

CALIFORNIA LAW REVISION COMMISSION

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April 21, 1997

<i>Date:</i> May 1-2, 1997	<i>Place:</i> Sacramento
May 1 (Thursday) 10:00 am – 5:00 pm	State Capitol, Room 2040
May 2 (Friday) 9:00 am – 4:00 pm	State Capitol, Room 3191
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.	
Most Commission meeting materials are available on the Internet at: http://www.clrc.ca.gov	

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

Thursday, May 1

1. MINUTES OF FEBRUARY 27, 1997, MEETING (sent 3/19/97)
2. RATIFICATION OF DECISIONS MADE AT FEBRUARY 27, 1997, MEETING
3. MINUTES OF APRIL 10, 1997, MEETING (to be sent)
4. RATIFICATION OF DECISIONS MADE AT APRIL 10, 1997, MEETING
5. ADMINISTRATIVE MATTERS
 Report of Executive Secretary
6. 1997 LEGISLATIVE PROGRAM
 Status of Bills
 Memorandum 97-23 (NS) (to be sent)

 AB 939 — Mediation Confidentiality
 Memorandum 97-33 (BG) (to be sent)
7. TRIAL COURT UNIFICATION BY COUNTY (STUDY J-1300)
 Memorandum 97-25 (BG) (to be sent)

8. SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE (STUDY H-603)

Comments on Tentative Recommendation

Memorandum 97-18 (BH) (sent 4/21/97)

First Supplement to Memorandum 97-18 (to be sent)

9. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)

Issues on SB 209

Memorandum 97-26 (RM) (to be sent)

10. ADMINISTRATIVE RULEMAKING (STUDY N-300)

Interpretive Guidelines

Memorandum 97-27 (BH) (sent 4/16/97)

Revision of Rulemaking Procedure

Memorandum 97-13 (NS) (sent 2/14/97)

First Supplement to Memorandum 97-13 (4/16/97)

Friday, May 2

11. PUBLIC UTILITY DEREGULATION (STUDY B-800)

General Considerations

Memorandum 97-28 (NS) (sent 4/16/97)

Electrical Industry

Memorandum 97-29 (NS) (sent 4/21/97)

Gas Industry

Memorandum 97-30 (NS) (sent 4/21/97)

Transportation Industry

Memorandum 97-31 (NS) (sent 4/21/97)

Telecommunications Industry

Memorandum 97-32 (NS) (sent 4/21/97)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
MAY 1-2, 1997
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on May 1-2, 1997.

Commission:

Present: Allan L. Fink, Chairperson
Christine W.S. Byrd, Vice Chairperson
Dick Ackerman, Assembly Member (May 1)
Bion M. Gregory, Legislative Counsel (May 1)
Arthur K. Marshall
Colin Wied

Absent: Robert E. Cooper
Quentin Kopp, Senate Member
Edwin K. Marzec
Sanford Skaggs

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel (May 1)
Brian P. Hebert, Staff Counsel (May 1)
Robert J. Murphy, Staff Counsel (May 1)

Consultants: Michael Asimow, Administrative Law (May 1)
J. Clark Kelso, Trial Court Unification (May 1)

Other Persons:

Lenore Alpert, Pacific Bell, San Francisco (May 2)
Bradford Barnum, California Public Utilities Commission, Sacramento (May 2)
Herb Bolz, Office of Administrative Law, Sacramento (May 1)
Larry Cassidy, California Association of Collectors, Sacramento (May 1)
Gretchen Dumas, California Public Utilities Commission, San Francisco (May 2)
Joan Eubanks, Department of Motor Vehicle Regulations, Sacramento (May 1)
James S. Hamasaki, Pacific Bell, San Francisco (May 2)
Cheryl Hills, AT & T, San Francisco (May 2)

Gerald James, Association of California State Attorneys and Administrative Law Judges, Professional Engineers in California Government, and California Association of Professional Scientists, Sacramento (May 1)
 Kent Kauss, California Public Utilities Commission, Sacramento (May 2)
 Ron Kelly, Berkeley (May 1)
 Jackie Kinney, Citizens Communications, Sacramento (May 2)
 Stella Levy, Legal Section, Department of Motor Vehicles, Sacramento (May 2)
 Rich Mason, AT & T, Sacramento (May 2)
 Carolyn McIntyre, Southern California Gas Co., Sacramento & Los Angeles (May 2)
 Julie Miller, Southern California Edison, Rosemead
 Steven Patrick, Southern California Gas Co., Los Angeles (May 2)
 Roy M. Pérez, GTE, Sacramento (May 2)
 Joel Perlstein, California Public Utilities Commission, San Francisco (May 2)
 Stephen Pickett, Southern California Edison, Rosemead (May 2)
 Dick Ratliff, California Energy Commission, Sacramento
 Susan Rossi, GTE, Thousand Oaks (May 2)
 Madeline Rule, Legal Office, Department of Motor Vehicles, Sacramento (May 1)
 Daniel L. Siegel, Attorney General's Office, Sacramento (May 1)
 Shannon Sutherland, California Nurses Association, Sacramento (May 1)
 Jean Vieth, California Public Utilities Commission, San Francisco (May 2)
 David Verhey, Institute for Legislative Practice, Davis (May 1)
 Tracy Vesely, Judicial Council, San Francisco (May 1)
 Cara Vonk, Administrative Office of the Courts, San Francisco (May 1)
 Jenny Wong, GTE, Thousand Oaks (May 2)

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MINUTES OF FEBRUARY 27, 1997, MEETING

Approval of Minutes

The Commission approved the Minutes of the February 27, 1997, Commission meeting as submitted by the staff.

Ratification of Actions

The Commission ratified decisions made at the February 27, 1997, Commission meeting as reported in the Minutes of the meeting.

MINUTES OF APRIL 10, 1997, MEETING

Approval of Minutes

The Commission approved the Minutes of the April 10, 1997, Commission meeting submitted by the staff, with the following revision:

On page 8, lines 25 and 26, the words “and Vice Chairperson” were deleted.

Ratification of Actions

The Commission ratified decisions made at the April 10, 1997, Commission meeting as reported in the Minutes of the meeting. Commissioner Gregory abstained from this action.

ADMINISTRATIVE MATTERS

Meeting Schedule

The Commission identified potential attendance problems at the meeting scheduled for July 10 in Sacramento. After considering a number of alternative meeting dates and places, the Commission concluded that Monday, July 21, in Sacramento offered the best prospect for Commissioner attendance. Accordingly, the Commission changed the July meeting date to Monday, July 21.

1997 Budget

The Executive Secretary reported that Assembly Budget Subcommittee #4 has approved a \$31,000 augmentation for the Commission’s budget, consistent with the augmentation given by Senate Budget Subcommittee #2.

1997 LEGISLATIVE PROGRAM

The Commission considered Memorandum 97-23, relating to the status of the Commission's 1997 legislative program. The Executive Secretary augmented the chart attached to the memorandum with the information that AB 939 (mediation) passed the Assembly on April 24 and that SB 177 (Best Evidence Rule) is set for hearing in Senate Judiciary Committee on May 13.

STUDY B-800 – PUBLIC UTILITY DEREGULATION

General Considerations

The Commission considered Memorandum 97-28, relating to general considerations on the public utility deregulation study. These Minutes include a reasonably detailed summary, but not an exhaustive treatment, of the wide-ranging discussion of these matters that occurred at the meeting.

The Commission's intention is to submit a report for consideration by the Public Utilities Commission and the Legislature by the June 30, 1997, statutory deadline of SB 960 that the Public Utilities Commission "in consultation with the Law Revision Commission" shall submit a report to the Legislature on needed revisions of the Public Utilities Code that result from utility restructuring. The Law Revision Commission's report will be based on written materials received and oral remarks made at the Law Revision Commission meetings. The Law Revision Commission plans to consider the staff draft of the Commission's report, and finalize the report, at its June 12 meeting.

The Law Revision Commission asked interested parties in several industries, and the parties agreed, to recast their concerns about Public Utilities Code revision by category, according to the following general scheme.

Categorization of Policy Issues in Public Utilities Code Revision (importance of particular issue may vary with industry)

(1) Direct Regulation of Service Providers

Is there a need for continuing traditional regulation of how a utility runs its business with respect to:

- planning for the future — expansion, facilities, markets
- audits and inspections
- new entrants (certification)

(2) Rates and Pricing

Is there a need to continue traditional regulation in the areas of:

- retail, wholesale
- antitrust matters

(3) Consumer Protection

Should the law continue to regulate such matters as:

- fraud
- information/misinformation
- access (universal service)

(4) Safety of Public

Is continuing protection needed for physical safety of the public, e.g.:

- gas pipelines
- railroad crossings

(5) Transitional Issues

Does the deregulation process itself require interim regulation for such matters as:

- stranded investments
- equal footing
- wheeling

The purpose of this categorization is to help provide a more useful overview of issues by type of issue rather than by Code section number. To this categorization, Southern California Edison would add reform of Public Utilities Commission procedures.

Within these categories, the Law Revision Commission report will attempt to identify those revisions on which all parties agree (such as repeal of obsolete or preempted statutes), those revisions that will require a legislative policy determination, and those revisions that fall somewhere in between and may present drafting issues.

It was noted that, in trying to make this assessment, we are proceeding on the basis of rather limited input from interested parties. It was also noted that the Public Utilities Commission appears to be reacting to suggestions for Code revisions rather than actively reviewing the Code and making its own suggestions; this may be due in part to the burden on the Commission and its staff at the moment of coping with the mechanics of opening markets to competition.

Some commentators suggested that Public Utilities Commissioners personally might wish to address some of these matters to the Law Revision Commission. PUC staff indicated that it in fact speaks for the Commissioners and not for itself.

Electrical Industry

The Commission considered Memorandum 97-29, along with a letter from Southern California Edison, attached to these Minutes as Exhibit pp. 1-3, relating

to deregulation in the electrical industry. In the electrical industry, the underlying issue appears to be whether deregulation is timely. Southern California Edison takes the position that the industry will be open to competition beginning January 1, and therefore deregulation is necessary to allow all parties to compete in the open market — monopoly-style regulation will no longer be appropriate. The Public Utilities Commission believes transitional regulation is necessary to allow new entrants to establish a foothold to promote effective competition.

The Public Utilities Commission believes it is too early to contemplate broad revision of the Code, at least during 1997. Southern California Edison has suggested that for the June 30 report of the Law Revision Commission, we should at least have specific language on Code changes that can be agreed upon, and a suggested path and timeline for completing work. They suggest that sunset provisions of the Code would force the process.

The parties felt that it would advance the process to categorize the types of Code changes upon which there is agreement and disagreement. They will consult with each other on this and submit materials in a timely fashion for the next meeting of the Law Revision Commission, with a view to drafting our report for the Legislature on this matter.

Gas Industry

The Commission considered Memorandum 97-30, relating to deregulation in the natural gas industry. Restructuring of the natural gas industry is further along than in the electrical industry. The Public Utilities Commission is currently engaged in an intensive review of the regulatory statutes, in the process of developing a natural gas strategy. They expect to complete their report on this matter this summer. The report will detail the status of deregulation and what needs to be done next.

The Southern California Gas Company has identified a number of problem areas in the Code it believes need to be addressed to implement deregulation. However, it believes all parties would be best served to address these issues in the context of the Public Utilities Commission's development of its strategic plan for natural gas, with one exception. Southern California Gas believes that Code provisions should be repealed immediately that require parity of rates for gas used in cogeneration technology with those used as fuel by an electric plant —

this is an artificial subsidy that is no longer appropriate in competitive gas and electricity markets.

The parties agreed that they would develop a categorized statement of areas of agreement and disagreement for the Law Revision Commission's report on this matter.

Transportation Industry

The Commission considered Memorandum 97-31, relating to deregulation in the transportation industry. The main factor in Public Utilities Commission regulation or deregulation of the transportation industry has been federal preemption. PUC agrees that many of the statutes in the Public Utilities Code are ripe for review to reflect this trend. Work is ongoing in reviewing existing statutes. PUC hopes to identify a number of statutes for reform in its June 30 report to the Legislature.

Railroads. The Public Utilities Commission's economic regulatory authority is limited to intrastate railroads that have no interstate connection. PUC is concerned that Union Pacific's proposed revisions of the statutes to reflect this could impact PUC's regulatory authority over safety issues. It appears to the Law Revision Commission staff that is a drafting question, rather than a policy dispute. We will try to confirm this with the interested parties before the next Law Revision Commission meeting.

Highway Property Carriers. The Public Utilities Commission's role in this field is terminating. The main statutes have been revised accordingly. However, there are a few missed provisions and cleanup legislation is expected this session.

Household Goods Carriers. The one industry letter on this matter, from the California Moving and Storage Association, indicates existing statutes are satisfactory. The Public Utilities Commission believes some adjustment is needed to reflect further federal preemption in some areas.

Passenger Carriers. There is full Public Utilities Commission regulation in this area. The PUC does not see a need for statutory change here.

Water Vessel Carriers. No significant issues have been identified in this area.

Airlines. Federal preemption in this area has made large segments of the Public Utilities Code ripe for review. The Public Utilities Commission retains authority to receive proofs of insurance of air carriers. PUC plans to review this matter to determine the extent to which this authority is still necessary.

Telecommunications Industry

The Commission considered Memorandum 97-32, along with the written submissions attached as Exhibit pp. 4-35, relating to deregulation in the telecommunications industry. (Note: The binder of attachments to the GTE letter of May 2, 1997, is not reproduced as an Exhibit but is available for inspection in the office of the Law Revision Commission.) The principle area of contention in the telecommunications industry concerns competition and deregulation in the local telephone service sector.

The Public Utilities Commission has been active in revising the Public Utilities Code to reflect restructuring in the telecommunications industry, which has been going on for some years. There is pending legislation to eliminate obsolete reporting requirements. PUC currently has an internal group actively studying the Code, and expects to have affirmative recommendations for its June 30 report to the Legislature on needed Code revisions. PUC anticipates meetings with interested persons in the fall to seek out areas of consensus on Code changes.

The Public Utilities Commission sees the need for continuing regulation in the local telephone service sector until a fully competitive environment is established. During this transition phase, regulation is still necessary to promote competition by new entrants in the market with the large former monopolies that still dominate the market. PUC views itself as the rational middle between contending parties in this area, with the purpose of fostering competition by an appropriate transitional level of regulation.

The Public Utilities Commission indicates that it is moving in the direction of competitiveness and away from heavy-handed regulation. However, it believes this whole area is very complex, and any deregulation must be instituted with great care. For example, factors that influence the direction of deregulation include such matters as market share, type of market (facilities-based v. resale), ability of competitors to cross-subsidize, etc. PUC has been issuing decisions that depend on the competitive environment, and these are very difficult and lengthy cases.

The Public Utilities Commission is supported in this approach by AT&T, which recites its own experience in moving from a monopolistic environment to a competitive environment in the long distance sector. Deregulation is not appropriate until the regulated monopolies lose market share and real choices are available to consumers of local telephone services.

Pacific Bell disagrees with this assessment, noting that the local telephone service sector is open to competition right now. While actual competition is not as great in the residential sector at present as it is in the business sector, the Public Utilities Commission is moving much too slowly. Telecommunications should be exempted from PUC economic regulation now. The 80 companies now entering the local telephone service market are large and fiercely competitive corporations like AT&T, and do not need special protection by PUC.

Pacific Bell is supported in this position by GTE California, which indicates that heavy-handed regulation by the Public Utilities Commission is still in place in the Code. GTE distinguishes between PUC oversight in the wholesale market, which may still be appropriate, and the retail market, where PUC regulation should be eliminated. There may be a continuing need for PUC regulation in the area of consumer protection, but this should apply to all carriers equally, not just to the former monopolies.

Pacific Bell and GTE take the position that the evidence is overwhelming that competition is here now. What is needed is not more meetings, but the specifics of deregulation during the competition period. There is a need to reform Public Utilities Commission regulation as soon as possible.

Based on this input, the Law Revision Commission concluded that several actions would be helpful. The Public Utilities Commission should establish criteria and standards for determining when sufficient competition exists for each phase of deregulation. This should be done in consultation with all interests. It would also be helpful to indicate what PUC's role will be when full competition exists and deregulation is complete — for example, will PUC be involved basically with licensing or certifying entrants into the market and ensuring consumer protection?

The Law Revision Commission asked the interested parties to consult with each other and consolidate their areas of agreement and disagreement on these issues in terms of the general categories set out above.

STUDY H-603 – SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE

The Commission considered Memorandum 97-18 and its First Supplement discussing comments received on the Tentative Recommendation relating to Severance of Joint Tenancy by Dissolution of Marriage.

A revised staff draft recommendation will be prepared to reflect the following decisions:

Legal Separation

The Commission affirmed its earlier decision that legal separation should not sever a marital joint tenancy. This is consistent with the treatment of legal separation under the Probate Code.

Revival on Remarriage

The Commission decided that remarriage of former spouses to each other should not revive a joint tenancy severed by their earlier divorce. The notice provided on the petition and judgment forms should alert divorcing parties of the need to reestablish a joint tenancy if it is their wish to do so.

Effect of an Invalid Divorce

The staff will attempt to conform the definition of dissolution and annulment to that used in Probate Code Section 6122. Particular care will be taken to protect third parties who rely on an apparently effective severance that is later determined to be ineffective as based on an invalid divorce.

Supplemental Study

As a supplement to Study H-603, the staff will study whether divorce should also revoke other non-probate testamentary transfers.

STUDY J-1300 – TRIAL COURT UNIFICATION

The Commission considered Memorandum 97-25 concerning revisions to the Code of Civil Procedure if SCA 4 passes. Due to time constraints, the draft revisions prepared by the Commission's consultant, Professor J. Clark Kelso, were attached to Memorandum 97-25 without any staff notes. In the future, the staff will add staff notes to Professor Kelso's drafts before presenting his drafts to the Commission.

Stopgap Measure

The Executive Secretary reported that there may be a statewide election in November 1997, with SCA 4 on the ballot. To prepare for that possibility, he has drafted a stopgap measure to take effect until more complete implementing legislation can be prepared. The Judicial Council and Professor Kelso are reviewing the draft, which will be on the agenda for the Commission's next meeting.

Policy Changes

The Commission revisited and reaffirmed its previous decision (April 10, 1997, Minutes, p. 6) that, in general, the legislation implementing SCA 4 should not attempt to effect policy changes. Otherwise, it would be extremely difficult to introduce the legislation, have it approved by as many as four policy committees in each house (Judiciary, Public Safety, Governmental Organization, and Fiscal), and have it enacted as an urgency measure by June 1998, as the Legislature expects from the Commission. As the study progresses, the Commission will compile a list of areas warranting future attention, including the jurisdictional limits for economic litigation procedures and small claims cases, and the justifications for providing a small claims retrial in a unified court. Assembly Member Ackerman will explore with Assembly and Senate leadership the possibility of obtaining broad authority for the Commission to study court processes and administration. He believes that the Commission is well-suited to the task, because of its thorough, nonpartisan study process with broad notice and good input.

Differentiating Between Municipal and Superior Court Causes when a Court Unifies

The Commission reviewed the proposed revision of CCP § 30 of Professor Kelso's draft and considered how to preserve the current differentiation between municipal and superior court causes when a court unifies. Options include:

(1) Create two categories of causes, such as "minor civil action" and "major civil action." Compile in one provision the statutes that give jurisdiction to the municipal courts. State that an action arising exclusively under one or more of those statutes is, for example, a "minor civil action," and any other action is a "major civil action." See Sections 30(b)(1)-(56), (c) in Professor Kelso's draft (Memorandum 97-25, Exhibit pp. 1-2).

(2) Create two categories of causes, one of which consists of actions that are within the original jurisdiction of the municipal court as that jurisdiction exists in a county in which the superior and municipal courts are not unified. See Section 30(b)(57) in Professor Kelso's draft (*Id.* at Exhibit p. 2).

(3) Combine the first two approaches, as in Section 30 of Professor Kelso's draft. See *id.* at Exhibit pp. 1-3.

(4) Have the Judicial Council maintain by court rule a list of statutes that give jurisdiction to the municipal courts, rather than trying to compile a list in statutory form. Alternatively, the Commission could include such a list in a Comment.

(5) Amend each section setting forth a cause. The amendment would state whether the cause is a “minor civil action” (or whatever terminology is chosen). A separate statute would provide that in a non-unified county, the municipal court has jurisdiction of any “minor civil action.”

The second approach and, to a lesser extent, the third approach would be unworkable if all trial courts unify. For that reason, and because of the difficulties involved in maintaining a comprehensive list of the causes like those now in municipal court, the Commission selected the last approach, under which each statute setting forth a cause would be amended to state the category to which the cause belongs. For the next meeting, the staff should present suggestions for naming the categories of causes, as well as for labeling matters consisting of multiple causes.

Code Civ. Proc. § 77: Appellate Division

SCA 4 would amend Article VI, Section 4 of the California Constitution to read in part:

In each superior court there is an appellate division. The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence of the appellate division.

The Commission considered how to implement that constitutional mandate.

The Commission decided to redraft Code of Civil Procedure Section 77 such that the Chief Justice has broad discretion in appointing judges to the appellate division. The staff is to propose language along those lines and seek input from Professor Kelso and the Judicial Council before the next meeting. As in Professor Kelso’s draft, references to “the appellate department” should be changed to “appellate division,” to conform to the language in SCA 4.

Small Claims Cases

The Commission considered, but did not resolve, how to provide a meaningful small claims retrial in a unified court (not just a chance to retry the case before a different judge of the same court). As recommended by Professor Kelso, statutory references to the “small claims court” should be corrected to

“small claims division,” but the implementing legislation should continue to permit colloquial use of the term “small claims court.”

Next Step

For the next meeting, the staff will revise the Code of Civil Procedure draft to incorporate the Commission’s decisions, make stylistic revisions, add Commission Comments and a preliminary part, and insert staff notes on significant issues. Draft revisions of other Codes are also in progress and should be ready for the Commission to review at its next meeting, so that a tentative recommendation (or several tentative recommendations) can be issued soon.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 97-33, which discusses concerns relating to the Commission’s bill on mediation confidentiality (AB 939 (Ortiz, Ackerman)). To address the concerns raised, the Commission decided to amend the bill as follows:

Evid. Code § 1115. Definitions

The definition of “mediation” should be amended to incorporate the existing definition in Code of Civil Procedure Section 1775.1:

“Mediation” means a process in which a neutral person ~~facilitates communication between~~ or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement ~~compromising, settling, or resolving a dispute in whole or in part.~~

The definition of “mediation consultation” should be amended to cover efforts to reconvene a mediation:

“Mediation consultation” means a communication between a person and a mediator for the purpose of ~~initiating or considering~~ initiating, considering, or reconvening a mediation or retaining the mediator.

To make clear that the bill neither endorses nor prohibits mandatory mediation, the following language should be added to the bill:

Nothing in this chapter expands a court’s authority to order participation in a dispute resolution proceeding. Nothing in this

chapter authorizes or affects the enforceability of a contractual clause in which parties agree to use of mediation.

Evid. Code § 1119. Recorded oral agreement

Section 1119(b) should be amended to read:

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

Evid. Code § 1121. Types of evidence not covered

As suggested by the State Bar Committee on Administration of Justice, Section 1121 should be amended to read:

1121. (a) Notwithstanding any other provision of this chapter, evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

Evid. Code § 1124. Written settlements and oral agreements reached through mediation

Evid. Code § 1125. When mediation ends

Sections 1124 and 1125 should be reorganized into parallel provisions on written settlements and oral agreements, respectively. Section 1124 should be amended along the following lines:

1124. (a) Notwithstanding any other provision of this chapter, an executed written settlement agreement prepared in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed if any of the following conditions is satisfied:

(1) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(2) The agreement provides that it is enforceable or binding or words to that effect.

(3) All signatories to the agreement expressly agree in writing, or orally in accordance with Section 1119, to its disclosure.

(4) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

~~(b) Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119. Unless the parties expressly agree otherwise, in writing or orally in accordance with Section 1119:~~

~~(1) When a written settlement fully resolving the dispute is fully executed, the mediation ends.~~

~~(2) When a written settlement partially resolving the dispute is fully executed, the mediation ends as to the issues resolved.~~

The Comment to Section 1124 should be revised to explain that the provision does not affect the use of confidential settlement agreements.

Section 1125 should be amended along the following lines:

1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:

~~(1) A written settlement fully resolving the mediated dispute is fully executed.~~

~~(2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.~~

~~(3) The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect.~~

~~(4) A disputant provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect.~~

(b) For purposes of this chapter, if a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:

~~(1) A written settlement partially resolving the dispute is fully executed.~~

~~(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119. Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation may be admitted in evidence or disclosed if any of the following conditions is satisfied:~~

~~(1) The agreement is in accordance with Section 1119.~~

~~(2) The agreement is in accordance with subdivisions (a) and (b) of Section 1119, and all parties to the agreement expressly agree, in~~

writing, or orally in accordance with Section 1119, to disclosure of the agreement.

(3) The agreement is in accordance with subdivisions (a) and (b) of Section 1119, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(b) Unless the parties expressly agree otherwise, in writing or orally in accordance with Section 1119:

(1) When an oral agreement fully resolving a dispute is reached in accordance with Section 1119, the mediation ends.

(2) When an oral agreement partially resolving a dispute is reached in accordance with Section 1119, the mediation ends as to the issues resolved.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION: SB 209

The Commission considered Memorandum 97-26, the First Supplement to Memorandum 97-26, and a letter from Robert Bezemek, a copy of which is attached to these Minutes as Exhibit p. 36. The Commission asked the staff to continue working with the organizations that opposed the bill and the Office of Administrative Law to try to resolve their concerns. The staff should point out to organizations that opposed the bill that the bill generally continues existing law on the rights and remedies in traditional mandamus. In addressing OAL concerns, the staff should consider whether to exempt preenforcement review of underground regulations from the bill, or whether a satisfactory substantive provision can be drafted. The staff should also confer with Senate Judiciary Committee staff to help with the bill analysis.

The Commission made the following decisions on sections in the bill:

§ 1123.120. Finality

§ 1123.140. Exception to finality requirement

The Commission approved the staff recommendation to consolidate Sections 1123.120 (finality) and 1123.140 (exception to finality) as follows:

1123.120. A (a) Except as provided in subdivision (b), a person may not obtain judicial review of agency action unless the agency action is final.

(b) A person may obtain judicial review of agency action that is not final if all of the following conditions are satisfied:

(1) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final.

(2) The issue is fit for immediate judicial review.

(3) Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

~~1123.140. Notwithstanding Section 1123.120 and subject to 1123.130, a person may obtain judicial review of agency action that is not final if all of the following conditions are satisfied:~~

~~(a) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final.~~

~~(b) The issue is fit for immediate judicial review.~~

~~(c) Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.~~

§ 1123.130. Agency may not be prohibited from adopting a rule

The Commission approved the staff recommendation to delete Section 1123.130 from the bill and to cite the *State Water Resources* case in the Comment to Section 1123.110:

~~1123.130. Notwithstanding any other provision of law, a court may not enjoin or otherwise prohibit an agency from adopting a rule.~~

§ 1123.160. Condition of relief

The Commission approved the staff recommendation to delete subdivision (b) (harmless error rule) from Section 1123.160 and to note in the Comment that Section 1123.710(a) (applicability of rules of practice for civil actions) applies the harmless error rule of Code of Civil Procedure Section 475. The staff should consider whether the reference to the harmless error rule should go in the Comment to Section 1123.160, Section 1123.710, or both, and whether the Comment should say omission of a procedural step required by statute, especially in the rulemaking context, is per se prejudicial. See, e.g., Gov't Code § 11350(a) (regulation may be declared invalid for "substantial failure to comply" with chapter). The staff should also consider whether Section 475 applies to judicial review of an administrative proceeding. See California Civil Writ Practice § 3.29 (Cal. Cont. Ed. Bar, 3d ed. 1996) (suggesting that Section 475 does apply to judicial review of an administrative proceeding).

§ 1123.230. Public interest standing

§ 1123.310. Exhaustion required

§ 1123.340. Exceptions to exhaustion of administrative remedies

The staff should prepare a memorandum for a future meeting dealing with concerns about exhaustion of remedies. Should a person be required to request the agency to correct its action before judicial review is available? Should the exhaustion requirement apply if there are no prescribed administrative procedures? Can a regulation be attacked in court as facially invalid without first resorting to administrative challenges?

§ 1123.450. Review of agency exercise of discretion

The Commission approved the staff recommendation to delete from the Comment the sentence that says, “Often, the determination of such [i.e., legislative] facts requires specialized expertise and the fact findings involve guesswork or prophecy.”

§ 1123.460. Review of agency procedure

The Commission approved the staff recommendation to revise subdivision (a) of Section 1123.460 as follows:

1123.460. The standard for judicial review of the following issues is the independent judgment of the court, giving appropriate deference to the agency’s determination of its procedures:

(a) Whether the agency has engaged in an unlawful or unfair procedure or decisionmaking process, or has failed to follow prescribed procedure.

(b)

The Comment should say “unfair” procedures need not be merely those that offend due process or violate a statute, and that this rejects the rule of *Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council*, 435 U.S. 519 (1978) (courts may not require agencies engaged in rulemaking to take procedural steps not required by constitution or statute).

The staff should deal in the statute, possibly in Government Code Section 11350, with continuing OAL concerns about the effect of standards of review on the deference required to be given to an agency’s determination that, in adopting a regulation, it need not comply with the rulemaking provisions of the Administrative Procedure Act. Herb Bolz of OAL suggested the statute might

say, “If an agency fails to follow the mandated rulemaking procedure for adopting a regulation, the regulation is invalid.”

§ 1123.630. Time for filing petition for review in adjudication of agency other than local agency and formal adjudication of local agency

The Commission approved the staff recommendation to revise Section 1123.630(e) as follows:

(e) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: “The last day to file a petition with a court for review of the decision is [date] unless another statute provides a longer period or the time is extended as provided by law.”

Comment. If the petition for review includes a claim for damages subject to the claims requirements of the California Tort Claims Act (see Section 1123.730(b) and Comment), a petition for review alleging the pending claim should be filed within the time provided in this section, and later amended when the claim is rejected to allege that fact. California Administrative Mandamus § 1.13, at 13 (Cal. Cont. Ed. Bar, 2d ed. 1989).

§ 1123.640. Time for filing petition for review in other adjudicative proceedings

The Commission approved the staff recommendation to revise Section 1123.640(d) as follows:

(d) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: “The last day to file a petition with a court for review of the decision ~~may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental law, as early as 30 days after the time begins to run~~ is [date] unless the time is extended as provided by law.”

Comment. Section 1123.640 does not override special limitations periods applicable to particular proceedings, such as for cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act (180 days, Gov’t Code § 51286), decision of a local legislative body adopting or amending a general or specific plan, zoning ordinance, regulation attached to a

specific plan, or development agreement (90 days, Gov't Code § 65009), or a cease and desist order of the San Francisco Bay Conservation and Development Commission and complaint by BCDC for administrative civil liability (30 days, Gov't Code §§ 66639, 66641.7). See Section 1121.110 (conflicting or inconsistent statute controls). Section 1123.640 does not apply to proceedings under the California Environmental Quality Act. Pub. Res. Code § 21168(b).

If the petition for review includes a claim for damages subject to the claims requirements of the California Tort Claims Act (see Section 1123.730(b) and Comment), a petition for review alleging the pending claim should be filed within the time provided in this section, and later amended when the claim is rejected to allege that fact. California Administrative Mandamus § 1.13, at 13 (Cal. Cont. Ed. Bar, 2d ed. 1989).

The staff should consider whether the notice provisions in Sections 1123.630 and 1123.640 might be consolidated in a separate section, since they are now substantively identical.

§ 1123.730. Type of relief

The Commission approved the staff recommendation to delete subdivision (d) from Section 1123.730:

~~(d) The court may award attorney's fees or witness fees only to the extent expressly authorized by statute.~~

STUDY N-300 – ADMINISTRATIVE RULEMAKING

Rulemaking Procedure

The Commission considered Memorandum 97-13 and its First Supplement concerning procedural reforms to the rulemaking provisions of the APA. The staff's recommendations were approved and will be incorporated into the draft tentative recommendation.

In addition, the staff will draft language allowing an agency to cancel a noticed hearing if no one notifies the agency of an intention to speak at the hearing, and allowing OAL to grant an extension of the one year rulemaking time limitation on a showing of good cause. This language will be incorporated into the tentative recommendation with a specific request for additional public comment.

Interpretive Guidelines

The Commission considered Memorandum 97-27, discussing whether an exception to rulemaking procedures for a statement expressing an agency's nonbinding interpretation of law is justified, and presenting a preliminary staff proposal to implement such an exception. The staff proposal exempts a self-identified "interpretive guideline," which by statute would lack the force and effect of law, from full rulemaking procedure. Adoption, amendment, or repeal of an interpretive guideline would instead be subject to streamlined notice and comment procedures.

The Commission endorsed the staff's general approach and instructed the staff to further refine the proposal by addressing the following points raised at the meeting:

- The need for an interpretive guideline exception should be reviewed in light of the availability of other means of communicating an agency interpretation of law, such as a declaratory decision in an administrative adjudication.
- The definition of interpretive guideline should be more clearly limited regarding the matters that can be expressed in an interpretive guideline. A purported interpretive guideline that contains language appearing to bind or compel could then be challenged as an improperly adopted regulation.
- It should be clear that an agency is free to act on an interpretation of law before that interpretation is expressed in an effective interpretive guideline.
- Post-adoption OAL review of an interpretive guideline should be available on request.
- Interpretive guidelines should be published in some place in addition to the California Regulatory Notice Register and agency interpretive guideline compilations.

APPROVED AS SUBMITTED

Date

APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Chairperson

Executive Secretary



Robert G. Foster
Senior Vice President

April 30, 1997

Mr. Nathaniel Sterling
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

California Law Revision Commission's Report
on Public Utilities Deregulation

Dear Mr. Sterling:

This is in response to the California Law Revision Commission's April 16, 1997 memoranda on public utilities deregulation. Southern California Edison Company ("Edison") appreciates the opportunity to offer comments on the Law Revision Commission's memoranda on needed revisions to the Public Utilities Code as a result of the changing competitive environment.

Senate Bill 960

Section 12 of S.B. 960 provides:

"SEC. 12. On or before June 30, 1997, the Public Utilities Commission in consultation with the Law Revision Commission shall submit a report to the Legislature on needed revisions of the Public Utilities Code that result from the restructuring of the electrical, gas, transportation, and telecommunications industries."

We agree with the general premise of your memoranda that:

"The existing Code is based on a model of regulation of monopolies through command and control, whereas the new statutory scheme provides procedures suited to the emerging competitive utility marketplace. In this respect, many of the statutory responsibilities of the Public

Utilities Commission may be antiquated and unnecessary."^{1/}

S.B. 960 requires review and revision of voluminous, monopoly-era regulations, most of which was adopted by reformers in 1879 and 1911 to govern powerful railroad industry interests. The model for this type of agency regulation was the now defunct Interstate Commerce Commission. Significant sections of the code must be revised in order to avoid placing the CPUC in the uncomfortable position of being required by statute to enforce obsolete laws that were designed for monopoly utility markets, while seeking to adjust its role to promoting policies that are appropriate to a competitive marketplace. In enacting Section 12 of S.B. 960 the Legislature recognized that out-of-date command and control era regulation represents a barrier to the competitive marketplace the Legislature and the CPUC are seeking to create.

Needed Code Revisions

The CPUC report recognizes that substantial portions of the code are obsolete. We agree with the memoranda that in providing that your commission consult on the CPUC report, the Legislature recognized that the Law Revision Commission is the 'revision of obsolete statutes expert.' With its statutory mandate^{2/} to examine California law for the purpose of discovering defects and anachronisms and recommending needed reforms, the Law Revision Commission is uniquely qualified to assist the Legislature to focus on the significant policy questions before them. It is encouraging that, in many areas, the CPUC states that it agrees in concept, and will work with the parties on statutory language. However, the Legislature requires a report on needed code revisions by June 30, 1997. Your memoranda states that the CPUC staff has interpreted this directive to require only a general indication of policy and not actual proposed legislation by that date. Further, the CPUC staff's report indicates that they oppose many suggestions for revision, including some suggested by the railroad industry, where the CPUC regulation has been preempted by federal law. Apart from consensus changes that may be made in 1997, your memoranda states the CPUC indicates a desire to continue discussions into the 1998 Legislative session "when more detailed conversation may take place."

In enacting Sections 12 and 14^{3/} of S.B. 960 the Legislature called for more than a cosmetic cleanup of provisions that have long since become obsolete. We suggest that the Law Revision Commission provide a report with a

^{1/} April 21, 1997 General Memorandum, p.2.

^{2/} See Gov't Code §§ 8280-8298.

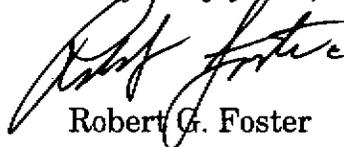
^{3/} Section 14 of S.B. 960 provides: "In order to enhance fair competition, on or before March 31, 1997, the commission shall submit a report to the Legislature concerning its recommendations for changes to regulations or statutes that may be required as a consequence of the changing competitive environment in which regulated and unregulated entities are competitors."

comprehensive submission of recommendations with draft code revisions for the Legislature to consider.

Some parties have commented that it is premature to delete certain statutes. Here Edison recommends a two-pronged approach. We suggest that the Law Revision Commission identify these statutes to the Legislature and assist the parties in drafting the appropriate language assuming that a competitive marketplace does exist. That is, let the Legislature determine if a competitive marketplace exists. The Law Revision Commission report would propose the draft language that would appropriately revise to the code if the Legislature makes that policy determination. Second, a sunset provision should be provided that would establish a procedure that requires the Public Utilities Code and CPUC regulations to periodically undergo review to determine if the law or regulation is still needed. The sunset clause should delete the provision at a date certain, unless there is later Legislative direction extending that date.

Again, we appreciate the opportunity to participate with your Commission in this undertaking.

Very truly yours,



Robert G. Foster

cc: The Honorable Steve Peace, Chair, Senate Energy, Utilities and
Communications Committee
The Honorable Bill Leonard, Vice Chair, Assembly Utilities and Commerce
Committee
The Honorable Diane Martinez, Chair, Assembly Utilities and Commerce
Committee

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Update on Telephone Competition

Legislative Briefing

March 5, 1997

California Public Utilities Commission

Local Telephone Competition: Why?

■ The Legislature and the Commission realize that Californians will benefit from increased competition

- New Services
- Lower Prices
- Greater Customer Choice

□ As California moves toward an information based economy, a strong telecommunications market is vital

CPUC's Plan for Local Phone Competition

- 1993: Governor asked CPUC to develop a telecommunications strategy for the State.
- After extensive public input, CPUC proposed to open all telephone markets to competition by 1/1/97
- Legislature codified this goal in the 1994 session

The CPUC Plan

- **Plan stresses flexibility and allowed parties to develop creative solutions**
- **The Plan covers the “Big Issues”**
 - Fairness of Market -- Level Playing Field
 - Universal Service -- Serving Everyone
 - Market Structure -- Equal Access to “Public” Network

Commissioners coordinate and review progress of the **Plan** at each public meeting

Nutshell Summary Federal Telecom Act of 1996

- Permits competitors to:
 - Physically interconnect networks
 - Purchase unbundled elements
 - Resell LEC services
- Parties are to negotiate agreements for all services CLCs desire that are technically feasible

If negotiations fail, states to arbitrate differences consistent with Act and FCC rules

CA's Universal Service Program--An Update

- History of Commission Efforts
 - Initiated Proceeding January 1995
 - ❖ OIR modeled after Polanco legislation
 - Proposed Rules issued July 1995
 - ❖ Extensive Public Participation Hearings in the Fall
 - Program established in October 1996
 - ❖ Identified High Cost Areas
 - ❖ Established subsidy level
 - ❖ Established discount for schools, libraries, hospitals and other qualified community based organizations

Funding Mechanisms Are Being Developed

- **February 1:** Carriers began collecting surcharges for high cost areas and discounts for schools and libraries
- **April 97:** Trust funds established for administration of subsidy collections and payments
- **June 97:** Carriers receive payments for high cost areas and discounts to schools and libraries

Future Implementation Efforts

- Establish interagency task force on roadside phones
- Establish working group to promote service in unserved areas
- Create and maintain consumer information matrix
- December 15 report to legislature mentioned the potential need for additional legislation to make California Teleconnect Fund an explicit surcharge

Act Grants Large Role to States Via Arbitrations

- Act gives states the responsibility to resolve disputes
- Must be consistent with Act and FCC rules
- States are left considerable pricing flexibility and complete control over local rates that are set for unbundled network elements
- States only have 110 days to resolve dispute

CPUC Role at the FCC

- Advising FCC on federal universal program
 - Joint Board of FCC and state regulators drafting universal service rules
 - Advocacy at FCC
 - FCC program will be implemented in 1997
- Multiple Rulemakings to implement Act (40+)
- CPUC via filings suggests policies and preserves jurisdiction

CPUC Will Comment on Major Issues Before FCC

- Access charge reform which could require states to recover \$100 M from end-users especially residential customers
- LNP cost recovery
- Universal Service fund size and applicability
- Advising FCC on separations reform
 - Joint Board of FCC and state regulators includes California representative
 - FCC will reform separations to reflect new competitive markets in 1997

Competition Scorecard

- ✓ CPUC has rapidly approved Competitors request to enter markets
- ✓ Under 1996 Telecommunication Act, CPUC is approving interconnection agreements

	Filed	Approved	Pending	First Filed On
New Carriers/Competitors				
Certificated	85	75	10	September 1, 1995
Tariffs	25	25		December 27, 1995
Interconnection Agreements				
Petitions for Arbitration	8	5	3	August 19, 1996
Voluntary Agreements	15	11	4	July 23, 1996

**Revisions to the Public Utilities Code for a Competitive Telecommunications
Industry in California**

California Law Revision Commission
May 2, 1997

Comments of Pacific Bell

1. A "Fresh Start" for Telecommunications Policy Reform in California

In our December 13, 1996 comments to the PUC on the need for Public Utilities ("PU") Code revision, we urged the Legislature and the PUC to adopt a "fresh start" approach to the need for a comprehensive revision of the many PU Code provisions designed originally to apply to monopolies. In brief, we believe California needs omnibus reform legislation to redesign competitive and customer safeguards for a competitive marketplace, to eliminate rate-of-return regulation, to assure that all competitors have the freedom to introduce, modify and price competitive services in accordance with market demand and to eliminate obsolete PUC requirements and rules.

2. Why the Public Utilities Code Must be Updated Now

State and federal policymakers are moving quickly to open all telecommunications markets to competition. With the passage of the Federal Telecommunications Act of 1996, the pace to open markets and expand competition has accelerated. Legal barriers to entry have been removed and the franchise monopolies of the past are being dismantled. To further facilitate entry, incumbent local exchange carriers ("LECs"), such as Pacific Bell, are required to:

- unbundle their networks for local competition so competitive local carriers ("CLCs") can get access to piece parts of LEC networks;

- arrange interconnection with CLCs' networks so CLC customers can be connected to LEC customers (and vice versa) in a seamless and transparent way;
- resell their retail services to CLCs at a discount (even where the retail price is already below cost); and
- allow competitors to place their telecommunications equipment in LEC buildings for more economical access to LEC switches.

Significant progress has been made to transition local and long distance markets in California to full and open competition, but the transition has been one-sided. Barriers to entry have been removed for new providers of telecommunications services, but incumbent LECs have not been given a chance to compete equally with these new entrants because of outdated rules and regulations. *While the PUC has taken steps to recommend modifications to existing sections of the Public Utilities Code, the magnitude of change is barely discernible.*

Current policies and practices require the incumbent LECs to face the new competitive environment with statewide averaged prices (despite differences in cost from one geography to another), some services priced below cost, earnings limitations, regulatory delays that inhibit quick responses to market changes, elaborate procedures for approving new service offerings, and myriad requirements (such as audits, reports and restrictions on affiliate transactions) that are inappropriate for a multiple-provider environment. Other competing providers are not similarly constrained and should *not* be where markets are open to competition.

In addition, the incumbent LEC is expected to continue to carry out its franchise obligations -- to be ready to serve all customers in its territory, the profitable and the unprofitable -- at prices that are well below cost.

In order to begin to realign regulatory policies and practices with the new competitive environment, the present PU Code, which defines the PUC's obligations

and responsibilities, must be significantly revised. Otherwise, the PUC will lack the tools it needs to ensure that regulation does not operate to the detriment of open markets, competition and some competitors.

Pacific Bell faces significant and growing competition in the majority of markets it serves. California is a unique and attractive market with competition unmatched by any other state in the country. Over one-third of all intraLATA¹ toll calls in the nation are made by Californians. California's telecommunications markets are geographically concentrated. Ten percent of Pacific Bell's geographic serving areas (also known as "wire centers") generate about 40% of our total revenues, and 20% of our wire centers generate over 60% of our total revenues. Revenues are also concentrated by customer segments -- for example, 20% of our business lines make 75% of all business toll calls. These concentrations of revenues and call volumes attract competitors to serve only the most profitable areas and customers and allow them to capture a disproportionately larger share of revenues with a smaller investment.

Since the onset of intraLATA toll competition in 1990, Pacific Bell's share of the market has fallen significantly, particularly with respect to business customers. By the end of 1996, we had *less than half* of the business intraLATA toll market. Our share of the 800 services (i.e., toll-free calling) market fell to 14% by the end of 1996. Likewise, our share of the calling card (i.e., a "charge" card for billing calls) market fell to 23%. Competition for local exchange services (telephone lines, local calling) has been heating up since competition was permitted at the beginning of 1996. For more information regarding competitive developments, we have attached a brief overview of the status of telecommunications competition in California.

¹ The former Bell Operating Companies ("BOCs") are permitted to provide toll services within Local Access and Transport Areas ("LATAs"; there are eleven LATAs in California) and thus the term "intraLATA". Until the passage of the Federal Telecommunications Act of 1996, former BOCs could not provide toll services between LATAs (also referred to as "interLATA"). The Act now permits the BOCs to apply for entry into interLATA markets once a number of conditions are met as determined by the FCC, the relevant State Commission and the Department of Justice.

If California is seriously committed to creating an environment of open markets and competition, then it must also allow markets to work on their own. Competition and the marketplace -- not regulators or outdated rules and regulations -- should be the key determinants of prices, products, providers and investments. Unless the PU Code is updated, the benefits of competition will never materialize for the majority of consumers in California. The majority of provisions in the PU Code were enacted many, many years ago. They were devised to give the Commission the tools to regulate monopoly markets and franchised utility companies. But today such markets and companies no longer exist, largely due to competition and state and federal policies aimed at removing barriers to entry and facilitating the entry of new competitors.

Pacific Bell is no longer the sole provider of telephone services. While Pacific may remain the primary provider of some services, such as basic residential service which is priced below cost, there are a wide array of competitors providing services that compete with many of Pacific's service offerings. Yet, the PU Code continues to focus on former monopoly companies rather than monopoly services or competitive services. In this way the Code acts as a shield that can be used to perpetuate disparate treatment of companies providing the same services. The Code also creates the opportunity for gaming of the regulatory process by competitors.

The Law Review Commission should examine the PU Code and eliminate or modify sections that are inconsistent with public policy changes that have already occurred. The most significant changes are the implementation of local and toll competition.

Requirements such as those in PU Code Sections 489, 491, 495, and 495.7, relating to the filing of tariffs and the timing of their effectiveness should be revised so that all services are treated the same regardless of the company providing the service. Flexibility is key to survival in a competitive marketplace. These statutes, as implemented by the PUC, inhibit the ability of some competitors such as the

incumbent LECs to compete fairly and equitably by allowing the PUC to impose upon incumbent LECs more extensive tariffing requirements. It made sense when most of these statutes were drafted almost a century ago, and even when they were re-enacted almost half a century ago, to impose such requirements on companies that provided utility services, as defined in PU Code Section 216, since those services were considered natural monopolies.

In the telecommunications industry, however, radical technological innovation has dramatically changed the landscape for the provision of telecommunications services. The inequitable application of the tariffing requirements of the PU Code has a substantial detrimental effect on consumers as well as on the providers so burdened. Providers are prevented from meeting customer needs for timely and beneficial price changes, products changes and/or new products. Likewise, customers are denied these benefits of competition when one provider among many is precluded from meeting customer needs in a timely way.

Many other sections of the PU Code allow the PUC to impose additional burdensome requirements on certain providers with respect to the procedures for approving price changes/increases or new service offerings. These include Section 454 regarding the showing required to justify price increases and Sections 455, 457, 532, 585, 728, 728.7, 729, and 729.5. These Code sections put the PUC in the position of being the arbiter of price fairness and the timing of new service introductions. In a competitive marketplace, it is the consumers who should have that right and responsibility.

Consumers, particularly users of business services, are already demonstrating their ability to make choices about the services they need or wish to receive and who they want to provide those services. Close PUC scrutiny of prices and service levels is inappropriate and unnecessary in a competitive environment. Rather, the PUC should focus on developing and enforcing consumer protections that apply to all

providers equally, and on responding through a complaint monitoring process when problems appear.

A final example of Code sections that need modernization are several provisions that perpetuate the PUC's micro-management of company business decisions relating to the transfer or encumbrance of utility property. PU Code Sections 851, 852 and 854 limit the flexibility necessary for companies to manage their internal business operations in an effective, efficient and, hopefully, profitable manner because they require PUC authorization of any transaction involving the disposition of public utility property or the acquisition of capital stock or control of another public utility.

The increasingly competitive telecommunications marketplace requires companies to act quickly and aggressively. This is not possible under such restrictive regulations requiring formal PUC decisions for any transaction involving utility property. The delay associated with formal decision-making may be critical in a commercial transaction (e.g., potential tenants of a company's property may not be willing to wait six months or longer for PUC approval of a lease). When companies regulated by the PUC must seek the Commission's approval for every transaction involving the transfer or encumbrance of utility property, their ability to act expeditiously and to compete are unnecessarily hindered.

3. The PUC's March 31, 1997 Report to the Legislature is a Small Step, But May Be "Too Little, Too Late"

The PUC's initial report to the Legislature on recommended Code changes does very little to modify or modernize outdated statutory requirements. The common rationale for the Report's disagreement with the vast majority of recommended PU Code revisions or deletions is that California is going through a "transition from a monopoly to competitive market for telecommunications services" and "competition has not developed sufficiently". In other words, the old rules that have governed

monopoly markets of the past should remain in place. The Report is not clear on the length of the "transition" nor does it explain what "sufficient" competition means.

There is ample evidence of existing and growing competition in telecommunications markets in California. However, the pace of competition will vary from market to market. For example, in the financial district of San Francisco, there are already five competitors (other than Pacific Bell) who have built facilities to compete for the local and toll (long distance) traffic of large businesses in the area. These same competitors may not, as yet, have extended their facilities to serve residential customers living a few blocks away. Nevertheless, the full force of the PU Code is brought to bear on all markets and all products as if all markets were developing at the same pace. Blanket conclusions regarding "insufficient" competition ignore the reality that competition will develop differently for different markets and products. Such conclusions deny the regulated company the flexibility needed to compete effectively in markets where regulation is no longer required.

We are *not* recommending that competition should be "measured" in some way before Code revisions are made. This would be a futile and unnecessary step. Both the California Legislature and the U.S. Congress have opened all telecommunications markets to competition. There is now a full set of competitive protections mandated in the Telecommunications Act of 1996. California cannot afford to wait until some undefinable measure of competition occurs in every market and for every product before updating its laws.

The PU Code must be reformed and designed for today's marketplace. Small, incremental Code revisions might avoid controversy but will not align the Code with present needs. Incremental revisions will leave the PUC burdened with hotly contested issues that are inevitably complicated by attempted arbitrage on the part of competitors "gaming" the regulatory process.

4. The Law Review Commission ("LRC") Has an Important Role in Bringing About a Thorough and Effective Review of Needed Code Revisions

The LRC, as the expert on revision of obsolete statutes, can play an important role in determining the most effective and timely *process* for review and revision of the PU Code in collaboration with the PUC. For example, the LRC can make recommendations on the timing and scope of the review and revision effort. We believe such a review should be done expeditiously. The process could include review of the competitive protections and the "duties" imposed upon the incumbent LECs by the Federal Telecommunications Act of 1996 and relevant FCC orders implementing the Act's provisions. These requirements, and existing competition, make many existing Code provisions obsolete, irrelevant and redundant. The LRC could also develop a set of guidelines to assist the Legislature and the PUC in determining rules of law governing the telecommunications industry that are antiquated and/or inequitable. In addition, the LRC, in collaboration with the PUC, could solicit detailed input from interested parties on specific Code revisions or deletions and the rationale and support for pursuing any recommended actions.

We urge the LRC to proceed aggressively to recommend substantive options. Among the options that are open to the LRC are drafting of specific legislation for Code revisions and proposing Code changes that legislative committees can consider and draft into legislation later this session. The LRC should assume a leadership role in fleshing out the needed changes to a now outdated and antiquated PU Code. If the LRC determines that certain sections of the Code need to remain in place for regulation of other types of utilities or services, it can still recommend the exemption of telecommunications services from Code sections that are no longer required because of competition. We believe time is of the essence and that proposed legislation should be drafted promptly. The LRC can, and should, get the legislative process moving.

The Status of Telecommunications Competition in California: A Brief Overview

Competition will go where the profits are, and the profits today are in usage (measured in minutes-of-use of the network). Customers who generate large calling volumes, data volumes and the like are the primary targets of competitors. Most of our profits are generated from business usage, intraLATA toll and the access we provide to interexchange carriers ("IECs") such as AT&T to reach their customers and vice versa. We don't make money on local exchange service (i.e., basic telephone lines) -- in fact, we lose money. Regulators have kept the price of basic telephone lines below cost and the price of usage well above cost. Competitors know this and will seek to provide basic telephone lines only to the most profitable customers (i.e., heavy users) and ignore high cost, low revenue customers. Nevertheless, competitors will argue that the Legislature and the PUC should not alter current regulations in any way because the LECs will continue to have the lion's share of basic telephone lines. This is a one-sided view of competitive developments. We would like to present the whole picture.

California is the most appealing telecommunications market in the U.S., with competition unmatched by any other state in the country.

California is a unique and attractive market

- California has the highest local, intraLATA and interLATA¹ call volumes in the nation. California accounts for over one-third (35%) of all intraLATA toll calls in the nation. The next closest states are New Jersey with about 9% intraLATA volumes and Massachusetts with 5.5%.
- California customers are highly dependent on telecommunications services and are among the most sophisticated in adopting leading technology.

Telecommunications revenue in California is highly concentrated

- California's markets are geographically concentrated. These concentrations allow competitors to reach the most profitable customers without building networks throughout the State.
 - 10% of our geographic serving areas (also known as "wire centers") contribute 40% of our total revenues

¹ In Pacific Bell service areas, local calls are any calls within about 12 miles of a residence or business. A Local Access and Transport Area ("LATA") is a specified geographic area. California is divided into 11 LATAs. IntraLATA calls are calls within the boundaries of a LATA (for example, a call between San Francisco and San Jose is an intraLATA call). InterLATA calls are calls between LATAs (for example, a call between San Francisco and Sacramento is an interLATA call). Currently, Pacific Bell is not authorized to handle interLATA calls. These types of calls are handled by telecommunications companies such as AT&T, MCI and Sprint.

- 20% of our wire centers generate over 60% of our total revenues
- Revenues are also concentrated by customer segments. The concentration of revenues occurs in both business and residential markets. Because of these concentrations, competitors need only serve a small geographic area, say the downtown district of San Francisco or San Diego, to pick off large amounts of profitable revenues.
 - 20% of residential customers make 70% of all residential toll calls
 - 20% of business lines make 75% of all business toll calls.
 - Less than 30% of customers contribute over 100% of Pacific Bell profits

Real and significant competition is here now

In his Opinion on Competitive Effects of the Proposed Merger between Pacific Telesis Group and SBC Communications Inc., dated December 31, 1996, the California Attorney General concluded that viable telecommunications competition is here and will expand:

Telesis business toll revenues have declined significantly ... during the past two years. Because interLATA and intraLATA services are functionally equivalent [footnote omitted], long distance carriers faced relatively insignificant barriers [footnote omitted] when they entered Telesis toll markets. Moreover, the demand for toll service is geographically concentrated with 85% of all toll calls originating in urban areas [footnote omitted]. Thus, by focusing on the business sector, AT&T and other long distance suppliers forced almost immediate rate reductions of 43 percent, while cutting Telesis's share of business toll revenues to 53 percent.² (AG's Opinion, pp. 9-10)

AT&T, MCI, Sprint, Metropolitan Fiber Systems, Brooks Fiber, TCG, ICG and other major firms now compete with Telesis [specifically, Pacific Bell] in markets where entry is viable and they are all planning to aggressively expand the range of that competition. (AG's Opinion, pp. 18-19)

AT&T, which is now installing switches in virtually every region in the United States served by the BOCs, plans to capture one-third of the local service business market within five to ten years. MCI and Sprint have similar intentions, although their projections are less ambitious. Local carriers likely to enter Telesis [specifically, Pacific Bell] markets in California include GTE, the largest local exchange company in the country, and U.S. West. At some point, wireless and cable companies may also offer competitive services in this market. (AG's Opinion, pp. 7-8)

Toll and alternative access competition in California is an established fact

² Pacific Bell's share of business toll revenues fell to 46% as of the end of 1996.

- Since the onset of intraLATA toll competition in 1990, Pacific Bell's share of the market has fallen dramatically, particularly with respect to business customers. By the end of 1996, we had *less than half* of the business intraLATA toll market. Our share of the 800 services (e.g., toll-free calling) market fell to 14% by the end of 1996. Likewise, our market share of the calling card (e.g., a "charge" card for billing calls) market fell to 23%.
- Strong competition is coming from competitive access providers ("CAPs") who provide customers (mostly large businesses) with direct access to IEC networks (thus avoiding our network). The means to provide such direct access is primarily through the provision of services such as high capacity access (also known as "HiCap").
 - In 1996, CAPs' share of the HiCap market climbed to 45% in San Francisco and Los Angeles, where profitable revenues are highly concentrated
 - Many CAPs have been authorized to offer local exchange service (i.e., basic telephone lines, local calling) on a statewide basis.

Competition for local exchange service is heating up as well

- Since the PUC authorized local exchange competition in early 1996, more than 111 companies have filed for authority to compete in local exchange markets in California. As of April, 1997, 84 received authorization to become competitive local carriers ("CLCs"), competing with Pacific Bell in the provision of local exchange service. The CLCs include well-established competitors such as AT&T, MCI, Sprint, and TCI. These competitors have strong brand recognition and an existing base of customers in California.

CAPs are competing aggressively in the local exchange market

- Metropolitan Fiber Systems ("MFS") now offers local exchange service over its own fiber network in Los Angeles, San Diego, and San Francisco.
- Brooks Fiber provides local exchange service to northern California businesses and plans to extend this to residential customers.
- Teleport Communications Group ("TCG") provides direct access to IECs using its own facilities in the three metropolitan areas (Los Angeles, San Francisco and San Diego) also served by MCIMetro (a subsidiary of MCI) and MFS.
- ICG Telecommunications operates networks in the key metropolitan areas plus the Central Valley. It has leased fiber from the cities of Los Angeles, Alameda, and Burbank and 1,200 route miles from Southern California Edison to deploy in its statewide data network.

IECs are forging ahead into business and residential local exchange markets

- MCI, through its subsidiary MCIMetro, provides local exchange service to businesses in the major metropolitan areas using MCI's own switches and fiber network. MCI's cornerstone

offering, (known as MCI One) integrates all charges for local, domestic and international long distance, wireless, Internet access, toll-free, private line and data service on a single bill.

- AT&T targets small businesses to offer bundled services that include local exchange, long distance, wireless, and online services in a simplified pricing package on one monthly bill. Its Digital Link service provides outgoing local calling and other services over digital access links.
- Both MCI and AT&T are reselling Pacific Bell local exchange service to residential customers. AT&T offers local service in Sacramento and plans a statewide rollout later in 1997, promising a single bill for local and long distance service.

Cable companies are joining the fray in telecommunications

- TCI, Cox, and Time Warner all plan to offer local exchange service in California in 1997. TCI will use its extensive cable network and Teleport's digital switches and fiber optic network while Cox and Time Warner will use their own networks to offer telephony services. Cox is now providing local exchange service to residential customers in Orange County. This deployment is part of Cox's \$65M program to enter the local exchange market. Cox is also planning to launch new technologies to combine PCS and cable networks under the Sprint Spectrum brand in 1997. Time Warner resells local exchange access and provides transport over its own fiber network in San Diego.

Wireless providers are vying for a piece of the California market

- Among others with PUC approval to offer local exchange service in California are the wireless companies, including GTE Mobilnet, WinStar Wireless, Bakersfield Cellular, SLO Cellular, and Cellular 2000. Not only do many of these carriers already offer wireless service in California, thereby possessing a proven track record and customer base, they also package their attractive service with local exchange service.

Other LECs are challenging the incumbent LECs

- GTE has already begun offering local exchange service in Pacific Bell territory. Unlike Pacific, it is not limited in its long distance offering and is able to package other services such as cellular and video with local exchange service.
- US West has recently merged with Continental Cablevision to provide local exchange service across the country and in California. They will package and offer video, Internet access, as well as local exchange service.

THERE CAN BE NO DOUBT THAT VIGOROUS COMPETITION IS WIDESPREAD AND INCREASING IN CALIFORNIA'S TELECOMMUNICATIONS MARKET.



GTE Telephone Operations

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TESTIMONY OF SUSAN ROSSI ON BEHALF OF GTE CALIFORNIA INCORPORATED
FOR THE CALIFORNIA LAW REVISION COMMISSION
MAY 2, 1997
PUBLIC UTILITIES DEREGULATION - TELECOMMUNICATIONS

Good afternoon Chairperson Fink and Commissioners. My name is Susan Rossi and I am a Senior Attorney for Regulatory and Corporate Affairs at GTE California. GTE is an incumbent local exchange carrier with about 18 percent of the local access lines in California. I have represented GTE before the California Public Utilities Commission (PUC) in the local competition docket that commenced in 1994. I have also been the primary negotiator for GTE's interconnection agreements with competitive local carriers (CLCs), and I have participated in several Telecommunications Act arbitrations at the PUC.

On behalf of GTE, I would thank you for the opportunity to provide input to the California Law Revision Commission here today. Your efforts to address the needed revisions to the Public Utilities Code to reflect the fact that the local telecommunications market has been opened to competition is a very important step under Senate Bill 960. The telecommunications carriers that are here today and the PUC have been working on rules to implement local competition for almost four years now, and GTE welcomes the fresh perspective that the Law Revision Commission can bring to this matter.

In its Vision 2000 report that was issued in 1993, the PUC foresaw that a competitive telecommunications market was the best way to bring the benefits of the Information Age to California's citizens, to make California a leader in the global marketplace and to sustain jobs and economic growth for the State. The Vision 2000 report also recognized that the heavy hand of regulation is unnecessary and, in fact, detrimental in a competitive market.

Since the issuance of that Report, Congress enacted the Telecommunications Act of 1996 which provides for competition in the local telecommunications market, and the PUC has opened all of California's telecommunications markets to competition. This fundamentally changed the nature of the telecommunications industry, which has ushered in an age of new providers and markets, as well as expanded services. But here in California the heavy hand of regulation is still with us. It is present in the form of a voluminous Public Utilities Code (the Code) that was written in an age when a competitive local market was never envisioned. Instead, it was compiled over the last century in an environment in which a single carrier provided local service in a designated area.

GTE has spent considerable time crafting its proposal for revising the Public Utilities Code, and we believe that it represents a careful balancing of important interests. On the one hand, it retains regulatory oversight of the wholesale market, which consists of the relationships and arrangements between carriers, and our proposal retains oversight of consumer protection issues. This mirrors the Telecommunications Act, which grants the PUC the authority to approve all negotiated interconnection agreements between carriers, and to resolve disputed issues between carriers by arbitration. The PUC would therefore continue to oversee activities related to interconnection, resale, access to rights of way, and compensation among carriers for the transport and termination of each other's traffic.

GTE also advocates that the PUC continue its regulation of social policy programs such as Lifeline, and the Deaf and Disabled Trust that might not otherwise be viable in a competitive market. The PUC should also retain the authority to regulate consumer protection matters. However, such regulations should not be selectively applied only to the incumbent local exchange companies. Prohibitions on customer abuses, such as slamming, where a carrier

switches a customer to its service without the customer's consent, must apply to all carriers.

For standard retail services, GTE recommends that regulation be eliminated, allowing that market to operate in a freely competitive environment. Local competition has been fully authorized for more than a year, it is happening now, and the evidence shows that within the next few years competition will be even more intense. The evidence of such burgeoning competition is compelling:

- over 78 carriers have received authorization from the PUC to operate as CLCs, and more continue to apply;
- CLCs have nine local switches in operation in GTE territory alone;
- CLCs have installed over 150 DS1 (digital) interconnection trunks in GTE serving territory. These facilities have the capacity to serve approximately 45,000 customers. GTE recently received an order from one carrier requesting 160 such trunks.
- GTE has completed the transition of all of its central offices to be equal access capable, so that a CLC customer is not disadvantaged by having to dial additional numbers for access;
- interim prices have been set by the PUC for a variety of unbundled network elements as well as for the resale of retail services;
- GTE began entering into interim interconnection agreements with CLCs more than a year ago, and GTE has 14 agreements under the Telecommunications Act that have been approved by the PUC;
- 55 new NXX codes (550,000 numbers) were opened by CLCS during 1996 in GTE's territory alone.

Competition comes not only from the CLCs. GTE and Pacific are now competing for retail customers in each other's respective serving territories. In addition, municipalities like the City of Burbank have constructed fiber telecommunications rings that are

available for competing services. ICG Communications recently announced that it signed a fifteen year agreement with Burbank to become a facilities-based provider of local service. This deal gives ICG the option to lease city owned fiber to gain access to approximately 45 targeted buildings in the Burbank area, including those of Warner Bros., Disney, and NBC.

Success in providing retail services should be based on the competitive choices of consumers, not on the fact that one carrier is hampered in its ability to launch a competitive response to a customer due to unequal regulation. The PUC recognized this principle in page 55 of its Vision 2000 Report when it made the following specific recommendation to the Legislature:

The Commission should remove regulations and streamline procedures which frustrate the attempts of California businesses to receive services from telecommunications providers in a timely manner and in a manner that fits their specific needs. The Commission will strive to act quickly where regulatory approval is required.

The current requirements for retail customer contracts are an example of disparate regulation that frustrates the fair and timely provisioning of services to customers. When GTE negotiates a contract with a customer for a retail service, GTE must submit the contract for approval to the PUC, and GTE's competitors for this business, the CLCs, may obtain copies of these contracts. GTE, however, does not have the ability to examine comparable contracts of the CLCs. This is an enormous competitive advantage to the CLCs. It is, in effect, like obtaining copies of GTE's business plan. They can keep track of our customers, what services we are providing them and at what rates. By reviewing our contracts, the CLCs can get a clear picture of GTE's retail business strategy -- the geographical areas and the types of customers we are targeting.

In addition, GTE is required to provide cost support for all such contracts, cost information which our competitors can freely examine. These unequal rules also competitively disadvantage GTE

because they require a great deal of resources in order to comply with them. GTE must retain staff to develop cost support for each contract, and regulatory personnel to guide the contract through the PUC's approval process. But more importantly, these additional retail restrictions hamper our ability to respond to consumers. These disparities are inequitable and must be addressed in order for consumers to realize the full benefits of competition. It is therefore vital that the revision of the code begin now.

The competitive carriers will argue that any revisions to the Code beyond nonsubstantive, housekeeping measures is premature at this time. There is talk of a "transition" period, but it is notable for its lack of any specific time frames. That approach would quite clearly lead us far into the next century before any meaningful reform was even considered. The result would be a twilight world in which the competitive realities were masked by an antiquated Code.

It is important to remember that the revisions to the Code which GTE is proposing will not happen overnight. We are now in the middle of 1997. Any revisions to the Code by the Legislature would not occur until the 1998 session, with implementation likely in 1999. That is why we need to be proactive and start now to thoroughly discuss the revisions to the Code that are necessary so that it will reflect the realities of the telecommunications industry when it is finally implemented.

GTE anticipates that the California Law Revision Commission, as an independent body with specific expertise on the revision of obsolete statutes, and which is tasked with consulting with the PUC on the pace and scope of such revisions, will have the foresight to look beyond mere housekeeping revisions to the Code and recommend that substantive revisions be made. As the Law Revision Commission noted in its Memorandum 97-28 on General Considerations, Section 12 of Senate Bill 960 assumes that deregulation has

rendered parts of the Code obsolete. Revision of the outdated sections of the Code that are at odds with a competitive telecommunications industry is clearly necessary.

GTE believes that its proposal to revise the Code and the PUC's regulatory authority along the wholesale/retail structure of the Telecommunications Act is the best path to a Code that balances PUC oversight of consumer protections and carrier relationships with a competitive retail market free from unnecessary and burdensome regulation. Such reform will be a large and contentious task. It should be begun without any further delay so that the reforms can be implemented within a reasonable time frame.



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May 2, 1997

CAS00LB

Allan L. Fink, Chairperson
California Law Revision Commission
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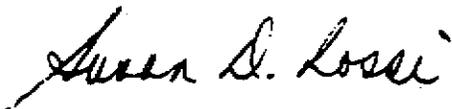
In accordance with the California Law Revision Commission's Notice of its May 2, 1997 meeting on Public Utilities Deregulation, GTE California Incorporated hereby submits the following written materials for consideration by Commission:

1. GTE's December 17, 1996 letter to Mr. Kent Kauss of the Office of Governmental Affairs of the California Public Utilities Commission detailing the need for significant revisions to the California Public Utilities Code;
2. GTE's Matrix of needed revisions to the Public Utilities Code which was submitted to the PUC on December 17, 1996;
3. GTE's February 13, 1997 letter to Mr. Kauss in response to the initial comments of other stakeholders;
4. GTE's Comments submitted March 18, 1997 to the PUC on Facilities Based Competition in the Local Exchange Market;
5. Statement of Jack Fields, former Chairman of the Telecommunication and Finance Subcommittees of the United States Congress, submitted at the March 18, 1997 Full Panel Hearing on Local Exchange Competition before the PUC.

GTE has prepared copies of these materials for each of the Commission's members. Thank you for this opportunity to present GTE's proposals for revisions to the Public Utilities Code, and if there is

Allan L. Fink, Chairperson
May 2, 1997
Page 2

any additional information that you would like GTE to provide to the Commission, please don't
hesitate to call me at 805/372-6358.



Susan D. Rossi
Attorney

Enclosures
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c: Vice Chairperson:
Christine W.S. Byrd

Members:

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Robert E. Cooper
Hon. M. Gregory
Hon. Quentin L. Kopp

Judge Arthur K. Marshall
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By Facismile
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April 30, 1997

Robert Murphy, Staff Counsel
California Law Revision Commission
4000 Middlefield Rd., Suite D-2
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Re: Your staff memo of April 29, 1997
concerning attorney fees and summary dismissal

Dear Mr. Murphy:

Thank you for your call and FAX concerning possible changes in your bill.

I am convinced that, overall, SB 209 is so out-of-touch with the appropriate procedures for ordinary mandate, actual law practice and the requirements of justice that it cannot be salvaged. In particular, the Commission's stubborn failure to acknowledge that ordinary mandate should not be a part of this bill will doom it to failure. Thus, far more than attorney fees and summary dismissal must be addressed by the LRC.

Meanwhile, I appreciate the staff acknowledgement that common law and equitable fees (under such doctrines as the common fund and substantial benefit) should not be legislated away (assuming they could be constitutionally eliminated.). (Incidentally, there are other common law and equitable bases for fees which I had not bothered to discuss.)

I will be circulating your draft to other interested parties and anticipate sending you a response in about 10 days. What is the current Commission timetable regarding this bill?

Thank you again for your call.

Very truly yours,

Robert J. Bezemek

cc: CFT
Misc. Interested parties