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**CALIFORNIA PUBLIC UTILITIES COMMISSION  
ALTERNATIVES TO LITIGATION PROGRAM**

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**A Progress Report  
October 12, 1993**

**I. Activities in 1993**

**A. Training**

**1. One-Day Session for Division Directors and Commissioner's Offices**

If institutional changes are required to reduce the Commission's dependence on litigation, it is critical that those involved in the process speak the same language. Toward that end, the staff division directors, commissioner's advisors and two commissioners attended a one-day training session designed to develop a common vocabulary concerning alternatives to litigation. The trainer mixed lectures with role-playing exercises to the concept of "principled negotiation" and the ways in which a neutral third party can help other participants discover compatible interests.

**2. Negotiation Training for Advocates**

The success of settlement negotiations is often dependent on the relative skills of the negotiators. For years, the Legal Division and the Division of Ratepayer Advocates have provided negotiation training to key staff members. This practice continued in 1993.

**3. Facilitation Training for CACD**

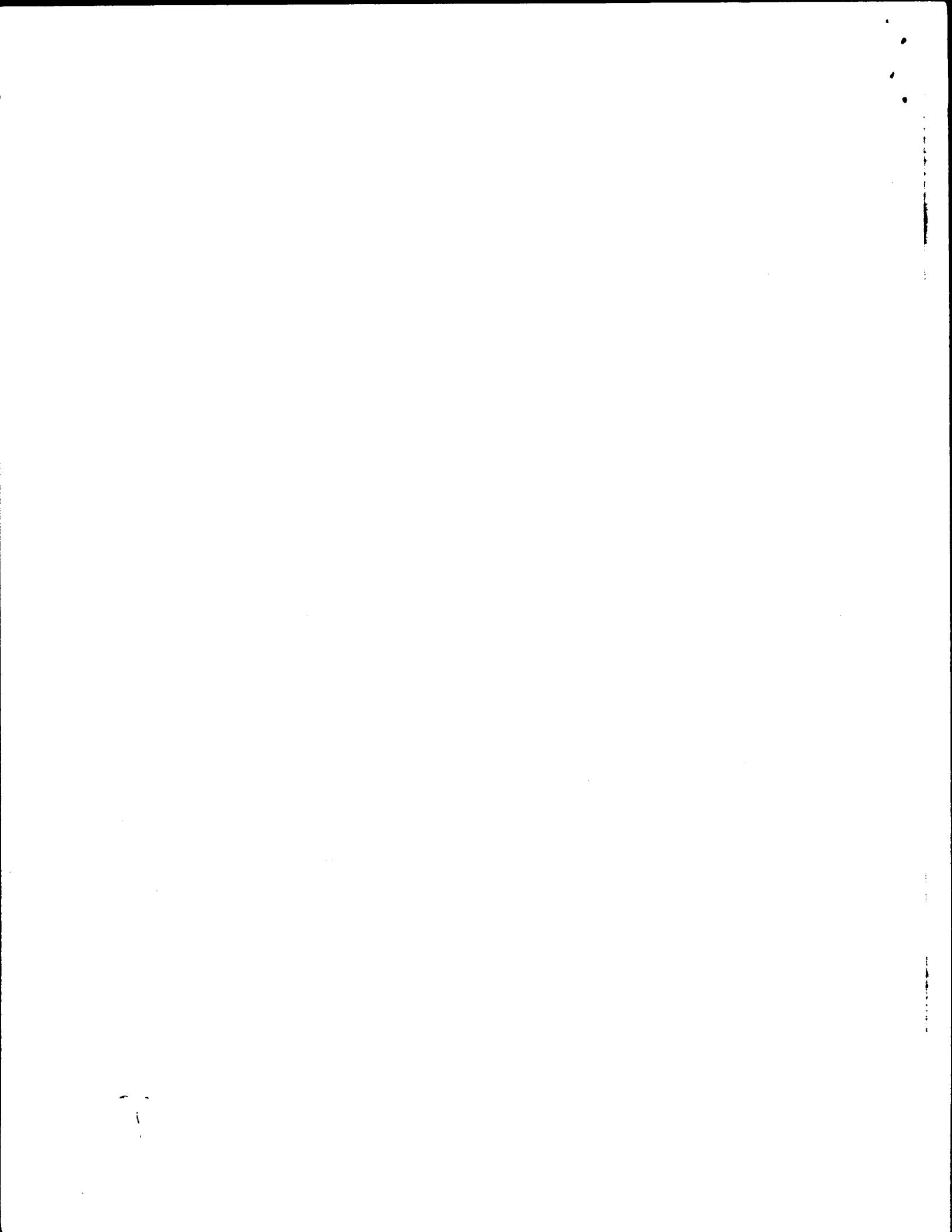
Although Commission-initiated workshops have been used for a variety of purposes, the process of bringing parties together to discuss common concerns may increase the likelihood of settlement. Typically, workshops are organized and facilitated by representatives of the Commission's Advisory and Compliance Division. Recently, CACD has taken steps to strengthen its workshop facilitation capabilities. Between April and June, sixteen staff members were trained in workshop facilitation skills. In September, CACD managers were taught skills needed to help staff when they are facilitating workshops.

**4. Intensive Mediation Training for Administrative Law Judges**

Approximately half of the Commission's administrative law judges have now undergone intensive mediation training including a full week of lectures, discussions, role-playing exercises and observations.

**5. Pilot Mediation Program**

The ALJ Division has begun providing the assistance of its trained mediators to help parties reach agreements. Thus far, mediators have been offered in two complaint cases, one major telecommunications proceeding, and one complex dispute involving small power producers. The intention is to expand this program as individual ALJs further hone their mediation skills.



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### **6. Modification of Case Management Approach**

The ALJ Division now examines each new proceeding to determine whether or not it is necessary or appropriate for that matter to go to hearing. The 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.

#### **B. The Public Process**

A crucial aspect of the Alternatives to Litigation Program is a systematic effort to bring to bear the collective expertise and insights of those who practice before the agency. At each phase of this public discussion, the agenda and priorities have been identified by the participants themselves. Here are the steps that have been taken thus far:

##### **1. First Discussion Paper**

A discussion paper was widely distributed in January, 1993, seeking open-ended comments and suggestions on a variety of issues related to the use of alternatives to litigation.

##### **2. Comments on First Paper**

More than 20 utilities, groups and individuals files comments in response to the first paper. The comments emphasized the importance of changing various aspects of the Commission's traditional practices and procedures in order to encourage settlements and provide a fair opportunity for effective involvement by those representing all significant interests.

##### **3. Alternatives to Litigation Workshops**

More than 50 people participated in two days of intensive workshops held in San Francisco in February, 1993. The discussion topics were derived from the written comments to the first discussion paper.

##### **4. Second Discussion Paper Based on Workshops**

The results of the workshops were reported in a second discussion paper, issued in August, 1993.

##### **5. Comments on Second Paper**

More that 20 parties offered comments in response to the second discussion paper.

##### **6. Full Panel Hearing**

The Commission set the agenda and chose the participants for today's full panel hearing based on the issues developed in the comments to the second discussion paper.

##### **7. Separate Workshops on Customer Complaints**

Customer 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. For these reasons, all participants in the February, 1993 workshops agreed that separate workshops should be held to address the best ways for responding to customer complaints and other concerns.

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A customer complaints workshop was held on September 30, 1993 in San Francisco. Participants explored 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. The participants proposed dozens of procedural changes. The Commission will schedule an additional workshop to further explore those proposals.

### **II. Some Examples of Alternative Approaches Endorsed By the Commission**

#### **A. 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, 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.

#### **B. 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 a full panel 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.

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### **C. 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. The Commission is currently considering these suggestions in its review of a proposed decision.

### **D. 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.

### **E. The 1992 Review of the New Regulatory Framework for GTEC**

In 1989, the Commission approved a new regulatory framework to replace the traditional rate-case method of setting rates for regulated telephone service. At the same time, the Commission called for an investigation to be undertaken every three years to review the effectiveness of the program for Pacific Bell and General Telephone of California (GTEC). GTEC and all 13 of the other parties participating in the investigation chose to negotiate a settlement of all major issues. Together, they elected to retain the services of two mediators - one from outside of the Commission and one from the Commission staff. After 6 weeks of intensive negotiations, a comprehensive deal was reached. It was approved in August, 1993. Pacific Bell and the same 13 interested parties were unable to reach an agreement. Seven weeks of hearings were eventually held in the Pacific Bell investigation and a Pacific Bell decision will follow the GTEC decision by several months.

## **III. Where Do We Go From Here?**

The Full Panel Hearing provides an opportunity for the commissioners to consider the next most appropriate steps. Options include the issuance of a policy statement, the consideration of rules changes, the development of suggested legislation, and the convening of additional targeted workshops. Beyond taking steps to ease the burdens of litigation, the Commission may wish to find ways to fundamentally change the communication that occurs

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between utilities and interested parties. Rather than focussing on dispute resolution, perhaps parties can find more creative ways to work together to ensure that the Commissions policies and the utility's practices are most consistent with our common interests. Many parties have commented that the atmosphere for settlements has improved simply because the Commission has increased the public discussion on these topics. However, in many ways, the most challenging part of this effort have just begun.

#### **IV. Steps Taken Prior to 1993**

##### **A. Settlement Rules**

Rules of Practice and Procedure Section 51 et seq. provide a procedure for Commission consideration of settlements and stipulations and, as such, officially sanction the consideration of settlements in applications, complaints, investigations and rulemaking proceedings. Since the rules took effect in the Fall of 1988, parties have presented the Commission with settlements in at least 35 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.

##### **B. 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.

##### **C. 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.

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### **D. 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.

### **E. 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.

### **F. 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.

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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.

### **G. The Commission's Refinement of Its Settlement Policy**

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



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"1. Our policy on all party settlement proposals:<sup>1</sup>

"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;<sup>2</sup> and,

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<sup>1</sup> 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."

<sup>2</sup> "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."

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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."

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."