

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Transmission System Pipelines.

I.11-02-016
(Filed February 24, 2011)
(Not Consolidated)

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company's Natural Gas Transmission Pipeline System in Locations with Higher Population Density.

I.11-11-009
(Filed November 10, 2011)
(Not Consolidated)

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company to Determine Violations of Public Utilities Code Section 451, General Order 112, and Other Applicable Standards, Law, Rules and Regulations in Connection with the San Bruno Explosion and Fire on September 9, 2010.

I.12-01-007
(Filed January 12, 2012)
(Not Consolidated)

Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms.

Rulemaking 11-02-019
(Filed February 24, 2011)

**MOTION OF THE DIVISION OF RATEPAYER ADVOCATES FOR
CLARIFICATION OF *EX PARTE* RULES**

I. INTRODUCTION

In accordance with Rule 11.1 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), the Division of Ratepayer Advocates (“DRA”) hereby requests clarification of the Commission’s *ex parte* rules with regard to communications between financial industry representatives and Commissioners’ offices. We request clarification because we are concerned that off-the-record communications with financial industry representatives that have the potential to influence decisionmakers in important pending cases may have occurred, or may occur, and if so should be reported (for ratesetting cases) or should not be permitted at all (for adjudicatory cases). Our immediate concern is with respect to the following proceedings: three related enforcement proceedings against Pacific Gas and Electric Company (“PG&E”), I. 11-02-016, I.11-11-009, and I. 12-01-007 (collectively, the “San Bruno Investigations”), and R. 11-02-019 (“PSEP Rulemaking”). The San Bruno Investigations are adjudicatory proceedings; the PSEP Rulemaking is categorized as ratesetting. DRA requests a ruling or rulings clarifying the application of the *ex parte* rules in each of these proceedings.

II. DISCUSSION

A. The Rules Regarding *Ex Parte* Communications

The rules governing *ex parte* communications with Commissioners, advisors, and other decisionmakers are set forth in Public Utilities Code §§ 1701.2, 1701.3, 1701.4¹ and in Article 8 of the Commission’s Rules of Practice and Procedure (“Rules”). In adjudicatory proceedings, *ex parte* communications are prohibited. § 1701.2(b); Rule 8.3(b). In ratesetting proceedings, *ex parte* communications are permitted subject to a number of conditions and reporting requirements. § 1701.3(c); Rule 8.3(c).

The Rules define an *ex parte* communication as a written or oral communication that:

¹ Unless otherwise noted, all further statutory references are to the Public Utilities Code.

“(1) concerns any substantive issue in a formal proceeding, (2) takes place between an interested person and a decisionmaker, and (3) does not occur in a public hearing, workshop, or other public forum noticed by a ruling or order in the proceeding, or on the record of the proceeding.” Rule 8.1(c).

The Commission’s *ex parte* rules are not limited to the active parties in a proceeding. Rule 8.1(d) defines an “interested person” as:

(1) any party to the proceeding or the agents or employees of any party, including persons receiving consideration to represent any of them;

(2) *any person with a financial interest ... in a matter at issue before the Commission*, or such person’s agents or employees, including persons receiving consideration to represent such a person; or

(3) a representative acting on behalf of any formally organized civic, environmental, neighborhood, business, labor, trade, or similar association who intends to influence the decision of a Commission member on a matter before the Commission, *even if that association is not a party to the proceeding*. (Emphasis added)

The ban on *ex parte* communications in adjudicatory cases is required not only by § 1701.2, and the Commission’s Rules, but also by due process. Commission procedures must comport with due process as well as any applicable statutory requirements.² One of the elements of due process is “record exclusivity.” That is, “[t]he decision of the agency head should be based on the record and not on off-the record discussions from which the parties are excluded. ... The right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties.”³ In short, due process requires that

² Cal. Const., Art. XII, § 2 provides in relevant part: “Subject to statute and due process, the commission may establish its own procedures.”

³ *Department of Alcoholic Beverage Control v. Quintanar* (2006) 40 Cal. 4th 1, 11 (*quotations and citations omitted*; applying rules governing adjudicatory proceedings under the Administrative Procedure Act); *see generally*, Charlene Simmons, *Ex Parte Communications: The Law and Practices at Six California Boards and Commissions*, California Research Bureau (2008). Commission hearings are not
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decisions in adjudicatory cases be made on the basis of the evidence *on the record* and not on off-the-record information. The “record exclusivity” requirement applies to Commission procedures pursuant to § 1705, which provides a right to be heard and to introduce evidence and requires that Commission decisions “contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decisions.” In sum, Commission decisions must be based on the record, *and are not supposed to be influenced by off-the-record communication with “interested persons.”*

B. When Are Communications Between Decisionmakers and Representatives of Financial Institutions “*Ex Parte* Communications”?

It is no secret that representatives of ratings agencies, industry analysts, and financial institutions (“Financial Industry Representatives”) routinely communicate with Commissioners and their advisors regarding the investor-owned utilities this Commission regulates. Often these industry representatives merely seek general information about regulatory policies and priorities, the impact of proceedings that are no longer pending, or Commission decisions that have already been made. At times, however, they may also have a specific interest in “a matter pending before the Commission,”⁴

To be clear, we are not suggesting that inquiries from Financial Industry Representatives are categorically *ex parte* communications. There may be times, however, when Financial Industry Representatives (or their clients) have a financial interest in matters at issue before the Commission, or views on what would be a “good” or “bad” outcome in a proceeding from their perspective or from the perspective of their financially interested clients. Under those circumstances Financial Industry

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subject to the Administrative Procedure Act, but as noted above, the Constitution requires that Commission procedures comport with due process.

⁴ Rule 8.1 (d).

Representatives, or their clients, may be “interested persons” as defined by the *ex parte* rules (Rule 8.3(d) (2) or (d) (3), quoted above on page 3).

For example, Financial Industry Representatives may hope that the Commission authorizes a rate of return at a certain level in the Cost of Capital proceeding. Or they may have an opinion on an issue in a ratemaking proceeding that could set an important precedent. As we all know, an opinion can be conveyed in the form of a question. Communication of opinions or concerns may cross the line, intentionally or inadvertently, into an *ex parte* communication on matters pending before the Commission.

DRA is concerned that communications of this nature may occur because of insufficient awareness that the Commission’s *ex parte* rules apply not only to parties formally participating in a proceeding, but to other “interested persons” as well. A ruling clarifying this point and raising awareness is needed. A proposed ruling is attached to this Motion.

C. *Ex Parte* Communications May Have Occurred In The San Bruno Investigations Regarding The Amount Of The Penalty

The evidence in the San Bruno Investigations reveals that Financial Industry Representatives from Bank of America/Merrill Lynch, Deutsche Bank Securities, and Morgan Stanley, among others, all report having met with Commissioners and/or their advisors and discussed the San Bruno Investigations.⁵ All three sets of Financial Industry Representatives came away from these visits expecting the Commission to impose a fine of about \$500 million in the San Bruno Investigations.⁶ All three have disclosed financial interests in PG&E.⁷ PG&E’s witness Mr. Fornell, author of the Wells Report,⁸

⁵ Jt. DRA Exs. 80, 81, 82 and Jt 14 RT 1526-1536. Unless otherwise noted, citations to transcripts and exhibits are from the record of the San Bruno Investigations.

⁶ Jt. DRA Exs. 80, 81, 82.

⁷ Jt. DRA Exs. 80, 81, 82.

⁸ Jt. Ex. 67, Wells Report.

conceded on cross examination that many of the Financial Industry Representatives whose opinions he cited in the Wells Report have financial interests in PG&E.⁹ Among the analyst reports he cited are reports from JP Morgan, Bank of America/Merrill Lynch, Morgan Stanley, and Barclays.¹⁰

Given that: (1) *ex parte* communications with decisionmakers are prohibited in adjudicatory cases;¹¹ (2) some, if not all, of the Financial Industry Representatives who reported discussing the San Bruno Investigations with Commission offices represent firms or clients with a financial interest in PG&E Corporation;¹² and (3) the size of the fine and other penalties the Commission may impose in the San Bruno Investigations is a substantive issue in all three investigations, it appears that there may have been improper *ex parte* communications in violation of Public Utilities Code § 1701.2 and the Commission's *ex parte* rules.¹³

Improper *ex parte* communications can have consequences. In his testimony, Mr. Fornell cautioned the Commission against imposing a fine that substantially exceeds “investor expectations.” On cross-examination Mr. Fornell agreed that published reports like Morgan Stanley's October 4, 2012, report entitled “California Visit Takeaways,”¹⁴ cited in the Wells Report, are widely read in the investment community and likely have a ripple effect on expectations.¹⁵ Every party other than PG&E has argued that the Commission should determine the level of penalties based on other factors, but assuming

⁹ Jt. 14 Rt. 1535-1536.

¹⁰ Jt. Ex. 67, Wells Report, pp. 19-20.

¹¹ Pub. Utils. Code § 1701.2 (b).

¹² Wells, and the other companies opining on what the “market” expects for a fine amount all have financial interests in PG&E and the outcome of these proceedings. See Jt. 14 RT 1443: 23-24 (“... Wells Fargo owns about \$28 million worth of PG&E shares.”); Jt. 14 RT 1535-1536 and Jt. 14 RT 1536:14-20 (a number of investment companies estimating the expected fine have disclosed a financial interest in PG&E and other California utilities). Owning PG&E stocks or bonds is only one form of financial interest. The analyst reports upon which Mr. Fornell relies disclose a variety of other types of business dealings with PG&E.

¹³ Commission Rules of Practice and Procedure, Article 8.

¹⁴ Jt. Ex. DRA-82.

¹⁵ Jt. 14 RT 1531.

for the sake of argument that the Commission does consider “investor expectations” in determining the level of penalties, it should consider the possibility that the source of the rumor among investment analysts that the fine in the San Bruno investigations is likely to be approximately \$500 million (according to the Wells Report) was improper *ex parte* communications with Commission offices. Further, if any decisionmakers expressed opinions to analysts on the size of the fine, the question arises whether those decisionmakers may have prejudged the outcome of these cases.

This example alone demonstrates the need for a ruling clarifying the *ex parte* rules as they apply to Financial Industry Representatives in these proceedings.

D. If *Ex Parte* Communications Have Occurred, At A Minimum The Parties Should Be Notified

For the reasons just discussed, the Commission should clarify the application of the *ex parte* rules to Financial Industry Representatives to ensure compliance *going forward*. But what should be done to address improper communications that may have already occurred?

At a minimum, all interested parties who have engaged in improper communications should be required to provide notice of those communications as provided in Rule 8.4. Notice should be required both for *ex parte* communications that are permitted with notice under the rules (in the ratesetting case), and for *ex parte* communications that should not have occurred in the adjudicatory proceedings.

DRA further recommends that in addition to clarifying the application of the *ex parte* rules as requested in this Motion, the Commission direct the Executive Director to serve the Financial Industry Representatives identified above with notice of their obligation regarding *ex parte* communications going forward, and of their obligation to provide notice of previous communications consistent with the ruling on this Motion. Interested parties who engaged in prior improper *ex parte* communications should be provided an amnesty period of ten business days from issuance of the ruling on this Motion. After that time, any “interested party” found to have violated the Commission’s *ex parte* rules, or who failed to provide notice of prior violations should be fined pursuant

to § 2111. Further, for prior *ex parte* communications in a ratesetting proceeding that are noticed pursuant to the ruling on this Motion, equal time should be granted intervenors consistent with Rule 8.3(c)(2).

III. CONCLUSION

DRA respectfully requests that the Commission issue a ruling clarifying the applicability of the *ex parte* rules to the above-captioned proceedings as discussed in this Motion. A proposed ruling is attached.

Respectfully submitted,

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May 14, 2013

**PROPOSED RULING IN RESPONSE TO MOTION OF THE DIVISION OF
RATEPAYER ADVOCATES FOR CLARIFICATION OF *EX PARTE*
REPORTING REQUIREMENTS**

On May 14, 2013 the Division of Ratepayer Advocates (DRA) served its “Motion Of The Division Of Ratepayer Advocates For Clarification Of *Ex Parte* Reporting Requirements” (DRA Motion). The requested clarification is provided as follows.

In ratesetting proceedings, when *ex parte* communications are permitted, they must be noticed pursuant to Rule 8.4 of the Commission’s Rules of Practice and Procedure (Rules). Rule 8.3(c). Further, when a decisionmaker grants a meeting with an interested party, other parties are entitled to equal time pursuant to Rule 8.3(c)(2).

Ex parte communications are prohibited in adjudicatory cases. Rule 8.3(b).

DRA is correct that the *ex parte* rules are not limited to parties participating formally in Commission proceedings. Persons and entities who are not formally participating as parties but who have a financial interest in the proceeding, or who represent such interests, are “interested parties” subject to the *ex parte* rules. Rule 8.1(d).

The amount of the penalties the Commission may impose in the three San Bruno Investigations captioned-above is a substantive issue.

The DRA Motion provides sufficient evidence to suggest that improper *ex parte* communications may have occurred between decisionmakers and financial industry representatives who have a financial interest in the outcome of the above-captioned proceedings.

Improper *ex parte* communications jeopardize the integrity of proceedings. Due process requires, at a minimum, that any improper *ex parte* communications be disclosed.

The DRA Motion has shown good cause to issue a ruling clarifying the *ex parte* rules, and to take action to address prior and future violations in these proceedings.

Accordingly, the DRA Motion is granted.

IT IS RULED THAT the Motion Of The Division Of Ratepayer Advocates For Clarification Of *Ex Parte* Reporting Requirements is granted.

1. Interested parties or their representatives in these proceedings, including financial industry representatives, shall comply with the *ex parte* rules, consistent with the interpretation of those rules set forth herein.
2. Interested parties or their representatives who have engaged in unreported *ex parte* communications in these proceedings shall, within 10 business days, file notices of prior *ex parte* communications containing the information required by Rule 8.4 of the Commission's Rules of Practice and Procedures (Rules) and serve the notices on the service lists for these proceedings. Interested parties who report *ex parte* communications in compliance with this Paragraph will not be subject to sanctions for the noticed violations.
3. Those entities who have engaged in unreported *ex parte* communications in these proceedings and who fail to comply with Paragraph 2 may be subject to a fine pursuant to § 2111.

4. Where prior *ex parte* communications in a ratesetting proceeding are noticed pursuant to Paragraph 2, equal time shall be granted to intervenors consistent with Rule 8.3(c)(2).
5. The financial industry representatives listed below may be “interested parties” as defined by the Commission’s rules. The Executive Director shall serve notice of this Ruling on those representatives. While they are on the service list for at least one of the above-captioned proceedings, additional notice is appropriate:

Naaz Khumawala
Bank Of America/Merrill Lynch
700 Louisiana, Suite 401
Houston, TX 77002

Kirby Bosley
JP Morgan Ventures Energy Corp.
700 Louisiana St. Ste. 1000, 10th Floor
Houston, TX 77002

Paul Gendron
JP Morgan Ventures Energy Corp.
700 Louisiana St. Ste. 1000, 10th Floor
Houston, TX 77002

Paul Tramonte
JP Morgan Ventures Energy Corp.
700 Louisiana St. Ste. 1000, 10th Floor
Houston, TX 77002

Rajeev Lalwani
Morgan Stanley
1585 Broadway, 38th Floor
New York, NY 10036

Stephen Byrd
Morgan Stanley
1585 Broadway, 38th Floor
New York, NY 10036

Anjani Vedula
Deutsche Bank
60 Wall Street
New York, NY 10005

Jonathan Arnold
Deutsche Bank
60 Wall Street
New York, NY 10005

Lauren Duke
Deutsche Bank Securities Inc.
60 Wall Street
New York, NY 10005