ORR&RENO
ATTORNEYS AT LAW

Douglas L. Patch
dpatch@orr-reno.com
Direct Dial 603.223.9161
Direct Fax 603.223.9061
Admitted in NH and MA

August 20, 2012

Via Email
Robert A. Bersak, Assistant Secretary and Associate General Counsel
Public Service Company of New Hampshire
780 N. Commercial Street
P.O. Box 330
Manchester, New Hampshire 03101

Re: DE 12-097 ELECTRIC AND GAS UTILITIES, Investigation into Purchase of Receivables, Customer Referral and Electronic Interface for Electric and Gas Distribution Utilities

Dear Mr. Bersak:

By letter dated August 15, 2012 you asked the Retail Energy Supply Association ("RESA") to reconsider its position objecting to certain data requests which Public Service Company of New Hampshire propounded on RESA.

I want to start by noting that the list that you included in the first paragraph of your letter of the data requests that RESA had objected to but then later answered notwithstanding the objection was extremely inaccurate. By our count RESA responded, at least in part, to all but four of the data requests, those four being PSNH 3, 4, 18 and 19. RESA did in fact provide a response to all of the other data requests. Given what you said in the first paragraph and given some of the other comments in your letter it appeared that you had not reviewed the responses that were provided notwithstanding the objections; if that is the case RESA would respectfully suggest that you do so before pursuing these issues further.

With regard to the objections RESA responds as follows. PSNH 1-3 and 1-4 asked questions pertaining to pro-ration of customer payments, something which RESA is not seeking in this docket. PSNH 1-18 and 1-19 sought extensive and what RESA believes is irrelevant information about RESA members. In addition, RESA responds more generally to your letter in the following way. RESA's objections start from the basis that many of these requests are not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding. If you look back at the Order of Notice and the Commission's Prehearing Conference Order it is clear that the issues in this docket are limited to whether purchase of receivables, customer referral and electronic interface programs will promote customer choice consistent with the restructuring principles of RSA 374-F:3, whether the resulting rates

associated with the programs are just and reasonable pursuant to RSA 378:5 and 7, and an examination of the costs and benefits of these programs, including the recovery of the associated costs. Data requests that seek information regarding individual RESA members and their efforts in other jurisdictions for the most part seek information that would not lead to the discovery of information that would be relevant to the issues to be addressed in this proceeding and therefore would not be admissible in this proceeding. The Commission has clearly articulated the scope of the docket and that scope does not include an examination of information pertaining to all of the RESA members who are suppliers in this state or other states.

In addition, RESA does not have in its possession the kind of information that PSNH has requested and RESA members have no obligation to provide this information to RESA and if requested may well choose not to provide this information. Moreover, the collection and dissemination of commercially sensitive information by a trade association, such as RESA, has serious implications under both the Sherman Anti-Trust Act and applicable NH anti-trust law and is contrary to RESA's anti-trust policy because the sharing of commercially sensitive information among competitors can lead to collusive behavior that is contrary to the law.

Gathering all of this kind of information from RESA's 22 members about their practices in each state in which each of those members and any of their affiliates are doing business would be extremely time consuming and burdensome.

Assuming the information requested met the relevance test and that the other bases for objection could be overcome, any suggestion that a non-disclosure agreement and a protective order would resolve RESA's concerns is incorrect. A protective order and non-disclosure agreement is an imperfect solution, especially where the information would be shared with other commercial entities. In the event of a breach it will be both costly and difficult to establish with accuracy the extent of the damages suffered by each affected RESA member. Such mechanisms also do not prevent the transfer of information which may occur when personnel change jobs and find themselves working for a competitor. In short, these mechanisms should not be used unless there is a strong and compelling need for the information, something which is not the case here.

As you also know as a result of the discussions during the technical session on August 16, 2012 RESA is providing some follow-up responses to certain data requests and RESA did provide information less formally in response to oral questions asked during the technical session.

Let me know if you have any additional questions.

Sincerely,

Douglas L. Patch

cc. Discovery Service List in DE 12-097 via email
913470_1

PUC Docket No. DE 12-097
RESA Responses to
First Round of PSNH Data Requests

Date of Request: July 27, 2012 **Date of Response: REVISED** - August 23, 2012

Q-PSNH 1-38. Is a utility's ability to disconnect a customer for non-payment a fundamental tenet of a POR program?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: Yes. In New Hampshire, retail suppliers cannot disconnect electric service for non-payment for their own, non-purchased receivables. Without POR, retail suppliers would be at a significant competitive disadvantage with respect to uncollectible costs. However, under a POR program a utility is permitted to disconnect a customer for non-payment of their bill, including supplier charges associated with the accounts receivable purchased by the utility. A POR program reduces barriers to supplier entry and helps level the playing field between an EDC's default service and retail supplier's competitive supply service, especially for the residential and small commercial market segments.

PUC Docket No. DE 12-097
RESA Responses to
First Round of PSNH Data Requests

Date of Request: July 27, 2012 Date of Response: REVISED - August 23, 2012

Q-PSNH 1-54. On page 10, lines 19-22, RESA's testimony states, "a well designed POR program would significantly contribute to the public policy objective to help reduce costs for all consumers by harnessing the power of competitive markets."

a. Is RESA guaranteeing that implementation of a well-designed POR program will reduce costs for all consumers?

b. In the states where RESA alleges "well-designed, non-recourse POR programs have been established, e.g., Connecticut, New York, Illinois, Maryland, and Pennsylvania" (p. 10, lines 11-13), are there retail electric customers that continue to receive their electric supply from standard offer, default service, provider-of-last-resort service, or some similar offering provided by an EDC in such state?

c. If the answer to subpart b is in the affirmative, please provide a listing of the number of retail customers that continue to receive electric supply from the EDC, by state, utility, and customer class.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request on the basis that it is argumentative, that it would be unduly burdensome to compile the information requested, that it is irrelevant to this proceeding and not calculated to lead to the discovery of information that would be admissible in this proceeding, and on the basis that the information may be more readily available from a more convenient and less burdensome source, namely the applicable electric distribution utilities or from a publicly available source.**

Notwithstanding and without waiving RESA's objections, RESA answers as follows:

(a) No. RESA believes that current retail market prices are lower than New Hampshire EDC's default service commodity prices.

(b) Yes.

(c) Please see objection.

PUC Docket No. DE 12-097
RESA Responses to
First Round of PSNH Data Requests

Date of Request: July 27, 2012 **Date of Response: REVISED** - August 24, 2012

Q-PSNH 1-59. On page 14, lines 2-5, regarding its proposed customer referral program, RESA's testimony states, "The EDCs would be also be required to offer residential and small commercial customers the option to learn about their electricity supply options when they contact the company for certain other purposes, namely (a) to make an inquiry regarding their rates or the amount of their bill; or (b) to seek information regarding energy efficiency or other value-added services."

a. Would the proposed marketing services provided by a utility's customer service representatives increase the duration of calls?
b. Would the proposed marketing services require an increase in the number of customer service representatives employed by a utility in order to keep the average wait-time to answer at the same levels provided prior to implementation of those marketing services?
c. How do RESA-member competitive suppliers inform customers about their electricity supply options today?
d. Do RESA-member competitive suppliers pay for marketing and/or advertising services today?
e. If any such marketing and/or advertising costs are incurred by RESA members today, do those costs include a profit margin to the entities supplying those services?
f. Does RESA propose that the state's EDCs can charge competitive suppliers for providing the proposed marketing services?
g. Does RESA propose that any charges imposed by the state's EDCs for such marketing services may include a profit margin?
h. In what states, if any, do such customer referral programs exist?
i. In any states identified in response to subpart h, do the utilities charge competitive suppliers for this service, and, if so, do such charges include a profit margin?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request on the basis that it is seeking information which is not in the possession, custody or control of RESA, and it would be imprudent for RESA to gather the requested information from its member companies because it is protected from disclosure among members by law and/or agreement respecting anti-trust principles, that calls for speculation, and that the information can be obtained from a publicly available source.**

Notwithstanding and without waiving RESA's objections, RESA answers as follows:

(a) Possibly.

(b) Possibly.

(c) RESA cannot answer this question in that it seeks information which is not in the possession, custody or control of RESA, which does not keep or record the information requested for its individual member companies. Moreover, it would be imprudent for RESA to gather the requested information from its member companies because it is highly confidential, proprietary and protected from disclosure among members by law and/or agreement respecting antitrust principles, confidentiality and/or non-disclosure.

(d) Please see response to subsection (c)

(e) Please see response to subsection (c)

(f) To the extent such proposed services can be provided at little or no incremental cost to the EDC, RESA recommends that they be provided as part of the EDC's general and administrative expense, recovered on a regulated cost of service basis. To the extent that the program requires significant incremental expenditures then RESA would support implementing some form of user fee to recover the expense from participating suppliers.

(g) Please see response to subsection (f). To the extent that the program costs are included in the general operating expense of the EDC then they should be subject to the same rate of return treatment as other operating expenses. To the extent the program costs are recovered through user fees on participating suppliers, RESA recommends that such fees not include a profit margin for the EDC.

(h) Please see response to Staff 1-10.

(i) Please see response to Staff 1-10.

ATTACHMENT C

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, FEBRUARY 24, 2009

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. CLK-2008-00002

Ex Parte: In the matter concerning revised State Corporation Commission Rules of Practice and Procedure

FINAL ORDER

The Rules of Practice and Procedure, now codified at 5 VAC 5-10-10 *et seq.* ("Rules"), were last revised in Case No. CLK-2007-00005,[1] in which the State Corporation Commission ("Commission") incorporated procedures for electronic filing. Prior to Case No. CLK-2007-00005, the Rules were last revised in 2001 in Case No. CLK-2000-00311.[2]

On August 7, 2008, the Commission entered an Order for Notice of Proceeding to Consider Revisions to Commission's Rules of Practice and Procedure ("Order"). In the Order, the Commission permitted interested persons to review the Commission Staff's ("Staff") proposed revisions to the Commission's Rules of Practice and Procedure ("Proposed Rules") and to file comments and suggestions thereon. A copy of the Proposed Rules was attached to the Order.

Comments were filed on October 3, 2008, by the following: Appalachian Power Company ("Appalachian Power"); the Office of the Attorney General, Division of Consumer Counsel ("Consumer Counsel"); Potomac Edison Company d/b/a Allegheny Power ("Allegheny

[1] Commonwealth of Virginia ex rel. State Corporation Commission, Ex Parte: In the Matter concerning revised State Corporation Commission Rules of Practice and Procedure, Case No. CLK-2007-00005 (Final Order, January 15, 2008).

[2] Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: In the Matter concerning revised State Corporation Commission Rules of Practice and Procedure, Case No. CLK-2000-00311, 2001 S.C.C. Ann. Rpt. 55 (Final Order, April 30, 2001).

Power"); Columbia Gas of Virginia, Inc. ("Columbia Gas"); Virginia Electric and Power Company d/b/a Dominion Virginia Power ("Virginia Power"); Washington Gas Light Company ("Washington Gas"); and the Virginia Industrial Energy Users Groups ("VIEUG").[3] Columbia Gas and Virginia Power requested a hearing, and Appalachian Power requested that the Commission require the Staff to file a report and to permit responses by parties to other comments and the Staff Report.

On November 21, 2008, the Commission entered an Order Scheduling Hearing and Directing Parties and Staff to File Additional Comments, directing the Staff to file a Report on the comments to the Proposed Rules, permitting the parties to file a response to the Staff Report, and permitting the Staff to file a reply to these responses. A public hearing was also scheduled for February 4, 2009.

The Staff Report was filed on December 16, 2008, addressing the numerous comments and proposed changes filed by the parties. Attached to the Staff Report were further changes recommended by the Staff as a result of the parties' comments ("Revised Proposed Rules"). Appalachian Power, Columbia Gas, Consumer Counsel, Allegheny Power, VIEUG, Virginia Power, and Washington Gas each filed a response to the Staff Report and the Revised Proposed Rules on January 9, 2009. The Staff filed a reply to these responses on January 23, 2009.

The Commission convened a hearing on February 4, 2009. All parties who submitted comments, as well as the Staff, appeared by counsel at the hearing. The Staff advised that they had met with those who had filed comments in advance of the hearing and had been able to reach accord on a number of the revisions remaining at issue after the filing of the Staff Report and the

[3] The VIEUG is comprised of the Virginia Committee for Fair Utility Rates, the Old Dominion Committee for Fair Utility Rates, and the Virginia Industrial Gas Users Association ("VIGUA").

Revised Proposed Rules attached thereto.[4] Resolution was reached either by agreement to new language, withdrawal of additional proposals, or withdrawal of objections to text included in the Revised Proposed Rules. However, two Rules were the subject of proposals that remained contested at the hearing.[5] Accordingly, full arguments on each contested proposal, as described below, were heard by the Commission.[6]

Rule 80[7]

Appalachian Power proposed in its initial comments that subsection B of Rule 80 be revised to require a respondent to update its notice of intent to participate.[8] Currently, Rule 80 B requires in part that a notice of participation state a specific action sought to the extent then known and the factual and legal basis for the action. Appalachian Power's proposal would modify Rule 80 B to require a respondent to state actions sought and facts underlying them as soon as such actions and facts are known and without regard to whether such respondent had completed discovery or whether the date for filing written testimony had passed.[9] While the Staff opposed the Appalachian Power proposal in the Staff Report, the Staff and Virginia Power offered an alternative approach at the hearing that was intended to require respondents to update the information provided in the notice of participation if the respondent did not prefile

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[4] *See* Tr. at 7-39; 166-168.

[5] *See* Tr. at 9, 28, 30, 39-40, 104, 107, 166.

[6] Tr. at 40-166.

[7] Each rule discussed herein will be referred to in this short form. The full citation for the Rule is 5 VAC 5-20-80.

[8] Appalachian Power October 3, 2008 Comments at 4-5.

[9] *Id.*

testimony.[10] Both the VIEUG and Consumer Counsel opposed the changes, arguing that the present language in the Rule was adequate.[11]

Separately, Columbia Gas proposed a revision to Rule 80 B to change the way in which groups or associations file their notices of participation. In filed comments, Columbia Gas recommended that Rule 80 require that a group or association include the name of each member of the association in the notice of participation.[12] At the hearing, Columbia Gas revised its proposal to address only associations consisting of utility customers that are grouped together to participate collectively rather than individually in a Commission proceeding.[13] VIEUG and the Staff opposed the proposal noting that there are alternative methods by which such information could be discovered if it is relevant to the proceeding.[14]

Rule 260

Columbia Gas sought to amend Rule 260 to permit interrogatories and requests for production of documents to be sent to individual members of an association appearing as a respondent in a Commission proceeding.[15] As with Rule 80, Columbia Gas modified its proposal at the hearing to make it applicable specifically to groups or associations of utility customers.[16] Columbia Gas contends that it is unfair for associations such as VIGUA to have the

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[10] Staff Report at 3-4; Tr. at 40-43, 46-48, 71-74, 77-80.

[11] *See* Consumer Counsel January 9, 2009 Response at 3-4; Tr. at 51-54, 71, 74-77.

[12] Columbia Gas October 3, 2008 Comments at 18-19, 29; Columbia Gas January 9, 2009 Response at 15-18.

[13] Tr. at 82.

[14] VIEUG January 9, 2009 Response at 7, n.10; Staff Report at 4-5; Tr. at 98-99, 102.

[15] Columbia Gas October 3, 2008 Comments at 19-22; Columbia Gas January 9, 2009 Response at 33-37.

[16] Tr. at 139-140.

ability to propound discovery upon Columbia Gas on behalf of individual customers in a Commission proceeding while Columbia Gas is not authorized to serve interrogatories on those same customers.[17]

VIEUG opposed the Columbia Gas proposal.[18] Counsel for VIEUG argued that when his law firm represents an association in a Commission proceeding, the law firm is not counsel for the individual members of the group and, as such, has no authority to answer discovery on behalf of these individual companies.[19] VIEUG also argued that modifying Rule 260 in the manner proposed by Columbia Gas could discourage participation in Commission proceedings.[20]

Allegheny Power and Washington Gas each proposed a change in the rules of discovery related to the Staff. Initially, both Allegheny Power and Washington Gas sought to amend Rule 260 to provide for full discovery on the Staff.[21] In its response to the Staff Report, Allegheny Power amended its proposal to provide for discovery on the Staff when it acts as a litigant in a Commission proceeding.[22] Allegheny Power argued that the right of full discovery between participants in a proceeding, including the Staff, promotes "judicial efficiency" and "just results."[23] Washington Gas stated in its comments that it needs discovery on the Staff to foster

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[17] Tr. at 116-124; 135-141; Columbia Gas January 9, 2009 Response at 34-36.

[18] VIEUG January 9, 2009 Response at 2-7.

[19] Tr. at 142.

[20] VIEUG January 9, 2009 Response at 6; Tr. at 141, 144-145.

[21] Allegheny Power October 3, 2008 Comments at 3-4; Washington Gas October 3, 2008 Comments at 9-12.

[22] Allegheny Power January 9, 2009 Response at 1-4.

[23] *Id.* at 2.

the opportunity to resolve issues on which an applicant, the Staff, and parties have differing opinions.[24]

The Staff opposed the proposals, noting that Rule 270 already requires the Staff to make available workpapers that support the Staff's recommendations in testimony and in reports to parties in a regulatory proceeding and that Rule 260 permits parties to discover factual information that supports those workpapers.[25] The Staff argued that this method of furnishing information continues to strike an appropriate balance between the interests of the parties to a regulatory proceeding and the Staff's unique role in Commission proceedings.[26] The Staff also opposed expanding discovery beyond the present level as an unnecessary expense on the Commission's limited resources.[27]

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds that the current Rules of Practice and Procedure shall be revised as set forth in the attachment to this Final Order. The Commission has considered all of the comments, revisions, argument of the participants, and applicable law in making its determination in this matter. The Commission commends the parties and the Staff for narrowing the issues in dispute prior to the start of the hearing. The uncontested revisions shall be adopted.[28]

We find that the contested proposals, discussed above, need not be adopted in this proceeding. We find that Rule 80 B's requirement for notice of participation is presently

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[24] Washington Gas October 3, 2008 Comments at 10-11; Tr. at 150-151.

[25] Staff Report at 13-16.

[26] *Id.* at 15-16; Staff January 23, 2009 Reply at 15-18.

[27] Staff Report at 16.

[28] *See* Tr. at 7-39, 166-168. The Commission has made technical changes where necessary to improve uniformity and clarity of the Rules as revised. These technical changes are in addition to, but consistent with, the uncontested revisions.

adequate. Any abuse of the Rule is currently subject to challenge on a case-by-case basis, and discovery options present parties with alternatives for addressing relevant concerns in the course of a proceeding. We further find that the proposal to permit discovery on non-parties to a proceeding — *i.e.*, individual members of an association — is not reasonable and should not be adopted. Finally, we find that the proposals for full or expanded discovery upon the Staff should be rejected. As the Staff serves a unique role in Commission proceedings, the two avenues for access to Staff workpapers and discovering facts relied upon by the Staff in those workpapers, pursuant to Rule 260 and Rule 270, remain sufficient for parties participating in the Commission's regulatory proceedings.

The revisions to these Rules adopted herein shall be effective March 11, 2009.

Accordingly, IT IS ORDERED THAT:

(1) The current Rules of Practice and Procedure as set forth in 5 VAC 5-20-10 *et seq.* are hereby revised and adopted as set forth on the attachment to this Final Order.

(2) The revisions to these Rules adopted herein shall be effective March 11, 2009.

(3) A copy of this Final Order and the Rules adopted herein shall be forwarded to the Virginia Register of Regulations for publication.

(4) This case shall be dismissed from the Commission's docket of active proceedings, and the papers filed herein shall be placed in the Commission's file for ended causes.

Commissioner Dimitri did not participate in this proceeding.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Donald G. Owens, Esquire, and Thomas C. Walker, Jr., Esquire, Troutman Sanders LLP, 1001 Haxall Point, P.O. Box 1122, Richmond, Virginia 23218-1122; Karen L. Bell, Esquire, and Lisa S. Booth, Esquire, Dominion Resources Services, Inc., P.O. Box 26532, Richmond,

Virginia 23261-6532; Vishwa B. Link, Esquire, and Andrea R. Chase, Esquire, McGuireWoods LLP, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030; Anthony Gambardella, Esquire, Woods Rogers, PLC, 823 East Main Street, Suite 1200, Richmond, Virginia 23219; Charles E. Bayless, Esquire, and James R. Bacha, Esquire, Appalachian Power Company, Three James Center, Suite 702, 1051 East Cary Street, Richmond, Virginia 23219; C. Meade Browder, Jr., Senior Assistant Attorney General, and Kiva Bland Pierce, Assistant Attorney General, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219; Richard D. Gary, Esquire, and Noelle J. Coates, Esquire, Hunton & Williams LLP, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219; Jeffrey P. Trout, Esquire, Allegheny Power, 800 Cabin Hill Drive, Greensburg, Pennsylvania 15601; James S. Copenhaver, Esquire, and T. Borden Ellis, Esquire, Columbia Gas of Virginia, Inc., 1809 Coyote Drive, Chester, Virginia 23836; Meera Ahamed, Esquire, Washington Gas Light Company, 101 Constitution Avenue, N.W., Washington, D.C. 20080; Louis R. Monacell, Esquire, Edward L. Petrini, Esquire, and Cliona Mary Robb, Esquire, Christian & Barton, L.L.P., 909 East Main Street, Suite 1200, Richmond, Virginia 23219-3095; and the Commission's Office of General Counsel.

STATE CORPORATION COMMISSION, CLERK'S OFFICE

Amend Rules of Practice and Procedure

Part I

General Provisions

5VAC5-20-10. Applicability.

The State Corporation Commission Rules of Practice and Procedure are promulgated pursuant to the authority of § 12.1-25 of the Code of Virginia and are applicable to the regulatory and adjudicatory proceedings of the State Corporation Commission except where superseded by more specific rules for particular types of cases or proceedings. When necessary to serve the ends of justice in a particular case, the commission may grant, upon motion or its own initiative, a waiver or modification of any of the provisions of ~~the~~ these rules, except 5VAC5-20-220, under terms and conditions and to the extent it deems appropriate. These rules do not apply to the internal administration or organization of the commission in matters such as the procurement of goods and services, personnel actions, and similar issues, nor to matters that are being handled administratively by a division or bureau of the commission.

5VAC5-20-20. Good faith pleading and practice.

Every pleading, written motion, or other document presented for filing by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, and the attorney's mailing address and telephone number, and where available, telefax number and email address, shall be stated. An individual not represented by an attorney shall sign the individual's pleading, motion, or other document, and shall state the individual's mailing address and telephone number. A

partnership not represented by an attorney shall have a partner sign the partnership's pleading, motion, or other document, and shall state the partnership's mailing address and telephone number. A nonlawyer may only represent the interests of another before the commission in the presentation of facts, figures, or factual conclusions, as distinguished from legal arguments or conclusions. In the case of an individual or entity not represented by counsel, each signature shall be that of the individual or a qualified officer or agent of the entity. [~~The~~] ~~pleadings~~ [~~document~~ Documents signed pursuant to this rule] need not be under oath unless so required by statute.

The commission allows electronic filing. Before filing electronically, the filer shall complete an electronic document filing authorization form, establish a filer authentication password with the Clerk of the State Corporation Commission and otherwise comply with the electronic filing procedures adopted by the commission. Upon establishment of a filer authentication password, a filer may make electronic filings in any case. All documents submitted electronically must be capable of being printed as paper documents without loss of content or appearance.

The signature of an attorney or party constitutes a certification that (i) the attorney or party has read the pleading, motion, or other document; (ii) to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry, it the pleading, motion or other document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (iii) it the pleading, motion or other document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A pleading, written motion, or other document will not be accepted for filing by the Clerk of the Commission if it is not signed.

An oral motion made by an attorney or party in a commission proceeding constitutes a representation that the motion (i) is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (ii) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Part II

Commencement of Formal Proceedings

[5VAC5-20-80. Regulatory proceedings.

A. Application. Except where otherwise provided by statute, rule or commission order, a person or entity seeking to engage in an industry or business subject to the commission's regulatory ~~control~~ authority, or to make changes in any previously authorized service, rate, facility, or other aspect of such industry or business that, by statute or rule, must be approved by the commission, shall file an application requesting authority to do so. The application shall contain (i) a specific statement of the action sought; (ii) a statement of the facts that the applicant is prepared to prove that would warrant the action sought; (iii) a statement of the legal basis for such action; and (iv) any other information required by law or regulation. Any person or entity filing an application shall be a party to that proceeding.

B. Participation as a respondent. A notice of participation as a respondent is the proper initial response to an application. A notice of participation shall be filed within the time prescribed by the commission and shall contain (i) a precise statement of the interest of the respondent; (ii) a statement of the specific action sought to the extent then known; and (iii) the factual and legal basis for the action. Any person or entity filing a notice of participation as a respondent shall be a party to that proceeding.

C. Public witnesses. Any person or entity not participating in a matter pursuant to subsection A or B of this section may make known their position in any regulatory proceeding by filing written comments in advance of the hearing if provided for by commission order or by attending the hearing, noting an appearance in the manner prescribed by the commission, and giving oral testimony. Public witnesses may not otherwise participate in the proceeding, be included in the service list, or be considered a party to the proceeding.

D. Commission staff. The commission staff may appear and participate in any proceeding in order to see that pertinent issues on behalf of the general public interest are clearly presented to the commission. The staff may, inter alia, conduct investigations and discovery, evaluate the issues raised, testify and offer exhibits, file briefs and make argument, and be subject to cross-examination when testifying. Neither the commission staff collectively nor any individual member of the commission staff shall be considered a party to the case for any purpose by virtue of participation in a proceeding.]

5VAC5-20-90. Adjudicatory proceedings.

A. Initiation of proceedings. Investigative, disciplinary, penal, and other adjudicatory proceedings may be initiated by motion of the commission staff or upon the commission's own motion. Further proceedings shall be controlled by the issuance of a rule to show cause, which shall give notice to the defendant, state the allegations against the defendant, provide for a response from the defendant and, where appropriate, set the matter for hearing. A rule to show cause shall be served in the manner provided by § 12.1-19.1 or § 12.1-29 of the Code of Virginia. The commission staff shall prove the case by clear and convincing evidence.

B. Answer. ~~An answer is the proper initial responsive pleading to a rule to show cause.~~ An answer or other responsive pleading shall be filed within 21 days of service of

the rule to show cause, unless the commission shall order otherwise. The answer shall state, in narrative form, each defendant's responses to the allegations in the rule to show cause and any affirmative defenses asserted by the defendant. Failure to file a timely answer or other responsive pleading may result in the entry of judgment by default against the party failing to respond.

5VAC5-20-100. Other proceedings.

A. Promulgation of general orders, rules, or regulations. Before promulgating a general order, rule, or regulation, the commission shall, by order upon an application or upon its own motion, require reasonable notice of the contents of the proposed general order, rule, or regulation, including publication in the Virginia Register of Regulations, and afford interested persons an opportunity to comment, present evidence, and be heard. A copy of each general order, rule, and regulation adopted in final form by the commission shall be filed with the Registrar of Regulations for publication in the Virginia Register of Regulations.

B. Petitions in other matters. Persons having a cause before the commission, whether by statute, rule, regulation, or otherwise, against a defendant, including the commission, a commission bureau, or a commission division, shall proceed by filing a written petition containing (i) the identity of the parties; (ii) a statement of the action sought and the legal basis for the commission's jurisdiction to take the action sought; (iii) a statement of the facts, proof of which would warrant the action sought; (iv) a statement of the legal basis for the action; and (v) a certificate showing service upon the defendant.

Within 21 days of service of a petition under this rule, the defendant shall file an answer or other responsive pleading containing, in narrative form, (i) a response to each allegation of the petition and (ii) a statement of each affirmative defense asserted by the defendant. Failure to file a timely answer may result in entry of judgment by default

against the defendant failing to respond. Upon order of the commission, the commission staff may participate in any proceeding under this rule in which it is not a defendant to the same extent as permitted by 5VAC5-20-80 D.

C. Declaratory judgments. Persons having no other adequate remedy may petition the commission for a declaratory judgment. The petition shall meet the requirements of subsection B of this section and, in addition, contain a statement of the basis for concluding that an actual controversy exists. In the proceeding, the commission shall by order provide for the necessary notice, responsive pleadings, and participation by interested parties and the commission staff.

5VAC5-20-120. Procedure before hearing examiners.

A. Assignment. The commission may, by order, assign a matter pending before it to a hearing examiner. Unless otherwise ordered, the hearing examiner shall conduct all further proceedings in the matter on behalf of the commission in accordance with ~~the~~ these rules. In the discharge of his duties, the hearing examiner shall exercise all the adjudicatory powers possessed by the commission including, inter alia, the power to administer oaths; require the attendance of witnesses and parties; require the production of documents; schedule and conduct pre-hearing conferences; admit or exclude evidence; grant or deny continuances; and rule on motions, matters of law, and procedural questions. The hearing examiner shall, upon conclusion of all assigned duties, issue a written final report and recommendation to the commission at the conclusion of the proceedings.

B. Objections and certification of issues. An objection to a ruling by the hearing examiner [during a hearing] shall be stated with the reasons therefor at the time of the ruling [~~, and the.~~ Any] objection [to a hearing examiner's ruling] may be argued to the commission as part of a response to the hearing examiner's report. A ruling by the

hearing examiner that denies further participation by a party in interest or the commission staff in a proceeding that has not been concluded may be immediately appealed to the commission by filing a written motion with the commission for review. Upon the motion of any party or the staff, or upon the hearing examiner's own initiative, the hearing examiner may certify any other material issue to the commission for its consideration and resolution. Pending resolution by the commission of a ruling appealed or certified, the hearing examiner shall retain procedural control of the proceeding.

C. Responses to hearing examiner reports. Unless otherwise ordered by the hearing examiner, responses supporting or objecting to the hearing examiner's final report must be filed within 21 days of the issuance of the report. A reply to a response to the hearing examiner's report may only be filed with leave of the commission. The commission may accept, modify, or reject the hearing examiner's recommendations in any manner consistent with law and the evidence, notwithstanding an absence of objections to the hearing examiner's report.

5VAC5-20-130. Amendment of pleadings.

No amendment shall be made to any ~~formal~~ pleading after it is filed except by leave of the commission, which leave shall be liberally granted in the furtherance of justice. The commission shall make such provision for notice and for opportunity to respond to the amended pleadings as it may deem necessary and proper.

5VAC5-20-140. Filing and service.

A ~~formal~~ pleading or other ~~related~~ document shall be considered filed with the commission upon receipt of the original and required copies by the Clerk of the Commission no later than the time established for the closing of business of the clerk's

office on the day the item is due. The original and copies shall be stamped by the Clerk to show the time and date of receipt.

Electronic filings may be submitted at any time and will be deemed filed on the date and at the time the electronic document is received by the commission's database; provided, that if a document is received when the clerk's office is not open for public business, the document shall be deemed filed on the next regular business day. A filer will receive an electronic notification identifying the date and time the document ~~is~~ was received by the commission's database. An electronic document may be rejected if it is not submitted in compliance with these rules.

When a filing would otherwise be due on a day when the clerk's office is not open for public business [during all or part of a business day] , the filing will be timely if made on the next regular business day ~~when~~ that the office is open to the public. [~~When~~ Except as otherwise ordered by the commission, when] a period of 15 days or fewer is permitted to make a filing or take other action pursuant to commission rule or order, intervening weekends or holidays shall not be counted in determining the due date.

Service of a ~~formal~~ pleading, brief, or other document filed with the commission required to be served on the parties to a proceeding or upon the commission staff, shall be effected by delivery of a true copy to the party or staff, or by deposit of a true copy into the United States mail [or overnight express mail delivery service] properly addressed and [~~stamped~~ postage prepaid, or via hand-delivery] , on or before the date of filing. Service on a party may be made by service on the party's counsel. Alternatively, electronic service shall be permitted on parties or staff in cases where all parties and staff have agreed to such service, or where the commission has provided for such service by order. At the foot of a formal pleading, brief, or other document required to be served, the party making service shall append a certificate of counsel of record that

copies were mailed or delivered as required. Notices, findings of fact, opinions, decisions, orders, or other documents to be served by the commission may be served by United States mail. However, all writs, processes, and orders of the commission, when acting in conformity with § 12.1-27 of the Code of Virginia, shall be attested by the Clerk of the Commission and served in compliance with § 12.1-19.1 or 12.1-29 of the Code of Virginia.

5VAC5-20-150. Copies and format.

Applications, petitions, motions, responsive pleadings, briefs, and other documents filed by parties must be filed in an original and 15 copies unless otherwise directed by the commission. Except as otherwise stated in these rules, submissions filed electronically are exempt from the copy requirement. One copy of each responsive pleading or brief must be served on each party and the commission staff counsel assigned to the matter, or, if no counsel has been assigned, on the general counsel.

Each document must be filed on standard size white opaque paper, 8-1/2 by 11 inches in dimension, ~~and~~ must be capable of being reproduced in copies of archival quality, and only one side of the paper may be used. Submissions filed electronically shall be made in portable document format (PDF).

~~Pleadings~~ Each document shall be bound or attached on the left side and contain adequate margins. Each page following the first page shall be numbered. If necessary, a document may be filed in consecutively numbered volumes, each of which may not exceed three inches in thickness. Submissions filed electronically may not exceed 100 pages of printed text of 8-1/2 by 11 inches.

~~Pleadings~~ Each document containing more than one exhibit should have dividers separating each exhibit and should contain an index. Exhibits such as maps, plats, and

photographs not easily reduced to standard size may be filed in a different size, as necessary. Submissions filed electronically that otherwise would incorporate large exhibits impractical for conversion to electronic format shall be identified in the filing and include a statement that the exhibit was filed in hardcopy and is available for viewing at the commission or that a copy may be obtained from the filing party. Such exhibit shall be filed in an original and 15 copies.

All filed documents shall be fully collated and assembled into complete and proper sets ready for distribution and use, without the need for further assembly, sorting, or rearrangement.

The Clerk of the Commission may reject the filing of any document not conforming to the requirements of this rule.

5VAC5-20-170. Confidential information.

A person who proposes in good faith in a formal proceeding that information to be filed with or ~~submitted~~ delivered to the commission [~~, or to be supplied to a party under Part IV (5VAC5-20-240 et seq.) of these rules,~~] be withheld from public disclosure on the ground that it contains trade secrets, privileged, or confidential commercial or financial information shall file this information under seal with the Clerk of the Commission, or otherwise ~~submit~~ deliver the information under seal to the commission staff, [~~requesting party,~~] or both, as may be required. Items filed or delivered under seal shall be securely sealed in an opaque container that is clearly labeled "UNDER SEAL," and, if filed, shall meet the other requirements for filing contained in these rules. An original and 15 copies of all such information shall be filed with the clerk. One additional copy of all such information ~~also~~ shall also be ~~submitted~~ delivered under seal to the commission staff counsel assigned to the matter, or, where no counsel has been assigned, to the general counsel who, until ordered otherwise by the commission, shall

disclose the information only to the members of the commission staff directly assigned to the matter as necessary in the discharge of their duties. Staff counsel and all members of the commission staff, until otherwise ordered by the commission, shall maintain the information in strict confidence and shall not disclose its contents to members of the public, or to other staff members not assigned to the matter. The commission staff or any party may object to the proposed withholding of the information.

[When an application (including supporting documents and prefiled testimony) contains information that the applicant claims to be confidential, the filing shall be made under seal and accompanied by a motion for protective order or other confidential treatment. The provision to a party of information claimed to be trade secrets, privileged, or confidential commercial or financial information shall be governed by a protective order or other individual arrangements for confidential treatment.]

On every document filed or delivered under seal, the producing party shall mark each individual page of the document that contains confidential information, and on each such page shall clearly indicate the specific information requested to be treated as confidential by use of highlighting, underscoring, bracketing or other appropriate marking. All remaining materials on each page of the document shall be treated as nonconfidential and available for public use and review. If an entire document is confidential, or if all information provided [~~electronically~~ in electronic format] under Part IV of these rules is confidential, a marking prominently displayed on the first page of such document or at the beginning of any information provided [~~electronically~~ in electronic format], indicating that the entire document is confidential shall suffice. [~~No document containing any confidential material may be filed electronically with the Clerk of the Commission.~~]

Upon challenge, ~~the filing party shall demonstrate to the satisfaction of the commission that the information should be withheld from public disclosure~~ [the] information shall be treated as confidential pursuant to these rules only where the party requesting confidential treatment can [~~prove it is more likely than not that public disclosure of the information will result in unreasonable harm~~ ~~the information shall be treated as confidential pursuant to the rules only where the party requesting confidential treatment can~~ demonstrate to the satisfaction of the commission that the risk of harm of publicly disclosing the information outweighs the presumption in favor of public disclosure]. If the commission determines that the information should be withheld from public disclosure, it may nevertheless require the information to be disclosed to parties to a proceeding under appropriate protective order.

Whenever a document is filed with the clerk under seal, an original and [~~15 copies~~ one copy] of an expurgated or redacted version of the document deemed by the filing party or determined by the commission to be confidential shall be filed with the clerk for use and review by the public. A document containing confidential information shall not be submitted electronically. An expurgated or redacted version of the document may be filed electronically. Documents containing confidential information must be filed in hardcopy and in accordance with all requirements of these rules. [Upon a determination by the commission, or a hearing examiner, that all or portions of any materials filed under seal are not entitled to confidential treatment, the filing party shall file one original and one copy of the expurgated or redacted version of the document reflecting the ruling.]

When the information at issue is not required to be filed or made a part of the record, a party who wishes to withhold confidential information from filing or production may move the commission for a protective order without filing the materials. In considering

such a motion, the commission may require production of the confidential materials for inspection in camera, if necessary.

A party may request additional protection for extraordinarily sensitive information by motion filed pursuant to 5VAC5-20-110, and filing the information with the Clerk of the Commission under seal and delivering a copy of the information to commission staff counsel under seal as directed above. Whenever such treatment has been requested under Part IV of these rules, the commission may make such orders as necessary to permit parties to challenge the requested additional protection.

The commission, hearing examiners, any party and the commission staff may make use of confidential material in orders, filing pleadings [~~or~~,] testimony [, or other documents,] as directed by order of the commission. When a party or commission staff uses confidential material in a filed pleading [~~or~~,] testimony, [or other document,] the party or commission staff must file both confidential and nonconfidential versions of the pleading [~~or~~,] testimony [, or other document] . Confidential versions of filed pleadings [~~or~~,] testimony [, or other documents] shall clearly indicate the confidential material contained within by highlighting, underscoring, bracketing or other appropriate marking. When filing confidential pleadings [~~or~~,] testimony, [or other documents,] parties must submit the confidential [~~pleadings or testimony~~ version] to the Clerk of the Commission securely sealed in an opaque container that is clearly labeled "UNDER SEAL." Nonconfidential versions of filed pleadings [~~or~~,] testimony [, or other documents] shall [expurgate, redact, or otherwise] omit all references to confidential material.

The commission may issue such order as it deems necessary to prevent the use of confidentiality claims for the purpose of delay or obstruction of the proceeding.

[A person who proposes in good faith that information to be delivered to the commission staff outside of a formal proceeding be withheld from public disclosure on the ground that it contains trade secrets, privileged, or confidential commercial or financial information may deliver the information under seal to the commission staff, subject to the same protections afforded confidential information in formal proceedings.]

5VAC5-20-180. Official transcript of hearing.

The official transcript of a hearing before the commission or a hearing examiner shall be that prepared by the court reporters retained by the commission and certified by the court reporter as a true and correct transcript of the proceeding. Transcripts of proceedings shall not be prepared except in cases assigned to a hearing examiner, when directed by the commission, or when requested by a party desiring to purchase a copy. Parties desiring to purchase copies of the transcript shall make arrangement for purchase with the court reporter. When a transcript is prepared, a copy thereof shall be made available for public inspection in the ~~Clerk of the Commission's~~ clerk's office. [If the transcript includes confidential information, an expurgated or redacted version of the transcript shall be made available for public inspection in the clerk's office. Only the parties who have executed an agreement to adhere to a protective order or other arrangement for access to confidential treatment in such proceeding and the commission staff shall be entitled to access to an unexpurgated or unredacted version of the transcript.] By agreement of the parties, or as the commission may by order provide, corrections may be made to the transcript.

Part IV

Discovery and Hearing Preparation Procedures

5VAC5-20-240. Prepared testimony and exhibits.

Following the filing of an application dependent upon complicated or technical proof, the commission may direct the applicant to prepare and file the testimony and exhibits by which the applicant expects to establish its case. In all proceedings in which an applicant is required to file testimony, respondents shall be permitted and may be directed by the commission or hearing examiner to file, on or before a date certain, testimony and exhibits by which they expect to establish their case. Any respondent that chooses not to file testimony and exhibits by that date may not thereafter present testimony or exhibits except by leave of the commission, but may otherwise fully participate in the proceeding and engage in cross-examination of the testimony and exhibits of commission staff and other parties. The commission staff also shall file testimony and exhibits when directed to do so by the commission. Failure to comply with the directions of the commission, without good cause shown, may result in rejection of the testimony and exhibits by the commission. With leave of the commission and unless a timely objection is made, the commission staff or a party may correct or supplement any prepared testimony and exhibits before or during the hearing. In all proceedings, all evidence must be verified by the witness before introduction into the record, and the admissibility of the evidence shall be subject to the same standards as if the testimony were offered orally at hearing, unless, with the consent of the commission, the staff and all parties stipulate the introduction of testimony without need for verification. An original and 15 copies of prepared testimony and exhibits shall be filed unless otherwise specified in the commission's scheduling order and public notice, or unless the testimony and exhibits are filed electronically and otherwise comply with these rules. Documents of

unusual bulk or weight and physical exhibits other than documents need not be filed in advance, but shall be described and made available for pretrial examination.

5VAC5-20-250. Process, witnesses, and production of documents and things.

A. Subpoenas. Commission staff and ~~a~~ any party to a proceeding shall be entitled to process, to convene parties, to compel the attendance of witnesses, and to compel the production of books, papers, documents, or things provided in this rule.

B. Commission issuance and enforcement of other regulatory agency subpoenas. Upon motion by commission staff counsel, the commission may issue and enforce subpoenas at the request of a regulatory agency of another jurisdiction if the activity for which the information is sought by the other agency, if occurring in the Commonwealth, would be a violation of the laws of the Commonwealth that are administered by the commission.

A motion requesting the issuance of a commission subpoena shall include:

1. A copy of the original subpoena issued by the regulatory agency to the named defendant;

2. An affidavit of the requesting agency administrator stating the basis for the issuance of the subpoena under that state's laws; and

3. A memorandum from the commission's corresponding division director providing the basis for the issuance of the commission subpoena.

C. ~~Documents~~ Document subpoenas. In a pending ~~case~~ proceeding, at the request of commission staff or any party, the Clerk of the Commission shall issue a subpoena. When a matter is under investigation by commission staff, before a formal proceeding has been established, whenever it appears to the commission by affidavit filed with the Clerk of the Commission by the commission staff or an individual, that a book, writing,

document, or thing sufficiently described in the affidavit, is in the possession, or under the control, of an identified person and is material and proper to be produced, the commission may order the Clerk of the Commission to issue a subpoena and to have the subpoena duly served, together with an attested copy of the commission's order compelling production at a reasonable place and time as described in the commission's order.

D. ~~Witnesses~~ Witness subpoenas. In a pending ~~case~~ proceeding, at the request of commission staff or any party, the Clerk of the Commission shall issue a subpoena.

5VAC5-20-260. Interrogatories to parties or requests for production of documents and things.

The commission staff and ~~a~~ any party in a formal proceeding before the commission, other than a proceeding under 5VAC5-20-100 A [~~and C~~] , may serve written interrogatories or requests for production of documents upon a party, to be answered by the party served, or if the party served is an entity, by an officer or agent of the entity, who shall furnish to the staff or requesting party information as is known. Interrogatories or requests for production of documents [, including workpapers pursuant to 5VAC5-20-270,] that cannot be timely answered before the scheduled hearing date may be served only with leave of the commission for good cause shown and upon such conditions as the commission may prescribe. [Such otherwise untimely interrogatories or requests for production of documents, including workpapers pursuant to 5VAC5-20-270, may not be served until such leave is granted.] No interrogatories or requests for production of documents may be served upon a member of the commission staff, except to discover factual information that supports the workpapers submitted by the staff [~~to the Clerk of the Commission~~] pursuant to 5VAC5-20-270. All interrogatories and requests for production of documents shall be filed with the Clerk of the Commission. Responses to

interrogatories and requests for production of documents shall not be filed with the Clerk of the Commission.

The response to each interrogatory or document request shall identify by name the person making the response. Any objection to an interrogatory or document request shall identify the interrogatory or document request to which the objection is raised, and shall state with specificity the basis and supporting legal theory for the objection. Objections~~, if any, to specified questions shall be stated with specificity, citing appropriate legal authority, and~~ shall be served with the list of responses or in such manner as the commission may designate by order. Responses and objections to interrogatories or requests for production of documents shall be served within ~~14~~ 10 days of receipt, unless otherwise ordered by the commission. Upon motion promptly made and accompanied by a copy of the interrogatory or document request and the response or objection that is subject to the motion, the commission will rule upon the validity of the objection; the objection otherwise will be considered sustained.

Interrogatories or requests for production of documents may relate to any matter not privileged, which is relevant to the subject matter involved, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of evidentiary value. It is not grounds for objection that the information sought will be inadmissible at the hearing if the information appears reasonably calculated to lead to the discovery of admissible evidence.

Where the response to an interrogatory or document request may only be derived or ascertained from the business records of the party questioned, from an examination, audit, or inspection of business records, or from a compilation, abstract, or summary of business records, and the burden of deriving or ascertaining the response is

substantially the same for one entity as for the other, a response is sufficient if it (i) identifies by name and location all records from which the response may be derived or ascertained; and (ii) tenders to the inquiring party reasonable opportunity to examine, audit, or inspect the records subject to objection as to their proprietary or confidential nature. The inquiring party bears the expense of making copies, compilations, abstracts, or summaries.

[5VAC5-20-270. Hearing preparation.

In a formal proceeding, a party or the commission staff may serve on a party a request to examine the workpapers supporting the testimony or exhibits of a witness whose prepared testimony has been filed in accordance with 5VAC5-20-240. The movant may request abstracts or summaries of the workpapers, and may request copies of the workpapers upon payment of the reasonable cost of duplication or reproduction. Copies requested by the commission staff shall be furnished without payment of copying costs. In actions pursuant to 5VAC5-20-80 A, the commission staff shall, upon the filing of its testimony, exhibits, or report, ~~will compile and file with the Clerk of the Commission three copies~~ provide (in either paper or electronic format) a copy of any workpapers that support the recommendations made in its testimony or report to any party upon request and may additionally file a copy of such workpapers with the Clerk of the Commission. The Clerk of the Commission shall make ~~the~~ any filed workpapers available for public inspection and copying during regular business hours.]

5VAC5-20-280. Discovery ~~in~~ applicable only to 5VAC5-20-90 proceedings.

~~The following~~ This rule applies only to ~~proceedings~~ a proceeding in which a defendant is subject to a monetary penalty or ~~injunctive penalties~~ injunction, or revocation, cancellation, or curtailment of a license, certificate of authority, registration, or similar authority previously issued by the commission to the defendant:

1. Discovery of material in possession of the commission staff. Upon written motion of the defendant, the commission shall permit the defendant to inspect and, at the defendant's expense, copy or photograph any relevant written or recorded statements, the existence of which is known, after reasonable inquiry, by the commission staff counsel assigned to the matter to be within the custody, possession, or control of commission staff, made by the defendant, or representatives, or agents of the defendant if the defendant is other than an individual, to a commission staff member or law enforcement officer.

A motion by the defendant under this rule shall be filed and served at least 10 days before the hearing date. The motion shall include all relief sought. A subsequent motion may be made only upon a showing of cause as to why the motion would be in the interest of justice. An order granting relief under this ~~section~~ rule shall specify the time, place, and manner of making discovery and inspection permitted, and may prescribe such terms and conditions as the commission may determine.

Nothing in this rule shall require the disclosure of any information, the disclosure of which is prohibited by statute. The disclosure of the results of a commission staff investigation or work product of commission staff counsel shall not be required.

2. Depositions. After commencement of ~~an action~~ a proceeding to which this rule applies, the commission staff or a party may take the testimony of a party or ~~another~~ a person ~~or entity~~ not a party, other than a member of the commission staff, by deposition on oral examination or by written questions. Depositions may be used for any purpose for which they may be used in the courts of record of the Commonwealth. Except where the commission or hearing examiner finds that an

emergency exists, no deposition may be taken later than 10 days in advance of the formal hearing. The attendance of witnesses at depositions may be compelled by subpoena. Examination and cross-examination of the witness shall be as at hearing. Depositions may be taken in the City of Richmond or in the town, city, or county in which the deposed ~~party~~ person resides, is employed, or does business. The parties and the commission staff, by agreement, may designate another place for the taking of the deposition. Reasonable notice of the intent to take a deposition must be given in writing to the commission staff counsel and to each party to the action, stating the time and place where the deposition is to be taken. A deposition may be taken before any person (the "officer") authorized to administer oaths by the laws of the jurisdiction in which the deposition is to be taken. The officer shall certify his authorization in writing, administer the oath to the deponent, record or cause to be recorded the testimony given, and note any objections raised. In lieu of participating in the oral examination, a party or the commission staff may deliver sealed written questions to the officer, who shall propound the questions to the witness. The officer may terminate the deposition if convinced that the examination is being conducted in bad faith or in an unreasonable manner. Costs of the deposition shall be borne by the party noticing the deposition, unless otherwise ordered by the commission.

3. Requests for admissions. The commission staff or a party to a proceeding may serve upon a party written requests for admission. Each matter on which an admission is requested shall be stated separately. A matter shall be deemed admitted unless within 21 days of the service of the request, or some other period the commission may designate, the party to whom the request is directed

serves upon the requesting party a written answer addressing or objecting to the request. The response shall set forth in specific terms a denial of the matter set forth or an explanation as to the reasons the responding party cannot truthfully admit or deny the matter set forth. Requests for admission shall be filed with the Clerk of the Commission and simultaneously served on commission staff counsel and on all parties to the ~~matter~~ proceeding.

Westlaw
55 CPUC 2d 672, 1994 WL 496409 (Cal.P.U.C.)

H

Re Alternative Regulatory Frameworks for Local Exchange Carriers
Decision 94-08-028
Interim Order 87-11-033 et al.
Applications 85-01-034, 87-01-002
Cases 86-11-028, 87-07-024

California Public Utilities Commission
August 3, 1994

ORDER reversing an administrative law judge's discovery ruling which had directed the California Cable Television Association to compel its members to answer data requests filed by Pacific Bell. Noting that the association had intervened in the proceeding on its own and not at the behest of its members, the commission finds that it cannot be ordered to require its members to answer certain data requests. Commission reasons further that the information being sought was not within the association's possession or control.

P.U.R. Headnote and Classification

1.
APPEAL AND REVIEW

s46 - Procedural rulings - By administrative law judge - Discovery - Policy against interlocutory review.
Ca.P.U.C. 1994
[CAL.] The commission frowns on reviewing evidentiary or procedural rulings made by an administrative law judge (ALJ) prior to final submission of a proceeding on its merits, as it prolongs the regulatory process and creates undesirable piecemeal resolution of disputes; moreover, there is no specific provision in the commission's rules permitting an appeal of an ALJ ruling.

Re Alternative Regulatory Frameworks for Local Exchange Carriers

P.U.R. Headnote and Classification

2.
PROCEDURE

s17 - Discovery and inspection - Nonparties - Commission power to require.
Ca.P.U.C. 1994
[CAL.] The commission's rules on discovery procedures mirror as much as possible those contained in the Code of Civil Procedure, thus limiting discovery of a person or entity not a party to a proceeding; however, to the extent that a nonparty has relevant evidence within its possession or control, it can be compelled to answer data requests for such, through depositions if not interrogatories.

Re Alternative Regulatory Frameworks for Local Exchange Carriers

P.U.R. Headnote and Classification

3.
PARTIES

s19 - Intervenors - Associations - Applicability of discovery rules - Standing separate from individual members.
Ca.P.U.C. 1994
[CAL.] The fact that an association intervenes in a commission proceeding does not mean that its individual members are automatically subject to discovery in the matter, as associations are not analogous to class action suits; moreover, associations and their individual members can have separate standing, and where an association intervenes on its own and not at the direction of its members, the association cannot be ordered to compel its individual members to answer discovery requests made of the association.

Re Alternative Regulatory Frameworks for Local Exchange Carriers

P.U.R. Headnote and Classification

4.
PROCEDURE

s17 - Discovery and inspection - Associations versus individual members - Commission power to require.

Ca.P.U.C. 1994
[CAL.] Under the commission's rules of discovery, when an association intervenes on its own and not at the direction of its members, the association cannot be ordered to compel its individual members to answer discovery requests made in the matter, especially since most such information would be unlikely to be in the possession or control of the association.

Re Alternative Regulatory Frameworks for Local Exchange Carriers

P.U.R. Headnote and Classification

5.
EVIDENCE

s33 - Privileged communications - Attorney/client privilege - Disclosure of identity of client - Attorney work product exception.
Ca.P.U.C. 1994
[CAL.] Disclosure of the identities of those members of an association that had authorized the association to work on their behalf in intervening in a commission proceeding was found to violate neither the attorney/client privilege nor the attorney work product privilege; the mere identity of an attorney's client is almost never deemed a privileged communication, nor can an association member's decision-making process for joining or not joining an association action fall within the attorney work product privilege.

Re Alternative Regulatory Frameworks for Local Exchange Carriers

BY THE COMMISSION:

*1 *INTERIM OPINION*

I. Background

Today's decision resolves the California Cable Television Association's (CCTA) appeal from the April 1, 1994 ruling of Administrative Law Judge (ALJ) Ramsey regarding Pacific Bell's (Pacific) motion to compel CCTA to answer a data request.

On April 1, 1994, ALJ Ramsey, acting in his capacity as the Law and Motion Judge for discovery disputes, issued a ruling which granted Pacific's January 11, 1994 motion to compel CCTA to respond to Pacific's November 24, 1993 data request. Pacific's data request was issued in connection with GTE California Incorporated's (GTEC) petition to modify Decision (D.) 89-10-031, and Pacific's joinder in that petition. The petition requests that the Commission eliminate the requirement in D.89-10-031 that any investment by local exchange carriers in fiber beyond the feeder be preapproved.

Pacific's original data request was composed of nine numbered questions with subparts. At the law and motion hearing, Pacific revised its data request by withdrawing request numbers 1 and 9, and all of request number 3 except for subdivision d. [FN1] The questions which are at issue are as follows:

'2. Has each of the members identified in response to question 1 above authorized CCTA to act on behalf of the member in this proceeding.

•a) If any members have not authorized CCTA to act on their behalf, please identify those members.'

'3. For each CCTA member identified in response to question 1 above, please provide the following information:

•d) What services the member provides, will provide, or is considering providing that compete or will compete with services provided by Pacific Bell.'

'4. For each CCTA member that has installed, or is installing, fiber in its cable television system, please provide the following information:

•a) The amount of investment in fiber the member has made during the last five years.

•b) A diagram showing where in the member's cable television system it has placed fiber.

•c) All of the member's reasons for placing fiber in its cable television system.

•d) All documents relied upon in preparing the responses to items 4 a) - 4 c) above.'

'5. Please identify each CCTA member that is planning to provide or contemplating the provision of

telecommunications services in addition to video services.

'6. For each CCTA member identified in response to question 5 above, please describe the telecommunications services the member plans to provide or is contemplating providing.

'7. For each CCTA member identified in response to question 5 above, please state whether the member has placed fiber optic cable in its system for the sole or partial purpose of being able to provide telecommunications services now or in the future.

'8. Please identify each CCTA member that plans to place fiber optic cable in its system in the next three to five years.'

In granting Pacific's motion to compel, the April 1, 1994 ruling ordered that:

*2 '2. Upon request, CCTA shall disclose to Pacific the identity of each of its members by name, business address, and class or category of membership (i.e., Regular member, Associate Member, etc.).

'3. Within 10 days of the date of this ruling, each member of CCTA, of whatever class or category, shall provide answers to Questions 2, 3(d), 4, 5, 6, 7, and 8 of Pacific's Data Request No. 1., unless a lesser number of respondents from among CCTA's membership is agreed upon by the parties, in which case such designated respondents shall provide said information within 10 days from the date of this ruling.'

On April 13, 1994, CCTA filed a motion to stay ALJ Ramsey's ruling of April 1, 1994, and an 'Appeal Of The Administrative Law Judge's Ruling Compelling Production of Documents.' [FN2] CCTA's appeal requests that the Commission review and overturn ALJ Ramsey's ruling of April 1, 1994. The arguments in CCTA's motion for a stay are identical to the three arguments that CCTA makes in its appeal of ALJ Ramsey's ruling.

On April 22, 1994, the California Association Of Long Distance Companies (CALTEL) filed a joinder in CCTA's appeal of ALJ Ramsey's ruling. [FN3]

On April 25, 1994, a prehearing conference was held before ALJ Wong, who was reassigned to hear GTEC and Pacific's petition for modification. At that prehearing conference, parties were given until May 4, 1994 to file a response to CCTA's motion for a stay and its appeal, and to CALTEL's joinder.

On May 4, 1994, three other pleadings were filed in connection with CCTA's motion and appeal. GTEC filed an opposition to CCTA's appeal, and to CALTEL's joinder in the appeal. Pacific filed a consolidated response to CCTA's appeal and motion for a stay, and to CALTEL's joinder in CCTA's appeal. The Cellular Resellers Association, Inc. (CRA) also filed a response to CCTA's appeal, and to CALTEL's joinder in CCTA's appeal.

On June 24, 1994, ALJ Wong referred CCTA's appeal of the April 1, 1994 ruling to the Commission. In addition, ALJ Wong's ruling granted CCTA's motion for a stay of the ruling until the Commission decides CCTA's appeal.

II. Position Of The Parties

A. CCTA's Position

CCTA first argues that at the March 22, 1994 hearing, which heard arguments regarding Pacific's motion to compel, Pacific stated that it wanted to revise the information sought in its data request by striking request numbers 1 and 9, and all of question 3 with the exception of subdivision d. Request number 1 had sought the identities of each member of CCTA. Despite Pacific's deletion of request number 1, CCTA argues that ALJ Ramsey's ruling analyzed at length whether the attorney-client privilege applied to the identity of CCTA's membership. CCTA asserts that the ruling misanalyzed CCTA's privilege argument. CCTA contends that it had argued that the information sought in data request number 1 regarding a membership list or the identity of its members was irrelevant. CCTA argues that its attorney-client privilege argument pertained to request number 2, which sought the identities of those CCTA members who had authorized CCTA to act on their behalf in this proceeding.

*3 CCTA's second argument is that the ruling failed to address the attorney-client privilege issue which it raised with respect to request number 2. CCTA con-

tends that the identity of its members who authorized CCTA to act on their behalf concerns a privileged attorney-client communication. CCTA argues that the only exception to this privilege, which Pacific has not raised, is when the facts show that circumstances surrounding the privileged activity were abused.

CCTA's third argument is that the ruling is inconsistent with the statutes under which the Commission operates because the ruling ordered CCTA to produce information and documents that are not within CCTA's control. According to CCTA, Pacific's request numbers 3(d), 4, 5, 6, 7, and 8, all seek proprietary information regarding the fiber deployment plans and telecommunications service offerings of CCTA's individual members. CCTA argues that such information has no bearing on the petition to modify of GTEC and Pacific. More importantly, CCTA does not collect or maintain such information on its members in the ordinary course of business, and cannot be compelled to produce documents and information from its individual members.

B. CALTEL's Position

CALTEL has joined in CCTA's appeal because of the ramifications that ALJ Ramsey's ruling could have in other Commission proceedings.

CALTEL argues that the United States Supreme Court has held that an association itself has standing to bring suit as a representative of its members. The ruling, however, states without any explanation or authority that CCTA's members are represented in this proceeding by CCTA, and as a consequence, 'such members must comply with orders and rulings issued in this proceeding.'

CALTEL also argues that CCTA is participating in a quasi-legislative proceeding under Rule 54, and is therefore not required to show any interest or injury in order to participate. Due to CCTA's status, the individual members of CCTA cannot be compelled to participate in discovery proceedings.

CALTEL also argues that the ruling is erroneous in that it compels an answer to Pacific's request number 2. The ruling requires CCTA to disclose the identity of the members who support CCTA's position in this proceeding. CALTEL asserts that the information sought is protected by the attorney-client privilege. CALTEL also argues that if the ruling was predicated on CCTA's waiver of the privilege during an informal meeting between Pacific and CCTA, the ruling failed to reach any determination that CCTA made such a waiver.

CALTEL's final argument is that if the ruling is upheld, participation or intervention in a Commission proceeding will subject the individual members of the association to discovery. This will discourage participation by associations, which, CALTEL believes, have been of benefit to the Commission by providing important information concerning the opinions and formal positions of entire industries in an efficient, timely, and cost effective manner.

C. GTEC's Position

*4 GTEC's opposition requests that ALJ Ramsey's ruling be upheld so as to compel responses to Pacific's request numbers 3 through 8. GTEC takes no position with respect to request number 2, and relies on CCTA's statement that CCTA has already responded to request number 1.

GTEC argues that CCTA is acting in a representative capacity on behalf of its members, and that because of this representative role, CCTA's members should be subject to discovery under appropriate guidelines.

D. CRA's Position

CRA supports the appeal of CCTA and the joinder of CALTEL. CRA argues that the ALJ's decision was erroneous, and that if it is upheld, it would have a chilling effect on participation by associations in Commission proceedings. CRA requests that the ruling be rescinded.

E. Pacific's Position

Pacific contends that CCTA's appeal and motion for a stay, and CALTEL's joinder in the appeal, should be denied.

Pacific argues that CCTA has, on the one hand, represented that it represents the interests of its individual members. On the other hand, especially when it comes to Pacific's attempts to discover information, CCTA asserts that it is acting pursuant to CCTA's

Executive Committee. As a result, Pacific asserts that CCTA seeks to gain a competitive advantage for its members, while at the same time shielding its members from legitimate discovery inquiries.

Pacific contends that the issue is not whether an association has standing to bring suit, but rather, whether an association that appears before the Commission can be compelled to provide relevant information from its members. Pacific argues that in class action proceedings, California courts have recognized that unnamed class members are considered parties for the purposes of discovery. However, in subjecting class members to discovery, the courts have balanced the competing interests of the parties, and have allowed discovery of a reasonable number of unnamed class members. Pacific points out that the Commission has also previously decided that discovery can be obtained from persons or entities whom are not named as parties in a proceeding.

As for CALTEL's argument that CCTA is participating in this proceeding under Rule 54, and not as an intervenor, that argument is irrelevant and without merit.

Pacific argues that the information it has requested in questions 3(d), and 4 through 8, is relevant and necessary to the resolution of issues in this case, and is reasonably calculated to lead to the discovery of admissible evidence. To reduce the burden on CCTA's members, Pacific points out that it has already offered to reduce the number of members who must respond.

Pacific asserts that the information it seeks is relevant because CCTA has stated in its protest, and in ex parte contacts, that its members are future competitors of GTEC and that its members plan to deploy fiber in their networks as well. Pacific asserts that this information it seeks is reasonably calculated to lead to the discovery of admissible evidence regarding the cost effectiveness of fiber beyond the feeder.

*5 Regarding the information sought in request number 2, Pacific contends that such information is not protected by the attorney-client privilege. Pacific asserts that the question is not seeking information about privileged communications between CCTA's counsel and CCTA's Executive Committee. Rather, the information sought is simply asking for the identity of the client. According to Pacific, such information must be disclosed unless the disclosure would uncover client confidences.

III. Discussion

[1] We note at the outset, that today's decision is a rare occurrence in that we are reviewing a ruling made by an ALJ before we have considered the merits of the entire proceeding. Normally, we are reluctant to review evidentiary and procedural rulings before the proceeding has been submitted. (See Rule 65.) Our reasoning for that has been expressed previously:

'There is no appeal from a procedural or evidentiary ruling of a presiding officer prior to consideration by the Commission of the entire merits of the matter. The primary reasons for this rule are to prevent piecemeal disposition of litigation and to prevent litigants from frustrating the Commission in the performance of its regulatory functions by inundating the Commission with interlocutory appeals on procedural and evidentiary matters.' (D.87070 [81 CPUC 389, 390]; D.90-02-048 at p. 4.)

Parties who contemplate appealing a ruling with which they are dissatisfied should recognize that we frown on such a practice, and view this kind of a decision as the rare exception rather than the rule.

We have decided to review the appeal in this proceeding because of possible ramifications the ruling could have in other proceedings where an association is a party to the proceeding. In addition, by our actions today, we want some finality to the actions that have taken place in the course of these proceedings.

We now turn to ALJ Ramsey's ruling, and the information sought by Pacific.

CCTA asserts that ordering paragraph 2 of ALJ Ramsey's ruling ordered CCTA to disclose 'the identity of each of its members by name, business address, and class or category of membership (i.e., Regular member, Associate Member, etc.). ' CCTA argues that ordering paragraph 2 was not necessary because request number 1, [FN4] which sought similar information, was withdrawn by Pacific due to CCTA's compliance with that request on December 21, 1993.

CCTA argues that due to this oversight, the ruling misanalyzed CCTA's privilege argument. Instead of ALJ Ramsey considering CCTA's claim of attorney-client privilege in the context of request number 2, CCTA argues that the dicta concerning the attorney-client privilege applied to request number 1.

Pacific does not appear interested in the information that ordering paragraph 2 has ordered to be produced. Instead, Pacific's opposition to CCTA's appeal and motion for the stay pertain to questions 2 through 8.

In reviewing the amended data requests propounded by Pacific, and ALJ Ramsey's ruling, we concur with CCTA's argument that ordering paragraph 2 was unnecessary because Pacific had withdrawn question number 1.

*6 The next series of questions that Pacific seeks answers to raises the issue as to whether the Commission can compel an association to provide answers from its members. ALJ Ramsey's ruling required each member of CCTA to provide answers to questions 2, 3(d), 4, 5, 6, 7, and 8 of Pacific's data request. CCTA takes the position that the Commission cannot compel CCTA to produce information and documents that are within the control of its individual members.

In determining what, if any, information CCTA should provide to Pacific, our first inquiry is to decide who is subject to discovery in Commission proceedings. [FN5]The Commission's closest expression of any discovery related procedures is found in Public Utilities Code (PU Code) § 1794. PU Code Section 1794 provides:

'The commission or any commissioner or any party may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this State and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, and accounts.'

For other discovery related procedures, the Commission generally follows the discovery rules that are found in the Code of Civil Procedure (CCP).

[2] The discovery procedures available in civil courts depend on the relationship or status of the person from whom discovery is sought. For a party to a proceeding, a wide range of discovery procedures are available. (See CCP §§ 2025, 2028, 2030, 2031, 2032, 2033.) However, discovery of one who is not a party to the action is more limited in the methods of discovery. One who is not a party to an action may be required to attend and testify at an oral or written deposition, or to produce business records for copying, or both to attend and testify and to produce business records, other writings, and things. (See CCP § 2020.)

PU Code § 1794 has been interpreted by the Commission as a mechanism by which parties can obtain discovery of nonparties. In D.88312 (83 CPUC 318), the Commission upheld an ALJ ruling that a non-utility did not have to respond to interrogatories, but that the non-utility was subject to having its deposition taken. The Commission held that if the non-utility possessed relevant evidence, that evidence may be discovered prior to hearing pursuant to PU Code § 1794. (See 68 CPUC 322.)PU Code § 1794 essentially provides the same sort of discovery tools available for obtaining discovery from a non-party under CCP § 2020. [FN6]

[3, 4] Pacific and GTEC argue that CCTA's participation in this proceeding is analogous to a class action suit, in which members of the represented class are subject to discovery. We have reviewed the cases cited by Pacific and GTEC, and conclude that class actions are distinguishable from an association's participation in proceedings before this Commission. [FN7]The most distinguishing factor is that in a class action, the class suit is brought so that the class representative and the class members can obtain a share of the damages, or of a common fund, or of property. (*Alpine Mutual Water Co. v. Superior Court* (1968) 259 Cal. App. 2d 45, 53.)In a Commission proceeding, however, an association and its members are not awarded any damages. Instead, associations participate in Commission proceedings because the rules or regulations at issue in a proceeding may impact the financial relationship between the utility and the association's members.

*7 We do not believe that members of an association should automatically be subject to discovery merely

because they are a member of an association. Otherwise, an association could subject all of its members to discovery by virtue of the association's participation in the proceeding. Such a result would be unduly burdensome on the individual members.

ALJ Ramsey's ruling requires 'each member of CCTA' to provide answers to request numbers 2 through 8. We conclude that the Commission cannot compel an association to require its individual members to answer data requests. Our reasoning for that is rather straightforward. One of the principal purposes of discovery is to enable the discovering party to obtain evidence from one's adversary who has control of the information in question. (*Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal. 2d 548, 562-563;*Scherrer v. Plaza Marina Commercial Corp.* (1971) 16 Cal. App. 3d 520, 523-524;*Alpine Mutual Water Co. v. Superior Court, supra*, 259 Cal. App. 2d at p. 54.)If information is being sought from individual members, it is unlikely that the association possesses or has control over that sort of information.

Pacific's questions were directed specifically to CCTA. To the extent that ALJ Ramsey's ruling requires responses by each member of CCTA, the ruling is reversed. We shall, however, require CCTA to provide answers to request numbers 3 (d), 4, 5, 6, 7, and 8. [FN8]

We note that if Pacific wants to obtain information from the individual members of CCTA, PU Code § 1794 permits discovery by way of deposition of non-party witnesses.

We next turn to the propriety of compelling a response to request number 2.

CCTA argues that the information sought in request number 2 seeks information protected by the attorney-client privilege because it is seeking 'Communications between CCTA members and its attorneys concerning their individual positions on CCTA's intervention in the instant case .' (CCTA's Response To Pacific's Motion To Compel, p. 9.) CCTA further argues that CCTA's actions in this proceeding have been authorized by CCTA's Executive Committee and not by its individual members. CCTA also argues that the meeting of CCTA's Executive Committee to consider supporting or opposing CCTA's participation in this proceeding is protected by the attorney work product privilege.

Evidence Code § 954 provides in pertinent part that 'the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . 'Evidence Code § 952 further explains a 'confidential communication' to mean as follows:

'As used in this article, •confidential communication between client and lawyer' means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.'

*8 Evidence Code § 917 provides that whenever a privilege is claimed, the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

[5] Pacific's request number 2 seeks the identity of those members who have authorized or refrained from authorizing CCTA from acting in this proceeding. The case law on this subject holds that the identity and address of an attorney's client is not a confidential communication protected by the privilege when there is a legitimate need for the court to require such a disclosure. However, when the disclosure of the identity might harm the client because it will betray a confidential communication, then it is protected by the privilege. (*Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 Cal. App. 3d 1514, 1518;*Willis v. Superior Court* (1980) 112 Cal. App. 3d 277, 291.)The rationale for this general rule is that the adverse party is entitled to know who the opponents are. (*Brunner v. Superior Court* (1959) 51 Cal. 2d 616, 618.)

We believe that Pacific's request number 2 merely seeks to identify the clients on whose behalf CCTA is acting, a matter which is not privileged as was noted in ALJ Ramsey's ruling. The disclosure of who CCTA is acting on behalf of will not result in the

disclosure of any of those member's communications. In addition, the information requested does not impinge on any communication made in confidence in connection with the attorney-client privilege.

The attorney work product privilege is codified in CCP § 2018. CCP § 2018 provides in pertinent part:

'(b) Subject to subdivision (c), the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

'(c) Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.'

The work product doctrine shelters the mental processes of the attorney, which provides the attorney with a privileged area within which one can analyze and prepare the client's case. (*People v. Collie* (1981) 30 Cal. 3d 43, 59.)In determining whether the work product privilege is involved in a particular discovery request, it is appropriate to look to the purposes of the statute, which are to preserve the right of an attorney to prepare a case for trial, and to prevent an attorney from taking undue advantage of an adversary's industry and efforts. (*Watt Industries v. Superior Court* (1981) 115 Cal. App. 3d 802, 804-805.)

CCTA contends that when its Executive Committee met to consider whether to support or to oppose CCTA's participation in this proceeding, that the meeting was protected by the attorney work product privilege. We do not believe that to be the case. The affidavit that CCTA attached in support of its response to Pacific's motion to compel states that the CCTA bylaws permit the Executive Committee to authorize and direct staff to intervene in proceedings before the Commission, and that the committee authorized and directed staff to file a protest. It is apparent that such authorization and direction was not derived from or the product of the mental processes of CCTA's attorneys. Rather, the vote or authorization to file a protest came from the Executive Committee. Accordingly, no work product privilege applies.

*9 We therefore conclude that ALJ Ramsey's reasoning for requiring a response to request number 2 was correct. However, for the reasons stated earlier, only CCTA shall be required to respond to this question.

A stay of ALJ Ramsey's ruling was granted in ALJ Wong's ruling of June 24, 1994 pending today's decision. That stay is now lifted.

Findings of Fact

1. At the law and motion hearing held on March 22, 1994, Pacific revised its data request by withdrawing request numbers 1 and 9, and all of request number 3 except for subdivision d.

2. On April 1, 1994, an ALJ ruling was issued which granted Pacific's January 11, 1994 motion to compel CCTA to respond to Pacific's November 24, 1993 data request.

3. The ruling ordered CCTA to disclose to Pacific the identity of each of its members, and the class or category of membership.

4. The ruling also ordered each member of CCTA to provide answers to the remaining questions of Pacific's data request, unless a lesser number of respondents from among CCTA's membership could be agreed upon.

5. On April 13, 1994, CCTA filed a motion to stay the ALJ ruling of April 1, 1994, and an appeal of that ruling.

6. On June 24, 1994, ALJ Wong referred CCTA's appeal to the Commission, and granted CCTA's motion for a stay until the Commission decides the appeal.

7. Ordering Paragraph 2 of the April 1, 1994 ruling was unnecessary because the question regarding the identity of CCTA's members had been withdrawn by Pacific.

8. The Commission's closest expression of any discovery related procedures for nonparties is found in PU Code § 1794.

9. The Commission generally follows the discovery rules that are found in the CCP.

10. The discovery procedures available in civil courts depends on the relationship or status of the person from whom discovery is sought.

11. Both the civil courts and the Commission have a procedure by which a party can obtain discovery from a non-party.

12. The stay granted in the June 24, 1994 ruling should be lifted.

Conclusions of Law

1. There is no provision in the Commission's rules which permit an appeal of an ALJ ruling.

2. Under Rule 65, the presiding officer may refer an ALJ ruling to the Commission for their determination.

3. The Commission frowns on the practice of issuing a decision regarding the appeal of an ALJ ruling before the proceeding has been submitted because it encourages the piecemeal disposition of a proceeding, and frustrates the Commission in the performance of its regulatory functions.

4. If a non-party possesses relevant evidence, that evidence may be discovered prior to hearing pursuant to PU Code § 1794.

5. The analogy that CCTA's representation of its members is similar to that of a class action, so as to subject its members to discovery, is distinguishable due to the nature of Commission proceedings.

6. The Commission cannot compel an association to require its individual members to answer data requests.

*10 7. The April 1, 1994 ruling requiring responses to request numbers 3 through 8 by each member of CCTA should be reversed.

8. The identity and address of an attorney's client is not a privileged communication and is discoverable, unless the identity of the client would betray a confidential communication.

9. CCTA's Executive Committee meeting to authorize its staff to intervene in this proceeding is not protected under the attorney work product privilege because such authorization was not derived from or the product of the mental processes of CCTA's attorney.

INTERIM ORDER

IT IS ORDERED that:

1. The California Cable Television Association's (CCTA) appeal of Administrative Law Judge (ALJ) Ramsey's April 1, 1994 ruling is granted to the extent set forth below, and denied in all other respects.

2. CCTA shall not be required to comply with Ordering Paragraph 2 of ALJ Ramsey's ruling dated April 1, 1994.

3. The members of CCTA shall not be required to provide answers to Pacific Bell's (Pacific) request numbers 2 through 8.

4. CCTA shall provide answers to Pacific's request numbers 2 through 8 within 10 days of the effective date of this order.

5. The stay granted in ALJ Wong's ruling of June 24, 1994 is lifted.

This order is effective today.

Dated August 3, 1994, at San Francisco, California.

DANIEL Wm. FESSLER, President, PATRICIA M. ECKERT, NORMAN D. SHUMWAY, P. GREGORY CONLON, JESSIE J. KNIGHT, JR., commissioners

FOOTNOTES

FN1 According to footnote 2 of Pacific's January 11, 1994 motion to compel CCTA to respond, as well as CCTA's January 21, 1994 response to Pacific's motion to compel, CCTA apparently provided a list of members to Pacific's counsel which purported to answer request number 1. It also appears

that CCTA responded to subdivision a, b, c, and d of question number 3.

FN2 There is no mechanism in the Commission's Rules of Practice and Procedure (Rule(s)) which permit an 'appeal' of an ALJ ruling. However, under Rule 65, the presiding officer may refer an ALJ ruling to the Commission for their determination. This was done in an ALJ ruling dated June 24, 1994.

FN3 According to CALTEL's joinder, CALTEL is an association of approximately 25 nondominant interexchange carriers who provide long distance telecommunications services in California.

FN4 Pacific's request number 1 had asked: 'Please specifically identify by name, address, and telephone number each and every member of CCTA.'

FN5 CCTA and CALTEL have raised the argument that because CCTA is participating in the proceeding under Rule 54 rather than as an intervenor under Rule 53, that discovery of CCTA's membership is not permitted. We do not find this distinction to be controlling in our analysis.

FN6 CCP § 2020 provides in pertinent part:
'(a) The method for obtaining discovery within the state from one who is not a party to the action is an oral deposition under Section 2025, a written deposition under Section 2028, or a deposition for production of business records and things under subdivisions (d) and (e). Except as provided in paragraph (1) of subdivision (h) of Section 2025, the process by which a nonparty is required to provide discovery is a deposition subpoena. The deposition subpoena may command any of the following:
(1) Only the attendance and the testimony of the deponent, under subdivision (c).
(2) Only the production of business records for copying, under subdivision (d).
(3) Both the attendance and the testimony of the deponent, as well as the production of business records, other documents, and tangible things, under subdivision (e).'

FN7 Of particular interest is the holding made in a case cited by GTEC.
'Whether or not a representative plaintiff does and can in fact adequately represent others is a question of fact for the trial court . It may also be true that while all class suits are representative in nature, all representative suits are not necessarily class actions.'

FN(*Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal. App. 3d 117, 129.)

FN8 As to whether question number 2 should be responded to, see the discussion which follows.

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