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Decision 91-07-074 July 31, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own)
Motion for purposes of compiling the)
Commission's rules of procedure in)
accordance with Public Utilities)
Code Section 322 and considering)
changes in the Commission's Rules)
of Practice and Procedure.)

ORIGINAL

R.84-12-028
(Filed December 19, 1984)

INTERIM OPINION ISSUING PROPOSED RULE
TO GOVERN EX PARTE COMMUNICATIONS
IN COMMISSION PROCEEDINGS

Introduction

Today we issue a rule to govern ex parte communications in covered Commission proceedings. We define a covered proceeding as "any formal proceeding other than a rulemaking or an OII consolidated with a rulemaking to the extent that the OII raises the identical issues raised in the rulemaking". Since the rule will be added to the Rules of Practice and Procedure, we will forward it to the Office of Administrative Law (OAL) in accordance with applicable provisions of the Government Code. At the conclusion of the OAL publication process, we intend to adopt the rule as set forth in Appendix B.

Because the ex parte rule will have a significant impact on this Commission and the parties who appear before it, we make an effort in this decision to describe the Commission's formal decisionmaking process and to draft a rule which is flexibly attuned to the dynamic and diverse nature of that process. As a matter of sound public policy, we believe that any rule applicable to all formal proceedings must be effective, fair (both in reality and in appearance), understandable, and easily administered. However, such clearly beneficial goals must be realized in an environment which accommodates the Commission's various functions.

The Formal Decisionmaking Process

This Commission is an administrative agency. Unlike a purely legislative or purely judicial body, we engage in two types of formal decisionmaking which extend across a spectrum of activity. At one end of the spectrum is pure "legislative" activity, while at the other end is pure "adjudication". The legislative forum, by its very nature, is one in which the decisionmakers seek and receive an array of viewpoints on issues of prospective, and typically general, application. It is an environment in which the decisionmakers must have full and open access to the broadest array of viewpoints if they are to discharge their responsibility fairly and effectively. In contrast, adjudication is a process in which participants expect fair and reasoned treatment in a context devoted to retrospective consideration of specific facts and issues. To achieve the goal of fairness in adjudication, the decisionmakers must restrict the ability of any one participant to circumvent the formal process and thus gain an advantage over others.

Between these two ends of the spectrum lies a great range of formal decisionmaking which may combine elements of both categories. Our task is to develop a rule which recognizes and accommodates not only the two ends of the spectrum, but the range of activities between the two. Below, we examine the characteristics which distinguish these formal decisionmaking processes and the legal basis for fashioning the ex parte rule which we issue today. Our rule will operate differently depending upon decisionmaking contexts, and represents our considered effort to balance the requirements of a multi-faceted process against fairness and due process concerns.

1. Adjudicatory Functions

When the Commission is acting in its most adjudicatory capacity, it is engaged in dispute resolution between or among parties about the legal effect of past actions or events. This is

an attempt to ascertain the truth regarding past events or facts, so that existing rules, regulations or laws can be applied to decide the merits of the allegations in issue. "Enforcement-related proceedings", as defined in the proposed rule, provide an example of such adjudication because their subject matter includes the alleged violation of a law, or of an order or rule of the Commission.

The retrospective nature of adjudicatory fact-finding and decisionmaking requires that we regulate off-the-record communications between parties and decisionmakers in adjudicatory proceedings more restrictively than in any other type of covered proceeding. Therefore, we promulgate a rule which, in "enforcement-related proceedings", requires disclosure of ex parte contacts until submission of the case and prohibits ex parte contacts after that time.

We are persuaded that in our purely adjudicatory proceedings it is unnecessary to apply a blanket prohibition of ex parte communications. Such communications made prior to submission of the matter will not be prohibited. However, a fair result requires that any and all ex parte communications be available for review in a file that is publicly accessible. We will require our Central File Room to maintain files of ex parte communications, and to make them available for public inspection. Thus, the rights of all parties will be protected by public disclosure of such communications.

At the same time, we also are persuaded that ex parte communications in adjudication made after the matter is submitted should be prohibited. To allow such communications after submission, we believe, could subject our decision to unfair influence.

2. Legislative Functions

When acting as a Constitutional alternative to or delegate of the Legislature, the Commission operates in a proactive mode, formulating new or revising existing policy via a process, which often (though not always) involves assessing facts of a more generalized nature than those which form the basis of an adjudicative case. We believe that the overwhelming majority of our activities involve legislative functions. Some of our proceedings are exclusively legislative; these proceedings include rulemakings. Pursuant to Rule 14.1 of our Rules of Practice and Procedure, rulemakings solicit public comment on the proposed rule but do not require evidentiary hearings.

Because rulemakings constitute a forum for soliciting public comment, they require an open process which affords us the opportunity to hear and consider conflicting viewpoints. This open process is a fundamental characteristic of a rulemaking, as the United States Court of Appeals for the District of Columbia Circuit observed in 1981:

Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. . . . Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs. (Sierra Club v. Costle, 657 F.2d 298, 400; see also Administrative Law Treatise, Kenneth Culp Davis, 2d ed., vol. 1, § 6:18, p. 537.)

We concur with this view. Consequently, to enable us to function efficiently in a rulemaking, we believe full and open communication between the participants in the legislative process and the Commission is mandatory. When the Commission is engaged in rulemaking, it is appropriate in the interests of furthering the Commission's proactive policymaking function to neither prohibit ex parte communications, nor to require their public disclosure. Therefore, we exclude ex parte communications from coverage under the generic rule.

3. The Difficulty of Readily Classifying All Commission Proceedings According to These Two Functions

It is possible to classify certain kinds of Commission proceedings as wholly adjudicatory or wholly legislative (i.e., enforcement-related proceedings and rulemakings as discussed above). However, our application and investigation proceedings are not so easily classified as necessarily lying at one end of the spectrum or at the other. At the same time, in crafting an ex parte rule, we consider it important that the rule be clear and simple in its application. Trying to define whether any particular formal proceeding is legislative or adjudicatory would often demand an inquiry into the case's individual history, scope, or procedural development, thus inviting litigation and uncertainty. Accordingly, rather than develop a rule that turns on the exact nature of a proceeding, we establish a rule that will apply broadly to entire classes of proceedings.

The classes of formal Commission proceedings that do not lie at either end of the decisionmaking spectrum include application cases, complaint cases challenging the reasonableness of the level of a regulated company's rates, and Commission orders instituting investigation (OII's). Many of these cases involve ratemaking, which is a prospective, legislative function. This point has been repeatedly affirmed by our Supreme Court. (See Consumers Lobby Against Monopolies v. Public Utilities Comm., 25

Cal.3d 891, 909 (1979) and the decisions there cited. As we have noted above in discussing our legislative function, the openness and accessibility of decisionmakers in such proceedings is a goal to be sought. On the other hand, these proceedings, unlike rulemakings, involve evidentiary hearings. And, these proceedings may incorporate some elements of adjudication. Consequently, at times it would be impossible to classify particular proceedings as solely legislative or solely adjudicatory, and at times, it is exceedingly difficult.

We bear in mind two competing considerations in developing an ex parte rule to cover these broad classes of proceedings. First, we wish to foster our ability to hear a range of viewpoints in a more informal setting which encourages an exchange of ideas. Second, we wish to promote fairness and the appearance of fairness in these proceedings. As noted above, these proceedings typically involve hearings, where different interests compete in a clearly adversarial setting. In such a proceeding, we are concerned that a communication outside of the public record could unfairly influence our decision if other parties are not afforded the opportunity to respond to that communication. (Compare Patco v. Federal Labor Relations Authority, 685 F.2d 547, 564 - 565, (D.C. Cir. 1982).) On balance, we conclude that a rule permitting ex parte contacts, but requiring their disclosure, fully protects the fairness of the process without stifling the exchange of viewpoints.

In short, to ensure that the Commission's decisions are rendered based on the evidence of record (Rule 1.2) and that the decisionmaking process fosters fairness, accuracy, and due process of law, we will require disclosure of ex parte communications in all proceedings other than rulemakings and (as more fully discussed below) in certain cases consolidating rulemaking with OIIs. We

remind parties to our proceedings that when we function in our legislative mode, communications from the parties are to be desired. Our goal is to make a record of, not discourage, such contacts.

Procedural Background

On March 22, 1991, the Assigned Commissioner issued a ruling inviting comments on a proposed generic ex parte rule. The Assigned Commissioner's proposed rule, which is attached as Appendix A, is a disclosure or "sunshine" rule, which would apply to all contested Commission proceedings at the time of submission. The Assigned Commissioner's proposal specifically exempts rulemakings and nonenforcement Commission investigations from the rule governing ex parte communications.

Twenty-five parties filed written comments in response to the Assigned Commissioner's ruling. The commenting parties are: the Ad Hoc Carriers Committee (Ad Hoc), Professor Michael Asimow (Asimow), Bay Area Teleport (BAT), CACD, the California Water Service Company (Cal Water), the California Cable Television Association (CCTA), California Industrial Group (CIG), California Trucking Association (CTA), the California Water Association (CWA), the Center for Public Interest Law (CPIL), DRA, GTE California Incorporated (GTEC), MCI Telecommunications Corporation (MCI), Pacific Bell, Pacific Power & Light Company (Pacific Power, Pacific Gas & Electric Company (PG&E), the Commission's Public Advisor's Office (Public Advisor), San Gabriel Water Company (San Gabriel), San Jose Water Company (SJWC), San Diego Gas & Electric Company (SDG&E), a group of 10 independent local exchange carriers (the independent LECs), Southern California Edison Company (Edison), Southern California Gas Company (SoCalGas), Toward Utility Rate Normalization (TURN), and Utility Consumers Action Network (UCAN) filing jointly, and US Sprint Communications Company Limited Partnership (Sprint).

The issues raised in these comments fall into several categories, including the scope of the proposed rule, who should be

covered under such a rule, the adequacy of the reporting mechanisms, key definitional terms, and enforcement. The parties' comments, summarized below, have assisted us in framing and resolving the issues addressed by our rule.

Scope and Application of the Proposed Rule

1. The Scope

In assessing issues of scope, we have determined which proceedings will be subject to the rule. We also have addressed certain related practical issues, including whether to adopt a disclosure or prohibition rule, and the appropriate duration of any such rule.

Several parties assert that the rule should apply to all Commission proceedings from commencement, rather than submission (e.g., DRA Comments, p. 3; Pacific Bell Comments, p. 2). CPIL favors a simpler and more flexible approach under which the Commission would apply the ex parte rule to all proceedings unless the Commission decided that it would be useful to waive the requirement of the rule for a particular proceeding (CPIL Comments, p. 3). Sprint's view is that if the Commission adopts ex parte rules, they should apply to all types of Commission proceedings, including rulemakings and investigations (Sprint Comments, p. 3). Indeed several parties argue against the exemption for rulemakings and investigations proposed by the Assigned Commissioner (TURN/UCAN Ad Hoc, MCI, and CCTA). Several parties including GTEC, the independent LECs, SJWC, PG&E, Edison and Asmiow, who favor exempting rulemakings and investigations, maintain that the scope of the ex parte rule is more appropriately limited to matters determined on an evidentiary record after "adjudicatory" hearing (Asimow's Comments, p. 3).

Our proposal does not confine the scope of the rule to the narrow "adjudicatory" category some of the parties prefer. Rule 1.1 (c) defines a "covered proceeding" as:

"any formal proceeding other than a rulemaking or an OII consolidated with a rulemaking to the extent that the OII raises the identical issues raised in the rulemaking. An OII is otherwise a covered proceeding. Except for OIIs, if no timely answer or protest or request for hearing is filed in response to a pleading initiating a covered proceeding, the proceeding ceases to be covered. If an answer or protest is withdrawn, the proceeding ceases to be a covered proceeding. However, if there has been a request for hearing, the proceeding remains covered until the request has been denied."

Our rule excludes informal Commission processes such as the advice letter process, which do not require development of an evidentiary record (however, a workshop conducted in a covered proceeding would be subject to the rule¹).

Our rule also specifically excludes rulemakings, where the Commission acts in its most legislative capacity and does not take evidence. We are cognizant, however, that often the Commission consolidates rulemaking and investigatory dockets for the purpose of procedural flexibility in the event that it is necessary to hold evidentiary hearings on issues relating to a rulemaking. Where such consolidation occurs, we do not intend the ex parte rule to apply automatically. In cases where the consolidated investigatory docket covers the same issues as the rulemaking, the rule will not apply. In cases where the investigatory docket branches out to cover issues not within the scope of the rulemaking, the rule will apply to such portions of the investigatory docket. The ALJ may resolve any dispute about

1. Given the definition of "decisionmaker", which excludes CACD, the practical effect of bringing some workshops under the parameters of the rule is simply to cover ex parte communications on the substantive issues raised in the workshop between parties and decisionmakers, but not between CACD and parties/decisionmakers.

the applicability of the ex parte rule in the case of consolidated rulemakings and investigations.

Several parties addressed the question of whether both procedural and substantive communications between parties and decisionmakers should be covered. For example, SJWC believes that reporting of substantive (but not procedural) communications is sufficient. MCI, which favors a prohibition rule in contested "adjudicatory" proceedings, and a disclosure rule in rulemakings and OIIs, confines its recommendation to substantive communications. Such comments are consistent with our experience in proceedings such as the recent A.88-12-035. In that proceeding we adopted an ad hoc ex parte rule which carefully defined "procedural communications", and excluded them from the rule, thereby facilitating necessary communication on such matters as scheduling, filing dates, and service list issues. In the interest of retaining the flexibility to process contested proceedings efficiently, consistent with our past experience, we have confined the proposed rule to substantive issues and have excluded defined "procedural" inquiries.

There is no consensus among the commenting parties on whether the Commission should adopt a disclosure or "sunshine" rule, a prohibition rule, or some combination. For example, DRA favors a sunshine rule from commencement to submission of a proceeding and a prohibition following submission. MCI would prohibit all communications between parties and decisionmakers on substantive matters in contested "adjudicatory" proceedings, while requiring disclosure in rulemakings and OIIs. TURN and UCAN suggest that disclosure is appropriate but that prohibition seven days prior to the Commission meeting may be required in order to ensure that last minute ex parte communications are avoided. Sprint also echoes the view that contacts within a specific period before a decision is reached should be prohibited (Sprint Comments, p. 6). BAT would prohibit ex parte communications in contested

matters but permit them under a disclosure requirement in rulemakings and OIIs until one week prior to Commission action. Asimow favors prohibition coupled with a narrow definition of the proceedings to which the rule would apply.

After considering these and the other comments filed, it is our view that a disclosure rule from commencement of the proceeding to the date of issuance of a final order in the proceeding is appropriate in most cases. The only exceptions to this rule are enforcement-related investigations or complaints which raise alleged violations of provisions of law or orders or rules of the Commission. In such cases, our rule requires disclosure from commencement until submission, and prohibition from submission until the date of issuance of a final order. This dual approach balances due process concerns in proceedings where alleged violations of law are litigated against the Commission's decisionmaking needs, by barring ex parte communications only after the matter is "submitted" for decisionmaking purposes, while carefully restricting such communications prior to submission.

At this time, we do not extend the prohibition to other covered proceedings, even in the days prior to issuance of a final order, as suggested by TURN/UCAN, Sprint, and BAT. In appropriate circumstances involving covered proceedings under Rule 1.3(b), the Commission may invoke Rule 1.6 and impose a prohibition upon further ex parte communications for some period prior to issuance of a final order. If ex parte communications occur just prior to issuance of a final order, it may be necessary to postpone final Commission action in order to accommodate the necessary disclosure and any opportunity to respond, but this is a matter which we will handle as it arises.

The rule we issue today is applicable to all covered proceedings pending on the date it is effective, and to all covered proceedings commenced on or after that date. However we will make our final order adopting this proposal (which we will consider at

the conclusion of the OAI process) effective within 30-60 days thereafter in order to allow time for implementation efforts, including staffing augmentation which is necessary to properly and efficiently administer this new rule.

2. Who is Covered Under the Proposed Rule

Several parties have addressed the question of who is a decisionmaker and who is a party under the proposed rule. Most of the comments focus on the question of our staff. For example, CWA, San Gabriel, and SJWC, are concerned about CACD Water Branch's role as an advocate in certain proceedings. Others such as Asmiow, believe that if the Commission bans ex parte communications, the ban should not extend to CACD, although CACD should not engage in ex parte communications in any event. For its part, CACD wishes to be excluded from whatever ex parte communication rules the Commission adopts (CACD Comments, p. 10). DRA believes CACD and the Transportation Division must be covered when acting as an advocate. DRA also supports a more comprehensive definition of the term "party" vis-a-vis DRA.

As stated previously, our primary concern is to achieve an appropriate balance between fairness and due process requirements and legitimate decisionmaking needs, including access to staff. Our rule adopts a narrow definition of "decisionmaker". It covers Commissioners' personal advisors, but does not cover other advisory staff such as CACD. On the other hand, the rule adopts a comprehensive definition of "party" which effectively includes all DRA staff members as well as those members of other staff organizations and divisions who are acting in an advocacy role in contested proceedings subject to this rule. Thus, the rule encompasses within the definition of "party" the CACD Water Branch acting in an advocacy role; however, it covers only those members of CACD Water Branch who are appearing as advocates or witnesses for a particular party in contested proceedings subject to the rule. Similar treatment is accorded only those Transportation

Division staff members or other staff members who appear as advocates or witnesses in contested proceedings subject to the rule. Inclusion of the term "agents" in the party definition is designed to ensure that other staff members of CACD or Transportation Division, who are neither advocates nor witnesses in a proceeding covered by this rule, will not circumvent this rule. However, specifically excluded from the definition of "Commission Staff of Record" for purposes of determining party status under this rule, are the Executive Director, the General Counsel, and Division Directors (except the director of the staff division created pursuant to § 309.5), who regularly advise the Commission on a variety of matters, and who perform functions critical to ensuring the flow of expert advice to Commissioners.

Finally, in response to an issue raised by the Public Advisor, the proposed rule specifically provides that a member of the public, who is not acting as the agent or employee of a party, is not a "party".

3. Reporting

In connection with disclosure provisions, several parties favor imposing the reporting obligation on the decisionmaker (e.g., TURN, UCAN, Sprint). Other parties favor disclosure by both the decisionmaker and the party (e.g., DRA, CPIL). Still other parties favor disclosure by the initiator of the contact (e.g., GTEC, Pacific Bell). CCTA suggests that decisionmakers should have the opportunity to correct factual errors in disclosure notices submitted by parties.

After assessing the comments, we opt to follow our practice in previously adopted ad hoc ex parte rules, and we impose the reporting obligation on the party.

In order to make such a report as simple and straightforward as possible, we require that notices of ex parte communication be filed in the Commission's San Francisco Docket office within three working days, and be provided simultaneously to

the assigned ALJ. We are dispensing with the service requirement set forth in Rule 4.5, in order to minimize the reporting burden. However we carefully specify the type of information to be included in the notice, consistent with the Assigned Commissioner's earlier recommendation, in order to make the notice complete and adequate to inform other parties of the nature and extent of the communication. In its notice, the party should not characterize or represent the decisionmaker's communication, if any, but rather should describe only the party's communication.

The filing of a notice will be reported promptly thereafter in the Commission's Daily Calendar, and parties may obtain a copy of the notice from the Commission's Central File room or from the filing party, who has an obligation to provide it to the requesting party without delay. To the extent a party wishes to respond to an ex parte communication, the party may do so. The parties must bear in mind, however, that the decisionmaker is bound neither by this rule nor by fairness of process to accord "equal time" to every party who wishes to engage in off-the-record communications.

4. Definitions

Several parties suggest the need to more carefully pinpoint when a proceeding commences and when a proceeding is submitted. Rule 1.1(a) defines commencement of a proceeding as the tender to the Commission of a notice of intention, the filing with the Commission of an application or complaint or the adoption by the Commission of an OII. The proposed rule also defines submission of a proceeding as "described in Rule 77 of the Commission's Rules of Practice and Procedure."

We have also defined "covered proceedings" in a manner which clearly apprises the parties of the proceedings subject to the proposed rule. Our rule differs from the Assigned Commissioner's proposal in that it is effective from commencement of a covered proceeding; therefore, we have considered whether

proceedings should be covered during the period between commencement and the filing of an answer or a protest or request for hearing. We have resolved this issue by bringing within the scope of the rule notices of intention, applications, and complaints, during the period between commencement and the filing of an answer or protest or denial of a request for hearing. If an answer or protest is withdrawn, the proceeding ceases to be a "covered proceeding." OIIs are always "covered proceedings", except when consolidated with rulemakings, as discussed above.

5. Sanctions

Several parties including Pacific Power and Pacific Bell, have urged that if the Commission adopts sanctions, it should do so with specificity. We have addressed this concern in Rule 1.5, where we confirm our authority to impose such penalties and sanctions or to issue other appropriate orders to ensure the integrity of the formal record and to protect the public interest. However, we do not propose more specific provisions at this time. We are concerned that adoption of specific sanction provisions may result in their abuse as a weapon by parties against adversaries in contested proceedings. We believe that the general language contained in Rule 1.5 is sufficient for enforcement purposes, and provides the Commission the enforcement flexibility it needs.

Summary

In drafting today's decision, we have been keenly aware of the fact that our ex parte rule must strike a delicate balance. The rule must be effective in ensuring that no party has unfair access to decisionmakers; only such a rule can promote both the reality and appearance of due process, as well as public confidence in our decisionmaking process. However, in so doing, it must not impede our ability to obtain critical input necessary to fulfill our obligation to act affirmatively in the public interest; our role is not merely to respond passively to the issues presented by parties in our proceedings. The public interest is not served if

the Commission is deprived of the knowledge and expertise it needs to function effectively.

Today we issue a rule which we believe will not impede our ability to make sound decisions. It is a rule that favors more access to knowledgeable sources, including Commission staff expertise, than some would prefer. However, it is a rule which also contains strict disclosure and clearly defined prohibition provisions, coupled with other features which are designed to address the fairness and due process concerns of all parties. In addition, the rule emphasizes the Commission's obligation to render its decision based on the evidence of record in its proceedings. In sum, while our rule will not please everyone, it attempts to strike a reasonable balance in an area of great controversy and difficulty.

Caveat

What we announce today represents our collective judgement, after extensive consultation with our staff, of an ex parte rule best tailored to the needs and responsibilities of this Commission. While we believe that it will function optimally in the public interest we cannot be certain of that outcome. In the final analysis, we will need that perspective which can only be developed through experience. If our interaction with the parties and the public suggests that features of the rule should be modified, it will be our responsibility to do so.

Finding of Fact

The proposal contained in Appendix B represents a realistic balancing of competing goals of ensuring that the Commission has adequate information to discharge its decisionmaking obligations and that the due process rights of parties are maintained.

Conclusion of Law

On completion of the Office of Administrative Law (OAL) publication process, the rule contained as Appendix B should be

placed on the Commission's Agenda for adoption as the final rule governing ex parte communications.

INTERIM ORDER

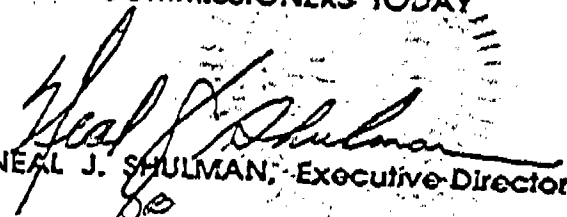
IT IS ORDERED that the Executive Director, in coordination with the Administrative Law Judge Division, should transmit a copy of this order to the Office of Administrative Law in accordance with the applicable provisions of the Government Code.

This order is effective today.

Dated July 31, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY


NEAL J. SHULMAN, Executive Director

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LTC/f.s

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own)
Motion for purposes of compiling the)
Commission's rules of procedure in)
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Code Section 322 and considering)
changes in the Commission's Rules)
of Practice and Procedure.)

R.84-12-028
(Filed December 19, 1984)

ASSIGNED COMMISSIONER'S RULING

After careful consideration, I believe the time has come to revisit the question of adoption of a generic rule governing ex parte contacts in Commission proceedings. This is not a new issue in this rulemaking docket. In 1986 the Commission held workshops, drafted a generic rule, and solicited comments, but deferred final action in order to gain experience with its newly adopted rules governing "Decisions and Proposed Reports" (Rules 77 through 77.5). Since that time, the Commission has adopted ex parte rules in specific proceedings on a case-by-case basis on its own motion or in response to requests by parties.

For a variety of reasons, we now wish to consider a change to the Commission's previous case-by-case approach. We now have extensive experience with the proposed decision/comments process, and it is difficult to see how an ex parte rule would not complement that process. Indeed, parties should address how the Public Utilities Code § 311 comments process might be improved if a generic ex parte rule, along the lines of that proposed in this ruling, is adopted. In addition, as we consider the introduction of competition to many of the industries we regulate, our proceedings are becoming increasingly complex and controversial. Given the high stakes, the participation of many parties representing diverse interests is not unusual. It is important that the Commission maintain both the full appearance and reality of due process and fair access for all parties appearing before it.

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Attached to this ruling is a proposed generic rule governing ex parte communications in defined Commission proceedings. Parties should review the proposed rule and file comments in this docket on or before April 22, 1991. I have requested the Administrative Law Judge Division to review the comments and to make a recommendation for the consideration of the full Commission.

In preparing their written comments, the parties should focus on the following issues, as well as any others they believe the Commission should consider:

1. Scope of the Ex Parte Rule

The proposed rule's primary mechanism is public disclosure of substantive (not procedural) communications BETWEEN Commissioners, Commissioners' advisors, the Chief Administrative Law Judge, Assistant Chief Administrative Law Judges, or any assigned Administrative Law Judge AND any employee, counsel, or agent of any party to any contested proceeding, except rulemaking proceedings and investigations on the Commission's own motion, excluding enforcement proceedings, following submission of a proceeding.

Parties should comment on the proposal's disclosure mechanism, as well as its differentiation between substantive and procedural communications. Parties may wish to comment on the issue of whether ex parte communications should be subject to disclosure from the commencement of a proceeding. To that end, a definition of "commencement of a proceeding" is included in the proposed rule.

In addition, parties should address the proposal's coverage of "contested proceedings" and enforcement proceedings, and its exclusion of rulemaking and other investigations initiated on the Commission's own motion.

Finally, parties should address the adequacy of the decisionmaker and party definitions. The proposed rule covers the

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Division of Ratepayer Advocates, but does not cover Commission Advisory and Compliance Division (CACD) staff members who may advise decisionmakers; parties should indicate whether they believe CACD staff members should be subject to the ex parte rule in certain circumstances, and if so, under what conditions. CACD should comment on this issue as well.

2. Reporting Mechanism

The proposed rule places the reporting obligation on the party, whether the communication is initiated by the party or the decisionmaker. The proposal also outlines a reporting mechanism which requires a docket office filing and service of the filing on all parties, within 5 working days of the communication. Since it is desirable to make the reporting obligation as simple, effective, and nonburdensome as possible given the strict time limits involved, parties should comment on the proposed reporting mechanism, including its allowance of the right to effective written or oral rebuttal, with these goals in mind.

Although the proposed reporting mechanism is patterned after rules the Commission has previously imposed on a case-by-case basis, it is worthwhile to consider alternative reporting mechanisms. For example, "Notices of Ex Parte Communication" might be filed with the Docket Office but not served on parties. Under this procedure, the Notice would appear in the Daily Calendar, and would be available to parties for review in the Commission's Docket Offices in San Francisco, Los Angeles, and San Diego.

Parties should also comment on the adequacy of the information to be included in the Notice of Ex Parte Communication, and should suggest alternatives, if they believe the proposed rule can be improved in this area.

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3. Definitions

Parties may also file comments on the adequacy of the definitions included in the proposed rule.

IT IS RULED that parties shall file an original and twelve copies of their comments on the proposed generic ex parte rule attached to this ruling, with certificate of service, on or before April 22, 1991. The Commission Advisory and Compliance Division shall also follow this procedure in filing its comments. A copy of the current service list is attached to this ruling to assist the parties in fulfilling their service obligations.

Dated March 22, 1991, at San Francisco, California.

/s/ PATRICIA M. ECKERT
Patricia M. Eckert
Assigned Commissioner

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Proposed Ex Parte Rule

a. No Decisionmaker shall have any oral or written communication with any Party to any contested proceeding, except rulemaking proceedings conducted pursuant to Article 3.5 of the Commission's Rules of Practice and Procedure, and investigations on the Commission's own motion, excluding enforcement proceedings, concerning any substantive issue involved in the proceeding, unless the communication is reported within 5 days. Communications limited to scheduling and procedural inquiries need not be reported. This Rule shall apply from the submission of a proceeding to the Commission to the date of issuance of a final order in that proceeding. It does not apply to communications made prior to submission.

b. Reportable communications shall be reported by the party, whether the communication was initiated by the party or decisionmaker. They shall be reported within 5 working days of the communication by filing a "Notice of Ex Parte Communication" (Notice) with the Commission's Docket Office (pursuant to the applicable Rules for filing pleadings), complete with a certificate of service on all parties. The Notice shall include the following information:

- (1) the date, time and location of the communication, and whether it was oral, written or a combination;
- (2) the identity of the recipient(s) and the person(s) initiating the communication;
- (3) a full description of the communication and its content, to which shall be attached a copy of any written material or text used during the communication.

c. Any party shall have the right to effective written or oral rebuttal of any of the matters raised in such communication, as prescribed by the Administrative Law Judge.

d. For purposes of this Rule, the following definitions apply:

- (1) "Ex parte communication" means a written or oral communication on any substantive issue in a contested proceeding, between a party and a

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decisionmaker as described in paragraph a. above, outside the hearing room and outside the presence of other parties;

- (2) "Decisionmaker" means any Commissioner, Commissioner's Advisor, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, or any Administrative Law Judge assigned to the proceeding;
- (3) "Party" means any interested party, applicant, respondent, complainant, defendant, intervenor, protestant, or Commission staff of record in a proceeding (but not other members of the Commission staff), and their agent(s) or employee(s).
- (4) "Commencement of a proceeding" is the tender to the Commission of a notice of intention, the filing with the Commission of an application or complaint, or the adoption by the Commission of an order instituting investigation.
- (5) "Submission of a proceeding" is as described in Rule 77 of the Commission's Rules of Practice and Procedure.

e. The Commission may also impose such penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest.

f. In addition to the above policy, the Commission, or the assigned Administrative Law Judge with the approval of the assigned Commissioner, may issue a ruling governing ex parte contacts tailored to the needs of any specific proceeding.

(END OF APPENDIX A)

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Article 1.5 Ex Parte Communications
In Commission Proceedings

1.1 Definitions

For purpose of this Article, the following definitions apply:

- (a) "Commencement of a proceeding" is the tender to the Commission of a notice of intention, the filing with the Commission of an application or complaint, or the adoption by the Commission of an order instituting investigation (OII).
- (b) "Commission Staff of Record" means (i) all members of the staff organization or division created pursuant to Public Utilities Code § 309.5, except those temporarily assigned to other staff organizations or divisions; and (ii) members of other staff organizations or divisions not specifically covered under § 309.5, who are appearing as advocates or as witnesses for a particular party in covered proceedings, but excluding other members of such staff organizations or divisions. The Executive Director, General Counsel, and Division Directors (except the director of the staff division created pursuant to § 309.5) are not Commission Staff of Record.
- (c) "Covered Proceeding" is any formal proceeding other than a rulemaking, or an OII consolidated with a rulemaking to the extent that the OII raises the identical issues raised in the rulemaking. An OII is otherwise a covered proceeding. Except for OIIs, if no timely answer or protest or request for hearing is filed in response to a pleading initiating a covered proceeding, the proceeding ceases to be covered. If an answer or protest is withdrawn, the proceeding ceases to be a covered proceeding. However, if there has been a request for hearing, the proceeding remains covered until the request has been denied.

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- (d) "Date of Issuance of a Final Order" is (i) the date when the Commission mails the decision after rehearing or denying rehearing; or (ii) where the period to apply for rehearing has expired and no application for rehearing has been filed, the last date for filing an application for rehearing under PU Code Section 1731. However, where a decision does not close a docket, there has been no issuance of a final order with respect to any issues that remain pending in the proceeding.
- (e) "Decisionmaker" means any Commissioner, Commissioner's Personal Advisor(s), the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, and any Administrative Law Judge assigned to the proceeding.
- (f) Enforcement-related proceedings are those OIIs and complaint proceedings where (i) the order instituting investigation or (ii) the complaint raises the alleged violation of any provision of law, or of any order or rule of the Commission. Complaints solely challenging the "reasonableness of any rates or charges" pursuant to Public Utilities Code § 1702 are not enforcement-related proceedings.
- (g) "Ex parte communication" means a written or oral communication on any substantive issue in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication.
- (h) "Party" means any applicant, protestant, respondent, petitioner, complainant, defendant, interested party who has made a formal appearance in the proceeding, or Commission staff of record in covered proceedings, and their agent(s) or employee(s). A member of the public who is not acting as the agent or employee of a party is not a party.

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- (i) "Submission of a proceeding" is as described in Rule 77 of the Commission's Rules of Practice and Procedure.

1.2 The Record

The Commission shall render its decision based on the evidence of record. Any notice filed pursuant to Rule 1.4 is not a part of the record of the proceeding. The record is closed for the receipt of evidence after the proceeding is submitted under Rule 77, unless it is reopened under Rule 84.

1.3 Applicable Proceedings

- (a) In any enforcement-related proceeding, no decisionmaker shall have any oral or written ex parte communication with any party to the proceeding concerning any substantive issue involved in the proceeding, unless the communication is reported within three working days in accordance with the reporting requirements set forth in Rule 1.4. Communications limited to the hearing schedule, location, and format, filing dates and identity of parties are procedural inquiries which need not be reported. This rule shall apply from the commencement of such proceeding to its submission to the Commission. After such proceeding has been submitted to the Commission, and until the date of issuance of a final order in such proceeding, ex parte communications between parties and decisionmakers concerning any substantive issue involved in the proceeding are prohibited.
- (b) In all other covered proceedings, any oral or written ex parte communication between a decisionmaker and any party to the proceeding concerning any substantive issue involved in the proceeding, shall be reported within three working days, in accordance with the reporting requirements set forth in Rule 1.4. These reporting requirements shall apply from the commencement of the proceeding to the date of issuance of a final order in that proceeding.

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- (c) Where proceedings covered by subsections (a) and (b) above are consolidated, the ALJ shall by ruling prior to the date of submission determine the extent to which the prohibition provisions of subsection (a) shall apply.

1.4 Reporting Ex Parte Communications

- (a) Reportable communications shall be reported by the party, whether the communication was initiated by the party or the decisionmaker. They shall be reported within three working days of the communication by filing (but not serving) the original and 12 copies of a "Notice of Ex Parte Communication" (Notice) with the Commission's San Francisco Docket Office. Such Notice shall be provided simultaneously to the assigned ALJ. The Notice shall include the following information:
- (1) the date, time and location of the communication, and whether it was oral, written or a combination;
 - (2) the identity of the recipient(s) and the person(s) initiating the communication, as well as the identity of any persons present during such communication;
 - (3) a description of the party's, but not the decisionmaker's, communication and its content, to which shall be attached a copy of any written material or text used during the communication.
- (b) The filing of a Notice will be reported promptly thereafter in the Commission's Daily Calendar.
- (c) Parties may obtain a copy of the Notice and any attachments from the Commission's Central File room or from the filing party, who must provide it to the requesting party without delay.

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1.5 Sanctions

The Commission may impose such penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest.

1.6 Specific Proceedings

In augmentation of the provisions of this Article, the Commission, or the assigned Administrative Law Judge with the approval of the assigned Commissioner, may issue an ex parte communications ruling tailored to the needs of any specific proceeding.

1.7 Applicability

This article applies to all covered proceedings (as set forth in Rule 1.3) pending on the date it is effective, and to all covered proceedings commenced on or after the date it is effective.

(END OF APPENDIX B)