Report to the California Public Utilities Commission Regarding Ex Parte Communications and Related Practices

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Part III: Issues Identified in Interviews

INTRODUCTION

Strumwasser & Woocher LLP has been retained by the Executive Director of the California Public Utilities Commission (CPUC or Commission) as outside attorneys to provide independent advice and counsel on CPUC ex parte rules and practices. This retention comes in response to revelations of allegedly improper private meetings between certain Commissioners and regulated utilities. However, our task is not to investigate the allegations regarding past practices, except as necessary to generally inform our advice to the Commission.

We have been asked to prepare this Report, assessing current laws and practices governing ex parte communications—generally speaking, private, off-the-record communications between agency decision-makers and interested parties regarding a matter that is before the agency for decision—and to compare CPUC ex parte rules with what would constitute best practices regarding ex parte communications in utility regulation. Based on our findings, we have been asked to identify in this Report what changes we recommend in statutory law, Commission Rules of Practice and Procedure, and prevailing practices of and before the CPUC to ensure fairness to parties appearing before the Commission and transparency and accountability to the public.

Our Report addresses these topics in four parts. **Part I** contains the analysis of existing law. We review the statutes and regulations governing ex parte communications before the CPUC, examine corresponding laws of other jurisdictions, and compare the CPUC statutes and regulations with those of the other jurisdictions. In **Part II** we examine actual ex parte practices before the CPUC. Based on data obtained from notices filed on the Commission's website by parties to ratesetting cases, we provide a quantitative characterization of the extent and nature of noticed ex parte communications over the past roughly 22 years. We then place ex parte communications within the context of the CPUC's proceedings. **Part III** provides the results of an interview process we undertook to hear the experiences and opinions of people with a stake or an interest in CPUC decision-making, including representatives of regulated utilities, intervenor groups who generally (but not always) appear in CPUC ratesetting cases in opposition to the positions of utilities, companies and industry groups who generally oppose specific utilities' positions, legislators and legislative staff, public critics of CPUC ex parte practices, CPUC staff (administrative law judges (ALJs), attorneys, and technical staff), and the CPUC Commissioners and their staffs. Then, in **Part IV**, we present our analysis of this information and our recommendations for changes to statutes, CPUC rules, and Commission practices.

EXECUTIVE SUMMARY OF FINDINGS AND RECOMMENDATIONS

Legal Review

The Public Utilities Code distinguishes between three categories of proceedings conducted by the CPUC and prescribes different procedures for each category, including different rules governing ex parte communications. *Adjudication cases*—generally encompassing applications by a utility for certain kinds of authorizations, complaints against utilities other than complaints about rates, and enforcement cases brought by the CPUC against a utility—are conducted as adversarial hearings under rules similar to those applicable to most California administrative agencies that perform similar functions. The Public Utilities Code prohibits any

ex parte communications in adjudication cases. *Quasi-legislative cases*—generally cases that set future policy or adopt prospective rules affecting an entire industry—are conducted using formal hearings with identified parties. Ex parte communications are authorized in quasi-legislative cases without restriction. Between those two categories are *ratesetting cases*—cases that establish rates and mechanisms used to set rates—which are conducted in hearings employing formal procedures closely resembling those used in adjudication cases. The Public Utilities Code permits ex parte communications under a complex set of rules that require limited disclosures to other parties of the fact that a communication occurred and the substance of what was communicated, and that in some cases permit other parties to have their own ex parte communications to respond.

Adjudication cases. Our review of other jurisdictions' laws led us to find that the CPUC's rules governing ex parte communications in adjudication cases are generally in line with those of federal agencies, other California agencies that conduct adjudications, and similar agencies of other states. Our interviews did not elicit substantial concerns regarding adjudication cases.

Quasi-legislative cases. The legislation appears to contemplate that the Commission will exercise its quasi-legislative, or rulemaking, function in formal hearings—what is generally called "formal rulemaking" in the parlance of administrative law. This is not an uncommon way for agencies, particularly those with ratesetting responsibilities, to make rules. Other California agencies employ "informal rulemaking," giving notice of planned action, taking and responding to public comments on the contemplated action, and adopting a final regulation without holding an adversarial hearing. In practice most CPUC rulemaking proceedings employ informal-rulemaking procedures, while adjudicatory procedures were used in other cases. We found that the CPUC rule of unrestricted, unregulated ex parte communications in quasi-legislative cases is very unusual among agencies that conduct formal rulemaking. In such cases, the prevailing practice is to prohibit ex parte communications in roughly the same manner as in adjudication cases. In fact, CPUC's permissive rules governing ex parte communications in quasi-legislative cases would not fall within best practices even when the Commission employs informal rulemaking, although there is a less clear consensus on that question.

Ratesetting cases. Most of the dispute over ex parte communications, and the focus of most of this Report, concerns the rules and practices for ratesetting cases. Under the governing laws, ex parte communications are, in general, permitted with certain conditions. Written communications from a party to a Commissioner or Commissioner's advisor are permitted if served on the same day on all parties—which actually makes them not "ex parte" at all in common legal parlance. A party seeking an ex parte meeting with a Commissioner must give the other parties advance notice of at least three days, and every other party must be given an opportunity to have its own meeting of the same duration. But under CPUC rules, ex parte meetings with a Commissioner's advisor may take place with no advance notice and no right of other parties to similar meetings. When an ex parte communication does take place, the party is required to file a notice disclosing that the meeting took place and describing what the party—but not the Commissioner—said.

Ex Parte Communications Practices in Ratesetting Cases

Noticed ex parte communications are numerous and pervasive. From 2001 through 2013, parties filed notices of 9,814 ex parte communications, an average of 755 per year. (Noticed ex parte contacts are the only kind for which we would have any evidence from our database of ex parte notices.) Among the 21 entities appearing most often before the CPUC, the most frequent user of noticed ex parte communications per proceeding was a telecommunications company, which averaged over 12 noticed ex parte communications per proceeding in which it was a party. Although a handful of consumer and environmental organizations that regularly intervene in CPUC proceedings and the CPUC's Office of Ratepayer Advocates (ORA) are among the most frequent filers of ex parte notices, that proved to be because of their presence in many proceedings against numerous utilities. But in the typical case involving major utilities, the utility had roughly 80% to 100% more noticed ex parte communications than the most active consumer group or ORA.

Ratesetting cases are heard by an ALJ, with a single Assigned Commissioner attending some days' hearings but typically a small fraction of the total hearing. The ALJ prepares a proposed decision, which is served on the parties, who have 20 days to file comments supporting or opposing adoption of the proposed decision and five days for reply comments responding to opponents' comments. Any Commissioner may propose an alternate decision in lieu of the ALJ's proposed decision. The bulk of ex parte communications take place during the period after the proposed decision is issued and before the Commission meeting.

Opinions and Recommendations Expressed in the Interviews

In interviews with 88 people, we received helpful information from a diverse set of informed participants and observers. This information ranged from some who defended current ex parte practices and opposed any significant change in the rules to others who called for ex parte communications to be sharply curtailed.

The defenders of ex parte communications cited the need for Commissioners to be well informed and favored a policy of maximum information flow. They also cited the Commissioners' busy schedules and practical inability to read a record of thousands of pages, saying ex parte meetings give them 20 or 30 minutes to tell the Commissioner or advisor their key points, engage them in conversation, and call their attention to crucial evidence in the record. Many of these interviewees also valued the opportunity to focus on their issues apart from the multitudinous issues raised by multiple parties. Some also claimed they needed ex parte channels to offset a claimed anti-utility bias among the staff or asserted weakness in the ALJ's performance, expressing the concern that some staff in advisory or decisional roles came from advocacy staff and had not left their opinions as advocates behind. And the defenders of ex parte communications cited the disclosure of the communication and other parties' right to have ex parte communication of their own. When pressed, these defenders acknowledged that they also value ex parte communications as an opportunity to communicate in private to the Commissioner what they "really need"—what is most important to them among the issues to be decided.

The opponents of ex parte communications claimed that ex parte communications at the CPUC were fundamentally unfair and worked to the advantage of the utilities. They asserted that

the purported disclosures of what was said were grossly inadequate and calculated to conceal, rather than to reveal, the substance of the conversation. The opponents said the opportunity for their own ex parte meeting was sometimes frustrated by last-minute notices by their adversary, leaving no time for a rebuttal meeting. And they emphasized that equal opportunity did not translate into equal access because they have far fewer people, leaving them little time even to monitor all the ex parte communications, much less to have their own. (We note that some intervenor groups disputed this point, saying private meetings with Commissioners or advisors were their best chance to be heard.) The opponents of ex parte communications also said that the law's exclusion from the disclosure of anything said by the Commissioner or advisor deprived them of crucial information and limited their own ability to respond to what was of greatest interest to the decision-maker. Those opposing current ex parte practices additionally claimed that their adversaries did not, in fact, limit their communications to evidence already in the record but made new, often untrue representations unsupported by the record. These interviewees also decried the recently revealed violations and opined that such incidents reflected the lack of a culture of compliance and an absence of ethical standards at the top of the CPUC.

All of the interviewees also offered very helpful suggestions and answered our questions regarding various aspects of the existing rules and possible changes in the laws and practices. These responses are detailed in Part III.

Analysis and Recommendations

It is clear that ex parte communications are a frequent, pervasive, and at least sometimes outcome-determinative in CPUC ratesetting cases. In general, these practices have the unavoidable effect of moving actual governmental decision-making out of the public eye. And we found that these practices are fundamentally unfair to the parties, who are not adequately informed by opposing parties' disclosures of what was said ex parte and are sometimes prevented from having ex parte meetings of their own by their adversaries scheduling their meetings at the last-minute. The practice of advisors (who presently take most ex parte meetings) not being required to grant equal-time meetings to all other parties is also unfair—and, in our analysis, not permitted by law. The evidence also supports the claim that present ex parte practices systematically favor the interests of utilities and other well-funded parties. Additionally troubling is the fact that the disclosures do not—and, by law, cannot—report what the decision-maker said. We received disturbing reports of instances where decision-makers sought to assist parties by telling them what to do or say in aid of their cases in communications that were undisclosed in reliance on a claimed loophole in the disclosure rules—a loophole that we have found does not actually exist.

We have also found that ex parte communications at the CPUC have come to fundamentally undermine record-based decision-making and to transform the very nature of CPUC rate hearings. We learned that the actual record of the proceedings before the ALJ that led to the proposed decision is not merely voluminous but also extremely difficult for the Commissioners and their staffs to access. Representations of parties, made in private, of what the record contains cannot be readily verified or refuted. In this evidence-sparse environment, the most successful advocates emphasize their personal relationships with decision-makers—sometimes overtly with "you know me" and "you know you can trust me" assurances, sometimes implicitly after years cultivating personal relationships.

Indeed, this confluence of ex parte contacts and lack of ready access to the evidentiary record has had a tendency to deflect the decision-making process away from a search for evidence-based truth into a negotiation between one Commissioner (or his or her advisor) and the utility, a quest to reach an outcome that is satisfactory to that party. One clue to this transformation is a question reported by several interviewees with experience with CPUC ex parte practices in various roles. The utility, we were told, would be asked, "What do you really need?" What the utility objectively needs is generally the ultimate question in the proceeding, toward which thousands of pages of record will have been devoted. But this isn't a question about the utility's objective need; this is a question about its subjective desires, how much less than it is asking for that the utility would be willing to settle for. That kind of an exchange, unheard by the other parties, is unfair and reflects a fundamental undermining of record-based, evidence-driven adjudication. And that, in turn, is symptomatic of the absence of a culture of compliance from leaders at the CPUC.

Given these deleterious effects of present ex parte rules and practices, were there no other way to realize the legitimate informational aims of ex parte communications, we would have to recommend that ex parte communications in ratesetting nonetheless be ended. As it happens, there is no need to make that choice. We have found that there are adequate other avenues for providing Commissioners information without depending on private, off-the-record communications. We recommend measures to ensure those avenues are available.

From these findings, we are making numerous detailed recommendations. In general, we are recommending:

- Substantive ex parte communications in ratesetting cases should be prohibited in the same manner they are prohibited in adjudicatory cases.

- In quasi-legislative proceedings, substantive ex parte communications should continue to be permitted, but only with full, detailed disclosure by the decision-maker of both the fact that the communication took place and the substance of the communication. The disclosure should include reporting not just what was said by the party but also what the decision-maker said.

- Increased sanctions for illegal ex parte communications should be enacted.

    - Advocates who violate the rules should be subject to restrictions on their participation in Commission proceedings, including, where appropriate, exclusion from appearance before the Commission.

    - Commissioners and Commission staff should be subject to sanctions for knowingly engaging in illegal ex parte communications.

- The Commission should reinforce measures to ensure separation of advisory and adjudicatory staff functions and to avoid the appearance of bias.

    - Staff should not simultaneously function in advisory and advocacy roles, even in separate cases.

- Commissioners' advisors should be treated as decision-makers and be subject to the same ex parte restrictions that apply to their principals.

- The Commission should take measures to prevent conduits—non-parties communicating on behalf of parties—from transmitting information in secret. Among these measures:

  - Whenever a decision-maker receives what he or she has reason to believe is a communication made on behalf of a party to a pending proceeding regarding that proceeding, the decision-maker should place the communication (if written) or a memorandum summarizing the communication (if oral) in the record of the proceeding, cause copies to be served on all parties, and allow other parties to respond to the communication.

  - To prevent industry conferences and similar meetings from becoming conduits for ex parte communications about pending proceedings, we recommend the Commission adopt rules employed in other jurisdictions to prevent the misuse of such meetings without a blanket ban on Commissioners benefitting from professional conferences.

- The Commission should appoint an independent Ethics Officer to monitor compliance with ex parte rules, to provide training to Commissioners, staff, and parties, and to develop codes of conduct for decision-makers and for advocates appearing in Commission proceedings.

We have concluded that the Commission can achieve the legitimate objectives cited in defense of ex parte communications—namely informing the Commissioners, using the record, to influence the outcome—without resort to private communications. We make several recommendations to facilitate moving the communications from the ex parte to the public arena, including:

- Greater use of oral argument and all-parties meetings. We offer some suggestions for getting the maximum value from those procedures.

- Adjustment of the timing of full-Commission consideration of proposed and alternate decisions to permit full consideration of comments and oral argument, and to permit the Commissioners to deliberate on rate cases in closed session if they so desire.

- Use of Commission meetings for discussion of general policy matters not yet implicated in pending proceedings, such as emerging technological issues and regulatory developments.

- Transformation of Commission public meetings, which have become perfunctory and ceremonial, where government decisions are announced but not made, into the place where parties are heard and decisions are made. This requires that the Commission meet more frequently than its established less-than-twice-a-month

practice.

We offer a number of additional recommendations, all of which are laid out in Section III of Part IV of this Report.

Part I

LEGAL FRAMEWORK

I. INTRODUCTION

In this Section of the Report, we discuss legal provisions governing the CPUC, as well as those in other California, federal, and state agencies, that regulate ex parte communications between decision-makers and parties who are not decision-makers. Ex parte communications, in general, are private, off-the-record communications between agency decision-makers and interested parties regarding a matter for decision that is before the agency. Ex parte communications can be oral or written; more relevant than the format of the communication is that other parties to the proceeding are not included in the communication. By definition, ex parte communications are not part of the record of a proceeding.

For our analysis, we begin with the CPUC's current rules, which apply different ex parte prohibitions or regulations in three different types of proceedings: adjudicatory, ratesetting, and quasi-legislative. We then review other California laws governing ex parte communications, considering the state agency some view as the most similar, the California Energy Commission (CEC), as well as the general requirements of California's Administrative Procedure Act (APA) and the ex parte rules of an agency exempt from the APA, the California Coastal Commission. We then turn a comparative lens to federal law, reviewing the provisions of the Federal Administrative Procedure Act (Federal APA) and the regulations governing ex parte communications at the federal agencies most similar to the CPUC: the Federal Communications Commission and the Federal Energy Regulatory Commission. We also review the applicable ex parte communications rules at state public utilities agencies in six of the more populous states: Florida, Illinois, New York, Pennsylvania, Texas, and Washington.

We then compare the CPUC's present rules with the practices in each of the agencies we studied, identifying the similarities and differences, as well as the range in regulatory approaches across agencies. We consider the following categories: (1) rules applicable in each of the three procedural categories of adjudicatory, quasi-legislative, and ratesetting; (2) scope of agency decision-making staff included; (3) disclosure requirements, including timing and right to reply; (4) disclosure content requirements; (5) inclusion of ex parte communication in the record of proceedings; (6) enforcement, penalties, and sanctions; (7) restrictions on communications with agency staff; and (8) general exemptions from ex parte disclosure rules. This analysis permitted us to conclude that in many respects, the CPUC is an outlier from the practices at almost every agency whose rules we studied.

II. STATUTORY AND REGULATORY RESTRICTIONS ON EX PARTE COMMUNICATIONS IN THE CPUC

A. Legal Background to the CPUC's Rules and Types of Proceedings

The rules governing ex parte communications before the CPUC distinguish between different categories of proceedings before the CPUC. In administrative law generally, and

California law in particular, a key distinction is drawn between "quasi-adjudicatory" and "quasi-legislative" proceedings.[1] Quasi-adjudicatory proceedings (sometimes called "quasi-judicial" or simply "adjudicatory") generally concern the rights of individual parties and are conducted under procedures similar to those employed in courts. Quasi-legislative proceedings (sometimes referred to as "rulemaking") generally concern the adoption of rules of general applicability and employ procedures akin to those of a legislative body.

In California, adjudicatory proceedings are usually conducted under the Administrative Procedure Act,[2] which consists of two parts: a set of general provisions applicable to all state-agency adjudications not exempt from its provisions,[3] and what are called the formal-hearing provisions of the APA,[4] which the Legislature has applied to certain agencies expected to conduct more formal, trial-type hearings. Article 7 of chapter 4.5 contains the APA's provisions regulating ex parte communications, which generally prohibit any direct or indirect substantive communications between the decision-makers (e.g., board or commission members) and other officers presiding over a hearing (typically administrative law judges) on the one hand, and representatives of the agency and other interested parties on the other.[5] The CPUC has been exempted by the Legislature from the general provisions of the APA[6] and has not been made subject to the APA's formal-hearing provisions. Instead, the Legislature has enacted CPUC-specific legislation, which itself provides for formal hearings before the Commission, employing many of the trial-type procedures found in the APA's formal-hearing laws.[7]

Quasi-legislative proceedings of state agencies are generally conducted pursuant to the rulemaking provisions of the Government Code.[8] They prescribe a procedure for adopting regulations (defined as any rule "to implement, interpret, or make specific the law" administered by the agency[9]). The core of the process is a notice-and-comment procedure whereby the agency promulgates a draft regulation and supporting material, the public is afforded an opportunity to comment, the agency makes any changes in response to the comments, and the agency then may adopt the regulation, which is reviewed by the Office of Administrative Law for legal

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[1] See generally Asimow, Strumwasser, Bolz, & Aspinwall, California Administrative Law (The Rutter Group 2014) ¶¶ 4:55-4:81.

[2] Gov. Code, tit. 2, div. 3, pt. 1, chs. 4.5 & 5; see *id.*, § 11400.

[3] Gov. Code, §§ 11400-11475.70. Article 6 of chapter 4.5 contains the Administrative Adjudication Bill of Rights, ensuring parties basic rights such as open hearings (§ 11425.20), unbiased decision-makers (§ 11425.40), and a written decision based on the record evidence (§ 11425.50).

[4] Gov. Code, §§ 11500-11529.

[5] Gov. Code, §§ 11430.10-11430.80.

[6] Pub. Util. Code, § 1701, subd. (b).

[7] Pub. Util. Code, div. 1, pt. 1, ch. 9, art. 1.

[8] Gov. Code, tit. 2, div. 3, pt. 1, ch. 3.5.

[9] Gov. Code, § 11342.600.

sufficiency.[10] These statutory procedures and requirements, which apply broadly across state government, are more restrictive than those applicable to the Legislature, but the nature of the proceedings is decidedly not like a trial, lacking, for example, sworn testimony, cross-examination, and detailed factual findings. The CPUC is exempt from most of the rulemaking chapter of the APA.[11] Rules regarding substantive utility regulation, including those pertaining to utility rates and tariffs, are adopted in rulemaking proceedings conducted under the CPUC's own Rules of Practice and Procedure.[12] Adoption and amendment of the Rules of Practice and Procedure themselves are, however, subject to the APA.[13]

In this paradigm distinguishing adjudication from rulemaking, the process of setting rates has sometimes proven difficult to categorize. In some respects it resembles an adjudication, commencing as it does with an application by a company proposing to set the rates it charges the public, often proceeding through the finding of specific historical and technical facts, and culminating in an administrative decision subject to judicial review. In other respects, however, it resembles the enactment of a statute or regulation, determining future charges to be borne by members of the general public, with many of the determinative "facts" tending to look more like the weighing of policies than the finding of historical facts. The mixed nature of ratesetting has challenged courts at least since Justice Holmes' 1908 opinion in *Prentis v. Atl. Coast Line Co.*[14]

The California Legislature has addressed this question of categorization by recognizing ratesetting as its own separate category, establishing different ex parte rules for adjudicatory

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[10] See Gov. Code, §§ 11346-11349.6.

[11] Gov. Code, § 11351, subd. (a); see also *id.*, § 11340.9, subd. (g) [exempting any "regulation that establishes or fixes rates, prices, or tariffs"].

[12] California Public Utility Commission Rules of Practice and Procedure rule 6.1-6.3, codified at Cal. Code of Regs., tit. 20, div. 1, ch. 1. (Subsequent references to "rule" are to these Rules of Practice and Procedure.)

[13] Gov. Code, § 11351, subd. (a) [excluding from the APA exemption "the rules of procedure"]; see also Pub. Util. Code, § 311, subd. (h) [expressly requiring changes in the Rules of Practice and Procedure to be submitted to the Office of Administrative Law for review and prescribing procedures for judicial review].

[14] 211 U.S. 210, 226, 29 S.Ct. 67, 69 [decision of Virginia Corporation Commission setting railway passenger rates, while adopted by a body with judicial powers under procedures requiring fact-finding, was legislative in nature and not subject to res judicata because the product would have prospective, not retrospective application]; see also *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292, 93 Cal.Rptr. 455, 481 P.2d 823 ["in fixing rates, a regulatory commission exercises legislative functions . . . and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions"]; *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 909, 160 Cal.Rptr. 124, 134, 603 P.2d 41, 51 [setting of prospective rates and of refunds pursuant to a prior order contemplating subsequent refunds was quasi-legislative].

hearings,[15] ratesetting hearings,[16] and quasi-legislative hearings.[17]

B. Rules Governing Ex Parte Communications Before the CPUC

The CPUC's ex parte rules cover communications on substantive issues between interested persons and decision-makers, provided that such communications do not occur in a public hearing or other public forum noticed by ruling or order in the proceeding.[18] Interested persons subject to this rule include the applicant or any party to the proceeding, any person with a financial interest in the proceeding (as defined in Government Code section 87100), any organization which intends to influence a decision-maker, and any representative of such persons.[19] Decision-makers include the Commissioners, the chief ALJ, any assistant chief ALJ, the assigned ALJ, and any designated law and motion ALJ.[20] Although they are not formally decision-makers, the Commissioners' personal advisors are governed by the same rules that apply to these decision-makers except that oral communications with advisors in ratesetting proceedings are permitted without certain restrictions as noted below.

Some of the ex parte rules apply to all types of proceedings. For example, communications regarding categorization are permitted without restriction, but must be reported pursuant to the reporting requirements described below.[21] Ex parte communications regarding the assignment of a proceeding to a particular ALJ, or reassignment of a proceeding to another ALJ, are prohibited.[22] It is worth noting that while permitted where indicated below, ex parte communications are not part of the record of the proceeding and "the Commission shall render its decision based on the evidence of record."[23]

The following are rules specific to each of the three types of proceeding categories.

1. Adjudicatory

Once a case has been categorized, ex parte contacts are prohibited in adjudicatory proceedings.[24]

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[15] Pub. Util. Code, § 1701.2.

[16] Pub. Util. Code, § 1701.3.

[17] Pub. Util. Code, § 1701.4.

[18] Pub. Util. Code, § 1701.1, subd. (c)(4); rule 8.1(c).

[19] Pub. Util. Code, § 1701, subd. (c)(4); rule 8.1(d).

[20] Rule 8.1(b).

[21] Rule 8.3(e).

[22] Rule 8.3(f).

[23] Rule 8.3(k).

[24] Pub. Util. Code, § 1701.2, subd. (c); rule 8.3(b).

2. Ratesetting

The Public Utilities Code states that "[e]x parte communications are prohibited in ratesetting cases."[25] The statute goes on to permit oral ex parte communications to which all parties are invited, written ex parte communications served on all parties, and individual ex parte meetings for which every other party is offered a meeting of equal time.[26] Moreover, these restrictions and reporting requirements apply only in those ratesetting cases in which the Commission has determined that the proceeding requires a hearing.[27] In proceedings where it has been determined that no hearing is necessary, ex parte communications are permitted without these rules and requirements.[28] By definition, procedural communications are not considered ex parte communications.[29] Rule 8.1 provides that "[c]ommunications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other subject nonsubstantive information are procedural inquiries, not ex parte communications."

As established by statute, in ratesetting proceedings with hearings, there are various types of permitted ex parte communications. First, individual oral communications with decision-makers are permitted if the decision-maker invites all parties to attend the meeting (or sets up a conference call in which all parties may participate) and gives notice of the meeting or call as soon as possible, but not later than three days before the meeting or call. [30] These are referred to in the rules as "all-party" meetings.[31] Second, interested parties may have individual oral communications with decision-makers, but if a decision-maker grants an ex parte communication meeting or call to any interested person individually, all other parties shall be granted an individual meeting of a substantially equal period of time with that decision-maker.[32] The interested person requesting the initial individual meeting must notify the parties that its request has been granted and file a certificate of service of this notification at least three days before the meeting or call.[33] Third, written ex parte communications are permitted at any time provided that the interested person making the communication serves copies of the communication on all

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[25] Pub. Util. Code, § 1701.3, subd. (c).

[26] *Ibid*.

[27] Pub. Util. Code, § 1701.3, subd. (a).

[28] *Ibid*; rule 8.3(d).

[29] Pub. Util. Code, § 1701.1, subd. (c)(4).

[30] Pub. Util. Code, § 1701.3, subd. (c); rule 8.3(c)(1).

[31] Rule 8.3(c)(1).

[32] Pub. Util. Code, § 1701.3, subd. (c); rule 8.3(c)(2). Rule 8.1(b) excludes the Commissioners' advisors from the definition of "decisionmaker," but rule 8.2 applies the same rules to them as to Commissioners except that an ex parte meeting does not give rise to a right in other parties to advance notice and an equal-time meeting.

[33] Rule 8.3(c)(2)

parties on the same day the communication is sent to a decision-maker.[34]

The restrictions regarding advance notice of meetings and equal-time requirements do not apply to oral communications with Commissioners' advisors. Parties must file a notice of *any* ex parte communications within three days of the communication, however, including those with Commissioners' advisors.[35] These notices, filed by the interested person regardless of who initiated the communication, must include the date, time, and location of the communication, and whether it was oral, written, or a combination; the identities of each decision-maker or advisor involved, the person initiating the communication, and any persons present during such communication; and a description of the interested person's, but not the decision-maker's or advisor's communication and its content, to which description shall be attached a copy of any written, audiovisual, or other material used for or during the communication.[36]

While ratesetting deliberative meetings are not often used by the Commission in practice, there are a few rules specific to them. First, the Commission may prohibit ex parte communications for a period beginning not more than 14 days before the day of the Commission business meeting at which the decision in the proceeding is scheduled for Commission action, during which period the Commission may hold a ratesetting deliberative meeting.[37] Second, in proceedings in which a ratesetting deliberative meeting has been scheduled, ex parte communications are prohibited from the day of the ratesetting deliberative meeting at which the decision in the proceeding is scheduled to be discussed through the conclusion of the business meeting at which the decision is scheduled for Commission action.[38]

3. Quasi-Legislative

Ex parte communications are permitted in quasi-legislative proceedings without restrictions or reporting requirements.[39]

C. Penalties

Statutory penalties are available in general terms for violations of the relevant division of the Public Utilities Code or CPUC orders and rules,[40] but there are no penal statutes specifically applicable to violations of the laws governing ex parte communications. When the Commission determines that there has been a violation of the ex parte rules, the Commission may impose

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[34] Pub. Util. Code, § 1701.3, subd. (c); rule 8.3(c)(3).

[35] Rule 8.4. A notice may address multiple ex parte communications within the same proceeding so long as the notice of each communication is timely.

[36] *Ibid*.; Pub. Util. Code, § 1701.1, subd. (c)(4)(C)(i)-(iii).

[37] Rule 8.3(c)(4)(A).

[38] Rule 8.3(c)(4)(B).

[39] Pub. Util. Code, § 1701.4, subd. (b); rule 8.3(a)

[40] Pub. Util. Code, § 2107.

"penalties and sanctions," or make any other order, as it deems appropriate to ensure the integrity of the record and to protect the public interest.[41]

III. LAWS GOVERNING EX PARTE CONTACTS BEFORE OTHER CALIFORNIA ADMINISTRATIVE AGENCIES

A. Administrative Procedure Act

As noted above, adjudicatory proceedings in California are usually conducted under the Administrative Procedure Act,[42] which consists of two parts: a set of general provisions applicable to all state-agency adjudications not exempt from its provisions,[43] and what are called the formal-hearing provisions of the APA,[44] which the Legislature has applied to certain agencies expected to conduct more formal, trial-type hearings.

1. Adjudicatory Proceedings

Article 7 of chapter 4.5 contains the APA's provisions regulating ex parte communications in adjudicatory proceedings (the Adjudicatory APA).[45] Under the APA, an adjudicatory proceeding is an "evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision."[46] In these proceedings under the Adjudicatory APA rules, there must be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.[47] This rule does not bar communications made on the record at any hearings.[48] Parties may, however, engage in ex parte communications about matters of procedure or practice, including a request for a continuance, so long as the procedural issue is "not in controversy."[49] In addition, non-prosecutorial agency staff may advise the presiding officer ex parte, for the purpose of providing technical assistance, evaluating evidence in the

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[41] Rule 8.3(j).

[42] Gov. Code, tit. 2, div. 3, pt. 1, chs. 4.5 & 5; see Gov. Code, § 11400.

[43] *Id.*, §§ 11400-11475.70. Article 6 of chapter 4.5 contains the Administrative Adjudication Bill of Rights, ensuring parties basic rights such as open hearings (§ 11425.20), unbiased decision-makers (§ 11425.40), and a written decision based on the record evidence (§ 11425.50).

[44] *Id.*, §§ 11500-11529.

[45] Gov. Code, §§ 11430.10-11430.80.

[46] Gov. Code, § 11405.20.

[47] Gov. Code, § 11430.10, subd. (a).

[48] Gov. Code, § 11430.10, subd. (b).

[49] Gov. Code, § 11430.20, subd. (b).

record, or advising the presiding officer concerning a settlement proposal.[50] If the agency's ex parte communication concerns a "technical issue in the proceeding," the content of the advice must be disclosed on the record and all parties given an opportunity to address it.[51]

One state agency that utilizes APA adjudicatory procedures to conduct ratesetting hearings is the Department of Insurance. Insurance Code section 1861.08 provides that all hearings are conducted pursuant to Chapter 5 of the APA, with minor modifications not relevant here. Chapter 5 of the APA sets forth procedural requirements in a formal adjudicatory hearing. Chapter 4.5, the ex parte provisions of which are detailed above, applies to any adjudicatory proceeding under APA Chapter 5.[52]

A significant difference from these ex parte rules and those of the CPUC lies in who has the burden to disclose ex parte communications and the content of what must be disclosed. Rather than relying on parties to disclose ex parte communications, in these other agencies the burden is on the presiding officers. If a presiding officer receives an improper ex parte communication, the presiding officer must make all of the following a part of the record in the proceeding: (1) If the communication was written, the writing and any written response of the presiding officer to the communication; and (2) If the communication is oral, a memorandum stating the substance of the communication, as well as any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication.[53] Additionally, the presiding officer must notify all parties that a communication described in this section has been made a part of the record, and if a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication, the party will be allowed to comment on the communication.[54] The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.[55] Should a presiding officer receive improper ex part communications in violation of the rules, the presiding officer may be disqualified from the proceeding.[56]

2. Rulemaking and Other Non-Adjudicatory Proceedings

The APA has no explicit rules relating to ex parte communications in non-adjudicatory proceedings, which include the notice-and-comment rulemaking provisions set forth in chapter 3.5 (the Rulemaking APA). The only limitation is the APA's basic requirement that final decisions be based on a public record. Some commissions have adopted their own regulations

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[50] Gov. Code, § 11430.30.

[51] Gov. Code, § 11430.30, subd. (c)(1).

[52] Gov. Code, § 11410.50.

[53] Gov. Code, § 11430.50, subd. (a).

[54] Gov. Code, § 11430.50, subd. (b)-(c).

[55] *Ibid*.

[56] Gov. Code, § 11430.60.

placing some restrictions or requirements on ex parte communications in non-adjudicatory proceedings, such as is indicated in the examples below.

B. California Energy Commission

The California Energy Commission, established by the Legislature in 1974, has seven core responsibilities: forecasting future energy needs; promoting energy efficiency and conservation by setting the state's appliance and building energy efficiency standards; supporting energy research that advances energy science and technology through research, development and demonstration projects; developing renewable energy resources; advancing alternative and renewable transportation fuels and technologies; certifying thermal power plants 50 megawatts and larger; and planning for and directing state response to energy emergencies.[57]

The Energy Commission has five commissioners, appointed by the governor and approved by the state senate to five-year terms. Within the Energy Commission, "presiding officer" under the ex parte rules consists of "all commissioners and all hearing advisors."[58] Additionally, the rules are clear that an advisor to a commissioner "or any other member of a commissioner's own staff" shall not be used in any manner that would circumvent the purposes and intent of the ex parte rules.[59] A proceeding is pending from the date of the petition, complaint, or application for a decision and continues until the Commission adopts or issues a final decision.

1. Adjudicatory Proceedings Within the Energy Commission

The APA ex parte provisions apply to all adjudicatory proceedings conducted by the CEC.[60] It holds adjudicatory hearings in certification proceedings for new power facilities or changes or additions to existing facilities.[61] The governing statutes and disclosure requirements are Government Code sections 11430.10 through 11430.80, detailed above, generally prohibiting most ex parte communications with the presiding officer.

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[57] *About the California Energy Commission*, available at http://www.energy.ca.gov/commission/ (last visited June 1, 2015).

[58] Cal. Code Regs., tit. 20, § 1216(a).

[59] Cal. Code Regs., tit. 20, § 1216(b).

[60] Cal. Code Regs., tit. 20, § 1216(a) ["The ex parte provisions of Article 7 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code (sections 11430.10 et seq.) apply to all adjudicatory proceedings conducted by the commission."]

[61] Pub. Resources Code, §§ 25500, 25513. Note that certifications proceedings are bifurcated with a non-adjudicatory component to identify issues for the adjudicatory hearing, to set forth the electrical demand basis for the proposed sites, to provide "knowledge and understanding" of the sites, obtain views and comments of the public parties, and governmental agencies, regarding the "environmental, public health, and safety, economic, social and land use impacts of the facility at the proposed sites," and to obtain information on alternative energy sources. (Pub. Resources Code, § 25509.5.)

2. Ratesetting and Other Non-Adjudicatory Proceedings Within the Energy Commission

The APA applies only to adjudicatory proceedings, and the Energy Commission does not have any additional rules specific to ex parte contacts. Instead, as with the APA generally, ex parte contacts are dictated by the requirement that the final decision must be based on the record and include a statement of the factual and legal basis of the decision.[62] Beyond this, there are no requirements to refrain from or provide notice regarding any ex parte contacts in non-adjudicatory proceedings. The CEC does not engage in ratesetting.

C. California Coastal Commission

The California Coastal Commission was established by voter initiative in 1972 (Proposition 20) and later made permanent by the Legislature through adoption of the California Coastal Act of 1976. The Coastal Commission states that, in partnership with coastal cities and counties, it plans and regulates the use of land and water in the coastal zone. Development activities, which are broadly defined by the Coastal Act to include (among others) construction of buildings, divisions of land, and activities that change the intensity of use of land or public access to coastal waters, generally require a coastal permit from either the Coastal Commission or the local government. [63]

The Commission has 12 voting members and 4 nonvoting members.[64] The Commission meets monthly in various coastal communities.[65] As of April 2013, the Commission had 142 authorized staff positions.[66] Since 1976 the Commission has directly reviewed more than 125,000 coastal development permits (CDPs), including more than 1,300 appeals of local government permit approvals.[67] During the 2013-14 fiscal year, 1,075 local government permits were reported as approved in California, of which 47 were appealed to the Commission.[68] From a review of the Commission's online reports and memoranda, we were unable to determine how

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[62] Gov. Code, § 11425.10.

[63] See *What We Do: Program Overview*, available at http://www.coastal.ca.gov/whoweare.html (last visited May 29, 2015).

[64] *California Coastal Commission: Why It Exists and What It Does*, available at http://www.coastal.ca.gov/publiced/Comm_Brochure.pdf (last visited May 29, 2015), p.6.

[65] *Ibid*.

[66] *California Coastal Commission Strategic Plan 2013-2018*, available at http://www.coastal.ca.gov/strategicplan/CCC_Final_StrategicPlan_2013-2018.pdf (last visited May 29, 2015), p. 10.

[67] *Id*. at p. 5.

[68] Summary of LCP Program Activity in FY 13-14, available at http://www.coastal.ca.gov/la/FY13_14_LCPStatusSummaryChart.pdf (last visited May 29, 2015.)

many permit actions it reviews annually from areas not covered by local coastal programs (LCPs).

As of October 2014, 73% of local governments in the coastal zone have certified LCPs covering approximately 87% of the geographic area of the coastal zone.[69] The Commission works with local governments to keep LCPs up to date and in recent years on average processes 60 LCP amendments a year.[70] The Coastal Commission has its own ex parte rules, codified in sections 30320-30329 of the Public Resources Code. These rules cover quasi-judicial matters within the commission's jurisdiction, which are defined as "any permit action, federal consistency review, appeal, local coastal program, port master plan, public works plan, long-range development plan, categorical or other exclusions from coastal development permit requirements, or any other quasi-judicial matter requiring commission action, for which an application has been submitted to the commission."[71] The rules do not otherwise differentiate between types of proceedings. It is worth noting that enforcement proceedings (typically cease and desist matters) are not included in the definition of "matters within the Commission's jurisdiction," and that this definition is limited to matters "for which an application has been submitted." The Attorney General and Coastal Commission General Counsel opined in August 2014 that ex parte communications are entirely prohibited in enforcement proceedings, though the matter is a subject of some debate.[72] Coastal Commission rulemaking is conducted pursuant to notice-and-comment rulemaking under the Rulemaking APA without additional restrictions on ex parte communications.

An "ex parte communication" is any oral or written communication between a member of the commission and an interested person about a matter within the commission's jurisdiction that does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.[73] Communications not considered ex parte include but are not limited to those between a staff member and any commissioner or interested party, those limited entirely to procedural issues (including but not limited to hearing schedule, location, format or filing date), those taking place on the record during an official proceeding of a state, regional, or local agency that involves a commissioner who also serves as an official of that agency, any communication between a nonvoting commission member and a staff member of a state agency where both the commission member and the staff member are acting in an official capacity, and any communication to a nonvoting member where the nonvoting member does not

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[69] *Ibid.*

[70] *California Coastal Commission Strategic Plan 2013-2018*, available at http://www.coastal.ca.gov/strategicplan/CCC_Final_StrategicPlan_2013-2018.pdf (last visited May 29, 2015), p. 5.

[71] Pub. Resources Code, § 30321.

[72] See Staff Report for item 4.5 of August 15, 2014 Coastal Commission meeting, available at: http://documents.coastal.ca.gov/reports/2014/8/F4.5-8-2014.pdf, pp. 11-20 (last visited May 15, 2015).

[73] Pub. Resources Code, § 30322, subd. (a).

participate in the action in any way with other members of the commission.[74] An interested party under these rules is any applicant or participant in the proceeding on any matter before the commission, any person with a financial interest in a matter before the commission, or a representative acting on behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization intending to influence a commission decision.[75]

No written materials may be sent to Coastal Commissioners unless the commission staff receives copies of all of the same materials at the same time, and all materials must clearly indicate that they have also been forwarded to the staff.[76] These materials are then included in the public record. Materials that do not show that copies have been provided to staff might not be accepted, opened, or read by commissioners.[77] Substantive telephone, fax, or other forms of messages may not be left for a commissioner.[78]

As with the Energy Commission, the burden lies with decision-makers to report ex parte communications. "No commission member, nor any interested person, shall conduct an ex parte communication *unless the commission member fully discloses and makes public* the ex parte communication by providing a full report of the communication to the executive director within seven days after the communication or, if the communication occurs within seven days of the next commission hearing, to the commission on the record of the proceeding at that hearing."[79] These reports, based on a standard disclosure form, must include the date, time, and location of the communication, the person or persons initiating and receiving the communication, the person on whose behalf the communication was made, all persons present during the communication, and a "complete, comprehensive description of the content of the ex parte communication," including a complete set of all text and graphic material that was part of the communication.[80]

All reports of ex parte contacts are placed in the public record by the executive director, and once communications have been fully disclosed and placed in the official record, they are no longer considered ex parte communications.[81] If a commissioner knowingly had an ex parte communication that was not reported, that commissioner may not participate in making or influencing a commission decision related to the communication, and "shall be subject to a civil

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[74] Pub. Resources Code, § 30322, subd. (b).

[75] Pub. Resources Code, § 30323.

[76] See *Ex Parte Communication Requirements*, *available at* http://www.coastal.ca.gov/roster.html#expart (last visited May 11, 2015).

[77] *Id*.

[78] *Id*.

[79] Pub. Resources Code, § 30324 (emphasis added).

[80] Pub. Resources Code, § 30324, subd. (b)(1).

[81] Pub. Resources Code, § 30324, subds. (b)(2) & (c).

fine, not to exceed seven thousand five hundred dollars ($7,500).”[82] Additionally, if an unreported ex parte communication may have affected a commission decision, an aggrieved party may seek a writ of mandate from a court requiring the commission to revoke its action and rehear the matter.[83] There do not appear to be any published court decisions relying on this provision to revoke any Coastal Commission actions.

IV. EX PARTE LAWS GOVERNING FEDERAL AGENCIES

A. The Federal Administrative Procedure Act

Generally, federal agency rulemaking and adjudicatory proceedings are subject to the provisions of the Federal Administrative Procedure Act. Under the federal rules, an ex parte communication is defined as “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.”[84] The Administrative Procedure Act governs (1) rule making, which is “agency process for formulating, amending, or repealing a rule;”[85] (2) adjudication, which is “agency process for the formulation of an order;”[86] and (3) licensing, which is “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.”[87]

Most federal quasi-legislative action is conducted as “notice-and-comment” rulemaking, sometimes referred to as “informal” rulemaking. These are rulemaking proceedings conducted without agency hearings. In brief, such proceedings include public notice, opportunity for public comment, and issuance of a final rule.[88] The statute governing notice-and-comment rulemaking contains no provisions governing ex parte communications, leaving the topic for the agencies’ determinations. Federal agencies vary in their approach to ex parte communications in notice-and-comment rulemaking. In sections IV.B and IV.C, below, we discuss the applicable regulations for the Federal Communications Commission and the Federal Energy Regulatory Commission as the agencies with the most similar jurisdictional authority to the CPUC.

In addition to notice-and-comment rulemaking, the Federal Administrative Procedure Act also provides for rulemaking in which a hearing must be held, known as “formal” rulemaking.[89]

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[82] Pub. Resources Code, § 30327. Additionally, a prevailing party in a civil action leading to the imposition of the fine is entitled to reasonable attorneys’ fees. (*Id.* at § 30327, subd. (b).)

[83] Pub. Resources Code at § 30328.

[84] 5 U.S.C. § 551(14).

[85] 5 U.S.C. § 551(5).

[86] 5 U.S.C. § 551(7).

[87] 5 U.S.C. § 551(9).

[88] See generally 5 U.S.C. § 553.

[89] See generally 5 U.S.C §§ 556-557. There are no universal definitions of “formal” and “informal” rulemaking proceedings. We use here the distinction drawn in the Federal APA as

Footnote continued

In such rulemaking, an agency employee or administrative law judge presides over a formal hearing in which evidence is taken and compiles a record for decision containing the transcript of testimony and exhibits along with all papers and requests filed in the proceeding.[90] Formal rulemaking contains strict prohibitions on ex parte communications. Interested persons outside the agency cannot "make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process an ex parte communication relevant to the merits of the proceeding."[91] Agency personnel are likewise prohibited from communicating with any interested person outside the agency.[92] Upon receipt of an ex parte communication, the agency member must place on the record all written communications, memoranda stating the substance of all oral communications, and all written responses or summaries of oral responses.[93] A party who violates the provisions may be required to show why the party's claim or interest in the proceeding should not be "dismissed, denied, disregarded, or otherwise adversely affected."[94]

The Federal Administrative Procedure Act applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," subject to certain limited exceptions.[95] In adjudicatory proceedings, the presiding officer may not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate."[96] The presiding officer also may not supervise or be supervised by an employee who engages in investigative or prosecuting functions for the agency.[97] Employees performing investigative or prosecuting functions may not, in the pending case "or a factually related case," participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings."[98] However, this provision does not apply to "proceedings involving the validity or application of rates, facilities or practices of public

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enumerated in 5 U.S.C. §§ 553 and 556. The latter lists such procedural characteristics as sworn testimony, availability of subpoenas, discretionary authority to take depositions, regulation of the proceeding by a presiding official, and recommendation of a proposed decision to a higher tribunal for final decision. Not all of these characteristics, of course, needs to be present in any given proceeding to classify it as "formal."

[90] 5 U.S.C. §§ 556(c) & (e).

[91] 5 U.S.C. § 557(d)(1)(A).

[92] 5 U.S.C. § 557(d)(1)(B).

[93] 5 U.S.C. § 557(d)(1)(C).

[94] 5 U.S.C. § 557(d)(1)(D).

[95] 5 U.S.C. § 554(a).

[96] 5 U.S.C. § 554(d)(1).

[97] 5 U.S.C. § 554(d)(2).

[98] 5 U.S.C. § 554(d)(2).

utilities or carriers"[99]—the Federal APA's ratesetting exception.

B. The Federal Communications Commission

The Federal Communications Commission (FCC) regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories.[100] The FCC's mission, specified in Section One of the Communications Act of 1934 and amended by the Telecommunications Act of 1996, is to "make available so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, rapid, efficient, Nation-wide, and world-wide wire and radio communication services with adequate facilities at reasonable charges."[101] Its vision is "to promote the expansion of competitive telecommunications networks, which are a vital component of technological innovation and economic growth, and to protect and promote the network compact, including consumer protection, competition, universal access, public safety and national security - while ensuring that all Americans can take advantage of the services that networks provide."[102] In its 2016 budget estimates submitted to Congress in February 2015, the FCC budgeted for 1,671 full-time equivalent employees.

The FCC, like the CPUC, classifies its proceedings into three categories, but differently defined, for purposes of its ex parte rules: "exempt" proceedings, in which ex parte presentations may be made freely and do not require subsequent notice;[103] "permit-but-disclose" proceedings, in which ex parte presentations to commission decision-making personnel are permissible but subject to certain disclosure requirements;[104] and "restricted" proceedings, in which ex parte presentations to and from commission decision-making personnel are generally prohibited.[105] These categories are more difficult to classify than the CPUC's ratesetting, rulemaking, and adjudicatory categories, as each category contains detailed, technical specifications, as described below.

It should be noted that the FCC has established by regulation a "Sunshine period," during which no presentation to any commissioner (whether or not subject to ex parte rules) is permitted, subject to limited exceptions, .[106] The Sunshine period begins on the day after the

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[99] 5 U.S.C. § 554(d)(2)(B).

[100] *What We Do*, available at https://www.fcc.gov/what-we-do (last visited June 1, 2015).

[101] 47 U.S.C., § 151.

[102] *Federal Communications Commission: Fiscal Year 2016 Budget Estimates Submitted to Congress February 2015*, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-331817A1.pdf (last visited June 1, 2015), at p. 43.

[103] 47 C.F.R. § 1.1204.

[104] 47 C.F.R. § 1.1206.

[105] 47 C.F.R. § 1.1208.

[106] 47 C.F.R. § 1.1203(a).

release of a public notice that a matter has been placed on the "Sunshine Agenda," and continues until a decision has been issued or the matter is removed from the agenda or referred to staff for further consideration.[107] Parties may still make any permitted reply to an ex parte communication that was made prior to the commencement of the Sunshine period.[108]

1. Exempt proceedings

Proceedings exempt from ex parte restrictions and disclosure requirements can roughly be described as rulemaking and other proceedings that are still in early or informal stages, including notice of inquiry proceedings; most petitions for rulemaking; tariff proceedings prior to being set for investigation; proceedings relating to prescription of common carrier depreciation rates prior to release of a public notice of specific proposed depreciation rates; informal complaint proceedings; and complaints against cable operators regarding their rates that are not filed on the FCC's standard complaint form.[109]

2. Permit-but-disclose proceedings

The permit-but-disclose category that is roughly analogous to the CPUC's ratesetting category and includes most informal rulemaking proceedings; proceedings involving rule changes, policy statements, or interpreted rules adopted without a Notice of Proposed Rule Making upon release of the order adopting the rule change, policy statement, or interpretive rule; declaratory ruling proceedings; tariff proceedings set for investigation; Freedom of Information Act proceedings; applications for certain types of licenses; proceedings before a Joint Board or proceedings before the commission involving a recommendation from a Joint Board; proceedings related to prescriptions of common carrier depreciation rates; proceedings to prescribe a rate of return for common carriers; certain cable rate complaint proceedings; modification requests; and petitions for commission preemption of authority to review interconnection agreements.[110]

Ex parte communications are permitted in these proceedings, with specific disclosure requirements. Disclosures generally must be filed within two business days following the ex parte communication.[111] Parties who make oral presentations must submit to the commission's Secretary a memorandum listing all persons attending or otherwise participating in the meeting,

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[107] 47 C.F.R. § 1.1203(b).

[108] 47 C.F.R. § 1.1203(c).

[109] 47 C.F.R. § 1.1204(b).

[110] 47 C.F.R. § 1.1206(a).

[111] 47 C.F.R. § 1.1206(b)(2)(iii). For presentations made on the day the Sunshine notice is released, any written ex parte presentation or memorandum summarizing an oral ex parte presentation required pursuant to section 1.1206 or section 1.1208 must be submitted no later than the end of the next business day. (47 C.F.R. § 1.1206(b)(2)(iv).) Any written replies must be filed no later than two business days following the presentation and are limited in scope to the issues presented in the ex parte filing to which they respond. (*Ibid.*)

and summarizing all data presented and arguments made.[112] The memoranda must contain a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed, generally requiring "[m]ore than a one or two sentence description of the views and arguments presented."[113] Where a presentation occurs "in the form of discussion at a widely attended meeting," the regulations permit use of a transcript or recording of the discussion in lieu of the memorandum.[114] Documents shown or given to decision-makers during ex parte meetings are deemed to be written ex parte presentations and, accordingly, copies of the documents must be filed and mailed, emailed, or faxed to the commissioners or commission employees who attended or otherwise participated in the presentation.[115] If a notice of an oral ex parte presentation is incomplete or inaccurate, staff may request the filer to correct any inaccuracies or missing information.[116] Failure by the filer to file a corrected memorandum in a timely fashion or any other evidence of substantial or repeated violations of the rules on ex parte contacts, should be reported to the commission's general counsel.[117] The commission's secretary shall issue public notices listing these disclosure memoranda at least twice per week.[118]

A significant provision that differentiates the FCC's permit-but-disclose rules from the CPUC's ex parte rules is the potential applicability to legislative personnel. Generally, presentations made by members of Congress or their staffs, or by other federal agencies, are not considered ex parte communications unless "the presentations are of substantial significance and clearly intended to affect the ultimate decision."[119] Such communications must be disclosed and placed in the record by the commission's staff.[120]

3. Restricted proceedings

All proceedings not enumerated under the FCC's regulations as being either exempt or permit-but-disclose proceedings are considered restricted proceedings in which no ex parte presentations are permissible.[121] These proceedings include, but are not limited to, all

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[112] 47 C.F.R. § 1.1206(b)(1).

[113] *Ibid*.

[114] *Id.* at Note to Paragraph (b)(1). Multiparty meetings may also be summarized by staff instead of each party filing a memorandum.

[115] 47 C.F.R. § 1.1206(b)(2). In cases where a filer believes that one or more of the documents or portions thereof to be filed should be withheld from public inspection, the filer should file electronically a request that the information not be routinely made available for public inspection. (*Id*. at § 1.1206(b)(2)(ii).)

[116] 47 C.F.R. § 1.1206(b)(2)(vi).

[117] *Ibid*.

[118] 47 C.F.R. § 1.1206(b)(4).

[119] 47 C.F.R. § 1.1206(b)(3).

[120] *Ibid*.

[121] 47 C.F.R. § 1.1208.

proceedings that have been designated for hearing, proceedings involving amendments to the broadcast table of allotments, applications for authority under Title III of the Communications Act, and all waiver proceedings (except for those directly associated with tariff filings).[122] If a restricted proceeding has only one party, "the party and the Commission may freely make presentations to each other because there is no other party to be served or with a right to have an opportunity to be present."[123] Additionally, the commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding be designated as permit-but-disclose.[124]

4. Exempt presentations

Within proceedings not exempt, certain types of presentations are exempt from the ex parte disclosure requirements.[125] The regulations specify numerous categories of such presentations. Some more relevant to the CPUC include presentations from sister federal agencies on topics of shared jurisdiction;[126] comments by listeners or viewers of broadcast stations relating to a pending application that has not yet been designated for hearing;[127] and, under certain circumstances, presentations requested by the FCC or staff for clarification or adduction of evidence, or for resolution of issues, including settlement.[128] Generally, these types of presentations are exempt from the prohibitions in restricted proceedings, the disclosure requirements in permit-but-disclose proceedings, and the prohibitions during the Sunshine Agenda period prohibition.[129]

5. Other noteworthy restrictions

"Decision-making personnel" is defined more broadly under FCC rules than under the CPUC's. Within the FCC, this group of people includes "[a]ny member, officer, or employee of the Commission, or, in the case of a Joint Board,[130] its members or their staffs, who is or may reasonably be expected to be involved in formulating a decision, rule, or order in a

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[122] *Ibid.*

[123] 47 C.F.R. § 1.1208, Note 1 to § 1.1208.

[124] 47 C.F.R. § 1.1208, Note 2 to § 1.1208.

[125] 47 C.F.R. § 1.1204(a).

[126] 47 C.F.R. § 1.1204(a)(5)&(6).

[127] 47 C.F.R. § 1.1204(a)(8).

[128] 47 C.F.R. § 1.1204(a)(10). Note that this exemption does not apply to restricted proceedings designated for hearing.

[129] 47 C.F.R. § 1.1204(a).

[130] Joint Boards are comprised of federal and state officials having related jurisdictions. (See 47 U.S.C. § 410.)

proceeding."[131]

6. Violations and sanctions

FCC personnel who receive oral ex parte presentations that they believe to be prohibited must provide a statement containing specified information about the presentation, and must provide any such written ex parte presentations to the agency's General Counsel.[132] The General Counsel has specific duties with respect to any such material. The General Counsel must determine whether an improper ex parte presentation was made, serve copies on the parties of the presentation, and solicit a sworn declaration from the proponent of the communication regarding the circumstances under which the communication was made.[133] Proceedings with substantial communications from the general public are exempt from these provisions, and the public communications are placed in a file that is available for public review.[134]

The FCC's regulations provide for sanctions for violations of the ex parte communications rules.[135] A violator may be disqualified from future participation in the proceeding, and if the proceeding is not a rulemaking, a party may be required to show cause why the party's claim or interest in the proceeding should not be "dismissed, denied, disregarded or otherwise adversely affected."[136] Commission personnel may be subject to "appropriate disciplinary or other remedial action," and other persons who are not parties may have appropriate sanctions imposed.[137] Monetary sanctions or forfeitures may be imposed by the Enforcement Bureau if an ex parte violation is found by the General Counsel's Office.[138]

C. The Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission (FERC) is an independent agency that regulates the interstate transmission of electricity, natural gas, and oil. FERC also reviews proposals to build liquefied natural gas (LNG) terminals and interstate natural gas pipelines, and licenses hydropower projects. [139] Pursuant to the Energy Policy Act of 2005, FERC is responsible for regulating the transmission and wholesale sales of electricity in interstate commerce; reviewing certain mergers and acquisitions and corporate transactions by electricity

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[131] 47 C.F.R. § 1.1202(c).

[132] 47 C.F.R. § 1.1212(b)&(c).

[133] 47 C.F.R. § 1.1212(d)-(g).

[134] 47 C.F.R. § 1.1212(h).

[135] See generally 47 C.F.R. § 1.1216.

[136] 47 C.F.R. § 1.1216(a).

[137] 47 C.F.R. § 1.1216(b)&(c).

[138] 47 C.F.R. §§ 0.251(g); 0.111(a)(15); 1.1216(d).

[139] *What FERC Does*, available at http://www.ferc.gov/about/ferc-does.asp (last visited June 1, 2015.)

companies; regulating the transmission and sale of natural gas for resale in interstate commerce; regulating the transportation of oil by pipeline in interstate commerce; approving the siting and abandonment of interstate natural gas pipelines and storage facilities; reviewing the siting application for electric transmission projects under limited circumstances; ensuring the safe operation and reliability of proposed and operating LNG terminals; licensing and inspecting private, municipal, and state hydroelectric projects; protecting the reliability of the high voltage interstate transmission system through mandatory reliability standards; monitoring and investigating energy markets; enforcing FERC regulatory requirements through imposition of civil penalties and other means; overseeing environmental matters related to natural gas and hydroelectricity projects and other matters; and administering accounting and financial reporting regulations of regulated companies. [140]

1. Adjudicatory and ratesetting proceedings

FERC has adopted its own regulations governing ex parte communications in its proceedings. These regulations prohibit ex parte contacts in all "contested on-the-record proceedings," which are defined as "any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, any proceeding initiated . . . by the filing of a complaint with the Commission, any proceeding initiated by the Commission on its own motion or in response to a filing, or any proceeding arising from an investigation." [141] This list includes both adjudicatory and ratesetting proceedings. The prohibitions begin from the time the commission initiates a proceeding or the time that intervention disputing a material issue is commenced, and remain in force until a final commission decision or other final order disposing of the merits of the proceeding is issued, the commission otherwise terminates the proceeding, or the proceeding is no longer contested.[142] Explicitly not included in the definition of contested proceedings are notice-and-comment rulemaking proceedings, investigations before they are proceedings, proceedings not having a party or parties, or any proceeding in which no party disputes any material issue.[143]

The restrictions apply to communications with decisional employees, defined as "a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee of the Commission, or contractor, who is or may reasonably be expected to be involved in the decisional process of a proceeding."[144] The restrictions cover communications "relevant to the merits," which does not include procedural inquiries or a "general background or broad policy discussion involving an industry or a substantial segment of an industry, where the discussion occurs outside the context of any particular proceeding involving a party or parties and does not address the specific merits of the proceeding."[145] Procedural inquiries specifically

[140] *Ibid*.

[141] 18 C.F.R. § 385.2201(c)(1)(i).

[142] 18 C.F.R. §§ 385.2201(c)(1)(i) & (d)(2).

[143] 18 C.F.R. § 385.2201(c)(1)(ii).

[144] 18 C.F.R. § 385.2201(c)(3).

[145] 18 C.F.R. § 385.2201(c)(5).

exclude any inquiries with a stated or implied preference for a particular party or position, or inquiries that are intended either directly or indirectly to address the merits or influence the outcome of a proceeding.[146]

Prohibited ex parte communications are not to be considered part of the record for decision.[147] Any decisional employee who makes or receives a prohibited ex parte communication must promptly submit to FERC's Secretary that communication, if written, or a summary of the substance of that communication, if oral.[148] The Secretary will place the communication or the summary in the public file associated with, but not part of, the decisional record of the proceeding.[149] Any party may file a response to a prohibited ex parte communication or file a written request to have the prohibited communication and the response included in the decisional record of the proceeding.[150] The communication and the response will be made a part of the decisional record if the request is granted by the commission.[151]

The Secretary will, not less than every 14 days, issue a public notice listing any prohibited off-the-record communications or summaries of the communication received by his or her office.[152] For each prohibited off-the-record communication the Secretary places in the non-decisional public file, the notice will identify the maker of the off-the-record communication, the date the off-the-record communication was received, and the docket number to which it relates.[153]

If a party or its agent or representative knowingly makes or causes to be made a prohibited ex parte communication, the commission may require the party, agent, or representative to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the prohibited communication. The commission may also disqualify and deny the person, temporarily or permanently, the privilege of practicing or appearing before it.[154] Additionally, commission employees who are found to have knowingly violated this rule may be subject to disciplinary

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[146] 18 C.F.R. § 385.2201(c)(5)(i).

[147] 18 C.F.R. § 385.2201(f)(1).

[148] 18 C.F.R. § 385.2201(f)(2).

[149] *Ibid*. The Secretary will instruct any person making a prohibited written ex parte communication to serve the document on all parties listed on the Commission's official service list for the applicable proceeding. (18 C.F.R. § 385.2201(f)(4).)

[150] 18 C.F.R. § 385.2201(f)(3).

[151] *Ibid.*

[152] 18 C.F.R. § 385.2201(h)(1).

[153] *Ibid.*

[154] 18 C.F.R. § 385.2201(i)(1)-(2).

actions as prescribed by the agency's administrative directives.[155]

2. Rulemaking proceedings

As noted previously, a notice-and-comment rulemaking proceeding is not a contested case under FERC regulations, and FERC's ex parte prohibitions do not apply to such proceedings. FERC does not customarily employ formal rulemaking.[156]

V. EX PARTE LAWS GOVERNING OTHER STATES' REGULATORY AGENCIES

Compared to most states' public utilities commissions, the CPUC is enormous in terms of its caseload and staff. In considering which states to analyze, we decided that those of other large states were most useful for purposes of comparison, due primarily to similarities in volume of caseload and number of involved interested parties. Based both on state size as well as states that our interviewees mentioned most often as interesting case studies based on their own experiences, this Report briefly analyzes the ex parte rules applied at the analogous commissions in Florida, Illinois, New York, Pennsylvania, Texas, and Washington. We begin our discussion with a review of a model state administrative procedure act which itself attempted to identify best practices among the 50 states.

A. Revised Model State Administrative Procedure Act

The National Conference of Commissioners on Uniform State Laws adopted the Revised Model State Administrative Procedure Act (Model APA) at its annual conference in July 2010. The Committee that drafted the Model APA aimed to identify "provisions that represent best practices in the states."[157]

1. Contested cases

The Model APA applies restrictions to ex parte communications in "contested cases," which are defined as "an adjudication in which an opportunity for an evidentiary hearing is required by the federal constitution, a federal statute, or the constitution or a statute of this state."[158] This provision leaves it to the state to determine whether ratesetting will be conducted pursuant to contested-case rules, as is the case in California. In some contexts rulemaking could also be conducted as a contested case if the statutory scheme required it.

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[155] 18 C.F.R. § 385.2201(i)(3).

[156] Presentation by Lawrence R. Greenfield, "An Overview of the Federal Energy Regulatory Commission and Federal Regulation of Public Utilities in the United States" (Dec. 2010), p. 13 available at http://www.ferc.gov/about/ferc-does/ferc101.pdf (last visited June 9, 2015).

[157] Revised Model State Administrative Procedure Act (National Conference of Commissioners on Uniform State Laws 2010) ("Model APA"), pp. 2-3.

[158] Model APA, § 102, subd. (7).

The Model APA generally bars ex parte communications with the final decision-maker and the presiding officer during the contested period, commencing from either the filing of an application or the issuance of the agency's pleading, whichever is earlier.[159] The term "final decision maker" is defined as "the person with the power to issue a final order in a contested case."[160] "Person" is defined to include government or governmental subdivision, agency, or instrumentality."[161] Unless an exception applies, there can be no "communication concerning the case without notice and opportunity for all parties to participate in the communication," once a contested case is pending.[162]

There are four enumerated exceptions to the ex parte prohibition. Ex parte communications authorized by statute, and communications concerning an "uncontested procedural issues" are permitted.[163] The Comment to the procedural exemption notes that it "does not apply to contested procedural issue nor does it apply to issues that do not easily fall into the procedural category. For example, other communications not on the merits but . . . related to security or to the credibility of a party or witness are prohibited."[164] The Model APA also exempts communications between a presiding officer or final decision-maker and "an individual authorized by law to provide legal advice" to the decision-maker; as well as communications on ministerial matters with individuals on the staff of the decision-maker.[165] Such communications are exempted only if the non-decision-maker party has not served as investigator, prosecutor, or advocate at any stage of the case, and the communication may not "augment, diminish, or modify the evidence in the record."[166]

A narrower exemption permits limited ex parte communications between an agency head serving as either presiding officer or final decision-maker and agency staff.[167] "Agency head means the individual in whom, or one or more members of the body of individual in which, the ultimate legal authority of an agency is vested."[168] Ex parte communications with staff are permitted only if the staff has not served as investigator, prosecutor, or advocate at any stage of the case, and has not spoken with any person about the case outside of communications expressly permitted under the Model APA.[169] Moreover, the communication may not "augment, diminish,

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[159] Model APA, § 408, subd. (b).

[160] Model APA, § 408, subd. (a).

[161] Model APA, § 102, subd. (25).

[162] Model APA, § 408, subd. (b).

[163] Model APA, § 408, subd. (c).

[164] Model APA, Comment to § 408, p. 72.

[165] Model APA, § 408, subd. (d).

[166] *Ibid.*

[167] Model APA, § 408, subd. (e).

[168] Model APA, § 102, subd. (5).

[169] Model APA, § 408, subd. (e)(1)(A)-(B).

or modify the evidence in the agency hearing record," and must be either (1) "an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record"; (2) an explanation of the precedent, policies, or procedures of the agency; or (3) a communication that does not address "the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses."[170] The latter requirements for exemption were added to the Model APA as a result of a compromise on the issue of whether agency heads could communicate ex parte with employees.[171] One faction advocated for no ex parte communications at all between employees and agency heads, while another advocated for permitting ex parte communications that did not augment or diminish the evidentiary record.[172] The requirement that the communication meet additional requirements was intended to further limit the applicability of the exemption as a compromise position.[173]

The final exception to the Model APA's ex parte communication ban allows a presiding officer, who is also a member of a multimember agency head, to communicate with the other members of the body "when sitting as the presiding officer and final decision maker."[174] This exception applies *only* where the presiding officer, "the individual who presides over the evidentiary hearings,"[175] is also a final decision-maker. "Otherwise, while a contested case is pending, no communication, direct or indirect, regarding any issue in the case may be made between the presiding officer and the final decision maker."[176]

If an ex parte communication is made in contravention of the prohibition, the presiding officer or final decision-maker must put the communication into the hearing record.[177] Written communications are placed in the record, along with a memorandum that contains the response of the presiding officer or final decision-maker to the communication.[178] Oral communications require the preparation of a memorandum of the substance of the communication, and the response of the presiding officer.[179] The presiding officer or final decision-maker must also notice all parties of the communication and provide parties the opportunity to respond no later than 15 days after the notice is given.[180] For good cause, additional testimony may be permitted

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[170] Model APA, § 408, subd. (e)(2)(A)-(C).

[171] Model APA, Comment to § 408, p. 73.

[172] *Ibid.*

[173] *Ibid.*

[174] Model APA, § 408, subd. (h).

[175] Model APA, § 102, subd. (26).

[176] Model APA, § 408, subd. (h).

[177] Model APA, § 408, subd. (f).

[178] Model APA, § 408, subd. (f)(1).

[179] Model APA, § 408, subd. (f)(2).

[180] Model APA, § 408, subd. (g).

in response to the prohibited communication.[181]

The Model APA provides for potential sanctions in the form of decision-maker disqualification, sealing of the record, or adverse ruling on the merits of the case or dismissal of the application.[182]

2. Rulemaking

Unless rulemaking is conducted under a contested procedure, in which case the ex parte regulations described above would apply, the Model APA does not restrict ex parte communications in rulemaking, which is through notice-and-comment procedures.[183] The law expressly provides that "[n]othing in this section prohibits an agency from discussing with any person at any time the subject of a proposed rule."[184] The provision allows an agency to take public comment, and "consider any other information it receives concerning a proposed rule during the rulemaking. Any information considered by the agency must be incorporated into the record."[185]

B. Florida Public Services Commission

The Florida Public Service Commission (PSC) regulates electric, natural gas, telephone, water, and wastewater.[186] In doing so, the PSC exercises regulatory authority over utilities in rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service.[187]

1. Adjudicatory and ratesetting proceedings

The PSC bars ex parte communications in all proceedings, with a specific exception for rulemaking and declaratory proceedings.[188] The bar only covers "commissioners" and explicitly does "not apply to commission staff."[189] This prohibition begins prior to the filing of an application or other formal commencement, barring ex parte contacts whenever an individual or

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[181] *Ibid.*

[182] Model APA, § 408, subd. (i).

[183] See generally Model APA, § 301 et seq.

[184] Model APA, § 306, subd. (b).

[185] *Ibid.*

[186] *The PSC's Role*, available at http://www.psc.state.fl.us/ (last visited June 1, 2015).

[187] *Ibid.*

[188] Fla. Stat. Ann., § 350.042, subd. (1).

[189] *Ibid.* This provision is strictly construed, barring only commissioners from ex parte communications. Commissioners' personal advisors are not subject to the bar. (Telephone call with Charlie Beck, General Counsel, Florida Public Service Commission (June 10, 2015).)

a commissioner knows or reasonably expects that an issue will be filed with the commission within 180 days.[190] Individual, uncompensated ratepayers are not subject to the ex parte prohibition as long as the ratepayer is advocating only for him or herself.[191]

On June 10, 2015, Florida enacted revised provisions pertaining to ex parte communications at conferences, eliminating a prior statutory exemption for attendance at conferences. The new statute notes that "it is important to have commissioners who are educated and informed on regulatory policies and developments in science, technology, business management, finance, law, and public policy," and that it is "in the public interest for commissioners to become educated and informed . . . through active participation in meetings that are scheduled by organizations that sponsor such educational or informational sessions, programs, conferences, and similar events and that are duly noticed and open to the public."[192] The bar on ex parte communications with commissioners is in effect at such events, so long as the commissioner is "attending or speaking at educational sessions, participating in organization governance by attending meetings, serving on committees or in leadership positions, participating in panel discussions, and attending meals and receptions associated with such events that are open to all attendees."[193] While participating in meetings, commissioners shall refrain from commenting on or discussing any proceeding currently pending or known or reasonably expected to be pending within 180 days.[194] Commissioners must also use "reasonable care" to ensure that the sessions in which the commissioner participates are "not designed to address or create a forum to influence the commissioner on any proceeding," either pending or likely to be pending within 180 days.[195]

Ex parte communications that violate the prohibition must be reported by both the commissioner and the party making the communication. If a commissioner knowingly receives an ex parte communication related to a proceeding to which he or she is assigned, he or she must place on the record of the proceeding copies of all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received and all oral responses made, and shall give written notice to all parties to the communication that such matters have been placed on the record.[196] Any party who desires to respond to an ex parte communication may do so, but the response must be received by the commission within 10 days after receiving notice that the ex parte communication has been placed on the record.[197] The commissioner may, if he or she deems it necessary to eliminate the

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[190] *Ibid.*

[191] Fla. Stat. Ann., § 350.042, subd. (2).

[192] Fla. Stat. Ann. § 350.042, subd. (3)(a).

[193] *Id.*, subds. (3)(b) & (c).

[194] *Id.*, subd. (3)(c)(1).

[195] *Id.*, subd. (3)(c)(2).

[196] Fla. Stat. Ann., § 350.042, subd. (4).

[197] *Ibid.*

effect of an ex parte communication received by him or her, withdraw from the proceeding, in which case the chair shall substitute another commissioner for the proceeding.[198]

Any person who makes an ex parte communication must submit to the commission a written statement describing the nature of the communication, including the name of the person making the communication, the name of the commissioner or commissioners receiving the communication, copies of all written communications made, all written responses to the communications, and a memorandum stating the substance of all oral communications received and all oral responses made. The commission places on the record of a proceeding all such communications.[199]

Penalties for violations of the ex parte prohibition are primarily imposed on the commissioners. Any commissioner who knowingly fails to place on the record any ex parte communications within 15 days of the date of the communication is subject to removal and may be assessed a civil penalty not to exceed $5,000.[200] Additionally, a separate Commission on Ethics has authority to receive and investigate sworn complaints of violations of the ex parte rules and to recommend punishments to the Governor.[201] The Governor is authorized to remove a commissioner from office if the Commission on Ethics finds a knowing and willful violation of the ex parte rules, and a commissioner who has previously been found to have knowingly and willfully violated the ex parte rules *must* be removed from office upon a subsequent finding of such conduct.[202] If the Commission on Ethics determines that an individual participated in an improper ex parte communication, the person may not appear before the commission or otherwise represent anyone before the commission for two years.[203] Commissioners are also required to complete at least four hours annually of ethics training.[204]

2. Rulemaking proceedings

The Florida PSC's restrictions on ex parte communications do not apply to rulemaking proceedings.[205]

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[198] *Ibid.*

[199] Fla. Stat. Ann., § 350.042, subd. (5).

[200] Fla. Stat. Ann., § 350.042, subd. (6). The Commission on Ethics is authorized to bring actions in the courts to enforce payment of these civil fines. (Fla. Stat. Ann., § 350.042, subd. (7)(c).)

[201] Fla. Stat. Ann., § 350.042, subd. (7)(b).

[202] *Ibid.*

[203] Fla. Stat. Ann., § 350.042, subd. (7)(d).

[204] *Id.*, § 350.041, subd. (3).

[205] Fla. Stat. Ann., § 350.042 (stating ex parte restrictions do not apply to proceedings under section 120.54, covering rulemaking cases, and 120.565, covering agency declaratory statements).

The PSC uses a notice-and-comment rulemaking scheme to adopt rules.[206]

C. Illinois Commerce Commission

The Illinois Commerce Commission (ICC) regulates public utilities, focusing on financial and operational analysis, policy development, public safety and enforcement activities related to electric, natural gas, water, sewer and telecommunications companies.[207] The ICC also has jurisdiction over the Illinois transportation industry, regulating trucking insurance and registration, railroad safety, relocation towing, safety towing and household goods moving company enforcement activities.[208] The ICC provides educational information on utility issues, resolves customer/utility disputes and develops rules on utility service and consumer protection.[209] Its mission is "to pursue an appropriate balance between the interest of consumers and existing and emerging service providers to ensure the provision of adequate, efficient, reliable, safe and least-cost public utility services."[210]

1. Adjudicatory and licensing proceedings

Restrictions on ex parte communications before Illinois' Commerce Commission apply to contested cases or licensing proceedings, defined as an "adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing."[211] Once notice of a hearing has been given in a contested case, commissioners, commission employees, and hearing examiners may not communicate directly or indirectly with interested parties, their representatives, or any other person without notice and opportunity for all parties to participate.[212] Commissioners, employees, or hearing officers who make or cause to be made an improper ex parte communication must place on the public record of the proceeding all such written communications, memoranda stating the substance of all such oral communications, and all written responses and memoranda stating the substance of all oral responses to the initial ex parte

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[206] Fla. Sta. Ann., § 120.54, subd. (3).

[207] *Illinois Commerce Commission Home Page*, available at http://www.icc.illinois.gov/ (last visited June 1, 2015).

[208] *Ibid.*

[209] *Ibid.*

[210] *About ICC*, available at http://www.icc.illinois.gov/about.aspx (last visited June 1, 2015).

[211] 5 Ill. Comp. Stat. 100/1-30; 83 Ill. Admin. Code, § 200.40 ("any proceeding, not including rate making, rul**e**making, quasi-legislative, informational or similar proceedings, where individual legal rights, duties or privileges of a party are required by law to be determined by the Commission after an opportunity for a hearing" (emphasis added)).

[212] 83 Ill. Admin. Code § 200.710, subd. (a).

communications.[213] These restrictions do not cover matters of procedure.

The ex parte restrictions explicitly exempt communications between the commission employees who are engaged in "investigatory, prosecutorial or advocacy functions" and parties to the proceeding, but the commission employee may not communicate ex parte with members of the commission, any decisional employees of the commission, and the hearing examiner.[214] Ex parte communications are also permitted between commissioners and the hearing examiner.[215]

Parties have a right to waive these restrictions.[216]

2. Ratesetting proceedings

The ICC's statutes restrict ex parte communications from public utility representatives in the ratesetting process.[217] The provisions apply to communications with commissioners, commissioners' assistants, and hearing examiners. Public utilities are not permitted to discuss any planned general case in a non-public setting with the designated decisional employees.[218] Once a utility has filed notice of intent to change rates, the public utility may not engage in substantive communication with the decisional employees until a notice of hearing is published.[219] Once the notice of hearing is published, ex parte communications are prohibited as set forth in the Illinois Administrative Procedure Act provisions for contested cases, discussed above with respect to adjudicatory proceedings.[220] In addition to the provisions outlined above, if any ex parte communication occurs, all details of the communication must be placed in the public record, including all materials used, the identities of the parties to the communication, the location and the duration of the communication.[221] "A commissioner, commissioner's assistant, or hearing examiner who is involved in any such communication shall be recused from the affected proceeding."[222] A proceeding in which an ex parte contact takes place may be dismissed if necessary to prevent prejudice to a party or preserve fairness.[223] Significant categories of

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[213] 5 Ill. Comp. Stat. 100/10-60, subd. (c); 83 Ill. Admin. Code, § 200.710, subd. (c).

[214] 220 Ill. Comp. Stat. 5/10-103; 83 Ill. Admin. Code, § 200.710, subd. (b)(1).

[215] 220 Ill Comp. Stat., 5/10-103; 83 Ill. Admin. Code, § 200.710, subd. (b)(2).

[216] 5 Ill. Comp. Stat. 100/10-70.

[217] See generally 220 Ill. Comp. Stat. 5/9-201, subd. (d).

[218] *Ibid.*

[219] *Ibid.*

[220] 220 Ill. Comp. Stat. 5/9-201, subd. (d); 220 Ill. Comp. Stat. 5/10-103; 5 Ill. Comp. Stat. 100/10-60.

[221] 220 Ill. Comp. Stat. 5/9-201, subd. (d).

[222] *Ibid.*

[223] *Ibid.*

communications are exempted from these prohibition, including things "indirectly related to a general rate case filing" such as "issues related to outages and restoration, credit ratings, security issuances, reliability, Federal Energy Regulatory Commission matters, Federal Communications Commission matters, regional reliability organizations, consumer education, or labor matters."[224]

3. Rulemaking proceedings

The ICC utilizes both formal, adjudicatory style rulemaking and notice-and-comment rulemaking processes. [225]

The Public Utilities Act expressly requires "all proceedings, investigations, and hearings," conducted by the commission to be based exclusively on the record of proceedings, and specifically requires the ex parte rules applicable to contested cases in the Illinois Administrative Procedure Act to apply in contested, or formal, rulemaking proceedings.[226] Moreover, "any commissioner, hearing examiner, or other person who is or may reasonably be expected to be involved in the decisional process of a proceeding, who receives, or who makes or knowingly causes to be made, a communication prohibited by this Section or Section 10-60 of the Illinois Administrative Procedure Act . . . shall place on the public record of the proceeding (1) any and all such written communications; (2) memoranda stating the substance of any and all such oral communications; and (3) any and all written responses and memoranda stating the substance of any and all oral responses to the materials described in clauses (1) and (2)."[227]

In notice-and-comment rulemaking, the Illinois Administrative Procedure Act contains a specific provision on ex parte communications in rulemaking.[228] An ex parte communication in rulemaking is "any written or oral communication by any person during the rulemaking period that imparts or requests material information or makes a material argument regarding potential action . . . that is communicated to that agency, head of that agency, or any other employee of that agency."[229] The law only applies to communications made after the commencement of the first notice period or filing of notice of rulemaking.[230] Any ex parte communication must be reported to the agency's ethics officer by the recipient of the communication.[231] The ethics

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[224] *Ibid.*

[225] 220 Ill Comp. Stat. 5/10-101 ["Any proceeding intended to lead to the establishment of policies, practices, rules or programs applicable to more than one utility may, in the Commission's discretion, be conducted pursuant to either rulemaking or contested case provisions, provided such choice is clearly indicated at the beginning of such proceeding and subsequently adhered to."]

[226] *Ibid.*

[227] 220 Ill. Comp. Stat. 5/10-103.

[228] 5 Ill. Comp. Stat. 100/5-165.

[229] 5 Ill. Comp. Stat. 100/5-165, subd. (b).

[230] *Ibid.*

[231] 5 Ill. Comp. Stat. 100/5-165, subd. (c).

officer must make the communication part of the record of the rulemaking proceeding.[232] In addition, the ethics officer must file the communication with the state's Executive Ethics Commission, providing all written communications, any written responses to the communications, and a memorandum stating the nature and substance of all oral communications, including information about the party making the communications and the party receiving the communication, and any action the person requested or recommended.[233]

Expressly exempted from these provisions are statements made in a public forum, procedural statements, and statements by an agency employee to the agency head or other employee of the agency.[234]

D. New York Public Service Commission

The New York Public Service Commission (PSC) regulates and oversees the electric, gas, steam, telecommunications, and water industries as part of the New York State Department of Public Service.[235] The Commission consists of up to five members appointed by the governor and confirmed by the state senate to six-year terms.[236]

Although New York's State Administrative Procedure Act prohibits decisional employees of state agencies in adjudicatory proceedings from communicating in any manner with any person or party regarding pending proceedings without notice and opportunity for all parties to participate, the law specifically exempts proceedings before the Public Service Commission."[237] "This subdivision does not apply (a) in determining applications for initial licenses for public utilities or carriers; or (b) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers."[238]

This clause has been interpreted to exempt all proceedings, adjudicatory or otherwise, involving public utilities before the PSC. While we have heard anecdotally that some commissioners set their own restrictions on ex parte communications in their own proceedings, there is no blanket ban or restriction on ex parte communications before the PSC in any proceedings. The Public Service Commission utilizes both notice-and-comment rulemaking under the provisions of the state Administrative Procedures Act and adjudicatory rulemaking in what are termed, "generic proceedings," used to examine issues of common interest to all

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[232] *Ibid.*

[233] *Ibid.*

[234] 5 Ill. Comp. Stat. 100/5-165, subd. (b).

[235] *Commissioners – Meet the* [*sic*], available at http://www3.dps.ny.gov/W/PSCWeb.nsf/All/553FBA3F3EEF7FBD85257687006F3A6D (last visited June 1, 2015).

[236] *Ibid.*

[237] 82 NY State Admin. Pro. Act, § 307(2).

[238] *Ibid.*

utilities.[239]

It is worth noting that New York is at one extreme of the spectrum insofar as permitting such free ex parte contacts. Such permissiveness is not without its critics. A 2013 report by the New York Moreland Commission on Utility Storm Preparation and Response—a commission established by Governor Andrew Cuomo in 2012 to review the "adequacy of regulatory oversight of the utilities and the mission of the State's energy agency and authority functions"[240]—concluded that large utilities are able to take advantage of the lack of ex parte regulations and that smaller parties before the PSC are harmed as a result:

> The Commission learned during the course of its investigation that it is statutorily permissible and common practice for utility company executives, lobbyists and other paid representatives of interested parties to have unfettered access to the PSC Chair and Commissioners without having to disclose details of these conversations, presentation materials or other specifics to the other parties participating in cases before the PSC . . . . Such communications are made in a manner that makes that information insufficiently available to challenge and counter by the adversely affected party or those with differing viewpoints. Since ex parte communications enable one party to influence a decision-maker off-the-record and outside the presence of the other interested parties, it effectively skirts procedural due process. Ex parte communications have the effect of undermining the indispensable fairness and unbiased attributes of decision-makers in judicial and administrative proceedings. Thus, actions to control those communications, in the form of statutory frameworks, become necessary for those proceedings before the agency to maintain fairness and transparency with the public-at-large.
>
> Of particular concern to the Commission is that many ratepayers lack the necessary resources to express their opinions and concerns on matters that impact their lives and their pocketbooks, and that of other similarly situated New Yorkers. . . . The Commission questions the fairness of allowing one side with virtually unlimited resources total access, while the other side lacks a similar voice.[241]

The Moreland Commission report went on to recommend that the PSC adopt ex parte restrictions similar to those of other states and federal agencies. A review of New York

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[239] See http://www.naruc.org/international/Documents/TypesofProceduresNYPSCUndertakes.pdf (last visited May 14, 2015.)

[240] Abrams, Robert & Lawsky, Benjamin, *Moreland Commission on Utility Storm Preparation and Response, Final Report* (June 22, 2013), at p. 8, *available at* http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/MACfinalreportjune22.pdf (last visited June 17, 2015).

[241] *Id*. at p. 42.

legislative efforts shows that there have been attempts to add ex parte restrictions to adjudicatory proceedings before the PSC, but they have not been successful.[242]

E. Pennsylvania Public Utility Commission

Pennsylvania's Public Utility Commission was created in 1937 and claims that it oversees nearly 8,000 entities furnishing services related to electricity; natural gas; telephone; water and wastewater collection and disposal; steam heat; transportation of passengers and property by motor coach, truck, and taxicab; pipeline transmission of natural gas and hazardous materials; and public highway-railway crossings.[243] The Commission is comprised of five-full time members nominated by the governor and approved by the state senate.[244] The commissioners set policy on matters affecting utility rate and services, as well as personnel, budget, fiscal, and administrative matters.[245]

1. Contested on-the-record proceedings—adjudicatory and ratesetting

Ex parte contacts before the Pennsylvania's Public Utility Commission, broadly defined as "any off-the-record communications to or by any member of the commission, administrative law judge, or employee of the commission, regarding the merits or any fact in issue of any matter pending before the commission," are prohibited in any "contested on-the-record proceeding."[246] Contested on-the-record proceeding means a proceeding required by a statute, constitution, published commission rule or regulation or order in a particular case, to be decided on the basis of the record of a commission hearing, and in which a protest or a petition or notice to intervene in opposition to requested commission action has been filed.[247] The rules explicitly allow for off-the-record communications before "the actual beginning of hearings" in a contested on-the-record proceeding when such communications are "solely for the purpose of seeking clarification of or corrections in evidentiary materials intended for use in the subsequent hearings."[248]

In these cases, no presiding officer may consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor may any presiding officer "be responsible to or subject to the supervision or direction" of any officer, employee or agent

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[242] See, e.g., N.Y. Sen. Bill No. S3169-2015; N.Y. Assem. Bill No. A4628-2015; N.Y. Sen. Bill No. S5535A-2009.

[243] *Pennsylvania Public Utility Commission: Annual Report FY 2013-14*, available at http://www.puc.state.pa.us/General/publications_reports/pdf/13-14_PUC_Ann_Rpt.pdf (last visited June 1, 2015) at p. 5.

[244] *Ibid.*

[245] *Ibid.*

[246] 66 Pa. Cons. Stat., § 334, subd. (c).

[247] *Ibid.*

[248] *Ibid.*

engaged in the performance of investigative or prosecuting functions for the commission.[249]

2. Rulemaking proceedings

The ex parte rules do not apply to quasi-legislative, or rulemaking, proceedings as those are not considered contested on-the-record proceedings. Pennsylvania uses notice-and-comment rulemaking procedures.[250]

F. Texas Public Utility Commission

Formed in 1975, the Public Utility Commission of Texas (PUCT) regulates the state's electric, telecommunication, and water and sewer utilities, implements related legislation, and offers customer assistance in resolving consumer complaints.[251]

1. Contested cases—adjudicatory and ratesetting proceedings

Texas' ex parte rules apply to all contested cases, which include ratemaking or licensing proceedings, and are defined as "those in which the legal rights, duties, or privileges of a party are to be determined after an opportunity for adjudicative hearing."[252] In these proceedings, members of the commission or administrative law judges assigned to render a decision or to make findings of fact and conclusions of law may not communicate, directly or indirectly, in connection with any issue of law or fact with any agency, person, party, or their representatives, "except on notice and opportunity for all parties to participate."[253] Members of the commission or administrative law judges assigned to render a decision or to make findings of fact or conclusions of law in a contested case may communicate ex parte with employees of the commission who have not participated in any hearing in the case for the purpose of utilizing the special skills or knowledge of the commission and its staff in evaluating the evidence.[254]

The PUCT uses administrative law judges from the Texas State Office of Administrative Hearings (SOAH) and all communications between SOAH administrative law judges and employees of the PUCT must be in writing or be recorded with a table of contents for each

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[249] 66 Pa. Cons. Stat., § 334, subd. (b).

[250] 45 Pa. Cons. Stat., § 1201 et seq.

[251] *About the PUCT*, available at https://www.puc.texas.gov/agency/about/mission.aspx (last visited June 1, 2015). When formed in 1975, Texas was the last state in the union to provide for statewide comprehensive regulation of electric and telecommunications utilities. (Public Utility Commission Of Texas: Agency Strategic Plan For the Fiscal Years 2015-2019, available at https://www.puc.texas.gov/agency/resources/reports/stratplan/stratplan.pdf [last visited June 1, 2015] at p. 6.)

[252] 16 Tex. Admin. Code, § 22.2(16).

[253] 16 Tex. Admin. Code, § 22.3(b)(2).

[254] *Ibid.*

recording.[255] All such communication submitted to or considered by the administrative law judge shall be made available as public records when the proposal for decision is issued.[256]

2. Uncontested cases

Texas' rules place no restrictions on uncontested cases, such as rulemaking proceedings, which are conducted pursuant to notice-and-comment provisions.[257] However, records must be kept of all communications *in person* by utilities or their representatives, or any person, between the commission or any employee of the commission.[258] The records must include the identity of the person contacting the commission and the identity of the party represented; the case, proceeding, or application; the subject matter of the communication; the date of the communication, the action, if any, requested of the commission; and whether the person has received or expects to receive a financial benefit for making the communication.[259] The records of such communications must be made available to the public on a monthly basis.[260]

G. Washington Utilities and Transportation Commission

Washington's Utilities and Transportation Commission (UTC) regulates the rates and services of private or investor-owned utility and transportation companies.[261] Regulated businesses include electric, telecommunications, natural gas, and water.[262] The commission also regulates in-state household movers, solid waste carriers, private ferries, and inter-city busses, as well as safety issues affecting charter buses, railroads, limousines, and nonprofit senior/handicapped transportation services.[263] The UTC is a three-member commission appointed by the governor and confirmed by the state senate.[264]

1. Adjudicatory and ratesetting proceedings

Washington's ex parte rules only pertain to adjudicatory proceedings, but the definition of adjudicatory proceedings includes "all cases of licensing and rate making in which an

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[255] 16 Tex. Admin. Code, § 22.3(b)(3)

[256] *Ibid.*

[257] Tex. Govt. Code, § 2001.021 et seq.

[258] 16 Tex. Admin. Code, § 22.3(b)(1).

[259] *Ibid.*

[260] *Ibid.*

[261] *Washington Utilities and Transportation Commission Home Page*, available at http://www.utc.wa.gov/Pages/default.aspx (last visited June 1, 2015).

[262] *About the Commission: Who We Are*, available at http://www.utc.wa.gov/aboutUs/Pages/overview.aspx (last visited June 1, 2015).

[263] *Ibid.*

[264] *Ibid.*

application for a license or rate change is denied . . . or in which the granting of an application is contested by a person having standing to contest under the law."[265] In all adjudicatory proceedings, ex parte communications are prohibited "unless reasonable notice is given to all parties to the proceeding, so that they may participate in, or respond to, the communication."[266] The rules apply to any person who has a direct or indirect interest in the outcome of the proceeding, including the commission's advocacy, investigative, or prosecutorial staff, who may not directly or indirectly communicate about the merits of the proceeding with the commissioners, the administrative law judge, or the commissioners' staff assistants, legal counsel, or consultants assigned to advise the commissioners in that proceeding.[267] This restriction does not prohibit procedural inquiries, communications between commissioners, or communications between decision-makers and legal counsel, staff assistants, or consultants under the decision-maker's supervision and not engaged in any investigative or prosecutorial functions in the same or related proceeding.[268]

A presiding officer who receives any improper ex parte communication must place on the record any such written communication received, any written response to the communication, and a memorandum stating the substance of any such oral communication received, any response made, and the identity of each person from whom the presiding officer received an ex parte communication.[269] Upon request made within ten days after notice of the ex parte communication, any party who wants to respond to the communication may place a written rebuttal statement on the record.[270] Portions of the record pertaining to ex parte communications or rebuttal statements do not constitute evidence of any fact at issue in the proceeding unless a party moves to admit any portion of the record for purposes of establishing a fact at issue and that portion is admitted by the presiding officer.[271]

The commission may prescribe appropriate sanctions, including default, for any violation of the ex parte rules.[272] Additionally, a presiding officer who receives an improper ex parte communication may be disqualified, and the portions of the record pertaining to the communication may be sealed by protective order.[273]

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[265] Wash. Rev. Code, § 34.05.455, subd. (1).

[266] Wash. Admin. Code, § 480-07-310(1); see also Wash. Rev. Code, § 34.05.455, subd. (1).

[267] Wash. Admin. Code, § 480-07-310(1).

[268] Wash. Admin. Code, § 480-07-310(2); Wash. Rev. Code, § 34.05.455, subd. (1).

[269] Wash. Admin. Code, § 480-07-310(4); Wash. Rev. Code, § 34.05.455, subd. (5).

[270] Wash. Admin. Code, § 480-07-310(4).

[271] *Ibid.*

[272] Wash. Admin. Code, § 480-07-310(5).

[273] Wash. Rev. Code, § 34.05.455, subd. (6).

2. Rulemaking proceedings

The rules do not include any restrictions on ex parte communications in rulemaking proceedings.[274] Washington uses notice-and-comment rulemaking procedures.[275]

VI. PRACTICES ACROSS AGENCIES STUDIED

In this Section, we synthesize the laws governing ex parte contacts across all of the agencies we studied. We analyze the laws issue-by-issue to identify dominant practices and trends[276] and to identify the various ways in which these agencies have reconciled controversial issues for which there is not a consensus approach one way or another.

A. Adjudicatory Proceedings

There is a clear consensus among nearly every agency studied that ex parte communications are prohibited in adjudicatory proceedings resolving the rights of a party, as they are at the CPUC. The Adjudicatory APA bars such communications, as does CEC and the Coastal Commission within California. The Federal APA does not permit ex parte communications in adjudicatory proceedings,[277] nor does FERC operating under the Federal APA. The Model APA bars ex parte communications in contested cases. Finally, every state we analyzed prohibits communications without notice and opportunity to respond in adjudicatory proceedings, with the exception of New York. There is thus near universal acceptance that it should not be permissible for a party in an adjudicatory proceeding to have off-the-record, private communications with a decision-maker about substantial issues in the proceeding.

B. Quasi-Legislative Proceedings

The CPUC permits ex parte contacts without restriction or reporting requirement in quasi-legislative proceedings. Across the entities we studied, we found a range of approaches to ex parte contacts in rulemaking proceedings. We determined that the variation in practices

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[274] Wash. Rev. Code, § 34.05.410, subd. (2).

[275] Wash. Rev. Code, ch. 34.05.

[276] Throughout this Report, we refer to "common practices," "dominant practices," and a "consensus" among jurisdictions as to certain practices. We do not view those terms as synonyms for "best practices." In the following Parts of the Report, we use that term to identify practices that are sufficiently common across jurisdictions that they lie well within the mainstream of administrative law. But we also evaluate which of the common practices best serve the purposes of regulating ex parte communication and, more broadly, serve the objectives of fairness, transparency, and accountability while meeting the fact-finding, rule-making, and policy-making purposes of the proceedings they govern.

[277] 5 U.S.C. § 554, subd. (d)(1); however this provision exempts "proceedings involving the validity or application of rates, facilities or practices of public utilities or carriers." *(*5 U.S.C. § 554, subd. (d)(2)(B).)

depends primarily on the procedure employed by the agency to enact rules and regulations. The CPUC uses both formal rulemaking processes involving evidentiary hearings as well as procedures more akin to informal notice-and-comment rulemaking, with a trend toward greater use of informal-rulemaking procedures.[278]

When agencies utilize notice-and-comment rulemaking, ex parte restrictions are fewer. Under the Rulemaking APA, before the CEC, in Federal APA informal rulemaking, in FERC rulemaking, in the Model State APA, and in the states of Florida, New York, Pennsylvania, and Washington, there are no restrictions or disclosure requirements for ex parte communications in rulemaking conducted with notice-and-comment rulemaking provisions. The California Coastal Commission, the FCC, and the states of Illinois and Texas require disclosure of ex parte communications in notice-and-comment rulemaking, but there is no restriction on ex parte communications. Illinois, in fact, requires more than disclosure in notice-and-comment rulemaking: any ex parte communications must be reported by the agency employee who receives them to an ethics officer, who makes the communication part of the record of the rulemaking.[279]

Formal rulemaking (or rulemaking through evidentiary hearings), as practiced by the CPUC, is less common among the agencies we studied. However, where formal rulemaking occurs, restrictions on ex parte contacts are significant. Under the Federal APA, in FCC proceedings with hearings, and in Illinois' contested rulemaking, ex parte communications are prohibited. New York was the only other state we studied that uses formal rulemaking processes yet permits unrestricted ex parte communications, much as the CPUC does.

Because of the variability in rules governing quasi-legislative proceedings, we consulted several academic analyses of ex parte communications in rulemaking, and our conclusions have been informed by comments from three scholarly sources. Esa L. Sferra-Bonistalli conducted a study of informal rulemaking in federal agencies for the Administrative Conference of the United States (ACUS),[280] which she summarized in testimony before the Little Hoover Commission last March.[281] Consistent with the ACUS's Recommendation 2014-4, which she describes as "the current federal consensus regarding [ex parte] communications,"[282] Sferra-Bonistalli recommends that agencies be permitted to receive ex parte communications in notice-

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[278] See p. 67, *ante*.

[279] 5 Ill. Comp. Stat. 100/5-165.

[280] Administrative Conf. of the U.S., *Ex Parte* Communications in Informal Rulemaking Final Report (May 1, 2014), available at https://www.acus.gov/report/final-ex-parte-communications-report (last visited June 17, 2015). Her recommendations were incorporated by the ACUS in its Recommendation 2014-4.

[281] Written Statement of Ms. Esa L. Sferra-Bonistalli Before the Little Hoover Commission (May 5, 2015), available at http://lhc.ca.gov/studies/activestudies/californiaopenmeetingact/March2015Hearing/TestimonyMar2015/BonistalliMar2015.pdf (last visited June 17, 2015) (Sferra-Bonistalli Statement).

[282] *Id.* at p. 6.

and-comment rulemaking but that they should be encouraged to provide for disclosure of both the occurrence and the content of ex parte communications made after promulgation of the notice of proposed rulemaking.[283] She describes these recommendations as enabling agencies to realize the benefits of ex parte communications while, through disclosure, "ensur[ing] that rulemaking proceedings are not subject to the appearance of or actual impropriety, improper influence, or unfairness because of *ex parte* communications."[284]

We have also reviewed the statement of Professor Michael Asimow submitted to the Little Hoover Commission.[285] He emphatically opposes amending California's Rulemaking APA to impose in that statute any additional requirement that would apply to all agencies. However, he urges that "individual agencies should be encouraged to set forth their ex parte practice in procedural regulations and agencies may well decide to limit such contacts in the interest of saving staff time or assuring equal access or responding to public concerns about undue influence."[286] He emphasizes the advantages of ex parte contacts in rulemaking—to help interested members of the public understand the issues being addressed in the rulemaking, to encourage candor from people communicating their concerns, and to facilitate political choices and hard compromises.[287] But he also recognizes that ex parte communications, in addition to consuming too much staff time and creating "problems of equal access by different groups," may "suggest to the public that the agency has been captured by the interests it regulates."[288] Asimow also makes it clear that his position on adding requirements to the Rulemaking APA is based in part on his belief that that statute's requirements are already "too complex and costly," and "[b]ecause I believe that California already overregulates the adoption of regulations, I oppose any additional restrictions on the rulemaking process."[289] Based on our experience representing public entities subject to the Rulemaking APA, we share his opinion that the act places unnecessary and unreasonable impediments to agency rulemaking. But that ought not to be of

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[283] *Ibid.*

[284] *Id.* at p. 7.

[285] Testimony of Michael Asimow before the Little Hoover Commission Meeting of Feb. 26, 2015, available at http://lhc.ca.gov/studies/activestudies/californiaopenmeetingact/March2015Hearing/TestimonyMar2015/AsimowMar2015.pdf (last visited June 17, 2015) (Asimow Testimony).

[286] *Id.* at p. 1.

[287] *Id.* at pp. 1, 5.

[288] *Id.* at p. 2. Asimow also emphatically supports the ban without exception on ex parte communications in agency adjudications, noting that they "affect[] the rights of specific parties, not the general public," that "the judge is confined to the record made during the proceeding," that "[a]ll inputs—whether fact, law, or policy—must occur during the adjudicatory process so they can be rebutted by the opposing party" in order to avoid "unfair advantage to those who make the communications." (*Id*. at p. 5.)

[289] *Id.*, p. 3.

significance here since the CPUC is exempt from the Rulemaking APA.[290]

The only CPUC-specific study we have reviewed is an article by Professor Deborah Behles and former CPUC ALJ Steven Weissman.[291] Their paper focuses on the revelations of "improper private communications between high-level utility officials and decision-makers at" the CPUC, which, they conclude, reflects a "culture of conversations with parties . . . behind closed doors."[292] Behles and Weissman survey various state, federal, and model codes, concluding, with respect to rulemaking proceedings, that "many ex parte rules . . . take a more nuanced approach [than the California Public Utilities Code] and focus on whether a pending proceeding is contested, hearings are held, or substantive rights might be affected."[293]

Taken together, these scholarly comments reflect the same overall conclusion we have reached regarding the regulation of ex parte communications in other jurisdictions: In adjudicatory proceedings, ex parte communications are nearly always prohibited in general, with specific kinds of communications excepted. In rulemaking proceedings, the same restrictions generally apply if the proceeding is conducted using adjudicatory procedures, but in notice-and-comment rulemaking practices vary and appear to depend on the circumstances in which the agency finds itself.

C. Ratesetting Proceedings

At the CPUC, ex parte communications are permitted in ratesetting proceedings under limited circumstances: oral ex parte communications with Commissioners are permitted only upon advance notice and equal time for meetings with every other party; oral communications with advisors are permitted but must be disclosed after-the-fact; and written communications may be made at any time as long as they are served on the parties the same day. The only agency that we reviewed with an approach like the CPUC's is the FCC, which uses a "permit but disclose" approach to ex parte communications in a number of proceedings addressing rates (rate of return for common carriers and common carrier depreciation rates).[294] However, the FCC

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[290] Pub. Util. Code, § 1701, subd. (b).

[291] Ex Parte Requirements at the California Public Utilities Commission: A Comparative Analysis and Recommended Changes (Jan. 2015), available at https://www.law.berkeley.edu/files/CLEE/Analysis_and_Recommendations_Related_to_CPUC_Ex_Parte_Practice_1.16.15.pdf (last visited June 17, 2015) (Behles & Weissman).

[292] *Id.* at p. 3.

[293] *Ibid.*; see also *id.* at p. 16 ["The key determinants in many jurisdictions are the existence of disagreement among the participants, the existence of adjudicatory-like features such as evidentiary hearing and the expectation that the decision-makers will have to review and assess conflicting positions."]

[294] 47 C.F.R. § 1.1206(a).

does not permit ex parte communications in proceedings set for hearing,[295] a noteworthy difference from the CPUC's practices.

Ex parte communications are prohibited in ratesetting proceedings in the majority of agencies that we analyzed. FERC, for example, prohibits ex parte communications in all "contested on-the-record proceedings," which include ratesetting proceedings where an intervenor disputes any material issue.[296] Pennsylvania also bars ex parte communication when a protest or intervention in opposition is filed.[297] Florida, Illinois, Texas, and Washington prohibit such communications in ratesetting proceedings generally. The outlier, again, is New York State, which permits unrestricted ex parte communications in all proceedings. While the Model APA does not address ratesetting specifically, in a contested case the Model APA prohibits ex parte communications. There is a clear consensus across the laws governing the agencies we studied that ex parte communications are inappropriate in adversarial proceedings tried on an evidentiary record, such as ratesetting at the CPUC.

There is less consensus as to the point in a ratesetting proceeding at which ex parte communications are prohibited. In the CPUC, there is no ban on ex parte communications until a proceeding has commenced, and once a proceeding is initiated a presumed category governs the proceeding until the scoping memorandum is prepared. The Model APA, Texas, and Washington employ a similar standard, permitting ex parte communication until an application is filed, at which point a proceeding is deemed to have commenced. In agencies which prohibit ex parte communications only in contested proceedings, such as FERC and Pennsylvania, ex parte communications are permitted until an opposing party has filed appropriate papers to demonstrate that it will contest the application. Florida and Illinois each take a different approach to the question. Florida prohibits ex parte communications whenever an individual knows that an issue will be filed with the agency within 90 days.[298] Illinois explicitly bars public utilities, and only utilities, from discussing any planned general rate case in a non-public setting with designated decision-makers, and the prohibition on utilities engaging in ex parte communications continues after the case is filed until the notice of hearing is published, at which time all parties are subject to the same prohibitions.[299] There seems to be a good reason that most agencies do not attempt to regulate ex parte contacts prior to the commencement of a proceeding: there is inherently uncertainty as to whether a proceeding might be commenced.

D. Scope of Agency Personnel Included

There is a range across agencies as to which agency employees are barred from receiving or making ex parte communications (where such communications are prohibited, of course). The CPUC's ex parte rules apply to communications with Commissioners and ALJs, and a more

[295] 47 C.F.R. § 1.1208.

[296] 18 C.F.R. § 385.2201(c)(i).

[297] 66 Pa. Cons. Stat., § 334, subd.(c).

[298] Fla. Stat., § 350.042, subd. (1).

[299] 220 Ill. Comp. Stat. 5/9-201, subd. (d).

limited set of rules governs communications with Commissioners' advisors. All other agency employees may speak freely with parties and decision-makers.

The CEC applies ex parte prohibitions in adjudicatory proceedings to presiding officers and hearing advisors, including commissioners' advisors and personal staff. In Illinois, during the pre-filing phase in ratesetting, utilities may not communicate with commissioners, their assistants, or hearing examiners; the scope of prohibited employees expands, however, once the hearing commences.

Other agencies include a somewhat broader scope of employees in ex parte prohibitions. FERC bars communications with "decisional employees," which include commissioners, their personal staffs, the ALJ, and other employees who are expected to be involved in the decisional process. The Federal Administrative Procedure Act's rules for formal rulemaking have a nearly identical formulation to FERC's decisional employees list, with the exception of the "personal staff" of commissioners. In contested rulemaking, Illinois prohibits commissioners, hearing examiners, and any employee involved in the decision from engaging in ex parte communications. Washington State's utility commission similarly applies its rules on adjudications to commissioners, ALJs, the commissioners' staff assistants, legal counsel, and consultants assigned to advise the commission on the proceeding—a somewhat more identifiable set of personnel than the more nebulous "employee involved in the decision" standard used in the other agencies discussed above, but broader than those included under the CPUC's present rules.

The broadest scope of coverage is found in agencies that bar *all* employees from ex parte communications regarding a proceeding. In permit-and-disclose or restricted proceedings, the FCC uses such a standard, applying to members of the commission, officers of the commission, and all employees of the commission, as well as all members of the agency's Joint Boards and staffs of such boards. In adjudicatory proceedings, including ratesetting, once hearings are commenced, Illinois applies its prohibition to commissioners, hearing examiners, and all commission employees. Illinois also requires that any ex parte communication of material information made to any agency employee during notice-and-comment rulemaking be disclosed. Pennsylvania also applies its ex parte prohibition to commissioners, ALJs, and employees of the commission.

A few jurisdictions only prohibit ex parte communications with the formal decision-makers, the narrowest possible exclusion if ex parte rules are applied at all. The Coastal Commission only applies its rules to commissioners. In Florida, only commissioners are subject to ex parte prohibitions and agency staff is expressly excluded. However, several jurisdictions' ex parte laws, including California's Adjudicatory APA, while specifying only communications with commissioners and other decision-makers, prohibit "direct or indirect" communications with those decision-makers. That language presumably would cover communications through an advisor to influence his or her principal.

E. Disclosure Obligations, Timing, and Right of Reply

The CPUC is nearly alone among agencies we examined in placing the obligation to disclose ex parte communications on the non-agency party to a communication. Nearly all the

agencies we studied place disclosure obligations on the decision-maker, not on the outside party (who may or may not be initiating a communication). The Adjudicatory APA, the CEC, the California Coastal Commission, the Federal Administrative Procedure Act for formal rulemaking, FERC, Illinois, and Washington all impose disclosure obligations on the decision-maker. Florida requires disclosure from both the party and the decision-maker. The FCC is the only agency we studied that requires disclosure by the outside party alone.

It is noteworthy that in Texas and Pennsylvania, which both ban ex parte communications during adjudicatory or ratesetting hearings, there are no statutes or regulations governing disclosure of improper ex parte communications.[300] The absence of any rules governing disclosure is interesting. On the one hand, the simplicity of a prohibition without extensive procedures for remedying violations conveys the messages that violations are not to be expected or accommodated in any manner. In agencies with extensive provisions for disclosure of prohibited communications, the disclosure provisions convey a mixed message that violating the prohibition is acceptable so long as the material is disclosed. On the other hand, without disclosure provisions, there is not a mechanism readily available to prevent the harm caused by improper ex parte communications in these systems. It is possible that in practice there are illegal ex parte communications which are disclosed in states like Texas and Pennsylvania; all we can conclude is that regulatory scheme does not provide for disclosure and simply prohibits the communications without further regulation.

Agencies deploy a wide range of timing for disclosures. In ratesetting, the CPUC requires three day advance notice of meetings with Commissioners, and notice of any ex parte communication to be filed three days after the communication. Written communications must be served the same day. The CPUC is unique among agencies we studied in imposing an advance notice requirement for meetings with Commissioners, and imposes one of the shortest time frames for required disclosures.

Timing for disclosure of ex parte communications is most commonly established for schemes permitting ex parte communications and requiring their after-the-fact disclosure. For instance, the Coastal Commission requires that decision-makers disclose ex parte communications in quasi-judicial matters within seven days of the communication. If a communication is received within seven days of a commission meeting on the matter addressed in an ex parte communication, the communication must be disclosed orally at the meeting. The FCC requires that the party making the ex parte communication file notice of the communication

[300] Texas does require what essentially amounts to a log book of communications with commissioners. We do not consider this equivalent to a disclosure requirement because no proceeding-specific disclosure is required. Instead, the logs of all commissioners are made available to the public on a monthly basis. To determine whether an ex parte communication occurred in a given proceeding, one would have to review the log books and look for communications in a given proceeding. The log books do not appear to be thoroughly completed, a further reason that they are not tantamount to disclosure in a proceeding. See http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/18641_61_753434.PDF for an example of a log book (last visited May 15, 2015).

within two business days. Like the Coastal Commission, the FCC attempts to address the issue of communications immediately before its public meetings. The FCC has created a "Sunshine period," that begins once the agenda for a meeting is released, during which no ex parte communications are permitted. As discussed below, parties retain a right to reply to such communications made before the Sunshine period after the period has commenced.

In agencies where ex parte communications are entirely prohibited, often there are no specific timing requirements for disclosure, even where the regulatory scheme specifically requires disclosure. Florida is an exception, providing that a commissioner who knowingly fails to disclose an ex parte communication within 15 days is subject to removal and civil penalty. Otherwise, the following agencies prohibit ex parte communications in a set of proceedings and require disclosure of any prohibited communications, without specifying a time frame for disclosure: the Adjudicatory APA, the CEC, the Federal APA, FERC,[301] the Model APA, Illinois, and Washington.

The majority of agencies we studied provide for a right of reply to an ex parte communication. The CPUC provides an equal opportunity for an ex parte meeting only in ratesetting proceedings when a Commissioner has granted one party's request for a meeting, but the remaining parties otherwise have no specific right of reply. The equal-time meeting is not functionally equivalent to a right of reply to a written summary of an ex parte communication that includes a description of both a party's and the decision-maker's statements during the ex parte meeting, because the party granted such a meeting is not fully aware of the information exchanged during the ex parte communication. The equal-time meeting is also required in only a limited subset of ex parte communications and not at all for ex parte communications with advisors or in any quasi-legislative proceedings.

Agencies that provide a right of reply include the Adjudicatory APA rules, the CEC, FERC, the Model APA, Florida, and Washington. These agencies usually limit the time in which a party may reply to an ex parte communication so as not to delay further proceedings.

F. Disclosure Contents

Agencies that require disclosure of ex parte communications generally seek to inform the public and the other parties of the substance of the communication and the identity of the parties to the communication. The CPUC requires the disclosing party to include the date, time, and location of a communication, the identity of the parties to the communication, and a description of the communication and its content, *excluding* the Commissioner's or advisor's remarks. The CPUC also requires service of any written ex parte communications. While most agencies require substantially the same information in their disclosures, and require the service or disclosure of written ex parte communications, two issues stand out: (1) what information must be provided about the communication; and (2) whether the decision-makers responses are

[301] FERC requires the Secretary to issue a public notice at least every 14 days of ex parte communications received, but does not specify a time frame for decision-makers to notify the Secretary that they have made or received a prohibited ex parte communication, although the notification must be made "promptly." (18 C.F.R. § 385.2201(f).)

disclosed.

On the question as to what information must be disclosed about the substance of the communication, the issue is one of wording. A few agencies had formulations of this requirement that were more helpful than others at conveying how much of the substance of a communication must be described in the ex parte disclosure. Most agencies use fairly general descriptions such as "the substance of the communication" or "all details of the communication," but the Coastal Commission and the FCC have more specific language in their disclosure provisions. The Coastal Commission requires that disclosures contain a "complete, comprehensive description"[302] of the communication. The FCC instructs the parties who must disclose that they need to include "more than a one or two sentence description of the views and arguments presented."[303]

Most agencies require disclosure of the decision-maker's statements, or at least disclosure of "any response" to the ex parte communication. The Adjudicatory APA specifically requires the disclosure of any response by the presiding officer.[304] So do the Federal APA, the Model APA, Florida, Illinois, and Washington State. The FCC, FERC, and the Coastal Commission do not expressly require disclosure of the decision-maker's statements. Only in the CPUC are the decision-maker's statements expressly exempted from disclosure.

G. Inclusion in Record of Proceedings

Among the agencies we studied, by far the dominant approach to ex parte communications is to remedy the "ex parte" nature of the communication by requiring the inclusion of the communication in the record of proceedings. The CPUC is a significant outlier by requiring that ex parte communications not be included in the record. FERC is the only other agency that regulates ex parte communications but does not require that such communications be made part of the record once disclosed. FERC does, however, permit any party to request that an ex parte communication and any replies to that communication, be made part of the record. In all other agencies with disclosure requirements, the ex parte communication, as disclosed, becomes a part of the record of proceedings. Washington State clarifies that such communications are not to be considered as evidence of any fact at issue in the proceeding, although a party may move to admit any portion of the record (including ex parte communications placed in the record) for purposes of establishing a fact at issue. The presiding officer determines whether to admit such material in a given proceeding. The Adjudicatory APA, the Coastal Commission, the CEC, the Federal APA, FERC, the Model APA, Florida, and Illinois all require that ex parte communications be disclosed and placed in the record.

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[302] Pub. Resources Code, § 30324, subd. (b)(1).

[303] 47 C.F.R. § 1.1206(b)(1).

[304] Gov. Code, § 11430.50, subd. (a).

H. Enforcement, Penalties, and Sanctions

Most agencies' rules provide for some form of enforcement or sanctions for violators of ex parte communication rules. The CPUC has authority to enforce its rules, though the rules on potential enforcement are less explicit than those of nearly every other agency we studied. The Commission may impose "penalties and sanctions" and make orders as appropriate to ensure the integrity of the record. While these provisions give the CPUC the necessary authority to address violations, other agencies have a more comprehensive list of possible penalties—expressly for illegal ex parte communications—that may better serve to deter potential violators and induce decision-maker compliance.

In most jurisdictions, penalties for violation of ex parte rules generally fall on the violating outside party, the decision-maker, and in some cases, potentially both parties.

When the penalty falls on the interested party, the law often requires that party to show cause why the offending party's claim or interest in a proceeding should not be "dismissed, denied, disregarded, or otherwise adversely affected." This formulation or a similar one is used in the Federal APA, the laws governing the FCC, FERC, Illinois, and Washington State, and is recommended in the Model APA. The FCC also may disqualify violators from continued participation in the proceeding, while FERC may disqualify the violator temporarily or permanently from practicing or appearing before it. The FCC also has the authority to impose monetary sanctions or forfeitures. Florida can prohibit a person from appearing before or representing anyone before the commission for a two-year period.

The most common penalty imposed on the decision-maker is disqualification from the decision on the matter addressed in the ex parte communication. Laws allowing disqualification as a sanction include the Adjudicatory APA, the Coastal Commission, and Washington State, and such a provision is recommended in the Model APA. Florida provides that a commissioner is "subject to removal" for knowing violations of the ex parte disclosure rules, as well as a penalty of up to $5,000. The Coastal Commissioners can also be fined up to $7,500. FERC and FCC employees who violate the rules may be subject to disciplinary action. The Coastal Commission provision allows a party to obtain a writ of mandate reversing a commission decision on the basis of improper ex parte contacts.

Some agencies have found it beneficial to have an internal or external officer who is made responsible for enforcing the ex parte rules. For example, the FCC's regulations assign specific duties to the General Counsel to investigate ex parte communications identified by agency personnel as prohibited communications.[305] In Florida a separate state agency, the Commission on Ethics, has authority to investigate sworn complaints of violations of the ex parte rules, and can impose penalties prohibiting individuals from appearing before the Public Service Commission.[306] Illinois' Administrative Procedure Act requires agencies to appoint an ethics

[305] 47 C.F.R. § 1.1212 (b)-(g).

[306] Fla. Stat. Ann., § 350.042, subd. 7(c)-(d).

officer to receive reports of ex parte communications in notice-and-comment rulemaking.[307] The CPUC presently lacks any specific individual who is designated to enforce the ex parte rules.

I. Communications with Decision-Makers

1. Staff communications

An issue addressed in most ex parte communication statutes is whether and under what circumstances agency staff may communicate with agency decision-makers. The CPUC generally has no restriction on advisory staff communicating with decision-makers. The Office of Ratepayer Advocates (ORA) is treated as a separate party for purposes of ex parte rules and thus is prohibited from ex parte communications to the same extent as the utilities and intervenors.

Most agencies recognize that there are certain categories of staff who cannot speak with decision-makers without compromising the integrity of an adjudicatory-type proceeding. The Model APA provides, for example, that staff that has served as an investigator, prosecutor, or advocate at any stage of a case are generally barred from communicating with decision-makers about that case. The Adjudicatory APA, Federal APA provisions on adjudicatory hearings, Illinois, Pennsylvania, Texas, and Washington all recognize this functional bar and restrict or prohibit communications between prosecutorial or advocacy staff and decision-makers.

Some agencies exempt all or most staff decision-maker communications from the ex parte rules. These agencies include the California Coastal Commission and Illinois, which permits staff communication only in notice-and-comment rulemaking. Texas allows ex parte communication with staff only if the staff has not participated in any hearing in the case. The Adjudicatory APA allows advisory staff to communicate ex parte with the presiding officer to provide technical assistance, evaluate evidence in the record, or advise on a settlement proposal. The content of any communication on a "technical issue" must be disclosed on the record and an opportunity to respond must be provided.

The Model APA has the most comprehensive set of provisions governing staff communications with decision-makers. These provisions recognize the potential for staff communications to undermine record-based decision-making, and so rely upon a set of conditions that limit the circumstances when staff can communicate directly with decision-makers without other parties present. The communication may not "augment, diminish, or modify the evidence in the agency hearing record." Staff's function may be to provide legal advice, to provide technical or scientific background or expertise, or to provide background on agency precedent or policies. Staff may not comment upon the weight to afford evidence or the credibility of the parties or witnesses. No agency we studied has adopted such a comprehensive set of rules on staff communication.

[307] 5 Ill. Comp. Stat. 100/5-165, subd. (c).

2. Non-party communications

The CPUC's rules define a fairly broad class of persons who are subject to ex parte disclosures as "persons with an interest" in a proceeding. Such persons include parties, their representatives, any person with a financial interest in the outcome of a proceeding, and representatives of civic, environmental, neighborhood, business, labor, trade, or similar association who intends to influence the Commission's decisions. Most agencies similarly prohibit "interested persons" from engaging in ex parte communications, including California's Adjudicatory APA, the CEC, and the Coastal Commission. Some agencies apply the prohibition more broadly, such as Illinois, which bars communications from parties, representatives, and any other person without notice and opportunity to participate.[308] Pennsylvania and Texas similarly prohibit communications between decision-makers and any person or party off the record.[309] The FCC has a unique regulation applying specifically to Members of Congress and their staffs. Communications from Congress are subject to ex parte disclosure if the presentations "are of substantial significance and clearly intended to affect the ultimate decision."[310]

J. Exempted Communications

Procedural communications are universally exempted from ex parte rules, but some agencies have included more guidance or limitations on what constitutes a procedural communication than is presently contained in the laws governing the CPUC. The CPUC's rules identify communications regarding schedule, location, or format for hearings, filing dates, identity of parties, and similar nonsubstantive information as procedural communications. Many agencies we studied have a similar formulation or simply exempt "procedural inquiries" from ex parte communication rules.

Agencies that attempt to more narrowly define the procedural communication exemption seek to eliminate two possible abuses of the exemption: private communications on controverted procedural issues and procedural communications that also address the merits of a proceeding. The first abuse is handled in the Adjudicatory APA by allowing ex parte communications only on procedural issues "not in controversy." The Model APA exempts only communications on uncontested procedural issues. Both FERC and the Federal APA prohibit any ex parte procedural communications that are "relevant to the merits." FERC elaborates upon that limitation to explain that inquiries with a "stated or implied preference for a particular party or position," may not be made ex parte, as well as "inquiries intended to either directly or indirectly address the merits or influence the outcome of a proceeding." The Model APA notes that procedural communications do not include communications that are not on the merits but related to the security or credibility of a party or witness.

Other exemptions to the ex parte rules are found inconsistently among the agencies we studied, though some are likely of interest to the Commission. Several agencies address

[308] 5 Ill. Comp. Stat. 100/1-30.

[309] 66 Pa. Cons. Stat., § 334, subd. (b); 16 Tex. Admin. Code, § 22.3(b)(2).

[310] 47 C.F.R. § 1.1206(b)(3).

attendance at conferences, a topic we understand to be of significant interest to the CPUC. Florida specifically exempted from its ex parte rules oral communication or discussion in scheduled and notice open public meetings of education programs or of a conference or other meeting of an association of regulatory agencies, but has just repealed that exemption and now applies ex parte rules during conferences, prohibits commissioners from discussing pending matters at conferences, and requires "reasonable care" that the event was not designed to influence a pending proceeding. Illinois exempts from the ex parte disclosure requirements for notice-and-comment rulemaking any statement made publically in a public forum. The FCC exempts presentations from sister federal agencies on topics of shared jurisdiction, and also permits disclosure of ex parte communications at widely attended events by submission of a transcript or recording of the communication (eliminating the need to identify every possible recipient of the communication).

Other agencies we studied have a variety of exemptions, but there appears to be no pattern or consistency among them. These exemptions have been identified in the text for each of the agencies discussed above.

K. Conclusions

To a significant degree, the CPUC's ex parte rules diverge from those governing the agencies we studied. These agencies were selected because we and others we consulted identified them as most potentially similar to the CPUC in terms of industries regulated, scope of proceedings, and types of dockets.

The areas where the CPUC appears to be in line with the other agencies we studied are (1) banning ex parte contacts in adjudicatory proceedings; (2) requiring disclosure of ex parte communications and service of written ex parte communications; and (3) exempting procedural communications from ex parte communication rules.

The CPUC ex parte rules differ significantly from the approach taken by the majority of the agencies we studied in the following categories:

(1) **Ratesetting:** The law governing the CPUC permits ex parte contacts in ratesetting hearings, requiring after-the-fact disclosure. The only other agencies we studied that permits ex parte contacts in ratesetting or when evidentiary hearings are held is the FCC, which permits ex parte contacts in certain ratesetting hearings but restricts them when a hearing is held, and New York State, which has no restrictions at all. Every other agency bans ex parte contacts entirely under analogous circumstances.

(2) **Disclosure:** Parties to CPUC ratesetting proceedings, rather than decision-makers, are required to disclose ex parte communications. The FCC is the only other agency that relies solely upon the parties to make this disclosure. Every other agency with a disclosure obligation that we studied requires the decision-makers to disclose the communication.

(3) **Disclosure contents:** California law prohibits disclosure of CPUC decision-

maker's ex parte statements. Most agencies require the disclosure of any response to an ex parte communication.

(4) **Inclusion in the record:** The CPUC does not include disclosures of ex parte communications in the record. FERC is the only agency we studied that does not require disclosed ex parte communications to be placed on the record, but even FERC permits parties to request inclusion. Every other agency that requires disclosure of ex parte communications requires such disclosures to be placed in the record.

(5) **Enforcement, penalties, and sanctions:** While the CPUC may have the authority needed to impose adequate penalties, its governing rules lack the specificity found in most other jurisdictions that may more effectively deter violations of the rules. And unlike most jurisdictions, there are no sanctions for violations of ex parte rules by decision-makers.

(6) **Communications between staff and decision-makers:** The CPUC does have a clear functional bar between investigatory or prosecutorial staff communicating with decision-makers, as do most of the agencies that we studied. However, there are circumstances where the same CPUC staff member serves advisory and prosecutorial functions at the same time in different proceedings involving the same utility.

Part II

EX PARTE COMMUNICATIONS IN PRACTICE BEFORE THE CPUC

Ultimately, the topic of ex parte contacts is one of information-flow in a legally defined process: How do decision-makers get the information that informs their decisions? Are the processes they use reliable? Fair? Efficient? Visible to the public?

In Part II of this Report, we consider each phase of the decision-making process, as it is prescribed by law and as it is described by participants, and we seek to identify whether and to what extent ex parte communications are part of the information flow in that phase. In Part III we report the views of various parties and other observers, and we report their recommendations regarding possible changes. In Part IV we analyze the information gleaned from our survey of ex parte laws in other jurisdictions, the information about how the process works, and the opinions and suggestions of those with an interest in the process, leading to our recommendations on reforms to address the identified concerns with ex parte practices before the CPUC.

I. VOLUME OF PROCEEDINGS AND EX PARTE CONTACTS

We begin with a quantitative overview of the Commission's regulatory work.

A. Volume of Proceedings and Decisions

The CPUC handles a very high volume of proceedings across the four industries it regulates. Since 2010, the CPUC has opened an average of 280 proceedings per year and has resolved an average of 330 proceedings per year. Table 1 summarizes the number of proceedings opened, resolved, and the number of decisions issued, according to the CPUC's Annual Reports (AR) and other public documents.

Table 1

Proceedings Opened, Closed and Decisions Issued: 2010-2014

Year	Proceedings Opened	Proceedings Closed/Resolved	Decisions Issued
2010	283 (2010 AR, p. 6)[311]	391 (2010 AR, p. 6.)[312]	540 (2010 AR, p. 6.)
2011	301 (2011 AR, p. 7)	305 (2011 AR, p. 7)[313]	501 (2011 AR, p. 7.)
2012	281 (2012 AR, p. 5)	335 (2012 AR, p. 5.)[314]	538 (2012 AR, p. 5.)
2013	274 (2013 AR, p. 5)[315]	285 (2013 AR, p. 5)[316]	507 (2013 AR, p. 5)
2014	264 (2014 AR, p. 10)	335 (2014 AR, p. 10.)[317]	576 (2014 AR, p. 10)

Relative to the number of proceedings it handles annually, the CPUC has few business meetings. The Commission nominally meets two times per month, though in actuality it has averaged approximately 1.7 meetings per month between January 2009 and March 2015. Given the number of proceedings addressed at each meeting, the meetings are not lengthy. A review of meetings between May 1, 2014 and April 9, 2015 revealed an average duration of 2.5 hours and only one meeting extending beyond lunch, taking 4.9 hours.[318] A staff member observed to us that there has been an increase in the use of consent agenda items in recent years. According to this staff member, meetings used to be held from 10:00 a.m. to 4:00 p.m., and would have 10-15 items on the consent agenda. Now the meetings end at 12:00 p.m. and there are close to 40 items

[311] CPUC docket search shows 284 proceedings.

[312] 2010 Report on Timely Resolution of Proceedings and CPUC Presence at Hearings (p. 5) shows 320 proceedings closed/resolved.

[313] 2011 Report on Timely Resolution of Proceedings and CPUC Presence at Hearings (p. 4) shows 246 proceedings closed/resolved.

[314] 2012 Report on Timely Resolution of Proceedings and CPUC Presence at Hearings (p. 5) shows 283 proceedings closed/resolved.

[315] CPUC docket search shows 246 proceedings initiated in 2013.

[316] 2013 Report on Timely Resolution of Proceedings and CPUC Presence at Hearings (p. 6) shows 258 proceedings closed/resolved.

[317] 2014 Report on Timely Resolution of Proceedings and CPUC Presence at Hearings (p. 6) shows 265 proceedings closed/resolved.

[318] These figures were taken from the videotape recordings of the public meetings, so they necessarily exclude time Commissioners may have met in closed session.

on the consent agenda.[319]

B. Volume and Frequency of Ex Parte Contacts

Parties to CPUC proceedings who are required to give notice of ex parte contacts they have had in ratesetting proceedings do so through a portal on the CPUC website, cpuc.ca.gov. At our request, the Executive Director's Office obtained from the Commission's Information Technology staff a flat file containing an entry for each filing reported as an ex parte contact notice through October 22, 2014. Although the file contained a number of errors and missing data, we made a series of assumptions that permitted us to derive a conservative estimate of the frequency of ex parte contacts in ratesetting cases.[320]

The number of reported ex parte contacts in CPUC practice is significant. Figure 1 charts the number of reported ex parte contacts annually from the date the disclosures were first required through 2013.[321]

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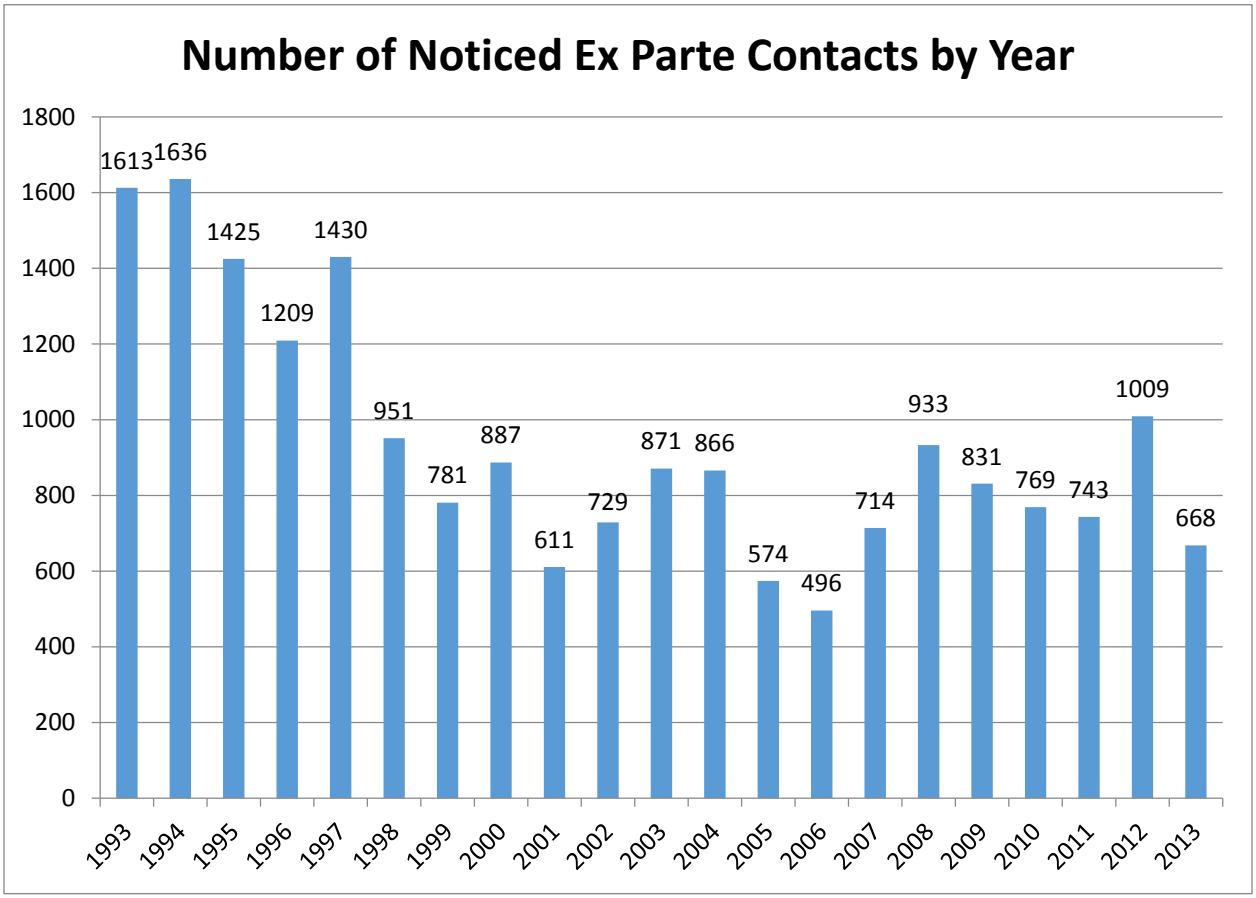
[319] This characterization of the agendas is consistent with our review of the May 2014-April 2015 agendas, which averaged 35 consent-agenda items and 6 regular-agenda items per meeting. Over this period, there was a total of 43 alternate decisions for items on the regular agenda (6 per meeting, one for every three cases) and a total of four alternate decisions for items on the consent agenda (0.2 per meeting, one for every 184 consent items). The Commission held over to the next meeting, on average, 9 items. So the Commission actually disposed of an average 32 items per meeting. And, as reported above, these meetings averaged 2½ hours to cover these 32 items plus other business.

[320] In particular, approximately 15% of the records in the file had no data other than the name of the filer—no date, no proceeding number, no description of what was being filed. We have assumed that these records represent transactions that were not completed and that the attempt was followed by a successful filing. To the extent that assumption is incorrect, the numbers we report here underestimate the frequency of reported ex parte contacts. We also discovered that where several proceeding numbers had been consolidated for hearing and a party had a single ex parte communication that pertained to several proceedings, some parties filed notices of the same meeting multiple times, once for each proceeding number. To avoid multiple-counting of such meetings, we eliminated duplicate records having the same filer, date, and description. This filter eliminated roughly a third of the records. In addition, in some cases multiple parties who had aligned positions in a proceeding attended a meeting with a decision-maker together and then one of them filed a single notice identifying all the attending parties. Each of these adjustments has the effect of reducing the apparent number of reported ex parte communications. And, of course, to the extent there were ex parte meetings that were never noticed, they are not reflected in the data. Consequently the numbers we report here should be understood to represent a lower-bound estimate of the extent of ex parte communications in ratesetting proceedings.

[321] Because the available data for 1992 and 2014 represent partial years, we have not included those partial-year totals in this chart.

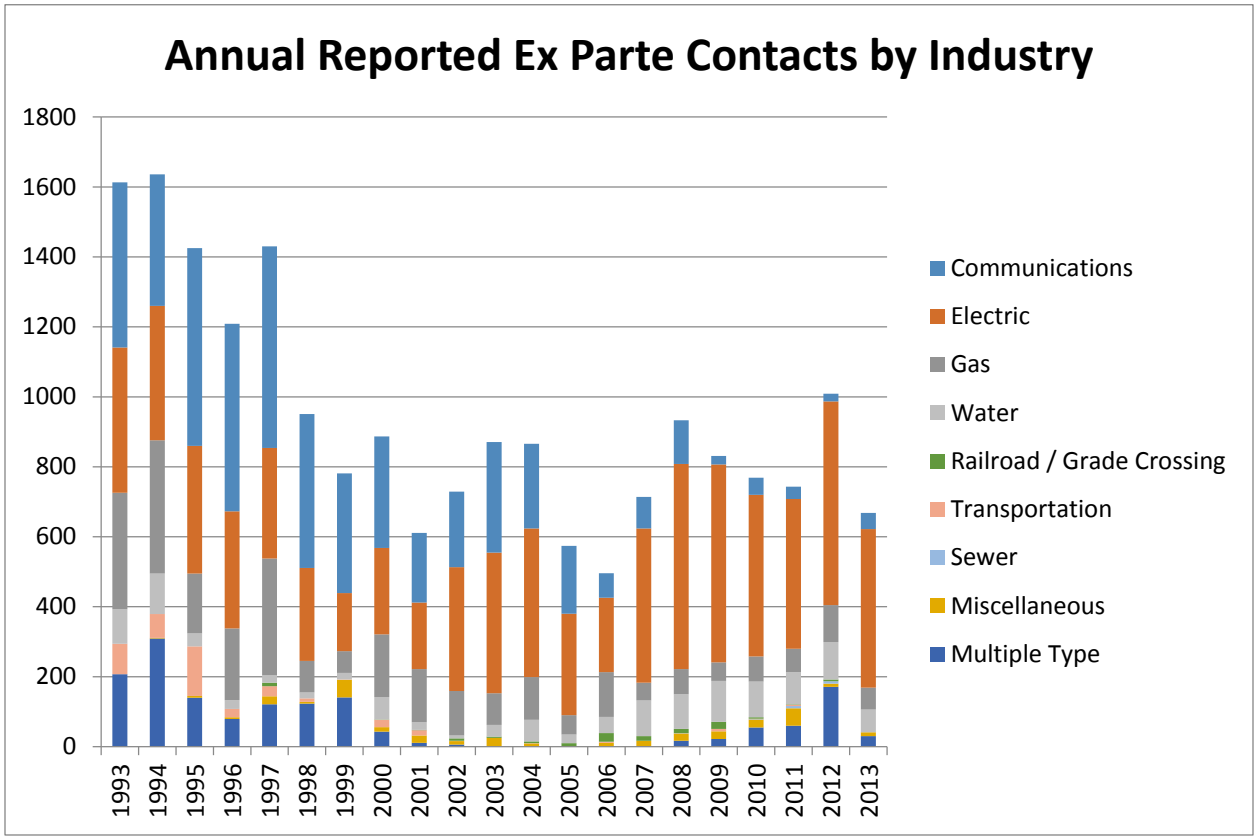
Figure 1



While there appears to be an overall downward trend in the frequency of noticed ex parte contacts from 1993 through 2013, we suspect the picture is not that simple. There appears to be a drop-off in ex parte notices after 2000. First, we note that rule 8.6, specifically governing proceedings filed before January 1, 1998, differs from the rules for more recent proceedings and appears to permit a broader range of ex parte communications, with concomitant more frequent disclosure notices, for the older cases. In addition, the years from 1993 to 2000, of course, represent the period leading up to enactment of electricity deregulation and the subsequent crisis. We should not be surprised to see a consistently high rate of ex parte notices during that period (an average of 1,242 per year according to the CPUC data). So we believe we are justified, for purposes of assessing whether there is a trend in the data, in treating the post-2000 period differently than the earlier period. In the 13 years from 2001 to 2013, the annual average drops to 755 noticed contacts (a 39% reduction), and there is no statistically significant trend in the post-2000 period.

Moreover, when looking at the trends in reported ex parte contacts by industry over time, it becomes clear that a significant factor in the decline in ex parte contacts leading up to 2000 is the decline in reported ex parte contacts specifically among the communications cases. These trends are shown in Figure 2.

Figure 2[322]



We further reviewed the data to assess the distribution of ex parte contacts among parties. During the period from March 1992 to October 2014—the period for which we have reliable data of reported ex parte contacts—there have been a total of 21,389 reported ex parte contacts by 1,456 unique parties, with an average of 14.7 contacts per party.[323] That average is distorted by a small number of heavy participants; the median number of ex parte contacts over that period is two contacts per party. Five hundred eighty-nine parties (40.5%) have had only one reported ex parte contact, 212 (14.6%) have had two, and 133 (9.1%) have had three reported ex parte contacts. In fact, 1,091 of the 1,456 parties, or 74.9%, have had five or fewer reported ex parte contacts. But 22 very active parties have made 100 or more reported ex parte contacts. Among

[322] The ex parte contacts database contains a utility type option called "Multiple Type." It appears this is used for proceedings that involve more than one type of utility. A closer examination of some of these proceedings showed that it may have been used in some proceedings that involved only a single type of utility. At a minimum, it was unclear why the Multiple Type designation was used for some proceedings. Regardless, its usage varied significantly over time, being phased out completely by 2003, but then reappearing and generally increasing in usage from 2007 to 2013.

[323] The data, of course, does not show in any fashion how many parties in proceedings have had no reported ex parte contacts.

these 22 parties, the average number of reported contacts is nearly 600. Even this group of the 22 most active parties is top-heavy, as the top seven most active parties account for 10,228 of all 21,389 reported contacts, or 47.8%, with an average within that group of 1,461 reported contacts. Table 2 shows the top ten filers of ex parte contacts since March 1992.

Table 2

Top Ten Filers of Ex Parte Contacts (March 1992-October 2014)

Rank	Filer	Number
1	ORA/DRA[324]	2,325
2	Pacific Gas & Electric	2,272
3	Southern California Edison	1,863
4	Pacific Bell Telephone Company[326]	1,281
5	Southern California Gas Co.	955
6	San Diego Gas & Electric	833
7	TURN	699
8	AT&T Communications of California[325]	351
9	GTE California, Inc.	263
10	Independent Energy Producers Association	236

We have looked at the same numbers for the past five years to get a sense of more recent activity. From October 23, 2009 to October 22, 2014, there have been 3,848 reported ex parte contacts by 377 unique parties, averaging 10.2 contacts per party. Again, the median is only two reported contacts because the average is distorted by heavy participants. Of the 377 parties, 270, or 72.9%, have made 5 or fewer ex parte contacts. The top eight filers account for just under half of all reported contacts over this five-year period.

There is again a distinct consistency in the identity of the top ex parte filers across the past five calendar years. The CPUC's Office of Ratepayer Advocates (ORA) and the three major

[324] CPUC's Office of Ratepayer Advocates, or its predecessor, the Division of Ratepayer Advocates.

[325] This figure *excludes* notices filed under the name Pacific Bell Telephone Company, although these notices sometimes stated that Pacific Bell Telephone Company was doing business as AT&T Communications of California.

[326] This figure combines notices filed under the name Pacific Bell Telephone Company and Pacific Bell. These entities appeared to be a single corporate entity for purposes of advocacy at the Commission, though to the extent that each were considered separately, each would be in the top-10 filers of ex parte notices over the March 1992-October 2014 period. This figure does not include notices filed under other potential corporate names for the Pacific Bell companies, including AT&T, SBC, Pacific Telesis, or Pacific Bell Communications.

investor-owned energy utilities are in the top ten for each of these years. ORA was the top filer in all of the past five years. ORA's dominance reflects the fact that its staff advocate in nearly every proceeding before the Commission. Consumer advocacy group The Utility Reform Network (TURN) and environmental group Natural Resources Defense Council (NRDC) are also among the top ten filers in most of the last five years. Table 3 presents the number of ex parte contacts per party by the top ten filers over the last five year period. It is noteworthy that while ORA is by far the top filer, investor-owned utilities fill out the rest of the top five. Because utilities engage in ex parte communications only in their own ratesetting proceedings, their dominance on the list of filers reflects how heavily utilities have invested in ex parte contacts in ratesetting matters.

The industries most frequently involved in noticed ex parte communications have changed in the last five years in a manner that appears to directly mirror the changing landscape of the CPUC's ratesetting authority. Among the top-10 filers over the entire ex parte disclosure period, approximately half of the industry filers were in the telecommunications industry. That industry was largely deregulated in 2006. Telecommunications utilities are now primarily involved in either complaint cases in which no ex parte communication is permitted, or quasi-legislative cases, in which there is not any reporting requirement for ex parte communications. Accordingly, telecommunications companies are no longer in the top-10 filers of ex parte notices in the past five years. In the most recent five-year period, most of the top-10 filers are parties involved in energy proceedings, including the major energy utilities, an environmental group, and several nonprofit advocacy organizations.

Table 3

Top Ten Filers of Ex Parte Contacts (10/23/09-10/22/14)

Rank	Filer	Number
1	ORA/DRA	562
2	Pacific Gas & Electric	346
3	Southern California Edison	326
4	San Diego Gas & Electric Co.	199
5	TURN	137
6	Natural Resources Defense Council	110
7	Southern California Gas Co.	109
8	California-American Water Co.	83
9	The Greenlining Institute	50
10	Alliance for Retail Energy Markets	49

The proceedings with the most ex parte contacts, looking solely at the last five years, reflect some of the most controversial issues and projects that have come before the Commission. These include the two proceedings to implement the Renewable Portfolio Standards, rulemaking on energy efficiency standards, the proceedings concerning the Tehachapi high voltage transmission line and its post-construction undergrounding in Chino Hills, and the consolidated proceeding involving low income assistance programs for all three investor-owned electric utilities. Historically, the proceeding with the most noticed ex parte contacts over the entire period in which the disclosure rules have been in force was the proceeding that introduced

competition into local telephone exchange service, effectively deregulating that industry. All of these proceedings concerned important issues of significant controversy. To get a better sense of what is happening within individual proceedings, we calculated the average number of ex parte contacts made per proceeding since 1992, and the average number of contacts made per proceeding per party. From March 1992 to October 2014, across 1,491 proceedings[327] in which there was at least one noticed ex parte communication, there was an average of 14.3 reported ex parte contacts per proceeding or set of consolidated proceedings, and a median of four reported contacts per proceeding. A small number of proceedings with an extremely large number of reported ex parte contacts brings the average up. Of the 1,491 proceedings, 875 (58.7%) have had five or fewer reported contacts. In fact, over one in four proceedings have had only one reported ex parte contact. Of the 1,491 proceedings, 35 have had more than 100 reported contacts, and these account for 7,212 of the 21,389 reported contacts (33.7%). One proceeding alone has had 1,285 reported contacts.[328]

Since 1992, the average number of contacts per proceeding by a given party is 2.56, with a median of 1.50. Again, this number does not consider parties who have made zero contacts in a proceeding, so it likely overstates a true average. Ninety percent of the parties that have reported ex parte contacts have averaged five or fewer contacts per proceeding. To compare the ex parte activity per proceeding among the biggest players, Table 4 shows the 21 parties who have reported ex parte contacts in the most proceedings since March 1992, which turns out to be those parties who have reported ex parte contacts in 27 or more proceedings.

[327] For purposes of this statistical analysis of reported contacts per proceeding, "proceeding" means a single proceeding or group of consolidated proceedings. The reason for this is that a filer of an ex parte disclosure will disclose a single ex parte contact separately in all consolidated proceedings even though it is only a single ex parte contact. We treat this in our analysis as a single reported ex parte contact in a single "proceeding" as defined in this footnote.

[328] This proceeding is R9504043, a Commission-initiated rulemaking to establish competition in telecommunications local exchange service that was active between 1996 and 2007. This rulemaking required disclosure of ex parte contacts by ruling of the ALJ and Assigned Commissioner. Rulings during the proceeding actually banned ex parte contacts on several issues at various times.

Table 4

Ex Parte Activity of the
Twenty-One Parties Involved in the Most Proceedings Since March 1992

Filer	No. of Ex Parte Contacts	No. of Proceedings	Avg. Contacts / Proceeding
Pacific Bell Telephone Company	1281	105	12.20
GTE California, Inc.	263	30	8.77
CA Cable Television Association	223	31	7.19
Verizon California Inc.	188	27	6.96
AT&T Communications of California	351	51	6.88
Southern California Gas Company	955	139	6.87
California-American Water Co.	192	29	6.62
MCI Telecommunications Corp.	178	27	6.59
Southern California Edison Company	1863	283	6.58
Pacific Gas & Electric Company	2272	378	6.01
Independent Energy Producers Association	236	47	5.02
San Diego Gas & Electric Company	833	180	4.63
Natural Resources Defense Council	187	41	4.56
CPUC/ORA	2325	529	4.40
Sempra Energy	206	54	3.81
Greenlining Institute, The	136	37	3.68
TURN	699	203	3.44
CA Water Service Company	98	30	3.27
Alliance For Retail Energy Markets	111	34	3.26
CA Large Energy Consumers Association	106	38	2.79
Coalition of California Utility Employees	68	33	2.06

Thus, normalized by proceeding, the data make it clear that the principal parties availing themselves of ex parte communications are regulated utilities and other business interests. Of the top 21 parties shown in Table 4, only four can be said to be advocating for ratepayers or public-interest organizations, and all four of them are in the bottom half of the list. While their presence on the list is certainly a measure of success of policies aimed at introducing a counterbalance to the utilities—both by the CPUC's in-house advocacy staff and by outside organizations funded through intervenor compensation—Table 4 confirms that there remains a wide quantitative disparity in ex parte access to decision-makers between the utilities and their adversaries. The utilities comprising the top ten parties are contacting decision-makers ex parte on average 7.5 times per proceeding, compared with an average of only four times per proceeding for ORA, NRDC, the Greenlining Institute, and TURN.

II. THE CONTEXT IN WHICH EX PARTE COMMUNICATIONS TAKE PLACE AT THE CPUC

In assessing ex parte practices before the Commission, it is important to identify the context in which ex parte communications take place and to identify how they function for the parties and the Commission. We begin by laying out the procedures the CPUC uses to decide cases and to make rules.

A. Categorization of Proceedings and the Corresponding Rules on Ex Parte Communications

As already noted, the rules regulating ex parte contacts before the CPUC differ according to the category of proceeding—adjudicatory (where ex parte communications are nominally prohibited), quasi-legislative (where ex parte communications are unrestricted), and ratesetting (where ex parte communications are permitted with restrictions). The categories are not defined to be mutually exclusive, so the Commission has discretion to choose in which category to place a given proceeding according to "which category appears most suitable to the proceeding."[329] Proceedings receive an initial categorization, which may then be changed.

1. Adjudication proceedings and ex parte communications

Adjudication proceedings "are enforcement cases and complaints except those challenging the reasonableness of any rates or charges."[330] Adjudication proceedings are initiated by the filing of a complaint or the commencement of an investigation.[331] All complaints and investigations are subject to ex parte rules applicable to adjudicatory proceedings until the proceeding is categorized by the ALJ and the categorization is provided to the parties in the instruction to answer.[332] In an adjudicatory proceeding, the ALJ is the presiding officer who issues a presiding officer's decision, which is the decision of the Commission unless it is appealed by a party or a Commissioner requests review.[333] The Commission may consider appeals in closed session but must vote in a public session on the appeal or request for review.[334]Any changes to the presiding officer's decision require a written explanation.[335]

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[329] Rule 7.1(e)(1); see also Pub. Util. Code, § 1701.1, subd. (a).

[330] Pub. Util. Code, § 1701.1, subd. (c)(2).

[331] Rule 1.3(a); see also Pub. Util. Code,§§ 1701.1, subd. (c)(2); 1704.

[332] Rule 8.5(c).

[333] Rule 14.4, 15.4; see also Pub. Util. Code, § 1701.2, subd. (a).

[334] Pub. Util. Code, § 1701.2, subd. (d); rule 15.4.

[335] Rule 15.4; see also Pub. Util. Code, § 1701.2, subd. (d).

Ex parte communications are prohibited in adjudicatory proceedings before the CPUC.[336] Practitioners did not express significant concerns about violations of ex parte contact rules in adjudicatory proceedings.

2. Quasi-legislative proceedings and ex parte communications

Quasi-legislative cases are "cases that establish policy, including, but not limited to, rulemaking and investigations which may establish rules affecting an entire industry."[337] The CPUC's quasi-legislative functions are exercised in rulemaking proceedings, which adopt, repeal, or amend rules, regulations, or guidelines for a class of public utilities or other regulated entities.[338] Although the statute contemplates that at least some rulemaking sessions to employ formal procedures,[339] we are advised that the CPUC uses informal procedures in most of its rulemaking proceedings. According to statistics we were given by the Executive Director's Office drawn from the Commission's Case Information System and hearing reporters, from 2003 through 2014 approximately 40% of rulemaking proceedings employed trial-type procedures that we would consider as characteristic of "formal hearings." In the most recent five years of that period, trial-type procedures were employed in only 28% of the rulemaking proceedings.

Rulemaking proceedings may be initiated on the Commission's own motion in an order instituting rulemaking (OIR) or by petition from any person as set forth in Public Utilities Code section 1708.5. At the time the OIR is issued, ex parte communications are governed by the category preliminarily determined by the Commission in the OIR, until the Assigned Commissioner's scoping memorandum finalizes the determination of category.[340] OIRs can be categorized as ratesetting in the scoping memoranda.

There are no restrictions or reporting requirements on ex parte communications in rulemaking proceedings.[341] Although disclosure is not required, some ALJs or Assigned Commissioners have imposed disclosure requirements in quasi-legislative proceedings. One Commissioner explained that their office had done so in a proceeding because of concerns about the behavior of the parties to the proceeding.

In practice, ex parte contacts in quasi-legislative proceedings differ only by degree from

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[336] Pub. Util. Code; § 1701.2, subd. (c); rule 8.3(b).

[337] Pub. Util. Code, § 1701.1, subd. (c)(1).

[338] See rule 1.3(d) ["'Quasi-legislative' proceedings are proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry."].

[339] Pub. Util. Code, § 1701.4, subd. (a) ["The assigned commissioner shall be present for formal hearings."].

[340] Rule 8.5(b).

[341] Pub. Util. Code, § 1701.4, subd. (b); rule 8.3(a).

those in ratesetting proceedings. A major difference is that because there is no equal-time requirement in quasi-legislative proceedings, Commissioners are more willing to meet directly with a party in these proceedings. However, practitioners and Commissioners concur that, today, advisors still take most of the ex parte meetings, even in quasi-legislative proceedings. A utility party commented that if it is concerned about the direction a quasi-legislative proceeding appeared to be taking it would frequently have ex parte meetings, usually with advisors. If the utility was satisfied with the direction of a rulemaking, it did not see the need to engage in ex parte communications. Another utility explained that in quasi-legislative proceedings, its regulatory affairs director determines whether to request a meeting, while in ratesetting matters it consults its attorneys before engaging in ex parte communications.

3. Ratesetting proceedings and ex parte communications

Ratesetting proceedings are those proceedings "in which the Commission sets or investigates rates for a specifically named utility (or utilities), or establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities)" and "include complaints that challenge the reasonableness of rates or charges, past, present, or future."[342] These proceedings involve the Commission's most complex set of restrictions and requirements for ex parte communications, less restrictive than for adjudicatory matters but not unrestricted as in quasi-legislative proceedings.

The Commission's Rules of Practice permit individual ex parte communications with decision-makers (which includes Commissioners but excludes their advisors[343]) so long as all other parties are granted a meeting for a similar amount of time with the decision-maker.[344] A party must make the request for the meeting (which is done by completing a form on each Commissioner's website), and, if the request is granted, notify the parties at least three days before the meeting or phone call.[345] These notice and equal-time requirements do not apply to communications with a Commissioner's advisor,[346] who take a significant number of ex parte meetings. Advisors' estimates for the percentage of time they spend in ex parte meetings ranged from 10% to 50%.

The equal-time requirement appears to significantly reduce private meetings or communications directly between parties and Commissioners. Most practitioners request to meet with Commissioners but are much more often granted meetings with advisors. Practitioners state that the reason they are given why meetings with Commissioners are denied is largely the equal-time requirement, as Commissioners are reluctant to commit to meeting every party in a proceeding, especially where large proceedings may have numerous parties. One utility estimated that 75% to 80% of its meetings are with advisors, and that when it is granted a

[342] Rule 1.3(e); see also Pub. Util. Code, § 1701.1, subd. (c)(3).

[343] Rule 8.1(b).

[344] Pub. Util. Code, § 1701.3, subd. (c); rule 8.3(c)(2).

[345] Rule 8.3(c)(2).

[346] Rule 8.2.

meeting with a Commissioner the meetings are usually shorter than the meetings with advisors. An intervenor similarly estimated that it met with Commissioners only 15% of the time. The intervenor found that Assigned Commissioners were more willing to meet with parties directly than the other Commissioners. Commissioners' offices confirm that the equal-time requirement prevents Commissioners from meeting directly with parties, as otherwise too much of the Commissioners' time would be taken up by meetings. Even though advisors are not obligated to give parties equal time, some advisors explained that they do give parties equal time and will try to avoid taking ex parte meetings if they do not have the time to hold them with all other parties.

Pre-meeting notice presents complications for both practitioners and Commissioners. A concern expressed by practitioners, especially those who work for a utility or the industry and who attend industry conferences, is the fear of being drawn into an improperly noticed ex parte communication with a Commissioner at such an event. Staff and intervenors who cannot afford to attend these conferences perceive that undisclosed communications may occur at such events. Utility representatives reported undertaking significant investigations prior to attending industry events to determine whether Commissioners will be in attendance and to instruct attendees as to the appropriate scope of conversation with Commissioners. These concerns extended to the scope of presentations at conferences, where a utility representative might be requested to speak about a topic related to a pending proceeding. A utility reported that its officers declined to attend some events because of concerns about running afoul of the ex parte notice provisions. Another utility stated that it would not talk about pending issues at a conference if the representative saw a Commissioner, but would engage in general conversation. Commissioners also commented that ex parte notice requirements give them concern about attending events.

Written ex parte communications are permitted at any time in a ratesetting proceeding, so long as the communication is served on all parties the same day the communication is sent to a decision-maker.[347] This requirement applies to written communications sent to advisors as well as Commissioners. Practitioners generally did not have concerns about the use of written ex parte communications, although one intervenor commented that parties appeared to try to subvert briefing page limits by including more content in ex parte letters. Any ex parte communication must be reported by the party, regardless of who initiated the communication.[348] The notice of the communication must be filed within three working days of the communication.[349] The notice must include the date, time, and location of the communication, the method of communication, the identities of the people present, and a description of the communication, *excluding* the comments of the decision-maker.[350] Practitioners generally found these notices to be rather vague and not particularly helpful. Practitioners contended that the descriptions of the communications were often so general as to not be particularly revelatory of the content of the communication, and generally relied upon the notices only insofar as the notice demonstrated that a particular party had communicated with a particular decision-maker. The docket office

[347] Pub. Util. Code, § 1791.3, subd. (c); rule 8.3(c)(3).

[348] Pub. Util. Code, § 1701.1, subd. (c)(4); rule 8.4.

[349] Pub. Util. Code, § 1701.1, subd. (c)(4)(C)(iii); rule 8.4(c).

[350] *Ibid.*

requires that the notices be filed in Adobe PDF-A, which some cited as a deterrent to engaging in communications or proper compliance.

Unless the Commission has established a black-out on ex parte communications prior to the business meeting pursuant to rule 8.3(c)(4), ex parte meetings may occur at any time until the Commission business meeting on a proposed decision, and in fact there are frequent meetings in the final days prior to a business meeting. A complaint among some consumer advocates is the practice of arranging a meeting so that notice that the meeting took place will not need to be filed until after a business meeting has occurred. An intervenor noted that other commissions have a requirement that any ex parte meetings that took place in the three days prior to a meeting must be disclosed more promptly. An industry representative noted that the FCC has a period before its decisions are released during which no communication is permitted with parties; at the CPUC there may be ex parte communications going on until 7:00 p.m. the day before the business meeting. Several intervenors thought that a quiet period would be helpful to avoid last-minute communications that otherwise go unrebutted.

The Commission's rules permit a "quiet period" of no more than 14 days prior to a business meeting, during which time the Commission may hold a ratesetting deliberative meeting.[351] If there is a ratesetting deliberative meeting, ex parte communications are prohibited from the ratesetting deliberative meeting until the conclusion of the business meeting in which the item is scheduled for action.[352] Practitioners indicate that the Commission rarely if ever sets a quiet period and does not frequently convene ratesetting deliberative meetings, although use of such meetings has increased recently.

B. Initiation of Proceedings

Proceedings at the CPUC are initiated by one of five methods. Parties outside of the Commission begin proceedings in one of three ways: (1) with an application filed by a regulated entity, (2) with a complaint filed by a person or local government regarding alleged violation of the Public Utilities Code, or (3) with a petition for rulemaking. In addition, the Commission can initiate an investigation on its own motion in two ways: (4) by filing an Order Instituting Investigation (OII) or (5) commencing a quasi-legislative proceeding with an Order Instituting Rulemaking (OIR).

Prior to the commencement of a proceeding by one of these five methods, there is no "proceeding" before the Commission and, accordingly, no restrictions on ex parte communications.

1. Applications

An application is filed by a regulated entity seeking specific relief or authorization from the Commission. Applications can seek numerous forms of relief, including, for example,

[351] Rule 8.3(c)(4)(A); Pub. Util. Code § 1701.3, subd. (c).

[352] Rule 8.3(c)(4)(B).

authorization to increase rates, to construct facilities, and to abandon service.[353] By rule, applications must specify the proposed category of proceeding and identify whether there is a need for hearing.[354] Applications may be protested within 30 days of the date of notice of filing of the application appearing on the Commission's Daily Calendar. A protest may request an evidentiary hearing and may provide responses or comments on the proposed category for the proceeding.[355] A "response" may also be filed to an application, presenting information that may be useful to the Commission.[356] The applicant may respond to all protests and responses with 10 days of the last day for filing protests and responses, or as determined by the assigned ALJ.[357]

We are advised that some utilities routinely have communications with Commission decision-makers in advance of filing certain applications. Again, because there is no proceeding pending at that time, these are not impermissible ex parte communications.

2. Complaints

A complaint may be filed by any person or other entity objecting to acts or omissions by any public utility, or for limited other purposes by local government or public utilities.[358] A complaint must include the proposed category for the proceeding and the need for hearing.[359] As soon as a complaint is accepted for filing, the Docket Office serves on the defendant instructions to answer and identifies the assigned ALJ, the category of the proceeding, and the preliminary determination of need for hearing. These determinations are made by the Chief ALJ in consultation with the President of the Commission.[360]

The answer to a complaint may take issue with the complainant's statement regarding a need for hearing.[361]

3. Petitions

Any person may petition the Commission to adopt, amend, or repeal a regulation.[362] A petition must be served on the Executive Director, the Chief ALJ, the Director of the appropriate industry division, and depending upon the content of the petition, may be required to be served

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[353] See generally Rules of Practice and Procedure, art. 3.

[354] Rule 2.1(c).

[355] Rules 2.6(b) & (d).

[356] Rule 2.6(c).

[357] Rule 2.6(e).

[358] Rule 4.1.

[359] Rule 4.2(a).

[360] Rule 4.3.

[361] Rule 4.4.

[362] Rule 6.3(a).

upon other parties to prior proceedings.[363] Responses and replies to a petition must be served within 30 days of service of the petition.[364] As with rulemaking proceedings initiated by the Commission, ex parte disclosure rules do not apply to petitions for rulemaking.[365]

Our understanding is that prospective petitioners will, prior to filing a rulemaking petition, frequently raise with individual Commissioners their views on the need for the quasi-legislative action to be requested. Again, this is at a time when there is no proceeding pending.

4. Orders initiating investigation

The Commission on its own motion may institute an investigation, either into a specific regulated entity or into a class of regulated entities.[366] The OII identifies a preliminary category of proceeding, identifies respondents, and directs whether respondents must file a response to the investigatory order. Any directed or voluntary response may contain objections regarding the need for a hearing, issues to be considered, and schedule.[367]

5. Orders instituting rulemaking

The Commission may, on its own motion, institute rulemaking proceedings to adopt, repeal, or amend rules, regulations and guidelines for a class of regulated entities.[368] Orders instituting rulemaking are served on all respondents and known interested persons and noticed on the Daily Calendar.[369] Any person may file comments on an order instituting rulemaking, including objections to the categorization and need for hearing.[370]

Because ex parte communications are "permitted without restriction" in rulemaking proceedings,[371] there is no record of notices from which to evaluate the possible role of ex parte communications in OIRs.

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[363] Rule 6.3(c).

[364] Rule 6.3(d).

[365] Rule 6.3(e).

[366] Rule 5.1.

[367] Rule 5.2.

[368] Rule 6.1.

[369] Rule 6.1.

[370] Rule 6.2.

[371] Pub. Util. Code, § 1701.4, subd. (b).

C. Initial Commission Action

1. Assignment of Commissioner

All proceedings within the CPUC are assigned to a specific Commissioner, who takes the leading role in handling the processing of the matter. The President of the Commission determines which Commissioner is assigned to a specific case. We have no indication that ex parte communications regarding the assignment process take place with any significant frequency. However, the presence of an individual Assigned Commissioner has implications that may increase ex parte practice, discussed in Part III, *post.*

2. Assignment of Administrative Law Judge

Ex parte communications concerning the assignment of a matter to an ALJ or the reassignment of a matter are strictly prohibited.[372] As with the assignment to the Assigned Commissioner, ex parte communications on this issue are not frequently reported, though practitioners before the Commission have now become aware from the 2014 revelations associated with PG&E that such communications have, on at least one occasion, taken place.

3. Categorization

The categorization of a proceeding as ratesetting, adjudicatory, or quasi-legislative determines the set of ex parte rules that will apply to a proceeding, as each category of proceeding has specific rules regulating whether and how ex parte communications may occur. The initial categorization of a proceeding is determined shortly after its initiation, and depends upon the way in which the proceeding was initiated. In practice, the ALJ is largely responsible for the categorization of most proceedings.

- **Application cases:** All applications received between business meetings are reviewed at the next business meeting to make a preliminary determination of the categorization of the proceeding and the need for hearing. The Assigned Commissioner makes the final determination of the category of proceeding. This decision may be appealed.[373]

- **Complaint cases:** The Chief ALJ and the President determine the category of proceeding and the need for hearing. The determination of category may be appealed.[374]

- **Investigations:** The OII itself determines the category, makes a preliminary determination of the need for hearing, and includes a preliminary scoping memo.

[372] Rule 8.3(f).

[373] Rule 7.1(a).

[374] Rule 7.1(b).

The determination of category may be appealed.[375]

- **Rulemaking:** The OIR preliminarily determines the category of proceeding and the need for hearing. The preliminary determination is confirmed or changed by the Assigned Commissioner, and may then be appealed.[376]

If a proceeding fits into more than one category, the Commission may assign it to a category or divide it into phases or multiple proceedings.[377] If there is not a clear fit into any category, the default category is ratesetting.[378]

Ex parte communications concerning the categorization of proceedings are permitted, but must be disclosed within three working days of the communication and contain all information normally required in ex parte disclosures.[379] The express permission to conduct ex parte communications concerning categorization of proceedings would appear to permit ex parte communications in adjudicatory proceedings on the question of categorization, where ex parte communications would normally be prohibited.

Although parties did not report significant ex parte practice around categorization, some parties noted concerns about categorization. One concern raised by several staff was the use of the quasi-legislative proceeding to take advantage of freer ex parte communications in a proceeding. Some staff believed there was a trend towards the increased use of quasi-legislative proceedings at the expense of ratesetting proceedings. An industry party with knowledge of Commission practices also confirmed that important proceedings or those concerning new technological developments were favored to be categorized as quasi-legislative to permit easier access to experts through ex parte communications. However, a Commissioner's advisor commented that ALJs do not classify proceedings as quasi-legislative unless the Legislature specifically instructed the CPUC to address an issue.[380] If the issue was not raised in legislation, proceedings are categorized as ratesetting. Staff believed that classification as adjudicatory for complaint cases was not controversial. One utility representative, however, felt that proceedings involving novel issues applicable industry-wide were wrongly categorized as adjudicatory simply because they were initiated by complaint. A utility raised the issue of mixed proceedings containing both quasi-legislative and adjudicatory components, and suggested that bifurcation of

[375] Rule 7.1(c).

[376] Rule 7.1(d).

[377] Rule 7.1(e)(1).

[378] Rule 7.1(e)(2).

[379] Rules 8.3(e), 8.4.

[380] See, e.g., Pub. Util. Code, § 2836, subd. (a) [directing CPUC to open a proceeding to determine appropriate targets for energy storage]; Stats. 2002, ch. 516, § 3 [requiring CPUC to adopt rules regarding the renewables portfolio standard]. We understand the Commission instituted rulemaking proceedings to implement each of these statutes.

the adjudicatory issues to a new proceeding would facilitate ex parte contacts on the quasi-legislative issues.

4. Prehearing conference

In a proceeding where it has been preliminarily determined that a hearing is needed, the Assigned Commissioner sets a prehearing conference 45 to 60 days after initiation of the proceeding.[381] Parties may file prehearing conference statements addressing scheduling and issues to be considered.[382]

5. Scoping memorandum

The scoping memo is issued by the Assigned Commissioner, in consultation with the ALJ, typically after the prehearing conference. This document is one of the most important in the proceeding. The scoping memo determines the issues to be addressed and the schedule for the proceeding.[383] For the Assigned Commissioner, the scoping memo is an opportunity to provide comments and direction on policy issues in a proceeding. One Commissioner observed that a scoping memo limits the issues that can be reached in a proceeding in the future, and cannot easily be amended, particularly once the proposed decision is released.

The scoping memo in an application or OIR makes the final determination of the category and need for hearing.[384] The determination of categorization may be appealed to the full Commission,[385] but judicial review must await any review of the merits.[386] The scoping memo in an adjudicatory proceeding will designate the presiding officer.[387] Although the authority to do so is not clear, we have been advised that in some quasi-legislative proceedings the Assigned Commissioner may impose an ex parte disclosure requirement.

Practitioners and staff did not identify ex parte communications about the scoping memo to be common in CPUC proceedings. Staff noted that applicants occasionally will work ex parte with the Assigned Commissioner's office during the preparation of the scoping memo.

6. Proceedings without answer, protest, or hearing

If no answer, response, protest or request for hearing is filed, responsive pleadings are withdrawn, or a scoping memo determines that a hearing is not necessary, ex parte

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[381] Rule 7.2(a); see also Pub. Util. Code, § 1701.1, subd. (b).

[382] Rule 7.2(a).

[383] Pub. Util. Code, 1701.1, subd. (b); rule 7.3.

[384] Rule 7.3(a).

[385] Rule 7.6(a).

[386] Pub. Util. Code, § 1701.1, subd. (a).

[387] Rule 7.6(a).

communications are permitted without any restrictions or disclosure requirements.[388] Several groups of staff independently suggested that the ex parte rules should be applied to proceedings without hearings, and noted that the exemption is a loophole in the rules. Parties noted that increasingly proceedings are held without formal hearings through the use of workshops and written comments. The ALJ and Assigned Commissioner may require ex parte disclosures in such cases under current rules, but are under no obligation to do so.[389]

7. Discovery

The Commission permits parties to proceedings to take discovery on any matter relevant to the subject matter involved in a pending proceeding.[390] Witnesses may be subpoenaed as well.[391] Discovery motions such as a motion to compel or limit discovery, or a motion for leave to file under seal are also permitted under the rules.[392] Discovery practice does not seem to implicate ex parte communications. One utility noted a situation in a quasi-legislative proceeding that also involved an adjudicatory proceeding over the utility's response to the CPUC's data requests, and explained that the utility did not engage in ex parte communications regarding the data-request dispute.

D. Hearing Procedures

When a hearing is held, the Commission's procedures generally follow an adjudicatory model for determination of the case.

1. Formal hearing

a) Presiding officer

The Commission's rules establish that the Assigned Commissioner or Assigned ALJ preside at all hearings. In adjudicatory and ratesetting proceedings, the presiding officer may be either the Assigned Commissioner or the assigned ALJ[393]; in practice, the ALJ is almost always the presiding officer. In quasi-legislative proceedings, the Assigned Commissioner is designated as the presiding officer; however, the ALJ presides in the absence of the Assigned Commissioner.[394]

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[388] Pub. Util. Code, § 1701.3, subd. (a); rule 8.3(d).

[389] Rule 8.3(d).

[390] Rule 10.1.

[391] Rule 10.2.

[392] Rules 11.3, 11.4.

[393] Rules 13.2(a) & (b).

[394] Rules 13.2(c) & (d).

The Assigned Commissioner must be present at the closing argument in a ratesetting proceeding.[395] Parties may request that the Assigned Commissioner be present at a hearing or at a portion of the hearing, which may be granted or denied in the sole discretion of the Commissioner.[396] In quasi-legislative proceedings, the Assigned Commissioner must be present for a hearing on "legislative facts," which are defined as "general facts that help the Commission decide questions of law and policy and discretion."[397]

Parties did not report frequent Commissioner attendance at hearings but did note that Assigned Commissioners are far more likely than any other Commissioner to attend any hearings.

b) Testimony and cross-examination

It is the usual practice in Commission proceedings for parties to offer written, prefiled direct testimony in lieu of direct oral examination of witnesses.[398] The prefiled testimony is the entirety of the witnesses' direct testimony. In an evidentiary hearing, the parties may and usually do cross-examine each witness. As is common in administrative law, technical rules of evidence are not strictly enforced,[399] but objections are entertained and ruled on when necessary,[400] for example, to protect a privilege, to preserve clarity of record, and to ensure there is an adequate basis for factual findings.[401] The ALJ may limit the evidence for the customary reasons of avoiding repetitious testimony.[402] Most practitioners found that cross-examination could lead to valuable insights, although some felt that the same analysis could be achieved by responding on paper. An industry representative stated that the ability for ALJs to ask questions permitted the ALJs to build the best record to support a decision.

[395] Rule 13.3(a).

[396] Rule 13.3(b).

[397] Rule 13.3(c).

[398] Rule 13.8(a).

[399] Pub. Util. Code, § 1701, subd. (a); rules 13.6(a) & (b).

[400] Rule 13.6, subd. (b).

[401] The Commission's decisions must be supported by substantial evidence in the record. (Pub. Util. Code, § 1757; see also p. 122, fn. 463, *ante*, noting the different language of Pub. Util. Code, § 1757.1 applicable to quasi-legislative decisions but noting that those decisions, as well, must be based on the record.) While hearsay is admissible in CPUC proceedings, the Commission is subject to the residuum rule, requiring at least a residuum of admissible evidence. (*Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, 961.)

[402] Rule 13.5.

c) Briefs

Closing briefs are provided for by the Commission's rules, preferably concurrent briefs.[403] The ALJ establishes the timing and page limitations for closing briefs. A primary rationale given by practitioners for engaging in ex parte communications is the concern that briefs, which are often voluminous, are not thoroughly read by Commissioners.

d) Argument

In adjudicatory proceedings, parties have a right to final oral argument.[404] There are no similar provisions for ratesetting or rulemaking proceedings, but we are advised that ALJs will sometimes themselves grant or initiate closing argument. Usually, however, there are not closing oral arguments before the ALJ. The Commission's Rules of Practice appear to provide for oral argument before the Commission prior to closure of the record,[405] but this requirement does not seem to be directed by statute, which simply provides the right to oral argument before the Commission without prescribing the point in a proceeding at which argument must take place.[406]

e) Close of evidentiary record and submission of matter

Once evidence has been taken, briefs filed, and any oral argument presented, a proceeding is submitted and the record is closed for further new evidence.[407] A party may move to reopen a proceeding.[408] Some practitioners disclosed that when a proceeding has been pending for a long time, a party may use ex parte communications to update the information that a decision-maker has regarding a proceeding.

2. Supplements and alternatives to formal hearing

In addition to, or in place of, a formal hearing on a matter, ALJs and Assigned Commissioners may convene less formal meetings of the parties to a proceeding.

a) Workshops

A workshop is typically run by either division staff or the ALJ and designed to address specific issues arising in connection with a proceeding. Workshops are typically held near the beginning of the process, and are sometimes held as an alternative to an evidentiary hearing. All parties to a proceeding are invited to attend, and the agenda is set by the ALJ. The Assigned Commissioner may attend, and in some more controversial and far-reaching proceedings,

[403] Rule 13.11.

[404] Rule 13.12.

[405] See rule 13.13.

[406] Pub. Util. Code, § 1701.3, subd. (d).

[407] Rule 13.14(a).

[408] Rule 13.14(b).

Commissioners other than the Assigned Commissioner also attend. Sometimes a report of the workshop is prepared after the event and the report becomes part of the record. If no report is prepared and the workshop is not transcribed, it does not become a part of the record.

b) All-party meetings

An all-party meeting is typically convened by a Commissioner (often, the Assigned Commissioner, but certain Commissioners will use such meetings in cases to which they are not assigned) and is more formal than a workshop. All-party meetings, by tradition, take place after the proposed decision is released. However, these meetings could take place at any time during the process. Most all-party meetings are not part of the record of the proceeding. All-party meetings are on the record only if there is a transcript prepared or a post-meeting report is filed. Moreover, the all-party meetings usually take place after the record has closed.

E. Proposed Decision Process

The period surrounding the issuance of the proposed decision marks the high point of ex parte communication in Commission proceedings, a fact uniformly confirmed by practitioners, staff, and Commissioners' offices.

A proposed decision is written by the ALJ.[409] The degree to which the Assigned Commissioner's views are reflected in the proposed decision varies and depends on the ALJ. Some ALJs view their role as independent and will not tailor a proposed decision to the Assigned Commissioner's opinions, while others are more willing to accommodate the wishes of the Assigned Commissioner to tender to the full Commission a proposed decision that reflects the Assigned Commissioner's views.

An Assigned Commissioner who is not pleased with the proposed decision may author an alternate decision, which must issue at the same time as the proposed decision.[410] Otherwise, any other Commissioner may prepare an alternate decision, which "shall be filed without undue delay."[411] We understand that the internal procedure is for the ALJ to forward the proposed decision to the Assigned Commissioner, whose approval is required to tender the proposed decision to the full Commission. A number of interviewees indicated that the simultaneity requirement for the proposed and alternate decisions sometimes delays issuance of the proposed decision.

CPUC ALJs do not accept ex parte contacts. They point out that pursuant to Government

[409] Rule 14.1(b). In an adjudicatory proceeding, the ALJ prepares a presiding officer's decision. (Rule 14.1(b).) A presiding officer's decision is final unless it is appealed to the full Commission by any party or a Commissioner requests review of the decision. (Rule 14.4.)

[410] Pub. Util. Code, § 1701.3, subd. (a); rule 14.2(a).

[411] Rule 14.2(c).

Code section 11475.10, they are covered by the Administrative Adjudication Code of Ethics.[412] That Code makes every incumbent in a position "defined by the State Personnel Board" in a "class specification for Administrative Law Judge"[413] to the Code of Judicial Ethics governing the judicial branch.[414] Canon 3(B)(7) says, with exceptions, that a judge "shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding." However, Government Code section 11475.40 states that Canon 3B(7) "do[es] not apply" to "Cannon 3B(7), to the extent it relates to ex parte communications. Nevertheless, there appears to be universal adherence to this rule among the ALJs, and practitioners confirm that ALJs are not the subject of ex parte contacts.

As soon as a proposed decision is released, ex parte communications are in full swing. A utility explained that its process is to review the proposed decision, and typically to request ex parte meetings with all five Commissioners. The utility tries to time its meetings so that it will have its comments prepared and filed prior to the meetings. The utility is usually the first mover in ex parte contacts and rarely responds to an equal-time offer of meetings because it either has sought a meeting or doesn't think it needs to have one. An intervenor agreed that utilities are typically the first to seek an ex parte meeting. The utility prepares three to five points for the ex parte meeting, in order of importance. Sometimes it has different points for different Commissioners. Another utility confirmed that it only engages in ex parte communications in unusual circumstances until the proposed decision is released, at which time it will routinely seek to meet with Commissioners.

Parties generally either engage in ex parte communications with all of the Commissioners offices or limit their communications to the Assigned Commissioner. Intervenors will group with other allied organizations and arrange meetings together. An intervenor explained that communicating with any Commissioner other than the Assigned Commissioner meant that the party needed to communicate with the other Commissioners so as not to slight anyone. Another intervenor explained that they meet first with the Assigned Commissioner, and then with the "Bagley-Keene Commissioner"—a reference to the Bagley-Keene Open Meetings Act[415]—who is informally identified as the one other Commissioner who is in conversation with the Assigned

[412] Gov. Code, §§ 11475-11475.70. The Administrative Adjudication Code of Ethics is part of the Administrative Adjudication Bill of Rights, from which CPUC hearings are generally exempted by Public Utilities Code section 1701, subdivision (b). However, Government Code section 11475.10 applies the Administrative Adjudication Bill of Rights to all ALJs, which, the Law Revision Commission comments to section 11475.10 makes clear "applies to an administrative law judge even though the proceedings in which the administrative law judge presides might otherwise be statutorily exempt from this chapter," citing specifically the CPUC and Public Utilities Code section 1701.

[413] Gov. Code, § 11475.10, subd. (a)(1).

[414] Gov. Code, § 11475.20. The Code of Judicial Ethics can be found at http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf (last visited June 17, 2015).

[415] Gov. Code, §§ 11120-11132.

Commissioner on a proceeding. Another intervenor explained that they focus on the Assigned Commissioner, initially, and then if they think the vote is likely to be close, will go to the other offices. An intervenor described the ex parte meetings after a proposed decision as a mandatory part of practice before the Commission.

1. Decision process before full Commission

The Commission must wait 30 days following the issuance of the proposed decision and any alternate decision before acting on an item.[416] Parties may file comments, generally limited to 15 pages (25 pages in major cases), on a proposed or alternate decision within 20 days of the date that the decision is served on the parties.[417] Comments are to focus on factual, legal, or technical errors in the proposed or alternate decision, and when comments propose specific changes to the decision they must include supporting findings of fact and conclusions of law.[418] Reply comments are filed within five days after the last day for filing comments on the decision. The page limit for reply comments is five pages and comments are limited to errors in the comments of other parties.[419]

As a result of the parties' comments on a proposed decision or the ex parte communications, any Commissioner other than the Assigned Commissioner may draft an alternate decision, or the proposed decision may be revised.[420] If a new alternate decision is issued, the parties must be provided 30 days prior to a Commission decision on the item.[421] If revisions to the proposed decision adopt changes suggested in prior comments or in a prior alternate decision, the revision is not considered an "alternate decision."[422] However, if the revisions to a decision "materially change[] the resolution of a contested issue, or … make[] any substantive addition to the findings of fact, conclusions or law, or ordering paragraphs," these changes would be considered an alternate proposed decision requiring an additional 30-day review period.[423]

So long as a change to a decision does not meet the requirements for an alternate decision (and trigger a 30-day review period), the changes may be made as little as one hour before the item is to be considered by the Commission. The decision must be made available to the public for an hour before the item is heard by the Commission, and is placed in a room at the

[416] Pub. Util. Code, § 311(e).)

[417] Rules 14.3(a) & (b).

[418] Rule 14.3(c).

[419] Rule 14.3(d).

[420] Pub. Util. Code, § 311, subd. (d); rule 14.1(d).

[421] Pub. Util. Code, § 311, subd. (e).

[422] Pub. Util. Code, § 311, subd. (e); rule 14.1(d).

[423] Rule 14.1(d).

Commission known as the Escutia Room.[424] In practice, the day of a hearing on an item, practitioners hurry into the Escutia Room an hour before the meeting to review the changes to proposed decisions in which they are interested. There are frequently changes made the night prior to the meeting, and even simple changes of a single word can have large consequences. Although substantive ex parte contacts are not possible at this point, one utility said that it is a common practice (particularly for sophisticated utility practitioners) to locate an advisor in the audience before an item is called in order to let the advisor know that the party has major concerns about the item. The communication is considered by the utility to be non-substantive because the request is to hold the item, which they believe to be "procedural" under rule 8.1(c). The advisors then communicate with their respective Commissioners, who can cause the item to be held over to the next meeting if he or she wishes.

In both ratesetting and quasi-legislative proceedings in which hearings were held, a party has the right to a final oral argument before the Commission, so long as the request is made in a party's closing brief.[425] Under the Commission's Rules of Practice, argument before the Commission takes place prior to the closure of the record, though the statute does not require this timing.[426] A quorum of the Commission must be present either in person or by teleconference.[427] This procedure is not frequently utilized. We were told that historically some Commissioners have strongly disfavored oral argument, so parties were not willing to request it. Parties may not be taking advantage of the opportunity because any oral argument must be scheduled far in advance of the Commission's consideration of the proposed decision.

Deliberation at Commission meetings is very limited. Many items are presently placed on the consent agenda for which no discussion takes place. For items on the regular agenda, Commissioners typically deliver prepared statements relating to a decision, and then cast their votes.

Commissioners may hold private ratesetting deliberative meetings in ratesetting cases in which a hearing has been held.[428] Historically these have not been common, although the Commission recently has begun to utilize these deliberative meetings more frequently. Some intervenor parties expressed concern about the lack of transparency from deliberating in private. In our interviews Commissioners generally favored ratesetting deliberative meetings where possible, noting that the discussions in recent meetings had been productive because all of the Commissioners were comfortable debating issues in the private setting.

Due to Bagley-Keene Act restrictions, the Commissioners do not know in advance of the meeting how most of the other Commissioners intend to vote. This leads to the occasional situation where a Commissioner will make a statement regarding an item and then cast a vote in

[424] See Pub. Util. Code, § 311.5.

[425] Pub. Util. Code, §§ 1701.3, subd. (d) & 1701.4, subd. (c); rule 13.13(b).

[426] Compare rule 13.13(b) to Pub. Util. Code, §§ 1701.3, subd. (d) & 1701.4, subd. (c).

[427] Pub. Util. Code, §§ 1701.3, subd. (d) & 1701.4, subd. (c); rule 13.13(b).

[428] Pub. Util. Code, § 1701.3, subd. (c).

the opposite direction once it has become apparent how other members are voting.

Recently, the Commission has begun to utilize a procedure known as "discuss and hold" on a small number of items at each meeting. For these items, the Commission's discussion tends to be somewhat more robust. No vote is taken on that item at that business meeting.

Commission decisions typically accept a proposed or alternate decision. The Commission does not utilize a remand process by which administrative agencies exercise the option of sending a matter back to an ALJ with instructions to develop evidence on other issues or to otherwise reopen proceedings.[429] Staff and Commissioners expressed concern about the potential use of a remand due to timing and the need to issue timely decisions in cases.

2. Rehearing

An application for rehearing must be filed within 30 days after service of the decision.[430] Parties may respond to the application for rehearing, though response is not required.[431] A party may request oral argument in connection with rehearing.[432] A rehearing application is necessary to preserve a party's right to appeal the decision to the appellate courts.[433]A petition for modification may be filed to seek changes in a decision; such petition must normally be filed within one year of the effective date of a decision.[434] The rehearing process did not emerge as a particular locus of ex parte communications, although some staff specifically suggested that ex parte communications should be prohibited in connection with rehearing proceedings.

3. Intervenor compensation applications

After a final decision, intervenor parties may request compensation under the intervenor compensation statute.[435] A party who intends to claim intervenor compensation must file of notice of intent do so, and may only receive compensation if the party makes a substantial

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[429] Compare Gov. Code, § 11517, subd. (c)(2)(D) [identifying as one of the options for an agency reviewing a proposed decision from an ALJ to "[r]eject the proposed decision and refer the case to the same administrative law judge . . . to take additional evidence. If the case is referred to an administrative law judge . . ., he or she shall prepare a revised proposed decision, . . . based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing."]. The revised proposed decision then comes back to the agency (typically a board, commission, or director) for a decision, again under section 11517.

[430] Pub. Util. Code, § 1731(b)(1); rule 16.1(a).

[431] Rule 16.1(d).

[432] Rule 16.3.

[433] Pub. Util. Code, § 1732.

[434] Rules 16.4(c) & (d).)

[435] Pub. Util. Code, §§ 1801-1812.

contribution to the proceeding.[436] The process of awarding compensation takes place after the decision in a matter is final.

Some parties suggested that intervenor compensation drives some aspects of ex parte practice. Utilities and an industry representative opined that intervenor compensation has led to a proliferation of single-issue parties who are compensated only if they can get their party's issue into a decision. Because meeting with a Commissioner is sometimes essential to getting views incorporated into the Commission's decision, ex parte practice by intervenors is increased. Intervenors noted that they frequently meet with Commissioners or advisors in coalitions, a practice that would seem less conducive to presenting a single entity's concerns. We did not hear from Commissioners any view that ex parte practice was being driven by parties concerned about receiving intervenor compensation.

F. Settlements

Settlements are not infrequent in Commission cases. Settlements may be proposed any time after the first prehearing conference and within 30 days after the last day of hearing.[437] The most frequent timeframe in a contentious proceeding for settlement to develop is after the parties have adduced evidence for the case, but prior to briefing. Settlements must be approved by the Commission.[438] A hearing may be set if parties contest the settlement.[439] In cases with all-party settlements, practitioners report that ex parte communications tend to be greatly reduced or entirely absent. In cases where a subset of parties settle, ex parte communications continue to take place, either by parties who disagree with the settlement terms or by the parties supporting the settlement.

III. EX PARTE PRACTICES OUTSIDE OF PROCEEDINGS

A. Pre-Proceeding Ex Parte Contacts

There are no restrictions on ex parte contacts before a proceeding of any kind has commenced. Such communications run the gamut from field contacts with staff to appointments with Commissioners. The most commonly identified practice in our interviews was that of utility applicants setting appointments with Commissioners prior to filing an application. As one utility explained, the purpose of such meetings is to communicate about a proposed new approach, or to present a choice of approaches, and get feedback from the Commissioners. One utility believed that pre-application meetings were essential in some cases because an application cannot be modified once it is filed. The utility has found that in such circumstances it is more likely to be granted a meeting directly with the Commissioner. Another utility confirmed that it briefs Commissioners prior to filing to advise them of what aspects of an application are important to

[436] Pub. Util. Code, § 1803, subd. (a).

[437] Rule 12.1.

[438] Rule 12.1.

[439] Rule 12.3.

it. These types of meetings did not raise particular concern for intervenors, though intervenors may not be aware of the practice as the meetings are not disclosed. Some staff found the practice acceptable while others considered it exploiting a loophole in the ex parte rules.

B. Post-Decision Ex Parte Contacts

Once the CPUC has issued its final decision, an aggrieved party to the administrative proceedings—utility or intervenor, but not staff—may seek a writ of review in a court of appeal or the Supreme Court.[440] Definitionally, there is no such thing as ex parte communications with CPUC decision-makers during judicial review. The Commission is a party, not the tribunal. Any ex parte communications from the Commission to the court before which the cases is pending are, of course, strictly limited by the ex parte rules applicable in courts, as are those communications of the other parties.

Precisely because the Commission is a party, not the tribunal, other parties to the appeal are free to communicate with the Commission's representatives, and the Commission may, in fact, settle a pending judicial-review case, and may approve the settlement in closed session, even if the settlement alters existing rates.[441]

C. Ex Parte Contacts with Regard to Advice Letters

Advice letters are the mechanism by which parties can obtain the Commission's concurrence as to whether a party's planned activities appropriately implement the Commission's prior decisions, and are intended to serve as a quicker process than a full Commission proceeding.[442] General Order 96-B defines "advice letter" as "(1) an informal request by a utility for Commission approval, authorization, or other relief, including an informal request for approval to furnish service under rates, charges, terms or conditions other than those contained in the utility's tariffs then in effect, and (2) a compliance filing by a load-serving entity pursuant to Public Utilities Code Section 380."[443] Most advice letters may be decided by industry staff or by Commission resolution,[444] and the process is run by staff rather than ALJs. No documents related to the advice letter process are included in the docket for the proceeding from which the need for the advice letter originated. There are no restrictions on ex parte communications in connection with advice letters, and staff reports that there are significant ex parte discussions about such matters. Some industry representatives opined that the use of advice letters has increased in recent years. Staff commented that there are occasions when advice letters appear to be deployed improperly where a formal proceeding would be more

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[440] Pub. Util. Code, § 1756.

[441] *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 797-809.

[442] Gen. Order 96-B, § 5.1 ["The advice letter process provides a quick and simplified review of the types of utility requests that are expected neither to be controversial nor to raise important policy questions."]

[443] Gen. Order 96-B, § 3.1.

[444] See Gen. Order 96-B, §§ 7.6.1 & 7.6.2.

appropriate.

Practitioners outside the utility setting viewed advice letters as the least transparent part of Commission practice. It is difficult for practitioners to know of all the pending advice letter requests, and difficult to find the advice letters on the Commission website. Intervenors indicated that they simply did not have the resources to monitor all advice letters. Staff expressed concern that the process has no record and no provisions for accountability for parties. The process affords significant discretion to advisory staff.

Part III

ISSUES IDENTIFIED IN INTERVIEWS

Between January and April 2015, we conducted a series of interviews to collect opinions on CPUC practices, recommendations on changes in the law governing CPUC proceedings, and reactions to others' suggested changes. Altogether we conducted 31 interviews with 88 practitioners, staff, public officials, and decision-makers, representing a wide range of experience and opinions regarding the CPUC. The interviews included four regulated utilities, two participants representing other industrial interests, and five intervenor organizations. Six legislative participants, including elected officials and committee consultants, were also consulted. We interviewed two former Commissioners as well as a number of former ALJs and advisors. Within the Commission, we spoke with ALJs as well as staff and leadership from the Legal Division, ORA, the Energy Division, and the Safety and Enforcement Division. Each of the sitting Commissioners office, along with many of their advisors, spoke with us near the end of the process. Many of the interviews were group interviews, allowing us to obtain the perspectives of a number of people in a single discussion and to draw out reactions from other interviewees to the comments of their colleagues. It must be noted that many interviewees drew from both current and previous experiences in a variety of roles in Commission practice.

Early in the process it became clear that interviewees' willingness to speak candidly was constrained by a reluctance to have their personal views and experiences attributed to their employer or group. Since we were not seeking evidence to prove a case or document historical events, it was more important to us to elicit our interviewees' frank opinions and candid accounts of their experiences than to get these people on the record. Accordingly, we agreed not to attribute comments to any individual in our Report. And given the number of people we interviewed and organizations from which they came, we have determined it appropriate not to attribute comments to any particular organization, but rather to simply identify comments and, where necessary, to describe generally whether the comments came from interviewees with utility, intervenor, staff or other experience.[445] We note also that the diverse backgrounds of the interviewees meant that many comments do not necessarily reflect the institution with whom the individual is currently affiliated, so attributing these comments to the institution would, in some cases, have been unwarranted.

In addition to conducting these interviews, we reviewed contemporaneous publications on issues relating to ex parte communications. These included testimony and reports by academics and practitioners before legislative committees and the Little Hoover Commission concerning CPUC practices and proposed legislation. In some cases we followed up by telephone or email with some interviewees.

[445] However, we advised interviewees that we were conducting the interviews as attorneys for the CPUC, which, as our client, is entitled to see our notes if they request them.

I. EX PARTE COMMUNICATIONS: OBJECTIVES AND DEFENSES OF THE PRACTICE

We begin our discussion of the interviews where we began most of our conversations: with the desire to uncover the reasons why people choose to engage in ex parte communications to convey information to decision-makers, rather than relying exclusively on the Commission procedures discussed in Part II to bring this information into a proceeding. The parties' reasons, as well as the Commissioners' and advisors' reasons for electing to engage in such communications, may be characterized broadly in two categories: the perceived practical impediments to communicating substantive information to decision-makers[446] using open channels, and the perceived need for privacy and confidentiality for such communications.

A. Perceived Impediments to Communicating Substantive Information Using Open Channels

At first blush, nearly all parties and decision-makers alike made the fairly unremarkable observation that the primary reason to engage in ex parte communications is an opportunity to present the party's primary concerns and rebuttals directly to the decision-maker (or advisor). One intervenor commented that one could not be a good advocate and not take advantage of the opportunity to convey important points to the individuals who will make the decision in a proceeding. Drilling deeper into the issue revealed a number of underlying reasons that a party feels ex parte communications are required and why Commissioners have found such communications desirable.

1. Complex, technical proceedings, voluminous records

The volume and scope of proceedings was a major justification for parties on all sides to engage in ex parte communications. All parties agreed that Commission cases can be document- and data-intensive. A general rate case may well have over thousands of pages of record documents. As many interviewees explained, the ex parte communication allows a party to provide a road map or short-cut to the relevant data or information. Many parties—utility and intervenor alike—stated that Commissioners do not have time to review all the relevant filings. The ex parte communication allows the utility to present its primary issues. All parties are concerned that the sheer volume of information will obfuscate key evidence and arguments, even if they are raised in written comments.

Commissioners and their staffs echoed these concerns, noting the number of proceedings and subjects on the business meeting agendas every two weeks. Even the prospect of reading perhaps a five-page summary from every party to a proceeding sounded like too much reading to

[446] We use the phrase "decision-maker" in this Part to include both the Commissioners and their advisors. We note in Part IV that the Commission's Rules of Practice and Procedure actually exclude advisors from the definition in rule 8.1(b), which, we also note, is contrary to common practice in administrative law and of doubtful statutory validity.

one Commissioner. With 50 to 60 items on the agenda for each meeting,[447] Commissioners are searching for a quick way to know what information they need to know to make a decision.

Utility representatives cited the expertise and technical knowledge of their advocates as a key reason for Commissioners to engage in ex parte communications. Such knowledge leads to educated decisions, and utilities are concerned that Commissioners do not have access to the right information if it is presented only through ALJs or other staff. A Commissioner agreed that communications with subject matter experts can be more helpful than the papers drafted by a party's attorneys.

Perhaps due to the complexity of the proceedings, some staff believe that Commissioners focus on the last thing that they have been told prior to the business meeting. Some non-utility parties claimed that utility parties, in particular, time their communications so that they have the last word and other parties do not have an opportunity to rebut. In contrast, one utility representative said that they generally try to get in as soon as the proposed decision comes out.

2. Many parties; discrete issues

Among intervenors and utilities, there was a shared opinion that the sheer number of parties appearing in Commission proceedings necessitates ex parte communications. For utilities, the number of parties raising a variety of specific issues in their briefs and arguments means that the utility must devote much of its briefing simply to responding to the various issues raised by others.

Intervenors want to ensure that their perspective is heard by Commissioners. Several intervenors commented on the half-hour of focused attention they might receive in an ex parte, compared to a five-minute argument in an all-party meeting. Interviewees focusing on the need for a party to get attention within the field of parties downplayed the private nature of the ex parte communications. As a former Commissioner put it, it did not seem like parties were communicating information that they wanted to keep private, but rather wanted to ensure that their information was heard. A utility opined that the only thing that happens behind closed doors is that all of the parties get to state what their position is. An intervenor noted that the meetings are about attention, not about private communication.

Intervenors who support the continued availability of ex parte communications contend that ex parte meetings are necessary because their issues may get lost in the larger proceeding. One intervenor complained that utilities often ignore the issues they raise with the result that their issue gets lost or appears unimportant. Staff of one Commissioner explained that ex parte meetings seem to benefit small parties more than utilities, by giving these parties an opportunity to raise issues that may have been excluded from the proposed decision or not on the radar screen in the Commission.

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[447] As noted above (see p. 59, fn. 319, *ante*), this estimate is high: the average length of a CPUC agenda over May 2014 to April 2015 was 35 consent-agenda items and 6 regular-agenda items.

Indeed, some have drawn a nexus between ex parte communications and intervenor compensation. An industry representative suggested that the need for intervenors to position themselves uniquely drives intervenors to select issues not raised by any other party and then to engage in ex parte communications to better their chances for making a sufficient contribution to a proceeding and therefore to be eligible for an award of intervenor compensation.

3. Give and take

A common thread in discussions of the substantive need for ex parte communications is the "give and take" that such discussions offer. Commissioners particularly expressed a strong desire for such conversations, as an opportunity to ask questions of the parties. When a party makes an argument in a brief, there is no opportunity to ask why the party has put forth that argument or inquire into its basis. Parties are more comfortable in these less formal, private meetings with sharing their rationales and objectives. Both utilities and intervenors offered this assessment. A utility explained that in an ex parte meeting, they engage in debates with advisors, which tend to improve decision-making. A filing is the worst way to communicate, according to an intervenor, because written filings permit no dialogue.

Relatedly, a shift away from hearings may increase some parties' desire for ex parte communications. One utility commented that when a proceeding is entirely on paper, ex parte meetings are more important. When a hearing has been held, there is at least an interchange with the ALJ. Without such interchange, policy results may not be optimal.

4. Maximize input to Commissioners

Participants in the process who most strongly defended the practice of ex parte communications often contended that such communications serve the public interest by ensuring that Commissioners have the freest access to any information that might be necessary to make an informed decision. A former Commissioner opined that the Commissioner's job is the toughest in California due to the complex and technical nature of the CPUC's cases, and that restrictions on attending public events made it difficult to become educated elsewhere. Therefore, ex parte communications with a broad range of parties are necessary to enable the Commissioner to be fully informed and not overly reliant on the agency's staff to formulate opinions. This rationale was especially relevant for parties considering communications in the quasi-legislative context. One intervenor cautioned against increasing the transactional costs of communications because of fears that Commissioners will become overly isolated when serving policy functions. A utility noted that the Legislature has afforded the CPUC significant latitude in designing programs and implementing policies, so open access to information is of heightened importance.

Some parties and decision-makers focused on the need to improve the public's ability to comment to the Commission, although not necessarily in the ex parte setting. A Commissioner commented that there are people not currently involved in the process who have relevant information and are frozen out. The CPUC's procedures and practices do not facilitate inclusion of this type of information when it is presented to the Commission. Practitioners and staff familiar with the FCC's process pointed to it as a model that greatly facilitates public comment. Staff contrasted the FCC with CPUC's recent effort to allow public comment in a proceeding

without making it widely known that public comment would be permitted. The result, according to staff, was that the public hearing was packed by one side with its well-organized supporters.

5. Commissioner engagement

Another reason cited for ex parte communications is that Commissioners are not involved enough in the hearing process. An industry representative commented that parties do not engage in ex parte communications as often when the Commissioner has attended hearings and has been involved as the proceedings develop. When a Commissioner has not been involved, parties feel the need to track down the Commissioner in an ex parte communication. The industry representative half-jokingly suggested that Commissioners be required to hold office hours like university professors. Some staff echoed the need to have Commissioners present and engaged in proceedings, and also suggested that Commissioners should be required to be in the office a certain percentage of the time.

6. Equalizes access

Interestingly, some smaller intervenors viewed the ex parte communication as a way to equalize their access to decision-makers. Although all such parties believed that utilities had far superior access to decision-makers at conferences and social events, the intervenors felt that that access was inevitable. Denied the ability to engage in ex parte communications, the utilities would, these intervenors believed, find a way to communicate with decision-makers and the intervenors would be excluded. Even though the intervenors were certain that utilities were better able to take advantage of the ex parte communications, these intervenors preferred that kind of inequality to a system in which the utilities would have less access and they would have no access at all.

7. Staff power, affiliation, and competence

Some utilities asserted that ex parte communications are a necessary counter-weight to staff's and ALJs' presentation of materials to Commissioners. One utility stated that without ex parte communications, staff would have enormous influence over Commission decisions. Utilities expressed some distrust of having the decision-making process be presented to Commissioners by the ALJs. One utility explained that because the proposed decision is written by the ALJ, it is appropriate to inform the Commissioner of issues that may not be addressed or apparent from the proposed decision.

A related issue is a perceived anti-utility bias in staff and a "revolving door" between ORA and ALJ positions. Utilities feel a need to counter what it believes are biased staff by meeting directly with decision-makers. A utility noted that having ORA housed in the Commission leads the utility to suspect a greater degree of informal communications. One utility suggested a ban on ORA staff occupying ALJ or advisor roles would be appropriate. Some staff feel that some Commissioners share the utilities' perceptions of staff bias and rely on utilities rather than consulting with staff.

There were concerns raised about the qualifications and ability of some ALJs that call into question their ability to understand and convey proper information about these complex

proceedings. A number of Commission sources acknowledged that ALJ quality is uneven but disagreed that the ability of ALJs drives the need for ex parte meetings. In the view of one Commissioner's office, delays in proceedings are more likely than weak ALJs to inspire a party to engage in ex parte communications.

Finally, what was viewed as the dual advocacy-advisory[448] roles of attorneys in the Legal division raised some concerns for parties and may increase ex parte communications. Attorneys in the Legal division are organized along industry-based lines, and can work on both advocacy (ORA) and advisory matters within their assigned industry, just not on the same matter. This leads to a given attorney taking different roles in proceedings involving the same utilities. Utility parties reported not knowing at times whether an attorney is acting in an advisory or advocacy capacity.

8. Easy to access or share information

For decision-makers, one reason that ex parte communications are desirable is that it is an easy way to get at necessary information. Scheduling all-party meetings can be difficult; it is much simpler to arrange a meeting with the one party that has the necessary information. A utility said that in an ex parte communication it can answer a question in 10 seconds rather than take 45 pages to respond in a brief.

9. Uniqueness of agency

The scope of industries and issues regulated by the Commission, the volume of proceedings it handles, and an unprecedented approach to policy issues that the agency has adopted are all cited as reasons why ex parte communications are needed. Staff and Commissioners felt that it was unfair to compare it to the Energy Commission, which by comparison has more limited breadth and depth of its proceedings, without the same timing concerns. Comparisons to other states' public utility commissions frequently drew the observation that the other state was so much smaller than California.

B. Perceived Need for Confidentiality in Communications

Parties generally did not initially cite a privacy rationale for ex parte communications, but when pressed to identify what needs could not be met through public fora, distinct themes of privacy and confidentiality emerged.

[448] The term "advisory staff" is sometimes used at the Commission to refer to a much broader category of employees than just Commission advisors. In this usage, it also includes members of the technical divisions and attorneys who may advise the Commissioners on legal issues. We understand that the Commission seeks to maintain a proper separation of functions by prohibiting any person from serving in both an advocacy and an advisory role in any one case, and we did not hear any complaints that this distinction was not maintained.

1. Negotiation

The paradigmatic case for private communications was presented by a utility representative, who explained that in meeting with Commissioners, he or she might ask, "What do you really need?" The representative explained that over long years working in the field, there is a relationship of trust with decision-makers. During the ex parte communications, a decision-maker can look into the representative's eyes and assess the sincerity of the statement. Most Commissioners stated that such types of ex parte communications are not common and all said that they did not engage in such discussions. One Commissioner stated that the ex parte process is not so much about negotiation but about an opportunity to understand the practical realities and impacts of a decision. One Commissioner acknowledged that utilities and large generators "get down to brass tacks" in ex parte communications, but that staff filtered most ex parte communications so that the Commissioner was not involved in these types of discussions.

While such frank exchanges may not be as commonplace among today's Commissioners, historic forms of horse-trading were identified by parties. One intervenor asserted that parties have used the ex parte process to negotiate, or log-roll, between outcomes in different proceedings in a manner that would be impossible in a formal proceeding. The advisor to one Commissioner described using ex parte communications to "organize parties" in a proceeding, saying that private communications are required to do so.

2. Fear of public debate or discussion

A thread in many comments about the need for ex parte communications is a perception by the parties that decision-makers will not discuss or debate any issue in public for fear of displaying in the public eye some lack of knowledge. In another example, one party that regularly works with utility contractors noted that contractors would be unwilling to take the stand in a hearing and testify against a utility whose business they were seeking, but are willing to join in the ex parte process and explain the issues in private meetings. A former Commissioner opined that Commissioners would not want to expose their thought processes to the public. A Commissioner recounted that people within the Commission had frowned upon a Commissioner questioning an ALJ in a closed deliberative ratesetting hearing and stated that such attitudes would inhibit genuine debate in a public setting.

3. Tone and candor

Current Commissioners and those who had previously served as Commissioners were sensitive to the public and parties' perceptions of their tone in communications. One former Commissioner said that stern conversations in public would be more problematic than in an ex parte, because it could send the wrong signal to other parties. A current Commissioner expressed the desire not to give the impression of being too friendly with any party.

Similarly, parties expressed the view that private meetings permitted greater candor on their parts as well as on the part of the decision-maker. Advisors opined that parties are unwilling to prioritize their demands in public but feel comfortable doing so in an ex parte communication.

4. Bagley-Keene Act restrictions

A number of comments focused on the restrictions on communications between more than two decision-makers or their advisors under the Bagley-Keene Open Meetings Act. These commenters viewed ex parte communications as a substitute for a prohibited form of private communication. Many parties both within and outside the Commission stated that the real problem is not ex parte communications but the Bagley-Keene restrictions, and especially its extension to advisors. Parties commented that Commissioners and their offices are increasingly isolated because they cannot communicate with other offices. Ex parte communications are the way to prevent that isolation. A former Commissioner suggested that the isolation has led to delays in resolving proceedings while the offices figure out where each other stand on an issue. Staff observed that the parties know more about the Commissioners' offices' positions in proceedings than the other offices do. An intervenor observed that the Bagley-Keene restrictions have prevented the Commission from functioning as a congenial body and have inhibited decision-making. One intervenor suggested that if the Commissioners were freer to engage in discussions within the Commission, the Commissioners would have less need to engage in ex parte communications. Several Commissioners echoed this perspective. Legislators, too, were concerned that if ex parte rules were too restrictive, Commissioners would be left without anyone to discuss matters with.

Commissioners have tried to overcome the Bagley-Keene restrictions by forming informal two-Commissioner committees in which the two Commissioners can discuss issues within the restrictions of the Bagley-Keene Act. One Commissioner explained that they try to partner with a Commissioner with a different perspective or a complementary skill set. Although the committees are informal, parties are aware that they exist and in some cases, the "Bagley-Keene Commissioner" is a particular focus of ex parte communications.

C. Success Stories (and Horror Stories)

We asked in most interviews whether the party could share any success stories about ex parte communications, or any horror stories of ex parte communications gone wrong. Interestingly, many parties stated that although they regularly engaged in ex parte communication, they could not identify specific results achieved as a result of the ex parte communication. Parties noted that it was impossible to determine a reason why a given decision adopted a certain position, and were unwilling to attribute the result to any ex parte communication.

There were a few instances, however, where parties were able to identify what they deemed success stories. A former Commissioner identified the re-routing of a transmission line to avoid sensitive areas as in part due to negotiations done ex parte. Parties noted instances where the ultimate decision was reformed in a way that reflected the party's objectives, or when they felt that they had successfully rebutted misleading information offered by another party. A Commissioner explained that the equal-time rule had assisted in reaching a good result, because a meeting with a utility lead to equal-time meetings with many other parties. A non-utility party turned out to make good arguments that helped the Commissioner make a decision in a difficult case.

One example raised by both an intervenor and a Commissioner's office concerned a proposed natural gas storage facility located underneath a disadvantaged community. An intervenor assisted the community in making contact with the Commission and raised awareness of the risks of gas storage underneath the homes. The project was ultimately set aside, a successful result for the intervenor. A Commissioner's office cited the same project, noting that ex parte communications had drawn their attention to the project. The Commissioner's office observed, however, that most of the process could have taken place "in the clear," if ex parte communications had not been permitted.

Practitioners did not offer many "horror stories," but staff had some to relate. Staff complained of getting calls from Commissioners' offices pointing out errors in a rehearing memo—comments that, staff contended, were completely incorrect and entirely in favor of one of the parties. Staff also recalled a decision based on an improper interpretation of the physics of an issue that seemed to have been provided to Commissioners ex parte without opportunity for rebuttal.

The most interesting success story we were told was interesting precisely because the other side appears to have cited the same story as an example of a horror story. A utility described a case involving a model that was relied upon by the ALJ in the proposed decision. The utility believed there was an error in the model and used the ex parte process to communicate directly with decision-makers about the error, which it reported was corrected in the final decision. Staff told what appears to have been the same story from the other side, noting a case in which ex parte communications avoided a decision based on a model that was in error. Staff recounted that the alleged error was not, in fact, an error in the model, but rather reflected a position of the utility that had been discredited in the hearing. We point to this example not to support either side on the merits, but to demonstrate the perils of the ex parte process. No one can know today whether the Commission ultimately got the decision right or wrong.

II. CONCERNS REGARDING USE OF EX PARTE COMMUNICATIONS

As the discussion above illustrates, not all parties are equally troubled or enthusiastic about the use of ex parte communications in CPUC practice, and even the most ardent supporters raised some concerns about the current practice. The concerns can be generally divided into two categories: procedural and structural concerns implicated by ex parte practice, and practical concerns about the application of the current ex parte rules.

A. Procedural Concerns Implicated by Ex Parte Communications

1. Fairness

The most fundamental complaint about the use of ex parte communications is fairness. Some intervenors and staff members advocated for a total ban on ex parte communications, or the prohibition of ex parte communications in a greater set of cases than is currently the case. Professor Deborah Behles and Steven Weissman, a former CPUC ALJ, opined in their analysis of CPUC ex parte practices, "the right to offer facts and critique opposing points of view in a

public, accountable manner must be protected, and . . . private substantive communications are in conflict with this objective."[449] One intervenor party found that the ex parte communications and existing relationships between a utility and decision-makers compromised the entire process in which the intervenor was involved and made it impossible for the intervenor's concerns to have weight. Some intervenors and staff distinguished between ex parte contacts with advisors and those held directly with Commissioners, concluding that contacts with Commissioners are more pernicious than those with advisors.

Interestingly, while some intervenors viewed ex parte communications as the best available equalizer (and thus closer to fair than any alternative scheme the intervenor could envision), some intervenors and staff noted that the way the rules are currently applied reinforces the dominance of the utility industry. The identical application of the rules to consumer parties and utility parties serves to reinforce the utilities' enormous influence, staff suggested. Other intervenors noted that those with time and the resources to have a physical presence in the CPUC's offices have a significant advantage over other participants, because there are informal and casual conversations taking place in the agency all the time. An intervenor commented that informal and social communications between utilities on the one hand and decision-makers and staff on the other are frequent. One intervenor observed that parties that do not have ex parte meetings are at a disadvantage over parties who do because those who do not lack the option of advocating one-on-one. As one Commissioner's office put it, while everyone has the same access to decision-makers on paper, that equality is not necessarily reality.

The only decision-makers at the Commission who will not take ex parte contacts are the ALJs. They cite legislation requiring ALJs to comply with the Code of Judicial Ethics governing judges.[450] The ALJs we interviewed cited fairness as a reason not to engage in ex parte communications. Because the ALJs do not take ex parte contacts, they are the only ones who have received all of the evidence in the case. One intervenor appreciated the integrity of the ALJs but nevertheless felt the eventual outcome of its proceeding was unfair because the outcome was ultimately the result of ex parte communications with decision-makers.

2. Record issues

Many of the most serious structural concerns raised by staff and parties concerned the relationship between ex parte communications and the evidentiary record. Parties who engage in ex parte communications insist that their communications are all based on evidence found in the evidentiary record, and that the vast majority of ex parte communications simply consist of a party reiterating points it had already advanced in comments and other briefing. Some parties disagreed with this depiction of the practice, however. One intervenor stated that ex parte communications are essentially one-sided presentations that sometimes make an end-run around

[449] Ex Parte Requirements at the California Public Utilities Commission: A Comparative Analysis and Recommended Changes (Jan. 2015) p. 16, available at https://www.law.berkeley.edu/files/CLEE/Analysis_and_Recommendations_Related_to_CPUC_Ex_Parte_Practice_1.16.15.pdf (last visited June 17, 2015) (Behles & Weissman).

[450] Gov. Code, § 11475.20; but see Gov. Code, § 11475.40.

the record by relying on materials that have been excluded from the record by the ALJ as irrelevant or otherwise inadmissible. This intervenor suggested that parties use ex parte communications to introduce issues that may not be legally relevant to a decision and therefore cannot be put into the proceeding on the record. These may include alleged economic effects of a decision, profits, jobs, union interests, investment industry views, and concerns that a company will not meet shareholders' expectations. Some staff likened the process to permitting final dispositive information to come in by a side door at the end of a proceeding. Staff elaborated that CPUC employees are demoralized by all of the time spent creating records and hearing transcripts, which are then entirely disregarded in favor of the ex parte process.

A former Commissioner concurred that parties may bring extra-record material into their ex parte meetings, because Commissioners and their advisors are generally not aware of what is in the record. The former Commissioner asserted that parties would report in disclosures only on the record-based subjects that were discussed, but would also discuss non-record-based items and not disclose that they were not in the record. This leads to a related concern revealed in our interviews with Commissioners: Commissioners are not easily able to access the record of proceedings. The record is not available on-line (either within the Commission or to the public), and is instead on paper and in the custody of the ALJ. The Assigned Commissioner is, generally, better aware of what is in the record in his or her own cases, but in other cases the Commissioner has to make a significant effort to access material in the record directly. One advisor described an instance where an ALJ responded to a request for a specific piece of evidence by saying it was in the ALJ's car and would be brought in the next day. Commissioners told us that they rarely make the effort to obtain materials in the record directly for themselves, except in very exceptional situations.

There are also questions as to what is and is not part of the record. Commissioners noted that public participation hearings, workshops, and all-party meetings are not normally part of the record, yet Commissioners are influenced by the information they learn through those processes. Many of these events take place after the record has been closed so they can no longer be included in the record. Another issue is how to incorporate records compiled in inter-agency proceedings, such as joint processes of the CEC and the CPUC to address issues of common concern. ALJs are not certain how to add this information to the record of Commission proceedings.

3. Absence of a culture of compliance at the top

Interviewees both within and outside of the Commission expressed concern about the general culture that has evolved at the Commission with respect to communications with outside parties. These complaints seemed to be directed at Commissioners and their advisors. One group of staff asserted that the fundamental problem at the Commission is the lack of an ethical culture or a culture of compliance. Within the Legislature there also seemed to be a belief among some that there is a culture at the CPUC of unethical conduct. One interviewee observed that the problem is not the rules, it is that the rules are not followed. An intervenor observed a basic cultural dynamic that favors and maintains the priority of the regulated entity to the exclusion of everything else and that even with the perfect set of rules the agency's underlying bias will keep it from treating all parties fairly. Another intervenor noted that deeply embedded within the agency is a culture of private conversations. An industry representative suggested that no

modifications or additional penalties for violations of the rules will help until the agency's cultural problems are addressed. Staff complained that there is an attitude that all proceedings are an attempt to "make a deal" with the utilities. A former Commissioner urged that a top-down response is needed in order to change the culture and lead to record-based decision-making. Commissioners expressed some skepticism that reforming the ex parte rules would lead to meaningful changes. One Commissioner observed, "Smart adults will not comply if they don't want to."

B. Practical Concerns Raised by Parties

A number of practical complaints were made by interviewees about the use of ex parte communications in general or about specific aspects of ex parte practice.

1. Inadequate and untimely disclosure

The primary practical complaint about the ex parte process was that parties' disclosures are vague and unhelpful; at times, disclosures are filed too late for a meaningful opportunity to respond. Nearly every party agreed that other parties' disclosures were too general to be of significant assistance in disclosing what was actually communicated during an ex parte meeting. One industry representative said that disclosures are "too high level" and "completely inadequate." Several intervenors suggested that disclosures should be required to be more explicit. Several parties claimed that their disclosures are more comprehensive than others. One intervenor said that vagueness in the disclosure reports is an industry practice that intervenors have also adopted. Commissioners all concurred that the disclosures are too brief and substantively inadequate.[451]

Some industry and intervenor parties claimed that they already knew what other parties would say in their meetings, so only the fact that a disclosure had been filed was of significance.

One inadequacy commented upon by some staff and intervenor parties is the absence of information about what the decision-maker said during the communication, information that is prohibited from disclosure in the notice by Public Utilities Code section 1701.1, subdivision (c)(4)(C)(iii) and rule 8.4(c). Those commenting upon the adequacy of disclosures believed that the failure to disclose Commissioner's statements is a significant flaw in the regime.

Timing of disclosures was also an issue for some staff and intervenors. As they explained, by timing a meeting for the end of the process, it was possible for a party to meet with an advisor the day before the business meeting and not disclose the meeting until after the business meeting. The other parties may be totally unaware that the communication has taken place at the time that the decision is voted on.

[451] In the opposite vein, one intervenor opined that even written ex parte communications can be an issue, because parties use lengthy letters to evade page limits on written comments and replies.

One industry representative complained that it is actually difficult to file a disclosure with the CPUC's docket office. The interviewee suggested that disclosures be prepared through an on-line form that contains all of the required information.

2. Communications initiated by Commissioners or staff

For obvious reasons, communications that are not initiated by a party but by Commissioners or staff create a particular concern for the recipient, who likely has a desire to respond to and accommodate the decision-maker. Ex parte communications initiated directly by Commissioners are not common but do occur, particularly in conferences and other settings outside the Commission, some utilities and former Commissioners report. One utility explained that it included scenarios in its training program for its officers and upper level management on how to respond if approached by a Commissioner.

Much more common is the ex parte communication initiated by advisory staff. Occasionally these communications take the form of an advisor approaching a party and saying, some version of "Don't say a word. I'm going to tell you something you should know," and outlining a course of action that the advisor recommends the party take. Staff contended, and at least one advisor confirmed, that advisors interpret these communications as permissible and non-disclosable within the current ex parte rules because only the Commissioner or advisor spoke.

3. Unreported communications

Many intervenors are suspicious that unreported ex parte communications take place between utilities and decision-makers, and recent revelations of such alleged communications furthered this suspicion. One intervenor noted that it had observed an industry representative lobbying a Commissioner at an event the intervenor hosted, and the intervenor contended that the communication was never disclosed. Another intervenor had seen communications suggesting that a decision-maker and a utility were having very informal meetings that were not disclosed. Staff contended that there are many unreported ex parte contacts, particularly at conferences. A party will attempt to evade the ex parte rules by being coy about mentioning the name of the case, saying something like, "in a case I can't mention." Other staff opined that unreported communications take place at the highest levels but that it was not a prevalent problem.

4. Attendance at conferences

One forum in which interviewees suspected that unreported contacts taking place was conferences, particularly industry events and events sponsored by utility-funded institutions and events. As described by an intervenor, such events include international trips and extended policy events where legislators, utility executives, and Commissioners spend time together and develop trust and relationships. Intervenors expressed deep suspicions about such events and the relationships that develop by virtue of the shared experience. Those who voiced such suspicions were also concerned that improper or unreported ex parte contacts were taking place during such events.

On the other hand, some Commissioners and utilities complained of an inability to attend conferences, including conferences sponsored by sister agencies of CPUC such as the CEC. Presently, Commissioners and advisors are told that their ability to attend such events is very limited due to concerns about ex parte communications. An advisor explained that in order to attend a CEC conference, she was required to post a notice in the dockets of proceedings—but it was entirely unclear how she could determine what proceedings she was supposed to provide notice in. Commissioners who speak at conferences noted that they are constantly on guard and provide notifications in their speeches that anyone who is a party to a proceeding will have to provide a notice of ex parte communication. Even sitting in the audience listening to a party will render a speech at a conference into an ex parte communication that must be disclosed by the speaker. This concern inhibits Commissioners from attending as many events as they would like. A former Commissioner said that staff discouraged new Commissioners from attending conferences and would instead hire a professor to come and privately educate the Commissioner. Some Commissioners expressed serious frustration that they are unable to take advantage of the opportunity to learn. As one Commissioner put it, "Ignorance is not a good thing." Some parties urged reform of ex parte rules for widely-attended public events, so they could attend more conferences without triggering ex parte disclosure obligations for attendees.

5. Use of conduits

Many parties expressed concerns about others serving as conduits of information without any disclosure. Examples of conduits included advisory staff directly conveying information from regulated entities or other interests to ALJs or Commissioners without disclosure of the provenance of the information, representatives of the financial industry conveying information about the potential financial impact of decisions to Commissioners, and communications solicited from legislators or the Governor directly to decision-makers. Testimony before the Senate Energy, Utilities, and Communication Committee noted that representatives from credit-rating agencies and investment firms regularly meet with Commissioners to discuss ongoing rate cases or other proceedings. These individuals express concern about utility profits and exposure to risk. They currently do not have a reporting obligation. The same testimony also noted that communications with the Executive Director, General Counsel, and division directors are not covered under ex parte rules. Staff stated that there is an informal rule that division directors will disclose communications with big utilities, even though this is not required. A Commissioner expressed concern about utility-staff relationships, noting that utilities speak to staff constantly and that there is no record of what utilities are telling staff.

6. Abuse of exemption for procedural communications

Some parties believed that other parties abused the exemption permitting undisclosed private communications about procedural matters without advance notice or disclosure. One intervenor stated that misuse of the procedural exemption is the single largest area of abuse of the ex parte rules. As an example, the intervenor suggested that a utility might inform a decision-maker of a procedural issue, such as the need for a decision by a certain date, adding substantive information about the importance of the action and the consequences of various possible decisions. Staff also noted that procedural communications are used as a wedge to open substantive discussions. Several parties suggested that clearer standards as to which communications are procedural and which are substantive would be very helpful.

7. Uncertainties about scope of coverage

Some parties expressed concerns about ambiguities in ex parte rules as to whether a given person or communication was covered. Some examples:

- Whether a Commissioner hearing a news story on a Commission item has received an ex parte communication
- Whether meetings by one utility about concerns over precedent set by a decision involving only an entirely different utility require disclosure
- Whether representatives of the Governor's office or the Legislature should be included as interested parties required to disclose communications
- Whether CPUC personnel such as head of Safety and Enforcement Division, Executive Director, or General Counsel should be decision-makers under the ex parte rules
- Whether financial institutions are interested parties required to disclose ex parte communications
- Whether one-way communications from decision-makers need to be disclosed under the rules.

III. RESPONSES TO SPECIFIC REFORM PROPOSALS

Throughout the interview process, we asked the interviewees' opinions of a number of different reforms, in part to assist in our evaluation of the merits of the reforms, but more often as a calculated exercise to draw out underlying assumptions and reasoning for a party's expressed preferences.

A. Further Restrictions to Ex Parte Communications

1. Eliminate ex parte communications in ratesetting

Several parties suggested an outright ban on ex parte communications in ratesetting proceedings. These included two intervenors and several groups of staff. Most favored replacing ex parte communications with a forum in which all parties were present with an opportunity to respond, such as an all-party meeting or workshop. Most parties we interviewed favored retaining the present practice permitting ex parte communications in ratesetting subject to disclosure and equal-time rules.

2. Expand equal time to advisors

Many parties noted that the equal-time requirement for meetings with Commissioners significantly reduces the number of ex parte meetings with Commissioners. No one advocated expansion of the equal-time requirement to advisors. One advisor commented that it would be a terrible idea to require advisors to grant equal time to all parties. Advisors in several

Commissioners' offices noted that their offices already grant meetings to any party who wants one. Advisors also noted that they already spend significant time in ex parte communications (from 10% to 50% of their time).

3. Quiet period prohibiting communications

Several interviewees thought that a quiet period during which no ex parte communications are permitted shortly before a Commission business meeting for a particular proceeding would be a good idea. One former Commissioner strongly advocated for this practice, noting that parties are conducting ex parte meetings in the evening prior to a Commission business meeting. Staff recommended cutting off ex parte communications at a point certain in all proceedings, though there was not consensus as to what point might be appropriate. An intervenor suggested that a quiet period would be useful as long as there was an adequate opportunity to respond to last comments; otherwise the quiet period simply pushed the opportunity to get the last word in a few days earlier. Another intervenor commented that a quiet period would be necessary to reform ex parte practices and protect record-based decision-making, but that a quiet period did not go far enough. A Commissioner thought that a quiet period would help ensure adequate time to consider a proposed decision before a business meeting.

B. Expansion of Disclosure Requirements

1. Conference call lines for listening in, posting recording

We discussed a hypothetical reform in which all ex parte communications would occur on a listen-only phone line, with a digital recording that would be posted online, in nearly every interview. The hypothetical received a very mixed reception. A common initial response was that this practice would effectively end ex parte communications. One Commissioner observed in particular that this would end ex parte communications from utilities, but that intervenors and environmental groups would probably still engage in the communications.

Parties predicted that behavior would change significantly if people could listen to the calls. Many people thought that Commissioners or advisors would sit silently during such meetings. A Commissioner expressed concern that outside parties might perceive a tone as too friendly to a party. A former Commissioner said that the practice would prevent Commissioners from being firm with a party.

Those who thought it would be a bad idea to allow parties to listen to ex parte communications were typically the parties who most favored maintenance of existing practices. A utility thought that posting recordings on line would not be a good idea, noting that anyone who is acting professionally would not say anything shocking during an ex parte communication. An intervenor observed that advisors ask questions during ex parte meetings that the intervenor thought would not be asked if the meetings were being listened to by utilities. A former Commissioner found the idea of people listening in during the communications to be very off-putting and stated that it made the job of Commissioner seem less desirable. One intervenor commented that the proposal would increase transaction costs and create a voluminous and meaningless record. One Commissioner thought that there could be Bagley-Keene issues with

posting recordings that might make the Commissioner's views known. An advisor questioned whether utilities could be subject to shareholder litigation over remarks made during such communications. A Commissioner was concerned about reporters listening to the calls and misinterpreting information presented there.

Staff viewed the idea of listen-only conference calls and posting recordings very favorably. Intervenors and staff liked the idea of having the recordings available. Some intervenors thought that they would not have the time to listen to the recordings, and feared that utilities would use the process to generate lots of recordings and effectively drown the other parties in communications. One intervenor disagreed, noting that in proceedings that they cared about they would make the time to listen to the recordings. A Commissioner thought that over time, decision-makers would become more comfortable with the format and focus on the information being provided, as they already do during ex parte communications today.

Some felt that this reform would be acceptable, but felt it missed the real problem of informal conversations that take place at conferences, in the CPUC cafeteria, and at social events. Another drawback staff raised was that before or after the recording started, unreported ex parte communications could easily occur.

2. Conference call, all parties participate

The idea of requiring ex parte conference calls in which all parties are permitted to actively participate was seen as more logistically problematic than a listen-only conference line. Some thought it would not be workable and that it would be preferable just to schedule an all-party meeting instead. A utility thought that such conference calls would be unmanageable and present all the disadvantages to the utility of all-party meetings where they have little time to respond to many parties. One intervenor expressed concerns that utilities would use their numerical advantage to schedule many ex parte calls, and that the party scheduling the call would be the only one to know in advance of the call the subjects the party intended to raise, leaving other participants at a disadvantage. This intervenor thought that open conference lines would only work if the calls were noticed in advance along with information on the subjects to be discussed.

3. Report decision-makers' statements

Many parties did not believe it would be a good reform to require that a decision-makers' statements be included in the ex parte disclosures. A primary objection was that this requirement would inhibit Commissioners and advisors from speaking frankly. Some also were concerned that parties would try to "spin" the decision-makers' comments in a favorable way. Commissioners were particularly concerned about the idea of the parties reporting the Commissioners' or advisors' statements, for the same reason. Commissioners did not want to have to monitor disclosures to ensure that they are not presenting their views in a misleading or inaccurate way. The hypothetical also raised Bagley-Keene issues for some because a Commissioner's views could become known to the other Commissioners this way. A former Commissioner contended that disclosure of Commissioners' statements would only increase lobbying through ex parte communications. However, some staff felt that it was a major loophole

not to require disclosure of the decision-makers' statements. Staff noted that the disclosures now necessarily present an incomplete picture.

4. Limit procedural exemption

For at least one intervenor, misuse of the exemption for "procedural" communications is the biggest abuse of the ex parte rules. Over the course of the interview process, parties suggested ways to narrow the procedural exemption or prevent its abuse. Staff suggested that if an issue is controversial, it should be considered a contested procedural matter and ex parte communications should be disclosed. An intervenor recommended allowing procedural communications to be made to the ALJ only. Use of the APA "not in controversy" definition was suggested by staff.

5. Require disclosure of pre-filing ex parte contacts

Utilities are the only parties who take advantage of the ability to make unreported ex parte contacts prior to filing an application. Although some intervenors viewed this as a loophole, intervenors were generally not so troubled by this practice.

6. Require disclosure of communications prior to business meetings

Practitioners at the CPUC are well aware that an ex parte meeting with an advisor is not required to be disclosed until three days after the meeting. This can lead to meetings the day before the business meeting that are not disclosed until a vote on the item. While more parties favored a quiet period to avoid such last minute meetings, other parties suggested that Commissioners be required to disclose ex parte meetings at the business meeting before a vote on an item. Others suggested that parties should have an obligation to disclose such meetings within a day of the meeting.

7. Make ex parte written communication part of the record

Currently, ex parte communications are expressly excluded from the record of a proceeding. When asked whether ex parte communications should be made part of the record, many parties resisted the hypothetical. Parties pointed out that most ex parte communications occur after the release of the proposed decision when the record is closed, so they could no longer be made part of the record. Parties also objected to the idea of including ex parte communications as "evidence" in the record. When the question was reframed so that it was clear that the ex parte communication would be placed in the record as argument, not as evidence that could support a decision, many concurred that placing such communications in the record would be appropriate and beneficial.

8. Require Commissioners' offices to disclose

Parties had mixed opinions as to the desirability of imposing the reporting obligation on Commissioners' offices rather than the party. A utility, several intervenors, academics, and some in the Legislature favored imposing disclosure obligations on Commissioners. Some favored the idea of Commissioners' offices reporting at least that a meeting had taken place. A utility noted that such disclosure would permit auditing of the disclosures filed by the parties against the

reports from the Commissioner's office. One Commissioner thought requiring Commissioner disclosure could be an effective check on the ex parte process.

A former Commissioner thought that requiring Commissioners to disclose was a very bad idea, noting some logistical concerns with the proposal. In particular, Commissioners receive many emails each day, and do not always know the categorization of all the proceedings on which they receive emails. In order to comply the Commissioner would have to look up each proceeding and possible notice the receipt of the emails. A current Commissioner noted that requiring reporting by Commissioners would not guarantee that Commissioners would comply.

C. Reforms to Commission Hearing and Meeting Procedures

1. Greater use of workshops and all-party meetings

The most common alternatives that practitioners suggested to the use of ex parte communications were all-party meetings and workshops. Parties with concerns about ex parte communications particularly favored workshops and all-party meetings because all parties are able to be present and hear the communications. An intervenor explained that they had seen workshops used very effectively to replace hearings and that they believed that all-party meetings served all of the legitimate functions of ex parte communications without causing transparency or fairness problems. This intervenor viewed workshops and all-party meetings as leveling the playing field. Some in the Legislature also pointed to all-party meetings as a desirable aspect of the Commission's current practice. An industry representative favored all-party meetings over ex parte communications because everybody is under the same pressure to be forthright. Parties are not able to stretch the truth when other parties are listening and able to respond. A utility representative found all-party meetings to be productive if they are structured well and proactively led by the ALJ. Practitioners did not find workshops to be as helpful where the workshop simply allowed the parties to present their positions, but they found the dialogue generated in a well-structured workshop to be very useful in focusing attention on issues. One intervenor noted that all-party meetings would be more efficient than serial ex parte meetings by bringing in all sides at once. Some Commissioners liked the format of all-party meetings for dialogue and follow up questions. Commissioners noted that the ability to include other Commissioners' offices was an additional benefit of the all-party meeting. Several Commissioners favored reforms that would enable workshops or all-party meetings to become part of the record.

Among incumbents, Commissioner Sandoval is best known for holding all-party meetings, and will even hold them in cases that are not assigned to her. In advance of the meeting, she identifies what questions she wants answered at the meeting, and these questions are included in the notice of the meeting. Several parties specifically noted that Commissioner Sandoval's all-party meetings are well-structured and very productive. One intervenor said that because Commissioner Sandoval attends the all-party meetings, there is better access to the Commissioner in that setting than in ex parte meetings, which are usually with advisors.

Not all who approved of the use of all-party meetings in general viewed them as an acceptable substitute for ex parte communications. One intervenor opined that regardless of how successful a workshop or all-party meeting is, that did not eliminate the need for that entity to

pursue ex parte communications. A utility representative saw no problem with the increased use of scheduled all-party meetings—but not as an alternative to ex parte meetings.

Interviewees who expressed concerns about all-party meetings and workshops primarily raised structural concerns. Both utilities and intervenors were worried about the amount of time afforded to each party in matters with many parties. An all-party meeting is not a substitute for the direct attention afforded in an ex parte because it offers so much less time to present arguments, an intervenor explained. A utility commented that it found it impossible to effectively respond to the issues raised by the numerous parties in a major case, where it was granted the same amount of time as each of the single-issue intervenors. Several intervenors had a similar complaint, noting that when there are many parties in the room no party could speak very much, but during an ex parte they might have a full half-hour of undivided attention. An industry representative thought that all-party meetings would be useful at reducing ex parte communications only if all of the Commissioners attended so that they could assess credibility of the parties for themselves. Some Commissioners did not find all-party meetings to be useful because parties tended to recite the same bullet points that were already in their briefs. Advisors similarly noted that the presentations at all-party meetings were more restrained and less forthcoming than ex parte communications. One advisor described parties posturing for each other and for the media instead of focusing on the issues. Commissioners also thought all-party meetings were harder to schedule than ex parte meetings and that space constraints are also a concern. One Commissioner noted that parties feel that they need regulatory counsel at all-parties meetings, so the cost to a party is higher than the cost of an ex parte.

2. Making hearings more efficient and productive

Many parties concurred that evidentiary hearings are important and lead to better outcomes overall. However, parties lamented the time it takes to conduct evidentiary hearings. Over the course of our interviews, many ideas emerged as to different procedures that could be deployed to improve Commission hearings and ideally make them more efficient. Ideas that were raised included: submission of joint pre-trial statements, inclusion of a proposed calendar or deadlines in the scoping memorandum, appending a summary of issues addressed in a proposed decision, and employing witness panels in lieu of individual witness cross-examinations.

3. Non-proceeding agenda items

Some interviewees suggested that a way to address the concern among decision-makers that they do not have adequate access to expertise is to convene meetings of such experts and invite stakeholders to participate in these discussions, along with Commissioners. One Commissioner thought that such a proposal was not workable, stating that the office could not convene a conference every time it needed to learn about an issue. Several interviewees noted the use of the “Energy Principals Group” convened by Governor Brown to bring together leaders from the state’s energy, air and water agencies. A former Commissioner suggested that these types of inter-agency groups increase the pressure on parties to communicate ex parte, because decisions are being made outside of formal agency dockets.

4. More frequent Commission meetings

Several outside parties questioned why the Commission does not meet more often and why meetings were not longer. One utility commented that the Commission has a lot of industries to regulate in only a four-hour meeting twice a month. One Commissioner experienced surprise upon joining the Commission at the infrequency of Commission meetings and thought that decision-making would be improved by meeting more frequently and dividing up decisions further. Two other Commissioners concurred that more frequent meetings would be appropriate. One Commissioner disagreed, opining that more frequent meetings would not improve Commission practices. That Commissioner noted that when items are Commission-wide, the Commissioner puts less effort into the item than when the items are assigned to that specific office. Another Commissioner explained that subcommittee meetings have increased the number of public meetings that Commissioners are now attending, which might make it difficult for the full Commission to meet more frequently.

5. Additional submissions to Commission

Some parties favored the idea of requiring a final, short (perhaps five-page) submission from all parties summarizing a party's major concerns in a given proceeding. Staff opined that such a submission might satisfy one of the parties' primary objectives in ex parte communications. A utility expressed concern that the complexity of such proceedings did not lend itself to summarization in a short filing and that Commissioners might not read such filings. One Commissioner, indeed, opined that a five-page document from every party in all proceedings on the agenda would be a lot of reading. An advisor noted that parties' written submissions are usually drafted by attorneys and are not as helpful at explaining complex technical issues as discussions with subject matter experts. One Commissioner's office employed a version of this reform by requesting comments from all parties on specific issues that were difficult for the Commissioner to resolve.

6. Oral argument before Commission

Some practitioners stated a preference for increased use of oral argument before the Commission. One utility favored the practice, particularly in front of all five Commissioners. Commissioners noted that parties do not ask for oral argument often. Some Commissioners expressed concerns about the ability to timely schedule oral argument in order to prevent delays in resolution of matters. Other Commissioners favored increased use of oral argument, suggesting that it would reduce the need for ex parte communications and have an advantage over all-party meetings because it would be on the record.

7. Deliberative closed sessions

Most who commented on the use of deliberative ratesetting meetings thought the practice was appropriate and improved decision-making. One intervenor thought the Commission would be "raked over the coals," if it had too many private meetings, and another intervenor distrusted the use of closed meetings in cases in which the intervenor was involved. By and large, however, interviewees commented that the opportunity to debate among Commissioners is valuable and should be permitted. These types of closed meetings were offered by some as a response to the

limitations of the Bagley-Keene Act. Some commented that it would be preferable to allow private discussion by reforming Bagley-Keene Act restrictions, rather than permit closed deliberation.

Commissioners generally appreciate the use of closed deliberative meetings where permitted by the rules, and thought that expanding their use to the rulemaking context would be helpful. One Commissioner commented that the Commissioners need more, not less, interaction. A Commissioner explained that in the closed deliberative meetings that the Commission has recently held, Commissioners have been more comfortable and candid about their positions, and are more comfortable compromising. Another benefit to such meetings is that the ALJ is able to attend and explain his or her reasoning. There is no forum for this in public meetings. Another Commissioner said that every time the Commission has recently held a closed deliberative meeting all of the Commissioners have agreed how great it was and have suggested that they should do it more often.

8. Increased use of discuss and hold

CPUC personnel contend that the use of "discuss and hold" for items at business meetings is increasing. One intervenor suggested that requiring such practice for all items on a Business Meeting agenda would increase public deliberation and also lead to better informed decisions. However, the intervenor thought the practice would do little to affect parties' use of ex parte communications, other than to change the timing of such communications, and perhaps afford a second round of communications.

9. Alternate decision process

Under the current statutory scheme, the Assigned Commissioner may only write an alternate decision if that decision is provided to the parties at the same time as the proposed decision. Many interviewees favored revision of the statutory scheme to eliminate this requirement and provide the Assigned Commissioner with the same opportunity as other Commissioners to provide an Alternate Decision. The current requirement encourages the ALJ and Assigned Commissioner to collaborate more on the proposed decision in order to avoid an alternate or permit the Assigned Commissioner to prepare one if necessary. A utility complained that alternate decisions extend the process. If another Commissioner writes an alternate decision later in the process, an entire new 30-day comment period is required. Because Commissioners who were not assigned the matter are not as familiar with it, these alternates may arrive later in the process making the entire review period longer. One Commissioner commented that having Commissioners engaged in process earlier can obviate the need for an alternate decision and reduce the need for communications on the back-end.

10. Use of remand procedures for decisions

The Commission currently does not remand decisions for further fact-findings. Parties who commented on this issue were split on whether or not it would be helpful to the Commission. One utility thought it would help if Commissioners could remand a decision to an ALJ with specific instructions as to how to revise it. Commissioners, however, were concerned about the delay that such a procedure might entail, where proceedings are already lengthy. One

advisor noted that this could present serious staffing problems. The value of a remand seemed limited, though Commissioners agreed that where factual issues were not adequately developed during a proceeding, a remand could be a satisfactory remedy. One Commissioner suggested that while a remanded decision was making its way through the process again, an interim decision could be used to address any exigent needs.

11. Facilitating settlement

Parties who practice before the Commission are generally supportive of settling matters or issues within a proceeding without the need for hearing whenever is possible. Some parties suggested reforms that would facilitate or improve settlement processes. An industry representative and a staff member both noted that staff need to be involved in settlement negotiations. Although the CPUC is not a party to a proceeding, settlements implicate the Commission and create obligations for it. If the staff are not involved in negotiations the parties may reach a settlement that is not acceptable to the Commission, which is procedurally inefficient. Using a separate judge to oversee settlement negotiations was a recommendation of several parties. Staff noted that the CPUC already uses settlement judges and has a robust ADR program.

D. Reforms to Commission Policy and Internal Procedures

1. Increase Commissioner engagement

Several intervenor and industry representatives observed that not all Commissioners seem fully engaged on a regular basis and that Commissioners do not seem to be available in San Francisco frequently. One intervenor suggested that Commissioners spend more time walking the halls of the CPUC offices. Another interviewee suggested that Commissioners be required to hold office hours when they are present and available for appointments. A staff member suggested a requirement that Commissioners spend a certain percentage of their time in the office. Staff thought that Commissioners were increasingly reliant on their advisors in lieu of line staff, which has led to an increase in ex parte communications.

2. Eliminate Assigned Commissioner

The idea of eliminating the Assigned Commissioner role was highly controversial. Some noted that the assignment of proceedings can be a tool for the President to punish or reward Commissioners for their votes in other proceedings. A Commissioner opined that there is no longer an “expertise-based” reason to assign proceedings to a particular Commissioner because most of the Commissioners currently are primarily interested in energy. An intervenor questioned the need for Assigned Commissioners, observing that the assignment appeared to provide an opportunity for the Commissioner to interfere in a proceeding and lead it in a particular direction. A Commissioner asserted that Assigned Commissioners normally advance proceedings without interfering, but that the Assigned Commissioner does have the ability to manipulate matters and prevent a case from moving forward.

Parties and a staff member observed that eliminating Assigned Commissioners would tend to give more power to staff and ALJs during the hearing process. Parties differed

significantly as to whether they believed such a shift in power would be beneficial or appropriate. Staff observed that Assigned Commissioners exercise ownership over a proposed decision at the expense of the ALJ. A Commissioner expressed concern about the idea, opining that Assigned Commissioners are needed to serve as a counterpoint to the ALJ. Another Commissioner explained that the Assigned Commissioner can force the ALJ into a debate, which is productive and leads to better decisions.

Many favored retaining the practice of assigning a Commissioner to a proceeding. Most thought that Assigned Commissioners served a necessary management function to shepherd proceedings through the lengthy process. One intervenor opined that having a single accountable Commissioner was necessary to avoid "passing the buck" between Commissioners. An intervenor explained that in the policy-oriented and ratesetting matters in which the intervenor was involved, the Assigned Commissioner is far more important than the ALJ, even during the hearing process. Several interviewees expressed the concern that Commissioners would not pay attention to matters if they were not assigned to them, so loss of assignments would be broadly detrimental to Commissioner engagement. A former Commissioner noted that without an Assigned Commissioner, there would be less proactive attention to proceedings by any Commissioner.

Some staff observed that because there is a Commissioner assigned a matter, other Commissioners do not engage at all on it until the proposed decision is out. Commissioners expressly affirmed that they spend more time on proceedings assigned to their office. One Commissioner noted that if their office is not the Assigned Commissioner, they have no reference point for the issues in a proceeding until the proposed decision is released. This office takes more ex parte meetings on proceedings where they are not the Assigned Commissioner.

3. ALJ autonomy

An issue related to elimination of the Assigned Commissioner is the independence of ALJs in drafting proposed decisions. This proposal was also controversial. Utility parties in particular disfavored giving ALJs autonomy, expressing concerns about ALJs' qualifications and training to resolve complex issues. An intervenor commented that it is the appointed Commissioners who have the ultimate decision-making authority in our democratic system, and power should not be shifted toward the ALJs and away from Commissioners. Commissioners expressed concerns about ALJs making policy determinations, preferring to see ALJs roles limited to evidentiary and fact-finding issues. Staff tended to view the idea of ALJ autonomy more favorably, commenting negatively on the pressure exerted by Commissioners to revise proposed decisions.

4. Use of two-Commissioner committees

Many interviewees raised concerns about the implications of Bagley-Keene Act restrictions on the functioning and collegiality of the Commission as a body. Such suggestions are generally outside the scope of this Report. Within the confines of the Bagley-Keene Act, however, individual Commissioners could work with one other Commissioner on proceedings. While this is now informally done when the Assigned Commissioner identifies one other Commissioner to communicate with about cases, some parties liked the idea of formalizing the

practice by having two Commissioners assigned to proceedings. A former Commissioner thought it could be very useful to bring together different expertise and abilities in a Commissioner committee. A utility agreed that having two Commissioners could be preferable to a single Assigned Commissioner. Some parties were, as with the notion of eliminating Assigned Commissioners, concerned about not having a Commissioner with clear responsibility to advance the proceeding.

5. Creation of ethics officers/ombudsman

Parties generally supported the idea of creating an Ethics Officer within the CPUC, though some were skeptical that the proposal would lead to any significant improvements in compliance or organization culture. One utility suggested use of an ombudsman to answer questions about ex parte rules and possibly to serve in an enforcement capacity. An intervenor suggested that more guidance documents, such as examples of the application of the rules in context, would be helpful. These documents could be prepared by a dedicated ethics officer charged with oversight of the implementation of ex parte communications rules. Staff thought that an ethics officer would be a good idea, particularly if used to oversee reporting of ex parte communications.

Some Commissioners were more skeptical about the usefulness of an ethics officer. One Commissioner thought that the tone must be set from above, suggesting that an ethics officer might be useful in setting the tone. Others were more dubious about whether an ethics officer would do much to change the behavior of parties who are otherwise intent on ignoring the rules.

6. Code of conduct

We understand that the Commission is considering adopting a code of conduct for Commissioners, and possibly for other staff. A staff member suggested the following key principles for Commissioner decision-making generally: “Integrity and Public Trust of Commission; Informed Decision-Making; Openness & Transparency; Clarity & Simplicity.” A utility strongly supported the idea of a Commissioner code of conduct. One Commissioner expressed skepticism that a code of conduct would deter someone who is intent on violating the rules from doing so.

7. Sanctions and other deterrence measures

Many interviewees found it difficult to identify what they thought would be appropriate and effective sanctions for violations of the ex parte rules. Several parties, including a Commissioner, concurred that the financial incentives for a utility to violate the rules are so great that it is difficult to impose a financial penalty that will actually deter improper conduct. An industry representative noted that is easier for the Commission to penalize a utility than an independent energy producer or third party. A Commissioner cautioned that increased penalties could deter poorer parties from participating.

The suggestions that we received for sanctions were:

- Increased penalties

- Clear and predictable penalties
- Findings of continuing violations
- Revoking ex parte privileges for repeat offenders
- Criminal liability
- Public posting on website of names of ex parte violators
- Mandatory recusal of Commissioners who violate ex parte rules

8. Conduit issues

A number of parties raised concerns about conduits, both from within the CPUC and from outside individuals who are not subject to ex parte disclosure rules. A utility suggested use of an anti-conduit rule to address these issues. Under such a rule, designated Commission staff (such as the Executive Director or division heads) would not be permitted to convey any information to a Commissioner that would have triggered an ex parte disclosure if a party were to have shared that information itself. The objective of this rule would be to prevent the direct transmission of a party's view to the Commissioners by a third party. The utility's ideal formulation would still permit a conduit to conduct factual investigations and report on the results, and would also permit the use of conduits when it is in the public interest to do so. One Commissioner thought that any rules requiring parties to disclose the true identity of the source of information would be confusing and difficult to implement.

9. Training and compliance assistance

Training is currently limited at the CPUC and entirely absent for many parties, particularly intervenors. Many parties indicated that they would welcome interpretive guidance from the CPUC on ambiguities or difficult points of the practice.

10. Better information technology and access to information

The state of the CPUC's website and information technology was a universally cause for despair. One issue is the ability of the public to make comments and find information. An industry representative lamented that it is very difficult for the public to file comments and suggested adopting the FCC's technology where it is easy for the public to place a comment in the record and read the comments of others. Staff also raised the FCC as a model for bringing in the public, and suggested that the CPUC use YouTube and other social medial to obtain public comment. One Commissioner noted that the CPUC needs to do a better job getting information to the public, and right now it "hides things in plain sight" on the website.

Even experienced practitioners have difficulty finding the information they need on the CPUC's website. This was a particular issue with advice letters. An industry representative suggested that all advice letters should be put online in a searchable database with links to the underlying resolutions.

Commissioners noted that they are not easily able to access the records of proceedings, and expressed some interest in a reform that would make it easier for Commissioners, the parties, and the public, to access this information.

11. Closing statutory and technical loopholes

Interviewees identified a number of statutory or technical loopholes or ambiguities in the rules that they believed would benefit from clarification. The suggestions were:

- Eliminate exception in ex parte rules for proceedings without hearings
- Eliminate all-party ex parte communications from definition of ex parte communication
- Clarification or guidelines on difference between procedural and substantive communications
- Clarify definition of "interested person" to reach investment banking and financial community
- Prevent communications before a proceeding has commenced
- Clarify application of rules to comments at public events

E. Changes to Rules in Adjudicatory or Quasi-Legislative Proceedings

1. Adjudicatory

Many practitioners concurred that the current ban on ex parte communications in adjudicatory proceedings is appropriate. The applicability of a strict ban on ex parte communications in adjudicatory proceedings was generally accepted as appropriate by the vast majority of practitioners. One industry representative commented that adjudicatory proceedings would benefit from ex parte communication because the ALJ is the only person who is aware of all of the facts and evidence, and that the Commissioners would be better educated if they were able to communicate ex parte.

2. Quasi-Legislative

Practitioners were divided on the advisability of unlimited and unreported ex parte communications in quasi-legislative proceedings. Many parties supported maintenance of current practices. Industry representatives likened rulemaking to legislation and highlighted the need for compromise and private debate in the legislative process. A utility supported open access in quasi-legislative proceedings because of the wide latitude to set policy details afforded by the Legislature to the CPUC. An intervenor party argued that Commissioners would not be comfortable attending conferences or outside events if they could not take unrestricted ex parte contacts in quasi-legislative proceedings. This party also expressed concern about the potential isolation of Commissioners if ex parte communications were limited in quasi-legislative proceedings, coupled with already-existing Bagley-Keene limitations. An intervenor who generally favored more stringent limitations on ex parte communications in ratesetting expressed

less concern about ex parte communications in quasi-legislative proceedings, noting that such proceedings do not present the same concerns about evidentiary records and probably benefit from multiple heads addressing the same policy questions. Another intervenor noted that dialogue with advisors flowed more freely in the quasi-legislative context and expressed some concern about a notion of restricting ex parte communications in these proceedings. Some Commissioners noted advantages to easier ex parte communications in quasi-legislative proceedings involving technical innovation or complex policy issues.

Other parties expressed concern about treating quasi-legislative proceedings differently than ratesetting proceedings. Some staff stated that ex parte communications should not be permitted in rulemaking proceedings, or that the rules should at least be the same as for ratesetting, given that both sets of proceedings involve important issues. A staff member was skeptical about the contention that Commissioners function like legislators in rulemaking proceedings, noting that the proceedings are still record-based. The staff member believed that ratesetting rules should apply to rulemaking proceedings. One interviewee commenting on the issue suggested banning ex parte communications in rulemaking proceedings that are contested and rely on critical factual assumptions.[452] An intervenor party argued that intervenors are outnumbered in rulemaking proceedings, as they are in ratesetting proceedings, and that the difference in access should be addressed by rules requiring open communication in quasi-legislative proceedings.

Some favored a "third way" short of a ban or the application of ratesetting rules in the quasi-legislative process, advocating greater disclosure of ex parte contacts in rulemaking. Several intervenors commented that they would appreciate knowing who is meeting with the Commissioners during the rulemaking process but that they did not see a reason not to impose a disclosure requirement on ex parte communications in rulemaking. Several Commissioners' offices also suggested that a disclosure requirement would be appropriate for ex parte contacts in quasi-legislative proceedings.

IV. CONCLUSION

The interviews with practitioners, Commission staff, and decision-makers drew into clearer focus those issues ripe for reform by revisions to the laws and regulations governing ex parte communications. In addition to reforms specifically requested by interviewees, our interviews highlighted the needs that are being met through ex parte communications and pointed to existing procedures commonly used in administrative law and available within the Commission's current regulatory guidelines. In Part IV of this Report, we present the analysis of these interviews and the legal review of other agency practices, from which we arrive at a detailed set of recommendations for reforms.

[452] Testimony of Steven Weissman before the Senate Energy, Utilities & Communication Committee, March 11, 2015.

Part IV

ANALYSIS AND RECOMMENDATIONS

In this part of the Report, we bring together the legal analysis, information on actual practices, and opinions of the people with whom we met to offer our assessment of the nature and effects of present rules and practices before the Commission and to make recommendations to improve the fairness, accessibility, transparency, and public accountability of Commission decision-making on the record. Before addressing the substance of the issues, however, we should make clear six points.

First, the recommendations we make here call for both internal reforms within the Commission and statutory changes. Of course, to achieve the proposals in the latter category legislation will be required. Our recommendations are, then, for the Commission to implement reforms within its present authority and to propose the remaining measures to the Legislature for adoption. As we explain below, these reforms necessarily extend beyond the laws explicitly addressing ex parte communications to the practices and procedures that we have found to be related to the claimed need for many of the ex parte communications that are permitted today.

Second, most of our recommendations are stated unconditionally. Those are measures that we find to be necessary to make CPUC proceedings fairer, more accessible to prospective participants, and more visible to the public, and where, as we explain, we have found the need for those measures to clearly outweigh counter-arguments against them. However, in some cases we have found the advantages of certain additional measures to be closely balanced against the disadvantages, and in those cases we merely "recommend for consideration" the Commission's assessment of those measures for possible adoption.

Third, as already noted, the Public Utilities Code has separate rules governing adjudicatory, ratesetting, and quasi-legislative proceedings. In general, those rules ban nearly all ex parte communications in adjudication and do not proscribe ex parte communications of any kind in quasi-legislative proceedings. Most of the concerns we heard regarding ex parte communications pertained to ratesetting proceedings, which represent a majority of the cases, and, except as otherwise indicated, our recommendations below should be read to be addressing ex parte practices in those cases. We do, however, draw conclusions and make some recommendations regarding other proceedings and indicate their broader application.

Fourth, in many cases we are recommending reforms to render illegal certain practices that are lawful today. We have found that, in part because of poor drafting of the governing laws, discussion of ex parte communications sometimes confuses what is illegal and what is legal but ought not to be. We wish it to be clear that just because we recommend a given reform, we are not necessarily saying that current practices are illegal. Rather, in many instances we are saying that the law should be changed to make them illegal.

Fifth, nothing we recommend would impose on the CPUC any restrictions that are not already in place for agencies elsewhere, which are successfully operating under those restrictions today.

Finally, as noted earlier, our mandate was not to assign responsibility for past events or to defend challenges that may arise from them. Nevertheless, we are aware of the events that were the impetus for this Report and the reforms it recommends, events that arose under different Commission leadership. We have found the present leadership fully aware of past abuses and already embarking on the reform process, of which we understand this Report to be a part. Our recommendations are not premised on a concern that the present Commissioners may repeat those abuses. But rules are not solely for the virtuous. We propose here reforms that will enhance decision-making while regulating not just the present Commissioners but those who may occupy their seats in years ahead.

I. KEY OBSERVATIONS

We begin with several findings that are particularly significant to our recommendations. In Section II we lay out policy implications that flow from those findings. Then, in Section III we offer our detailed recommendations.

A. Ex Parte Communications Are a Frequent, Pervasive Part of CPUC Practice That Sometimes Determine the Outcome of Proceedings

We have found that ex parte communications are not occasional incidents but a central feature of CPUC practice, as indispensable to practitioners before the Commission as expert testimony and legal briefs. In recent years, parties to ratesetting cases have reported an average 755 ex parte communications per year. The notices filed by the 10 most frequent users of ex parte communications on a per-proceeding basis (nine of which are utilities and the tenth an association of non-utility power producers) ranged from six to over twelve ex parte communications per proceeding. Overall, the largest utilities noticed twice to nearly three times the number of ex parte communications per proceeding than the most active consumer groups and ORA.[453]

So pervasive are ex parte communications that they have become a compulsory part of advocacy before the Commission. While some (but by no means all) intervenors and advocacy staff express concern about the utilities' ex parte contacts and bemoan the fact that they themselves have fewer resources than the utilities for these contacts, none can afford to forgo them.

A recent episode illustrates how parties have matter-of-factly come to take it for granted that CPUC cases are decided in ex parte communications. In the contentious hearing on the proposed (and now abandoned) acquisition of Time Warner by Comcast, the proposed decision provided for approval of the applications subject to numerous conditions that the applicants

[453] See Table 4, p. 55, *ante*. It shows that the five utilities that were the heaviest users of noticed ex parte communications ranged from 8.4 to 12.2 contacts per proceeding, while the two non-industry organizations noticing the most communications per proceeding, NRDC and ORA, averaged 4.6 and 4.4, respectively.

contended were "unnecessary and inappropriate and should not be adopted."[454] Expressing their "commit[ment] to finding an equitable resolution with the Commission," the applicants announced in their public filing their "plan to work through the ex parte process with the Commission toward a set of conditions that address concerns identified by the Proposed Decision – including conditions that Comcast would agree to voluntarily."[455] There were 21 parties, not counting the applicants, who had litigated the case before the ALJ to the proposed decision. The applicants simply assumed that now that they were in front of the five Commissioners, they could negotiate with them a different outcome without the participation of those other parties—and apparently assumed from past experience that the Commission would go along with it.

There is little doubt that, at least in some cases, ex parte meetings are the place where Commissioners' opinions are formed. There is no way to reconstruct how many, or what percent of, decisions are affected by ex parte communications. Some have pointed out that in most cases the Commission adopts the proposed decision of the ALJ. However, it is not clear how often the proposed decision itself is affected by ex parte communications. While ALJs decline to take ex parte contacts, Assigned Commissioners and their advisors historically have not. And the influence of the Assigned Commissioner on the ALJ and on the proposed decision will vary according to the inclinations of both parties. Furthermore, the fact that the proposed decision was adopted does not mean that ex parte communications played no role in its adoption. Just as an ex parte contact has the potential to persuade Commissioners to reject a proposed decision, a counter-ex parte contact can interdict that inclination, persuading Commissioners that the prior ex parte contact was misguided. Such an ex parte draw does not mean the contacts had no influence on the final decision; it merely means the party siding with the proposed decision won the ex parte round.

And even assuming that ex parte contacts affect only a subset of the Commission's decisions, they likely do so in precisely those cases that are most sharply contested, that have the most significant impact on the public, and that the Commissioners individually or collectively find the decision most difficult—in other words, the big cases and the close cases.

The fact remains that sophisticated participants in CPUC proceedings maintain staffs and devote resources to the regular pursuit of influence over Commission decisions through extensive ex parte contacts. They seem to believe that they're getting their money's worth. No one has suggested they are not.

Indeed, the Commission itself recently confirmed the importance of ex parte contacts to CPUC decision-making. In D.14-11-041 the Commission imposed both monetary and non-monetary penalties on PG&E for violations of the ex parte rules. Among the penalties was an order banning PG&E from participating in ex parte communications for a year. The Decision observes that "parties' and especially large utilities' ability to influence decision makers outside

[454] Joint Applicants' Consolidated Opening Comments On Administrative Law Judge's Proposed Decision (Public Version), Applics. 14-04-013, 14-06-012, March 5, 2015, p. 1.

[455] *Id.*, p. 2.

of the formal record of a proceeding is invaluable, . . .” (*Id.* at 17.) The opportunity to influence CPUC decisions in ex parte communications can be “invaluable” only if ex parte communications are, indeed, influential in CPUC decisions.

B. Asserted defenses for ex parte communications—two categories

As ex parte communications are viewed by many practitioners before the CPUC as an essential, required component of practice, practitioners who advocate for all sides, as well as Commissioners, detailed a number of reasons why they engage in ex parte communications. These reasons were often advanced as a reason why current ex parte practices should be continued, as practitioners and Commissioners viewed ex parte communications as critical to effectively advocating before the Commission and leading toward better outcomes in Commission proceedings. The reasons advanced for engaging in ex parte communications and maintaining current practices fall into two categories: practical concerns that appear more easily addressed by ex parte communications, and the need to communicate secretly, without the presence of other parties.

1. Practical needs

A number of practical concerns were raised by practitioners and Commissioners alike as necessitating ex parte communications. Chief among these concerns was the sheer volume of material associated with a given Commission proceeding. No one, Commissioners included, contends that Commissioners have the time to read all of the materials associated with even one large proceeding, let alone the 40-plus proceedings that are on a meeting agenda.[456] Indeed, as we discovered during our interviews, Commissioners’ offices are not easily able to access the record materials in a proceeding, and so are often unable to review for themselves the testimonial record constituting the evidentiary basis of a proposed decision. In light of the voluminous materials, practitioners who advocate before the Commission believe it is imperative to engage in ex parte meetings where a simplified, boiled-down version of a party’s biggest priority items can be presented orally to the Commissioner, or, more likely, the advisor. While many viewed such meeting as merely presenting arguments that had already been presented in briefing, the belief that was repeated time and again was that Commissioners simply don’t read the briefing.

Some interviews also noted that the compressed timing between when a proposed decision is issued, comments are filed, and the matter is set for hearing before the full Commission, as well as potential for delays associated with the filing of an alternate decision, make it difficult to convene more formal, all-party meetings. To some practitioners, it is simply easier, faster, and more predictable to set up a single meeting with a decision-maker, or to set up five such meetings, than to juggle schedules of the parties, the Commissioners, and the ALJ to set up an all-party meeting which not all Commissioners are likely to even attend. Thus, serial ex parte meetings take the place of one all-party meeting.

[456] See p. 56, fn. 319, *ante*.

Finally, we found that Commissioners expressed some desire for the interaction and debate on issues that is currently available in the ex parte meeting format. Due to Bagley-Keene Act restrictions, Commissioners and advisors cannot discuss issues pending before the Commission with more than one other office, leaving Commissioners to feel siloed. Due perhaps to the logistical concerns discussed above, ex parte communications have been viewed as a way to provide Commissioners with the interaction that is a necessary aspect of leading an agency that is itself leading the way on many crucial issues.

2. Desire for secrecy

While few interviewees volunteered that they preferred to engage in ex parte communications because they wanted to communicate in secret, for many who advocated maintenance of the ex parte regime, their need for ex parte communications in its essence was based upon the fact that these communications occur outside the presence of others.

Among decision-makers, including both Commissioners and advisors, many expressed a preference for ex parte communications over more public forums because they permitted candor, and allowed the decision-maker to ask questions that might seem uninformed if asked in a public context. Practitioners perceived this desire by the party on the other side of the table as well, opining that requiring disclosure of decision-makers' statements would inhibit the communication in ex parte meetings. It is widely accepted that in an ex parte meeting, it is acceptable to ask the "dumb" questions, or to reveal ignorance about a central issue, and that doing so in public would be uncomfortable for decision-makers.

A different claimed need for secrecy emerged in some interviews where parties described a kind of negotiation process that takes place in ex parte meetings. Particularly in meetings with an applicant, a decision-maker might ask the applicant, "What do you really need?" In response to this question, the expectation was not that the applicant would reiterate what it has formally requested in its application, but rather that it would explain what it was willing to live with. One utility representative explained that these types of conversations at ex parte meetings are largely bottomed on the personal relationships between the representative and the decision-maker, who, after years of repeated contact (in part in previous ex parte communications) had developed a basis to trust in the statements of the speaker.

C. Objections to Ex Parte Communications

The fact that ex parte communications are so extensive and central to CPUC proceedings does not, of course, resolve the ultimate question whether the practice is in the public interest. We take up that question next, weighing in this Section the objections that have been made to the use of ex parte contacts.

1. Unfairness to parties

The principal objection to ex parte communications is the claim that they are unfair to other parties. [457] We have found this objection to be well founded, particularly as applied to ex parte practices in CPUC cases, for four reasons.

Inadequate disclosure of substance of party's communication. The assumption on which regulation of ex parte communications before the CPUC seems to be founded is that any unfairness to parties not present during the communication is cured by providing the subsequent written "notice of ex parte communication" to those parties of what was communicated. In practice that is not the case, and in theory it is almost always impossible.

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[457] Sometimes the phrase "due process" is used as a synonym for fairness in administrative procedures. We have avoided that usage here because parties to many CPUC proceedings may not have any "due process rights," particularly under the federal Constitution. For example, there are no Fifth Amendment due process rights to procedural due process in quasi-legislative action (e.g., *Atkins v. Parker* (1985) 472 U.S. 115, 128-129 [while food-stamp recipients have procedural due process rights to the fairness of their individual determinations of eligibility, due process is not implicated in enactment of legislation changing the entire program]; *Western Oil & Gas Ass'n v. Air Resources Board* (1984) 37 Cal.3d 502, 525 ["Since the Board was acting in a 'quasi-legislative' capacity, no constitutional issue of due process is presented."]) or in investigations (e.g., *Lee v. Board of Registered Nursing* (2012) 209 Cal.App.4th 793, 798 [order for registered nurse to submit to mental-health examination "did not deprive [her] of any state or federal due process interest" because the examination itself would not deprive her of the right to practice her profession]; see generally Cal. Administrative Law, ¶¶ 3:25-3:45). Similarly, in a ratesetting proceeding, the utility may be able to show a sufficient potential for deprivation of its property to entitle it to procedural due process (e.g., *Cook v. City of Buena Park* (2005) 126 Cal.App.4th 1, 6 ["landlord undoubtedly has a property interest in collecting rent under the lease]; but see *Orange County Cable Communications Co. v. City of San Clemente* (1976) 59 Cal.App.3d 165, 171 ["there was no constitutional requirement that there even be an evidentiary hearing in the course of the City's consideration of the request for a rate increase" because the city was acting in its legislative capacity, not only in awarding cable franchise but also in granting or denying a rate increase]), but intervenors can make no such showing. We note, however, that under the California Constitution's due process clause (Cal. Const., art. I, § 7, subd. (a)), one granted the right to a hearing does not have to show a liberty or property deprivation to be entitled to procedural due process (*People v. Ramirez* (1979) 25 Cal.3d 260, 264-268 [recognizing a state due process right to "freedom from arbitrary adjudicative procedures"]; see generally Cal. Administrative Law, ¶¶ 3:525-3:536), so to the extent a utility has the right to California procedural due process in a CPUC proceeding so too would an intervenor.

We assume the Commission wishes to ensure fundamental fairness in its proceedings, even those proceedings to which constitutional due process protections do not attach, and have accordingly employed fairness as our test for the rules and practices under review here.

In practice, the disclosures filed pursuant to the requirement of rule 8.4(c) for a "description of the interested person's . . . communication and its content" are often brief and almost always uninformative. Every interviewee we asked was dismissive of the notices and believed them not to fully report what was said.

We drew a random sample of 25 notices and reviewed the text purporting to describe the content of the filer's communication. The responses ranged from 2 to 34 lines of text, with an average of 12 lines. Often they purported to summarize to topics addressed but did not describe what was said about those topics. Other times they appeared to summarize the party's litigation position in terms mirroring their comments on the proposed decision. There is, of course, no way for us to determine how complete or faithful to the descriptions actually were, but it seems clear that, say, 12 lines of text is unlikely to contain a complete account of a 20- or 30-minute meeting.

While the disclosures could certainly be more forthcoming, it is not realistic to expect an after-the-fact written summary to be complete and fully representative of what was said. And because the notice is filed by the party, not the decision-maker, there is every incentive on the filer's part to omit details necessary for other parties to rebut what it said in the meeting.

Inadequate disclosure of decision-maker's communication. Public Utilities Code section 1701.1, subd. (c)(4)(C)(iii) prescribes that the notice of ex parte communication describe "the party's, but not the decisionmaker's, communication and its content."[458] Omission of what the Commissioner or his or her advisor asked or said deprives the other parties of the opportunity to address in subsequent meetings what the decision-maker revealed in the first ex parte meeting to be the issues of greatest importance to his or her vote or possible sponsorship of an alternate decision.[459]

No check on truthfulness of representations. Many of the people we interviewed, representing experience with ex parte communications in different roles, expressed the strong conviction that at least some of the regular participants in ex parte meetings frequently make false statements, particularly about the content of the record, in the course of their ex parte communications. Any adversarial proceeding depends on opposing parties to controvert and disprove false evidentiary and legal statements. By giving parties the opportunity to make such statements to decision-makers in private, ex parte communications deny other parties the fair opportunity to rebut false representations and deny the tribunal those parties' expected contribution to the fact-finding process.

Often timed to preclude any response. The notice of ex parte communication must be filed within three days of the communication taking place.[460] If the meeting takes place in the

[458] See also rule 8.4(c) employing the same language.

[459] We understand this statutory provision was inserted to prevent Commissioners from vote-signaling to their colleagues in contravention to the Bagley-Keene Open Meetings Act (Gov. Code, §§ 11120-11132). We explain below (see p. 146, *post*) why we think this provision is a misguided attempt to serve that purpose that should be corrected by the Legislature.

[460] Pub. Util. Code, § 1701.1, subd. (c)(4)(C); rule 8.4.

last three days in which an ex parte communication may be made (e.g., within three days of the meeting at which the vote will be taken or within three days of a quiet period[461]), parties can wait until after the meeting to file their disclosure and adverse parties will not have time to obtain an appointment and conduct an ex parte meeting of their own. Thus, even if given a notice of ex parte communication reveals communications that the recipient wishes to rebut, there will be no opportunity to do so if the notice was given near the end of the window for such meetings.

2. Undermining, deprecation of record-based decision-making

The administrative record of a ratesetting case typically spans thousands of pages of direct- and cross-examination, exhibits, and briefs explicating each factual, legal, and policy issue. By regulation, an ex parte contact may not add any new evidence to that record, and what is said in the closed meeting is not made a part of the record.[462] Yet the Commission's decision must be "based on evidence in the record."[463] If, as seems clear, ex parte communications are, at least sometimes, affecting the Commission's final decision and those communications are not part of the record, there is an apparent gap between the statutory standard and Commission practice.

The answer frequently tendered is that supporting evidence is always in the record, somewhere among the thousands of pages, and that is often true. In a voluminous record compiled by able adversaries, there will be evidence supporting contradictory findings and decisions. Likewise, such records will contain arguments favoring each of the parties' respective opposing positions. That very fact demonstrates that in such cases the ultimate, outcome-determinative questions consist of selecting whose evidence and which arguments to adopt. For this selection to take place off the record itself, without any way for the public, the other parties,

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[461] See Pub. Util. Code, § 1701.3, subd. (c).

[462] Rule 8.3(c)(3). There is no explicit statutory proscription against making ex parte communications part of the record, but it may arguably be implied by the definition of "ex parte communication," which specifies that the communication "does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding."

[463] Pub. Util. Code, § 1701.3, subd. (e)); rule 8.3(k); see also Pub. Util. Code, § 1701.2, subd. (a) (adjudicatory proceeding). The standard of review for proceedings other than "a complaint or enforcement proceeding, or in a ratemaking or licensing decision of specific application that is addressed to particular parties" (Pub. Util. Code, § 1757, subd. (a))—of which nearly all that is left is the quasi-legislative category—specifies, inter alia, review for abuse of discretion, failure to proceed in the manner required by law, and failure to be supported by the findings. (Pub. Util. Code, § 1757.1, subds. (a)(1), (a)(2), (a)(4).) This standard also calls for evidentiary support in the record for the decision. (See, e.g., *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 478 ["Abuse of discretion is established if the respondent [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Internal quotation marks omitted).] So whether the Commission's decision was adjudicatory, ratesetting, or quasi-legislative, it must be supported by record evidence.

or a reviewing court to know what statements won is fundamentally inconsistent with decision-making on the record.

Indeed, there is reason to doubt how well such decisions are actually anchored in the record. As previously noted, the Commissioners and their advisors do not have ready access to the record, rarely consult it, and often have no ready way to confirm independently whether or not evidence described to them in an ex parte communication was actually in the record. Given the magnitude and relative inaccessibility of the record, the Commissioners' review of proposed decisions and fashioning of alternate decisions appears to involve little direct reliance on the source documents.

In this information vacuum, where statements cannot be readily tested by either an adversary's rebuttal or the evidence itself, carefully cultivated personal relationships with parties' government-relations representatives take on outsized importance. Accepting or rejecting a party's ex parte representations may be taken as a matter of trust in, if not affinity for, the party's representative. We interviewed several people with experience in past Commissioners' offices who confirmed this assessment with accounts of utility representatives who were quick to remind decision-makers that "you know me" and to take personally an adverse decision.[464]

In precisely this way, the Commission's extensive reliance on ex parte communications in its decision-making processes deprecates the record carefully compiled over months and years. And in the decision-makers' evidence-deprived environment, one may expect them to look for ways to resolve questions before them without grappling with the facts and reasoning for which the record was compiled. For instance, they may tend to over-rely on general policy predilections. While Commissioners are expected to have policy preferences, often developed from years of experience, when called on to decide a rate case, the question is not whether, say, in the Commissioner's experience utilities tend to overcharge their customers or consumer advocates fail to appreciate the need for capital formation. The question in a rate case is which side had the stronger case *in the record*.

The more the critical events in a case take place outside, and without reliance on, the record, the more the Commission disparages the hearing process and undermines the integrity of its decision-making.

3. Tendency to transform a legal quest for evidence-based truth into a negotiation to find an outcome satisfactory to one or more parties

We have found one way, in particular, where decision-makers have employed ex parte communications to divert ratesetting cases away from record-bound adjudications: by engaging the party, in particular the utility, in a kind of negotiation, seeking a resolution that more

[464] These accounts we received referred specifically to utility representatives, but we have no reason to assume that there were no other interest groups that may have achieved similar relationships with past Commissioners.

resembles a partial settlement[465] than a determination of objective facts or an explicit balancing of competing policies.

The process by which we were led to this conclusion began by asking interviewees questions intended to parse the arguments in support of current ex parte practices. When we asked for reasons why parties, and sometimes also decision-makers, sought ex parte contacts, the reasons invariably began with a recitation of practical concerns: timing requirements that were said to preclude all-party meetings, the already-voluminous record that was claimed to render written submissions served on all parties ineffective, and similar arguments about the practicalities of the decision-making procedures. We then asked the interviewees to assume hypothetically that deadlines were modified to accommodate those concerns. Some, particularly those with experience working in Commissioners' offices, then cited the value of an interactive conversation, the ability to ask follow-up questions and to draw out additional information. We then added assumptions permitting interactive discussions among all parties in well-structured all-party meetings. At that point, it became clear that there was some desire—expressed most candidly by some with the perspective of decision-makers and, to a lesser extent, among utilities—for secret[466] communications for reasons different from the practical ones initially proffered.

The key to understanding the desire for secrecy came from a phrase quoted, often virtually verbatim, by several interviewees: the decision-maker wanted to ask the utility, "What do you really need?" Of course, what the utility[467] really needs is supposed to be the subject of

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[465] We refer to this as a "partial settlement" not because it resolves less than all the issues in the case but because it is a settlement with fewer than all the parties—typically just with the utility. In common parlance, a true "settlement" is a resolution to which all parties agree and which the Commission approves. And the Commission is empowered to "settle" litigation challenging a final decision it has adopted by agreement with the utility over the objections of intervenors. (*Southern California Edison Co. v. Lynch* (9th Cir. 2002) 307 F.3d 794, 806-807 *modified,* (9th Cir. 2002) 307 F.3d 943 and *certified question answered sub nom. Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781 ["An intervenor does not have the right to prevent other parties from entering into a settlement agreement."].) But these ex parte communications are occurring *before* there is any final decision, and the negotiations are not between the utility and the Commission but between the utility and a Commissioner (or advisor).

[466] We have found the word "secret" to evoke strong reactions, in part because of an often-unarticulated distinction between "secret meeting" and "secret communication." As used in this Report, the term refers to the secrecy of *what was said*, not the fact of the meeting. While, as we note elsewhere, many parties suspect clandestine meetings take place, those meetings are unlawful absent the filing of the required notice of ex parte contact that makes the fact of the meeting not secret. But given the universal inadequacy of those notices to disclose what was actually said during the ex parte meeting, the substance of the communications themselves remain secret, unknown to all except those in attendance.

[467] It is possible that this question is sometimes also posed to parties opposing the utility, but instances of intervenors or ORA being asked what they "really need" were never cited to us.

Footnote continued

the ratesetting hearing itself, elucidated in hours of testimony and bookshelves of documentary evidence. In the course of our interviews, it became clear that the decision-maker was not asking for a guide to this record—which the utility could give not only to the decision-maker but also to the other parties. Rather, he or she was inviting confidential *negotiations* with the utility. It was understood that the utility's application, and the evidentiary case it presented, was requesting more from the Commission than the utility could reasonably expect to get, partly in recognition of the likelihood that the final decision would, for political and similar reasons, give the utility less than all it requested. The decision-maker was asking for the utility's bottom-line (or some tactical response that would hint at a bottom-line), and the utility was prepared to provide it.

Of course, no decision of the Commission ever contains an explicit finding about the utility's subjective expectations or desires, nor does it cite as support for the decision what the utility revealed in confidence it "really needs." That merely confirms that the utility's subjective hopes have nothing to do with a rate hearing on the utility's objective needs. In litigation of a case on an evidentiary record under adjudicatory procedures, the decision-maker is expected to render the decision dictated by the evidence, and to be prepared to disappoint a party when the evidence leads to such an outcome.

We have no doubt that negotiations and settlements have a proper place in practice before the CPUC. Anglo-American jurisprudence relies heavily on settlements, not only to ease crowded calendars but to achieve some harmony in outcomes. The CPUC has devoted an entire article of its Rules of Practice and Procedure to arriving at and reviewing settlements among the parties.[468] Neither those rules nor any other law of which we are aware sanctions settlement negotiations between a utility and a decision-maker in a pending, contested ratesetting proceeding.

In a process where the Commissioners have little access to the record, little time to study the evidence and arguments, and numerous ex parte entreaties to rule in favor of one party or another, it is understandable that Commissioners may be tempted to search for a way to resolve disputes without mastering the record evidence and arguments. But yielding to that temptation results in a process that has the worst of two worlds: on the one hand, lengthy, costly litigation to produce a voluminous record and a proposed decision based on that record, and, on the other, a final decision reflecting not the search for truth in that record but a negotiated outcome that, at best, merely promises minimal dissatisfaction of one or some parties.

To the extent that takes place, what is said here about the practice generally applies to communications with such non-utility parties.

[468] Rules 12.1-12.7.

4. Places governmental decision-making outside the public view, makes Commission meetings ceremonial rather than deliberative

The restrictions on ex parte contacts are grounded in fundamental fairness of the agency's hearings and decision.[469] The restrictions protect, in the first instance, the parties to the proceeding. But these rules also provide an additional benefit, exposing government decision-making to public view. Advancing this latter interest is the principal purpose of the Bagley-Keene Act, which is not the focus of this Report. Nevertheless it is worth observing that ex parte communications undermine the transparency and accountability interests the Legislature sought to advance in enacting the Bagley-Keene Act, and it does so in a way that Bagley-Keene does not readily reach. That act proscribes any "congregation of a majority of the members of a state body . . . to hear, discuss, or deliberate" outside of a noticed public meeting.[470] In general, ex parte communications take place with individual decision-makers, not with a quorum of the Commission.[471]

Having found that ex parte communications are a central part of Commission decision-making, and that such communications sometimes determine the outcome of cases,[472] it follows that the practice undermines state policy favoring a transparent process for deciding on public action—and, inevitably, weakens the effectiveness of open-meeting laws. This effect is confirmed by the history of CPUC voting meetings. Historically, these meetings have been more ceremonial than deliberative, events where decisions are announced, not where they are made. That may not be surprising in cases where the Commission has only a proposed decision before it, which it votes to adopt—often on its consent calendar. But it has also been the case in the past when the Commission considered and adopted an alternate decision proposed by a Commissioner. While one or more Commissioners may read a statement at the meeting explaining his or her vote, the statements and the Commissioners' decisions appear to have been decided before the meeting began.

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[469] E.g., *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-11 [setting forth rationale for limitation on ex parte contacts in adjudicatory proceeding as required for fairness and to preserve the exclusivity of the record].

[470] Gov. Code, § 11122.5, subd. (a).

[471] Section 11122.5 was added to the Bagley-Keene Act in 2009 to make it clear that a "majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body."

[472] See section I.A, *ante*. We emphasize that we are not saying, and have not found, that Commissioners are agreeing in advance of a meeting on how to vote, which would be a clear violation of the Bagley-Keene Act. Our point is that there has been little or no *inter-Commissioner* deliberation taking place anywhere, rather that the Commissioners have tended to do their deliberating with parties, not with each other.

That is not to say that the Commission may only deliberate in public session. On the contrary, Public Utilities Code section 1701.3, subdivision (c) authorizes the Commission to "meet in closed session" to deliberate on ratesetting cases.[473] But closed sessions may be conducted "only during a regular or special meeting" for which notice has been given that identifies the general nature of the business to be conducted in closed session.[474] A similar provision of the Bagley-Keene Act permits boards and commissions to deliberate adjudicatory decisions in proceedings governed by the formal-hearing provisions of the Administrative Procedure Act and similar statutory schemes.[475] This exception to the general open-meeting requirement reflects legislative recognition of the advantages to be gained from a frank, uninhibited discussion among members of a multi-member agency, where they can share their views and exchange questions with less inhibition than they could in a public session. But these are sessions closed not only to the public but also to the parties to the adjudication. State policy favors private, off-the-record conversations about such decisions *among the Commissioners*—not between individual Commissioners and litigating parties.

While the Commission's rules explicitly authorize "ratesetting deliberative meetings,"[476] until recently the CPUC rarely held such meetings. Our interviews, particularly with those who have decision-maker experience, have led us to infer that Commissioners who engage in ex parte communications are, at least to some extent, relying on ex parte meetings to serve the function that would otherwise be served by closed-session deliberations—asking questions, testing propositions, voicing concerns. If we are correct in this inference, it represents another pernicious effect of ex parte communications, undermining inter-Commissioner deliberation and granting outside parties access to and influence over Commission decision-making that the Legislature never intended.

In summary, we have concluded that over-reliance on ex parte communications has contributed to the absence of a public decision-making process and has helped render Commission meetings uninformative, largely ceremonial events that undermine the law and public policy favoring collective deliberation of decisions among the five Commissioners.

II. POLICY IMPLICATIONS

The observations just described have important policy implications that guide the detailed recommendations made in this Report. We address those policy implications here before taking up the specific recommendations in section III.

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[473] A similar provision permits deliberation in closed session when considering an appeal of an adjudicatory decision. (Pub. Util. Code, § 1701.2, subd. (c).) There is no provision for closed-session deliberation of a quasi-legislative matter.

[474] Gov. Code, §§ 11125, subd. (b), 11128.

[475] Gov. Code, § 11126, subd. (c)(3), referring to any proceeding required to be conducted pursuant to Chapter 5 (commencing with Section 11500) or similar provisions of law."

[476] Rules 8.3(c)(4), 15.1(b).

A. Commission Meetings

Commission meetings have to matter. Commission decisions should be where Commissioners do not merely read their positions but actually state their views in public, strive to persuade one another of those views, and receive responses from their colleagues. This entire process should be part of Commission meetings (whether reached in public or permissible closed session), and the five Commissioners should be interacting with each other on Commission business at noticed public meetings.

And once Commission deliberation and decision-making is genuinely integrated into CPUC public meetings, we expect the Commissioners to find that there is not sufficient time for thorough review and action in a less-than-half-day meeting[477] that takes place less than twice a month.[478] This will particularly be the case if the Commission implements additional recommendations we make here, such as greater use of deliberative closed sessions for ratesetting deliberations, more frequent oral arguments and all-party meetings in lieu of ex parte communications, and greater use of meetings for non-proceeding presentations about general topics to address emerging issues and inform Commissioners on matters of interest to them.

B. Commission Decision-Making

If the record is to matter in every case, the Commission will have to adopt measures to make the record the actual focus of its deliberations and the place where all information and events pertinent to the final decision can be found. That will enable the Commission to sharply curtail the frequency of ex parte communications and minimize the inherent tendency of such communications to divert decision-makers' attention to matters that are outside the record and properly irrelevant to the merits.

The Commission also needs to provide parties practical and time-efficient ways to communicate with it on the record. Written submissions need not all be voluminous; inviting the submission of one-page or five-page summaries of the parties' positions can meet many of the

[477] The 21 meetings between April 1, 2014 and April 9, 2015 ran an average of 2 hours 30 minutes, with the longest (the only one to go past lunch) taking 4 hours 51 minutes. The median meeting lasted 2 hours 22 minutes.

[478] Our review indicates that from January 2009 through December 2014 the Commission held 127 business meetings, about 1.7 meetings per month. If the 2.5-hour average length calculated for the 12-month period referenced in the preceding footnote is representative of the six years identified in this footnote, it would imply Commissioners spend about 4.3 hours a month in public meetings with a quorum of their colleagues. We recognize that the data does not account for the time Commissioners spend in other public meetings at which a quorum of Commissioners may be present, such as all-party meetings and workshops. We offer these figures not to suggest Commissioners have an easy job. We are well aware of how hard Commissioners work. Rather, we suggest these averages indicate that very little of that work is taking place in public meetings of the Commission, from which we infer that meetings are not where much governing takes place.

legitimate needs for identification of each party's key issues. And well-structured procedures for presenting oral arguments can give the Commission the valuable opportunity to interact with advocates and probe positions in ways that discourage rote recitation of what is already in the papers, encouraging give-and-take discourse.

The Commission's repertoire of actions it may take on consideration of a proposed decision should be broadened. The rules should be revised to give Commissioners (including Assigned Commissioners) reasonable opportunity to prepare alternate decisions, which should, then, be deliberated by the five Commissioners meeting face-to-face. Where a defect in a proposed decision can be readily identified and remedied, the Commissioners should be encouraged to remand cases back to the ALJ for preparation of a new proposed decision, rather than the Commissioners and their advisors themselves generating the decision.

And deficiencies in the storage and handling of the record should be remedied. Each decision-maker should have ready access to the entirety of the record and be able to locate and review specific testimony, exhibits, and argument in the course of weighing proposed and alternate decisions.

C. Proposed Decisions

One of the most contentious topics in our review has been the role of ALJs, particularly as it relates to the Assigned Commissioners. In our view, the standard model for administrative adjudication should be followed in CPUC adjudication and ratesetting: ALJs, who are the only decision-makers who will have attended the entirety of the hearing and heard all the evidence, should be individually responsible for preparing proposed decisions and tendering them to the full Commission. Permitting ex parte communications with Assigned Commissioners during the hearing is simply an invitation for parties dissatisfied with the presiding ALJ to solicit the Assigned Commissioner to apply pressure on the ALJ and his or her proposed decision. If, on his or her own or after hearing the views of a party, an Assigned Commissioner disagrees with the views of the ALJ and the direction of the proposed decision, the vehicle for the Assigned Commissioner's views should be an alternate decision, not pressure on the ALJ in preparing the proposed decision with which the ALJ disagrees.[479]

Commissioners, including the Assigned Commissioner, should have ample time to prepare alternate decisions when they see fit. The present rule, requiring that an Assigned Commissioner's alternate decision must issue concurrently with the ALJ's proposed decision,[480] unnecessarily delays issuance of proposed decisions and limits the Assigned Commissioner's opportunity to sponsor an alternate decision.

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[479] Once the Commission has made it clear that the contents of a proposed decision lie within the discretion of ALJ, there will certainly be nothing inappropriate about the Assigned Commissioner and ALJ discussing the issues in the case and each seeking to persuade the other.

[480] Pub. Util. Code, § 1701.3, subd. (a); rule 14.2(a).

Conversely, in rulemaking, the ALJ's function is properly limited to supporting the Assigned Commissioner, whose discretion should determine what is submitted to the full Commission. Both these recommendations—that the ALJ should be vested with the discretion to prepare his or her proposed decision in adjudicatory and ratesetting cases, and that the corresponding discretion lies with the Assigned Commissioner in quasi-legislative proceedings—are, in our view, what the law presently prescribes.

We also suggest that the role of the Assigned Commissioner be reconsidered. Commissioners are no longer routinely assigned to proceedings on the basis of specialization among the industries the Commission regulates. Usually the Assigned Commissioner is simply one among five who will eventually vote to determine how the matter is resolved. We do not doubt the contribution any Commissioner can make to any proceeding, but, particularly given the competing demands on Commissioners' time, that time may not be best used to attend some but not all of the proceedings that will eventually produce a complete record that every Commissioner can review. Some interviewees contended that Assigned Commissioners can serve a useful function by keeping the proceeding moving along. If that is the case, the Commission may wish to institutionalize that role and make explicit Assigned Commissioners' responsibility for keeping the schedules set in the scoping memos.

To the extent substantive Commissioner input prior to the proposed decision is useful, it may be preferable to assign two Commissioners to perform whatever function there is for pre-proposed decision Commissioner input—for example, where the President recognizes competing policy predilections among the Commission and may choose to assign Commissioners with different a priori views. All of these policies should, we believe, be assessed by the Commission in connection with its present reform program.

D. Concerns About Conduits

Virtually every interest group represented in our interviews expressed concerns about ex parte conduits—people who are not formally parties but who may be, in effect, lobbying Commissioners on behalf of a party. We have concluded that both sides—utilities on the one side, staff and intervenors on the other—have grounds for their concerns. And our interviews have revealed additional concerns that require the Commission's attention.

1. Utilities' concerns about advisory staff bias arising out of their advocacy functions

The Commission is required to separate its advocacy staff—those employees who litigate before the Commission on behalf of ratepayers—from its advisory staff—those who may advise the Commissioners or serve other supporting roles for decision-makers.[481] Staff functioning in

[481] Rule 8.1(a) sets out a definition of "Commission staff of record" that appears to be intended to distinguish advocacy from non-advocacy staff. However, the term "Commission staff of record" appears nowhere in article 8 other than in the definitions and is not used in the rules to regulate ex parte contacts. As noted below (see section II.D.3, *post*), the Commission's definition of "decisionmaker" excludes advisors to Commissioners (see rule 8.1(b), authorized by Pub.

Footnote continued

advocacy roles must, for purposes of ex parte communications, be treated as parties and may not have undisclosed private communications with the Commissioners in order to assure due process to the parties.[482]

In our interviews with utilities' representatives, we heard charges of bias among the Commission's advisory staff (implicitly including Commissioners' advisors, ALJs, and members of the line divisions not designated as advocacy staff), which, in turn were cited as reasons why the utilities required ex parte access to the Commissioners themselves. The interviewees cited two bases for the claim of bias. First, they noted that in the course of reassigning staff, some attorneys in the Legal Division serving advisory functions retained some legacy cases from prior advocacy roles in the Office of Ratepayer Advocate (ORA). CPUC management has confirmed that such instances do occur. Second, the utilities complain of a kind of revolving door, in which personnel rotate among ORA, the ALJ Division, and Commissioners' advisors, bringing with them the institutional bias of an advocate. While the charge of bias is emphatically rejected by CPUC personnel we interviewed, they confirmed that such employee rotations do occur.

Initially, we emphasize that if there is a problem of bias, the solution is not ex parte communications for persons having a different position. The very fact that practitioners before the Commission view ex parte contacts in this way reflects a duct-tape attitude toward basic institutional concerns. If there is the fact or appearance of bias, the circumstances giving rise to them should be remedied. Ex parte communications should not be justified by those circumstances and should not relieve the Commission of the obligation to assess the claims of actual or apparent bias and remedy them as necessary.

Util. Code, § 1701.1, subd. (c)), which effectively takes advisors' communications with parties out of the statutory definition of "ex parte communication." (See Pub. Util. Code, § 1701.1, subd. (c)(4) ["'Ex parte communication,' for purposes of this article, means any oral or written communication between a decisionmaker and a person with an interest in a matter . . . ."].)

[482] E.g., *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90-99 [hearing in which "City's advocate for the initial denial of the renewal application[] acted as legal advisor to the hearing officer reviewing that denial, violated Petitioners' rights to due process]; see also *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2006) 40 Cal.4th 1 [agency prosecutor's confidential memo to ultimate decision-maker or an advisor to decision-maker violated APA (declining to address due process)]; compare *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197 [fact that county superintendent of education, who recommended revocation of charter, also served as secretary to board of supervisors, the ultimate decision-maker, did not violate due process]; see generally Cal. Administrative Law, ¶¶ 3:425-3:492.

The Commission treats advocacy staff as parties, and, since parties are authorized by statute to have ex parte contacts as regulated by Public Utilities Code sections 1701.1-1701.4, advocacy staff is permitted ex parte access to decision-makers on the same conditions as the utilities and intervenors. Although no case specifically addresses staff ex parte contacts in this context, we assume that due process is not offended by this arrangement.

We have not sought to assess whether and to what extent advisory staff actually harbor impermissible biases. We note that even Commissioners themselves are understood to come to their public office with policy views, which are not considered to be disqualifying biases.[483] But it is conceivable that some staff members harbor views that would render them unqualified to serve in a decision-making role. Proof of such bias is always difficult, which properly is a concern of both the parties and the Commission. And independent of actual bias, the Commission is obliged to avoid even the appearance of bias.[484]

One particularly problematic practice we learned of was for attorneys who are functioning in advisory roles in cases concerning the rates and practices of a given utility to simultaneously retain assignments as advocates in different cases involving the same utility. The Supreme Court has held that it does not necessarily violate due process for the same agency staff member to serve as an advocate in one case and an advisor to the decision-maker in another.[485] But the court has never addressed a case in which the staff member is assigned advocacy and advisory functions in two cases *against the same party*. We urge caution on the part of the Commission in permitting such assignments.

We understand the present organization of the Legal Division was adopted many years ago with an eye to concentrating subject-matter expertise in groups of attorneys who may then either advocate or advise in different cases, with the understanding that attorneys would switch between the two roles. That organization appears to have given rise to what some parties take as an appearance of impropriety. We suggest, in the context of addressing the defense of ex parte communications on the basis of such appearances, that this organization be reassessed and that

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[483] *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 791 ["A trier of fact with expressed political or legal views cannot be disqualified on that basis alone even in controversial cases. The more politically or socially sensitive a matter, the more likely it is that the [administrative law officer], like most intelligent citizens, will have at some time reached an opinion on the issue. This is an unavoidable feature of a legal system dependent on human beings rather than robots for dispute resolution."]; *CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 328 ["that members possessing the statutory qualifications may be sympathetic towards the objectives of the Act is not a valid criticism. It is the statutory duty of the commissions to implement the policies of the Act."].

[484] We note that the Commission is obliged to "develop appropriate procedures to ensure that the existence of the office does not create a conflict of roles for any employee. The procedures shall include, but shall not be limited to, the development of a code of conduct and procedures for ensuring that advocates and their representatives on a particular case or proceeding are not advising decisionmakers on the same case or proceeding." (Pub. Util. Code, § 309.5, subd. (d).)

[485] *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 738 [the APA "does not prohibit an agency employee who acts in a prosecutorial capacity in one case from concurrently acting in an advisory role in an unrelated case."]; see generally Cal. Administrative Law, ¶¶ 3:460, 5:245.

the advocacy function be staffed by full-time advocates.[486]

2. Concerns of advocacy staff and some intervenors about utilities' perceived use of surrogates to avoid the rules on ex parte communications

For their part, members of the CPUC staff and some intervenors express concerns regarding utilities' alleged use of outsiders as conduits for utility lobbying of individual Commissioners and their staffs. Two categories of such surrogates have been identified to us, governmental[487] and non-governmental.[488] They also complain that Commissioners are hosted by utilities and their allies at seminars, sometimes provided at exotic, remote locales, where, under the guise of educational programs, the Commissioners are lectured and beseeched regarding issues directly involved in pending adjudicatory and ratesetting cases.[489]

There is no question that meaningful regulation of ex parte communications regarding pending proceedings requires recognition and regulation of indirect communications on behalf of a party. In general, we recommend in section III that ex parte communications by agents be treated as communications from their principals, the parties whose position they are supporting. That means that written communications should be served on all parties—by the recipient

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[486] We are also aware that there have, from time to time, been calls for increased independence of what is currently the ORA by moving the unit out of the Commission and into another state agency. We offer no recommendation here regarding such suggestions but note that the Commission may want to assess its position with an eye to the effects the current organization has on parties' perception of fairness.

[487] There appears to be little doubt that utilities will sometimes marshal support for their positions in CPUC cases from members of the Legislature and local government, who, it is widely assumed, are urged to contact the CPUC on the utility's behalf both on the record and off. These messengers are not difficult to identify, and Commissioners seem generally to assume that such contacts are frequently orchestrated and believe they can detect when that is the case.

A particularly difficult problem arises when the outside lobbying comes from the Governor's Office. We assume for present purposes that there is nothing wrong with the Governor seeking to influence Commission actions, although his role as the Commissioners' appointing power can be assumed to give his views particular attention. But we know of no reason why Commissioners should not be required to make such communications public when they occur.

[488] Among the non-governmental surrogates are various business and labor groups and experts. In recent years utilities have used investment bankers and representatives of other financial institutions to warn Commissioners about the effects of denying the utility the relief it is seeking. Critics assert that these financial institutions typically receive lucrative business from the utility.

[489] These concerns have become more acute since it was publicly disclosed that at least one Commissioner had ex parte contacts with a utility regarding pending proceedings at a conference in Europe sponsored by an industry-funded organization.

Commissioner if the surrogate has not already done so. The writing should be placed in the record, and other parties should be given the opportunity to respond. Oral communications on a pending adjudicatory or ratesetting proceeding should be rejected by Commissioners if they are detected in advance, and, if not, the Commissioner should provide the parties and the record a written summary, again with the right of other parties to respond. We propose statutory and regulatory changes to mandate these measures, measures that will bring CPUC practice in line with prevailing practice before other agencies that regulate ex parte communications.

3. Concerns about Commissioners' advisors, the authorized conduits

The law effectively authorizes one class of conduits to Commissioners: their advisors, the three to five staff members assigned to each of the five Commissioners' offices.[490] The statute defines "ex parte communication" as a substantive communication outside of the public proceeding or record between "a decisionmaker" and a "person of interest,"[491] and authorizes the CPUC to define by regulation the term "decisionmaker."[492] The Commission's regulation defines "decisionmaker" as "any Commissioner, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion Administrative Law Judge."[493] Thus, the Commission has excluded the Commissioners' advisors from "decisionmaker," thereby eliminating communications with advisors from the statutory definition of "ex parte communications." However, while excluding advisors from the definition of "decisionmaker," the Commission has added a separate, non-statutory restriction on communications with advisors:

> Communications with Commissioners' personal advisors are subject to all of the restrictions on, and reporting requirements applicable to, ex parte communications, except that oral communications in ratesetting proceedings are permitted without the restrictions of Rule 8.3(c)(1) and (2).[494]

The "except" clause eliminates the requirement that other parties be given three-day advance notice of the meeting and the opportunity for equal-time meetings in response to an ex parte contact.

So the manner in which the Commission's rules define the statutory terms explicitly authorizes the use of advisors as conduits to decision-makers. And that appears to be a substantial

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[490] Further complicating the topic of advisors is the difficulty of reliably defining who is an advisor. Apparently civil service positions are not formally allocated to the Commissioners' offices. The State Budget does not identify advisor positions. (Cal. Dept. of Finance, Cal. State Budget, 2015-2016, Salaries & Wages Supplement, p. GG19.) Public Utilities Code section 309.1 provides for the Governor to appoint one advisor for each Commissioner, who is exempt from civil service. Advisors are identified on each Commissioner's web page, however.

[491] Pub. Util. Code, § 1701.1, subd. (c)(4).

[492] Pub. Util. Code, § 1701.1, subd. (c)(4)(C).

[493] Rule 8.1(b).

[494] Rule 8.2.

part of their jobs. Advisors have given us estimates from 10% to 50% of their time being spent in ex parte meetings to which other parties have no right to respond.[495]

We have been given no explanation for the exemption from equal time for meetings with advisors other than the implicit assumption that it is necessary to satisfy the demand for ex parte contacts. The cost of satisfying that demand is a huge volume of ex parte communications with no adequate public disclosure of their content and no opportunity for other parties to respond. It is a practice that should not be permitted to continue.

E. Inadequacy of Legal Sanctions to Deter Violations

It is also apparent that existing law failed to deter the violations that occurred. Presently the Commission may levy on regulated utilities penalties of $500 to $50,000 per violation of law or order of the Commission.[496] That law was applied in the 2014 decision fining PG&E $1,050,000, and imposing additional sanctions, for at least 20 improper ex parte violations,[497] and that decision cites five earlier cases in which lesser fines were imposed on utilities for unlawful ex parte contacts.[498]

It is widely observed that such monetary fines offer little deterrence to a multi-billion-dollar utility that stands to make far more from a favorable outcome of a proceeding than any monetary penalty that might be imposed if an illegal ex parte communication is detected. In D.14-11-143, in addition to the penalty of over $1 million imposed on PG&E, the Commission imposed a ban on the company's representatives having any ex parte contacts for a year,[499] and we were told by several interviewees at the Commission that they believe that that was, indeed, an effective sanction.

Utilities and their officers and employees are also subject to misdemeanor prosecution for violating California law or Commission orders.[500] While criminal penalties are appropriate in certain cases, the severity of the sanction and the difficulty getting a prosecutor to bring such a case lead us to doubt that misdemeanor liability is, in practice, an effective sanction. We believe there is a need for intermediate sanctions, between fines and criminal prosecution, that practitioners before the Commission would take seriously when contemplating a violation. We recommend below building on the recent sanctions with additional measures that would be likely to improve the prospects for deterrence.

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[495] The average of what were given to us as rough estimates was something like 25% of their time, a significant part of their workday. Adding the hours of each advisor, it appears that the average Commissioner's office, under historic practices, has the equivalent of about one full-time employee devoted to taking ex parte meetings.

[496] Pub. Util. Code, § 2107.

[497] D.14-11-041.

[498] *Id.*, at pp. 11-12.

[499] *Id.*, at pp. 20-21.

[500] Pub. Util. Code, § 2110.

There is one more hole that needs to be plugged. Conspicuously missing from any statutory penalties for violations of the ex parte laws is any sanction for violations committed by Commission decision-makers. Recent history has confirmed the need to deter them from violating the law as well.

F. Past Absence of a Culture of Compliance among Commissioners and Advisors

This Report would not be complete without recognizing the relationship between the events that gave rise to the present circumstances—the manipulation and outright violation of the existing ex parte rules by some Commissioners and some utilities, badly damaging the Commission's reputation and credibility—and the culture that existed at the CPUC. Numerous interviewees alluded to an ethos at the top of the organization that was disrespectful of procedural rules and hostile to restrictions on ex parte contacts. That appears to have led some former decision-makers to treat the ex parte rules like some accountants treat the Internal Revenue Code—a set of rules to be navigated and, when necessary, evaded in the pursuit of a higher duty.

And there should be no doubt that past violations were fueled in part by a sense of a higher duty. There is no allegation of personal corruption in any of the charges; each violation of statute or rule was taken in sincere belief that it served the public interest. Some (although scarcely all) of the most controversial episodes concerned such worthwhile goals as promoting clean energy and reducing California's contribution to global warming. We trust it is now clear that even those ends do not justify the means used.

We think it likely that one of the reasons for Commissioners' past aversion to open decision-making is a desire to avoid public criticism of actions that they deemed necessary but that they believed would expose them to unjustified criticism. In our experience, many members of multi-member tribunals that govern in fields of heightened public attention and controversy wish to minimize their exposure to critical publicity. It is understandably tempting to want to announce new clean-energy initiatives without acknowledging that those initiatives may well increase utility rates. Indeed, utility regulators often feel themselves unfairly vulnerable to demagoguery any time the facts necessitate a rate increase. And these fears may well be factually justified. But those are the rules governing the job they accepted—public decision-making based on evidentiary facts, legal principles, and policy considerations vetted in a public, adversarial process.

The result may be best illustrated by the "Don't say a word" episodes described in Part II,[501] when certain Commissioners or their advisors privately approached parties and communicated to them what the parties should say or do in a pending case, preceded by the admonition to the party, "Don't say a word." The conceit was that because Public Utilities Code section 1701.1, subdivision (c) prescribes that only "reportable communications shall be reported" by the party, but then says that the notice of an ex parte communication shall contain a "description of the party's, but not the decisionmaker's, communication and its content," if the

[501] See p. 96, *ante*.

party says nothing there's nothing to report and no prohibited ex parte contact. As it happens, that analysis is certainly incorrect with respect to communications from Commissioners, and likely incorrect with respect to communications from advisors.[502] But perhaps even more importantly, where were these officials' ethical compass? Even if they were lulled by longstanding Commission practice into believing such conduct was technically legal, what so numbed their sense of fairness that, knowing there would be no notice of the communication and, thus, little likelihood of being discovered, they could give one party secret advice in a proceeding then pending before them? What made them think this was appropriate conduct for a CPUC Commissioner or a member of a Commissioner's personal staff?

The present Commission has made clear its view that the past violations were unacceptable and publicly charted a reform course. Those are important first steps in establishing a culture of compliance. But building a culture of compliance cannot be achieved solely with public pronouncements. There are concrete measures that can be taken, which we recommend

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[502] The fact that only the decision-maker spoke *does* mean that there was no "reportable communication" under section 1701.1, subdivision (c). But it *does not* mean there was no "ex parte communication," which is defined as "any oral or written communication between a decisionmaker and a person with an interest . . . concerning substantive, . . . issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record . . . ." (Pub. Util. Code, § 1701.1, subd. (c)(4). A monologue delivered by a Commissioner to a party is still a communication and, under the circumstances, an ex parte communication. And "[e]x parte communications are prohibited in ratesetting cases." (Pub. Util. Code, § 1701.3, subd. (c).) Clearly a Commissioner having a clandestine "don't say a word" meeting is having a prohibited ex parte communication.

The question is closer if the speaker is an advisor, not the Commissioner, because Section 1701.1, subdivision (c)(4) defines an ex parte communication as one "between a decisionmaker and a person with an interest," and the Commission's rules define "decisionmaker" to exclude Commissioners' advisors. (Rule 8.1(b).) But we believe that a message from a Commissioner delivered to a party through an advisor is still a communication between the Commissioner and the party. Only if the advisor was not communicating on behalf of his or her principal would the message not constitute an ex parte communication. (See also p. 141, *post*, suggesting that rule 8.1(b)'s definition of "decisionmaker" is inconsistent with the statute.)

Furthermore, the Commission's rules do not limit the reporting obligation to "reportable communications" but rather to all ex parte communications. Rule 8.4 says that "*[e]x parte communications* that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. Notice of *ex parte communications* shall be filed within three working days of the communication." (Emphasis added.) So, at a minimum, a notice disclosing the meeting but reporting nothing that was said would be in order.

We have been informed that this issue is considered to be unsettled within the Commission and that a request for clarification concerning reporting of one-way ex parte communications has been filed by ORA.

below, to rebuild a culture of compliance at the CPUC—measures that, in addition to their practical value in preventing violations, communicate to those inside and outside alike that the Commission is sincerely committed to fair hearings, open government, and record-based decisions.

The Legislature also has a contribution to make in reforming the culture at the Commission. The present statutory framework can fairly be taken as an endorsement of ex parte and outside-the-record communications, of limited disclosure and limited opportunities for rebuttal. Reform should include a rewriting of Public Utilities Code sections 1701 through 1701.4 to make it California policy that adjudicatory and ratesetting decisions should be based on a record compiled completely and exclusively in the hearings the Legislature has mandated, untainted by secret, off-the-record communications, and that CPUC rulemaking should be fully transparent to the public.

G. The Alternative: Legislative Ratesetting

We should also address what is perhaps the most fundamental policy question posed by our inquiry, frequently raised in one version or another of the following faux syllogism: "Ratesetting is legislative, the Legislature doesn't restrict ex parte communications, so neither should the CPUC."

It is true that the setting of prospective rates has been categorized for many purposes as legislative (or quasi-legislative, to acknowledge the fact that it is carried out by the executive branch).[503] Whether, in the modern era, it would be possible for the Legislature to authorize the CPUC to adopt rates in an entirely quasi-legislative process without violating the utility's due process rights is an interesting question, but we are prepared to indulge the assumption that it would.

But that is not the system we have. As is often the case, the Legislature has mandated that the legislative function of ratesetting being carried out employing adjudicatory procedures.[504]

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[503] E.g., *New Orleans Public Service, Inc. v. Council of City of New Orleans* (1989) 491 U.S. 350, 369, 371; *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 909 [160 Cal.Rptr. 124, 134, ["'There is a distinction between the power to fix rates and the power to award reparation. The former is a legislative function, the latter is judicial in its nature.'" quoting *Southern Pacific Co. v. Railroad Com.* (1924) 194 Cal. 734, 739; *Consumers Lobby* was disapproved on a different point by *Kowis v. Howard* (1992) 3 Cal.4th 888; see also *Dominey v. Department of Personnel Administration* (1988) 205 Cal.App.3d 729, 736 ["Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts," quoting *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35, fn. 2].

[504] *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 279 ["'[A]dministrators exercising quasi-legislative powers commonly resort to the [judicial] hearing procedure to uncover, at least in part, the facts necessary to arrive at a sound and fair legislative decision.... Hence the presence of certain characteristics common to the judicial process does not change the

Footnote continued

When making prospective rates, California, like the ratesetting agencies of the federal government and most states, prescribes that decisions be made in trial-type hearings, where sworn testimony is taken, witnesses are cross-examined, certain rules of evidence are applied, and detailed findings of fact and conclusions of law are issued, all of which are supposed to lead to the rate decision that is adopted. Unlike the CPUC, the Legislature's enactments need not be supported by any rulemaking record.[505] None of these are procedures by which the Legislature makes laws. They are the instruments of administrative agencies applying the techniques of litigation to reach evidence-based decisions, not political enactments.

The Commission is free to propose that the Legislature abandon this administrative-adjudication model in favor of legislative procedures, among them unrestricted ex parte communications. But so long as utility rates are to be set in California using the adjudication model, there is no place for secret communications and restricted rebuttal rights.

At the moment the CPUC has, in at least some cases, the worst of both worlds: a long, expensive process producing enormous evidentiary records and extensive legal argumentations, on which a detailed proposed decision is based, followed by decisions that may be determined by unverified, untested oral representations to decision-makers not contained in the record.

H. The Bottom Line: The Commission Should Sharply Reduce Ex Parte Communications and End Confidential Exchanges with Parties to Hearings

To summarize, we have concluded that substantive ex parte communications in adjudicatory and ratesetting proceedings are not necessary to meet the legitimate needs of the Commission or the parties that appear before it. Historic practices have unfairly prejudiced parties, compromised the legal process, led to decisions influenced by bases that cannot be found in the record, and resulted in Commission meetings where decisions are not made but merely announced. The legitimate benefits to Commission decision-making of such meetings can be realized through all-party meetings, written communications, and substantive discussions in Commission meetings.

In particular, ex parte meetings should no longer be used for parties to present factual claims and arguments in secret. Anything important enough to impose on a Commissioner's or

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basically quasi-legislative nature of ... proceedings' of that type," quoting *City of Santa Cruz v. Local Agency Formation Com.* (1978) 76 Cal.App.3d 381, 388].

[505] Compare Pub. Util. Code, § 1757.1, subds. (a)(1), (a)(2), (a)(4), imposing abuse-of-discretion review of CPUC quasi-legislative enactments, which includes inquiry into whether the enactment is supported by the record. (See, e.g., *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 478 ["Abuse of discretion is established if the respondent [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Internal quotation marks omitted).]

advisor's time is sufficiently important that all other parties should know entirely and exactly what was said and be given an opportunity to rebut it.

With these policies in mind, we make the following recommendations. [506]

III. RECOMMENDATIONS

A. Basic Policy on Ex Parte Communications: Rules to be Applied to Each Category of Proceeding

We first address the fundamental question of whether and to what extent substantive communications between parties and decision-makers should be permitted.

1. In adjudicatory and ratesetting proceedings

Recommendation No. 1: Substantive ex parte communications should not be permitted in CPUC adjudications and ratesetting proceedings.

The scales tip so clearly against permitting substantive ex parte communications in adjudicatory and ratesetting proceedings that we recommend that the Commission cease the practice entirely, sponsoring legislation to amend Public Utilities Code sections 1701.1 through 1701.3 and revising its rules and practices to promptly halt any further such communications. The prejudice to parties, the harm to CPUC decision-making on the record, and the diversion of policymaking away from public meetings has impaired the CPUC's performance and led to events that have compromised the Commission's processes and damaged the Commission's reputation.

And we see no legitimate benefits from parties' ex parte communications that cannot be realized by other, public means. We recommend below measures to make those means readily available to the Commission and the parties.[507]

We carefully considered preserving for the Commissioners and parties some form of ex parte communication that would still permit such meetings to take place without the deleterious effects we have identified. In particular, we discussed with many interviewees an alternative arrangement in which "ex parte meetings" with Commissioners and advisors could take place so long as there was an open conference-call phone line with a call-in number that other parties could use to listen to (but not participate in) the conversation, and so long as the call was recorded and a recording was promptly posted to the CPUC website. The notion was that with the opportunity for secret communications eliminated, the parties could continue to have the meetings that some of them prefer. We recognized, however, that while there are commercial vendors that can provide such telephone services, there would be practical difficulties implementing such a protocol, difficulties such as equipping suitable rooms at the cramped

[506] An Index of Recommendations begins at page 176.

[507] See Section III.H, *post*.

CPUC headquarters, ensuring adequate audio quality, and straining already stretched CPUC information-technology resources. And most of those whom we interviewed thought that this change, eliminating the opportunity for secrecy in the substance of the communication, would effectively end all ex parte contacts, which we took as suggesting that there would be so few such meetings it would not be worth the cost and effort of arranging for the conference-call capability. We ultimately concluded that the opportunity for such restricted communications was of little value to the parties, and the value of cleanly breaking from past over reliance on ex parte communications was of substantial benefit to the Commission.

We should address a familiar argument against effective regulation of ex parte communications, the "they'll do it anyway" argument. It is, of course, necessary and appropriate to contemplate possible unintended consequences of any change in the rules. But we do not find this prediction of future behavior credible. Our recommendations are based on rules that have long been enforced in jurisdictions around the country. We have seen no reports of widespread violations under those rules—certainly nothing like the reported violations of the CPUC rules revealed in the past year. This is largely a question of law enforcement, of creating a high enough probability that violations will be detected and severe enough sanctions when they are that the relevant actors will recognize it to be in their self-interest to comply with the law. We accompany among our recommendations to enhance deterrence with other recommendations to create a culture of compliance at the Commission that will make clear the Commission's, and the Commissioners', expectation of full compliance. We reject the unsupported assumption that the Commission is powerless to create and maintain a fair, open, accessible, and accountable regulatory process.

Several interviewees expressed concern about the statutory treatment of proceedings in which no hearing is held. The ex parte provisions of Public Utilities Code section 1701.3, subdivision (c) only apply, by virtue of subdivision (a), to a ratesetting case that "requires a hearing." The concern is that significant cases are being decided without hearing, using alternative procedures such as workshops, with unregulated ex parte communications. These concerns are increased by our recommendation here to prohibit substantive ex parte communications in ratesetting cases, possibly creating an incentive to eliminate hearings in order to open the door to unrestricted ex parte communications.

Our concern here is not to prevent the use of less formal procedures to dispose of cases. Rather, we seek simply to avoid the deleterious effects of ex parte communications where there are genuine disputes to be resolved. Accordingly, we recommend that the trigger for the prohibition on ex parte communications in ratesetting should not be whether a hearing is ordered but whether there is a protest or relevant facts are disputed. That would be consistent with best practices in other jurisdictions.

Indeed, making all of these changes in adjudicatory procedures will bring the CPUC into compliance with the best practices of other jurisdictions. As we recount in Part I, the clear weight of practices across administrative law is to prohibit ex parte communications in adjudicatory proceedings and in rulemaking proceedings employing adjudicatory procedures. Our recommendation is consistent with California's Adjudicatory Administrative Procedure Act, with the Federal Administrative Procedure Act, and with most of the largest states.

This recommendation represents a substantial change from existing practice with respect to *oral* ex parte contacts. However, *written* ex parte contacts are largely unaffected by this recommendation. Current law permits written communications to decision-makers so long as the other parties receive copies the same day.[508] In fact, written communications to decision-makers with same-day copies to all parties are not properly defined as "ex parte" at all.[509]

2. In quasi-legislative proceedings

Recommendation No. 2: Ex parte communications in quasi-legislative proceedings should continue to be permitted, but only with full, detailed disclosure by the decision-maker of both the fact and the substance of the communication.

In administrative law, there are two models of rulemaking, sometimes referred to as "formal" and "informal."[510] "Formal" rulemaking involves prospective rules of general applicability (whether denominated "rules," "general orders," "regulations," or otherwise) developed in proceedings employing adjudicatory procedures, including exhibits and witness

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[508] Pub. Util. Code, § 1701.3, subd. (c); rule 8.3(c)(3).

[509] Throughout American jurisprudence, "ex parte" merely refers to something "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest." (EX PARTE, Black's Law Dictionary (10th ed. 2014).) However, rule 8.3(c)(3) seems to define written communications as permissible "written ex parte communications," despite the fact that they are served on all parties and would therefore not be considered "ex parte" in a court. That rule may be the origin of the oxymoronic term used at the Commission, "all-party ex parte meeting." Logically, if all parties are present, the meeting is not ex parte, and if a written communication has been timely served on all parties, it too is not ex parte.

[510] We follow here the nomenclature used in practice under the federal Administrative Procedure Act (5 U.S.C. §§ 551-559). (See p. 21, footnote 89, ante.) The requirements for what is customarily called "formal" rulemaking are applied when a statute requires that the rule "be made on the record after opportunity for an agency hearing." (5 U.S.C. § 553, subd. (c).) In such cases, the act requires the hearing to include such attributes of an adjudicatory proceeding as an officer (commonly an ALJ) presiding, designation of parties with rights to present their cases, testimony under oath, cross-examination, subpoenas, allocation of a burden of proof, limited application of the rules of evidence typical for administrative adjudications, and an "exclusive record for decision" consisting of "testimony and exhibits, together with all papers . . . filed in the proceeding" (5 U.S.C. § 556), upon which an "initial decision" is issued and is subject to review by the head or heads of the agency (5 U.S.C. § 557).

In contrast, in "informal" rulemaking the agency publishes a "notice of proposed rule making" in the Federal Register (or actual notice to persons subject to the proposed rule) containing either the proposed rule or a description of its intended subject, an opportunity for interested persons to submit written arguments and support that may or may not be augmented by "oral presentation," and adoption of the rule with a "concise general statement" of its "basis and purpose." (5 U.S.C. § 553.)

testimony, legal briefs, and oral proceedings, all going into a record supporting the resulting rule. "Informal" rulemaking is generally referred to as "notice-and-comment" rulemaking, in which the agency circulates a rule proposed for adoption, the public is given notice of its attention and an opportunity to file written comments, and the agency then adopts a final rule, generally with a written statement of reasons.

The best practice is for there to be a general prohibition on ex parte communications in formal rulemaking and a permit-but-disclose policy in informal rulemaking.

The CPUC employs both formal and rulemaking in its quasi-legislative actions. In those proceedings employing formal-rulemaking procedures, it does not apply the ban on ex parte communications that generally accompanies formal rulemaking. And even in those proceedings employing more informal procedures, the CPUC does not generally apply the permit-but-disclose rule that we have found constitutes best practices.

Under the California Rulemaking APA—which does not apply to the CPUC[511]—state agencies are only authorized to employ informal, notice-and-comment rulemaking.[512] The act has, over the years, been amended to add requirements for various impact studies and increasingly detailed supporting statements,[513] mandating an oral hearing, and adding a layer of review to all regulations by the Office of Administrative Law,[514] the prescribed procedures remain non-adjudicatory. And the Rulemaking APA contains no restrictions on ex parte meetings—neither limits on them nor disclosure requirements for meetings that take place.

The current Commission practices clearly do not conform to best practices for quasi-legislative proceedings. Where the Commission employs adjudicatory procedures for adoption of rules, it permits unrestricted ex parte communications. And its "permit without any restrictions"[515] policy does not conform to best practices even when the Commission follows notice-and-comment procedures for rulemaking. As we have explained, best-practices ex parte rules for such proceedings require decision-maker disclosure of the fact and substance of each ex parte communication.

Accordingly, we recommend that the Commission sponsor legislation to amend Public Utilities Code section 1701.4 to eliminate the provision permitting ex parte communications "without any restrictions," and to impose, instead, the requirement that ex parte communications be permitted but be followed by the decision-maker preparing, serving on the proceeding's

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[511] Pub. Util. Code, § 1701, subd. (b).

[512] There probably is nothing in the rulemaking APA that would prohibit an agency from holding a trial-type hearing in a notice-and-comment proceeding so long as it also satisfied the express requirements of the code. We know, however, of no instance in which a California agency has done so.

[513] E.g., Gov. Code, § 11346.2, subd. (b).

[514] Gov. Code, §§ 11349-11349.6.

[515] Pub. Util. Code, § 1701.4, subd. (b).

service list, and making part of the record a full disclosure of the fact and substance of the communication, including a copy of any documents provided.[516]

The recommendations here for those occasions when the CPUC employs notice-and-comment procedures in rulemaking are largely consistent with those of Sferra-Bonistalli in her report to the ACUS. However, Sferra-Bonistalli recommends that agencies place the burden of making the disclosures on the commenting party rather than the decision-maker.[517] Based on the CPUC's experience with such disclosures, and given the Commission's past practices and recent injuries to public perception of its fairness, we do not think reliance on the outside-party communicator for disclosure will dispel the appearance of improper influence and unfairness in CPUC rulemaking, even assuming parties can be induced to make full and fair disclosures. Thus, we have reached the opposite conclusion about disclosure: that each decision-maker accepting an ex parte communication should be responsible for making the disclosure and for it being a complete account.

We are aware that we are, in effect, saying that California's Rulemaking APA does not prescribe best practices with respect to ex parte communications. But neither the Rulemaking APA nor its federal analog are inconsistent with this recommendation. Both statutes leave to the agency the choice of imposing greater restrictions or disclosure requirements on ex parte communications. As a CPUC-specific recommendation, we are persuaded that the goals of fairness, accessibility, public accountability, and record-based decision-making militate strongly in favor of requiring ex parte communications in this agency's rulemaking to be fully disclosed and to be made part of the rulemaking record.

It may be argued that our recommendations create an incentive for the Commission to abandon adjudicatory hearings in ratesetting and to move decisions affecting rates into notice-and-comment rulemaking, where the Commission could avoid the ban we recommend on substantive ex parte communications. There will, of course, be less incentive to do so by virtue of our recommended requirement of Commissioner (rather than party) disclosure of the communication. If this requirement is not adopted, our recommendation would be to prohibit ex parte communications altogether in rulemaking proceedings. But even with it, we caution that notice-and-comment procedures are not well suited for all quasi-legislative actions. In a prospective rulemaking where the number of likely participating parties is reasonably small, where the provisions of an anticipated rule will depend not just on contrasting policy arguments but also on empirical facts, where conflicting expert opinions will be proffered on pertinent technical issues, and where the better arguments and the more persuasive opinions can emerge from the adversarial crucible, the Commission will be well advised to apply its adjudicatory rulemaking format.[518]

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[516] For further recommendations regarding decision-makers' disclosure of ex parte communications generally, including in rulemaking, see pp. 147-148, *post*.

[517] *Id.*, pp. 5-6.

[518] We note that Government Code section 11340.9, subdivision (g) exempts from the Rulemaking APA any "regulation that establishes or fixes rates, prices, or tariffs," recognizing

Footnote continued

Not Recommended: Making the CPUC subject to the Rulemaking APA.

The CPUC is one of only two state agencies exempted by the Legislature from the Rulemaking APA.[519] In conducting our review, we considered whether to recommend that the CPUC sponsor legislation repealing the exemption and imposing the requirements of the Rulemaking APA on the Commission. Upon consideration we recommend against placing the CPUC under the Rulemaking APA.

The Rulemaking APA once prescribed a simple, efficient method to adopt regulations, giving all interested members of the public full notice of what the agency was considering, giving the public ample opportunity to file comments in support or opposition, to which the agency responds, and resulting in a regulation and an explanation of its purpose and rationale.

As noted in Part I, in recent years the Legislature has passed an array of additional requirements of breathtaking magnitude and complexity. As Professor Asimow has noted, "[t]he provisions for rulemaking in California undoubtedly exceed in complexity the law of any other state or the federal government."[520] In our experience, these additional requirements have warped the process of governance, leading agencies to avoid rulemaking and to seek other vehicles, often less suitable to the task, to achieve their regulatory objectives.

B. Scope of Agency Personnel Covered and Separation of Functions

Recommendation No. 3: The definition of "decisionmaker" in rule 8.1(b) should be amended to treat Commissioners' advisors as decision-makers.

Rule 8.1(b)'s definition of "decisionmaker,"[521] to whom restrictions on ex parte communications apply, excludes advisors to the Commissioners. The effect is that the advisors are conduits for ex parte communications, taking meetings about which other parties do not receive advance notice and do not have a right to a meeting of their own. In this respect, the CPUC is an outlier on the spectrum of administrative agency practices.

The rule's phrasing may reflect an overly literal definition. It is true that advisors do not "make decisions" on their own. The Commissioners make the decisions. But in precisely that sense, the advisors are the eyes and ears of the Commissioner, part of the confidential inner

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that the setting of rates, notwithstanding certain quasi-legislative attributes, may not be well-suited for notice-and-comment rulemaking.

[519] Gov. Code, § 11351, subd. (a) [exempting the CPUC and the Workers' Compensation Appeals Board]; see also Gov. Code, § 11340.9, subd. (g) [exempting ratesetting].

[520] Asimow Testimony, p. 2.

[521] "'Decisionmaker' means any Commissioner, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion Administrative Law Judge." The ALJs are separately prohibited and as a practice abstain from substantive ex parte communications, so this definition effectively adds to those restricted from ex parte communications just the five Commissioners.

circle that collaborates with the corporeal Commissioner to make decisions. Just as it would be fatuous to claim that a phone call to a Commissioner was not a communication with the Commissioner but rather with the telephone, it is untenable to deny that a party's meeting with an advisor intended to impart information that will influence the Commissioner isn't a "communication between [the Commissioner] and a person with an interest in a matter."[522]

In fact, the definition of "decisionmaker" adopted in rule 8.1(b) appears to be inconsistent with the statute. Public Utilities Code section 1701.1, subdivision (c)(4)(C)(iii) specifies that disclosures of ex parte communications filed by parties shall describe "the party's, but not the decisionmaker's communication." Thus, the Legislature has created two categories of potential CPUC participants in ex parte meetings: "decisionmakers," with whom an ex parte meeting triggers the right in other parties to prior notice and equal-time meetings, but whose statements are excluded from disclosure; and people who are not "decisionmakers," with whom meetings do not trigger rights to prior notice and equal-time meetings, but whose statements are not excluded from disclosure. Acting pursuant to that same code section, the Commission has adopted in rule 8.1(b) a definition of "decisionmaker" that excludes advisors. But then in rule 8.4(c) the Commission has inserted (tellingly in parentheses) an exclusion from the disclosure requirement for what advisors say in ex parte meetings. Rule 8.4 says the "notice shall include," among other items, a "description of the interested person's, but not the decisionmaker's (or Commissioner's personal advisor's), communication and its content." With that insertion, the Commission has added a new category of participant: an advisor, who can take ex parte meetings without giving other parties notice or a meeting of their own, yet whose utterances during the meeting are protected from disclosure. The parenthetical exemption in the rule appears to be contrary to the statute.

Distinguishing what other jurisdictions refer to as "decisional staff" from other agency employees is critical to separation of functions, a doctrine with constitutional dimension.[523] Commissioners' advisors are clearly such decisional staff and should be treated as such. Just as a Commissioner's right to have ex parte communications comes with certain restrictions, so should his or her advisor's. The conflict between rule 8.4 and Public Utilities Code section 1701.1 should be resolved.

Given possible uncertainty regarding the definition of "advisor,"[524] the regulation should not depend solely on organization-chart or civil-service terms. It should also address staff who, at least for the proceeding at issue, function as advisors, such as a "member of [the Commissioner's] personal staff, an administrative law judge, or any other employee of the Commission, or contractor, who is or may reasonably be expected to be involved in the decisional process of a proceeding."[525]

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[522] Pub. Util. Code, § 1701.1, subd. (c)(4).

[523] See Cal. Administrative Law, ¶ 5:211.

[524] See p. 135, fn. 490, *ante*.

[525] 18 C.F.R. § 385.2201(c)(3) [FERC definition of "decisional employee"]. Similar language appears in the Federal APA. (See 5 U.S.C. § 557(d) ["banning ex parte

Footnote continued

Recommendation No. 4: The Commission should establish clearer institutional separation of functions to avoid the appearance of bias in advisory staff.

The CPUC takes pains to ensure that its attorneys do not exercise both advocacy and advisory roles in the same case, and that is normally all that is called for under separation of functions.[526] However, the Supreme Court has cautioned that this is not a per se rule but rather depends on the circumstances, holding that "the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias."[527]

The CPUC's caseload is relatively unusual in that a large proportion of its pending cases at any given time involve a small number of utilities. This can lead to a utility encountering someone in a decisional capacity in one case who simultaneously, or recently, occupied an advocacy role in another of its cases. We think that, in the interest of both the appearance and reality of fairness, anyone serving as a decision-maker, including an advisor to a Commissioner, should be excluded from performing an advisory function in a case involving the same utility that he or she faced in an advocacy role concurrently or in the recent past.[528]

Recommended for Consideration: The Commission should consider adopting policies regarding the circumstances under which advisory staff may communicate directly with decision-makers regarding a matter pending before the Commission.

The Commission employs hundreds of advisory staff, many of whom are expert in the various matters that come before the Commission. Decision-makers should not be discouraged from seeking the advice and input of the agency's advisory staff, so long as the staff member consulted is not serving in a prosecutorial or advocacy role in the matter on which the staff's expertise is sought. In the course of our interviews, it became clear that at least some ex parte contacts are made simply because a utility or other outside party is perceived as a more efficient route to obtain an answer to a discrete question. In many cases, staff asserted that it is available and able to answer or obtain an answer to these types of questions. Moreover, staff should be utilized to the fullest possible extent as a resource for decision-makers in grappling with the

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communications with "any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding"].)

[526] See generally Cal. Administrative Law, ¶ 5:206; *cf*. Gov. Code, § 11425.10, subd. (a)(4) ["[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions"].

[527] *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741.

[528] We limit this recommendation to utility parties, not intervenors. Even when a group or company has intervened in a utility's case, the case is about the utility and is adjudicating its rights and obligations. We do not believe the advocate's role vis-à-vis an intervenor raises the same concerns.

complex issues that are frequently before the Commission.

We do not, however, believe that communications between staff and decision-makers are appropriate in all circumstances and on all possible topics. In order to ensure fairness to the parties and preserve the integrity of the decisional record, we recommend that the Commission implement policies setting forth the circumstances under which it is appropriate for staff to directly communicate with decision-makers outside of the presence of the parties to a proceeding. The state Model APA contains a robust set of rules on this issue. First, no ex parte communications may occur with staff who have served as an investigator, prosecutor, or advocate at any stage of a proceeding. At a minimum, the Commission should apply this functional prohibition to the list of staff that may engage in ex parte communications with decision-makers in a given proceeding.

The Model APA additionally limits the subjects and circumstances under which staff are permitted to communicate ex parte with decision-makers. The Model APA prohibits ex parte staff communications that augment, diminish, or modify the evidence in the record. Staff ex parte communications must either explain technical or scientific basis of record evidence, or provide an explanation of agency policies, precedent, or procedures, and may not address the quality or sufficiency of the evidence in the agency record, the weight that should be given to evidence, or the credibility of agency witnesses.

The Commission will know how best to make use of its staff resources, so we do not make a specific recommendation on this issue. The Commission should consider how to best ensure that decision-makers can receive the technical advice and analysis they require from staff, while maintaining fairness to the parties and ensuring that the agency's decisions are record-based.

Not Recommended: Transferring the ALJ Function to an Outside Agency.

There have been suggestions that the ALJ function be transferred out of the CPUC and placed in an independent agency such as the Office of Administrative Hearings (OAH) in the Department of General Services.

We think the question of transferring the ALJs to an independent agency is a close one. Serious concerns about the CPUC's management and staffing of ALJs have been raised. Utilities are understandably concerned if they find themselves before an ALJ who had until recently been an advocate for ORA as their adversary, although they have unlimited rights to peremptorily challenge any ALJ who has served in an advocacy capacity in the previous 12 months.[529] Others claim that some Commissioners have unduly interfered with ALJs in the preparation of proposed decisions. And there have been questions raised about the CPUC's ability to recruit and retain ALJs who are (or can be made to be) familiar with utility regulation, can conduct long, complex hearings on highly technical subjects, and can produce well-crafted decisions in a reasonable time.

[529] Pub. Util. Code, §§ 1701.2, subd. (a) [adjudicatory cases], 1701.3, subd. (b) [ratesetting cases].

While an independent ALJ corps has obvious advantages, it is not clear that there presently is a superior location for this function. OAH has excellent judges, but that agency's caseload is very different from that of CPUC ALJs'. OAH has a large number of short cases (one day or less). The agency has recently been receiving longer, more complex cases and handling them ably, but they can present difficulties in folding them into the OAH's normal stream of cases. OAH has developed panels of judges able to specialize in technical issues such as medical cases, but developing competence in utility rate regulation would be a challenge.[530]

This report makes a number of recommendations to strengthen separation of functions and to protect the role of the ALJ, and we understand the question of recruitment and retention of ALJs has the Commission's attention. At this point those measures should be given time to work, recognizing that if well-founded concerns remain the issue should be revisited.

C. Disclosure Timing and Right to Reply

Recommendation No. 5: The prohibition on ratesetting ex parte communications should include communications made in anticipation of a filing, but, with that exception, should otherwise apply only to communications made after a proceeding commences.

Amid the public controversy about ex parte communications, one strain of criticism has involved claims that representatives of the Commission consulted with utilities on investigations and possible charges and penalties before any charges were filed. This point was raised in only one of our interviews, but it touches on a definitional issue for ex parte communications, essentially raising the question whether pre-filing communications should be regulated as ex parte communications.

A general requirement extending ex parte-communication regulation to pre-filing communications would be very unusual in the law. A moment's reflection reveals why. Many agencies have inspectors, examiners, investigators and the like, who investigate possible violations of law by regulated entities. The process of going from a discovered violation to the filing of charges universally and necessarily involves communication between the agency and the one being investigated. A health inspector, upon finding an unsanitary condition at a restaurant, has discretion whether to write up a citation and, if so, what violations to cite. In the course of doing so, the inspector will ask questions to assess the nature and scope of the violations and the possibility of mitigating circumstances. The inspector, and then often a supervisor, will weigh whether to charge the business and what charges should be filed, reflecting on the severity of the violations, aggravating and mitigating circumstances, and competing demands on enforcement and prosecution resources. Throughout this process, the

[530] Interestingly, while the California Department of Insurance frequently uses OAH for enforcement cases, when the voters enacted Proposition 103 (Ins. Code, §§ 1861.01-1861.15) and gave the Insurance Commissioner the authority to approve insurers' rates in formal APA adjudications, they provided for the Insurance Commissioner either to use OAH or to appoint ALJs to hear those rate cases (Ins. Code, § 1861.08, subd. (a). The Department of Insurance has a small staff of ALJs who typically hear those cases, which more closely resemble CPUC ratesetting proceedings than OAH hearings.

inspector may communicate with the business to get information that will inform the agency's decision. And, of course, throughout this process, there is no proceeding, there are no "parties," and there is no "ex parte" issue.

To be sure, the public has an interest in how the laws are enforced, particularly laws on which the safety of our communities depends. The same is true of how prosecutors enforce the criminal law. But these are not questions of "ex parte communications," and the means by which the public holds enforcement officials accountable cannot, in practice, depend on restricting investigators' and prosecutors' communications with those whom they are investigating.

The longstanding and logical rule remains that the regulation of ex parte communications begins when a proceeding commences, and we do not recommend abandoning that clear line.

There is, however, reason for one exception to the rule—not in enforcement actions but in ratesetting. We are informed that it is customary for utilities, prior to filing an important application, to meet with Commissioners and advisory staff to "brief" them on the impending filing. These are not "ex parte communications" because there is not yet any "public proceeding."[531] These may be considered "courtesy visits," such that past practice may have created the expectation of such meetings. But there is no justification for preconditioning the tribunal on issues that are about to become the subject of a contested hearing, and no reason why whatever representations the utility makes should not be made part of the record that will be compiled in that proceeding.[532] Accordingly, we recommend that the restrictions on ex parte communications be extended to cover communications initiated by the utility in anticipation of a filing that is expected to initiate a proceeding.

[531] See Pub. Util. Code, § 1701.1, subd. (c)(4).

[532] Such restrictions are applied in Illinois (220 Ill. Comp. Stat. 5/9-201, subd. (d) [prohibiting utilities from discussing planning general cases ex parte with decisional employees of agency], and Florida (Fla. Stat. Ann., § 350.042 [prohibiting ex parte communications regarding matters reasonably expected to be filed within 180 days]), and conforms to the advice given in California to decision-makers at the State Water Resources Control Board and California Regional Water Quality Control Boards. (Memorandum from Michael A.M. Laufer to Board Member of the State Water Resources Control Board and California Regional Water Quality Control Board (April 25, 2013), pp. 5-6, available at http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf (last visited June 9, 2015) [explaining need to avoid ex parte communications in "impending" adjudicatory matters, which are those matters known to the decision-maker to be filed before the board imminently].)

D. Disclosure Content Requirements

Recommendation No. 6: In any reporting of ex parte contacts, what was said by the Commissioner, his or her advisor, or other decision-maker should be fully reported.

In order to ensure full disclosure to all parties, fairness of the proceedings, and open government, the disclosures of ex parte communications must reveal not only what the party said to the Commissioner or advisor but also what he or she said to the party.

It is difficult to imagine a more prejudicial practice than a tribunal telling one party what it thinks in a closed-door meeting to which the other parties are not privy. The parties to a CPUC proceeding to whom the Commissioner's questions and opinions are not revealed do not know what arguments proved of greatest interest to the Commissioner, what concerns the Commissioner identified, with what facts in the record the Commissioner was and was not familiar, and which way the Commissioner was leaning. The most flagrant examples of the unfairness of undisclosed statements by Commissioners or advisors may be the "Don't say a word" examples cited above, where the party was told, by or on behalf of a Commissioner, what position or action to take in a pending case and the other parties were unaware of the coaching.

This recommendation requires an amendment to Public Utilities Code section 1701.1, subdivision (c)(4)(C)(iii), which says the post-meeting notice of ex parte communication shall report a "description of the party's, but not the decisionmaker's, communication and its content." We understand this provision was inserted to prevent Commissioners from vote-signaling to their colleagues in contravention to the Bagley-Keene Act and its prohibition of "collective action" or "collective commitment"[533] outside a noticed public meeting. In particular, Government Code section 11122.5 prohibits serial meetings, typically through staff, to reach agreement outside of a duly noticed public meeting:

> A majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body.

Section 11122.5, and the parallel amendment to the Ralph M. Brown Act,[534] which requires open meetings of local government agencies, were enacted to overrule the holding of *Wolfe v. City of Fremont* that "serial individual meetings that do not result in a 'collective concurrence' do not violate the Brown Act."[535] The Legislature first enacted Government Code section 54952.2,

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[533] *Id.*, § 11122.5, subd. (b)(1).

[534] Gov. Code, §§ 54940-54963.

[535] *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, 545, fn. 6. *Wolfe* dealt with a city manager who met individually with each member of the city council to discuss and build concurrence for a matter to be decided at a subsequent public council meeting. The court held that such private serial meetings with each member did not violate the Brown Act.

reversing *Wolfe*,[536] and then, the following year, enacted Government Code section 11122.5 to "make the Bagley-Keene Act's serial meeting prohibition identical to the Ralph M. Brown Open Meeting Law . . . the counterpart to the Bagley-Keene Act that is applicable to local government bodies."[537]

We do not believe the policies of the Bagley-Keene Act are well served by this provision of Public Utilities Code sections 1701.1. There is no small irony in an open-government statute mandating secrecy in what a member of a commission says to a party to a proceeding before that commission. In our view, the Bagley-Keene Act would not be offended by a Commissioner giving a public speech in which he or she refers to a pending ratesetting case, even if the speech is publicly available and reported in the press.[538] As a mechanism to enforce the Bagley-Keene Act, the disclosure restrictions of section 1701.1 are singularly inapt. We think it clear that the injury to open government from Commissioners revealing in secret to a private party to a pending matter their thoughts about that matter is palpably greater than the possibility of Commissioners using notices of ex parte conversations as a vote-signaling and agreement-building instrument.

So long as the post-ex parte-meeting disclosures lack the information obtained by the attending party, that omission will remain an insurmountable impediment to full and fair disclosure of the substance of ex parte meetings and an impenetrable barrier to effective rebuttal. And for those purposes, knowing what the decision-maker said to the attending party is of great importance.

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[536] The Legislature enacted Government Code section 54942.2, expressly for the purpose of reversing the ruling in *Wolfe*. See Stats. 2008, ch. 63, § 1 ["The Legislature hereby declares that it disapproves the court's holding in *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, 545, fn. 6, to the extent that it construes the prohibition against serial meetings by a legislative body of a local agency, . . . to require that a series of individual meetings by members of a body actually result in a collective concurrence to violate the prohibition rather than also including the process of developing a collective concurrence as a violation of the prohibition."; see also Sen. Com. on Governmental Organization, Rep. on Sen. Bill No. 1732 (2007-2008 Reg. Sess.) as Amended April 24, 2008 ["The impetus for this bill is Footnote 6 of the appellate court's decision in *Wolfe*"].

[537] Sen. Comm. on Governmental Organization, Floor Analysis on Concurrence in Sen. Amendments to Assem. Bill No. 1494 (2009-2010 Reg. Sess.) as Amended June 4, 2009.

[538] See Gov. Code, § 11122.5, subd. (c)(3). We are advised that the current Commission practice is for Commissioners to avoid referring to pending cases in any public speeches.

Whether other provisions of law would be offended is a different matter. A decision-maker may be disqualified from voting on a matter that he or she has prejudged, which may be inferred from public statements. (See, e.g., *Cinderella Career & Finishing Schools, Inc. v. Federal Trade Comm'n* (D.C. Cir. 1970) 425 F.2d 583, 589-592; *Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 484; see generally Cal. Administrative Law, ¶ 5:370.) But the violation would be the views the decision-maker harbors, not their public disclosure.

Recommendation No. 7: When ex parte meetings are permitted, responsibility for reporting the substance of the meeting should rest with the decision-maker, who should be required to fully report what was said.

While we recommend ending substantive ex parte communications in ratesetting cases (and retaining the existing ban in adjudicatory cases), we are recommending continuing to permit ex parte communications in quasi-legislative proceedings—but we tie that recommendation to the imposition of full-disclosure requirements with responsibility for the disclosure residing with the decision-maker[539] being contacted.

No interviewees disputed the fact that the statutory disclosures by parties of what was said in oral ex parte communications are uninformative. About the most favorable comment we received regarding the quality of notices was from one interviewee who said the description didn't matter because "I already know what they're saying." Other interviewees recognized that how an adversary presents his or her arguments, what claims he or she made in support of that position, what evidence (real or imagined) was cited, and what aspects of a case that may span hundreds of hours and thousands of pages were focused on are all important to know in order to respond.

The fairness of any ex parte communication surely depends on the absent parties knowing what was said so they have an opportunity to rebut false statements, interpose pertinent counter-evidence, and meet the arguments made. When the Legislature enacted Public Utilities Code sections 1071.1 through 1701.4, it presumably expected that the disclosures would be fully informative. The reality is now known: Disclosures filed by parties are neither complete nor edifying.

We have concluded that best practice with respect to who must make the disclosure is to place that obligation on the decision-maker, not the party.[540] Particularly given the CPUC's experience with disclosure of ex parte communications, there is no basis for assuming parties before this agency can be depended on to make full and faithful disclosures. The uninformative disclosures now prevalent among CPUC practitioners could certainly be improved with prescriptive dictates about what and how much must be included in a disclosure, but we cannot assume advocates will overcome the temptation to omit that which would be most helpful to their adversaries who may be disposed to challenge what the decision-maker was told.

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[539] Elsewhere we recommend that the rules be amended to include Commissioners' advisors as decision-makers. (See p. 1145, *ante*.) For purposes of our discussion of this recommendation, we are assuming advisors are included as decision-makers.

[540] Of the jurisdictions we reviewed in Part I, the clear majority of those that provide for disclosure (either permit-and-disclose jurisdictions or states that prohibit ex parte communications but impose a disclosure obligation if one occurs) require disclosure by the decision-maker. The one noteworthy exception is the FCC, which requires the communicating party to file the disclosure. Others, including FERC, the California Coastal Commission, and those California agencies employing the Adjudicatory APA, place the obligation on the decision-maker—ALJ, commissioner, or board member.

Accordingly, the statutes and rules should be amended to make it the duty of the CPUC official receiving the communication to write the report on what was said[541] and to require prompt service of that document on all parties and its inclusion in the record. The rule should prescribe in reasonable detail that the disclosure must include not merely the fact of the meeting or the topics of discussion but what was actually said, including what was asked of the decision-maker and the principal points asserted in support of each request.

Because we are recommending other measures that are expected to sharply reduce the number of ex parte communications, we do not think the burden on Commissioners of reporting whatever residual meetings take place would be that great. However, we do have a suggestion that could substantially reduce whatever burden remains. The rule could authorize the decision-maker to direct the party with whom he or she is meeting to bring to the meeting, or to promptly supply to the decision-maker thereafter, a proposed draft of the disclosure that the decision-maker must file. However, the disclosure to be filed—whether drafted in the first instance by the decision-maker or drafted by the party and filed, with our without modifications, by the decision-maker—should be personally signed by the decision-maker affirming that the disclosure fully and fairly reports the sum and substance of the communication. The personal signature requirement is important to make clear to the decision-maker that he or she is vouching for the adequacy of the disclosure.

E. Inclusion of Ex Parte Communications in the Record of the Proceeding

Recommendation No. 8: Written communications with Commissioners, with their advisors, and with the full Commission should be placed in the proceeding record.

The administrative record of a proceeding should contain a full account of what took place before the agency, including everything that was before decision-makers, from initiation of the proceeding to the final administrative action (adopting a decision or, when applicable, denying rehearing). The record properly contains not just what was admitted in evidence (testimony and exhibits) and excluded evidence but also pleadings, motions, and briefs, as well as the transcript of all reported proceedings. Public Utilities Code section 1706 prescribes that on review a complete record of the proceeding shall be prepared:

> A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter . . . . In case of an action to review any order or decision of the commission, a transcript of that testimony, together with all exhibits or copies

[541] Again, we are addressing here oral communications. We assume any written communication will be served on all parties, which is the requirement today for written ex parte communications that must be disclosed, and will be made part of the record, which we propose immediately below.

> thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, . . .[542]

Public Utilities Code section 1701.1, subdivision (c)(4), in its definition of "ex parte communication," can be read to exclude ex parte communications from the record of a proceeding, and that appears to be the basis of the Commission's practice of not including ex parte written submissions, among them the notices of ex parte communications, in the record.[543]

We recommend that the Commission's rules be revised, and that it seek a legislative amendment,[544] to prescribe that written materials submitted by the parties, including materials submitted to one or more Commissioners, be required to be made part of the record of the proceeding. Even more than parties' comments on a proposed or alternate decision, even more than their closing briefs to the ALJ, the written submissions to commissioners in support of or opposition to a proposed or alternate decision reveals the parties' most cogent, focused arguments on the Commission's decision. All parties are entitled to know what those arguments were, to rebut them, and, if necessary, to point to them on review. And the public is entitled to be able to consult the record of a proceeding and to fully understand what led to the final decision.

And even more importantly, making ex parte communications part of the public record will help ensure that the Commission's decisions are reached on the basis of the record. We have been told that parties will often submit ex parte comments that contain factual assertions not found in the record. One staff member cited to us a recent example of a communication while a proposed decision was under review, urging action on a matter pending before the Commission and claiming the favored action will create thousands of jobs in California, a claim, we were told, that found no support in the record. Having access to written ex parte communications will enable parties to object to those that are unsupported or otherwise improper.

In other recommendations below, we propose, in lieu of ex parte contacts, greater reliance on oral arguments. The comments on the proposed decision and the transcript of the arguments will give the parties the opportunity to identify for the Commission any unsupported factual representations being made by adversaries.

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[542] The formal-hearing provisions of the APA contains a similar definition: "The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case." (Gov. Code, § 11523.)

[543] Rule 8.3(k).

[544] In our view, exclusion of the ex parte notices from the administrative record is not mandated by statute and is arguably at odds with Public Utilities Code section 1706. We acknowledge, however, that because the statutory definition of "ex parte communication" excludes a "communication . . . that does not occur . . . on the official record of the proceeding on the matter," section 1701.1, subdivision (c)(4) can be read to reflect the Legislature's understanding that written ex parte communications would not be placed in the record.

This recommendation should be clearly understood to be intended to support, not to undermine, the distinction between evidence and argument in the record. The *evidentiary* record will have been closed by the ALJ prior to issuance of the proposed decisions. Submissions to the full Commission or individual Commissioners thereafter should become part of the full administrative record but cannot augment the body of evidence in the record before the Commission and cannot provide evidentiary support for the Commission's final decision. Rather, they are in the nature of additional briefs, presenting argument not evidence—argument the public and any reviewing court is entitled to see.

Recommendation No. 9: The entire record of each proceeding should be readily available on the CPUC website to Commissioners, staff, parties, and the general public.

In the course of our review, it became clear that the all participants in the administrative process are having difficulty with access to the records of proceedings. Even Commissioners and their advisors have difficulty locating and obtaining specific items in the record.

It should not be that difficult. Some documents are already filed in digital form[545] at www.cpuc.ca.gov, and the rules can be revised to capture the balance. The website should be upgraded to make inputting easier, to incorporate contemporary error-correcting tools, to make searching easier,[546] and to provide Commission management with strong reporting tools.

We understand the Executive Director is presently planning to propose to the Commission a major upgrade in information technology. We recommend that an upgrade to those portions of the Commission website that provide access to proceeding information and documents be included in that upgrade.

[545] Some interviewees, who were not regular participants in CPUC proceedings, complained that the website requires submissions to be in an Adobe Acrobat format that is not in widespread use, to which they had difficulty conforming. The referenced turned out to be to the PDF-A format, which is better suited to the archival function that is presumably one of the CPUC site's purposes. PDF-A embeds fonts in the document so the reader's system need not have those fonts loaded locally. Current versions of most word-processors are capable of readily generating PDF-A documents. We note that the federal courts are transitioning to PDF-A for electronic filings. It appears reasonable for www.cpuc.ca.gov to require filings in PDF-A.

[546] We note that CPUC decisions, including authoritative precedents, are extremely difficult to locate. They are available on Lexis but not on Westlaw, which we understand to be the most-used legal research service. This represents another barrier to advocates who want to participate in CPUC proceedings, particularly if their plans are for only occasional participation. Better searchability of the body of CPUC decisions, including keyword Boolean searching, could greatly improve accessibility.

F. Enforcement, Penalties, Sanctions

1. Regulation of Conduits

One of the recurring complaints we received—from all sides for differing reasons—was that their opponents skirted restrictions on ex parte communications by using non-party conduits to carry their messages for them. Among utilities the complaints focused mainly on communications from Commission personnel, an issue we address with recommendations listed in Section II.D.1, above. For some intervenors and the staff itself, two concerns were raised, which we address here: (1) what appear to be solicited letters and calls supporting a utility's position in a pending case from government officials, business and labor interests, and civic organizations; and (2) presentations at industry-sponsored conferences and seminars.

Recommendation No. 10: When a decision-maker receives a communication from a non-party that he or she has reason to believe has been made on behalf of a party, the decision-maker should give the parties notice of the communication, have it made part of the record, and offer the parties the opportunity to respond.

As discussed in section II.D, nearly all parties expressed concerns about communications from non-parties, including communications from governmental officials as well as other non-party interests. There would be little benefit to the reforms we recommend, including the elimination of ex parte communications in ratesetting proceedings, were parties able to circumvent them by sending messages through persons not subject to ex parte regulations. The present definition of "person with an interest" in Public Utilities Code section 1701.1, subdivision (b)(4) is fairly broad, and we do not recommend any change in that provision. Under the current definition, interested persons include not only parties, but also persons with a financial interest or a representative of any "civic, environmental, neighborhood, business, labor, trade or similar organization who intends to influence the decision of a commission member on a matter before the commission."[547] Our recommendation is that all persons who meet the present definition of "person with an interest" should be subject to the ex parte rules that we recommend, including the prohibition on ex parte communication in ratesetting proceedings and required disclosures by decision-makers of ex parte communications in quasi-legislative proceedings.

We further recommend that the Commission's rules be revised to clarify that if a decision-maker receives a communication from any non-party relating to any pending ratesetting or quasi-legislative matter, whether or not the person meets the definition of "person with an interest," if the decision-maker has reason to believe that the communication is being conveyed on behalf of a party, the decision-maker should give the parties notice of the communication. This requirement would apply to communications where any person, including legislative or gubernatorial representatives, appear to the decision-maker to be serving as a conduit and conveying a party's message in a manner that would be prohibited to the party. We recommend that the decision-maker serve any such written communications on the parties, or prepare a memorandum disclosing the content of any oral communication. These documents should be

[547] Pub. Util. Code, § 1701.1, subds. (b)(4)(B) & (C).

included in the record of the proceeding. Moreover, the parties should be afforded an opportunity to respond to any such communication.

Not Recommended: A ban on Commissioner attendance at industry- and civic group-sponsored conferences.

The issue of Commissioner attendance at conferences is a difficult one. While some intervenor groups complained of lavish conferences at which utilities may bend a Commissioner's ear, Commissioners expressed a genuine concern about their need to attend events where important issues are being discussed by leading innovators in their fields. The disclosure of improper ex parte contacts during such a conference has confirmed that there is at least some basis for the intervenors' concerns about these events. Yet prohibiting Commissioners entirely from attending such conferences is a very blunt tool to address these issues. While cutting off such events entirely would eliminate the source of the problem, this would be at the expense of eliminating legitimate and valuable educational opportunities for decision-makers. We therefore do not recommend a flat-out prohibition on Commissioner attendance at all industry- and civic-group sponsored conferences, but rather below propose targeted reforms that we believe will adequately cure the problems posed by Commissioner attendance at industry-sponsored conferences.

Recommendation No. 11: Decision-makers should avoid attending industry-sponsored conferences where issues presented in pending adjudicatory or ratesetting proceedings are expected to be part of the program. When attending conferences where such issues are not expected to be part of the program, decision-makers should avoid communications pertaining to issues presented in pending adjudicatory and ratesetting proceedings and, where such communications inadvertently occur, they should disclose them on the record and serve the disclosure on the parties, who, if substantive communications occurred, should be given an opportunity to respond.

Instead of prohibiting attendance at all industry conferences, we recommend that decision-makers exercise discretion as to which events they attend. Decision-makers should not attend industry-sponsored conferences when the decision-maker is aware that issues presented in pending adjudicatory or ratesetting proceedings will be discussed as part of the program. Because we recommend that ex parte communications be permitted, with disclosure, in quasi-legislative proceedings, events where issues in pending quasi-legislative proceedings are being discussed do not pose the same concern. Decision-makers can draft appropriate disclosures of any communications at conferences regarding a pending quasi-legislative proceeding.

During the course of attending such a conference, decision-makers should take care not to communicate with others about issues in pending ratesetting proceedings. If a decision-maker inadvertently engages in such a communication regarding a pending ratesetting proceeding, the decision-maker must prepare a summary of the communication and disclose it on the record of the proceeding. Parties must be given an opportunity to respond. A decision-maker should follow the same approach for any communications regarding a quasi-legislative proceeding, providing the disclosure that we recommend for ex parte communications in such proceedings.

Recommendation for Consideration: The Commission should consider adopting a policy precluding Commissioners from accepting free travel, lodging, and meals from organizations affiliated with utilities and other parties to proceedings before the Commission.

Interest in claimed industry-related organizations providing Commissioners free travel to remote locales where they receive improper ex parte communications has, of course, been heighted by allegations of such an industry-funded trip by a now-former Commissioner where he is asserted to have negotiated the resolution of a pending matter. We, of course, draw no conclusions about the truth or falsity of those allegations, which we have not investigated. We simply note that they have raised public interest in the question whether utility-related organizations sponsor appealing travel for decision-makers in exchange for access to them for what amounts to ex parte communications.

Public officials' acceptance of free travel is regulated by the Political Reform Act of 1974.[548] It generally permits members of a state commission to accept reimbursement for transportation costs, lodging, and subsistence reasonably related to a governmental purpose under either of two conditions: (i) in connection with the official giving a speech within the United States or (ii) when provided by a governmental, educational, or tax-exempt nonprofit.[549] We are told by critics that the most common trips fall within the second condition, being funded by nonprofit organizations funded by utilities, including utilities regulated by the CPUC. That being the case, it appears that these instances, if they occur, are not illegal so long as appropriate notices of ex parte communications are given. And, to the extent the communications come not from identified representatives of the utility itself but from the organization or others attending the event, no notice is required under present law.

Precluding acceptance of reimbursement is, of course, entirely separate from attendance at events. The recommendation here is simply that the cost of decision-maker attendance at such functions be borne by the Commission.

In Recommendation No. 7,[550] we propose that when a decision-maker receives a communication that appears to be made on behalf of a party he or she should made a disclosure[551] and give other parties the opportunity to rebut what was said. That can address, at least in part, the secrecy of the communication but not necessarily the implication some see that the industry and its firms are seeking favor with decision-makers with such paid travel.

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[548] Gov. Code, §§ 81000-91014.

[549] Gov. Code, § 89506, subd. (a).

[550] See p. 149, *ante*,

[551] In many cases, the burden of disclosure is lightened by the fact that there is often a recording of the formal proceedings (speeches, panel discussions), if that is where the communications occurred. The FCC notes and takes advantage of this fact in its rules. (47 C.F.R. § 1.1206(b)(1) at Note to Paragraph (b)(1).)

We make no recommendation on this topic, but we call to the Commission's attention the possibility of a CPUC policy of the agency itself paying for any such travel and declining to accept reimbursement from industry-related sponsors of the events.

2. Sanctions

Recommendation No. 12: The Commission should sponsor legislation creating additional sanctions for illegal ex parte communications and establishing sanctions applicable to decision-makers for such violations of law.

The Commission's ex parte rules presently lack specificity, although the Commission has the authority to impose significant penalties and sanctions. The Commission's November 26, 2014 decision imposing over $1 million in penalties on PG&E and a one year ban on future ex parte contacts is evidence that the Commission has the authority to significantly penalize a party who violates the ex parte rules.[552] A significant omission from statutory sanctions, however, is any provision authorizing sanctions against a decision-maker for violations of ex parte communication rules. Although the present Commissioners are well aware of the rules and prohibitions, the Commission would be better served in the future by a law giving Commissioners notice of potentially significant sanctions that could befall a future Commissioner who knowingly violates the rules. The rules should also be revised to more clearly specify to the parties the potential penalties for violation of the ex parte communication rules.

The law should be revised to include a specific list of penalties that may be imposed upon Commissioners for knowing violations of the ex parte rules. Penalties for decision-maker non-compliance will be even more important if our other reforms are implemented, because it will be decision-makers, and not the parties, who have the obligation to disclose ex parte communications. We recommend including a potential fine of up to $7,500 for knowing

[552] How effective available sanctions are to deter violations is always a somewhat speculative inquiry. However, the Commission has a rare opportunity to obtain some empirical evidence on the question. The 2014 decision imposing over $1 million in sanctions on PG&E creates a natural experiment. How did those record-high penalties, together with the other sanctions administered (including the loss of ex parte access to decision-makers for a year) affect the company's shareholders? Economists and statisticians often study how a given event affects shareholder values. The tool of choice to answer that question is an "event study," in which shareholder returns before and after an event are rigorously compared, using statistical controls to factor out overall-market influence. We have determined that such a study can be performed to analyze the effect of the PG&E sanctions decision relatively quickly and inexpensively. The answer would reveal whether the evidence indicates a statistically significant (i) reduction in investor returns (suggesting, for example, a potent effect likely to deter future violations), (ii) increase in investor returns (suggesting the market may have actually expected stronger sanctions), or (iii) no change in investor returns (indicating that the decision was along the lines the market expected). We have no idea which indication the data would support, but we think the analysis would provide useful information on an important question.

violations of the ex parte rules, a fine identical to that which may be imposed on a Coastal Commissioner who has violated the rules. We also recommend that a Commissioner be disqualified from future participation in a proceeding in which the decision-maker has violated ex parte rules. Finally, we recommend statutory authority for a party to be permitted to seek a court order voiding a decision if it can be demonstrated that ex parte contacts improperly influenced a decision.

We recommend more specific sanctions be included in the rules applicable to parties that violate ex parte prohibitions, as with most other agencies that regulate ex parte contacts. These sanctions should include terminating sanctions, along the lines of a common formulation in administrative law that requires consideration whether a party's claim should be "dismissed, denied, disregarded or otherwise adversely affected."[553] Advocates who violate the ex parte rules should also be subject to disqualification from appearing before the CPUC for a specific period. The Commission should also include as an explicit potential sanction a prohibition on engaging in ex parte communications (in proceedings where ex parte communications are permitted) for a specified period. Finally, the penalty levels in Public Utilities Code section 2107 of $500 to $50,000 per violation should be retained, and specific reference to those penalties should be included in the rules governing ex parte communications.

3. Culture of Compliance

Having found that Commission leadership has failed to inculcate a culture of compliance with the laws governing ex parte communications,[554] we recommend measures to help create awareness of and support for those laws, and to communicate to CPUC personnel and to parties and advocates appearing before the Commission that compliance is a high priority.

Recommendation No. 13: The Commission should develop tools to explain the applicable rules and communicate its commitment to their enforcement.

Several of our recommendations here will, if implemented, have the effect of simplifying what are presently extremely complex rules for what is and is not a permissible ex parte communication and explicating the duties of a party engaging in one. Nevertheless, the rules will remain intricate and susceptible of inadvertent as well as advertent violation.

One relatively easy way to help parties, Commissioners, and staff comply would be to put together instructional materials to assist them with compliance. The Commission presently has on its website a Practitioners' Guide to Ex Parte Communications,[555] which we find to be a good start toward a more complete body of instructions and compliance aids. Many questions, however, remain unanswered. A good example of a very helpful guide is the 24-page document,

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[553] E.g., 5 U.S.C. § 557, subd. (d)(1)(D).

[554] See Section II.F, *ante*.

[555] See http://docs.cpuc.ca.gov/PUBLISHED/REPORT/124510.htm (last visited June 17, 2015).

Ex Parte Questions and Answers, posted by the State Water Resources Control Board on its website,[556] explaining ex parte practices before the state and regional boards.

Such tools not only make it easier for people to comply with the law and to avoid inadvertent errors, they also communicate, internally and externally, the Commission's and Commissioners' determination to see the laws complied with.

Recommendation No. 14: The Commission should develop a Code of Conduct for Commissioners and advisors, and a Code of Conduct for advocates appearing before the Commission.

A Code of Conduct for Commissioners and Advisors should be developed, identifying the rules governing ex parte communications and other proceeding-related laws and obtaining each covered person's acknowledgment of those laws and signed commitment to comply with them. Similarly, a Code of Conduct for Advocates appearing before the Commission (including CPUC staff in advocacy roles) should be developed to obtain the appropriate acknowledgment and commitment.

Recommendation No. 15: The Commission should conduct training programs on compliance with the ex parte rules for Commissioners, advisors, advocacy staff, and interested outside parties.

We have found that what formal training programs there are for Commissioners and staff have been neglected in recent years, with the void only partially filled by voluntary programs from experienced staff. We recommend that the Commission revitalize those programs, building on the materials compiled by interested staff.

We also recommend that the Commission put together training for advocates before the Commission, starting with its own advocacy staff. Those programs can then be made available to outside parties appearing before the Commission if they are interested.

Recommendation No. 16: The Commission should create the position of Ethics Officer, whose job it would be to develop training tools, monitor ex parte and related practices, and recommend changes in Commission rules and practices.

Responsibility for these initiatives should, we recommend, be vested in a newly-created position of Ethics Officer, who would be appointed by the Commission.

He or she would initially be given the task of preparing the tools for ex parte compliance, the Codes of Conduct, and the training programs proposed above. But we envision a broader role for the Ethics Officer.

[556] See http://www.swrcb.ca.gov/laws_regulations/docs/exparte.pdf (last visited June 17, 2015).

There is a need at the CPUC for someone to be responsible for ex parte practices. The Ethics Officer should be that person, monitoring practices before the Commission, identifying what changes in rules and practices are necessary, and reporting to the Commission and the public how well the rules are being followed.

The Ethics Officer, whose charter should give him or her a measure of independence from those being monitored, may be given other duties related to the ethical obligations of CPUC personnel. It would probably make sense to put the responsibilities of the current Code Compliance Officer in the Ethics Officer's portfolio. And there may well be other opportunities for consolidation of functions in the new office.

G. General Exemptions from Ex Parte Rules

Recommendation No. 17: Permissible ex parte communications on "procedural issues" should be restricted to non-substantive matters that are not in controversy.

One of the recurring complaints we received was of abuses in the use of the exemption to the prohibition on ex parte communications for "procedural" issues. The exemption appears in the statutory definition, which, in part, says:

> "Ex parte communication," for purposes of this article, means any oral or written communication between a decisionmaker and a person with an interest in a matter before the commission *concerning substantive, but not procedural issues*, . . .[557]

The Commission's rule 8.3(c) elaborates on the procedural-issues exemption:

> Communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications.

Several interviewees reported incidents of ex parte communications on hotly contested issues that were claimed to be "procedural." While in these accounts the issues claimed to be "procedural" concerned topics that the party and the decision-maker should have recognized were substantive, even when the issue arguably involves a "procedural question," it may not be suitable for ex parte communications. Some strictly procedural issues can be sharply disputed, and their outcome can have a prejudicial effect on opposing parties and on the direction of the proceeding.

California's Administrative Adjudication Bill of Rights identifies the solution. After first prohibiting in Government Code section 11430.10 any "communication, direct or indirect, regarding any issue" in a pending proceeding, section 11420.20 says that a "communication

[557] Pub. Util. Code, § 1701.1, subd. (c)(4), emphasis added.

otherwise prohibited by Section 11430.10 is permissible" if it "concerns a matter of procedure or practice, including a request for a continuance, *that is not in controversy*."[558]

This "not in controversy" condition does not appear in Public Utilities Code section 1701.1, nor in rule 8.3. We are told that it is common practice among ALJs, who do not accept substantive ex parte communications, to ask any party making a procedural ex parte request whether the party has cleared the request with the other parties, which achieves a similar elimination of controversial requests that ought not to be dealt with ex parte. But we do not know of any Commissioner who has adopted a similar policy.

Adding the "not in controversy" to the conditions for a permissible procedural ex parte communication will prevent continued abuse of the exception.

H. Changes in Commission Practices to Ensure Parties Have Necessary Access to Decision-Makers and to Keep Parties' Advocacy in Arenas Accessible to all Parties and Open to the Public

This Report has recommended measures to eliminate many forms of ex parte communication, in part on the basis that parties' legitimate need to communicate with decision-makers can be preserved without resort to private, off-the-record conversations. We have also noted that present practices seem to encourage parties to use ex parte, rather than public, channels. We now turn to recommendations intended to ensure parties access in the public arena and to remove incentives for parties to engage in ex parte communications.

1. Proceedings Before the ALJ Leading to Issuance of the Proposed Decisions

Recommendation No. 18: The Commission should make greater use of all-party meetings and should manage those meetings to ensure that they are productive.

The efficacy of a well-planned, well-managed all-party meeting has been established and extolled by parties and decision-makers alike. While unstructured, unmanaged all-party meetings may yield mere recitations of well-known arguments and little else of value, an ALJ or Commissioner who has questions that cannot be readily answered in the ongoing hearing may convene an all-party meeting and pose those questions. Likewise, a party who wishes to raise an issue outside of the regular order in the case can request an all-party meeting to do so.

All-party meetings can be requested at any time, before or after the proposed decision issues. They represent an arrow in the quiver of both ALJs and Commissioners.

[558] Gov. Code, § 11430, subd. (b), emphasis added.

Recommendation No. 19: The Commission should reaffirm that the contents of the proposed decision in a ratesetting case lies within the discretion of the assigned ALJ.

Control of the administrative hearing is vested in a "presiding officer" (adjudicatory cases) or "principal hearing officer" (ratesetting cases), who may be either the ALJ assigned to the matter or the Assigned Commissioner designated by the Commission.[559] In practice, the ALJ frequently serves as the presiding officer or principal hearing officer.

In ratesetting cases, "[t]he decision of the principal hearing officer shall be the proposed decision," and he or she "shall present the proposed decision to the full commission at a public meeting."[560] The Assigned Commissioner who is not the principal hearing officer may issue an alternate decision and present it at the same time to the Commission.[561] Unless he or she is designated the principal hearing officer, the Assigned Commissioner is required to be present only at closing arguments,[562] which, in practice, rarely occur. This procedure is in contrast to the procedure prescribed for quasi-legislative cases, where the ALJ "act[s] as an assistant to the assigned commissioner," who is required to be present for all formal hearings and to prepare the proposed rule or order "with the assistance" of the ALJ.[563]

We read these statutes to vest discretion in the ALJ presiding in a ratesetting hearing over the substance of the proposed decision.[564] We make this observation because we have been told that in some instances Assigned Commissioners exert pressure on the ALJ with regard to the proposed decision. And we mention that report because such a practice would have the natural effect of inviting ex parte communications with Assigned Commissioners to influence the proposed decision.

We think it would have salutary effect, and potentially reduce ex parte communications prior to the proposed decision, if the Commission's rules were clarified to confirm that the ALJ has the discretion to decide what goes in a proposed decision in a ratesetting case.

Recommendation No. 20: The Assigned Commissioner should be allowed to circulate an alternate decision at any time that any other Commissioner may do so.

Under Public Utilities Code section 1701.3, subdivision (a) and rule 14.2(a), if the Assigned Commissioner wishes to issue an alternate decision, he or she must do so

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[559] Pub. Util. Code, § 1701.2, subd. (a), rule 13.2.

[560] Pub. Util. Code, § 1701.3, subd. (a).

[561] *Ibid.*

[562] *Ibid.*

[563] Pub. Util. Code, § 1701.4, subd. (a).

[564] That is consistent with the nearly universal practice in formal adjudications under the APA, in which the ALJ hears the case alone, and "he or she shall prepare . . . a proposed decision" to the agency. (Gov. Code, § 11517, subd. (c)(1).)

simultaneously with issuance of the ALJ's proposed decision. Any other Commissioner may issue an alternate decision thereafter "without delay."[565]

We understand that the practice is for the ALJ to tender the proposed decision to the Assigned Commissioner when it is ready for issuance but not to issue it until the Assigned Commissioner signs off. The purpose, we are informed, is to allow the Assigned Commissioner time to prepare his or her alternate decision, since the Assigned Commissioner loses the power to author an alternate decision once the proposed decision issues. Our interviews indicated that this requirement of simultaneous issuance is the source of significant delay in some cases. Where the Assigned Commissioner's hold is the result of, or in anticipation of, ex parte communications from parties, the delay may be increased.

We recommend that this requirement that an Assigned Commissioner issue his or her alternate decision concurrently with issuance of the proposed decision be repealed.

Recommended for Consideration: Whether to revise or abandon the Assigned-Commissioner model in ratesetting cases.

The Assigned Commissioner process is, so far as we know, unique in California administrative law to the CPUC. Under the formal-hearing provisions of the APA, a case is heard either by an ALJ or by the full agency itself sitting with the ALJ.[566] In the latter case, the ALJ presides at the hearing, rules on the admissibility of evidence, and advises the agency on questions of law, but "the agency itself shall exercise all other powers relating to the conduct of the hearing" unless it delegates additional powers to the ALJ.[567] "In the vast majority of adjudicatory proceedings, the evidence is not heard by the agency head (or the members of a multi-member agency head), but instead by a presiding officer . . . who renders a proposed decision."[568]

As noted,[569] the original purpose of having Assigned Commissioners, providing for Commissioner-specialization by industry, no longer applies to Commission practice. It is not clear to us that the continued assignment of individual Commissioners to cases prior to a proposed decision—which we observe may serve as a magnet for ex parte communications during that stage of the case—still serves the Commission's purposes and is worth the time required of Commissioners. That is a question the Commissioners themselves are in the best position to answer.

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[565] Rule 14.2(c).

[566] Gov. Code, § 11512, subd. (a).

[567] Gov. Code, § 11512, subd. (b).

[568] Cal. Administrative Law, ¶ 4:101.

[569] See p. 15, *ante*.

2. Proceedings Before the Full Commission from Proposed Decision to Final Agency Action

While our recommendations are expected to sharply reduce the frequency of ex parte communications and reliance on them, they should not cut Commissioners off from any information they reasonably need. Rather, our aim is to channel that information so that it is received in settings where all parties know and can respond to what is communicated, where the public can see the process of governance, and where the fuel for persuasion is the evidence and arguments found in the record. Accordingly, one purpose of our interviews was to identify procedures that place the communications with Commissioners in the open, giving all parties timely knowledge of what is being said to decision-makers, while realizing the legitimate benefits presently being derived from ex parte communications. The recommendations we make here reflect our finding that alternative, open processes can and should be employed instead. We have found that a key to realizing this goal is to make the public processes, starting with full Commission meetings, effective places to obtain the information the Commissioners require.

Recommendation No. 21: The Commission should encourage parties to invoke their rights to oral argument and, when appropriate, should structure argument for maximum value.

In ratesetting cases, every party has a right to oral argument before the Commission.

> Any party has the right to present a final oral argument of its case before the commission. Those requests shall be scheduled in a timely manner. A quorum of the commission shall be present for the final oral arguments.[570]

Nevertheless, we are told that parties almost never invoke their right to argument before the Commission. Many of the people we interviewed professed puzzlement that argument is not requested. One likely reason may be that they know they can argue their cases to Commissioners or their representatives in individual ex parte meetings. Another may be that as Commission meetings have become more perfunctory and non-substantive, parties have simply come to accept that meetings are not where the Commission wants to decide cases.

We recommend that the Commission reverse this perception and this reality.

Since most ex parte communications take place after the proposed decision has been issued and before the Commissioners vote, it should be clear that oral argument offers the parties precisely the opportunities they presently seek in ex parte meetings—to communicate orally and interactively with Commissioners, to draw their attention to favorable aspects of the record, and to answer questions the Commissioners may have.

We have heard the claim that oral argument is impractical for CPUC cases, where there may be dozens of parties, each claiming the right to argue. The answer is that courts where there is a right to oral argument routinely allocate time by "side," grouping parties that have similar positions, and requiring each side to put forth a single advocate for those positions. In a complex

[570] Pub. Util. Code, § 1701.3, subd. (d).

proceeding, the President can partition the argument into separate parts covering discrete issues. And while the law assures parties oral argument, it does not dictate how much time a given case or advocate must be allotted.

Some of the people we interviewed expressed the opinion that oral argument is not as useful as it may seem because the parties simply present their set-piece arguments, straight from their briefs. We are not surprised by that belief. When arguments take the form of unilluminating readings from a prepared text, though, the blame is shared by the advocates and the tribunal. The key to an informative oral argument is preparation by the advocate and effective management of the session by the presiding officer with the help of the rest of the panel, who together press the advocates on issues of concern and draw out the bases for conflicting claims. Argument should not consist of a procession of advocates delivering canned, often-redundant speeches.

Nothing vitiates oral argument like a cold panel. If the Commissioners have questions, oral argument is the place to get answers. Accordingly, oral argument should not be scheduled until the Commissioners have had time to study the proposed decision, any alternate decisions, and the parties' comments and can identify what, if any, questions they still have. It will sometimes be useful for the Commission to circulate in advance of argument a list of questions it has. [571] A well-prepared panel brings out the best of the advocates and, in turn, leads to sounder decisions.

Of course, sometimes the proposed decision and the parties' comments will satisfy the Commissioners, who then may not have any questions. In such cases, the parties will present their arguments and the case will be finished, likely with less consumption of time by Commissioners and parties alike than would be consumed by a parade of ex parte meetings.

Recommendation No. 22: Where oral argument is requested, the Commission should allow adequate time for preparation, deliberation, and voting, which may well call for the item to appear on multiple agendas.

In cases where the parties will be presenting oral argument, the Commission, like other tribunals, should allow time for deliberation after the argument before voting on the matter. Accordingly, matters that will involve argument should not be voted on in the same meeting unless deliberation is to take place during that meeting after the argument.

For oral argument to be most useful to the Commissioners, they should have time to digest the proposed decisions and the parties' written comments and to formulate whatever

[571] Of course, sometimes questions will arise after oral argument, for example when the Commissioners adjourn to a ratesetting deliberative meeting and where, in the course of the discussion, they realize that there seems to be an important unanswered question or unaddressed issue. In such cases, it may be of value to the Commission to solicit from the parties written submissions on a given topic. Courts make frequent use of this technique, inviting parties to submit trial briefs (in trial courts) or supplemental letter briefs (in appellate courts) addressing a specific issue or answering specific questions—sometimes imposing specific page-limits on the submissions.

questions they would like the advocates to address. That may require additional time before the argument. At its shortest, the time from a proposed decision to a vote of the Commission on its possible adoption can be as little as 30 days.[572] Within that 30-day period, the parties are given 20 days to file comments on the proposed decision of up to 15 pages and five days to file replies of up to five pages.[573] The Commissioners, then, may have as little as five days to read the replies before voting. Of course, that five-days-before-a-voting-meeting applies to each of the items on that meeting's agenda, which recently has been averaging 35 consent-agenda items and 6 regular-agenda items.[574]

Adding to the time pressure, the rules provide for non-Assigned Commissioners to offer alternate decision, and while at least 30 days must pass before the matter can be heard by the Commission,[575] certain changes to proposed decisions may be made without being deemed an alternate decision and extending the time for hearing. We were told that such changes can occur up to one hour before a Commission meeting. Parties learn about such changes on the day of the meeting, when the Commission lays out the documents on that day's agenda in the "Escutia Room" and parties check for last-minute changes in proposed decisions they are interested in. When parties detect an adverse or erroneous last-minute change, they find a Commissioner's advisor whom they can alert to the disagreement and ask that the matter be put over to the next meeting, which, we understand, the advisor generally communicates to the Commissioner on the dais, who then asks to have the matter put over to the next meeting.[576]

Aside from the crisis atmosphere in which these maneuvers seem to be taken, the process obviously stimulates additional ex parte communications.[577]

Taken together, there appears to be a need to adjust the timetable for voting on a proposed decision and any alternate. We recommend (i) that an adequate time be provided between the filing of comments and oral argument, (ii) that argument be followed by deliberation, either at the same meeting or a subsequent meeting, and (iii) that the Commission

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[572] Pub. Util. Code, § 311, subd. (b).

[573] Rules 14.3(b), (d).

[574] See p. 58 & fn. 319, *ante*.

[575] Pub. Util. Code, § 311, subd. (e); rule 14.1(d).

[576] See p. 56, *ante*. In our 21-meeting sample, an average of nine items per meeting were put over. We cannot discern how many of them were put over as a result of the Escutia Room process.

[577] Actually, these communications presumably go unreported and are not reflected in our data. The law excludes from the definition of "ex parte communication" those deemed to be "procedural" (Pub. Util. Code, § 1701.1, subd. (c)(4); rule 8.1(c)), relieving the communicating party of any disclosure requirement. Likewise, there is no way to tell whether any of these communications would have been "in controversy," since the Commission's definition, unlike most jurisdictions, permits "procedural" ex parte communications even regarding disputed issues.

then take the vote on the matter in public session. We also recommend that if there is a last-minute modification to a proposed decision, the matter should be held over at the request of any party made in open session.

Recommendation No. 23: In ratesetting and adjudicatory cases in which the Commissioners would find it helpful, the Commission should avail itself of deliberative closed meetings to discuss pending decisions.

The Legislature has authorized the Commission to meet in closed session to deliberate adjudicatory cases and ratesetting cases.[578] This authority to deliberate in closed session is similar to that which is conferred by the Bagley-Keene Act on other state agencies when deliberating decisions in cases being heard under the formal-hearing provisions of the Adjudicatory APA or similar statutes.[579]

The logic of such provisions is that multi-member tribunals should be able to exchange views, share tentative opinions, and probe one another's positions privately. It is a venerable assumption that also drives closed deliberations by appellate courts.

Closed deliberative sessions seem particularly appropriate for the CPUC because some interviewees defended the use of ex parte meetings for precisely the same reason: to privately ask questions, test assumptions and arguments, hear points the writings before the Commissioners did not answer well. Those are legitimate desires, but they should be met by deliberations with fellow Commissioners,[580] not by individual Commissioner-interested party private meetings.

[578] Pub. Util. Code, §§ 1701.2, subd. (c), 1701.3, subd. (c).

[579] See Gov. Code, § 11126, subd. (c)(3).

[580] Closed deliberative sessions should, of course, exclude parties, advocates, and the general public. An interesting question arises, however, concerning the ALJ who authored the proposed decision. The APA prohibits direct and indirect communications between an ALJ and the agency for whom he or she has heard the case regarding the merits of any issue in any pending matter. (Gov. Code, § 11430.80, subd. (a).) That provision does not apply to CPUC hearings, so the Commission has the power to choose whether an ALJ should be permitted in closed deliberative sessions over a proposed decision he or she has authored. The better rule certainly prohibits him or her from lobbying for adoption of the proposed decision, but the Commission may wish to permit the ALJ to be present to answer factual questions about where to find specific evidence in the record. (See Cal. Administrative Law, ¶ 5:304 [section 11430.80 precludes only communications concerning the merits, and "does not preclude, for example, the agency head from directing the PO to elaborate portions of the proposed decision in the proceeding, from asking the PO where an exhibit can be found," citing the Law Revision Commission comment to the section].)

We emphasize that authorized deliberative closed sessions may occur during a duly noticed regular or special meeting.[581] The Commission presently conforms to that requirement. It regularly notices closed ratesetting deliberative meetings for the same day as its general business meetings. However, the Commission only rarely convenes for closed deliberative meetings, which remain uncommon in CPUC practice.

Recommendation No. 24: The Commission should, where appropriate, be able to dispose of a proposed decision with an order identifying why it is not adopting the proposed decision and remanding the matter to the ALJ with directions to prepare a new proposed decision and, if necessary, to take further evidence.

The dominant pattern in administrative law is for an ALJ to hear a case, prepare a proposed decision, and tender it to the agency (board, commission, director, etc.) for final agency action. A typical example of the options available to the agency at that point is found in the Adjudicatory APA: The agency may (1) adopt the proposed decision as tendered; (2) reduce the proposed penalty and adopt the balance of the proposed decision; (3) make minor technical changes in the proposed decision and adopt it as changed; (4) reject the proposed decision and refer the case back to the ALJ; or (5) reject the proposed decision and decide the case itself upon the record, with or without taking additional evidence.[582] In CPUC practice, option number 4 is, so far as we know, never used—the Commission never sends a matter back to the ALJ for a new or revised decision. Agencies find remand a useful tool that we recommend the CPUC adopt.

For example, the construction of a statute is sometimes a threshold issue in a case. If the Commission's review of the proposed decision leads it to conclude that the ALJ has misconstrued the statute, perhaps leading to exclusion from the record of evidence that is admissible under the Commission's construction, it should be able to issue an order setting aside the proposed decision, explaining the error, and returning the matter to the ALJ with instructions for further proceedings. On other occasions the Commission may conclude for other reasons that certain evidence was improperly excluded, requiring that the ALJ take the evidence and issue a new proposed decision reflecting the full record. In these and other ways, the Commission may efficiently dispose of a deficient proposed decision without having to completely rewrite the decision itself.

Public Utilities Commission 1701.3, subdivision (e) says that the Commission may, "in issuing its decision, adopt, modify, or set aside the proposed decision or any part of the decision based on evidence in the record." The term "set aside" normally indicates that a judgment, order, or similar ruling under review has been struck down.[583] Presumably that was not intended to be the end of the proceeding. Something more must take place, something other than adopting or modifying the proposed decision, which are already enumerated. We read the statute to permit the Commission to set aside a proposed decision and return it to the ALJ for further action.

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[581] Gov. Code, § 11128.

[582] Gov. Code, § 11517, subd. (c)(A).

[583] Black's Law Dictionary defines the verb "set aside" as "to annul or vacate (a judgment, order, etc.)." (SET ASIDE, (10th ed. 2014).)

3. Commission Proceedings in Other Matters

Recommendation No. 25: In quasi-legislative proceedings, the Commission should deliberate in its public meetings.

There is no comparable exemption in the Public Utilities Code or the Bagley-Keene Act for closed sessions to deliberate quasi-legislative action. Instead, the law requires that those deliberations be conducted in public session.

Historically the CPUC has adopted proposed rules without extensive public debate. It may well be that the adjudicatory hearing process employed by the Commission for quasi-legislative action provides adequate opportunity to develop the arguments for and against a proposed rulemaking decision.

We suggest that the Commission consider whether discussion of important proposed rulemaking among the five Commissioners would be of use to them in their decision-making and provide an opportunity to educate the public on important regulatory issues. If so, we urge the Commission to schedule such discussions, which must be conducted in public session.

Recommendation No. 26: When Commissioners seek information on policy issues, emerging technologies, and other regulatory issues not presented in pending proceedings, they should consider placing non-proceeding items on agendas.

We have heard it said several times that the Commissioners don't have opportunities to learn about non-proceeding issues such as emerging technologies, economic trends, and policy developments in utility regulation. These concerns are cited in defense of Commissioners attending outside conferences and meetings, often sponsored by regulated industries. The concerns are also invoked in support of pleas to be exempted from certain strictures of the Bagley-Keene Act.

We discuss the question of outside conferences below. But what strikes us about these claims is how they undervalue the CPUC itself as a forum for forward-looking, blue-sky discussions. Were the Commission to schedule a public meeting to explore a topic of general interest independent of any proceeding, and invited leading academic, industry, and public figures to address the issues, it could obtain—for itself and for the public—an instructive, authoritative briefing on the topics of interest.[584]

[584] To the extent there is any concern that the discussion might veer into issues in pending cases, the Commission can give notice to the parties in those cases of the planned meeting, which, because it would be held in public, would not present any risk of ex parte communications.

Recommendation No. 27: The Commission should meet more frequently.

For the Commission to hold more frequent oral arguments, occasional all-party meetings, and non-proceeding briefings, together with the balance of its business, the Commission will have to meet more often than 1.7 times per month for about 2.5 hours per meeting.[585]

We lack an adequate basis to estimate how many hours of meeting time would be required by these recommendations, but it is apparent that having serious discussions (either closed- or open-session deliberations) will involve significant additional time.[586] And our recommendation that the Commission allow for oral argument and ratesetting closed deliberations will create need not just for more total time in meetings but also for noticed meeting days in which to hear matters.

I. Interim Measures

Recommendation No. 28: Pending enactment of statutory reforms, the Commission should (1) determine whether to sponsor proposed legislation to implement these recommendations; (2) commence a rulemaking proceeding to make those revisions to the Rules of Practice and Procedure that can be made in compliance with existing statutes; and (3) adopt a resolution placing a moratorium on ex parte practices it seeks authority to terminate.

Some of the recommendations we make here will require changes to statutes, which we propose the Commission ask the Legislature to enact. Our recommendations will also necessitate changes to the Commission's Rules of Practice and Procedure, some of them contingent on the statutory amendments, others within the Commission's present authority. The legislative and rulemaking processes can take time. However, the Commission can steps relatively quickly to advance the reform process.

We suggest the first step is for the Commission to determine whether it wishes to adopt those recommendations that call for legislative action and then to assemble a package for submission to the Legislature. Since the legislative session is underway and bills have already been introduced addressing some of these issues, it may be appropriate for the Commission to focus first on the topics presently being considered in the Capitol.

Second, the Commission can immediately institute a quasi-legislative proceeding to consider amendments to its Rules of Practice and Procedure to implement its revised policies.

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[585] See p. 129, fn. 477, *ante*.

[586] We examined the agendas for the 21 meetings from May 2014 through April 2015 and attempted to relate the number of matters decided (consent or regular agenda) against the duration of each meeting. We found there was no statistically significant relationship. In effect, the length of the meeting does not seem to depend much on how many cases are decided. That is consistent with the observation that deliberation and decision has not been taking place in Commission meetings.

That proceeding can likewise be structured to identify first those amendments to the rules that can be made without statutory changes and to draft those amendments.

Third, we recommend that the Commission institute some of these reforms on an interim basis, pending action by the Legislature and completion of the rulemaking process. In our view the most important of these interim measures[587] would be:

- Establishing a moratorium on ex parte communications with Commissioners and advisors in ratesetting cases.

- Adopting an interim policy for Commissioners and advisors to disclose ex parte communications in quasi-legislative proceedings, including the substance of such communications.

- Initiate changes in CPUC public-meeting practices, including more frequent meetings, the holding of oral arguments, greater use of closed ratesetting deliberative meetings, and regular deliberations in public on quasi-legislative matters.

- Begin including ex parte materials, including disclosures, in the administrative record of the relevant proceeding.

- Commence recruiting an Ethics Officer and initiate the measures recommended for his or her attention.

- Begin upgrading of the Commission's information-technology program and web site.

[587] These are *interim* measures specifically because they may require changes in the law to permit their permanent institution. Many of the other recommendations do not require such action, and, if accepted by the Commission, can be implemented without an interim step.

INDEX OF RECOMMENDATIONS