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

Michael J. Strumwasser

Beverly Grossman Palmer

Dale K. Larson

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Michael J. Strumwasser
Beverly Grossman Palmer
Dale K. Larson
Strumwasser & Woocher LLP
10940 Wilshire Blvd, Suite 2000
Los Angeles, California 90024[*]

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I. INTRODUCTION

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

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

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

industry groups who generally oppose specific utilities' positions, legislators and legislative staff, public critics of CPUC ex parte practices, CPUC staff (administrative law judges (ALJs), attorneys, and technical staff), and the CPUC Commissioners and their staffs. Then, in **Part IV**, we present our analysis of this information and our recommendations for changes to statutes, CPUC rules, and Commission practices.

A.Executive Summary of Findings and Recommendations Legal Review

The Public Utilities Code distinguishes between three categories of proceedings conducted by the CPUC and prescribes different procedures for each category, including different rules governing ex parte communications. *Adjudication cases*—generally encompassing applications by a utility for certain kinds of authorizations, complaints against utilities other than complaints about rates, and enforcement cases brought by the CPUC against a utility—are conducted as adversarial hearings under rules similar to those applicable to most California administrative agencies that perform similar functions. The Public Utilities Code prohibits any ex parte communications in adjudication cases. *Quasi-legislative cases*—generally cases that set future policy or adopt prospective rules affecting an entire industry—are conducted using formal hearings with identified parties. Ex parte communications are authorized in quasi-legislative cases without restriction. Between those two categories are *ratesetting cases*—cases that establish rates and mechanisms used to set rates—which are conducted in hearings employing formal procedures closely resembling those used in adjudication cases. The Public Utilities Code permits ex parte communications under a complex set of rules that require limited disclosures to other parties of the fact that a communication occurred and the substance of what was communicated, and that in some cases permit other parties to have their own ex parte communications to respond.

Adjudication cases. Our review of other jurisdictions' laws led us to find that the CPUC's rules governing ex parte communications in adjudication cases are generally in line with those of federal

agencies, other California agencies that conduct adjudications, and similar agencies of other states. Our interviews did not elicit substantial concerns regarding adjudication cases.

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

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

B.Ex Parte Communications Practices in Ratesetting Cases

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

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

C. Opinions and Recommendations Expressed in the Interviews

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

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

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

often untrue representations unsupported by the record. These interviewees also decried the recently revealed violations and opined that such incidents reflected the lack of a culture of compliance and an absence of ethical standards at the top of the CPUC.

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

D. Analysis and Recommendations

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

We have also found that ex parte communications at the CPUC have come to fundamentally undermine record-based decision-making and to transform the very nature of CPUC rate hearings. We learned that the actual record of the proceedings before the ALJ that led to the proposed decision is not merely voluminous but also extremely difficult for the Commissioners and their staffs to access. Representations of parties, made in private, of what the record

contains cannot be readily verified or refuted. In this evidence-sparse environment, the most successful advocates emphasize their personal relationships with decision-makers—sometimes overtly with "you know me" and "you know you can trust me" assurances, sometimes implicitly after years cultivating personal relationships.

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

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

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

- Substantive ex parte communications in ratesetting cases should be prohibited in the same manner they are prohibited in adjudicatory cases.
- In quasi-legislative proceedings, substantive ex parte communications should continue to be permitted, but only with full, detailed disclosure by the decision-maker of both the fact that the communication took place and the substance of the communication.

The disclosure should include reporting not just what was said by the party but also what the decision-maker said.

- Increased sanctions for illegal ex parte communications should be enacted.
  - Advocates who violate the rules should be subject to restrictions on their participation in Commission proceedings, including, where appropriate, exclusion from appearance before the Commission.
  - Commissioners and Commission staff should be subject to sanctions for knowingly engaging in illegal ex parte communications.
- The Commission should reinforce measures to ensure separation of advisory and adjudicatory staff functions and to avoid the appearance of bias.
  - Staff should not simultaneously function in advisory and advocacy roles, even in separate cases.
  - Commissioners' advisors should be treated as decision-makers and be subject to the same ex parte restrictions that apply to their principals.
- The Commission should take measures to prevent conduits—non-parties communicating on behalf of parties—from transmitting information in secret. Among these measures:
  - Whenever a decision-maker receives what he or she has reason to believe is a communication made on behalf of a party to a pending proceeding regarding that proceeding, the decision-maker should place the communication (if written) or a memorandum summarizing the communication (if oral) in the record of the proceeding, cause copies to be served on all parties, and allow other parties to respond to the communication.
  - To prevent industry conferences and similar meetings from becoming conduits for ex parte communications about pending proceedings, we recommend the Commission adopt rules employed in other jurisdictions to prevent the misuse of such meetings without a blanket ban on Commissioners benefitting from professional conferences.
- The Commission should appoint an independent Ethics Officer to monitor compliance with ex parte rules, to provide training to Commissioners, staff, and parties, and to develop codes of conduct for decision-makers and for advocates appearing in Commission proceedings.

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

- Greater use of oral argument and all-parties meetings. We offer some suggestions for getting the maximum value from those procedures.
- Adjustment of the timing of full-Commission consideration of proposed and alternate decisions to permit full consideration of comments and oral argument, and to permit the Commissioners to deliberate on rate cases in closed session if they so desire.
- Use of Commission meetings for discussion of general policy matters not yet implicated in pending proceedings, such as emerging technological issues and regulatory developments.
- Transformation of Commission public meetings, which have become perfunctory and ceremonial, where government decisions are announced but not made, into the place where parties are heard and decisions are made. This requires that the Commission meet more frequently than its established less-than-twice-a-month practice.

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

PART I LEGAL FRAMEWORK

I. INTRODUCTION

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

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

We then compare the CPUC's present rules with the practices in each of the agencies we studied, identifying the similarities and differences, as well as the range in regulatory approaches across agencies. We consider the following categories: (1) rules applicable in each of the three procedural categories of adjudicatory, quasi-

legislative, and ratesetting; (2) scope of agency decision-making staff included; (3) disclosure requirements, including timing and right to reply; (4) disclosure content requirements; (5) inclusion of ex parte communication in the record of proceedings; (6) enforcement, penalties, and sanctions; (7) restrictions on communications with agency staff; and (8) general exemptions from ex parte disclosure rules. This analysis permitted us to conclude that in many respects, the CPUC is an outlier from the practices at almost every agency whose rules we studied.

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

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

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

In California, adjudicatory proceedings are usually conducted under the Administrative Procedure Act,[2] which consists of two parts: a set of general provisions applicable to all state-agency adjudications not exempt from its provisions,[3] and what are called the

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

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

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

formal-hearing provisions of the APA,[4] which the Legislature has applied to certain agencies expected to conduct more formal, trial-type hearings. Article 7 of chapter 4.5 contains the APA's provisions regulating ex parte communications, which generally prohibit any direct or indirect substantive communications between the decision-makers (e.g., board or commission members) and other officers presiding over a hearing (typically administrative law judges) on the one hand, and representatives of the agency and other interested parties on the other.[5] The CPUC has been exempted by the Legislature from the general provisions of the APA[6] and has not been made subject to the APA's formal-hearing provisions. Instead, the Legislature has enacted CPUC-specific legislation, which itself provides for formal hearings before the Commission, employing many of the trial-type procedures found in the APA's formal-hearing laws.[7]

Quasi-legislative proceedings of state agencies are generally conducted pursuant to the rulemaking provisions of the Government Code.[8] They prescribe a procedure for adopting regulations (defined as any rule "to implement, interpret, or make specific the law" administered by the agency[9]). The core of the process is a notice-and-comment procedure whereby the agency promulgates a draft regulation and supporting material, the public is afforded an opportunity to comment, the agency makes any changes in response to the comments, and the agency then may adopt the regulation, which is reviewed by the Office of Administrative Law for legal sufficiency.[10] These statutory procedures and requirements, which apply broadly across state government, are more restrictive than those applicable to the Legislature, but the nature of the proceedings is decidedly not like a trial, lacking, for example, sworn testimony, cross-examination, and detailed factual findings. The CPUC is

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[4] Gov. Code, §§ 11500-11529.

[5] Gov. Code, §§ 11430.10-11430.80.

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

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

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

[9] Gov. Code, § 11342.600.

[10] See Gov. Code, §§ 11346-11349.6.

exempt from most of the rulemaking chapter of the APA.[11] Rules regarding substantive utility regulation, including those pertaining to utility rates and tariffs, are adopted in rulemaking proceedings conducted under the CPUC's own Rules of Practice and Procedure.[12] Adoption and amendment of the Rules of Practice and Procedure themselves are, however, subject to the APA.[13]

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

The California Legislature has addressed this question of categorization by recognizing ratesetting as its own separate

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

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

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

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

category, establishing different ex parte rules for adjudicatory hearings,[15] ratesetting hearings,[16] and quasi-legislative hearings.[17]

B.Rules Governing Ex Parte Communications Before the CPUC

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

Some of the ex parte rules apply to all types of proceedings. For example, communications regarding categorization are permitted without restriction, but must be reported pursuant to the reporting requirements described below.[21] Ex parte communications regarding the assignment of a proceeding to a particular ALJ, or reassignment of a proceeding to another ALJ, are prohibited.[22] It is worth noting that while permitted where indicated below, ex parte communications

[15] Pub. Util. Code, § 1701.2.
[16] Pub. Util. Code, § 1701.3.
[17] Pub. Util. Code, § 1701.4.
[18] Pub. Util. Code, § 1701.1, subd. (c)(4); rule 8.1(c).
[19] Pub. Util. Code, § 1701, subd. (c)(4); rule 8.1(d).
[20] Rule 8.1(b).
[21] Rule 8.3(e).
[22] Rule 8.3(f).

are not part of the record of the proceeding and "the Commission shall render its decision based on the evidence of record."[23]

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

1.Adjudicatory

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

2.Ratesetting

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

As established by statute, in ratesetting proceedings with hearings, there are various types of permitted ex parte communications. First, individual oral communications with decision-makers are permitted if the decision-maker invites all parties

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[23] Rule 8.3(k).
[24] Pub. Util. Code, § 1701.2, subd. (c); rule 8.3(b).
[25] Pub. Util. Code, § 1701.3, subd. (c).
[26] *Ibid*.
[27] Pub. Util. Code, § 1701.3, subd. (a).
[28] *Ibid*; rule 8.3(d).
[29] Pub. Util. Code, § 1701.1, subd. (c)(4).

to attend the meeting (or sets up a conference call in which all parties may participate) and gives notice of the meeting or call as soon as possible, but not later than three days before the meeting or call. [30] These are referred to in the rules as "all-party" meetings.[31] Second, interested parties may have individual oral communications with decision-makers, but if a decision-maker grants an ex parte communication meeting or call to any interested person individually, all other parties shall be granted an individual meeting of a substantially equal period of time with that decision-maker.[32] The interested person requesting the initial individual meeting must notify the parties that its request has been granted and file a certificate of service of this notification at least three days before the meeting or call.[33] Third, written ex parte communications are permitted at any time provided that the interested person making the communication serves copies of the communication on all parties on the same day the communication is sent to a decision-maker.[34]

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

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

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

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

[33] Rule 8.3(c)(2)

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

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

the decision-maker's or advisor's communication and its content, to which description shall be attached a copy of any written, audiovisual, or other material used for or during the communication.[36]

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

3.Quasi-Legislative

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

C.Penalties

Statutory penalties are available in general terms for violations of the relevant division of the Public Utilities Code or CPUC orders and rules,[40] but there are no penal statutes specifically applicable to violations of the laws governing ex parte communications. When the Commission determines that there has been a violation of the ex parte rules, the Commission may impose "penalties and sanctions," or make any other order, as it deems appropriate to ensure the integrity of the record and to protect the public interest.[41]

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[36] *Ibid*.; Pub. Util. Code, § 1701.1, subd. (c)(4)(C)(i)-(iii).
[37] Rule 8.3(c)(4)(A).
[38] Rule 8.3(c)(4)(B).
[39] Pub. Util. Code, § 1701.4, subd. (b); rule 8.3(a)
[40] Pub. Util. Code, § 2107.
[41] Rule 8.3(j).

III. Laws Governing Ex Parte Contacts Before Other California Administrative Agencies

A. Administrative Procedure Act

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

1. Adjudicatory Proceedings

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

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

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

[44] *Id.*, §§ 11500-11529.

[45] Gov. Code, §§ 11430.10-11430.80.

[46] Gov. Code, § 11405.20.

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

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

request for a continuance, so long as the procedural issue is "not in controversy."[49] In addition, non-prosecutorial agency staff may advise the presiding officer ex parte, for the purpose of providing technical assistance, evaluating evidence in the record, or advising the presiding officer concerning a settlement proposal.[50] If the agency's ex parte communication concerns a "technical issue in the proceeding," the content of the advice must be disclosed on the record and all parties given an opportunity to address it.[51]

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

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

[49] Gov. Code, § 11430.20, subd. (b).
[50] Gov. Code, § 11430.30.
[51] Gov. Code, § 11430.30, subd. (c)(1).
[52] Gov. Code, § 11410.50.
[53] Gov. Code, § 11430.50, subd. (a).

be allowed to comment on the communication.[54] The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.[55] Should a presiding officer receive improper ex part communications in violation of the rules, the presiding officer may be disqualified from the proceeding.[56]

2.Rulemaking and Other Non-Adjudicatory Proceedings

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

B.California Energy Commission

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

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

[55] *Ibid*.

[56] Gov. Code, § 11430.60.

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

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

1.Adjudicatory Proceedings Within the Energy Commission

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

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

The APA applies only to adjudicatory proceedings, and the Energy Commission does not have any additional rules specific to ex parte contacts. Instead, as with the APA generally, ex parte contacts

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

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

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

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

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

C.California Coastal Commission

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

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

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[62] Gov. Code, § 11425.10.

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

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

[65] *Ibid*.

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

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

appealed to the Commission.[68] From a review of the Commission's online reports and memoranda, we were unable to determine how many permit actions it reviews annually from areas not covered by local coastal programs (LCPs).

As of October 2014, 73% of local governments in the coastal zone have certified LCPs covering approximately 87% of the geographic area of the coastal zone.[69] The Commission works with local governments to keep LCPs up to date and in recent years on average processes 60 LCP amendments a year.[70] The Coastal Commission has its own ex parte rules, codified in sections 30320-30329 of the Public Resources Code. These rules cover quasi-judicial matters within the commission's jurisdiction, which are defined as "any permit action, federal consistency review, appeal, local coastal program, port master plan, public works plan, long-range development plan, categorical or other exclusions from coastal development permit requirements, or any other quasi-judicial matter requiring commission action, for which an application has been submitted to the commission."[71] The rules do not otherwise differentiate between types of proceedings. It is worth noting that enforcement proceedings (typically cease and desist matters) are not included in the definition of "matters within the Commission's jurisdiction," and that this definition is limited to matters "for which an application has been submitted." The Attorney General and Coastal Commission General Counsel opined in August 2014 that ex parte communications are entirely prohibited in enforcement proceedings, though the matter is a subject of some debate.[72] Coastal Commission rulemaking is conducted pursuant to notice-and-

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

[69] *Ibid*.

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

[71] Pub. Resources Code, § 30321.

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

comment rulemaking under the Rulemaking APA without additional restrictions on ex parte communications.

An "ex parte communication" is any oral or written communication between a member of the commission and an interested person about a matter within the commission's jurisdiction that does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.[73] Communications not considered ex parte include but are not limited to those between a staff member and any commissioner or interested party, those limited entirely to procedural issues (including but not limited to hearing schedule, location, format or filing date), those taking place on the record during an official proceeding of a state, regional, or local agency that involves a commissioner who also serves as an official of that agency, any communication between a nonvoting commission member and a staff member of a state agency where both the commission member and the staff member are acting in an official capacity, and any communication to a nonvoting member where the nonvoting member does not participate in the action in any way with other members of the commission.[74] An interested party under these rules is any applicant or participant in the proceeding on any matter before the commission, any person with a financial interest in a matter before the commission, or a representative acting on behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization intending to influence a commission decision.[75]

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

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

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

[75] Pub. Resources Code, § 30323.

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

commissioners.[77] Substantive telephone, fax, or other forms of messages may not be left for a commissioner.[78]

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

All reports of ex parte contacts are placed in the public record by the executive director, and once communications have been fully disclosed and placed in the official record, they are no longer considered ex parte communications.[81] If a commissioner knowingly had an ex parte communication that was not reported, that commissioner may not participate in making or influencing a commission decision related to the communication, and "shall be subject to a civil fine, not to exceed seven thousand five hundred dollars ($7,500)."[82] Additionally, if an unreported ex parte communication may have affected a commission decision, an aggrieved party may seek a writ of mandate from a court requiring the commission to revoke its action and rehear the matter.[83] There do

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[77] *Id*.

[78] *Id*.

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

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

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

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

[83] Pub. Resources Code at § 30328.

not appear to be any published court decisions relying on this provision to revoke any Coastal Commission actions.

IV. EX PARTE LAWS GOVERNING FEDERAL AGENCIES

A. The Federal Administrative Procedure Act

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

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

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[84] 5 U.S.C. § 551(14).
[85] 5 U.S.C. § 551(5).
[86] 5 U.S.C. § 551(7).
[87] 5 U.S.C. § 551(9).
[88] See generally 5 U.S.C. § 553.

In addition to notice-and-comment rulemaking, the Federal Administrative Procedure Act also provides for rulemaking in which a hearing must be held, known as "formal" rulemaking.[89] In such rulemaking, an agency employee or administrative law judge presides over a formal hearing in which evidence is taken and compiles a record for decision containing the transcript of testimony and exhibits along with all papers and requests filed in the proceeding.[90] Formal rulemaking contains strict prohibitions on ex parte communications. Interested persons outside the agency cannot "make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process an ex parte communication relevant to the merits of the proceeding."[91] Agency personnel are likewise prohibited from communicating with any interested person outside the agency.[92] Upon receipt of an ex parte communication, the agency member must place on the record all written communications, memoranda stating the substance of all oral communications, and all written responses or summaries of oral responses.[93] A party who violates the provisions may be required to show why the party's claim or interest in the proceeding should not be "dismissed, denied, disregarded, or otherwise adversely affected."[94]

The Federal Administrative Procedure Act applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," subject to certain limited exceptions.[95] In adjudicatory proceedings, the presiding officer may

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[89] See generally 5 U.S.C §§ 556-557. There are no universal definitions of "formal" and "informal" rulemaking proceedings. We use here the distinction drawn in the Federal APA as enumerated in 5 U.S.C. §§ 553 and 556. The latter lists such procedural characteristics as sworn testimony, availability of subpoenas, discretionary authority to take depositions, regulation of the proceeding by a presiding official, and recommendation of a proposed decision to a higher tribunal for final decision. Not all of these characteristics, of course, needs to be present in any given proceeding to classify it as "formal."

[90] 5 U.S.C. §§ 556(c) & (e).

[91] 5 U.S.C. § 557(d)(1)(A).

[92] 5 U.S.C. § 557(d)(1)(B).

[93] 5 U.S.C. § 557(d)(1)(C).

[94] 5 U.S.C. § 557(d)(1)(D).

[95] 5 U.S.C. § 554(a).

not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate."[96] The presiding officer also may not supervise or be supervised by an employee who engages in investigative or prosecuting functions for the agency.[97] Employees performing investigative or prosecuting functions may not, in the pending case "or a factually related case," participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings."[98] However, this provision does not apply to "proceedings involving the validity or application of rates, facilities or practices of public utilities or carriers"[99]—the Federal APA's ratesetting exception.

B.The Federal Communications Commission

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

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[96] 5 U.S.C. § 554(d)(1).

[97] 5 U.S.C. § 554(d)(2).

[98] 5 U.S.C. § 554(d)(2).

[99] 5 U.S.C. § 554(d)(2)(B).

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

[101] 47 U.S.C., § 151.

that networks provide."[102] In its 2016 budget estimates submitted to Congress in February 2015, the FCC budgeted for 1,671 full-time equivalent employees.

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

It should be noted that the FCC has established by regulation a "Sunshine period," during which no presentation to any commissioner (whether or not subject to ex parte rules) is permitted, subject to limited exceptions, .[106] The Sunshine period begins on the day after the release of a public notice that a matter has been placed on the "Sunshine Agenda," and continues until a decision has been issued or the matter is removed from the agenda or referred to staff for further consideration.[107] Parties may still make any permitted reply to an ex parte communication that was made prior to the commencement of the Sunshine period.[108]

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

[103] 47 C.F.R. § 1.1204.

[104] 47 C.F.R. § 1.1206.

[105] 47 C.F.R. § 1.1208.

[106] 47 C.F.R. § 1.1203(a).

[107] 47 C.F.R. § 1.1203(b).

[108] 47 C.F.R. § 1.1203(c).

1.Exempt proceedings

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

2.Permit-but-disclose proceedings

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

Ex parte communications are permitted in these proceedings, with specific disclosure requirements. Disclosures generally must be filed within two business days following the ex parte

[109] 47 C.F.R. § 1.1204(b).
[110] 47 C.F.R. § 1.1206(a).

communication.[111] Parties who make oral presentations must submit to the commission's Secretary a memorandum listing all persons attending or otherwise participating in the meeting, and summarizing all data presented and arguments made.[112] The memoranda must contain a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed, generally requiring "[m]ore than a one or two sentence description of the views and arguments presented."[113] Where a presentation occurs "in the form of discussion at a widely attended meeting," the regulations permit use of a transcript or recording of the discussion in lieu of the memorandum.[114] Documents shown or given to decision-makers during ex parte meetings are deemed to be written ex parte presentations and, accordingly, copies of the documents must be filed and mailed, emailed, or faxed to the commissioners or commission employees who attended or otherwise participated in the presentation.[115] If a notice of an oral ex parte presentation is incomplete or inaccurate, staff may request the filer to correct any inaccuracies or missing information.[116] Failure by the filer to file a corrected memorandum in a timely fashion or any other evidence of substantial or repeated violations of the rules on ex parte contacts, should be reported to the commission's general counsel.[117] The

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

[112] 47 C.F.R. § 1.1206(b)(1).

[113] *Ibid*.

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

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

[116] 47 C.F.R. § 1.1206(b)(2)(vi).

[117] *Ibid*.

commission's secretary shall issue public notices listing these disclosure memoranda at least twice per week.[118]

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

3.Restricted proceedings

All proceedings not enumerated under the FCC's regulations as being either exempt or permit-but-disclose proceedings are considered restricted proceedings in which no ex parte presentations are permissible.[121] These proceedings include, but are not limited to, all proceedings that have been designated for hearing, proceedings involving amendments to the broadcast table of allotments, applications for authority under Title III of the Communications Act, and all waiver proceedings (except for those directly associated with tariff filings).[122] If a restricted proceeding has only one party, "the party and the Commission may freely make presentations to each other because there is no other party to be served or with a right to have an opportunity to be present."[123] Additionally, the commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding be designated as permit-but-disclose.[124]

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[118] 47 C.F.R. § 1.1206(b)(4).
[119] 47 C.F.R. § 1.1206(b)(3).
[120] *Ibid*.
[121] 47 C.F.R. § 1.1208.
[122] *Ibid*.
[123] 47 C.F.R. § 1.1208, Note 1 to § 1.1208.
[124] 47 C.F.R. § 1.1208, Note 2 to § 1.1208.

4.Exempt presentations

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

5.Other noteworthy restrictions

"Decision-making personnel" is defined more broadly under FCC rules than under the CPUC's. Within the FCC, this group of people includes "[a]ny member, officer, or employee of the Commission, or, in the case of a Joint Board,[130] its members or their staffs, who is or may reasonably be expected to be involved in formulating a decision, rule, or order in a proceeding."[131]

6.Violations and sanctions

FCC personnel who receive oral ex parte presentations that they believe to be prohibited must provide a statement containing specified information about the presentation, and must provide any

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[125] 47 C.F.R. § 1.1204(a).

[126] 47 C.F.R. § 1.1204(a)(5)&(6).

[127] 47 C.F.R. § 1.1204(a)(8).

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

[129] 47 C.F.R. § 1.1204(a).

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

[131] 47 C.F.R. § 1.1202(c).

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

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

C.The Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission (FERC) is an independent agency that regulates the interstate transmission of electricity, natural gas, and oil. FERC also reviews proposals to build liquefied natural gas (LNG) terminals and interstate natural gas

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[132] 47 C.F.R. § 1.1212(b)&(c).
[133] 47 C.F.R. § 1.1212(d)-(g).
[134] 47 C.F.R. § 1.1212(h).
[135] See generally 47 C.F.R. § 1.1216.
[136] 47 C.F.R. § 1.1216(a).
[137] 47 C.F.R. § 1.1216(b)&(c).
[138] 47 C.F.R. §§ 0.251(g); 0.111(a)(15); 1.1216(d).

pipelines, and licenses hydropower projects. [139] Pursuant to the Energy Policy Act of 2005, FERC is responsible for regulating the transmission and wholesale sales of electricity in interstate commerce; reviewing certain mergers and acquisitions and corporate transactions by electricity companies; regulating the transmission and sale of natural gas for resale in interstate commerce; regulating the transportation of oil by pipeline in interstate commerce; approving the siting and abandonment of interstate natural gas pipelines and storage facilities; reviewing the siting application for electric transmission projects under limited circumstances; ensuring the safe operation and reliability of proposed and operating LNG terminals; licensing and inspecting private, municipal, and state hydroelectric projects; protecting the reliability of the high voltage interstate transmission system through mandatory reliability standards; monitoring and investigating energy markets; enforcing FERC regulatory requirements through imposition of civil penalties and other means; overseeing environmental matters related to natural gas and hydroelectricity projects and other matters; and administering accounting and financial reporting regulations of regulated companies. [140]

1.Adjudicatory and ratesetting proceedings

FERC has adopted its own regulations governing ex parte communications in its proceedings. These regulations prohibit ex parte contacts in all "contested on-the-record proceedings," which are defined as "any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, any proceeding initiated . . . by the filing of a complaint with the Commission, any proceeding initiated by the Commission on its own motion or in response to a filing, or any proceeding arising from an investigation." [141] This list includes both adjudicatory and ratesetting proceedings. The prohibitions begin from the time the commission initiates a proceeding or the time that intervention disputing a material issue is commenced, and remain in force until a

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

[140] *Ibid*.

[141] 18 C.F.R. § 385.2201(c)(1)(i).

final commission decision or other final order disposing of the merits of the proceeding is issued, the commission otherwise terminates the proceeding, or the proceeding is no longer contested.[142] Explicitly not included in the definition of contested proceedings are notice-and-comment rulemaking proceedings, investigations before they are proceedings, proceedings not having a party or parties, or any proceeding in which no party disputes any material issue.[143]

The restrictions apply to communications with decisional employees, defined as "a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee of the Commission, or contractor, who is or may reasonably be expected to be involved in the decisional process of a proceeding."[144] The restrictions cover communications "relevant to the merits," which does not include procedural inquiries or a "general background or broad policy discussion involving an industry or a substantial segment of an industry, where the discussion occurs outside the context of any particular proceeding involving a party or parties and does not address the specific merits of the proceeding."[145] Procedural inquiries specifically exclude any inquiries with a stated or implied preference for a particular party or position, or inquiries that are intended either directly or indirectly to address the merits or influence the outcome of a proceeding.[146]

Prohibited ex parte communications are not to be considered part of the record for decision.[147] Any decisional employee who makes or receives a prohibited ex parte communication must promptly submit to FERC's Secretary that communication, if written, or a summary of the substance of that communication, if oral.[148] The Secretary will place the communication or the summary in the public file associated

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[142] 18 C.F.R. §§ 385.2201(c)(1)(i) & (d)(2).
[143] 18 C.F.R. § 385.2201(c)(1)(ii).
[144] 18 C.F.R. § 385.2201(c)(3).
[145] 18 C.F.R. § 385.2201(c)(5).
[146] 18 C.F.R. § 385.2201(c)(5)(i).
[147] 18 C.F.R. § 385.2201(f)(1).
[148] 18 C.F.R. § 385.2201(f)(2).

with, but not part of, the decisional record of the proceeding.[149] Any party may file a response to a prohibited ex parte communication or file a written request to have the prohibited communication and the response included in the decisional record of the proceeding.[150] The communication and the response will be made a part of the decisional record if the request is granted by the commission.[151]

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

If a party or its agent or representative knowingly makes or causes to be made a prohibited ex parte communication, the commission may require the party, agent, or representative to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the prohibited communication. The commission may also disqualify and deny the person, temporarily or permanently, the privilege of practicing or appearing before it.[154] Additionally, commission employees who are found to have knowingly violated this rule may be subject to disciplinary actions as prescribed by the agency's administrative directives.[155]

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

[150] 18 C.F.R. § 385.2201(f)(3).

[151] *Ibid.*

[152] 18 C.F.R. § 385.2201(h)(1).

[153] *Ibid.*

[154] 18 C.F.R. § 385.2201(i)(1)-(2).

[155] 18 C.F.R. § 385.2201(i)(3).

2.Rulemaking proceedings

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

V.EX PARTE LAWS GOVERNING OTHER STATES' REGULATORY AGENCIES

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

A.Revised Model State Administrative Procedure Act

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

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

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

1.Contested cases

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

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

There are four enumerated exceptions to the ex parte prohibition. Ex parte communications authorized by statute, and communications concerning an "uncontested procedural issues" are permitted.[163] The Comment to the procedural exemption notes that it "does not apply to contested procedural issue nor does it apply to issues that do not easily fall into the procedural category. For example, other communications not on the merits but . . . related to security or to the credibility of a party or witness are prohibited."[164] The Model APA also exempts communications between a presiding officer or final decision-maker and "an individual authorized by law to provide legal advice" to the decision-maker; as well as communications on

[158] Model APA, § 102, subd. (7).
[159] Model APA, § 408, subd. (b).
[160] Model APA, § 408, subd. (a).
[161] Model APA, § 102, subd. (25).
[162] Model APA, § 408, subd. (b).
[163] Model APA, § 408, subd. (c).
[164] Model APA, Comment to § 408, p. 72.

ministerial matters with individuals on the staff of the decision-maker.[165] Such communications are exempted only if the non-decision-maker party has not served as investigator, prosecutor, or advocate at any stage of the case, and the communication may not "augment, diminish, or modify the evidence in the record."[166]

A narrower exemption permits limited ex parte communications between an agency head serving as either presiding officer or final decision-maker and agency staff.[167] "Agency head means the individual in whom, or one or more members of the body of individual in which, the ultimate legal authority of an agency is vested."[168] Ex parte communications with staff are permitted only if the staff has not served as investigator, prosecutor, or advocate at any stage of the case, and has not spoken with any person about the case outside of communications expressly permitted under the Model APA.[169] Moreover, the communication may not "augment, diminish, or modify the evidence in the agency hearing record," and must be either (1) "an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record"; (2) an explanation of the precedent, policies, or procedures of the agency; or (3) a communication that does not address "the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses."[170] The latter requirements for exemption were added to the Model APA as a result of a compromise on the issue of whether agency heads could communicate ex parte with employees.[171] One faction advocated for no ex parte communications at all between employees and agency heads, while another advocated for permitting ex parte communications that did not augment or diminish the evidentiary record.[172] The requirement that the communication meet

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[165] Model APA, § 408, subd. (d).
[166] *Ibid.*
[167] Model APA, § 408, subd. (e).
[168] Model APA, § 102, subd. (5).
[169] Model APA, § 408, subd. (e)(1)(A)-(B).
[170] Model APA, § 408, subd. (e)(2)(A)-(C).
[171] Model APA, Comment to § 408, p. 73.
[172] *Ibid.*

additional requirements was intended to further limit the applicability of the exemption as a compromise position.[173]

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

If an ex parte communication is made in contravention of the prohibition, the presiding officer or final decision-maker must put the communication into the hearing record.[177] Written communications are placed in the record, along with a memorandum that contains the response of the presiding officer or final decision-maker to the communication.[178] Oral communications require the preparation of a memorandum of the substance of the communication, and the response of the presiding officer.[179] The presiding officer or final decision-maker must also notice all parties of the communication and provide parties the opportunity to respond no later than 15 days after the notice is given.[180] For good cause, additional testimony may be permitted in response to the prohibited communication.[181]

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

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[173] *Ibid.*
[174] Model APA, § 408, subd. (h).
[175] Model APA, § 102, subd. (26).
[176] Model APA, § 408, subd. (h).
[177] Model APA, § 408, subd. (f).
[178] Model APA, § 408, subd. (f)(1).
[179] Model APA, § 408, subd. (f)(2).
[180] Model APA, § 408, subd. (g).
[181] *Ibid.*
[182] Model APA, § 408, subd. (i).

2.Rulemaking

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

B.Florida Public Services Commission

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

1.Adjudicatory and ratesetting proceedings

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

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

[184] Model APA, § 306, subd. (b).

[185] *Ibid.*

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

[187] *Ibid.*

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

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

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

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

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[190] *Ibid.*

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

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

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

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

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

Ex parte communications that violate the prohibition must be reported by both the commissioner and the party making the communication. If a commissioner knowingly receives an ex parte communication related to a proceeding to which he or she is assigned, he or she must place on the record of the proceeding copies of all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received and all oral responses made, and shall give written notice to all parties to the communication that such matters have been placed on the record.[196] Any party who desires to respond to an ex parte communication may do so, but the response must be received by the commission within 10 days after receiving notice that the ex parte communication has been placed on the record.[197] The commissioner may, if he or she deems it necessary to eliminate the effect of an ex parte communication received by him or her, withdraw from the proceeding, in which case the chair shall substitute another commissioner for the proceeding.[198]

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

Penalties for violations of the ex parte prohibition are primarily imposed on the commissioners. Any commissioner who knowingly fails to place on the record any ex parte communications within 15 days of the date of the communication is subject to removal and may

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

[197] *Ibid.*

[198] *Ibid.*

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

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

2.Rulemaking proceedings

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

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

C.Illinois Commerce Commission

The Illinois Commerce Commission (ICC) regulates public utilities, focusing on financial and operational analysis, policy development, public safety and enforcement activities related to electric, natural gas, water, sewer and telecommunications

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

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

[202] *Ibid.*

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

[204] *Id.*, § 350.041, subd. (3).

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

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

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

1.Adjudicatory and licensing proceedings

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

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

[208] *Ibid*.

[209] *Ibid*.

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

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

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

officers who make or cause to be made an improper ex parte communication must place on the public record of the proceeding all such written communications, memoranda stating the substance of all such oral communications, and all written responses and memoranda stating the substance of all oral responses to the initial ex parte communications.[213] These restrictions do not cover matters of procedure.

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

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

2.Ratesetting proceedings

The ICC's statutes restrict ex parte communications from public utility representatives in the ratesetting process.[217] The provisions apply to communications with commissioners, commissioners' assistants, and hearing examiners. Public utilities are not permitted to discuss any planned general case in a non-public setting with the designated decisional employees.[218] Once a utility has filed notice of intent to change rates, the public utility may not engage in substantive communication with the decisional employees until a notice of hearing is published.[219] Once the notice of hearing is published, ex parte communications are prohibited as set forth in the Illinois Administrative Procedure Act provisions for contested cases,

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

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

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

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

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

[218] *Ibid.*

[219] *Ibid.*

discussed above with respect to adjudicatory proceedings.[220] In addition to the provisions outlined above, if any ex parte communication occurs, all details of the communication must be placed in the public record, including all materials used, the identities of the parties to the communication, the location and the duration of the communication.[221] "A commissioner, commissioner's assistant, or hearing examiner who is involved in any such communication shall be recused from the affected proceeding."[222] A proceeding in which an ex parte contact takes place may be dismissed if necessary to prevent prejudice to a party or preserve fairness.[223] Significant categories of communications are exempted from these prohibition, including things "indirectly related to a general rate case filing" such as "issues related to outages and restoration, credit ratings, security issuances, reliability, Federal Energy Regulatory Commission matters, Federal Communications Commission matters, regional reliability organizations, consumer education, or labor matters."[224]

3.Rulemaking proceedings

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

The Public Utilities Act expressly requires "all proceedings, investigations, and hearings," conducted by the commission to be based exclusively on the record of proceedings, and specifically requires the ex parte rules applicable to contested cases in the Illinois Administrative Procedure Act to apply in contested, or formal,

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

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

[222] *Ibid.*

[223] *Ibid.*

[224] *Ibid.*

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

rulemaking proceedings.[226] Moreover, "any commissioner, hearing examiner, or other person who is or may reasonably be expected to be involved in the decisional process of a proceeding, who receives, or who makes or knowingly causes to be made, a communication prohibited by this Section or Section 10-60 of the Illinois Administrative Procedure Act . . . shall place on the public record of the proceeding (1) any and all such written communications; (2) memoranda stating the substance of any and all such oral communications; and (3) any and all written responses and memoranda stating the substance of any and all oral responses to the materials described in clauses (1) and (2)."[227]

In notice-and-comment rulemaking, the Illinois Administrative Procedure Act contains a specific provision on ex parte communications in rulemaking.[228] An ex parte communication in rulemaking is "any written or oral communication by any person during the rulemaking period that imparts or requests material information or makes a material argument regarding potential action . . . that is communicated to that agency, head of that agency, or any other employee of that agency."[229] The law only applies to communications made after the commencement of the first notice period or filing of notice of rulemaking.[230] Any ex parte communication must be reported to the agency's ethics officer by the recipient of the communication.[231] The ethics officer must make the communication part of the record of the rulemaking proceeding.[232] In addition, the ethics officer must file the communication with the state's Executive Ethics Commission, providing all written communications, any written responses to the communications, and a memorandum stating the nature and substance of all oral communications, including information about the party making the

[226] *Ibid.*
[227] 220 Ill. Comp. Stat. 5/10-103.
[228] 5 Ill. Comp. Stat. 100/5-165.
[229] 5 Ill. Comp. Stat. 100/5-165, subd. (b).
[230] *Ibid.*
[231] 5 Ill. Comp. Stat. 100/5-165, subd. (c).
[232] *Ibid.*

communications and the party receiving the communication, and any action the person requested or recommended.[233]

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

D.New York Public Service Commission

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

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

This clause has been interpreted to exempt all proceedings, adjudicatory or otherwise, involving public utilities before the PSC. While we have heard anecdotally that some commissioners set their own restrictions on ex parte communications in their own proceedings, there is no blanket ban or restriction on ex parte

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[233] *Ibid.*

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

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

[236] *Ibid*.

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

[238] *Ibid*.

communications before the PSC in any proceedings. The Public Service Commission utilizes both notice-and-comment rulemaking under the provisions of the state Administrative Procedures Act and adjudicatory rulemaking in what are termed, "generic proceedings," used to examine issues of common interest to all utilities.[239]

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

The Commission learned during the course of its investigation that it is statutorily permissible and common practice for utility company executives, lobbyists and other paid representatives of interested parties to have unfettered access to the PSC Chair and Commissioners without having to disclose details of these conversations, presentation materials or other specifics to the other parties participating in cases before the PSC . . . . Such communications are made in a manner that makes that information insufficiently available to challenge and counter by the adversely affected party or those with differing viewpoints. Since ex parte communications enable one party to influence a decision-maker off-the-record and outside the presence of the other interested parties, it effectively skirts procedural due process. Ex parte communications have the effect of undermining the indispensable fairness and unbiased attributes of decision-makers in judicial and administrative proceedings. Thus, actions to control those communications, in the

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

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

form of statutory frameworks, become necessary for those proceedings before the agency to maintain fairness and transparency with the public-at-large.

Of particular concern to the Commission is that many ratepayers lack the necessary resources to express their opinions and concerns on matters that impact their lives and their pocketbooks, and that of other similarly situated New Yorkers. . . . The Commission questions the fairness of allowing one side with virtually unlimited resources total access, while the other side lacks a similar voice.[241]

The Moreland Commission report went on to recommend that the PSC adopt ex parte restrictions similar to those of other states and federal agencies. A review of New York legislative efforts shows that there have been attempts to add ex parte restrictions to adjudicatory proceedings before the PSC, but they have not been successful.[242]

E.Pennsylvania Public Utility Commission

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

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

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

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

[244] *Ibid*.

[245] *Ibid*.

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

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

In these cases, no presiding officer may consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor may any presiding officer "be responsible to or subject to the supervision or direction" of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for the commission.[249]

2.Rulemaking proceedings

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

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[246] 66 Pa. Cons. Stat., § 334, subd. (c).
[247] *Ibid.*
[248] *Ibid.*
[249] 66 Pa. Cons. Stat., § 334, subd. (b).
[250] 45 Pa. Cons. Stat., § 1201 et seq.

F.Texas Public Utility Commission

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

1.Contested cases—adjudicatory and ratesetting proceedings

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

The PUCT uses administrative law judges from the Texas State Office of Administrative Hearings (SOAH) and all communications

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

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

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

[254] *Ibid.*

between SOAH administrative law judges and employees of the PUCT must be in writing or be recorded with a table of contents for each recording.[255] All such communication submitted to or considered by the administrative law judge shall be made available as public records when the proposal for decision is issued.[256]

2.Uncontested cases

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

G.Washington Utilities and Transportation Commission

Washington's Utilities and Transportation Commission (UTC) regulates the rates and services of private or investor-owned utility and transportation companies.[261] Regulated businesses include electric, telecommunications, natural gas, and water.[262] The commission also regulates in-state household movers, solid waste

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

[256] *Ibid.*

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

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

[259] *Ibid.*

[260] *Ibid.*

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

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

carriers, private ferries, and inter-city busses, as well as safety issues affecting charter buses, railroads, limousines, and nonprofit senior/handicapped transportation services.[263] The UTC is a three-member commission appointed by the governor and confirmed by the state senate.[264]

1.Adjudicatory and ratesetting proceedings

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

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[263] *Ibid*.

[264] *Ibid*.

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

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

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

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

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

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

2.Rulemaking proceedings

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

VI.PRACTICES ACROSS AGENCIES STUDIED

In this Section, we synthesize the laws governing ex parte contacts across all of the agencies we studied. We analyze the laws

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

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

[271] *Ibid.*

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

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

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

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

issue-by-issue to identify dominant practices and trends[276] and to identify the various ways in which these agencies have reconciled controversial issues for which there is not a consensus approach one way or another.

A.Adjudicatory Proceedings

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

B.Quasi-Legislative Proceedings

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

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

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

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

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

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

Because of the variability in rules governing quasi-legislative proceedings, we consulted several academic analyses of ex parte communications in rulemaking, and our conclusions have been informed by comments from three scholarly sources. Esa L. Sferra-Bonistalli conducted a study of informal rulemaking in federal agencies for the Administrative Conference of the United States

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

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

(ACUS),[280] which she summarized in testimony before the Little Hoover Commission last March.[281] Consistent with the ACUS's Recommendation 2014-4, which she describes as "the current federal consensus regarding [ex parte] communications,"[282] Sferra-Bonistalli recommends that agencies be permitted to receive ex parte communications in notice-and-comment rulemaking but that they should be encouraged to provide for disclosure of both the occurrence and the content of ex parte communications made after promulgation of the notice of proposed rulemaking.[283] She describes these recommendations as enabling agencies to realize the benefits of ex parte communications while, through disclosure, "ensur[ing] that rulemaking proceedings are not subject to the appearance of or actual impropriety, improper influence, or unfairness because of *ex parte* communications."[284]

We have also reviewed the statement of Professor Michael Asimow submitted to the Little Hoover Commission.[285] He emphatically opposes amending California's Rulemaking APA to impose in that statute any additional requirement that would apply to all agencies. However, he urges that "individual agencies should be encouraged to set forth their ex parte practice in procedural regulations and agencies may well decide to limit such contacts in the

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

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

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

[283] *Ibid.*

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

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

interest of saving staff time or assuring equal access or responding to public concerns about undue influence."[286] He emphasizes the advantages of ex parte contacts in rulemaking—to help interested members of the public understand the issues being addressed in the rulemaking, to encourage candor from people communicating their concerns, and to facilitate political choices and hard compromises.[287] But he also recognizes that ex parte communications, in addition to consuming too much staff time and creating "problems of equal access by different groups," may "suggest to the public that the agency has been captured by the interests it regulates."[288] Asimow also makes it clear that his position on adding requirements to the Rulemaking APA is based in part on his belief that that statute's requirements are already "too complex and costly," and "[b]ecause I believe that California already overregulates the adoption of regulations, I oppose any additional restrictions on the rulemaking process."[289] Based on our experience representing public entities subject to the Rulemaking APA, we share his opinion that the act places unnecessary and unreasonable impediments to agency rulemaking. But that ought not to be of significance here since the CPUC is exempt from the Rulemaking APA.[290]

The only CPUC-specific study we have reviewed is an article by Professor Deborah Behles and former CPUC ALJ Steven Weissman.[291] Their paper focuses on the revelations of "improper private communications between high-level utility officials and

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

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

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

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

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

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

decision-makers at" the CPUC, which, they conclude, reflects a "culture of conversations with parties . . . behind closed doors."[292] Behles and Weissman survey various state, federal, and model codes, concluding, with respect to rulemaking proceedings, that "many ex parte rules . . . take a more nuanced approach [than the California Public Utilities Code] and focus on whether a pending proceeding is contested, hearings are held, or substantive rights might be affected."[293]

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

C.Ratesetting Proceedings

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

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

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

rates).[294] However, the FCC does not permit ex parte communications in proceedings set for hearing,[295] a noteworthy difference from the CPUC's practices.

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

There is less consensus as to the point in a ratesetting proceeding at which ex parte communications are prohibited. In the CPUC, there is no ban on ex parte communications until a proceeding has commenced, and once a proceeding is initiated a presumed category governs the proceeding until the scoping memorandum is prepared. The Model APA, Texas, and Washington employ a similar standard, permitting ex parte communication until an application is filed, at which point a proceeding is deemed to have commenced. In agencies which prohibit ex parte communications only in contested proceedings, such as FERC and Pennsylvania, ex parte communications are permitted until an opposing party has filed appropriate papers to demonstrate that it will contest the application. Florida and Illinois each take a different approach to the question. Florida prohibits ex parte communications whenever an individual knows that an issue will be filed with the agency within 90 days.[298]

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[294] 47 C.F.R. § 1.1206(a).
[295] 47 C.F.R. § 1.1208.
[296] 18 C.F.R. § 385.2201(c)(i).
[297] 66 Pa. Cons. Stat., § 334, subd.(c).
[298] Fla. Stat., § 350.042, subd. (1).

Illinois explicitly bars public utilities, and only utilities, from discussing any planned general rate case in a non-public setting with designated decision-makers, and the prohibition on utilities engaging in ex parte communications continues after the case is filed until the notice of hearing is published, at which time all parties are subject to the same prohibitions.[299] There seems to be a good reason that most agencies do not attempt to regulate ex parte contacts prior to the commencement of a proceeding: there is inherently uncertainty as to whether a proceeding might be commenced.

D.Scope of Agency Personnel Included

There is a range across agencies as to which agency employees are barred from receiving or making ex parte communications (where such communications are prohibited, of course). The CPUC's ex parte rules apply to communications with Commissioners and ALJs, and a more limited set of rules governs communications with Commissioners' advisors. All other agency employees may speak freely with parties and decision-makers.

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

Other agencies include a somewhat broader scope of employees in ex parte prohibitions. FERC bars communications with "decisional employees," which include commissioners, their personal staffs, the ALJ, and other employees who are expected to be involved in the decisional process. The Federal Administrative Procedure Act's rules for formal rulemaking have a nearly identical formulation to FERC's decisional employees list, with the exception of the "personal staff" of commissioners. In contested rulemaking, Illinois prohibits commissioners, hearing examiners, and any employee involved in the decision from engaging in ex parte communications. Washington

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

State's utility commission similarly applies its rules on adjudications to commissioners, ALJs, the commissioners' staff assistants, legal counsel, and consultants assigned to advise the commission on the proceeding—a somewhat more identifiable set of personnel than the more nebulous "employee involved in the decision" standard used in the other agencies discussed above, but broader than those included under the CPUC's present rules.

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

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

E.Disclosure Obligations, Timing, and Right of Reply

The CPUC is nearly alone among agencies we examined in placing the obligation to disclose ex parte communications on the non-agency party to a communication. Nearly all the agencies we studied place disclosure obligations on the decision-maker, not on the outside party (who may or may not be initiating a communication). The Adjudicatory APA, the CEC, the California Coastal

Commission, the Federal Administrative Procedure Act for formal rulemaking, FERC, Illinois, and Washington all impose disclosure obligations on the decision-maker. Florida requires disclosure from both the party and the decision-maker. The FCC is the only agency we studied that requires disclosure by the outside party alone.

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

Agencies deploy a wide range of timing for disclosures. In ratesetting, the CPUC requires three day advance notice of meetings with Commissioners, and notice of any ex parte communication to be filed three days after the communication. Written communications

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

must be served the same day. The CPUC is unique among agencies we studied in imposing an advance notice requirement for meetings with Commissioners, and imposes one of the shortest time frames for required disclosures.

Timing for disclosure of ex parte communications is most commonly established for schemes permitting ex parte communications and requiring their after-the-fact disclosure. For instance, the Coastal Commission requires that decision-makers disclose ex parte communications in quasi-judicial matters within seven days of the communication. If a communication is received within seven days of a commission meeting on the matter addressed in an ex parte communication, the communication must be disclosed orally at the meeting. The FCC requires that the party making the ex parte communication file notice of the communication within two business days. Like the Coastal Commission, the FCC attempts to address the issue of communications immediately before its public meetings. The FCC has created a "Sunshine period," that begins once the agenda for a meeting is released, during which no ex parte communications are permitted. As discussed below, parties retain a right to reply to such communications made before the Sunshine period after the period has commenced.

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

The majority of agencies we studied provide for a right of reply to an ex parte communication. The CPUC provides an equal

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

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

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

F.Disclosure Contents

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

On the question as to what information must be disclosed about the substance of the communication, the issue is one of wording. A few agencies had formulations of this requirement that were more helpful than others at conveying how much of the substance of a communication must be described in the ex parte disclosure. Most

agencies use fairly general descriptions such as "the substance of the communication" or "all details of the communication," but the Coastal Commission and the FCC have more specific language in their disclosure provisions. The Coastal Commission requires that disclosures contain a "complete, comprehensive description"[302] of the communication. The FCC instructs the parties who must disclose that they need to include "more than a one or two sentence description of the views and arguments presented."[303]

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

G.Inclusion in Record of Proceedings

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

[302] Pub. Resources Code, § 30324, subd. (b)(1).
[303] 47 C.F.R. § 1.1206(b)(1).
[304] Gov. Code, § 11430.50, subd. (a).

purposes of establishing a fact at issue. The presiding officer determines whether to admit such material in a given proceeding. The Adjudicatory APA, the Coastal Commission, the CEC, the Federal APA, FERC, the Model APA, Florida, and Illinois all require that ex parte communications be disclosed and placed in the record.

H.Enforcement, Penalties, and Sanctions

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

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

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

The most common penalty imposed on the decision-maker is disqualification from the decision on the matter addressed in the ex parte communication. Laws allowing disqualification as a sanction

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

Some agencies have found it beneficial to have an internal or external officer who is made responsible for enforcing the ex parte rules. For example, the FCC's regulations assign specific duties to the General Counsel to investigate ex parte communications identified by agency personnel as prohibited communications.[305] In Florida a separate state agency, the Commission on Ethics, has authority to investigate sworn complaints of violations of the ex parte rules, and can impose penalties prohibiting individuals from appearing before the Public Service Commission.[306] Illinois' Administrative Procedure Act requires agencies to appoint an ethics officer to receive reports of ex parte communications in notice-and-comment rulemaking.[307] The CPUC presently lacks any specific individual who is designated to enforce the ex parte rules.

I.Communications with Decision-Makers

1.Staff communications

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

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[305] 47 C.F.R. § 1.1212 (b)-(g).

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

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

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

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

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

2.Non-party communications

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

J.Exempted Communications

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

Agencies that attempt to more narrowly define the procedural communication exemption seek to eliminate two possible abuses of the exemption: private communications on controverted procedural

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

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

[310] 47 C.F.R. § 1.1206(b)(3).

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

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

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

K.Conclusions

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

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

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

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

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

(3)Disclosure contents: California law prohibits disclosure of CPUC decision-maker's ex parte statements. Most agencies require the disclosure of any response to an ex parte communication.

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

(5)Enforcement, penalties, and sanctions: While the CPUC may

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

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