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EX PARTE REQUIREMENTS AT THE CALIFORNIA PUBLIC UTILITY COMMISSION: A COMPARATIVE ANALYSIS AND RECOMMENDED CHANGES

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I.	INTRODUCTION AND SUMMARY.....	3
II.	GENERAL BACKGROUND.....	4
A.	PURPOSE OF EX PARTE REQUIREMENTS	4
B.	THE MODEL ADMINISTRATIVE PROCEDURE ACT EX PARTE RULES	5
III.	CPUC’S EX PARTE REQUIREMENTS	7
A.	CPUC’S CURRENT EX PARTE REQUIREMENTS	7
B.	ISSUES RELATED TO CPUC ‘S CURRENT EX PARTE REQUIREMENTS.....	9
1.	Pervasive Ex Parte Contacts Both Proper and Improper.....	9
2.	The Statutory Language Allows for Ex Parte Communications in Ratesetting Proceedings If All Parties Are Invited.	10
3.	The Rule’s Requirements Are Unclear or Not Well Understood.....	12
IV.	ELEMENTS OF EX PARTE REQUIREMENTS – COMPARISON AND RECOMMENDATION	13
A.	OVERVIEW OF ANALYSIS	13
B.	ANALYSIS OF ELEMENTS OF EX PARTE REQUIREMENTS	13
1.	Types of Proceedings Covered – All Contested Proceeding Should Be Covered	13
2.	Types of Communications Covered – There Should Be a Clear Delineation Between Procedural and Substantive Communications.....	16
3.	Parties or Members of the Public.....	17
4.	Treatment of Other Agency Staff - Rules Need to Clearly Define Who Is a Decision-Maker..	17
5.	Discussions Between Decision-makers.....	17
6.	An Affirmative Duty on Decision-makers Receiving Improper Ex Parte Contacts	18
7.	Remedies for Improper Ex Parte Contact	20
IV.	CONCLUSION.....	20

APPENDIX 1 – Experience by Previous Decision-makers related to Ex Parte Rules 22

Discussion with Jon Wellinghoff, October 16, 2014..... 22

Discussion with Peter Bradford, November 3, 2014..... 22

Discussion with Marty Cohen, November 3, 2014..... 23

APPENDIX 2 - SUMMARY OF THE REQUIREMENTS FOR STATES AND AGENCIES DISCUSSED IN COMPARISON 24

 FEDERAL ENERGY REGULATORY COMMISSION 24

 CALIFORNIA ADMINISTRATIVE PROCEDURE ACT..... 26

 CALIFORNIA AIR RESOURCES BOARD 28

 CALIFORNIA ENERGY COMMISSION..... 29

 CONNECTICUT 29

 DELAWARE 32

 ILLINOIS 34

 TEXAS 37

 VIRGINIA 38

 NEVADA..... 38

 NEW YORK 39

 FLORIDA 40

I. INTRODUCTION AND SUMMARY

Emails released beginning in the fall of 2014 demonstrate several improper private communications between high-level utility officials and decision-makers at the California Public Utility Commission (“CPUC”).¹ The email chains show discussions ranging from a utility repeatedly lobbying on the outcome of an enforcement matter or aggressively pushing for a new judge assignment, to a commissioner soliciting donations to a political campaign or a banquet fund. Entities in the transportation industry have also alleged improper contacts with CPUC officials.² In each instance, the CPUC decision-makers did not report the communications or insist that the utilities stop sending them. Rather, they actively participated in the exchanges and, if anything, encouraged them.

In the judicial and adjudicatory context, courts, legislatures and public agencies have long prohibited private communications with decision-makers to ensure a fair outcome and preserve the integrity of governmental action. These private communications are called *ex parte contacts*. Even though the CPUC uses a judicial-type of process to gather information for the record and allow for argument by interested parties, it broadly permits *ex parte* contacts in ratemaking proceedings, which are the majority of the CPUC’s contested cases. In addition, as many of the revealed emails indicate, some CPUC decision-makers have allowed for *ex parte* communications in circumstances in which all such contacts are strictly prohibited. Many decision-makers in the CPUC regularly engage in off-the-record communications with utilities and other stakeholders, creating a culture of conversations with parties occurring behind closed doors. The recent disclosures have caused many to seriously question the CPUC’s decision-making process.

To restore the integrity of the CPUC’s process, the agency and the legislature should change the applicable rules. An analysis of practices in other state and federal agencies reveals that federal regulators, other California agencies, and utility regulators in most other states make similar decisions without allowing for *ex parte* contacts. While the CPUC places no constraints on private communications related to legislative rulemaking proceedings, many *ex parte* rules examined in this analysis take a more nuanced approach and focus on whether a proceeding is contested, hearings are held, or substantive rights might be affected.

The CPUC should follow the lead of many similar states, agencies, and the Federal Energy Regulatory Commission and prohibit *ex parte* communications in all contested proceedings, defined to include all ratesetting and adjudicatory procedures, and any other matter that requires hearings and affects an individual entity’s substantive rights. This prohibition need not restrict the ability of CPUC decision-makers to hold properly noticed meetings which all parties can attend. Through its rules, the CPUC should require that decision-makers avoid

¹ See, e.g., PG&E Late Notice of Ex Parte Contacts (October 6 2014), available at http://www.pgecorp.com/sfg14/PGE_LateNotice.pdf

² See, e.g., Patrick Hoge, *Complaints About PG&E’s Secret Meetings Mirrored in “Ride-Sharing” Proceedings*, SAN FRANCISCO BUSINESS TIMES, November 7, 2014, available at <http://www.bizjournals.com/sanfrancisco/blog/2014/11/public-utilities-cpuc-peevey-uber-lyft-sidecar.html?page=all>.

improper ex parte contacts, report on such communications when they do occur, and allow other parties a chance to respond. Finally, the ex parte rules should provide clear explanations about what types of communications are truly procedural and thus not subject to the ex parte rules.

II. GENERAL BACKGROUND

Ex parte communication is defined under the federal Administrative Procedures Act as “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.”³ Black’s Law Dictionary defines “ex parte” similarly as “on one side only; by or for one party; done for, in behalf of, or on the application of, one party only.”

A. PURPOSE OF EX PARTE REQUIREMENTS

One of the primary purposes of restrictions on ex parte contacts with decision-makers is to prevent a party from gaining an unfair advantage in a contested matter.⁴ By not being subject to the adversarial process, ex parte contacts violate the right to a fair hearing.⁵ Ex parte contacts generally cannot be rebutted in the adversarial process.⁶ And, problematically, an ex parte contact may carry disproportionate weight in the decision-making process.⁷

Improper ex parte communications have been referred to as fraud on the court, because they interfere with the decision-makers ability to make a fair decision.⁸ As one court summarized: “a party’s right to due process is violated when the agency decision-

³ Administrative Procedures Act, 5 U.S.C. § 551 (14).

⁴ *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1543 (9th Cir. 1993) (finding that in the Endangered Species context “[b]asic fairness requires that ex parte communications play no part in Committee adjudications, which involve high stakes for all the competing interests and concern issues of supreme national importance.”); C. Wolfram, *MODERN LEGAL ETHICS*, § 11.3 (“The purpose of the prohibition [on ex parte contacts] . . . is to prevent the communicating side from gaining an unfair advantage in the litigation.”)

⁵ C. Wolfram, *MODERN LEGAL ETHICS*, § 11.3 (“Such contacts violate the right of every party to a fair hearing, a corollary of which is the right to hear all evidence and argument offered by an adversary. The violation is particularly acute because the calculated secretiveness of such communications strongly suggests their inaccuracy.”)

⁶ *Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547, 563 (D.C. Cir. 1982); *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1543 (9th Cir. 1993) (listing cases).

⁷ John Allen, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH LAW REVIEW 1135, 1197 (1993) (“Unchallenged evidence or arguments are more salient, more likely to be recalled by the decision maker, and more likely to carry inordinate weight in the mental process of reaching a final conclusion.”)

⁸ *See, e.g., State ex. Rel. Corbin v. Arizona Corp. Com’n*, 143 Ariz. 219 (1984).

maker improperly allows ex parte communications from one of the parties to the controversy.”⁹

Allowing ex parte contacts can essentially nullify the public’s right to attend and participate in agency decisions. As the Ninth Circuit observed:

The public’s right to attend all Committee meetings, participate in all Committee hearings, and have access to all Committee records would be effectively nullified if the Committee were permitted to base its decisions on the private conversations and secret talking points and arguments to which the public and the participating parties have no access.¹⁰

The D.C. Circuit has further stated that ex parte contacts make a “mockery of justice”:

We think it is a mockery of justice to even suggest that judges or other decision-makers may be properly approached on the merits of a case during the pendency of an adjudication. Administrative and judicial adjudication are viable only so long as the integrity of the decisionmaking process remains inviolate. There would be no way to protect the sanctity of the adjudicatory process if we were to condone direct attempts to influence decision-makers through ex parte contacts.¹¹

In addition to issues of general fairness and possible taint of the decision, ex parte contacts can also damage the “integrity of the decision making process itself, and the public’s perception of the process.”¹²

B. THE MODEL ADMINISTRATIVE PROCEDURE ACT EX PARTE RULES

In the early 1980s, the Model Administrative Procedure Act was revised to include a prohibition of ex parte contacts in agency adjudication proceedings. The 1981 Model State Administrative Procedure Act was enacted by many states including Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Iowa, Kansas, Montana, Tennessee and Wyoming.¹³ It provides that:

. . . unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate directly or indirectly, regarding any issue in the proceeding, which the proceeding is pending, with any party, with any person who has a direct or

⁹ *State ex. Rel. Corbin v. Arizona Corp. Com’n*, 143 Ariz. 219 (1984).

¹⁰ *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1542 (9th Cir. 1993) (citing *United States Lines, Inc. v. Federal Maritime Comm’n*, 584 F.2d 519, 539 (D.C. Cir. 1978).

¹¹ *Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547, 570 (D.C. Cir. 1982).

¹² *Re Contacts Between Public Utilities and Former Commissioners*, 82 P.U.R.4th 559, 1987 WL 257598 (Minn. P.U.C. 1987).

¹³ Uniform Law Commission, Legislative Fact Sheet _ Model State Administrative Procedure Act (1981), available at [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Model State Administrative Procedure Act \(1981\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Model State Administrative Procedure Act (1981)).

indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.¹⁴

The Model Administrative Procedure Act (APA) further provides that members of multi-member panels may communicate with each other and work with staff as long as the staff does not receive ex parte communications.¹⁵ If an ex parte communication is received, the Model APA requires that it be put on the record and that other parties have an opportunity to rebut it.¹⁶ Finally, the Model APA provides for disqualification of a presiding officer receiving an ex parte communication and possibly disciplinary actions for a willful violation of the ex parte rules.¹⁷ The Model APA does not require oral communications to be included in the rulemaking record, stating “it would be undesirable to require all oral communications pertinent to every rule-making proceeding to be electronically recorded or reduced to writing and to be included in the rule-making record.”¹⁸

The Model State APA was revised in 2010. The new model rules broadened the scope of the ex parte prohibition to cover communications related to a pending case, rather than to just communications related to issues in the proceeding.¹⁹ The revision also limited an agency head to only have communications with staff that do not “augment, diminish or modify the evidence in the agency hearing record” to communications that either “explains technical or scientific evidence, explains precedent or policies, or otherwise does not address the weight, sufficiency,

¹⁴ 1981 Model Administrative Procedure Act, § 4-213 (1981), <http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa81.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 1981 Model Administrative Procedure Act, § 4-213 (1981). This section provides: “If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.” *Id.* It further provides that: “The agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section.” *Id.*

¹⁸ 1981 Model Administrative Procedure Act, Comment to § 3-112 (citing sources), *available at* <http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa81.pdf>. The model rule comment also states that “Of course, if an agency wants to impose on itself by rule such a prohibition on ex parte oral communications in rulemaking, or a requirement that all such oral communications be related to writing and included in the agency rule-making record, it may do so.” *Id.*

¹⁹ 2010 Model Administrative Procedure Act, § 408, *available at* http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf.

or quality of the evidence.”²⁰ The 2010 revision also specified that only uncontested procedural matters fall under an exception to the ex parte prohibition.²¹

III. CPUC’S EX PARTE REQUIREMENTS

A. CPUC’S CURRENT EX PARTE REQUIREMENTS

The California Public Utilities Code defines ex parte communication as: “any oral or written communication between a decision-maker and a person with an interest in a matter before the commission concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter.”²² The statute defines “[p]erson with an interest” as:

- (A) Any applicant, an agent or an employee of the applicant, or a person receiving consideration for representing the applicant, or a participant in the proceeding on any matter before the commission.
- (B) Any person with a financial interest. . . in a matter before the commission, or an agent or employee of the person with a financial interest, or a person receiving consideration for representing the person with a financial interest.
- (C) A representative acting on behalf 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.

The statute further describes some requirements for the CPUC’s ex parte rules including that: “reportable communications shall be reported by the party” even if the decision-maker initiated it; notice of communications should be reported within three working days; notices should describe the people present at the communication and the “date, time, and location of the communication, and whether it was oral, written, or a combination,” and the notice shall describe the “party’s, but not the decision-maker’s communication and its content.”²³

The statute further specifies that ex parte communications are prohibited in adjudication proceedings and allowed in rulemaking.²⁴ The statute’s language related to ratesetting proceedings appear to be conflicting. It provides that:

Ex parte communications are prohibited in ratesetting cases. However, oral ex parte communications may be permitted at any time by any commissioner if all interested parties are invited and given not less than three days' notice. Written ex

²⁰ 2010 Model Administrative Procedure Act, § 408, http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf.

²¹ 2010 Model Administrative Procedure Act, § 408, http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf.

²² Cal. Pub. Util. Code § 1701.1

²³ Cal. Pub. Util. Code § 1701.1.

²⁴ Cal. Pub. Util. Code § 1701.2 (adjudication); Cal. Pub. Util. Code § 1701.4.

parte communications may be permitted by any party provided that copies of the communication are transmitted to all parties on the same day. If an ex parte communication meeting is granted to any party, all other parties shall also be granted individual ex parte meetings of a substantially equal period of time and shall be sent a notice of that authorization at the time that the request is granted. In no event shall that notice be less than three days. The commission may establish a period during which no oral or written ex parte communications shall be permitted and may meet in closed session during that period, which shall not in any circumstance exceed 14 days. If the commission holds the decision, it may permit ex parte communications during the first half of the interval between the hold date and the date that the decision is calendared for final decision. The commission may meet in closed session for the second half of that interval.²⁵

One provision states that all parties need to be “invited and given not less than three days’ notice” for oral ex parte communications. Yet, another provision states that “individual ex parte meetings” are allowed as a follow-up to any individual meeting that does occur, and the decision maker must provide “a substantially equal period of time” for those follow-up meetings. This conflict is discussed further below.

The CPUC’s regulations define ex parte communications as a written or oral communication that:

- (1) concerns any substantive issue in a formal proceeding,
- (2) takes place between an interested person and a decision-maker, and
- (3) does not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the proceeding, or on the record of the proceeding.²⁶

The rules further describe what types of communication are procedural and not subject to the ex parte requirements: “[c]ommunications 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.”²⁷ The rules specifically prohibit discussion relating to the proper categorization of a proceeding and administrative law judge assignments.²⁸ The rules define interested person consistent with the statutory definition.²⁹ The rules also apply to advisors of the Commissioners: “[c]ommunication with Commissioners’ personal advisors are subject to all of the restrictions on, and reporting requirements applicable to, ex parte communications” except the requirement to provide equal time to parties.³⁰

The CPUC’s regulations follow the statutory mandate and divide its proceedings into three categories: adjudicatory, quasi-legislative, or ratesetting.³¹ In adjudicatory proceedings, ex

²⁵ Cal. Pub. Util. Code § 1701.3.

²⁶ Cal. Code Regs. tit. 20, § 8.1.

²⁷ *Id.*

²⁸ *Id.* at § 8.3.

²⁹ Cal. Code Regs. tit. 20, § 8.1.

³⁰ *Id.* at § 8.2

³¹ Cal. Code Regs. tit. 20, § 8.3

parte contacts related to the substance are prohibited.³² In quasi-legislative proceeding, ex parte contacts are permitted.³³ In ratesetting proceedings, ex parte contacts are permitted if noticed to other parties and other parties are given equal opportunity to meet with the Commissioner.³⁴ Ex parte communications are not included in the record of the proceeding.³⁵

The CPUC's rules interpret the potentially conflicting statutory language related to ratemaking proceedings as allowing for oral ex parte contacts in ratemaking proceedings through two different avenues: (1) all party meetings in which all parties are invited, and (2) individual meetings as long as each party is given equal time.³⁶ Consistent with the statute, the regulations also prohibit ex parte contacts in relation to a ratesetting deliberative meeting.³⁷ In the event of a violation, the rules provide: "When the Commission determines that there has been a violation of this rule or of Rule 8.4, the Commission may impose 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."³⁸ The rules, as the statute prescribes, also require that the ex parte communication is reported by the "interested person" even if the interested person did not initiate it.³⁹

B. ISSUES RELATED TO CPUC 'S CURRENT EX PARTE REQUIREMENTS

1. Pervasive Ex Parte Contacts Both Proper and Improper

The CPUC ex parte rules broadly allow private contacts in ratemaking proceedings, which are the majority of the CPUC's contested proceedings, as long as the first such contact is noticed to other parties at least three days in advance and then all contacts are noticed to other parties after it has occurred.⁴⁰ Ratemaking proceedings are at the heart of what the CPUC does – it passes judgment on the appropriate revenue requirement for a given utility, including such things as the cost of new power contracts, safety programs and new infrastructure, which in turn determines where most Californians get their electricity and how much it costs. In these proceedings, the Commission also establishes rate design, which is critical to the allocation of costs to various customer classes, and can have dramatic effect on the Commission's ability to achieve its policy objectives. Given the agency's broad allowance of ex parte contacts, decision-makers in the CPUC regularly engage in off-the-record communications with utilities and other stakeholders, creating a culture of the exchange of information critical to Commission decisions occurring behind closed doors. This seriously compromises the integrity and the fairness of the process and the public's right to have a meaningful say in the makeup of their electrical grid.

³² Cal. Code Regs. tit. 20, § 8.3.

³³ *Id.*

³⁴ *Id.* The rules also provide that the Commission may prohibit ex parte communications 14 days before a vote on a proposed decision if a ratesetting deliberative meeting is held. *Id.*

³⁵ Cal. Code Regs. tit. 20, § 8.3(k).

³⁶ Cal. Code Regs. tit. 20, § 8.3.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Cal. Code Regs. tit. 20, § 8.4.

⁴⁰ *See supra* at pp. 8-9.

Improper private contacts, such as those recently revealed, raise suspicions of wrongdoing and of an unfair process. The CPUC controversy is prompted solely by the revelation of questionable emails. What has been said in face-to-face conversations and in other contexts? Beyond the potential to effectively nullify the benefits of developing an administrative record in a proceeding, such private conversations have no assurance of accuracy or completeness. The decision-makers may be left with an impression that they understand the critical issues and underlying facts, but then they are unlikely to take adequate steps to test that impression. In addition, allowing private contacts, as California does, can consume significant amounts of decision-makers time – time which could be better spent evaluating the official administrative record.⁴¹

2. The Statutory Language Allows for Ex Parte Communications in Ratesetting Proceedings If All Parties Are Invited.

The statute appears to contain internal inconsistencies. It prohibits ex parte communications in ratesetting matters unless “all interested parties are invited and given not less than three days' notice.” This language is not limited to a subset of oral ex parte communications. The plain language initially requires that all parties be invited for all oral ex parte communications related to ratemaking proceedings. The statute then describes the notice and equal-time requirement triggered if a decision-maker nonetheless grants a private meeting. One implication is that private meetings are permitted in ratesetting matters if certain procedures are met. A more restrictive interpretation is that the Legislature intended to eliminate and prohibit private meetings and only included other procedures to protect all parties in the event that a decision-maker violated the ban and undertook a private meeting.

A closer look at the legislative history suggests that the California Assembly preferred the more restrictive interpretation. The Assembly's Bill Analysis states:

Ratesetting cases shall be heard by either an ALJ or a commissioner as the principal hearing officer. The principal hearing officer shall be present in at least one-half of the hearings. The assigned commissioner shall be present for the closing arguments. *Ex parte communications are prohibited except: oral ex parte communications may be permitted by any commissioner if all interested parties are invited and given three days notice; and written ex parte communications may be permitted if copies of that communication are transmitted on the same day.*⁴²

Thus, the Assembly analysis seems to interpret the ratemaking provision as requiring all parties to be invited to ex parte meetings. That same Assembly analysis describes the purpose of the legislation as a “positive first step in transforming an agency designed to regulate monopolies through command and control regulation to one with procedures more suited to the emerging competitive utility marketplace.”⁴³

⁴¹ The authors are aware that the CPUC staff in Commissioners' offices have raised this concern in informal discussions.

⁴² California Bill Analysis, S.B. 960 Assem., 8/28/1996 (emphasis added).

⁴³ California Bill Analysis, S.B. 960 Assem., 8/28/1996.

That same day, the Senate released a conference report that described how the provision allows ex parte communications as long as each party has equal opportunities. The report provides:

The Conference amendments to SB 960 create three classes of cases within the PUC: adjudication, ratesetting, and quasi-legislative. At the start of each case a commissioner must issue a scoping memo which describes the issues and lays out a timetable for resolution. In adjudication cases, where the PUC is acting like a court, off-the-record, or ex parte, contact is prohibited. *In ratesetting cases the PUC may have ex parte contacts provided that all parties have an equal opportunity for contact.* Once the ex parte contact is ended the PUC may meet in closed session to consider the case. In cases in which the PUC is setting policy (quasi-legislative) a commissioner must be present for all formal hearings. To facilitate the free flow of information, there are no ex parte contact restrictions.⁴⁴

This focus on an equal opportunity for contact in the Senate's report is different from the focus on inviting all parties suggested by the Assembly report, but the two can be read to be consistent. If all parties are invited to ex parte meetings, then all parties will be given equal opportunity for contact.

Later reports suggest that Senate Bill 960, which added the relevant language, was intended to reduce ex parte contacts. For example, one report related to Senate Bill 779 states that: "SB 960 also created new stricter rules governing off-the-record (ex parte) communications."⁴⁵

Regardless of how one were to reconcile these mixed messages, two things are clear. First, the Commission's rules implementing the statute do not reflect the legislative preference to discourage, if not entirely ban, ex parte communications in ratesetting proceedings. Instead, the Commission's rules swing the door wide open and focus on notice and filing requirements, implying that all private communications in such proceedings are welcome. Second, although the ban on communication in both the adjudicatory and ratesetting contexts is stated in terms general enough to apply to all participants, including decision-makers, the Commission's rules and practice impose the prohibition only on interested parties, and set forth no responsibilities for commissioners and other decision-makers other than the obligation to entertain equal-time meetings in ratesetting cases. In addition, consistent with statutory requirements, the Commission has created rules that place the obligation to report on ex parte communications squarely on the shoulders of interested parties, who are in turn prohibited from reporting on what a decision-maker might have said at that meeting. While most other jurisdictions impose the reporting requirement on the decision-makers themselves, CPUC commissioners and other decision-makers take no formal responsibility to inform other parties or the general public about their private conversations. In short, the CPUC decision-makers have left themselves with no

⁴⁴ California Bill Analysis, S.B. 960, 8/28/1996 (emphasis added).

⁴⁵ See California Bill Analysis, S.B. 779, available at ftp://leginfo.public.ca.gov/pub/97-98/bill/sen/sb_0751-0800/sb_779_cfa_19980825_143640_asm_comm.html

obligation to avoid improper meetings or to let anyone know about private meetings (improper or otherwise) that do occur. This is inconsistent with most other jurisdictions examined in this analysis.

3. The Rule's Requirements Are Unclear or Not Well Understood.

In addition to there being problems with the over-permissive culture in which private conversations are pervasive, some of the current rules appear to be misunderstood. For instance, even though the CPUC's ex parte rules clearly prohibit discussions related to judge assignments, one of the Commissioners claimed he was not aware of the rule and that he would take a refresher course on the rules.⁴⁶ This lack of awareness is not entirely surprising given that ex parte contacts are currently a regular, every-day occurrence, and due to the fact that decision-makers have no explicit responsibility to report ex parte contacts.

In addition, even when a party or decision-maker tries to follow the rules, there are some ambiguities that effect whether all contacts that influence decision-makers are reported. For instance, Rule 8.2 applies ex parte requirements to "personal advisors." "Personal" is not defined in the rules, which makes it unclear who qualifies as a personal advisor. The agency has typically interpreted this requirement as applying only to advisors that sit in an actual commissioner office. However, a recent ruling in a proceeding imposing sanctions for violating ex parte rules requires one utility to "report all communications with any Commission staff acting in an advisory capacity, including but not limited to the General Counsel, the Executive Director, Deputy Executive Directors, Division Directors, and advisory staff, regarding any substantive or procedural issue in an open formal adjudicatory or ratesetting proceeding."⁴⁷ Given that staff members outside of a Commissioner's office regularly advise decision-makers, this could be an appropriate ruling to apply more broadly.

Another issue is the distinction between procedural and substantive matters. While the CPUC's rules attempt to recognize this difference, the distinction between procedural and substantive issues can be ambiguous to parties trying to determine whether to contact a decision-maker, and apparently unclear to decision-makers, as well. For example, one news article recently quoted a commissioner as suggesting that a message discussing the potential financial impact on the company of a significant enforcement penalty was not "substantive" because it did not directly advocate for a specific fine.⁴⁸ The communication clearly related to potential action in a specific docket. The communication must be either procedural or substantive. It is unclear how one could argue that the communication in question addressed a procedural issue, or that it

⁴⁶ See PG&E Officials Removed for Improper Communications, NEW YORK TIMES (Sept. 15, 2014), <http://www.nytimes.com/aponline/2014/09/15/us/ap-us-pipeline-explosion.html?hp&action=click&pgtype=Homepage&version=WireFeed&module=pocket-region®ion=pocket-region&WT.nav=pocket-region>.

⁴⁷ See CPUC Application 13-12-012, October 16, 2014 Ruling of Administrative Law Judge Yacknin.

⁴⁸ See California Energy Markets Issue 1294 at p. 6 (August 1, 2014).

did not go to the substantive outcome of the proceeding. The existing rules offer no clarity in this regard.

IV. ELEMENTS OF EX PARTE REQUIREMENTS – COMPARISON AND RECOMMENDATION

A. OVERVIEW OF ANALYSIS

This analysis of ex parte rules focuses on states and agencies that share similarities with the CPUC. The federal agency that regulates energy rates, the Federal Energy Regulatory Commission, was analyzed. Two California agencies that work on technical energy-related issues – the California Air Resources Board and the California Energy Commission – were also analyzed. This analysis also evaluates the rules for the utility commissions in the four most populous states in the country after California – Texas, New York, Illinois and Florida, and a handful of other states around the country-- Connecticut, Delaware, Virginia, and Nevada. Appendix 2 provides a description of the ex parte requirements for each of these entities. In addition to analyzing similar entities, the authors also conducted a handful of interviews of former regulators to understand some regulators’ views of the ex parte practices in their respective jurisdictions. Summaries of these conversations are included in Appendix 1 and referenced throughout. The purpose of this analysis was to evaluate the ex parte requirements for each of the entities and identify potential improvements to the CPUC’s current requirements.

B. ANALYSIS OF ELEMENTS OF EX PARTE REQUIREMENTS

1. Types of Proceedings Covered – All Contested Proceeding Should Be Covered

The CPUC’s allowance of ex parte contacts in ratemaking proceedings is inconsistent with the majority of entities analyzed. For instance, FERC prohibits ex parte communications in “all contested on-the-record proceedings.”⁴⁹ The majority of the states analyzed do not allow ex parte contacts in contested proceedings, which has been interpreted to include ratemaking proceedings.⁵⁰

One exception to the general rule is New York’s Public Service Commission. New York’s experience, however, should not be followed in California. Notably, although ex parte requirements are technically inapplicable to the Public Service Commission, some commissioners have imposed strict ex parte requirements in their cases.⁵¹ In addition, there

⁴⁹ 18 C.F.R. § 385.2201. Contested on-the-record proceedings is 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 pursuant to rule 206 by the filing of a complaint with the Commission, or any proceeding initiated by the Commission on its own motion or in response to a filing.” *Id.* at § 385.2201(c)(1). The coverage of this rule begins when FERC issues an order that initiates a proceeding, court issues a mandate for remand, a complaint is filed, or an intervention is filed in which an intervenor disputes a material issue. *Id.* at § 385.2201(d).

⁵⁰ See *infra* Appendix 2.

⁵¹ Interview with Peter Bradford, November 3, 2014.

recently have been recommendations to change New York's broad allowance of ex parte contacts. In November 2012, the Governor of New York established a commission called the Moreland Commission to review the "adequacy of regulatory oversight of the utilities and the mission of the State's energy agency and authority functions."⁵² After analyzing the Public Service Commission's ex parte rules, the Moreland Commission recommended that the "[e]xisting statutory exemption of ex parte rules as they relate to the [Public Service Commission] Commissioners should be eliminated."⁵³ The Moreland Commission based this recommendation on several findings, including the observation that New York's current broad allowance of ex parte contacts creates a "disparity in the ability of certain classes of utility customers to avail themselves of direct access to decision-makers."⁵⁴ The Moreland Commission further found that ex parte contacts undermine "the indispensable fairness and unbiased attributes of decision-makers," and that New York's broad allowance of contacts is an anomaly.⁵⁵

In addition to the fact that the majority of similar entities do not allow ex parte contacts in ratemaking proceedings, the courts have similarly found that ratemaking proceedings should be afforded the protections of a judicial proceeding. While the legislature initially set rates in most jurisdictions, the states soon recognized that this function was not purely legislative in nature, and all states established regulatory agencies that function in a "quasi-legislative, quasi-judicial" manner. This hybrid condition was made more obvious over the years, as legislatures passed more and more statutory provisions which must be interpreted by regulators as part of the ratesetting process. Arguably, statutory interpretation includes some characteristics akin to a judicial function. In 1890, when reviewing ratemaking proceedings related to railroads, the Supreme Court stated that: "[t]he question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."⁵⁶ Courts reviewing ratemaking proceedings more recently have followed a similar line of reasoning. The Ninth Circuit found that because Congress required rate decisions under the Pacific Northwest Electric Power Conservation Act to be based on a record after a hearing, APA protections, including the ban on ex parte contacts, were triggered.⁵⁷ The Ninth Circuit has also found that Bonneville Power Administration

⁵² See NEW YORK MORELAND COMMISSION ON UTILITY STORM PREPARATION AND RESPONSE, FINAL Report (June 22, 2013), *available at* <http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/MACfinalreportjune22.pdf>.

⁵³ See NEW YORK MORELAND COMMISSION ON UTILITY STORM PREPARATION AND RESPONSE, FINAL REPORT (June 22, 2013), *available at* <http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/MACfinalreportjune22.pdf>

⁵⁴ *Id.* at 43.

⁵⁵ *Id.* at 43. The Moreland Report also cited Massachusetts as broadly allowing ex parte contacts.

⁵⁶ *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U.S. 418, 457-58 (1890).

⁵⁷ See *Southern Cal. Edison v. Fed. Energy Regulatory Authority*, 770 F.2d 779 (9th Cir. 1985).

ratemaking proceedings are subject to the APA's prohibition of ex parte communications.⁵⁸ This ban does not extend to discussions between customers with whom the agency was authorized to enter into rate negotiations.⁵⁹ An Arizona court decision similarly found that the commission's process for gathering evidence through an evidentiary hearing in the ratemaking process is quasi-judicial and therefore subject to ex parte rules.⁶⁰

Of the federal and state provisions that were examined for this analysis, a few entities provide an exception for legislative rulemaking. Specifically, FERC's ex parte prohibition applies to all contested on-the-record proceedings except "notice-and-comment rulemakings under 5 U.S.C. 553, investigations under part 1b of this chapter, proceedings not having a party or parties, or any proceeding in which no party disputes any material issue."⁶¹ The California Administrative Procedure Act only provides an exception for legislative regulatory action, which is defined as: "the regulatory action, notice of which is submitted to the office for publication in the California Regulatory Notice Register."⁶²

Some of the states analyzed provide a limited exception for legislative rulemaking, declaratory judgments or other types of uncontested proceedings. Specifically, Connecticut's requirements generally apply to all contested cases, including ratemaking, except for the promulgation of regulations and declaratory judgments.⁶³ Delaware's rules apply to "all agency case decisions except by its utility commission except temporary restraining orders or similar types of orders."⁶⁴ Illinois' rules apply to all Commission proceedings.⁶⁵ Florida's requirements generally apply to all proceedings except legislative rulemakings, declaratory actions, workshops and internal affairs meetings.⁶⁶ Texas' rules apply to all contested cases, which are defined as: "[a] proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing."⁶⁷ Virginia's statute broadly applies to: "any fact or issue arising out of a proceeding involving the regulation of rates, charges, services or facilities of railroad, telephone, gas or electric companies."⁶⁸ Nevada's statute applies to contested cases, which is defined as a "proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed."⁶⁹

⁵⁸ *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101 (9th Cir. 1984).

⁵⁹ *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101 (9th Cir. 1984).

⁶⁰ *State ex rel. Corbin v. Arizona Corp. Comm'n*, 13 Ariz. 219 (Ariz. Ct. of Appeals 1984).

⁶¹ 18 CFR § 385.220.

⁶² Cal. Gov't Code § 11342.595.

⁶³ Conn. Gen. Stat. Ann. § 4-166.

⁶⁴ Del. Code Ann. tit. 29, § 10121.

⁶⁵ 220 Ill. Comp. Stat. Ann. 5/10-103.

⁶⁶ Fla. Stat. Ann. § 350.042.

⁶⁷ Texas Administrative Code, Title 16, Part 2, Chapter 22, Subchapter A, Section 22.2(16).

⁶⁸ Virginia General Statutes § 12.1-30.1 (Meetings and communications between commissioners and parties or staff).

⁶⁹ Nevada Administrative Procedure Act, NRS 233B.032.

The key determinants in many jurisdictions are the existence of disagreement among the participants, the existence of adjudicatory-like features such as evidentiary hearings and the expectation that the decision-makers will have to review and assess conflicting positions. The implication is that the right to offer facts and critique opposing points of view in a public, accountable manner must be protected, and that private substantive communications are in conflict with this objective. For all of the reasons discussed above, the CPUC should follow the majority of states, the CEC, CARB, and FERC by prohibiting ex parte contacts in all contested proceedings, with the possible exception of legislative rulemaking proceedings where no hearings are held and no individual substantive rights are affected.

2. Types of Communications Covered – There Should Be a Clear Delineation Between Procedural and Substantive Communications.

As discussed above, CPUC’s rules distinguish between procedural and substantive matters. The rules specify that: “[c]ommunications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such non-substantive information are procedural inquiries, not ex parte communications.”⁷⁰ However, as discussed above, there can be issues determining whether something qualifies as an ex parte contact. The difficulty distinguishing between what matters are truly procedural and what matters are substantive and contested has been noted in cases. For instance, in a case in Connecticut, the court stated: “[t]he [agency] attorneys in particular are acutely aware that the boundary line between that which is procedural and that which is substantive is often unclear, and they act accordingly with circumspection.”

FERC’s statute provides detailed definitions describing the type of communications subject to the prohibition. “Off-the-record communication means any communication relevant to the merits of a contested on-the-record proceeding” without filing and noticing the other parties.⁷¹ Relevant to the merits is defined as:

capable of affecting the outcome of a proceeding, or of influencing a decision, or providing an opportunity to influence a decision, on any issue in the proceeding, but does not include:

- (i) Procedural inquiries, such as a request for information relating solely to the status of a proceeding, unless the inquiry states or implies a preference for a particular party or position, or is otherwise intended, directly or indirectly, to address the merits or influence the outcome of a proceeding;
- (ii) 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; or,

⁷⁰ Cal. Code Regs. tit. 20, § 8.1.

⁷¹ 18 C.F.R. § 385.2201(b).

(iii) Communications relating to compliance matters not the subject of an ongoing proceeding.⁷²

The California Administrative Procedure Act and the Law Revisions Commission Comments provide more guidance to help distinguish between procedural and substantive matters than do the CPUC ex parte rules. Section 11430.20 of the California Administrative Procedure Act provides that the prohibition does not include communications that “concern a matter of procedure or practice, including a request for a continuance, that is not in controversy.”⁷³ The Law Revision Commission Comments provide further description of what this provision is intended to cover: “This article is not intended to preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions . . . [s]uch topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.”⁷⁴ It would be helpful to include this more specific clarification and discussion in the CPUC ex parte rules to help minimize issues that may arise related to distinguishing between procedural and substantive issues.

3. Parties or Members of the Public

CPUC’s requirements apply to “interested persons,” which is a limited subset of entities that may privately contact CPUC decision-makers. Due to the definition of “interested persons,” if an agency decides to become a party to a proceeding, it will need to report all contacts whereas other agencies that are not parties to a proceeding will not report contacts. Other entities have a broader scope and require other agencies that contact the entity to at least provide notice of the contact. For example, FERC’s requirements apply to any “person outside the Commission.”⁷⁵ FERC’s rules allow ex parte contacts from agencies with regulatory responsibility, but then require that such contacts are reported.⁷⁶ This allows there to be increased transparency related to outside agency contacts. Other entities also take a stricter approach than the CPUC. Connecticut’s and Delaware’s requirements apply to any “person” or “party.”⁷⁷ Texas’s requirements apply to communications “in connection with any issue of law or fact with any agency, person, party, or their representatives.” In other words, Texas’ requirements apply to anyone making a communication related to law or fact. A majority of the analyzed entities require a broader approach, similar to that employed by Texas. California should explore changing CPUC’s requirements to apply more broadly to entities other than interested persons as currently defined.

4. Treatment of Other Agency Staff - Rules Need to Clearly Define Who Is a Decision-Maker

As discussed above, there has been some confusion related to which agency staff members are covered under the rules. FERC’s rules provide a clearer definition:

⁷² 18 C.F.R. § 385.2201(c)(5).

⁷³ Cal. Gov’t Code § 11430.20.

⁷⁴ 25 Cal. L. Rev. Comm. Reports 55 (1995).

⁷⁵ See 18 C.F.R. § 385.2201.

⁷⁶ *Id.*

⁷⁷ See Conn. Gen. Stat. Ann. § 4-181; Del. Code Ann. Tit. 29, § 10129.

Decisional employee means 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, but does not include an employee designated as part of the Commission's trial staff in a proceeding, a settlement judge appointed . . . a neutral (other than an arbitrator) . . . in an alternative dispute resolution proceeding, or an employee designated as being non-decisional in a proceeding.⁷⁸

A similar definition would help to eliminate confusion as to whether a particular advisor is a “personal” advisor or not under the rules. This rule would also help ensure that parties would not contact other agency staff as a run-around of the ex parte rules.

5. Discussions Between Decision-makers

It is considered to be antithetical to a fair and open process to allow private deliberations among decision-makers in a context where ex parte communications are permitted. This can be seen in the structure of California’s Opening Meeting Act, called Bagley-Keene, which applies to the CPUC and does not allow more than two CPUC commissioners to discuss a matter in private unless a ratesetting deliberative meeting is set and ex parte contacts are prohibited for a prescribed period of time.⁷⁹ This interplay between allowing decision-makers to meet and banning ex parte contacts is seen in other entities that were studied. For example, Connecticut limits the ability of decision-makers to talk to each other if a decision-maker has received an improper ex parte contact.⁸⁰ Nevada, which bans ex parte communications, provides explicit permission for members of the agency to meet in private.⁸¹ Broadly for federal regulatory matters, the Sunshine Act includes an exception from open-meeting requirements for formal agency adjudications.⁸² Commonly, an on-the-record proceeding is considered to be a formal agency adjudication. Courts have found that the legislative history leading to the Sunshine Act “makes clear that the exemption should apply only to discussions of adjudication when the adjudication has taken place on the record and subject to the prohibition of *ex parte* communications in the Administrative Procedure Act. These strictures on formal adjudication work together with the Sunshine Act to achieve full accountability to the public.”⁸³

It should be noted that while New York’s Open Meeting Law does provide a general exemption for “judicial or quasi-judicial proceedings,” this exemption does not currently apply to public service commission proceedings, which are not subject to an explicit ex parte ban.

Considering the CPUC’s current liberal use of ex parte meetings in a wide variety of contested proceedings, it is not surprising that the Bagley-Keene Act does not allow for the commissioners to deliberate privately in more situations. Based on experiences both at the

⁷⁸ 18 C.F.R. § 385.2201.

⁷⁹ Cal. Gov’t Code § 54950, et. al.

⁸⁰ Interestingly, this is from Connecticut’s statutory language. The regulatory language does not have such a requirement.

⁸¹ Nevada Administrative Procedure Act, NRS § 233B.126.

⁸² 5 U.S.C. § 552b(c)(10).

⁸³ *Philadelphia Newspapers, Inc. v. Nuclear Regulatory Commission*, 727 F.2d 1195, 1201 (D.C. Circ. 1983).

federal level and in other states, there is reason to imagine that the Legislature might loosen Bagley-Keene restrictions as they apply to the CPUC in response to restrictions on ex parte communications more in line with those affecting other agencies.

6. An Affirmative Duty on Decision-makers Receiving Improper Ex Parte Contacts

The California Public Utilities Code and the CPUC's rules do not require decision-makers to report improper ex parte contacts or to ensure that ex parte contacts are appropriately filed and noticed. CPUC's rules are in the minority. Most entities that have ex parte prohibitions include some type of affirmative requirement on decision-makers. As former Illinois Commissioner Marty Cohen pointed out, since parties do not want to unduly burden decision-makers, most parties are careful to not put decision-makers in a position of having to disclose contact.⁸⁴ This, alone, may tend to discourage unnecessary communications.

For example, FERC requires decision-makers to disclose improper ex parte contacts:

Any decisional employee who makes or receives a prohibited off-the-record communication will promptly submit to the Secretary that communication, if written, or a summary of the substance of that communication, if oral. 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.⁸⁵

Former FERC chair Jon Wellinghoff reports that the commissioners take this responsibility very seriously. They attempt to avoid unlawful contacts. When they occur nonetheless, the practice is for the effected decision-maker to file a report promptly.⁸⁶

The California APA, followed by CARB and the CEC, also requires a decision-maker to "disclose the content of the communication on the record and give all parties an opportunity to address it."⁸⁷ Section 11430.50 further specifies that the presiding officer "shall make" the improper communication part of the record, notify all the parties of the communication, and allow parties an opportunity to address it.⁸⁸ Illinois, Texas and Florida similarly require decision-makers to report ex parte contacts. For example, Texas requires that records must be kept of all such communications and made available to the public on a monthly basis. The records of communications must contain the following information:

- (A) name and address of the person contacting the commission;
- (B) name and address of the party or business entity represented;
- (C) case, proceeding, or application, if available;
- (D) subject matter of communication;
- (E) the date of the communication;
- (F) the action, if any, requested of the commission; and

⁸⁴ See Appendix 1, Summary of Conversation with Marty Cohen.

⁸⁵ 18 C.F.R. § 385.2211(f).

⁸⁶ See Appendix 1, Summary of Conversation with Jon Wellinghoff, October 16, 2014.

⁸⁷ Cal. Gov't Code § 11430.40.

⁸⁸ Cal. Gov't Code § 11430.50.

(G) whether the person has received, or expects to receive, a financial benefit in return for making the communication.

Texas also requires the commission to establish rules governing communications. The Texas Commission's own rules state that members of the commission or administrative law judges assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not communicate, directly or indirectly with anyone except commission advisory staff about the case. The onus is placed squarely on the decision makers.

It is unusual that an agency such as the CPUC would put the reporting burden on the parties, rather than on the decision-maker. In this case, however, the CPUC created rules consistent with the underlying statute. It would require a change in the law to relieve parties of the responsibility to file reports. However, the CPUC could go beyond existing law and establish a procedure where its decision-makers would file reports as well. This could be done without new legislation.

7. Remedies for Improper Ex Parte Contact

In Florida, if a commissioner knowingly fails to put an ex parte communication on the record, the commissioner could be fined.⁸⁹ One case, a commissioner was fined \$5000 for failing to put an improper ex parte contact on the record.⁹⁰ In general, most jurisdictions apply a balancing test to determine the remedy for an improper ex parte contact. Florida's approach is worth exploring because it has been applied when a commissioner violates an affirmative duty to report improper ex parte contacts. However, an examination of other jurisdiction uncovered no precisely-defined remedies, beyond general provisions in various states for penalties in the event of the violation of orders or rules by utilities or other parties.

Most logically, the existence of clear and predictable remedies in the face of an ex parte rule violation by an outside party or a decision-maker should provide an incentive for all involved to comply with the rules. The CPUC has already struggled with the appropriate and effective way to penalize a multi-billion dollar corporation for such rule violations. This may be a worthy topic for further consideration by the legislature.

IV. CONCLUSION

Most California agencies, key federal agencies, and utility regulators in most other states recognize the importance of avoiding ex parte communications in contested matters. In most situations, the CPUC does not. Where prohibitions on such private communications are stronger than those before the CPUC, regulators report no impairment in their ability to decide matters knowledgeable and efficiently. In all other jurisdictions studied for this report where ex parte prohibitions exist, the primary responsibility rests with the decision-maker to avoid such contacts. The rules at the CPUC place no responsibility on the decision-makers, beyond requiring that they grant equal-time meetings in some circumstances. Where other agencies

⁸⁹ Fla. Stat. Ann. § 350.042

⁹⁰ See *In re Rudolph Bradley*, 2007 WL 1697092 (Fla. Div. Admin. Hearings June 11, 2007).

require reporting of ex parte contacts, it is the decision-makers who must make the report. Not so at the CPUC.

It is not difficult to see how these circumstances can lead to communications in contested matters that would violate some concepts of ethical behavior, to violations of the prohibitions that do exist at the CPUC, and to unreported communications. When it comes to governing their own communications with public officials, many advocates will take their lead from the public officials themselves. If the official does not put a stop to improper contacts, then why stop? If the public official does not express a concern about the need to file reports on ex parte communications, why report? For these reasons, the highest priority of any ex parte reform at the CPUC should be the following:

1. Broaden the list of prohibited communications to make it more consistent with the approach used by other agencies. – a ban on ex parte communications in contested matters, while allowing for properly noticed meetings where all parties are invited.
2. Phrase the prohibition as it applies to other agencies – prohibit the decision-makers from participating in improper communications.
3. Place the reporting responsibility where it applies in most other agencies – the responsibility to report ex parte communications should rest with the decision-makers.

Beyond these principles, there are several other modifications that promise to clarify responsibilities and contribute to more effective and transparent process:

1. More clearly define the distinction between substantive communications, which would be subject to limitations, and procedural communications, which would not. This might be done most effectively by creating a discrete list of communications which would be considered to be procedural.
2. Broaden the restrictions to apply to communications with any outside person, not just formal parties and their agents.
3. To avoid having various advisory staff serve as messengers between interested parties and those current designated as decision-makers, broaden the definition to decision-makers to include all of those staff members who are working with commissioners or their in-office advisors to help shape the ultimate result.
4. Clearly define the consequences of a decision-makers failure to prohibit avoidable ex parte communications or to report on those that do occur.

Most of these changes could be enacted by the CPUC without benefit of new legislation. Where current law does not require certain behavior by decision-makers, the CPUC could likely take on additional responsibilities without a change in the statute. Others may require changes to the law. The CPUC can take the lead in seeking such changes.

Finally, ex parte reforms may be the key to better decision-making at the agency. With proper limitations on ex parte communications, the CPUC would be in a much stronger position to seek modifications to open meetings laws to facilitate more effective deliberations among the commissioners.

Appendix 1 – Experience by Previous Decision-makers related to Ex Parte Rules

Discussion with Jon Wellinghoff, October 16, 2014

Mr. Wellinghoff most recently served as the Chair of the Federal Energy Regulatory Commission, where he functioned within the boundaries of a rule that banned ex parte communications in contested proceedings. He found that this rule did not interfere with his ability to make fully informed decisions. Mr. Wellinghoff and his staff could rely on all of the pleadings and anything in the formal record. Commissioners could meet to discuss pending matters as long as a quorum (three of the five commissioners) was not present. In addition, the commissioners' advisory staff met frequently to discuss pending cases with each other and with the staff responsible for writing draft orders. As a result, decisions were complete and ready for a vote by the time the Commission considered them in a public meeting. The onus was on the commissioners and other decision-makers to report on any ex parte communications, whether or not the outside person represented a formal party to the proceeding in question. For instance, if a U.S. senator called a commissioner to express interest in a pending proceeding, the commissioner would inform the senator that the communication was an ex parte communication and that he or she would file a report on the conversation with the FERC General Counsel and include the report in the record in the proceeding.

Any entity planning to file an application, complaint, or make any other formal request might contact a decision-maker prior to making a formal filing in order to discuss the matter. This, in some circumstances, may have created the potential for an inequitable situation, in that other effected parties may have no notice of the meeting or impending filing and therefore may not be able to anticipate and respond to points made by the filing party. However, these communications preceded both the development of the formal record and the time for internal deliberations. Also, there was no certainty that the proposed filing would in fact be made. Mr. Wellinghoff found these early communications to generally be useful, but to have little impact on the outcome of the proceeding. On balance, he felt that the benefits of the ex parte ban far outweighed any inequities related to the pre-filing communications.

Discussion with Peter Bradford, November 3, 2014

Mr. Bradford has been a decision-maker for three entities: the New York Public Service Commission, the Maine Public Utilities Commission and the Nuclear Regulatory Commission. In his over twenty years of experience, he has been able to make his decisions without ex parte communications. He commented that Maine and the NRC had similar ex parte rules, which prohibited ex parte contacts in adjudicatory proceedings.

In New York, although ex parte contacts were broadly allowed, each commissioner was allowed to apply their own rules. He used what he did in Maine and the NRC and prohibited ex parte contacts. (During his tenure in New York, several of the commissioners had a policy of no ex parte contacts.) There were several reasons why he did this. He did not want to spend the time to have the meetings because he would then have had to have similar meetings with most of the

other parties and he did not think he would gain much from ex parte meetings. He does not believe that he was put at a disadvantage by not having meetings, and it did not impair his ability to understand the cases. He noted that nothing prevented commissioners from communicating with administrative law judges to assure that a full record was developed on any issue of interest.

He noted that regulatory agencies do not have operational responsibilities and can therefore take the time to get the facts that they need through adjudicatory processes. Exemption processes can be crafted to deal with the rare emergency situations in which formal procedures take too long.

Mr. Bradford further noted how the court system functions with prohibitions on ex parte contacts, and that he sees no reason why regulatory agencies cannot do the same. He also commented that there is no reason to believe that the many states with rigorous ex parte requirements have not made good decisions. One tool that he found effective in New York was relying on panels in which all the parties were invited to present.

Discussion with Marty Cohen, November 3, 2014

For three decades Mr. Cohen has worked as an advocate and expert witness before the Illinois Commerce Commission, and briefly served as its Chairman. Illinois affirmatively requires decision-makers, including commissioners and their assistants, to report improper ex parte communications. Mr. Cohen noted that due to this affirmative duty, parties are careful to not put a commissioner in a situation where they have to report a communication. He also described that parties and commissioners are very cautious now in Illinois because there were problems around a decade ago when there was a perceived coziness of some commissioners with the utilities, although an investigation by the state Attorney General's office did not result in any action.

Under the Illinois Open Meeting Act, the five commissioners can only meet privately in groups of no greater than two, but nothing prevents commissioners from meeting in series. He described how one way parties work around the ex parte rule is that they preview cases to commissioners before they file, provided there are no pending cases addressing the same issues. This is a common practice.

APPENDIX 2 - SUMMARY OF THE REQUIREMENTS FOR STATES AND AGENCIES DISCUSSED IN COMPARISON

- FERC
- California APA
- CARB
- CEC
- Connecticut
- Delaware
- Illinois
- Texas
- Virginia
- Nevada
- New York
- Florida

FEDERAL ENERGY REGULATORY COMMISSION

The purpose of FERC's ex parte prohibition is to permit "fully informed decision making by the Commission while ensuring the integrity and fairness of the Commission's decisional process."⁹¹ FERC prohibits ex parte communications in "all contested on-the-record proceedings."⁹² FERC exempts communications in "notice-and-comment rulemakings under 5 U.S.C. Section 553 investigations under part 1b of this chapter, or any proceeding in which no party disputes any material issue" from this requirement.⁹³

The statute specifies that unless expressly permitted, "in any contested on-the-record proceeding, no person outside the commission shall make or knowingly cause to be made to any decisional employee, and no decisional employee⁹⁴ shall make or knowingly cause to be made to any person outside the Commission, any off-the-record communication."⁹⁵

⁹¹ 18 C.F.R. § 385.2201(a).

⁹² 18 C.F.R. § 385.2201. Contested on-the-record proceedings is 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 pursuant to rule 206 by the filing of a complaint with the Commission, or any proceeding initiated by the Commission on its own motion or in response to a filing." *Id.* at § 385.2201(c)(1). The coverage of this rule begins when FERC issues an order that initiates a proceeding, court issues a mandate for remand, a complaint is filed, or an intervention is filed in which an intervenor disputes a material issue. *Id.* at § 385.2201(d).

⁹³ 18 C.F.R. § 385.2201(c)(1)(ii).

⁹⁴ "Decisional employee means 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, but does not include an employee designated as part of the Commission's trial staff in a proceeding, a settlement judge . . . , a neutral (other than an arbitrator) . . . in an alternative dispute resolution

The statute provides detailed definitions describing the type of communications subject to the prohibition. “Off-the-record communication means any communication relevant to the merits of a contested on-the-record proceeding” without filing and noticing the other parties.⁹⁶ Relevant to the merits is defined as:

capable of affecting the outcome of a proceeding, or of influencing a decision, or providing an opportunity to influence a decision, on any issue in the proceeding, but does not include:

- (i) Procedural inquiries, such as a request for information relating solely to the status of a proceeding, unless the inquiry states or implies a preference for a particular party or position, or is otherwise intended, directly or indirectly, to address the merits or influence the outcome of a proceeding;
- (ii) 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; or,
- (iii) Communications relating to compliance matters not the subject of an ongoing proceeding.⁹⁷

Contested on-the-record proceeding is defined in the regulations to mean:

- (i) Except as provided in paragraph (c)(1)(ii) of this section, 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 pursuant to rule 206 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 under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter.
- (ii) The term does not include notice-and-comment rulemakings under 5 U.S.C. 553, investigations under part 1b of this chapter, proceedings not having a party or parties, or any proceeding in which no party disputes any material issue.⁹⁸

The prohibition applies from the time of the order or a complaint is filed initiating the proceeding until a final decision in the proceeding.⁹⁹ The rules further exempt communications from a “non-party elected official” and “a Federal, state, local or Tribal agency” that has regulatory responsibilities and is not a party to the proceeding if notice is provided to the other parties.¹⁰⁰ Interestingly, the ex parte prohibition does not apply to a communication from “an interceder who is a local, State, or Federal agency which has no official interest in and whose official duties

proceeding, or an employee designated as being non-decisional in a proceeding.” *Id.* at § 385.2201(d).

⁹⁵ 18 C.F.R. § 385.2201(b).

⁹⁶ 18 C.F.R. § 385.2201(b).

⁹⁷ 18 C.F.R. § 385.2201(c)(5).

⁹⁸ 18 C.F.R. § 385.220.

⁹⁹ 18 C.F.R. § 385.2201(d).

¹⁰⁰ 18 C.F.R. § 385.2201(e).

are not affected by the outcome of the on-the-record proceedings before the Commission to which the communication relates....”¹⁰¹ An “interceder” is defined by § 385.2201(a) as “any individual outside the Commission, whether in private or public life, partnership, corporation, association or other agency, other than a party or an agent of a party, who volunteers a communication.”

In the event an improper ex parte communication is made, FERC requires its disclosure, prohibits its consideration, and allows parties to file comments responding to the communication.¹⁰² The rules also allow for sanctions if a party knowingly makes a prohibited communication.¹⁰³ The D.C. Circuit has found that: “[e]ven if FERC receives an ex parte communication that violates 18 C.F.R. § 385.2201, the court will not undo FERC's action unless “the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair.”¹⁰⁴

CALIFORNIA ADMINISTRATIVE PROCEDURE ACT

California’s Government Code contains general provisions that prohibit ex parte communications during pending agency adjudicatory proceedings. Many California agencies, including the California Air Resources Board and the California Energy Commission, are subject to these requirements. Section 11430.10 of the Government Code provides that:

[w]hile the proceeding is pending there shall 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.¹⁰⁵

This section defines a proceeding as “pending” as starting from “the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.”¹⁰⁶ This section was added in 1995 through Senate Bill 523 from former Section 11513.5(a) and (b). As related to “interested person outside the agency,” the Law Revision Commission Comments state that it “replaces the former reference to a “person who has a direct or indirect interest in the outcome of the proceeding,” and is drawn from federal law.”¹⁰⁷ These provisions apply to a hearing officer or whoever the decision-maker is.¹⁰⁸ The provisions further provide that the presiding officer can generally speak with other agency personnel that are not parties, but that the

¹⁰¹ 18 C.F.R. § 385.2201(b)(1).

¹⁰² 18 C.F.R. § 385.2201(f).

¹⁰³ 18 C.F.R. § 385.2201(i).

¹⁰⁴ *Lichoulas v. F.E.R.C.*, 606 F.3d 769, 778 (D.C. Cir. 2010) (citing *Press Broad. Co. v. FCC*, 59 F.3d 1365, 1369 (D.C.Cir.1995)).

¹⁰⁵ Cal. Gov’t Code Section 11430.10.

¹⁰⁶ Cal. Gov’t Code Section 11430.10(c).

¹⁰⁷ 25 Cal.L.Rev.Comm. Reports 711 (1995) (citing federal APA and a case that interprets the language as applying to anyone who has an interest beyond the general public).

¹⁰⁸ *See* Cal. Gov’t Code Section 11430.20 (provisions apply to agency head or other person delegated to make decision).

officer cannot speak with the agency head.¹⁰⁹ Strangely, although this prohibition applies to communications to the presiding officer, the law’s comments note that “it does not preclude the presiding officer from communicating with an adversary.”¹¹⁰

Section 11430.20 provides that the prohibition does not include communications that “concern a matter of procedure or practice, including a request for a continuance, that is not in controversy.”¹¹¹ The Law Revision Commission Comments provide further description of what this provision is intended to cover: “This article is not intended to preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions. Subdivision (b). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.”¹¹²

Section 11430.30 defines the agency employees that may communicate with a decision-maker. In general, as long as a person has not served as an “investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage” the person may give advice related to a proceeding.¹¹³ The Section also provides that: “[a]n assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record.”¹¹⁴ The Section also allows someone who has served as an investigator, prosecutor or advocate to discuss a settlement with a hearing officer. The Section further allows “advice [that] involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it.”¹¹⁵ This exception only applies to adjudicative proceedings that are “nonprosecutorial in character.”¹¹⁶ The Comments to the Revision describe the purpose of this exception as follows:

Subdivision (c) applies to non-prosecutorial types of administrative adjudications, such as power plant siting, land use decisions, and proceedings allocating water or setting water quality protection or in-stream flow requirements. The provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for an agency to adhere to the restrictions of this article, given limited staffing and personnel. Subdivision (c)(1) recognizes that such an adjudication may require advice from a person with special technical knowledge whose advice would not otherwise be available to the presiding officer

¹⁰⁹ Cal. Gov’t Code Section 11430.80.

¹¹⁰ 25 Cal.L.Rev.Comm. Reports 711 (1995). The comments also note how this reverses former Section 11513.5.

¹¹¹ Cal. Gov’t Code Section 11430.20.

¹¹² 25 Cal.L.Rev.Comm. Reports 55 (1995).

¹¹³ Cal. Gov’t Code Section 11430.30.

¹¹⁴ Cal. Gov’t Code Section 11430.30.

¹¹⁵ Cal. Gov’t Code Section 11430.30(c).

¹¹⁶ Cal. Gov’t Code Section 11430.30(c).

under standard doctrine. Subdivision (c)(2) recognizes the need for policy advice from planning staff in proceedings such as land use and environmental matters.¹¹⁷

If a decision-maker receives an improper ex parte communication, Section 11430.40 requires a decision-maker to “disclose the content of the communication on the record and give all parties an opportunity to address it.”¹¹⁸ Section 11430.50 further specifies that the presiding officer “shall make” the improper communication part of the record, notify all the parties of the communication, and allow parties an opportunity to address it.¹¹⁹ Another provision limits communications between the presiding officer and agency head unless the presiding officer does not issue a decision in the proceeding.¹²⁰

CALIFORNIA AIR RESOURCES BOARD

The California Air Resource Board is governed by the California Administrative Procedure Act, which is described above. Its regulations thus prohibit:

while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication.¹²¹

The rules define pending as “from the time that the petition for review of an executive officer decision is filed.” The rules exempt “matters of procedure and practice, including requests for continuances that are not in controversy” and communications when the opposing party is in default.¹²² The rules also allow for the hearing office to be assisted by other agency employees that are not an investigator, prosecutor or advocate in the proceeding.¹²³ The rules require that improper communications should be disclosed on the record, and all parties should be given an opportunity to address it.¹²⁴ The rules further describe how the ex parte rules apply to the state board. As the rules provide, communications with the state board are generally prohibited, and the state board may communicate with staff of the state board if parties are “provided reasonable notice and opportunity to participate in such communications.”¹²⁵

CALIFORNIA ENERGY COMMISSION

The California Energy Resources Conservation and Development Commission (California Energy Commission) applies the California APA’s ex parte prohibition to its adjudicatory proceedings. The relevant rules define “presiding officer” as “all commissioners

¹¹⁷ 25 Cal.L.Rev.Comm. Reports 711 (1995)

¹¹⁸ Cal. Gov’t Code Section 11430.40.

¹¹⁹ Cal. Gov’t Code Section 11430.50.

¹²⁰ Cal. Gov’t Code Section 11430.80.

¹²¹ Cal. Code Regs. tit. 17, § 60055.13

¹²² Cal. Code Regs. tit. 17, § 60055.13(d).

¹²³ Cal. Code Regs. tit. 17, § 60055.13(e).

¹²⁴ Cal. Code Regs. tit. 17, § 60055.14.

¹²⁵ Cal. Code Regs. tit. 17, § 60055.15

and all hearing officers.”¹²⁶ The rules further require that “[a]n adviser 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 this section.”¹²⁷

CONNECTICUT

In 1971, Connecticut enacted a statute that prohibits ex parte communications between agency decision-makers and members of the public for issues of fact and decision-makers and parties for issues of law.¹²⁸ The current relevant statutory language provides that:

Unless required for the disposition of ex parte matters authorized by law, no hearing officer or member of an agency who, in a contested case, is to render a final decision or to make a proposed final decision shall communicate, directly or indirectly, in connection with any issue of fact, with any person or party, or, in connection with any issue of law, with any party or the party's representative, without notice and opportunity for all parties to participate.¹²⁹

Contested case is defined as:

“Contested case” means a proceeding, including but not restricted to rate-making, price fixing and licensing, in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held, but does not include proceedings on a petition for a declaratory ruling under section 4-176, hearings referred to in section 4-168 or hearings conducted by the Department of Correction or the Board of Pardons and Paroles;¹³⁰

Section 168 referenced in the statute applies to the promulgation of regulations, and section 4-176 applies to declaratory rulings. The statute has a parallel provision that provides that: “no party or intervenor in a contested case, no other agency, and no person who has a direct or indirect interest in the outcome of the case” shall communicate about “any issue in that case” with “a hearing officer or any member of the agency, or with any employee or agent of the agency assigned to assist the hearing officer or members of the agency in such case” without opportunity for all parties to participate.¹³¹ Thus, the statute makes it clear that the ex parte protections extend to agency personnel who are assisting decision-makers and to persons who have a direct or indirect interest. The statute further states that members of an agency may consult with each other:

a member of a multimember agency may communicate with other members of the agency regarding a matter pending before the agency, and members of the agency or a hearing officer may receive the aid and advice of members, employees, or

¹²⁶ Cal. Code Regs. tit. 20, § 1216.

¹²⁷ Cal. Code Regs. tit. 20, § 1216.

¹²⁸ See Conn. Gen. Stat. Ann. § 4-181.

¹²⁹ Conn. Gen. Stat. Ann. § 4-181(a).

¹³⁰ Conn. Gen. Stat. Ann. § 4-166.

¹³¹ Conn. Gen. Stat. Ann. § 4-181(c).

agents of the agency if those members, employees, or agents have not received communications prohibited by subsection (a) of this section.¹³²

Interestingly, the statute provides an exception to the ability of interagency communications if the decision-maker received improper ex parte communications.¹³³ These statutory ex parte provisions provide that the agency may decide when a case has commenced, but it must be no later than the date of the hearing.¹³⁴

Connecticut's Public Utilities Regulations provide similar language as the statute and prohibits ex parte communications in a contested case without notice and opportunity for all parties to participate.¹³⁵ The regulations provide an exception for "routine communications":

This rule shall not be construed to preclude such necessary routine communications as are necessary to permit the commission staff to investigate facts and to audit the applicable records of any party in a contested case at any time before, during and after the hearing thereof.¹³⁶

The applicable regulatory definition of "commence" for triggering the ex parte provisions is the date of service of the initial notice of the hearing thereof.¹³⁷ Similar to the statute, the regulations explicitly allow commissioners and commission staff to communicate with each other.¹³⁸ The regulations, however, do not include the provision stating that the decision-makers cannot talk to other decision-makers that are tainted by improper ex parte contacts.

Connecticut state law has long "held that a fundamental requirement of a fair administrative hearing is that 'the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations.'"¹³⁹ Accordingly, "[e]ven in the absence of such a statute [prohibiting

¹³² Conn. Gen. Stat. Ann. § 4-181(b).

¹³³ *Id.*

¹³⁴ Conn. Gen. Stat. Ann. § 4-181(d).

¹³⁵ Connecticut Public Utilities Regulations § 16-1-28, *available at* http://www.ct.gov/pura/lib/pura/regs/16-1-1to345-9_title_16_comprehensive.pdf. The rules apply when the case is commenced, which is on the date of service of the initial notice of the hearing. *Id.* at 16-1-27. Contested case is defined in section 4-166(2) of the Connecticut General Statutes. Connecticut Public Utilities Regulations § 16-1-2. Contested case is defined as "a proceeding, including but not restricted to rate-making, price fixing and licensing, in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held" *Id.*

¹³⁶ Conn. Agencies Regs. § 16-1-28.

¹³⁷ Conn. Agencies Regs. § 16-1-27.

¹³⁸ Connecticut Public Utilities Regulations § 16-1-28.

¹³⁹ *See Henderson v. Dept. of Motor Vehicles*, 202 Conn. 453, 458 (1987) (citing *Morgan v. United States*, 298 U.S. 468, 480 (1936)).

ex parte communications], therefore, an ex parte communication by an adjudicator concerning a case before him would indicate that the decision had been made upon unlawful procedure.”¹⁴⁰

A Connecticut court has reversed and remanded a decision when an improper ex parte contact occurred. For example, in *Lapia v. Stratford*, the Connecticut Court of Appeals reversed an award of attorney’s fees because the commissioner that issued the award had an improper ex parte contact with the attorney.¹⁴¹

Several cases have examined what constitutes a communication for purposes of ex parte contacts and have found that agency reports and investigations do not constitute a “communication” under the statute.¹⁴² An opinion by the Connecticut Department of Public Utility Control (Department) suggests that the Department strictly maintains the prohibition on ex parte contacts related to substantive issues.¹⁴³ A city filed a motion for recusal after the hearing officer discussed a scheduling issue with the petitioner. The Department found that the communication qualified as a routine procedural matter, and therefore was not an improper ex parte contact. In its opinion, the Department described how its structure facilitated making proper decisions related to the distinction between procedural and substantive:

The Department is constantly vigilant to ensure that the integrity and fairness of its proceedings are not compromised in any manner. To this end, case coordinators are employed at the agency to function in a similar manner as clerks of the court - persons who are equipped to facilitate the progress of complex, multi-party proceedings by administering the procedural aspects of all cases. On occasion, the case coordinators may be assisted in their duties by the Department’s attorneys or other staff persons. The attorneys in particular are acutely aware that the boundary line between that which is procedural and that which is substantive is often unclear, and they act accordingly with circumspection.¹⁴⁴

Although not explicitly related to public utility commissions, a Connecticut Worker’s Compensation Treatise states that “[t]he commission’s general policy of open communications between the parties has resulted in a practice of little, if any, ex parte communication with the

¹⁴⁰ See *Henderson v. Dept. of Motor Vehicles*, 202 Conn. 453, 458 (1987) (citing *Morgan v. United States*, 298 U.S. 468, 480 (1936)).

¹⁴¹ 47 Conn. App. 391 (1997).

¹⁴² See, e.g., *Menillo v. Commission on Human Rights & Opportunities*, 47 Conn. App. 325 (1997) (finding that an investigator’s report was not an ex parte communication with Commission on Human Rights & Opportunities when landlord had notice of report prior to submission); *New England Rehabilitation Hosp. of Hartford v. Commission on Hospitals and Health Care*, 226 Conn. 105 (1993) (finding that including a report by Commission on Hospitals and Health Care into evidence was not an ex parte contact).

¹⁴³ See *Connecticut Dept. of Public Utility Control*, Decision 97-07-10, 1997 WL 33806520 (Conn. D.P.U.C.).

¹⁴⁴ See *Connecticut Dept. of Public Utility Control*, Decision 97-07-10, 1997 WL 33806520 (Conn. D.P.U.C.).

commissioners regarding the informal or formal hearing.”¹⁴⁵ The treatise further emphasizes that “[t]he commissioners themselves function under a Code of Ethics which stresses the improper nature of ex parte communications except in relation to purely procedural matters of scheduling or in relation to settlement negotiations.”¹⁴⁶

DELAWARE

In 1976, Delaware enacted a statute prohibiting ex parte contacts in agency decisions. The relevant statutory text provides:

No member or employee of an agency assigned to participate in any way in the rendering of a case decision shall discuss or communicate, directly or indirectly, respecting any issue of fact or law with any person or party, except upon notice to and opportunity for all parties to participate. This section shall not apply to communications required for the disposition of ex parte matters authorized by law or to communications by and among members of an agency, the agency's staff and the agency's attorney.¹⁴⁷

The statute defines “case decision” as:

any agency proceeding or determination that a named party as a matter of past or present fact, or of threatened or contemplated private action, is or is not in violation of a law or regulation, or is or is not in compliance with any existing requirement for obtaining a license or other right or benefit. Such administrative adjudications include, without limitation, those of a declaratory nature respecting the payment of money or resulting in injunctive relief requiring a named party to act or refrain from acting or threatening to act in some way required or forbidden by law or regulation under which the agency is operating.¹⁴⁸

Delaware’s requirements apply to all contested proceedings except for “(1) Decisions relating to the assessment of taxes or tax penalties made by the Tax Appeals Board; or (2) Temporary restraining orders and similar orders authorized by law to be issued summarily.”¹⁴⁹

Delaware’s regulations applicable to its Public Service Commission provide a blanket rule that is nearly identical to the statutory language providing that Commissioners and Commission staff deciding a case cannot “discuss or communicate directly or indirectly, respecting any issue of fact or law with any party or person except upon notice to, and

¹⁴⁵ 19 Conn. Practice, Workers’ Compensation Section 20:6 (footnotes omitted).

¹⁴⁶ 19 Conn. Practice, Workers’ Compensation Section 20:6 (footnotes omitted).

¹⁴⁷ Del. Code Ann. tit. 29, § 10129.

¹⁴⁸ Del. Code Ann. tit. 29, § 10102.

¹⁴⁹ Del. Code Ann. tit. 29, § 10121.

opportunity for, all parties to participate.”¹⁵⁰ Delaware’s rules apply once the proceeding has moved to the decision-making phase.¹⁵¹ The rule states:

No Commissioner or Commission Staff assigned to participate in any way in the rendering of a case decision shall discuss or communicate, directly or indirectly, respecting any issue of fact or law with any party or person except upon notice to, and opportunity for, all parties to participate. This rule shall not apply to communications required for the disposition of ex parte matters as authorized by law, or to communications, not prohibited by law, by and among Commission members and Commission Staff.¹⁵²

Cases interpreting the statute have found the purpose of the law is to “insure impartiality” of the agency rendering a decision, and therefore, communications which occur after the decision are not prohibited.¹⁵³ Another case interpreted the statute as not applying to scheduling matters.¹⁵⁴

To notify the public and parties of improper ex parte communications, the Delaware Public Service Commission posts them on its website for 30 days and sends a notification to all parties of record in the proceeding.¹⁵⁵ The explanation of the website states that:

Ex Parte Communications are any oral or written communications with a Commissioner or Commission Staff member that addresses the merits of an adjudicatory proceeding on which the Commissioner or Staff member must render a decision and that was neither on the record nor on reasonable prior notice to all the parties. Such communications with Commissioners and Commission Staff are inappropriate between the time of the initial application filing and the rendering of a final decision on the case. When the Commissioners or Staff members receive such communications, they will be posted on the website for 30 days with notification sent to all parties of record on the proceeding.¹⁵⁶

¹⁵⁰ Delaware Regulations: Administrative Code: Title 26, Rules of Practice and Procedure of the Delaware Public Service Commission, Rule 1.12, <http://regulations.delaware.gov/AdminCode/title26/1000/1001.pdf>.

¹⁵¹ Delaware Regulations: Administrative Code: Title 26, Rules of Practice and Procedure of the Delaware Public Service Commission, Rule 1.12, <http://regulations.delaware.gov/AdminCode/title26/1000/1001.pdf>.

¹⁵² Del. Regs. Code, Title 26, Section 1001.1, Rule 1.12.

¹⁵³ See *Timmons, et. al. v. Kulp, et. al.*, 1993 WL 331088 (Superior Ct. of Delaware July 29, 1993).

¹⁵⁴ *J.L.B. Corp. v. Delaware Alcoholic Beverage Control Commission*, 1985 WL 189008 (June 7, 1985).

¹⁵⁵ Delaware Public Service Commission, Ex Parte Communications, <http://depssc.delaware.gov/exparte.shtml> (last visited October 15, 2014).

¹⁵⁶ Delaware Public Service Commission, Ex Parte Communications, <http://depssc.delaware.gov/exparte.shtml> (last visited October 15, 2014).

Thus, the Public Service Commission at least appears to affirmatively require that commissioners or commission staff post improper communications that they receive. On October 15, 2014, three contacts were posted: (1) an email from the Commission Director discussing a potential settlement related to a merger; (2) a letter from the Delaware State Chamber of Commerce related to the same merger; and (3) a letter from an individual related to the same merger.¹⁵⁷ The website description of the ex parte rules states that it applies to adjudicatory proceeding even though that is not defined in the PSC's regulations.¹⁵⁸

ILLINOIS

In the mid-1980's, Illinois promulgated a statute prohibiting ex parte contacts at its Commerce Commission unless other parties could participate. The statute applies broadly to "Commission proceedings, including ratemaking proceedings," and it applies to "[a]ny commissioner, hearing examiner, or other person who is or may reasonably be expected to be involved in the decisional process of the proceeding."¹⁵⁹ The statute places an affirmative duty on the agency decision-maker to place improper ex parte communications on the record.

§ 10-103. In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding, including, in contested cases. . . . The provisions of Section 10-60 of the Illinois Administrative Procedure Act shall apply in full to Commission proceedings, including ratemaking cases, any provision of the Illinois Administrative Procedure Act to the contrary notwithstanding.

The provisions of Section 10-60 shall not apply, however, to communications between Commission employees who are engaged in investigatory, prosecutorial or advocacy functions and other parties to the proceeding, provided that such Commission employees are still prohibited from communicating on an ex parte basis, as designated in Section 10-60, directly or indirectly, with members of the Commission, any hearing examiner in the proceeding, or any Commission employee who is or may reasonably be expected to be involved in the decisional process of the proceeding. 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 as modified by this Section, 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

¹⁵⁷ Delaware Public Service Commission, Ex Parte Communications, <http://dep.sc.delaware.gov/exparte.shtml> (last visited October 15, 2014).

¹⁵⁸ *Id.*

¹⁵⁹ 220 Illinois Code Section 5/10-103.

(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).

The Commission, or any commissioner or hearing examiner presiding over the proceeding, shall in the event of a violation of this Section, take whatever action is necessary to ensure that such violation does not prejudice any party or adversely affect the fairness of the proceedings, including dismissing the affected matter.¹⁶⁰

The Illinois Commerce Commission's Rules of Practice provides parallel, more specific regulatory requirements. The Rules prohibit direct or indirect ex parte communications between parties and commissioners, commission employees and hearing examiners related to a contested case or licensing proceeding without the opportunity for all parties to participate.¹⁶¹ Illinois' rules specify that communications between a commissioner and other commissioners, hearing examiner, or personal assistants are not prohibited.¹⁶² As the statute requires, the rules state that if an ex parte communication is made, the commissioner, hearing examiner or other commission employee who received or made the communication has to place the written communication or a memoranda stating the substance of the oral communication on the record.¹⁶³

The rules specifically provide:

a) Unless waived by written stipulation of the parties in the proceeding as provided by Section 10-70 of the Illinois Administrative Procedure Act [5 ILCS 100/10-70], once notice of hearing has been given in a contested case or licensing proceeding, Commissioners, Commission employees and Hearing Examiners shall not communicate directly or indirectly with:

- 1) Any party to the proceeding on any issue in the proceeding; or
- 2) A party's representative on any issue in the proceeding; or
- 3) Any other person concerning an issue of fact in the proceeding; without notice and opportunity for all parties to participate.

b) The following communications are not subject to subsection (a) of this Section:

- 1) Communications between Commission employees who are engaged in investigatory, prosecutorial or advocacy functions and other parties to the proceeding, provided that such Commission employees are still prohibited from communicating on an ex parte basis, as designated in subsection (a), directly or indirectly, with members of the Commission, any Hearing Examiner in the proceeding, or any Commission employee who is or may reasonably be expected to be involved in the decisional process of the proceeding (this language derived from Section 10-103 of the Public Utilities Act [220 ILCS 5/10-103] and applies only to proceedings under that Act);
- 2) Communications between a Commissioner and other Commissioners, and between a Commissioner or hearing examiner and one or more personal assistants. [5 ILCS 100/10-60]

¹⁶⁰ 220 Illinois Code Section 5/10-103.

¹⁶¹ Illinois Code, Title 83, Chapter I, Subchapter b, § 200.710.

¹⁶² Illinois Code, Title 83, Chapter I, Subchapter b, § 200.710.

¹⁶³ Illinois Code, Title 83, Chapter I, Subchapter b, § 200.710.

c) Any Commissioner, Hearing Examiner, or other Commission employee 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 Section 10-60 of the Illinois Administrative Procedure Act as modified by Section 10-103 of the Public Utilities Act [220 ILCS 5/10-103] shall place on the public record of the proceeding:

- 1) All such written communications;
 - 2) Memoranda stating the substance of all such oral communications; and
 - 3) All written responses and memoranda stating the substance of all oral responses to the materials described in subsections (c)(1) and (2). [220 ILCS 5/10-103]
- d) The material specified in subsection (c) shall be disclosed to the parties of record by:
- 1) service on the parties at the next hearing; or
 - 2) if no hearing is scheduled within the next seven days, service by mail on all parties of record.¹⁶⁴

Only a few cases have substantively interpreted Illinois' *ex parte* requirements as applied to the Commerce Commission. One case, which has been cited by other cases and agency briefing, compared the prohibition of *ex parte* contacts in the agency context to the judicial context:

In interpreting the Supreme Court rules on judicial conduct, one court has held that the appearance of bias or prejudice can be as damaging to the public confidence as actual bias or prejudice. (*People v. Bradshaw* (1988), 171 Ill.App.3d 971, 976, 121 Ill.Dec. 791, 525 N.E.2d 1098.) Inherent in the rules is the concept that a judge who has a personal interest in a case cannot act fairly in that case. The principle of jurisprudence that one with a personal interest in the subject matter of decision in a case may not act as judge in that case is applicable not just to judges but to administrative agents, commissioners, referees, masters in chancery, or other arbiters of questions of law or fact not holding judicial office. (*In re Heirich* (1956), 10 Ill.2d 357, 384, 140 N.E.2d 825.) A duty to recuse oneself has been applied to an arbiter of facts or law in an adversary proceeding who had a financial interest in the subject matter. *Heirich*, 10 Ill.2d at 385, 140 N.E.2d 825. On the basis that defendant was a commissioner whose duties were similar to those of a judge, we hold that the judicial conduct principles applied to him resulting in a duty to recuse himself when his impartiality was reasonably questioned. We also hold that plaintiffs' complaint stated a cause of action because it sufficiently alleged the appearance of impropriety by defendant, who as a commissioner, was required to avoid such an appearance and was statutorily prohibited from making *ex parte* communications.¹⁶⁵

Another case found that *ex parte* communications should not be considered part of the record because that would eviscerate the purpose of the prohibition:

¹⁶⁴ Ill. Admin. Code Title 83, § 200.710.

¹⁶⁵ *Bus. & Prof'l People for Pub. Interest v. Barnich*, 244 Ill. App. 3d 291, 296-97 (1993).

[M]ere disclosure of an *ex parte* communication does not transform such material into competent evidence before an administrative tribunal. To hold otherwise would be tantamount to a wholesale evisceration of the provisions requiring adherence to the rules of evidence for the circuit courts and that findings of fact be based upon evidence in the record. When ascertaining the meaning of a statute, it should be read as a whole with all relevant parts considered, and it should be construed so that no word or phrase is rendered superfluous or meaningless.¹⁶⁶

TEXAS

Texas requires that records are kept of all communications between the commission and its employees and public utilities and any person.¹⁶⁷ Texas prohibits *ex parte* communications related to a contested case.¹⁶⁸ Section 14.153 of the Public Utilities Regulatory Act provides:

- (a) The regulatory authority shall adopt rules governing communications with the regulatory authority or a member or employee of the regulatory authority by: (1) a public utility; (2) an affiliate; or (3) a representative of a public utility or affiliate.
- (b) A record of a communication must contain: (1) the name of the person contacting the regulatory authority or member or employee of the regulatory authority; (2) the name of the business entity represented; (3) a brief description of the subject matter of the communication; and (4) the action, if any, requested by the public utility, affiliate, or representative.
- (c) Records compiled under Subsection (b) shall be available to the public monthly.

The applicable regulations provide:

(2) *Ex parte* communications. Unless required for the disposition of *ex parte* matters authorized by law, members of the commission or administrative law judges assigned to render a decision or to make findings of fact and conclusions of law in a contested case 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. 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.¹⁶⁹

¹⁶⁶ *Vill. of Montgomery v. Illinois Commerce Comm'n*, 249 Ill. App. 3d 484, 495 (1993).

¹⁶⁷ Texas Administrative Code, Title 16, Part 2 Rule See also P.M Schenckan, *Ex Parte Rules in the Administrative Setting: Opinion No. 587 and Proposed Changes to Rule 3.05*, Texas Disciplinary Rules of Professional Conduct (August 2010), <http://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceInfoandEthicsHelpline/ExParteIssuesInAdmin.Setting-2010Superconf-7-19-10.PDF>

¹⁶⁸ Texas Administrative Code, Title 16, Part 2 Rule

¹⁶⁹ Texas Administrative Code, Title 16, Part 2, Chapter 22, Subchapter A, Rule Section 22.3(b)(2).

VIRGINIA

The applicable statute provides that:

The Commission shall after public hearing, promulgate rules of practice and procedure pursuant to § 12.1-25 controlling meetings and communications between commissioners and any party, or between commissioners and staff concerning any fact or issue arising out of a proceeding involving the regulation of rates, charges, services or facilities of railroad, telephone, gas or electric companies. The rules shall provide, among other provisions, that no commissioner shall consult with any party or any person acting on behalf of any party with respect to such proceeding without giving adequate notice and opportunity for all parties to participate.¹⁷⁰

The Virginia Administrative Code provides that commissioners and hearing examiners cannot consult with a party related to a pending formal proceeding without allowing all parties to participate.¹⁷¹ The rules specifically provide:

No commissioner or hearing examiner shall consult with any party or any person acting on behalf of any party with respect to a pending formal proceeding without giving adequate notice and opportunity for all parties to participate.

The Canon of Judicial Ethics for the State of Virginia applies to members of the State Corporation Commission. It prohibits any ex parte communications other than those for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits.¹⁷²

NEVADA

The Nevada Administrative Procedure Act prohibits ex parte contacts for contested cases except if notice is provided for all parties to participate.¹⁷³ Agency members can communicate with other members of the agency and have the aid of personal assistants.¹⁷⁴

Specifically, it provides that:

Limitations on communications of agency's members or employees rendering decision or making findings of fact and conclusions of law. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or

¹⁷⁰ Virginia Code § 12.1-30.1 (the Section is entitled “Meetings and communications between commissioners and parties or staff”).

¹⁷¹ 5 Virginia Administrative Code § 5-20-50.

¹⁷² 5 Virginia Administrative Code § 5-20-50.

¹⁷³ Nevada Administrative Procedure Act, NRS 233B.126.

¹⁷⁴ Nevada Administrative Procedure Act, NRS 233B.126.

indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or the party's representative, except upon notice and opportunity to all parties to participate. An agency member may, subject to the provisions of NRS 233B.123

1. Communicate with other members of the agency.
2. Have the aid and advice of one or more personal assistants.

“Contested case” means a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed.¹⁷⁵

NEW YORK

The New York Administrative Procedure Act exempts public utility proceedings from the prohibition on ex parte contacts stating it does not apply to “(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.”¹⁷⁶ The APA, however, does generally apply to other agency proceedings, stating:

Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case.

Although ex parte requirements are technically inapplicable to the Public Service Commission, some commissioners have imposed strict ex parte requirements in their cases.¹⁷⁷ The broad allowance of ex parte contacts has also been subject to scrutiny. In November 2012, the New York Governor established a commission called the Moreland Commission to review the “adequacy of regulatory oversight of the utilities and the mission of the State’s energy agency and authority functions.”¹⁷⁸ After analyzing the PSC’s ex parte rules, the Moreland Commission recommended that: “[t]he existing statutory exemption of ex parte rules, the PSC should enact an implementing regulation that includes a specific triggering event, preferably with a set term prior

¹⁷⁵ *Id.* at NRS 233B.032

¹⁷⁶ New York Administrative Procedure Act § 307(2).

¹⁷⁷ Interview with Peter Bradford, November 3, 2014.

¹⁷⁸ *See* NEW YORK MORELAND COMMISSION ON UTILITY STORM PREPARATION AND RESPONSE, FINAL REPORT (June 22, 2013), *available at*

<http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/MACfinalreportjune22.pdf>.

to filing with the PSC, along with sanctions that are sufficient enough to deter violations (i.e., fines).”¹⁷⁹

FLORIDA

Florida’s ex parte rules provide that commissioners “shall neither initiate nor consider ex parte communications” in any proceeding except rulemaking, proceedings related to declaratory statements by agencies, workshops, or internal affair meetings.¹⁸⁰ Florida’s requirements generally apply to all proceedings except legislative rulemakings and declaratory actions.:

A commissioner should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under s. 120.54 or s. 120.565, workshops, or internal affairs meetings. No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days. The provisions of this subsection shall not apply to commission staff.¹⁸¹

Sections 120.54 and 120.565 referenced in the rule above relate to legislative rulemaking and declaratory actions.

The rules also state that: “No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days.”¹⁸² The ex parte rules do not apply to commissioner advisors and an individual ratepayer representing himself.¹⁸³ If an ex parte communication is made to a commissioner, the commissioner is required to put it on the record and “may” withdraw from the proceeding.¹⁸⁴ The rules provide:

If a commissioner knowingly receives an ex parte communication relative to a proceeding other than as set forth in subsection (1), 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

¹⁷⁹ See NEW YORK MORELAND COMMISSION ON UTILITY STORM PREPARATION AND RESPONSE, FINAL REPORT (June 22, 2013), *available at* <http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/MACfinalreportjune22.pdf>.

¹⁸⁰ Florida Statutes Title XXVII, Chapter 350, § 42, <http://www.flsenate.gov/laws/statutes/2011/350.042>. The section exempts proceedings under two other sections from ex parte rules – section 120.54 covers agency rulemaking, and section 120.565 covers declaratory statements by the agency.

¹⁸¹ Fla. Stat. Ann. § 350.042.

¹⁸² Fla. Stat. Ann. § 350.042.

¹⁸³ Fla. Stat. Ann. § 350.042.

¹⁸⁴ Fla. Stat. Ann. § 350.042.

communication that such matters have been placed on the record. Any party who desires to respond to an ex parte communication may do so. 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. The commissioner may, if he or she deems it necessary to eliminate the 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.¹⁸⁵

If a commissioner knowingly fails to put an ex parte communication on the record, the commission could be fined.¹⁸⁶ One case fined a commissioner \$5000 for failing to put an improper ex parte contact on the record.¹⁸⁷ The individual making the ex parte communication also has a duty to document the communication and put it on the record.¹⁸⁸ These rules apply prior to the case assignment.¹⁸⁹

¹⁸⁵ Fla. Stat. Ann. § 350.042 (providing that “[a]ny commissioner who knowingly fails to place on the record any such communications, in violation of the section, within 15 days of the date of such communication is subject to removal and may be assessed a civil penalty not to exceed \$5,000.”)

¹⁸⁶ Fla. Stat. Ann. § 350.042.

¹⁸⁷ See *In re Rudolph Bradley*, 2007 WL 1697092 (Fla. Div. Admin. Hearings June 11, 2007).

¹⁸⁸ Florida Statutes Title XXVII, Chapter 350, § 42,
<http://www.flsenate.gov/laws/statutes/2011/350.042>.

¹⁸⁹ Florida Statute Ann. § 350.042.