

**Presentation on Ex parte Report to the Policy and
Governance Subcommittee**

May 20, 2015

Assistant Chief ALJ Ebke

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

November 25, 2009

Dear Chief Administrative Law Judge Karen Clopton,

I am pleased to submit the Report of the Ex Parte and Proceeding Categorization Working Group to you. This report is in response to your letter dated June 19, 2009, in which you identified the members of the Ex Parte and Proceeding Categorization Working Group (Working Group) and offered the following charge:

“Review existing rules and statutes for any loopholes, unhelpful redundancies, or unnecessary complexities. Develop proposals for recommended revisions, including language which could be submitted to the Legislature that will not undermine due process but will also minimize administrative burdens associated with existing rules.”

The Working Group’s report identifies several proposals for your consideration. Each proposal is followed by a brief description and a list of pros and cons. Where applicable, each proposal also includes proposed changes to the relevant Commission rules or statute. In summary, the proposals are:

Rate Setting Proceedings:

- Proposal 1: Provide a one-way conference call bridge for all ex parte communications between decision makers and individual parties.
- Proposal 2: Revise the definition of “interested party” to include representatives of the Governor’s Office and members of the Legislature.
- Proposal 3: Clarify the reporting requirements for ex parte communications with Commissioner Advisors, and extend those requirements to communications with the Commission’s Executive Director.
- Proposal 4: Expand notice requirements for ex parte communications occurring within the three working days prior to a Commission business meeting.
- Proposal 5: Apply ex parte requirements to all rate setting proceedings whether or not a hearing is scheduled or held.

Proposal 6: Schedule a final All-Party Meeting with the Assigned Commissioner and institute a quiet time during which no ex parte communications are allowed after the All-Party Meeting.

Quasi-Legislative Proceedings:

Proposal 7: Extend the existing ex parte communication reporting requirements for rate setting proceedings to quasi-legislative proceedings.

All Commission Proceedings for which Ex Parte Communications Are Allowed and Reportable:

Proposal 8: Revise rules to add definition of “other public proceeding” as referenced in Public Utility Code §1701.1 (c)(4).

Proposal 9: Reverse recent decision to delete notification of ex parte communications in the Commission’s Daily Calendar.

Adjudicatory Proceedings:

Proposal 10: Revise rules to allow requests to change preliminary categorization of complaint cases after issuance of a scoping memo.

Proposal 11: Revise rules to address problems that occur when adjudicatory and quasi-legislative proceedings “overlap.”

The proposals presented in the report have emerged from discussions among the members of the Working Group. The members of the Working Group are:

James Lehrer	Southern Cal Edison	james.lehrer@sce.com
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Nick Selby	Law Office of Earl Nicholas Selby	ens@loens.com

I would like to commend the members of the Working Group for sharing their thoughts and views openly with each other and for contributing to these thoughtful options. Each member's contribution was unique and important. Special thanks go to Sarah DeYoung for her assistance with preparing the report for final production. In preparing this report, the Working Group also consulted with other individuals who are involved in ex parte activities or have familiarity with the existing ex parte rules at the Commission; the Working Group is thankful for their input and thoughtful suggestions.

I also would like to thank the Administrative Law Judges Division and the members of the Working Group for the opportunity to work as the group's facilitator on this important project. I look forward to the next steps!

Sincerely,

Maryam Ebke, Administrative Law Judge

Ex Parte Communication and Categorization Working Group Facilitator

Cc: Michelle Cooke, Assistant Chief Administrative Law Judge

Cc'd electronically to Michelle Cooke and Ex Parte and Proceeding Categorization Working Group Members.

NOVEMBER 25, 2009 REPORT OF THE EX PARTE AND PROCEEDING CATEGORIZATION WORKING GROUP

DISCLAIMER

The attached report contains a number of proposals developed by members of the Ex Parte and Proceeding Categorization Working Group. The Working Group did not attempt to reach a consensus as to which proposals to recommend to the Commission, but rather decided to forward to the Commission, for its consideration, each proposal that, at the end of the Working Group's discussions, was supported by at least one member of the Working Group. Some members of the group may not support any of the proposals or the statements of pros and cons that accompany each proposal. The Working Group expects that the Commission will provide for further public consideration before any of these proposals are adopted. The order in which these proposals are presented in the attached report has no significance, and the report does not attempt to identify who supports or opposes any particular proposal.

Proposals

Rate Setting Proceedings:

- Proposal 1:** Provide a one-way conference call bridge for all ex parte communications between decisionmakers and individual parties.
- Proposal 2:** Revise the definition of “interested party” to include representatives of the Governor’s Office and members of the Legislature.
- Proposal 3:** Clarify the reporting requirements for ex parte communications with Commissioner Advisors, and extend those requirements to communications with the Commission’s Executive Director.
- Proposal 4:** Expand notice requirements for ex parte communications occurring within the three working days prior to a Commission business meeting.
- Proposal 5:** Apply ex parte requirements to all rate setting proceedings whether or not a hearing is scheduled or held.
- Proposal 6:** Schedule a final All-Party Meeting with the Assigned Commissioner and institute a quiet time during which no ex parte communications are allowed after the All-Party Meeting.

Quasi-Legislative Proceedings:

- Proposal 7:** Extend the existing ex parte communication reporting requirements for rate setting proceedings to quasi-legislative proceedings.

All Commission Proceedings for which Ex Parte Communications Are Allowed and Reportable:

Proposal 8: Revise rules to add definition of “other public proceeding” as referenced in Public Utility Code §1701.1 (c)(4).

Proposal 9: Reverse recent decision to delete notification of ex parte communications in the Commission’s Daily Calendar.

Adjudicatory Proceedings:

Proposal 10: Revise rules to allow requests to change preliminary categorization of complaint cases after issuance of a scoping memo.

Proposal 11: Revise rules to address problems that occur when adjudicatory and quasi-legislative proceedings “overlap.”

Proposal 1:

Brief Description of Proposal:

Provide a listen-only conference call bridge for all ex parte communications in ratesetting proceedings between decisionmakers and individual parties. See next page for proposed changes to Rule 8.2 (c) (2).

Does the Proposal Require Statutory Changes?

May require statutory changes in that the current statute and rules exclude reporting to other parties what decision makers say to individual parties in ex parte communications.

Pros:

- Provides transparency on what was discussed at individual ex parte meetings
- Takes advantage of advances in technology
- Mitigates concern that ex parte notices currently vary too significantly as to the detail and description of the issues/facts discussed
- Not knowing what the decision maker said about issues and facts discussed decreases transparency since other parties do not know (1) whether issues and facts are being properly discussed (*e.g.*, are limited to the evidentiary record; other parties' positions fairly described, etc); (2) which issues the decision maker believes are relevant; and (3) whether the decision maker has reached a decision that other parties believe to be based on an incorrect understanding of the issues and facts

Cons:

- Requires scheduling conference bridges in advance and limits locations where ex parte communication can take place
- May increase cost to PUC and/or ratepayers
- The decision maker will not know who is listening in, and his/her communication will likely be limited or chilled, out of concern for being quoted out of context or that others may view the decision maker's questions or comments as definitively indicating his/her position on the subject. This chilling effect would lead to reduced opportunities for ex parte communications, thus limiting the ability of decisionmakers to get critical, focused and timely explanation of parties' views on key issues or to get their own questions about the cases answered
- Does not provide an immediate opportunity for listening parties to voice their disagreements with what is being discussed

Proposal 1

Proposed Changes to Rule 8.2 (c)(2)

Rule 8.2 (Rule 8.2) Ex Parte Requirements

(2) Individual oral communications: If a decisionmaker grants an ex parte communication meeting or call to any party individually, all other parties shall be granted an individual meeting of a substantially equal period of time with that decisionmaker. The interested person requesting the initial individual meeting shall notify the other parties that its request has been granted, and shall file a certificate of service of this notification, at least three days before the meeting or call. **This interested person will also provide notice that a listen-only conference call bridge will be made available to all parties, and will include the listen-only conference bridge number and other information to enable other interested persons to listen in.**

Proposal 2:

Brief Description of Proposal:

Revise the definition of “interested person” in Rule 8.1 (d) for rate setting proceedings to include representatives of the Governor’s Office and members of the Legislature.

Does the Proposal Require Statutory Changes?

Will require statutory changes. Public Utilities Code § 1701.1 and related rules do not currently define representatives of the Governor’s Office and members of the legislature as “interested persons.” This statute and related rules allow representatives from the Governor’s Office and state legislature to contact and attempt to influence decision makers. See next page for proposed changes to Public Utilities Code Section 1701.1.

Pros:

- Some agencies disallow all contacts with decision makers
- Promotes transparency on how decisions are being made at the Commission
- The Commissioners are appointed by the Governor and confirmed by legislators, and these facts make their relationship different from other government officials. The public has a right to know the dynamics of the relationship between the entities that appoint and approve Commissioner appointments and the impact on the decision making process
- Promotes the independence of the Constitutional body by requiring disclosure of contacts from the Governor and from legislators
- Prevents parties from using their legislators to influence the Commission’s decisionmakers without any public transparency

Cons:

- May chill open and frank communication between the PUC and other branches of state government, and may interfere with elected officials’ conduct of their constitutional and statutory duties
- To the extent this proposal requires statutory changes, the identified potential problems and “pros” of the proposal do not identify issues that are likely to compel legislative action, particularly where that action would limit the legislators’ own ability to communicate freely with Commission decisionmakers
- Allows contacts with some government officials (e.g. city mayors) while disallowing others

Proposal 2

Proposed Changes to Section 1701.1

1701.1.

(c)

(4) "Ex parte communication," for purposes of this article, means any oral or written communication between a decisionmaker and a person with an interest in a matter before the commission concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public meeting, or on the official record of the proceeding on the matter. "Person with an interest," for purposes of this article, means any of the following:

(A) Any applicant, an agent or an employee of the applicant, or a person receiving consideration for representing the applicant, or a participant in the proceeding on any matter before the commission.

(B) Any person with a financial interest, as described in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9 of the Government Code, in a matter before the commission, or an agent or employee of the person with a financial interest, or a person receiving consideration for representing the person with a financial interest.

(C) A representative acting on behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization who intends to influence the decision of a commission member on a matter before the commission.

(D) The Governor or any staff from the Governor's office;

(E) A state legislator or any legislative staff.

The commission shall by regulation adopt and publish a definition of decisionmakers and persons for purposes of this section, along with any requirements for written reporting of ex parte communications and appropriate sanctions for noncompliance with any rule proscribing ex parte communications. The regulation shall provide that reportable communications shall be reported by the party, whether the communication was initiated by the party or the decisionmaker. Communications shall be reported within three working days of the communication by filing a "Notice of Ex Parte Communication" with the commission in accordance with the procedures established by the commission for the service of that notice. The notice shall include the following information:

(i) The date, time, and location of the communication, and whether it was oral, written, or a combination.

(ii) The identity of the recipient and the person initiating the communication, as well as the identity of any persons present during the communication.

(iii) A description of the party's, but not the decisionmaker's, communication and its content, to which shall be attached a copy of any written material or text used during the communication.

Proposal 3:

Brief Description of Proposal:

Clarify the reporting requirements for ex parte communications with Commissioner Advisors in rate setting proceedings, and extend those requirements to communications with the Commission's Executive Director. See next page for proposed clarification/revision to Rules 8.1, 8.3 and 8.5.

Does the Proposal Require Statutory Changes?

No.

Pros:

- The rules that pertain to ex parte communications and reporting requirements are unclear as to communications with Commission Advisors (i.e. communications do not require advance notice but must be reported by the interested party). These requirements could be clarified by better integrating Rules 8.3 and 8.5
- Recognizes that the Executive Director provides a unique advisory role to the Commissioners
- The Executive Director is in charge of staff that provide direct assistance to decisionmakers regarding technical issues that are in dispute in Commission proceedings

Cons:

- The proposal treats the Executive Director as having a role similar to Commission advisors. However, the Executive Director serves a much broader role in the day-to-day conduct of the Commission's business, in ways similar to other Commission staff such as the General Counsel and other Division Directors

Proposal 3

Proposed Changes to Rule 8.1, 8.3 and 8.5

Rule 8.1 (Rule 8.1) Definitions.

(b) "Decisionmaker" means any Commissioner, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion Administrative Law Judge. **Commissioners' Personal Advisors, and the Commission's Executive Director are not defined as decisionmakers, but ex parte communications with these individuals must be reported as described in Rules 8.3 (a) (2) and (3) and Rule 8.5.**

Rule 8.3 (Rule 8.3) Reporting Ex Parte Communications.

Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. A "Notice of Ex Parte Communication" (Notice) shall be filed with the Commission's San Francisco Docket Office within three working days of the communication. The Notice shall include the following information:

(a) The date, time, and location of the communication, and whether it was oral, written, or a combination;

(b) The identities of each decisionmaker (or Commissioner's personal advisor **or the Commission's Executive Director**) involved, the person initiating the communication, and any persons present during such communication;

(c) A description of the interested person's, but not the decisionmaker's (or the Commissioner's personal advisor's **or Commission's Executive Director'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.

Rule 8.5 (Rule 8.5) Communications with Advisors and the Executive Director

Communications with Commissioners' personal advisors and the Commission's Executive Director are subject to all of the restrictions on, and reporting requirements applicable to, ex parte communications, except that oral communications in ratesetting proceedings are permitted without the restrictions of Rule 8.2 (c) (1) and (2).

Proposal 4:

Brief Description of Proposal:

Expand notice requirements for ex parte communications by requiring Commissioners to provide a list (either orally or in writing) at Commission business meetings of all reportable ex parte communications concerning an item on the agenda for that business meeting that took place within the three working days prior to that Commission business meeting (i.e. a list similar to the Hold List that is published in advance of each business meeting). See next page for proposed revisions to Rule 8.3.

Does the Proposal Require Statutory Changes?

May require statutory changes in that it places ex parte reporting requirements on Commissioners as opposed to interested persons.

Pros:

- Other Commissions have similar requirements
- Shines a light on the number of ex parte communications held just prior to a business meeting
- Ensures that there is information available concerning all ex parte communications prior to a vote, since the notices of ex parte communications are not due for filing until three working days after the communication

Cons:

- Requiring the Commissioners to compile and report this information at their business meeting would not provide sufficient time or substantive information to enable parties to effectively respond at the meeting, through pleadings, or via additional ex parte communications
- Current reporting requirements already “shine a light” on the number of ex parte communications held. Ex parte notices are electronically filed and served on the entire service list for the applicable proceeding within three days
- Creates new record-keeping and reporting obligations for the Commissioners

Proposal 4

Proposed Changes to Rule 8.3

Rule 8.3 (Rule 8.3) Reporting Ex Parte Communications.

Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. A "Notice of Ex Parte Communication" (Notice) shall be filed with the Commission's San Francisco Docket Office within three working days of the communication. The Notice shall include the following information:

(a) The date, time, and location of the communication, and whether it was oral, written, or a combination;

(b) The identities of each decisionmaker (or Commissioner's personal advisor, involved, the person initiating the communication, and any persons present during such communication;

(c) A description of the interested person's, but not the decisionmaker's (or the Commissioner's personal 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.

In addition, Commissioners will provide a list (either orally or in writing) at Commission business meetings of all reportable ex parte communications concerning an item on the agenda for that business meeting that took place within the three working days prior to that Commission business meeting. The list shall include the information required in subparts (a) and (b) but not the content information required in subpart (c) of Rule 8.3.

Proposal 5:

Brief Description of Proposal:

Apply ex parte requirements to all rate setting proceedings whether or not a hearing is scheduled or held. See next page for proposed changes to Rule 8.2(d) to remove the references to hearings.

Does the Proposal Require Statutory Changes?

Probably no statutory changes required.

Pros:

- When an application is protested, even when the Commission determines in a scoping memo that no hearing is required, without this proposal those parties who protested an application would not get notice of ex parte communications
- There are proceedings which involve issues of law and fact in which the Commission has relied on technical workshops and paper pleadings. These proceedings may involve policy issues of equal or greater importance as issues advanced in fact-specific applications; thus, the same rationales for transparency and open government justify reporting ex parte communications even when no evidentiary hearings are scheduled
- The existing rules are based on an outdated process which assumed that a lack of evidentiary hearings indicated that there were no factual issues in dispute

Cons:

- Rule 8.2 (d) already provides the Administrative Law Judge, with the approval of the Assigned Commissioner, with the power to override that Rule's provisions. If good cause exists to warrant such action, parties are free to so request

Proposal 5

Proposed Changes to Rule 8.2 (d)

Rule 8.2 (Rule 8.2) Ex Parte Requirements.

(d) Notwithstanding Rule 8.4, unless otherwise directed by the assigned Administrative Law Judge with the approval of the assigned Commissioner, the provisions of subsections (b) and (c) of this rule, and any reporting requirements under Rule 8.3, shall cease to apply, and ex parte communications shall be permitted, in any proceeding in which (1) no timely answer, response, protest, or request for hearing is filed, or (2) all such responsive pleadings are withdrawn, ~~or (3) a scoping memo has issued determining that a hearing is not needed in the proceeding.~~

Proposal 6:

Brief Description of Proposal:

Schedule a final All-Party Meeting with the Assigned Commissioner in all rate setting proceedings, and institute a quiet time during which no ex parte communications are allowed after the All-Party Meeting. See next page for proposed changes to Rule 8.2.

Does the Proposal Require Statutory Changes?

No statutory changes required.

Pros:

- Levels the playing field to address perceived concerns about the current equal time rules
- Provides equal opportunity for all parties to “have the last word”
- Establishes automatic quiet time
- Allows for reasonable flexibility to accommodate assigned Commissioner’s schedule

Cons:

- The proposal is overly prescriptive; it assumes there is always an interest in having an ex parte communication. Some proceedings are uncontested, and others are resolved through all-party settlements or ADR. Scheduling all-party meetings and imposing mandatory quiet times in such cases serves no purpose
- The proposal would be unduly burdensome when the assigned Commissioner has multiple proceedings on the agenda or other logistical restraints; it does not provide enough flexibility to accommodate Commissioners’ schedules
- The proposal would require advance scheduling in the scoping memo. Optionally, it could be implemented only for “highly contested” proceedings, although that term would need to be defined
- The proposal would probably interfere with the timely conduct of the Commission's business, including the timely issuance of decisions. For example, if an Assigned Commissioner is unable to schedule all required mandatory all-party meetings for his or her ratesetting proceedings in the designated one or two-day window, then some decisions would presumably have to be held to a subsequent meeting under this proposal
- A long quiet time is neither useful nor practical (*e.g.* other Commissioners in addition to the Assigned Commissioner may want to meet with parties). Some members of the Working Group agree that quiet time is OK if reasonably short (*e.g.* 3-4 days). Others believe that any quiet time is unreasonable, especially given current process used to issue and provide no comment on revised Proposed Decisions

Proposal 6

Proposed Addition to Rule 8.2 (c) (4)

Add new section: Rule 8.2 (c)(4)(C)

Not less than two days nor more than 14 days prior to the day of the Commission Business Meeting at which the decision in a proceeding is scheduled for Commission action, the Assigned Commissioner for that proceeding shall schedule and conduct an all-party meeting to which all active parties in the proceeding are invited to participate in-person or by conference call. Following the all-party meeting, all ex parte communications on that decision are prohibited. If the decision is held, ex parte communications again will be permitted pursuant to Rule 8.2, including this all-party rule requirement.

Proposal 7:

Brief Description of Proposal:

Extend the existing ex parte communication reporting requirements for rate setting proceedings to quasi-legislative proceedings (i.e. no other ex parte requirements for rate setting proceedings would apply to quasi-legislative proceedings). See next page for proposed changes to Rule 8.2 (a).

Does the Proposal Require Statutory Changes?

May require statutory changes in that Public Utilities Code § 1701.1 (4) (b) currently permits ex parte communications in quasi-legislative proceedings “without any restrictions.”

Pros:

- Provides transparency re: what issues are being discussed in quasi-legislative proceedings, and who decision makers are meeting with
- Addresses perceptions that certain parties have more access to decision makers in quasi-legislative proceedings and provides a process for monitoring ex parte communications and provide facts to ascertain how often parties are meeting with decision makers in quasi-legislative proceedings
- Important policy issues are at stake in quasi-legislative proceedings. The same rationales for transparency and open government thus justify reporting ex parte communications
- Ex parte reporting requirements do not constitute a “restriction” on ex parte communications

Cons:

- To the extent this proposal requires statutory changes, no specific problems resulting from ex parte communications in quasi-legislative proceedings have been identified to justify pursuing a statutory change. The mere desire to “monitor” communications made in quasi-legislative proceedings does not provide a compelling basis to propose a statutory change to the legislature
- The legislature’s exclusion of quasi-legislative proceedings from the ex parte communication reporting requirements was in response to then-Commissioner Conlon’s observation that communications free of such requirements enabled Commissioners to deal more effectively with broad policy issues and industry-wide rulemakings. Commissioner Conlon’s argument remains valid today
- Proponents of this change base their conclusion that a statutory change is not required upon the too-narrow interpretation of “any restriction” to include post-communication reporting requirements. The legislature’s use of the modifier “any” compels a broader interpretation which includes reporting requirements as among the restrictions the

legislature intended to prohibit in quasi-legislative matters. Accordingly, this proposed rule change would require a statutory change

Proposal 7

Proposed Changes to Rule 8.2 (a)

Rule 8.2 (Rule 8.2) Ex Parte Requirements.

(a) In any quasi-legislative proceeding, ex parte communications are allowed without restriction or reporting requirement **but are subject to the reporting requirements set forth in Rule 8.3.**

Proposal 8:

Brief Description of Proposal:

Revise rules to further define that “other public proceeding” as referenced in Public Utilities Code § 1701.1 (c) (4) includes all-party meetings, workshops, and oral arguments. See next page for proposed changes to Rule 8.1.c.3.

Does the Proposal Require Statutory Changes?

No statutory changes required.

Pros:

- The meaning of the phrase “public forum established in the proceeding” could benefit from clarification, which would provide all practitioners with useful guidance. The rule already identifies “workshops” as a “public forum established in the proceeding” but is silent with regard to “all-party meetings” and “oral arguments.” The rule should be clear that the term “public forums” includes “all-party meetings” and “oral arguments” when they are “established in the proceeding.” Hence, communications made during “all-party meetings” and “oral arguments” that “established in the proceeding” are not “ex parte communications” and do not have to be reported. Thus, communications made during an oral argument established in an adjudicatory proceeding would not be ex parte communications
- Likewise, the rule should be clear that communications made in “public forums” such as NARUC conferences, CCPUC conferences, other conferences, private events, and meetings outside the Commission that are not “established in the proceeding” are ex parte communications” and therefore subject to the applicable ex parte rules

Cons:

- This proposal does not fully address potential ambiguities between Public Utilities Code § 1701.1 (c)(4) and the related rules

Proposal 8

Proposed Changes to Rule 8.1 (c)(3)

Rule 8.1 (Rule 8.1) Definitions.

(c) “Ex parte communication” means a written communication (including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:

(1) concerns any substantive issue in a formal proceeding,

(2) takes place between an interested person and a decisionmaker, and

(3) does not occur in a public hearing, workshop, or other public forum **(including all-party meetings and oral arguments)** established in the proceeding or on the record of the proceeding.

Communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications.

Proposal 9:

Brief Description of Proposal:

Reverse recent decision to delete notification of ex parte communications in the Commission's Daily Calendar. See next page for proposed changes to Rule 8.3.

Does the Proposal Require Statutory Changes?

No statutory or rule changes required

Pros:

- The Daily Calendar is one of the Commission's main vehicles to communicate and inform the public of its daily business. The members of the public are usually referred to the Daily Calendar to find out about new filings, hearings, and other Commission regular activities. For example, if there is an ex parte communication between a utility and a decision maker on a General Rate Case, the members of the public who are not on the service list need to be able to find out about it as much as they need to know about new filings or hearings. If the Commission's logic to eliminate the reporting requirement in the Daily Calendar is that the ex parte notices are being filed in the docket and will be served on the service list, the same argument is true on a number of other Commission activities such as workshops and hearings which have not been eliminated. With this logic, soon all would be noticed in the Daily Calendar are new filings and it will lose its importance as a window for the public to view what's going on at the Commission and as a way of communicating with the public in a more transparent manner
- Most of the Commission proceedings these days have overlapping issues and the definition of stakeholders in each proceeding is much wider than the service list. For example, the Long Term Procurement Proceeding is the umbrella proceeding for more than ten other proceedings, such as, Demand Response, Energy Efficiency, Renewable Standard Portfolio, and others. Everyone involved in all these proceedings need to be informed about activities on all interrelated proceedings, or at a minimum, at least need to know if any of the parties have communicated to the decision makers on a related issue

Cons:

- Ex parte notices are still filed and served on all parties in a proceeding. Parties with sole interest in ex parte communications in a proceeding can always be added as "information only" parties on a given service list, or can use the Commission's new subscription process

Proposal 9
Proposed Changes to Rule 8.3

Rule 8.3 (Rule 8.3) Reporting Ex Parte Communications.

Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. A “Notice of Ex Parte Communication” (Notice) shall be filed with the Commission’s San Francisco Docket Office within three working days of the communication. The Notice shall include the following information:

(a) The date, time, and location of the communication, and whether it was oral, written, or a combination;

(b) The identities of each decisionmaker (or Commissioner’s personal advisor, involved, the person initiating the communication, and any persons present during such communication;

(c) A description of the interested person’s, but not the decisionmaker’s (or the Commissioner’s personal 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.

In addition, the filing of a Notice will be reported promptly in the Commission’s Daily Calendar.

Proposal 10:

Brief Description of Proposal:

Revise rules to allow requests to change preliminary categorization of complaint cases after issuance of a scoping memo. See next page for proposed changes to Rule 7.5.

Does the Proposal Require Statutory Changes?

No statutory changes required.

Pros:

- Per Rule 7.1, complaint cases are immediately categorized prior to issuance of a scoping memo. This is in contrast to other proceedings which are categorized once the issues are identified in the scoping memo (See Rule 7.3). Until the issues are delineated in a scoping memo, the parties have no basis to challenge or dispute a complaint case being categorized as purely adjudicatory. This proposal would allow parties to request a change to the categorization of some or all issues in the proceeding (*e.g.* to address interpretations of a statute that may affect all regulated entities in a given industry) after the issues are identified in the scoping memo

Cons:

- The Working Group did not identify any cons

Proposal 10

Proposed Changes to Rule 7.5

Rule 7.5 (Rule 7.5) Changes to Preliminary Determinations.

(a) If the assigned Commissioner, pursuant to Rule 7.3(a), changes the preliminary determination on categorization or need for hearing, the assigned Commissioner's ruling shall be placed on the Commission's Consent Agenda for approval of that change.

(b) In complaint cases that have been categorized as adjudicatory pursuant to Rule 7.1(b), any party not later than 15 days after the date of issuance of the scoping memo pursuant Rule 7.3(a) may file a motion to request recategorization of the proceeding or of a particular issue identified in the scoping memo on the basis that the proceeding or particular issue is likely to establish policy or rules that affect a class of regulated entities. Such motion shall state why the adjudicatory classification is wrong as a matter of law or policy.

Proposal 11:

Brief Description of Proposal:

Revise rules to address problems that occur when adjudicatory and quasi-legislative proceedings “overlap.” See next page for proposed new Rule 8.7.

Does the Proposal Require Statutory Changes?

May require statutory changes in that PUC Section 1701.1 currently places no limitations on ex parte communication in quasi-legislative proceedings.

Pros:

- Eliminates uncertainty for parties involved in simultaneous adjudicatory and rulemaking or ratesetting proceedings that seek to make an ex parte communication in the rulemaking or ratesetting proceeding without violating the statute/rule prohibiting ex parte communications in the adjudicatory proceeding
- Provides a means of proceeding for parties involved in rulemaking or ratesetting proceedings to safely address an issue that is also pending in an adjudicatory proceeding without inadvertently violating the statute/rule prohibiting ex parte communications in the adjudicatory proceeding
- Provides a means for parties involved in simultaneous adjudicatory and rulemaking or ratesetting proceedings to advise the Commission of the existence of overlapping issues without violating the ban on ex parte communications in adjudicatory proceedings
- Permits parties involved in simultaneous adjudicatory and rulemaking or ratesetting proceedings to participate in rulemaking or ratesetting proceedings on the same equal footing as parties in the rulemaking or ratesetting proceedings that are not involved in the adjudicatory proceeding

Cons:

- Eliminates perceived advantage held by parties in rulemaking proceedings that are not parties in adjudicatory proceedings over parties that are parties in adjudicatory proceedings to make ex parte communications on overlapping issues
- Would impose a reporting requirement in quasi-legislative proceedings where one would otherwise not exist
- No ex parte communications should be allowed on overlapping issues. This proposal would be adverse to the public interest in consumer complaint cases. While the party who may conduct ex parte communications on an overlapping issue could be a large entity with lots of resources, the complainant could be a ratepayer who has been harmed by the action of that entity, but does not have the resources to participate in ex parte communications

- Allows ex parte communications on an issue related to an adjudicatory proceeding. An alternative would be to provide for a ban on ex parte communications concerning overlapping issues in both proceedings
- If the complainant in the adjudicatory case is a single individual or business who is unlikely to be participating in the quasi-legislative proceeding, this proposal would disadvantage such a party

Proposal 11

Proposed New Rule 8.7

Rule 8.7 (Rule 8.7) Requirements in Quasi-Legislative and Adjudicatory Proceedings Where the Commission Finds an Overlapping Policy, Legal and/or Factual Issue.

(a) For the purposes of this rule, (i) “overlapping issue” shall mean that the same or a substantially similar policy, legal and/or factual issue is presented in one or more proceedings before the Commission at the same time and (ii) “overlapping proceedings” shall mean the adjudicatory and ratesetting, or adjudicatory and quasi-legislative, proceedings in which the Commission has found that there is an overlapping issue.

(b) In any quasi-legislative, ratesetting or adjudicatory proceeding, a party may file a motion requesting the Commission to find that a policy, legal and/or issue is presented in both (i) a quasi-legislative or ratesetting proceeding and (ii) an adjudicatory proceeding then pending before the Commission.

(c) A motion described in Rule 8.7(b) must be filed and served in accordance with the requirements of Article 11. Such motion shall be served on all parties in the proceedings that are claimed to have an overlapping issue. Any party in such proceedings may respond to such motion as provided in Article 11 in the proceeding in which the motion is filed. The response shall be served on all parties in the proceedings that are claimed to have an overlapping issue. For the purposes of this Rule, a party filing or responding to such a motion need not be a party in both proceeding where such motion is filed.

(d) A motion described in Rule 8.7(b) must identify the specific ground(s) on which it is claimed that the identified proceedings contain an overlapping issue.

(e) A motion described in Rule 8.7(b) must identify the time when the party filing the motion became aware of the overlapping issue in such proceedings and shall explain why the motion could not have been earlier filed.

(f) If the Commission, either in response to a motion described in Rule 8.7(b) or on its own motion, finds the existence of an overlapping issue, the Commission shall identify the overlapping issue. Any party in the overlapping proceedings may thereafter make an ex parte communication in the quasi-legislative or ratesetting proceeding, provided that the party making such communication specifies, at the time of making such communication, that (A) such communication concerns an issue identified by the Commission as an overlapping issue and (B) the communication is only made in the quasi-legislative or ratesetting proceeding concerning the specified overlapping issue. If a party making an ex parte communication regarding an overlapping issue addresses any other, non-overlapping issue pending in the adjudicatory

proceeding, such communication concerning such other issue shall be deemed a violation of Rule 8.2(b).

(g) Any ex parte communication regarding an overlapping issue made pursuant to this Rule shall be reported as provided in Rule 8.2(c) and Rule 8.3. A copy of the notice of the ex parte communication shall be served on all parties in the overlapping proceedings.

**Excerpts From Chief Clopton's February 2010
Presentation To The Commission**



“Soup to Nuts” Process Review Update

Karen Clopton
Chief Administrative Law Judge

February 25, 2010





Establishment of Working Groups

Three small working groups from diverse perspectives were established to address decision-making process issues that might require statutory initiatives including:

- Practice and Procedure modifications with a focus on identifying opportunities for improving initial case management, calendaring, scheduling and utilization of ADR;
- Ex Parte and Proceeding Categorization Rules; and
- Public Access, Participation and Accommodation, Public Notices, Intervenor Compensation Program;



Their reports were submitted on November 30, 2009.





Ex Parte Action Items

- Develop an "ex parte procedures" overview sheet, to emphasize that CPUC won't tolerate violations – publish to Practitioner's page described above
- Invite a Commissioner to undertake a pilot project to allow 1-way phone bridge to allow parties to listen in to individual ex parte meetings
- Invite ALJs and Commissioners to establish an electronic same-day (rather than 3-day) ex parte reporting rule on a proceeding specific basis in the Scoping Memo Rulings
- Invite Commissioners to utilize final oral arguments, all party meetings, ratesetting deliberative meetings, and quiet time procedures that are already available to them
- Explore efficient way for offices to maintain a public real-time log of scheduled and conducted ex parte contacts by proceeding number (currently discoverable) for easy public access





Rules of Practice and Procedure Changes

- Consider Rule modifications in next round of Rules of Practice and Procedure changes, including:
 - Rule 8.3 modifications to adopt a same day (rather than 3-day) ex parte reporting rule
 - Rule 8.1(c)(3) modification to define “other public proceeding”
 - Moving Rule 8.5 forward within Article 8 to precede the current Rule 8.3 to better integrate the requirements associated with Commissioner’s personal advisor
 - Rule 3.2 modifications designed to streamline notice procedures developed in conjunction with efforts led by the Public Advisor’s Office
 - Other suggestions by the Working Groups
- We expect to submit proposed changes to the Office of Administrative Law in September 2010

