Reasonableness Review, the determination of the demarcation points for inside and outside telephone wiring in multi-unit buildings, the resolution of several energy utility rate proceedings, and changes in the way the Commission regulates the gas industry and household goods carriers. Cases are just about as likely to be settled regardless of the type of utility involved.

In addition to offering the procedures set forth in its settlement rules, the Commission does various things to promote alternatives to litigation:

1. Informal Complaints

The Commission's Consumer Affairs Branch informally resolves the vast majority of the disputes between customers and utilities. Upon receiving a complaint in writing or by telephone, the staff analyzes the positions of the customer and the utility and issues an informal opinion. A customer who is not satisfied with the informal opinion can file an appeal to the manager of Consumer Affairs. The staff tries to help the parties settle their disputes. Sometimes, the manager of Consumer Affairs will travel to the customer's home or a neutral location to help mediate the dispute.

Consumer Affairs reports the handling of 57,467 informal complaints during the 1990-1991 fiscal year. The handling of at least 7,600 of these complaints may have involved nothing more than transferring a customer telephone call to the appropriate utility. By comparison, only 223 formal complaints were filed with the Commission in 1991.

2. Transportation Enforcement Investigations

In the face of evidence of tariff violations by truckers, the Commission initiates enforcement proceedings. At a prehearing conference held before an ALJ designated for that purpose, the respondent is given an opportunity to confer with staff members in an

effort to settle the case. The parties can choose to conduct settlement discussions on or off the record and with or without the help of an ALJ. If these discussions result in a settlement, the staff prepares written stipulations and submits them to the respondent for signature. If a settlement is not reached, a new ALJ is assigned and hearings are scheduled. According to the Transportation Division, roughly 3 out of 4 such cases are settled.

3. Small Water Companies

In a decision issued in March of 1992, the Commission initiated a program designed to allow the smallest of the regulated water companies to more easily obtain rate increases when needed. Most such rate increases are handled through the advice letter process. However, the Commission's staff normally has inordinate leverage when negotiating the terms of the advice letter filing. Since the smallest water companies often cannot afford to enter into lengthy litigation, the threat of having to go through a formal application process in the face of a staff protest enables the staff to make "take-it-or-leave-it" offers. Under the new approach (referred to as a "small claims court" procedure), the water company is entitled to an informal hearing, without reporter or counsel, to air its dispute with the staff. Although sworn evidence could be taken, the ALJ would be expected to use mediation skills to seek a voluntary resolution of the dispute. If this effort fails, the ALJ would issue a recommended decision within 30 days. This informal route of appeal should place the parties on a more even footing when negotiating the terms of an advice letter filing and encourage more settlements.

4. Expedited Complaint Proceedings

Relatively small billing disputes that are not settled through informal means can be processed as Expedited Complaints, which must be scheduled for hearing within thirty days and can be resolved in brief decisions which need not contain Findings of Fact and Conclusions of Law. Parties to hearings in such cases are not represented by counsel. This process encourages alternatives to litigation in at least three ways. First, the Docket Office will not accept the filing of an Expedited Complaint unless the complainant has exhausted informal avenues. Second, the Expedited Complaint process

diverts matters from the more cumbersome, expensive and time-consuming formal complaint process. Finally, the informal nature of the hearings and quick hearing date encourage settlement on the courthouse steps or through the use of Settlement Judge techniques by the ALJ.

5. Less Dramatic Techniques

ALJs often do small things that tend to encourage informal resolution of otherwise contested issues and (in some instances) entire proceedings. Some of these things can be described as "settlement boosterism". An ALJ might actively encourage opposing parties to "talk to each other" -- discuss concerns and problems among themselves before bringing them formally to the ALJ. In addition, some commissioners and ALJs ask the parties to consider settling their differences. One such technique is to include discussion of the potential for settlement as an agenda item at each prehearing conference in a proceeding. Sometimes, these techniques can create a settlement expectation in proceedings where parties may have previously applied only more traditional expectations. In some instances, commissioners have simply directed parties to go off and talk, and not come back until they have reached a settlement.

Other less dramatic techniques can be described as "settlement facilitators". For instance, parties to contested rate cases are often required to produce joint comparison exhibits near the close of a proceeding, to clearly delineate the differences between the parties. In some such cases, ALJs are now directing parties to produce these exhibits prior to the evidentiary hearings. Some have found that simply asking the parties to agree upon a list of differences makes it easier for them to eliminate some or all of those differences. ALJs also often direct parties to meet prior to hearings to prepare lists of stipulated facts, helping to narrow apparent contention and encourage negotiation.

Workshops are often called for the purpose of facilitating settlement. There is some institutional confusion as to what workshops are and how they relate to the decisionmaking process. However, they tend to be off-the-record discussions between parties without the involvement of decisionmakers, allowing for a more free-flowing discussion of issues. At a minimum, they should improve all parties' understanding of their positions and the underlying facts, making it more possible for settlement to occur.

Sometimes, ALJs or commissioners direct parties to hold workshops specifically to function as settlement conferences. Often, a representative of the Commission's Advisory and Compliance Division will serve as facilitator. In at least one instance, the staff facilitator was directed to produce a report and recommend an action plan in the event that settlement efforts failed. Workshops often produce settlements or joint positions of the parties.

6. Commission-Prompted Settlements

In several instances, the Commission has directed or encouraged parties in major proceedings to develop mutually agreeable solutions outside of the hearing room. Some significant examples follow:

- **Interim Standard Offer 4 Contracts for Qualifying Facilities**

In 1983, the Commission determined that, to enable some developers to attract project financing, the electric utilities needed to provide long-term contracts for the purchase of power from qualifying facilities. In order to get acceptable contracts written as soon as possible, the Commission chose to encourage negotiated agreements. A Commission attorney was selected to serve as facilitator. A law school lecture hall was reserved for the negotiating sessions for six weeks only. The facilitator maintained a non-intervention posture during the entire process, by merely calling meetings to order and assuring that only one person spoke at a time. Largely as a result of intense sessions held during the sixth week, contracts for all utilities were drafted and quickly approved by the Commission.

- **Demand-Side Management Collaborative Process**

In January of 1989, news articles reported on the work of the Natural Resources Defense Council suggesting that the State of California and its utilities had fallen behind in their efforts to promote energy conservation and other programs that have come to be known as Demand-Side Management. In August of 1990, the Commission approved greatly expanded utility Demand-Side Management programs, including utility shareholder incentive payments.

At an en banc meeting held in July, 1989, the Commission encouraged stakeholders to work together to develop new demand-side management programs, including shareholder incentive payments. Borrowing a model and name used in several other states, the stakeholders developed a Statewide Demand-Side Management Collaborative Process in August, 1989, with representatives from the Commission's Strategic Planning Division serving as facilitators and managers. This role involved setting meetings, performing as a liaison between the group and the commissioners, and sometimes mediating disagreements. The group of collaborators numbered 24 and represented 15 parties. In January, 1990, the collaborative group issued its report containing 12 consensus recommendations and 3 non-consensus recommendations. After four months of further negotiations, each utility filed an application requesting approval of a funding level and incentive mechanism. Virtually all remaining issues were settled by August, 1990, when the Commission issued decisions approving each application.

- **Electromagnetic Fields Consensus Group**

There is substantial public concern that prolonged exposure to low level electromagnetic fields may be unhealthy. The ambiguity caused by sometimes inconsistent research results has hampered the ability of government to act decisively in response to public concern. After opening an investigation of this issue as it effects electric utilities and after receiving comments from interested parties, the Commission invited 17 individuals to serve on a consensus group. The group members represented utilities, consumer and other citizen groups, and state agencies. The mission of the group was to return to the Commission within 120 days with suggestions concerning public education, protocols to govern utility response to customer concerns, and additional utility-funded research. Utilities pooled funds to cover general meeting costs as well as travel expenses and a nominal per diem for otherwise unfunded group members.

Although provided with a neutral facilitator from the Commission staff, the group chose to hire an outside facilitator. The group published a proposal, containing both consensus and non-consensus suggestions. Hearings on the proposals were scheduled for December of 1992.

- **Demand-Side Management Measurement and Evaluation**

The ALJ in the demand-side management rulemaking proceeding directed the parties to retain an outside facilitator and attempt to develop joint testimony containing detailed suggestions for measurement and evaluation of the utilities' programs.

7. New Steps

In some instances, the current Commission environment is obviously conducive to settlement. At the same time, there is an almost universal desire to increase the use of alternatives to litigation. The Commission has already taken several steps to encourage greater use of such alternatives. First, an intensive training session was held for all division directors and two commissioners. The purpose of the day-long session was to create a common vocabulary related to alternatives to litigation and to expose the leaders of the Commission to the fundamentals of mediation and the principles of interest-based negotiation.

The Commission also has a pilot settlement judge project, offering administrative law judges (ALJs) as mediators in a limited number of cases. The plan is to develop a small group of ALJs who are trained and experienced mediators who can be utilized, on request, to help reduce the need for hearings. The ALJ Division is also exploring changes to its case management system that would allow for periodic review of pending cases to identify those which might be resolved without litigation.

These structural changes should help parties to solve more issues without litigation. However, to ensure that this new emphasis will be successful, we need to consider various aspects of problem-solving at the Commission that affect the ability or willingness of parties to develop solutions without resorting to full litigation. Through workshops, we will explore each of these areas, and try to identify appropriate solutions.

Workshop Issues

1. Factors that, from the outset of a proceeding, may discourage settlement or encourage traditional litigation

Why do parties often fail to explore an alternative path? The answers probably reflect both general characteristics of our economy and culture, and specific peculiarities of the way we do business at the Commission. Litigation may be more comfortable because it is familiar. Parties may not feel that they possess sufficient information, or strong negotiating skills. The proceeding may not seem well-suited to resolution through other means. It may be in the economic interest of the parties or their counsel or consultants to pursue a more lengthy course. The parties may perceive that the Commission is not receptive to settlements, in general, or to a settlement in a particular case. There may be too many parties involved, with areas of interest that seldom overlap. The parties may simply desire, for any number of reasons, to receive an official pronouncement from the Commission resolving their concerns.

We should consider the extent to which these general characteristics affect the decision to choose traditional litigation at the Commission and the extent to which specific characteristics of this agency and practice before the Commission may influence that decision. Some argue that parties may be discouraged from negotiating due to a real or perceived power imbalance driven by differing perceptions of the time limitations, funding inequities, access to information or applicability of intervenor compensation rules. Others suggest that promotional practices for some parties might encourage settlement, while those for other parties might only reward successful litigants. What should the Commission do to address these concerns?

2. Means of ensuring full participation.

Reliance on traditional litigation can serve as a barrier for participation for those who are not well versed in the Commission's procedures or not financially capable of hiring qualified lawyers and expert witnesses. If litigation can be avoided, it may be possible to reduce cost and the need for prior exposure to Commission procedures. In practice, do alternative problem-solving techniques either support or hinder full

participation by interested parties? What steps can the Commission take to ensure the highest level of participation by interested parties?

3. Matters that may not be well-suited to alternative methods

There are a number of reasons that a particular case may not be well-suited for the use of alternatives. Here are some of the characteristics that may make agreement difficult:

1. Where one or more of those directly affected by the outcome of the case are not available to participate in the process
2. Where one party has overwhelming power or leverage over another party
3. Where one or more parties are simply unwilling to try to negotiate an agreement
4. Where one or more parties need a decision on the law or policy as a guide for future activity or where the legal or policy principles are otherwise more important than the dispute
5. Where the parties do not have and are not interested in developing an ongoing working relationship
6. Where the outcome of litigation is predictable
7. When indeterminate delays work to the particular advantage of one party

Is this list of factors complete and appropriate? Relating this list to practice before the Commission, are there certain types of situations in which alternatives to litigation should not be encouraged or pursued? What steps can the Commission take to overcome any of these factors?

4. Factors that affect the relative bargaining power of the parties

One often-voiced concern about the negotiation of settlements in Commission proceedings is that parties often do not have equal bargaining power. If there is a real or perceived imbalance, some or all parties may be unwilling or unable to move beyond an adversarial posture and undertake interest-based negotiations. The balance of power might be affected by budgets, access to information, time constraints, level of concern about the outcome, breadth of interest in the issues raised, experience and sophistication of the negotiators, location of meetings and costs related to negotiating. What are the

factors that affect relative bargaining power at the Commission? What steps can the Commission take to improve the balance?

A special consideration is the way to treat requests for intervenor compensation when settlement are offered. Under relevant rules and statutes, intervenors must demonstrate that a special contribution has been made before compensation can be awarded. How should the Commission make this determination?

5. Factors that contribute to the success or failure of negotiations

Here are some of the raw materials that could determine whether any alternative resolution will sink or float:

- ♦ Level of Preparation
- ♦ Sense of Urgency of Finding Solutions
- ♦ Lawyer's Fees and Other Litigation or Alternative Costs
- ♦ High Principle/Emotions
- ♦ Over-Confidence or Other Failure to Understand the Relative Advantages of Participants
- ♦ Different Assessment of Value
- ♦ The Quality of Expert Advice
- ♦ Lawyer's Tactics/Deliberate Delay
- ♦ Complexity
- ♦ Existence or Absence of Zones of Agreement
- ♦ Differential Willingness to Settle

What should be added to this list? Are there other factors that are peculiar to practice before this Commission? How can the Commission influence these factors to encourage successful negotiation?

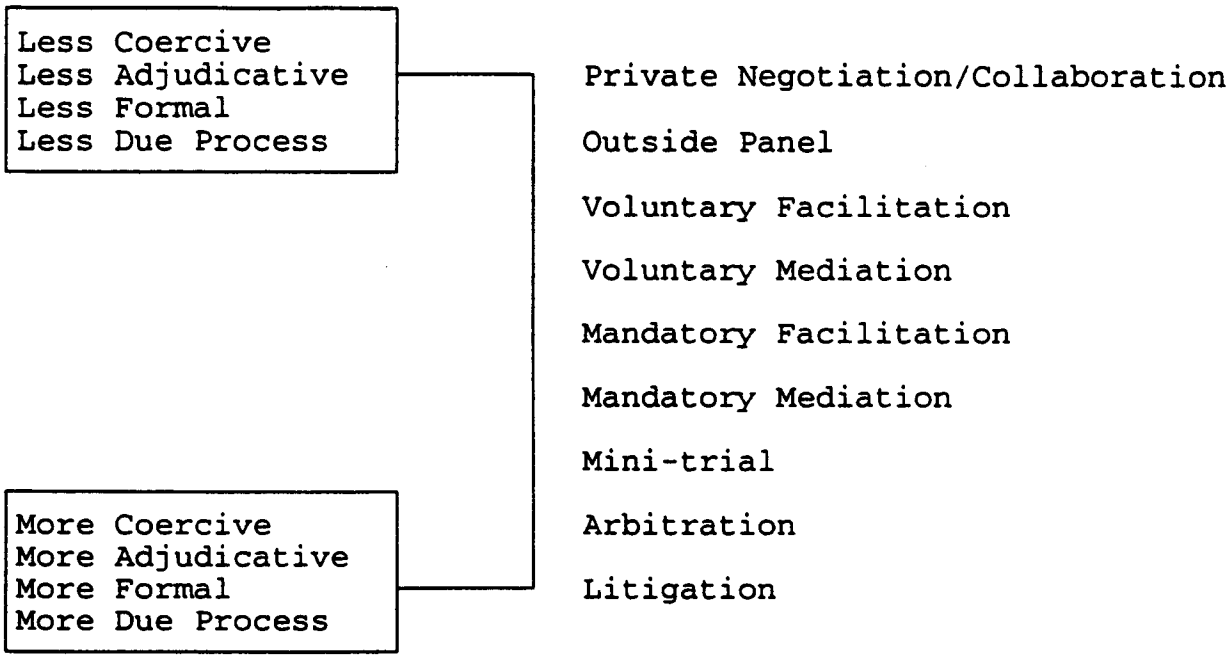
6. Factors that contribute to the acceptance or rejection of settlements

Perhaps the greatest distinction between settlements before the Commission and those before a civil court is that Commission settlements almost always touch upon the public interest. In civil courts, the government must adjudicate disputes between two or more parties. There, the public interest is generally limited to assuring fairness. The public interest in Commission proceedings is defined by the state constitution, statutes, court decisions and prior Commission orders. As such, the public interest is not always fully represented at the bargaining table. For a solution derived through the use of an alternative to litigation to succeed, it must be acceptable not only to the parties, but to the Commission as the body charged to determine and protect the public interest. In its recent decision establishing general rates for the San Diego Gas and Electric Company (Decision 92-12-019), the Commission established its preference for "all-party" settlements while emphasizing the importance of providing a record adequate to allow the decisionmakers to understand the settlement and to provide adequate regulatory oversight (See Appendix B of this paper for key language from that decision). Rule 51 requires that, in order to win approval, all settlements be found reasonable in light of the record as a whole and consistent with the public interest. Is there sufficient guidance in the Commission's rules and decisions to enable parties to understand the necessary elements of a successful solution? If not, what type of guidance is needed?

7. Additional techniques or services, such as the use of settlement judges, mediators or facilitators, that should be offered by the Commission to encourage alternatives to litigation

Alternatives to litigation can be seen as falling along a continuum, with the least intrusive alternative involving an agreement among the parties outside of a formal Commission proceeding and the most intrusive alternative being arbitration.

ALTERNATIVES TO LITIGATION



Depending on various circumstances, each of these techniques may be useful for problem-solving related to Commission matters. Which, if any, should become the focus of the Commission's efforts to promote alternatives to litigation? Should the Commission offer settlement judges, facilitators and/or mediators? Under what circumstances -- only when a formal matter is pending or when other specified conditions apply? Should the Commission offer mini-trials or arbitrators? Under what circumstances? Should the Commission offer early neutral evaluation in some instances, or require that certain types of issues be directed to a settlement judge or mediator as a matter of course? Should the parties bear any of the cost of these procedures?

8. Alternatives to litigation and issues of fairness.

Often, an agency will rely on the rituals of traditional litigation in order to assure adherence to due process and to maintain public confidence in the fundamental fairness of the agency's deliberations. What procedural protections need to be included in an effort to promote alternatives to litigation in order to assure that the rights of the parties are preserved? What safeguards are needed to promote public acceptance of the outcome?

9. The need for separate workshops involving specific industries or types of proceedings.

Are there issues related to alternatives to litigation that are specific to the Commission's regulation of certain industries or its consideration of certain types of proceedings that should be discussed in smaller, focussed workshops? What issues should receive such treatment, and why?

10. The definition and role of workshops, in general.

Workshops in specific proceedings often provide a vehicle for resolving issues without litigation. However, many have suggested a need to more precisely define the term "workshop" as it applies to Commission practice. Should the Commission do so? If so, what is the appropriate role of workshops? What guidelines, if any, should be established governing their use?

11. Changes in rules or practices that may be needed to encourage greater use of alternatives to litigation.

There may be no legal or procedural obstacles to the provision of the additional services discussed above. However, we must be certain that the Commission's rules and practice are compatible with their successful use. Are there any constraints created by the Commission's discovery, settlement or decisionmaking procedures that should be changed? Is there a need to provide greater protection for the confidentiality of settlement negotiations?

Workshop Procedures

The workshops to be held in response to this discussion paper are not considered to be confidential negotiations. Instead, they are intended as a public forum to address the above enumerated issues and others, where relevant. The workshops will be chaired and facilitated by Administrative Law Judge Steven Weissman. Participants will be asked to submit and distribute written comments addressing both the questions that are raised above and other related issues that parties feel need to be discussed. The comments should be distributed no later than January 29, 1993, to ALJ Weissman and each commissioner's office. Those interested in receiving copies of the comments of

others should so notify the Process Office in writing no later than January 21, 1993. The Process Office will provide a copy of the distribution list to each party filing comments. The commenting parties should send a copy of the comments to each party on the distribution list no later than February 10, 1993. At the commencement of the first workshop, a schedule will be set for discussion of issues raised in this paper or in the comments of the parties. The workshop results will contribute to a final discussion paper that will be distributed to all interested parties in advance of an en banc meeting with the Commissioners to discuss additional steps to be taken.

Appendix A

California Public Utilities Commission
Rules of Practice and Procedure
Article 13.5. Stipulations and Settlements

51. (Rule 51) Definitions.

The following definitions apply for purposes of this article:

(a) "Party or Parties" means any person on whose behalf an appearance has been filed in the proceeding.

(b) "Commission Proceeding" means an application, complaint, investigation or rulemaking before the California Public Utilities Commission.

(c) "Settlement" means an agreement between some or all of the parties to a Commission proceeding on a mutually acceptable outcome to the proceedings. In addition to other parties to an agreement, settlements in applications must be signed by the applicant and in complaints, by the complainant and defendant.

(d) "Stipulation" means an agreement between some or all of the parties to a Commission proceeding on the resolution of any issue of law or fact material to the proceeding.

(e) "Contested" describes a stipulation or settlement that is opposed in whole or part, as provided in this article, by any of the parties to the proceeding in which such stipulation or settlement is proposed for adoption by the Commission.

(f) "Uncontested" describes a stipulation or settlement that (1) is filed concurrently by all parties to the proceeding in which such stipulation or settlement is proposed for adoption by the Commission, or (2) is not contested by any party to the proceeding within the comment period after service of the stipulation or settlement on all parties to the proceeding.

51.1. (Rule 51.1) Proposal of Settlements or Stipulation .

(a) Parties to a Commission proceeding may stipulate to the resolution of any issue of law or fact material to the proceeding, or may settle on a mutually acceptable outcome to the proceeding, with or without resolving material issues. Resolution shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings.

(b) Prior to signing any stipulation or settlement, the settling parties shall convene at least one conference with notice and opportunity to participate provided to all parties for the purpose of discussing stipulations and settlements in a given proceeding. Written notice of the date, time, and place shall be furnished at least seven (7) days in advance to all parties to the proceeding. Notice of any subsequent meetings may be oral, may occur less than seven days in advance, and may be limited to prior conference attendees and those parties specifically requesting notice.

(c) Attendance at any stipulation or settlement conference or discussion conducted outside the public hearing room shall be limited to the parties to a proceeding and their representatives.

Parties may by written motion propose stipulations or settlements for adoption by the Commission in accordance with this article. The motion shall contain a statement of the factual and legal considerations adequate to advise the Commission and parties not expressly joining the agreement of its scope and of the grounds on which adoption is urged.

When a settlement pertains to a proceeding under the Rate Case Plan or other proceeding in which a comparison exhibit would ordinarily be filed, the settlement must be supported by a comparison exhibit indicating the impact of the settlement in relation to the utility's application. If the participating staff supports the settlement, it must prepare a similar exhibit indicating the impact of the proposal in relation to the issues it contested, or would have contested, in a hearing.

(d) Stipulations and settlements should ordinarily not include deadlines for Commission approval; however, in the rare case where delay beyond a certain date would invalidate the basis for the proposal, the timing urgency must be clearly stated and fully justified in the motion.

(e) The Commission will not approve stipulations or settlements, whether contested or uncontested, unless the stipulation or settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

51.2. (Rule 51.2) Timing

Parties to a Commission proceeding may propose a stipulation or settlement for adoption by the Commission (1) any time after the first prehearing conference and (2) within 30 days after the last day of hearing.

51.3. (Rule 51.3) Filing

Parties proposing a stipulation or settlement for adoption by the Commission shall concurrently file their proposal in accordance with the rules applicable to pleadings (See Article 2), and shall serve the proposal on all parties to the proceeding.

51.4. (Rule 51.4) Comment Period.

Whenever a party to a proceeding does not expressly join in a stipulation or settlement proposed for adoption by the Commission in that proceeding, such party shall have 30 days from the date of mailing of the stipulation or settlement within which to file comments contesting all or part of the stipulation or settlement, and shall serve such comments on all parties to the proceeding. Parties shall have 15 days after the comments are filed within which to file reply comments. The assigned administrative law judge may extend the comment and/or response period on motion and for good cause.

51.5. (Rule 51.5) Contents of Comments.

A party contesting a proposed stipulation or settlement must specify in its comments the portions of the stipulation or settlement that it opposes, the legal basis of its opposition, and the factual issues that it contests. Parties should indicate the extent of their planned participation at any hearing. If the contesting party asserts that hearing is required by law, appropriate citation shall be provided. Any failure by a party to file comments constitutes waiver by that party of all objections to the stipulation or

settlement, including the right to hearing to the extent that such hearing is not otherwise required by law.

51.6. (Rule 51.6) **Contested Stipulations and Settlements.**

(a) If the stipulation or settlement is contested, pursuant to Rule 51.4, in whole or in part on any material issue of fact by any party, the Commission will schedule a hearing on the contested issue(s) as soon after the close of the comment period as reasonably possible. Discovery will be permitted and should be well underway prior to the close of the comment period. Parties to the stipulation or settlement must provide one or more witnesses to testify concerning the contested issues and to undergo cross-examination by contesting parties. Contesting parties may present evidence and testimony on the contested issues.

(b) The Commission may decline to set hearing in any case where the contested issue of fact is not material or where the contested issue is one of law. In the latter case, opportunity for briefs will be provided.

To ensure that the process of considering stipulations and settlements is in the public interest, opportunity may also be provided for additional prehearing conferences and any other procedure deemed reasonable to develop the record on which the Commission will base its decision.

(c) Stipulations may be accepted on the record in any proceeding and the assigned administrative law judge may waive application of these rules to the stipulation upon motion and for good cause shown.

51.7. (Rule 51.7) **Commission Rejection of a Stipulation or Settlement.**

The Commission may reject a proposed stipulation or settlement without hearing whenever it determines that the stipulation or settlement is not in the public interest. Upon rejection of the settlement, the Commission may take various steps, including the following:

1. Hold hearings on the underlying issues, in which case the parties to the stipulation may either withdraw it or offer it as joint testimony.
2. Allow the parties time to renegotiate the settlement.
3. Propose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief.

51.8. (Rule 51.8) **Adoption Binding, Not Precedential.**

Commission adoption of a stipulation or settlement is binding on all parties to the proceeding in which the stipulation or settlement is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding any principle or issue in the proceeding or in any future proceeding.

51.9. (Rule 51.9) **Inadmissibility.**

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.

51.10. (Rule 51.10) Applicability.

These rules shall apply on and after the effective date of the decision promulgating them in all formal proceedings involving gas, electric, telephone, and Class A water utilities.

In proceedings where all parties join in the proposed stipulation or settlement, a motion for waiver of these rules may be filed. Such motion should demonstrate that the public interest will not be impaired by the waiver of these rules.

Any party in other proceedings before the Commission may file a motion showing good cause for applying these rules to settlements or stipulations in a particular matter. Such motion shall demonstrate that it is in the public interest to apply these rules in that proceeding. Protests to the motion may be oral or written.

Exhibits may be sponsored by two or more parties in a Commission hearing as joint testimony without application of these rules.

Appendix B

In Decision 92-12-019, in the most recent San Diego Gas & Electric Company General Rate Case docket, at page 7, the Commission establishes the following standard for approval of all-party settlement proposals:

"1. **Our policy on all party settlement proposals:**[1]

"We envision settlements as a vehicle for executing rather than formulating Commission policy. With this objective in mind, we are prepared to adopt a settlement that meets sponsorship and content criteria which pertain to both the identity and capacity of the sponsoring parties and the terms of their recommendation. As a precondition to our approval the Commission must be satisfied that the proposed all party settlement:

a. commands the unanimous sponsorship of all active parties to the instant proceeding;

b. that the sponsoring parties are fairly reflective of the affected interests;

c. that no term of the settlement contravenes statutory provisions or prior Commission decisions;[2] and,

d. that the settlement conveys to the Commission sufficient information to permit us to discharge our future regulatory obligations with respect to the parties and their interests."

---

[1] In Footnote 2 at page 2 of Decision 92-12-019, the Commission states, "[as] used in this opinion an "all party" settlement is one sponsored by all of the parties to the Commission proceeding. Such a proposal is to be distinguished from an "uncontested" settlement which may not be sponsored by all of the parties but in which the non joining parties do not contest the terms pursuant to Rules 51.4--6 of our Rules of Practice and Procedure.

"In the instant case the California Energy Commission entered the proceeding for a very limited purpose and that with respect to that purpose it has not agreed to the position taken by all other parties. Such a factor raises the immediate question as to whether the failure of a single issue participation party to join in sponsoring a settlement deprives it of the "all party" quality to which our enunciated policy would apply. We conclude that it does not. The failure of a single issue participant to co-sponsor a settlement means that as to that issue we will not take the recommendation of the sponsoring parties as potentially establishing reasonableness."

[2] "In formulating this criteria we do not intended to preclude the sponsoring parties from suggesting changes in established Commission policy or precedent or proposing policy in areas we have yet to address. However, we expect the sponsoring parties to clearly identify those portions of any proposed all party settlement which would require modification of Commission policy or the formulation of heretofore unannounced policy. Our goal is to always make policy amendment a conscious decision of the Commission. Further, the sponsoring parties must understand that the Commission is perfectly free to reject the recommendation by adhering to established policy or refusing to go beyond it."

In Footnotes 16 and 17 at pages 17 and 18 of Decision 92-12-019, the Commission further explains the "sufficient information" requirement as follows:

"Often, SDG&E simply states that '1988 base year recorded costs were adjusted as follows...' Although this type of explanation might help a reader to understand where the cost figures came from, it does not provide a justification. Why is it appropriate to use a 1988 base year recorded cost for this account? What changes are expected in staffing and operations? Why are the specified adjustments appropriate? How were they calculated? These types of questions should be easily answered by the initial showing."

"SDG&E's guarded initial showing may be a product of a protective, litigative instinct. All too often, utilities offer only the most minimal support for their rate requests, choosing instead to wait to see what subjects appear to be of interest to DRA. In response to DRA's concerns, utilities then provide focussed rebuttal.

"This strategy may be traditional, but it is not acceptable. Hopefully, the company has done a more complete job of satisfying itself that a given program or expense is worthwhile. We would expect the company to make an equally convincing showing to this Commission when asking to pass those costs through rates. Where a rate case is litigated or a settlement is contested, the utility must provide a more detailed showing for all of its requested revenue requirement, in order to sustain its burden of proof. Where a settlement is adopted by all parties and is consistent with relevant law and Commission policy, the utility must provide a more detailed showing to enable the Commission to be confident both that the settlement can be well understood in the context of the company's initial request and that the Commission and its staff will have sufficient information with which to monitor the utility's activities and costs.

"Without question, a utility seeking to encourage settlement must shed this traditional strategy and be more forthcoming with support for its request. In addition to providing information that is essential to understanding and monitoring the results of the settlement, a more complete initial showing will quicken the discovery process that is so critical to timely settlement. Because an all-party settlement obviates the need for the development (through hearings) of an extensive evidentiary record, the quality of the utility's initial showing becomes all the more important. We will reject future rate case settlements, no matter how reasonable they might otherwise appear, where they are not supported by a comprehensive initial showing."