12-15-1989

Interim Hearing on Public Utilities Commission Process Proposals - ex parte and Administrative Law Judge Refore: SB 1125 and SB 1126

Senate Committee on Energy and Public Utilities

CALIFORNIA LEGISLATURE

SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES

Senator Herschel Rosenthal, Chairman

Interim Hearing on

PUBLIC UTILITIES COMMISSION PROCESS PROPOSALS -- EX PARTE AND ADMINISTRATIVE LAW JUDGE REFORM: SB 1125 and SB 1126

December 15, 1989
University of California at Los Angeles
Faculty Center, 405 Hilgard Avenue
Los Angeles, California

Committee Consultants
Paul Fadelli
Michael Shapiro

Committee Secretary
Patricia Stearns

California Legislature

SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES

HERSCHEL ROSENTHAL
CHAIRMAN

PAUL L. FADELLI
PRINCIPAL CONSULTANT
MICHAEL E. SHAPIRO
PRINCIPAL CONSULTANT
PATRICIA J. STEARNS
COMMITTEE SECRETARY
ROOM 2035, STATE CAPITOL
SACRAMENTO, CA 95814
TELEPHONE: 445-9764

TABLE OF CONTENTS

Appendices

Written Testimony submitted

California Legislature

SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES

HERSCHEL ROSENTHAL
CHAIRMAN

PAUL L. FADELLI
PRINCIPAL CONSULTANT

MICHAEL E. SHAPIRO
PRINCIPAL CONSULTANT

PATRICIA J. STEARNS
COMMITTEE SECRETARY

ROOM 2035, STATE CAPITOL
SACRAMENTO, CA 95814
TELEPHONE 445-9764

INTERIM HEARING AGENDA

Public Utilities Commission Process Proposals--Ex Parte & Administrative Law Judge Reform: SB 1125 and SB 1126

University of California at Los Angeles

Friday, December 15, 1989

CHAIRMAN ROSENTHAL'S OPENING STATEMENT 10:00 AM

I. DISCUSSION OF ADMINISTRATIVE PROCEDURES

1. Professor Michael Asimow
   UCLA; California Law Review Commission

2. Honorable Nahum Litt, Chief Administrative Law Judge, United States Department of Labor

3. John B. Weiss, Administrative Law Judge
   Public Utilities Commission

4. Aaron Read, Legislative Advocate
   Association of California State Attorneys and Administrative Law Judges

II. PUBLIC UTILITIES COMMISSION

1. Commissioner
   Public Utilities Commission

2. Wesley Franklin, Acting Executive Director
   Public Utilities Commission

III. PUBLIC INTEREST

1. James Wheaton, Executive Director
   Center for Public Interest Law (CPIL)

2. Audrie Krause, Executive Director
   Toward Utility Rate Normalization (TURN)

LUNCH BREAK

IV. TRANSPORTATION WITNESSES

1. Barbara L. Eastes, Director of Legislative Affairs
   California Trucking Association

2. Douglas Hall, President
   California Moving & Storage Association

3. Larry E. Farrens, Legislative Advocate
   CA Carriers Association & CA Dump Truck Owners Assn

V. TELECOMMUNICATIONS WITNESSES

1. Bruce Jamison, Executive Director
   State Regulatory Proceedings, Pacific Bell

2. James L. Lewis, Director External Affairs
   MCI Telecommunications

3. Robert B. Stechert, V.P. Regulatory Affairs
   AT&T

4. Alan Gardner, V.P. Regulatory Affairs
   California Cable Television Association

5. Kevin Payne, Director of State Regulatory Affairs
   GTE California

6. Sam Williams, Manager, Governmental Affairs
   US Sprint

7. John P. McDonald, V.P. and Associate General Counsel
   Reuben H. Donnelley Corporation

8. John Ayers, President
   Bay Area Teleport

VI. ENERGY UTILITIES

1. Joe Kloberdanz, Regulatory Affairs Manager
   San Diego Gas & Electric Company

2. John Hemphill, Manager State Regulatory Affairs
   Southern California Gas Company

3. James M. Lehrer, Esq. Law Department
   Southern California Edison Company

California Legislature

SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES

PAUL L. FADELLI
PRINCIPAL CONSULTANT

MICHAEL T. SHAPIRO
PRINCIPAL CONSULTANT

PATRICIA J. STEARNS
COMMITTEE SECRETARY

ROOM 2035, STATE CAPITOL
SACRAMENTO, CA 95814
TELEPHONE: 445-9764

MEMORANDUM

TO: MEMBERS, SENATE ENERGY & PUBLIC UTILITIES COMMITTEE
FROM: COMMITTEE STAFF
FOR: DECEMBER 15, 1989 INTERIM HEARING

SUBJECT: PUC PROCESS PROBLEMS & PROPOSALS FOR IMPROVEMENT-- EX PARTE AND ADMINISTRATIVE LAW JUDGE REFORM: SB 1125 and SB 1126

THIS HEARING:

will focus on two bills which would affect how the Public Utilities Commission (PUC) conducts business: SB 1125, which would establish an "ex parte" disclosure rule; and SB 1126 which would more clearly separate the functions of the PUC commissioners and Administrative Law Judges (ALJ's). The hearing will also accept testimony from witnesses on other process and procedure issues at the PUC.

ISSUES:

WHAT IS THE PERCEPTION OF PARTIES CONCERNING THE WAY THE PUC CONDUCTS PROCEEDINGS AND MAKES DECISIONS? WHAT PROCESSES IN PARTICULAR ARE IN NEED OF REVIEW OR IMPROVEMENT.

HOW HAS THE NUMBER, SCHEDULE & COMPLEXITY OF PROCEEDINGS AFFECTED HOW THE PUC PROCESS WORKS?

WHAT ARE THE EX PARTE POLICIES OF THE COMMISSION & THE INDIVIDUAL COMMISSIONERS?

WHAT SHOULD BE THE ROLE OF THE ALJ'S WHICH PROPOSE DECISIONS ON IMPORTANT CASES? SHOULD ATTEMPTS BE MADE TO SEPARATE THE ROLES OF ALJ AND THE ASSIGNED COMMISSIONER AND COMMISSION?

ARE THERE SUGGESTIONS FOR LEGISLATIVE CORRECTIONS TO THE PUC DECISION-MAKING PROCESSES?

MEMORANDUM CONTENTS

I. ADMINISTRATIVE PROCEDURE & THE PUBLIC UTILITIES COMMISSION

The decision-making processes of the legislature and judiciary are more easily understood, and usually more visible to the public, than those of the scores of regulatory agencies whose critical decisions impact our daily lives. The Public Utilities Commission (PUC), for example, has a tremendous workload and agenda which annually involves thousands of decisions impacting not only the transportation and water utilities, but the critical concerns involving the cost and quality of telephone, gas and electric service to all Californians.

How these decisions are made, and the fairness of the process, has been an on-going issue at the PUC for many years. Depending upon the make up of the commission and the decisions made, various interests have either thought the process has worked well--or has been in need of dramatic overhaul and clearer procedural guidelines. Inside the commission, as well, debate has continued concerning what the role of staff should be and what relationship it should have with the PUC commissioners. With the large number of significant proceedings initiated by this commission, and the decisions made to change traditional ways of regulating utilities, (see Section II) the way in which the PUC conducts business has again become an issue.

PUC Decision Process

Originally established in 1911 as the Railroad Commission, the PUC is authorized by the state constitution to regulate utilities. The governor appoints and the senate approves the five commissioners which serve for six years.

Commissioners approve all regulatory decisions by a majority vote, only after a lengthy process which involves both legislative and judicial responsibilities. The PUC code requires the commission to determine how utility service can best be delivered in a safe and reliable manner and what amount is appropriate for ratepayers to pay for the service. The commissioners must also determine a fair rate of return for the utilities and their stockholders.

Usually, the most important proceedings at the PUC are when utilities request for a change in the rates they charge or the services they provide. In the context of rate cases, the PUC

has also initiated it own investigatory proceedings (en banc hearings) which have become the initial step to significant restructuring of certain regulatory sectors.

The process of determining the outcome of such requests is the "hearing process", and it generally includes the following steps:

o a prehearing conference is held to identify the parties involved and the major issues which need to be addressed;

o an administrative law judge is selected to preside over the actual hearing where the parties, their lawyers, economists and other expert witnesses present testimony. Testimony is either given in support of the utility's request or against it. Written testimony is also presented and ultimately reviewed by the ALJ;

o the ALJ, upon completion of the hearing, issues a draft decision which is usually reviewed and approved by the assigned commissioner which is circulated for comments among the parties;

o after review of the comments, the commissioner assigned to the specific case, issues a decision which is presented to the full commission for approval.

o the commissioners vote on the decision; unhappy parties can petition for a modification of the decision;

o the last avenue for critics of the commission's final decision is to request that the state Supreme Court (the only appellate court allowed to review PUC decisions) reverse the PUC action. The supreme court rarely agrees to such review requests.

Legislative Efforts at Improving Administrative Procedures

The "Bagley-Keene Act" (Sect. 11125 of the Govt. Code) requires that the public be notified of meetings of state agencies and be supplied with an agenda to be covered at the meeting. Also, present law requires that copies of public documents to be discussed be made available and that reports of executive sessions be made public.

Section 311 of the Public Utilities Code is the primary body of law which outlines the administrative responsibilities of the PUC commissioners and staff with respect to conducting hearings. This section specifies what the roles of the ALJ's are. The two most important and debatable parts of the code are the following: **(1)** "(b)...The commission, upon scheduling hearings and specifying the scope of issues to be heard in any proceeding...shall assign an administrative law judge to preside over the hearings, either sitting alone or assisting the commission or commissioners who will hear the case." and **(2)** "(d) The administrative law judge shall prepare and file an opinion setting forth recommendations, findings and

conclusions. The opinion of the (ALJ) is the proposed decision and a part of the public record in the proceeding. The decision of the (ALJ) shall be filed with the commission and served upon all parties to the action or proceeding...(t)he commission shall issue its decision not sooner than 30 days following filing and service of the proposed decision by the (ALJ)." Various parties say these two sections work at odds with each other--one saying the ALJ has a relationship to the assigned commissioner, the other section can be interpreted as allowing an independent ALJ role.

AB 3391 (Moore) enacted in 1984, requires the PUC to compile and report to the Legislature on its rules of procedure on an annual basis.

No state statute exists concerning how discussions between decision makers at the PUC and parties to specific proceedings should undertake "ex parte" communications.

II. HEAVY PUC AGENDA

Increasingly, concerns have been raised at legislative hearings and in other forums about maintaining a fair PUC hearing process. It is very difficult for a party to various PUC proceedings to criticize a commission it must also deal with in the future. However, as the speed and scope of several recent PUC proceedings have pitted various distinct competitive groups against each other, and as this commission has moved in regulatory directions that some contend favor the general deregulatory goals of large utility interests, criticisms about the hearing process have been raised.

Monitoring how the PUC undertakes its proceedings, then, has become increasingly important because, as the following list of actions and decisions indicate, many more revisions of the present regulatory structure are taking place.

Recent Significant PUC Proceedings and Actions:

TELECOMMUNICATIONS--

- Changed AT&T's Regulatory Framework
- Allowing AT&T to provide new services
- Revamped the way local telephone service is regulated
- Conducting a proceeding to establish a new regulatory framework for cellular telephones
- Will investigate how to share Yellow Pages information
- Developing ways to implement 900 & 976 services
- Decided on local telco competitive services
- Will decide on competition in local

calling areas

TRANSPORTATION--

- Revised regulation of general freight trucking industry
- Establishing new safety and licensing requirements
- Initiated a major proceeding to change the regulation of household goods carriers

ENERGY--

- Evaluating and will decide on the merger of San Diego Gas & Electric and Southern California Edison
- Updating the competitive bidding procedures for qualifying facilities
- Will decide on major proposals to increase out-of-state power resources
- Implemented new regulatory framework for natural gas
- Investigation seeking support of new natural gas pipeline proposal

III. CONCERNS RAISED ABOUT PROCESS

Among the concerns raised about PUC process are:

Appellate Court Review -- Some have complained that because the decisions made by the PUC can only be reviewed by the California Supreme Court, which rarely accepts review of PUC cases, there is actuality no accountability of commissioners on how they do business and make decisions. Few legal changes have been made since the supreme court was first established as the sole reviewer of commission decisions--except to add language confirming its sufficiency.

When the supreme court does grant a petition for review of a PUC decision, it will receive a record, hear arguments and render an opinion with an explanation of its reasoning. If in fact legal issues are discovered, the decision can become an adjudicated legal precedent and have the efffect of "stare decisis". A 1988 article published in the Hastings Law Journal, stated:

> In some ninety percent of the cases coming up from the CPUC, however, the court denies the petition for a writ of review. In such cases, the court does not have the record before it, does not hear oral argument, and issues its denial without opinion or explanation.

Some hearing witnesses may promote the establishment of an additional lower appellate court review in order to provide greater incentive for the PUC to make decisions based closer to the facts which have been determined in the hearing record. Assemblyman Floyd last year introduced legislation to allow the supreme court the right to refer cases, it determined to be deserving, to a lower court for review.

Ex Parte Communication -- The PUC does not have administrative regulations to monitor ex parte discussions or to trigger a prohibition in certain controversial decisions. In recent years, the staff has prepared recommendations for dealing with such sensitive discussions--but the commission has decided not to adopt administrative procedures for a comprehensive ex parte rule. Instead, the PUC has testified that because of its quasi-legislative-judicial roles, what works best is the present system of only making such a rule "in particular cases of great importance and widespread public interest". Presently, the commissioners, ALJ's and staff not only meet with parties to significant hearings, but also make no restrictions on discussions involving complaint procedures--which are more adjudicatory in nature.

Critics have contended that the present system of laissez faire with respect to communications between parties and PUC policy makers is not in the best interests of the state--with so many important regulatory decisions at stake. They also point out that the PUC has only recently moved to initiate ex parte restrictions when the Attorney General has raised the concern as a party to controversial cases. Other parties have defended the system stating that access to commissioners is an important part of doing business at the PUC.

Several other federal and state agencies presently have either administrative or statutorily-mandated procedures for conducting such discussions. The Air Resources Board and the California Energy Commission have administrative rules. The Federal Communications Commission (FCC) has both strict rules in dealing with telecommunication companies, and a disclosure rule for less significant proceedings. The Federal Energy Regulatory Commission (FERC) has .

Last session the legislature approved, and the governor signed into law, the establishment of a "California Integrated Waste Management and Recycling Board" with strict ex parte restrictions. On the other hand, last year the Senate also defeated legislation by Assemblyman Friedman, which would have established an ex parte disclosure statute for the California Coastal Commission.

Administrative Law Judge Reform-- There are at least two schools of thought with respect to what the role of the ALJ's should be in the PUC. Some, including the present commission

members, believe that besides their statutory responsibilities to hear cases, the primary function of the ALJ's should be to assist the assigned commissioner or commission on specific cases. Rather than being a independent public document upon which the commissioners would later vote or alter as part of their final decision, commissioner input and approval requirements have often led to ALJ decisions which are more a preview of what the commission will actually decide.

Certain parties and several ALJ's have stated that the ALJ draft decision should be a separate document from the commissioner's final decision, and that an effort should be made to more clearly define the separate roles of the ALJ's and the commissioners. For example, critics state that the ALJ should not incorporate a commissioner's schedule/deadline into its own hearing proceeding. They say that because a judge's decision will have to be approved by the assigned commissioner, great pressure and influence is put upon the decision the judge will actually make.

Discovery Rules-- Some parties have been concerned that the PUC does not have rules for "discovery" between parties to a case or hearing. They contend that some parties, especially the smaller ones, are left at a disadvantage when it comes to confronting other parties in PUC proceedings. The PUC has testified that it does not believe it necessary to establish such a ruling. AB 2252 (Friedman) of 1989, was introduced to require the PUC to adopt such a rule.

Complaint Procedures-- Some parties have raised concerns about the difficulty in conducting complaint proceedings at the PUC and have questioned if the new regulatory programs will make the complaint process even more complicated. For example, with new telecommunication issues involving lucrative competitive services increasingly becoming the topic for complaints, timing and length of the process will determine how successful competitors can compete with large utilities.

Senate Office of Research Recommendations-- The Senate Office of Research issued a report in September 1989 entitled "Changes in our Telephone Regulation--Competition at the Crossroads", which reviewed the recent proposals for regulatory change of the local telephone companies. It made recommendations on the regulatory plans themselves and on how the PUC might improve its processes. These recommendations included: streamlining the PUC complaint process, allowing appeals of PUC decisions to be taken to another court besides the supreme court, requiring the PUC to adopt comprehensive ex parte rules, clarifying the role of the Division of Ratepayer Advocates, and creating an independent ALJ division.

California Law Revision Commission-- The California Law Revision Commission is presently undertaking a report on how to best revise administrative procedure in the state. The first phase of the study, primarily involving agency adjudication, has

been distributed. The report, by Prof. Michael Asimow of UCLA, suggests the need to separate the functions of the commissioners from the ALJ's, but states that physically removing the ALJ's from the commission could pose other difficulties.

IV. LEGISLATION

SB 1125 (Rosenthal) would establish the "Public Utilities Commission Ex Parte Disclosure Act" by requiring the PUC to adopt rules governing ex parte communications. Based on FCC rules of disclosure which most telecommunication corporations must follow at the federal level, SB 1125 makes a legislative finding that the flow of information in PUC proceedings is important and "should only be curtailed where absolutely necessary, but that disclosure of those contacts should be public information and made part of the record."

SB 1125 would.....require parties making an ex parte communication to commissioners, advisors to commissioners, or ALJ's to submit to the PUC on the same day a copy of the presentation, or if oral, a written summary of the data and argument for the public record. The docket number of the proceeding would be included;

would.....not prohibit ex parte communications at the PUC.

would.....require the PUC to issue each week a public notice of the written and oral ex parte communications made for the previous week;

would.....allow the commission to issue more stringent ex parte regulations when it determines it to be in the public interest;

SB 1126 (Rosenthal) would require that a separate "Division of Public Utilities Commission Administrative Law Judges" be created in the Office of Administrative Hearings of the Dept. of General Services.

SB 1126 would.....grandfather present ALJ into the new division, and maintain a separate division to enhance ratemaking expertise of the regulatory ALJ's;

would.....continue to allow non-attorneys to be PUC ALJ's; and

would.....not require an assigned commissioner to approve an ALJ decision before it is released to the public.

BILL NUMBER: SB 1125

BILL TEXT

AMENDED IN SENATE JANUARY 4, 1990

INTRODUCED BY Senator Rosenthal

MARCH 8, 1989

An act to add Chapter 2.3 (commencing with Section 351) to Part 1 of Division 1 of the Public Utilities Code, relating to the Public Utilities Commission.

LEGISLATIVE COUNSEL'S DIGEST

SB 1125, as amended, Rosenthal. Public Utilities Commission: ex parte communications.

(1) Under existing law, any investigation, inquiry, or hearing which the Public Utilities Commission may undertake or hold may be undertaken or held by or before one or more commissioners to whom the matter has been assigned or, in the commissioner's or commissioners' behalf, by an administrative law judge designated for that purpose. No provision specifically regulates ex parte communication to that commissioner or those commissioners or to the designated administrative law judge.

This bill would require the commission to adopt rules and orders governing ex parte communications. In general, these rules and orders would require a copy of written ex parte presentations and a memoranda of ex parte oral presentations to decisionmakers, as defined, to be placed in the public file or record of the affected proceeding. The bill would additionally require the commission to adopt procedures to ensure compliance with these provisions and

to provide public notice listing written ex parte presentations and memoranda of oral presentations received during the previous week relating to affected proceedings.

The bill would also permit the commission to issue a public notice adopting more stringent regulations governing ex parte communications when it is in the public interest with respect to particular proceedings to do so. Unless exempted, the bill would prohibit any ex parte communication to decisionmakers during the period of time that this provision has been made applicable to the matter.

The bill would make a violation of any rule or order adopted by the commission pursuant to these provisions a misdemeanor subject to a specified fine, thereby imposing a state-mandated local program by creating a new crime.

(2) The California Constitution requires the state to reimburse local

BILL NUMBER: SB 1125

BILL TEXT

agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) The Public Utilities Commission is required by law to confine its decisions to the official record of a proceeding. However, commissioners, staff, and administrative law judges of the commission actively discuss upcoming decisions with principal parties to the decisions, with no provision in law to specifically regulate ex parte communication.

(b) At the direction of the commission, its staff recently developed ex parte procedures. These procedures were never adopted by the commission. Basic ex parte procedures become even more important because the commission is presently undertaking several significant proceedings which will change the very manner in which several utilities are regulated in this state.

(c) The Legislature agrees that, in the long process of a commission proceeding, the flow of significant information is important for commissioners and staff and that personal contacts with affected parties should only be curtailed where absolutely necessary, but that disclosure of those contacts should be public information and made a part of the record.

(d) It is the Legislature's intent to establish for the Public Utilities Commission an ex parte disclosure act in order to preserve the integrity and fairness of the ratemaking process while allowing for ample access for all interested parties to decisionmaking personnel of the commission.

SEC. 2. Chapter 2.3 (commencing with Section 351) is added to Part 1 of Division 1 of the Public Utilities Code, to read:

BILL NUMBER: SB 1125

BILL TEXT

CHAPTER 2.3. EX PARTE COMMUNICATIONS

351. This chapter shall be known and may be cited as the 'Public Utilities Commission Ex Parte Disclosure Act.'

352. For purposes of this chapter, a proceeding is commenced when an application, complaint, or other initiatory pleading is filed with the commission, or the commission issues an investigatory order, rulemaking order, order to show cause, or order setting hearing.

353. For purposes of this chapter, 'communication' means an oral or written comment made after a proceeding is commenced, and before the decision is final, relating to any part of the substance of the proceeding. An inquiry that relates solely to a procedural matter such as a hearing schedule, location, format, or filing date is not a communication within the meaning of this chapter.

354. For purposes of this chapter, 'decisionmaker' means any commissioner, advisor to a commissioner, a member of the commission's staff who is reasonably expected to be involved in the decisionmaking process in a proceeding, or the administrative law judge assigned to a proceeding.

355. The commission shall adopt rules and orders governing ex parte communications to implement this chapter. The rules and orders shall provide, at a minimum, for all of the following:

~~(a) Any person not a commissioner or a member of the~~

(a) Any party to a proceeding before the commission, including a member of the staff of the Division of Ratepayer Advocates, but excepting a commissioner and other members of the commission's staff

, who makes an ex parte communication to a decisionmaker shall provide to the commission, under separate cover, on the same day the presentation is made to the decisionmaker, a copy of the presentation, or, in the case of an oral ex parte presentation, a written memorandum summarizing the data and arguments for inclusion in the public record. The presentation shall indicate on its face the docket number of the proceeding to which it relates, and the fact that a copy of it has been submitted to a decisionmaker. A copy of the memorandum shall be provided to the decisionmaker to whom the presentation was made.

(b) The commission shall develop and implement procedures to ensure that written ex parte presentations and memoranda of oral presentations are placed in a public file or record of the proceeding. Each week the commission shall issue a public notice listing any written ex parte presentations and memoranda of oral presentations received during the previous week relating to affected proceedings.

356. When it is in the public interest with respect to particular proceedings, the commission may issue a public notice adopting more stringent

regulations and orders governing ex parte communications. Unless exempted, no ~~person~~ party to a proceeding before the commission, and no member of the staff of the Division of Ratepayer Advocates shall make any

ex parte communication to decisionmakers during the period of time that this section has been made applicable to the matter. That period of time shall commence with the release of a public notice that a matter has been made subject to this section, and shall terminate when the commission takes one of the following actions, whichever occurs first:

(a) Releases the text of a decision or order relating to the matter.

(b) Issues a notice that the matter is no longer subject to this section.

(c) Issues a public notice stating that the matter has been returned to the staff for further consideration.

357. The rules and orders adopted pursuant to this chapter may be enforced by an action in mandamus or for an injunction or declaratory relief by any interested person who shall, if a violation is found, be awarded costs and reasonable attorney's fees. The remedy provided by this section is in addition to any other remedy provided by law for the enforcement of this chapter.

358. Notwithstanding Chapter 11 (commencing with Section 2100), any person who violates a rule or order of the commission adopted pursuant to this chapter, is guilty of a misdemeanor and shall be punished by a fine of not less than one thousand dollars ($1,000) or more than five thousand dollars ($5,000).

Any person who engages in any collusion or conspiracy to violate any rule or order adopted pursuant to this chapter is guilty of a misdemeanor and shall be punished by a fine of not less than ten thousand dollars ($10,000) or more than fifty thousand dollars ($50,000).

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

BILL NUMBER: SB 1126

BILL TEXT

AMENDED IN SENATE JANUARY 4, 1990
AMENDED IN SENATE APRIL 24, 1989

INTRODUCED BY Senator Rosenthal

MARCH 8, 1989

An act to ~~add Section 11370.6 to the Government Code, and to amend Sections 309, 310, and 311 of,~~ and to add Section ~~309.1 to,~~ amend Section 311 of the Public Utilities Code, relating to the Public Utilities Commission.

LEGISLATIVE COUNSEL'S DIGEST

SB 1126, as amended, Rosenthal. Public Utilities Commission: administrative law judges.

Under existing law, the Public Utilities Commission is authorized to employ administrative law judges. In any proceeding involving an electrical, gas, telephone, railroad, water corporation, or highway carrier, the commission is required to assign an administrative law judge to preside over the hearings, either sitting alone, or assisting the commissioner or commissioners who will hear the case. Existing law requires the proposed decision of the administrative law judge to be filed with the commission and served upon all parties to the action or proceeding without undue delay.

~~This bill would create the Division of Public Utilities Commission Administrative Law Judges in the Office of Administrative Hearings of the Department of General Services. The bill would delete the authority of the commission to employ administrative law judges, and would instead require that all administrative law judges assigned to conduct proceedings of the commission be employees of the division. The bill would require the administrative law judges employed in the division to be appointed by the Director of the Office of Administrative Hearings from a list of eligible employees of the commission, and would provide that they need not be admitted to practice law in this state. The bill would also deem administrative law judges employed by the commission on the effective date of this bill to be appointed by the Director of the Office of Administrative Hearings and employed in the division without loss of salary or benefits.~~

This bill would require that the proposed decision be filed and made public without the consent or approval of the commission, a

BILL NUMBER: SB 1126

BILL TEXT

commissioner, or any other person.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

~~SECTION 1.~~ ~~Section 11370.6 is added to the Government Code, to read:~~

~~11370.6. (a) There is established within the Office of Administrative Hearings the Division of Public Utilities Commission Administrative Law Judges.~~

~~(b) Administrative law judges assigned to conduct administrative proceedings of the Public Utilities Commission shall be employed in the division.~~

~~(c) Administrative law judges employed in the division shall be appointed by the director from a list of eligible candidates compiled by the Public Utilities Commission.~~

~~(d) Adminstrative law judges employed in the division need not be admitted to practice law in this state.~~

~~(e) Administrative law judges employed by the Public Utilities Commission on the effective date of the statute which added this section to the Government Code are deemed appointed by the director and are employed in the division without loss of salary or benefits.~~

~~SEC. 2. Section 309 of the Public Utilities Code is amended to read:~~

~~309. The executive director may employ such officers, experts, engineers, statisticians, accountants, inspectors, clerks, and employees as the executive director determines to be necessary to carry out this part or to perform the duties and exercise the powers conferred upon the commission by law. All officers and employees shall receive that compensation which is fixed by the commission.~~

~~SEC. 3. Section 309.1 is added to the Public Utilities Code, to read:~~

~~309.1. All powers and duties heretofore exercised by administrative law judges employed by the commission are hereby vested in the Division of Public Utilities Commission Administrative Law Judges of the Office of Administrative Hearings of the Department of General Services pursuant to Section 11370.6 of the Government Code.~~

~~SEC. 4. Section 310 of the Public Utilities Code is amended to read:~~

~~310. No vacancy in the commission impairs the right of the remaining commissioners to exercise all the powers of the~~

BILL NUMBER: SB 1126

BILL TEXT

~~commission. A majority of the commissioners constitutes a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission. Any investigation, inquiry, or hearing which the commission may undertake or hold may be undertaken or held by or before any commissioner or commissioners designated for the purpose by the commission. The evidence in any investigation, inquiry, or hearing may be taken by the commissioner or commissioners to whom the investigation, inquiry, or hearing has been assigned or, in his, her, or their behalf, by~~

~~an administrative law judge assigned for that purpose by the Director of the Office of Administrative Hearings pursuant to Chapter 4 (commencing with Section 11370) of Division 3 of Title 2 of the Government Code. Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding, opinion, and order of the commission.~~

~~SEC. 5.~~

SECTION 1. Section 311 of the Public Utilities Code is amended to read:

311. (a) The commission, each commissioner, the executive director, and the assistant executive directors may administer oaths, certify to all official acts, and issue subpoenas for the attendance of witnesses and the production of papers, waybills, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of the state.

(b) The administrative law judges may administer oaths, examine witnesses,

issue subpoenas, and receive evidence, under rules that the commission adopts. The commission, upon scheduling hearings and specifying the scope of issues to be heard in any proceeding involving an electrical, gas, telephone, railroad, or water corporation, or a highway carrier, shall ~~request assignment of~~ assign an administrative law judge to preside over the hearings, either sitting alone or assisting the commissioner or commissioners who will hear the case.

(c) The evidence in any hearing shall be taken by the administrative law judge assigned for that purpose. The administrative law judge may receive and exclude evidence offered in the hearing in accordance with the rules of practice and procedure of the commission.

(d) The administrative law judge shall prepare and file an opinion setting forth recommendations, findings, and conclusions. The opinion of the administrative law judge is the proposed decision and a part of the public record in the proceeding. The proposed decision of the administrative law judge shall be filed with the commission and served upon all parties to the action or proceeding without undue delay, not later than 90 days after the

matter has been submitted for decision. ~~Once it is filed with the commission, the proposed decision may be made public without the consent or approval of the commission or a commissioner. The~~

BILL NUMBER: SB 1126

BILL TEXT

~~commission shall~~ The proposed decision shall be filled and made public without the consent or approval of the commission, a commissioner, or any other person. The commission shall issue its decision not sooner than 30 days following filing and service of the proposed decision by the administrative law judge, except that the 30-day period may be reduced or waived by the commission in an unforeseen emergency situation or upon the stipulation of all parties to the proceeding. The commission may, in issuing its decision, adopt, modify, or set aside the proposed decision or any part of the decision. Every finding, opinion, and order made in the proposed decision and approved or confirmed by the commission shall, upon that approval or confirmation, be the finding, opinion, and order of the commission.

(e) The commission may specify that the administrative law judge assigned to a proceeding involving an electrical, gas, telephone, railroad, or water corporation, or a highway carrier, initiated by customer or subscriber

complaint, need not prepare, file, and serve an opinion, unless the commission finds that to do so is required in the public interest in a particular case.

TRANSCRIPT

CHAIRMAN HERSCHEL ROSENTHAL: Good morning. I want to welcome Senator Russell, Vice Chairman of the committee, and Assemblyman Terry Friedman who has an interest in the subject matter in terms of his legislation.

I want to thank all of those who braved the Los Angeles Airport at this busy holiday period to join us today at the UCLA campus to discuss a topic many might think not especially sexy for a legislative hearing, that is "Processes of the Public Utilities Commission".

On first blush, the issue sounds dull, bureaucratic and arcane. But, on closer review, making sure the PUC has a fair and open process is of critical concern to every Californian, because what is decided at the PUC has a dramatic effect and impact on how we get, and how much we pay, for utility services.

It seems that various aspects of the PUC process have once again raised some concerns. The reason for this may be that never before has the commission entered into and decided on so many significant proceedings which have changed or will change the very regulatory structure of whole industries and utilities. Never has so much regulatory change been so swift in so many sectors -- like local and long distance telephones utilities, the trucking industry, the merger of huge utilities, the cellular industry, and now even the moving and storage industry.

There isn't any question that it is the responsibility of the PUC to regulate the rates and services of the utilities, and to develop the structures to accomplish those goals. We are glad that they exist so that the Legislature doesn't have that onerous task.

o However, it is the Legislature's responsibility to make sure that the parties to the PUC proceedings are treated fairly and properly--and to make changes to correct the situation if it sees fit.

o It is the Legislature's responsibility to see if it agrees with what the PUC has decided for its constituent ratepayers--and make changes if it sees fit.

o And, since the time of the railroad commission, it has been the Legislature's responsibility to oversee the workings of the PUC to make sure decisions are made on the basis of merit and fact--and not made merely because of the control of personalities or powerful interests. This is what we are doing here today.

PUC oversight is the purpose of this hearing. As Chairman of this committee for

the past six years, one of my themes has been opening up the process and keeping it fair to everyone involved.

The speed by which this commission has moved to change traditional regulation has led me to be more sensitive to the critics which have complained about certain fairness questions. I admit that. And, I just happen to have a couple bills which I introduced last year to address the concerns about which I have heard the most--ex parte communication and the administrative law judge system at the PUC.

Now, I know each of these bills will have a difficult time becoming law with this commission and this Governor. But it is important that we do discuss them, and it is important for the PUC to know that their process must be held publicly accountable.

To the PUC, I say that I know these housekeeping matters are not issues you would like to deal with, but this forum is for you to state your case as to why you believe the system works just fine without legislative involvement.

And to the other parties, I say that I know it is not easy to raise criticisms of the same commission you must go back to and deal with. (Certain witnesses invited have, in fact, chosen not to appear for this reason.) But if, in fact, some concerns are legitimate and you have reasonable suggestions to share about how the process might be improved, we are here to listen, and are willing to act if need be.

We may be dealing with either fact or perception here. But either way, if it is fact that the PUC system somehow is unfair, or it is perception, we must address those concerns and try and correct them. I am anxious to hear from all of you.

We will begin with a panel to help us better understand the tremendously complicated world of administrative procedures law, how it might be changed, and if this relates to our PUC.

Senator Russell, do you have any opening comments?

SENATOR NEWTON RUSSELL: No. That's a pretty clear statement.

CHAIRMAN ROSENTHAL: Assemblyman?

ASSEMBLYMAN TERRY FRIEDMAN: Go right ahead.

CHAIRMAN ROSENTHAL: Professor Asimow of this campus, this UCLA campus, is heading a study on this topic for the California Law Revision Commission and will now begin. Please identify yourself for the record.

PROFESSOR MICHAEL ASIMOW: Thank you, Senator, very much. My name is Michael Asimow and I'm Professor of Law at UCLA Law School. I very much appreciate your scheduling the hearing right here on the UCLA campus, even before you knew I was going to speak.

I've submitted written testimony much more detailed than I have the time to cover in my brief statement here. So I hope that the staff and the committee members will consult the written testimony.

Now, I'm a consultant to the California Law Revision Commission. They have engaged me to try to come up with a new administrative procedure act that would cover all state agencies, including the PUC. So, ultimately I hope that we will have a state statute, a new APA, that will resolve these questions for all agencies rather than having to go at it piecemeal in the agency-by-agency context as we're compelled to do now.

In the course of preparing the first phase of my report, I did interview extensively at the Public Utilities Commission and have done a good deal of research on it, so I do feel qualified to address the issues presented in the two bills, SB 1125 and 1126.

First, on the ex parte bill, SB 1125. I strongly support the total prohibition of ex parte contacts, written and oral, in on-the-record ratemaking proceedings. I therefore support SB 1125 as an expedite compromise because it permits ex parte contacts, written and oral, but requires them to be placed on-the-record. It's an expedite compromise; I myself would go much further.

SENATOR RUSSELL: May I ask a question?

CHAIRMAN ROSENTHAL: Yes, Senator Russell.

SENATOR RUSSELL: There's always stupid questions being asked sometime or other. But how do ex parte questions arise? In what context are they presented? And why are they handled in the current -- what are some of the reasons for the current use of ex parte communications? If you get that to your testimony, in your testimony, fine.

PROFESSOR ASIMOW: Yes, I was about to come to that.

SENATOR RUSSELL: Okay, fine.

PROFESSOR ASIMOW: At present, the PUC conducts a large amount of individualized ratemaking proceedings. These are proceedings to set the rates or trade practices for regulated industries, mostly public utilities. And they do this by conducting trials. They have hearings that go on for weeks or months before administrative law judges, the ALJ, hears the case, prepares a careful report. And this is a proposed decision which then goes to the commission. Now the people that are interested in this, both on the utility side and the consumer side as well, have always had free access to the members of the commission, to come in and make statements to them off-the-record, orally or in writing, as to how these proceedings shall be resolved. It's always been tolerated, indeed even encouraged at the PUC, that these off-the-record approaches to the commissioners be made. To some degree, there are also off-the-record contacts made with administrative law judges, although I gather that's much less of a problem and is discouraged. The problem really are people who wish to influence the commission either by presenting facts or arguments and want to do so off-the-record rather than by presenting it in the form of a brief or in testimony. Instead they prefer to go into the office and make their communication off-the-record.

SENATOR RUSSELL: Has that been a traditional long-standing, forever process?

PROFESSOR ASIMOW: At the PUC, yes, it has, Senator.

SENATOR RUSSELL: And you're going to explain why it should be changed now?

PROFESSOR ASIMOW: I'm going to try.

SENATOR RUSSELL: Okay.

PROFESSOR ASIMOW: What you have here is something like the NBA season, that is you play season games and they really don't count for anything. All they do is get you into the playoffs. The hearings before the ALJ are like that: tremendous expense; tremendous time, three or four months perhaps of hearings; tremendous record of report. It doesn't count for much. What counts are the few well chosen words spoken into the ears of the commissioner which can set at naught all that occurred during the hearing. I believe this is offensive to fair play and substantial justice. It makes judicial review a sham because the facts and arguments that were decisive were not in the record. And it breeds an attitude of cynicism that politics and influence counts for more at the PUC than any well prepared case.

Now, these hearings that occur in individualized ratemaking cases are required by the statute which requires hearings, and by constitutional law. Due process requires in the case of individualized ratemaking that trial-type hearings occur. And when you have a trial-type hearing required by statute, by the Constitution, it is inconsistent with due process with the concept of a hearing that factual material coming off-the-record. It all has to be on-the-record, both facts, as well as arguments. And there's a great amount of law, of case law, arising from the Constitution, from statutes, from ethical guidelines applicable to attorneys, and so on, that ex parte contact in the context of a trial-type hearing is improper.

I believe that someday that the California Supreme Court is going to confront this issue squarely and will reverse a PUC decision, showing to be tainted by ex parte contact. So far, by some miracle, the PUC has avoided having the California Supreme Court confront its long-term practice ...

SENATOR RUSSELL: Question.

PROFESSOR ASIMOW: ... but I believe the result will be inevitable.

Yes, sir.

SENATOR RUSSELL: In a court trial, aside from PUC, regular court trials of Superior Court, I understand -- I'm not a lawyer -- but I understand that the judge sometimes invites the parties into his chambers, one party or the other or both, and they discuss various aspects of the case. Is that correct? Do they do that?

PROFESSOR ASIMOW: Well, sometimes the judge will invite both attorneys to come in and discuss the case, particularly to settle it, off-the-record. But it would be most improper for the judge to discuss the case off-the-record with only one of the lawyers.

SENATOR RUSSELL: They don't do that?

PROFESSOR ASIMOW: No.

SENATOR RUSSELL: They do it with both.

PROFESSOR ASIMOW: They do not, and it's equally improper in that situation, as in this.

SENATOR RUSSELL: Are you suggesting then that in your recommendation that we don't allow ex parte? Would you foreclose the possibility of both sides going in for ...?

PROFESSOR ASIMOW: No. But unfortunately, it's difficult because there's many sides. In these very complex cases, there are a lot of people involved; there aren't just two sides. However, I have no problem at all with a meeting in which all -- lawyers for all of the represented interest are present or unrepresented interest. If all of them are present, then there's no harm in presentations being made there where they can be rebutted. The problem is that only one person comes in, whispers into the ear of the commissioner, and that has an undue influence.

Now, as I understand the commission's position, they make two arguments in favor of their practice. First they say they just need the extra information. And there are lots of ways that they can get information, by way of contacts with the regulated industries and with consumers. But when the matter is the subject of a trial-type hearing, the information that is needed should come through the process of the trial, through the hearing record and through briefs that are filed. Indeed, I believe that the information or arguments presented ex parte are presented ex parte because they may be false, incomplete, or fallacious. That is, they couldn't provide the adversarial testing that goes on in the trial-type process.

A second argument that is often made in this context is that, well, this is different from what you described, Senator Russell, as the ordinary court case. This is quasi-legislative, and not quasi-judicial. But I reject that argument because of the fact that adjudicatory processes are being used to make the rates. If they were being made through the process of rulemaking that is applicable across the board to utilities generally, I'd feel entirely different about the problem. But when they're being made through the course of a trial, you're using adjudicatory norms, and the mere fact that you are setting a rate for the future doesn't make it any less adjudicative.

I have a lot more to say about this, but I think within my time frame I should probably move on to the second issue of administrative law judges. Now here the goal is to enhance the independence of ALJs. That's something that I very strongly support. There's been a long-term process at the PUC in which administrative law judges have gone from a mere part of the team to a much more independent factor. It used to be that the way it worked was the ALJ was really called a hearing officer. He would hear the case, he would file a -- he would write a proposed decision, but the party wouldn't

even see it. It would just go to the commissioners. And the commissioners and the staff and everyone would work together to produce the decision. So that the hearing officer was little more than just a referee at the hearing.

Now, this has changed. And today the ALJs have independence within the PUC; they're not supervised by prosecutors; they write a proposed decision which is circulated to the parties; and that proposed decision becomes the focus of the appeal at the commissioner level.

SENATOR RUSSELL: How was that changed? By law, or by practice?

PROFESSOR ASIMOW: It was changed by law. There was a statutory change that occurred some years back that made the -- said the proposed decision had to be released to the public.

Now, because this has been an evolutionary process, some vestiges of the old system remain. One of them is the assigned commissioner system at the PUC. And I think that's the problem here that should be corrected. Under that system, each ALJ is assigned a commissioner, and that commissioner works with the ALJ on the case. Procedural matters that come up on negotiating the decision. And although it has some advantages, I think that on the whole that's a bad idea, that it's a vestige on the old system in which the ALJs were mere hearing officers. Many ALJs have told me that they resent the assigned commissioner system. They want to control their own cases. They want to write their own decision and not negotiate it with a member of the commission. In addition, I think it isn't fair for one commissioner to have undo influence on a case. If that commissioner's views are at variance with the other commissioners, could have too much influence on the ALJ decision. I don't think it's a good use of the commissioner's time to be involved in the nuts and bolts of ongoing cases. They have a great deal to do besides sharing the ALJ's job.

And finally, in a world of ex parte contacts, I'm highly concerned that the assigned commissioner will be the vehicle, the conduit for transmitting ex parte contacts that he or she has received to the ALJ. So, all in all, I would strongly support dispensing with the assigned commissioner system. And that alone would have a great and positive influence in enhancing the independence of the PUC ALJs.

SENATOR RUSSELL: What would you put in its place?

PROFESSOR ASIMOW: I would say that like all the other agencies that I know about, state and federal, the cases assigned to the ALJ, the ALJ is in charge of that case while it's before him or her. And the ALJ then files a proposed decision and the case goes to the commission. In other words, you don't need the involvement of a commissioner at the ALJ level, in my opinion. And so far as I know, no other agency has a system like that, and it's really a vestigate of what used to be.

Now, SB 1126 goes further -- oh, I'm sorry, Senator.

SENATOR RUSSELL: Mr. Chairman, may I ...?

CHAIRMAN ROSENTHAL: Yes, go ahead.

SENATOR RUSSELL: Did you have a question?

CHAIRMAN ROSENTHAL: I was -- is it likely or -- we've heard it's from inside of the PUC that the system of where the commissioner actually works with the ALJ, that in fact, the ALJ comes out with a decision that the commissioner wants. Is that what we're trying to avoid?

PROFESSOR ASIMOW: In some cases, yes; and in some cases, no. In other words, some ALJs at the commission don't like the system and they simply refuse to negotiate the decisions. In other cases, the ALJs work smoothly with the commissioner and negotiate it. So what you do have is a decision that one assigned commissioner out of five happens to like.

What I'm saying is that you should think of it more like a trial court and an appellate court. The trial judge tries the case and makes his decision. Then it goes to the appellate court and they handle the appeal. There's no need for appellate judges to get involved in helping the trial judge render his decision. That very much undercuts the independence of that trial judge.

SENATOR RUSSELL: Why don't we just do away with the PUC and let the ALJ be the whole show. That's what it sound like what you're advocating.

PROFESSOR ASIMOW: No, Senator, I wouldn't favor that. I think that the five members of the PUC are the ones entrusted by law with exercising great discretion, as Senator Rosenthal said at the beginning, decisions of enormous moment to California consumers and business. And those final decisions should not be made by an ALJ. Those should be made by the politically responsible five commissioners. What I'm simply saying that they -- when they do it, they should do it by way of review of the ALJ decision. That's the way every other agency does it, including the ratemaking agencies at the federal level.

SENATOR RUSSELL: It seems to me that these issues are so technical and so complex that the benefit of having a commissioner -- and there is certainly down sides to that, as I recognize -- but the benefit of that is you have the ALJ, the commissioner sort of moving in tandem in terms of understanding the issues, at least theoretically, and that when a decision is made by the ALJ, opinion rendered, the one person who is expert in that area that's been assigned to that has the knowledge, has the understanding to be able to then convince his compadres on the PUC as to what the issues are. You have a five-man PUC -- or five-person PUC. By your recommendation, you don't have any experts. And it's like the members of this committee, we're supposed to be experts in all this stuff, but we're not, as everybody knows, we're sort of generalists. And we mess around making these decisions that affect people's lives, and by the grace of the

Lord, it comes out most of the time okay.

So that's my concern, if your recommendation were to be implemented, you would eliminate that expertise on that issue, I would think.

PROFESSOR ASIMOW: I think there's a good deal in what you say, Senator Russell, and I think that's the best argument that can be made in favor of retaining the assigned commissioner system. That is, that you do have the advantage of having a commissioner who is up to speed on the particular case. I think that's fair to say that that's an advantage. But I think that the disadvantages outweigh that in terms of undercutting the independence of the ALJ, in giving that one commissioner undo influence over the case, and in acting as a conduit for ex parte contacts that that commissioner might have received. I'm not persuaded on my study of the PUC that the advantage that you mentioned of having one of the five commissioners that already has some familiarity with the case before it gets to the commissioner level, outweighs the disadvantages to PUC adjudication that occur.

Now, SB 1126 goes further than this ... (cross talking)

CHAIRMAN ROSENTHAL: Okay, finish, will you.

PROFESSOR ASIMOW: Okay. I just have a couple more points to make and I'm done.

SB 1126 goes further than this and would actually remove the ALJs from the PUC and place them into an independent agency, the Office of Administrative Hearings. Now, I'm not persuaded that this is necessary or really a good idea. The advantage of doing so is that it enhances the appearance of impartiality. It makes all the people who deal with the PUC more confident that the ALJs really are independent of the PUC and that their career path cannot be affected by their decisions, and that in itself certainly would be a good thing.

However, let's consider the fact that the only agencies in California which are in the Office of Administrative Hearings are the prosecutorial ones agencies, plus a couple others; ones that take punitive action against people. Regulatory agencies, like the PUC, generally have employed their own ALJs and that's true completely at the federal level as well as in California. I don't see the strong conflict between prosecution and adjudication in the PUC that might lead us to take the ALJs out.

In addition, I think there are some real down sides to doing it. One of the positive things about present PUC practice is that the ALJs can be used in helping to prepare the final decision, which responds to your question, Senator Russell. The ALJ is the expert on the hearing record, has lived with that record for perhaps three to four months and knows better than anyone else what's in it. And when the PUC comes to prepare its final decision, I think a very good thing that ALJs are available and frequently are used to help make sure that that final decision is responsive to what is in the record. And I think you'd lose that if you took the ALJs outside of the PUC.

Secondly, it also was part of the practice -- and both of you mentioned this before -- these cases are enormously technical and sometimes they are -- the ALJ needs help in understanding, for example, economic models that are involved. And the ALJ now freely can consult the staff of the commission that have not been involved in the particular case. It's perfectly okay, in my opinion, it's the general practice in these kinds of cases for the ALJ to get in touch with experts on the staff, the sort called, for example, the CADC staff of the commission, people that have not been adversaries in the case, for help in understanding, not for new facts, but for help in understanding it. And there again, I think you'd lose that if you took the ALJs outside the commission.

SENATOR RUSSELL: May I ask another question?

CHAIRMAN ROSENTHAL: Yes, Senator.

SENATOR RUSSELL: In your opinion of your study of the PUC, don't you think that the PUC is more than just a simple reviewer of facts and then their decision results in assimilating the facts, but also relating to the real world out there which is oftentimes, I would think, beyond the purview of the ALJ? The ALJ looks at facts, two plus two is four. The PUC looks at that too, but they recognize that there are other concerns, political issues, social issues, other kinds of things that aren't readily related to just black and white mathematical computations.

PROFESSOR ASIMOW: Oh, I absolutely agree with that, Senator Russell. There's no doubt that these decisions -- I mean, I think that it's up to the parties to convey issues of social policy and discretion to the ALJ as well. And these certainly try to do that in the course of the hearing. But I very much agree that questions of great discretion and difficulty that do involve everything about the economic climate in California have to be brought to bear on these cases. And therefore, we need to do everything possible to get the best possible decisions out of the ALJs as well as the commissioners.

SENATOR RUSSELL: But the ALJs, they're what? they're appointed by ...

PROFESSOR ASIMOW: Yes.

SENATOR RUSSELL: ... through a process; and the commissioners come and go based upon who is governor. And so the commissioners reflect a particular philosophy which we may or may not agree with.

PROFESSOR ASIMOW: Of course.

SENATOR RUSSELL: The direction I hear you advocating is that the ALJ becomes more of a factor that cannot be easily ignored by these decisionmakers; that you want them to become more the person who decides what it should be; and that if the commission then deviates from the facts that the ALJ has come up with his decision, they do it perhaps at their greater peril than would be the case today. Now there's good sides and down sides to that, but would that not be true?

PROFESSOR ASIMOW: Well, it's a complex question, Senator. I think that as to matters of fact that the commissioners should not deviate from what is in the record. And the ALJ is very helpful in assisting them to understand the factual inputs that are in the record. But when it comes to matters of policy and discretion, I think it's up to the members of the commission to do that the best that they can.

SENATOR RUSSELL: But what I hear -- and maybe I'm incorrect -- but what I hear is that the ALJ will be more, not only a factual presentor of the facts, but will be also a decisionmaker, writing his own opinion with the door closed between him and the PUC commissioners, so to speak, and then handing this out that this is my opinion, and that it's -- would be that pretty difficult for the PUC, whatever the reasons, to come up with some other kind of a proposal than what the ALJs have.

PROFESSOR ASIMOW: Well, I ...

SENATOR RUSSELL: And the AJLs are not appointed to do that.

PROFESSOR ASIMOW: I don't think that it's difficult, Senator, for the commissioners when they review the proposed decision of the ALJ to substitute a different political point of view, a different economic analysis, a different balancing of the equities. That is their job. What they are limited to are the factual inputs that are in the record.

Now, I'm really striking a compromise on this. I'm sympathetic with which you're saying and that's why I really do not support SB 1126 which would take the ALJs outside the commission and cause them to really render an independent decision such as occurs in the Pharmacy Licensing Board or something like that. I think that the evolution that has gone on whereby the ALJs are independent within the PUC and render a proposed decision is good. I think you get a better decision that way, by building up ALJ independence to that degree. I don't think it makes sense, however, in light of the kinds of factors you suggested, to take the ALJs out of the PUC completely into an independent agency. There, I think, you are cutting them off too much from the staff and from the commissioners.

SENATOR RUSSELL: Do you see the current practice of the ALJs more than just a fact-finder and a presenter of facts?

PROFESSOR ASIMOW: Oh, definitely. Much more. The ALJs not only hear the facts and make decisions about facts, they themselves do the best that they can in trying to solve the economic and social problems that are presented in that case.

SENATOR RUSSELL: Has that been their traditional role? Or has that evolved fairly recently because of the changes in the law?

PROFESSOR ASIMOW: Oh, I think that's traditional, and it also has been evolving; that that is proposed decision, the ALJ does his or her best to resolve the entire problem that has been presented. And that obviously includes not only finding one plus

one equals two, but deciding what is best for California business and California consumers. It isn't the final call on that. But it's a very important call.

SENATOR RUSSELL: And that's been their traditional role.

PROFESSOR ASIMOW: Certainly, that's very much been their role since the statute was changed whereby their proposed decision is released to the public, yes.

SENATOR RUSSELL: When was that law passed?

PROFESSOR ASIMOW: I don't have the date handy.

SENATOR RUSSELL: Five years?

PROFESSOR ASIMOW: Five to ten years, I believe. It's not very long ago.

SENATOR RUSSELL: Because where I come from -- and it may show a tremendous amount ignorance and probably does -- is that I thought that the administrative law judges get out and get all the nitty-gritty and the facts and take that amount of time, which the commission does not have, and mass it together and put it in a form that's then given to the PUC. They take that and make the decision. I wasn't aware that the law judges were, in a sense, decisionmakers subject to review.

PROFESSOR ASIMOW: No, they very much are the latter, Senator. They are decisionmakers subject to review.

SENATOR RUSSELL: Okay, thank you.

PROFESSOR ASIMOW: And that's -- I believe, that's a good thing, but you still have to find an appropriate compromise between complete independence and complete dependence.

SENATOR RUSSELL: I don't believe it's appropriate for the commission to come down to a law judge and have obscure, you know, whatever decision he feels is appropriate. But, by the same token, I feel the final decision that -- well ... I'm struggling with this ...

PROFESSOR ASIMOW: I've probably gone over my 10 minutes, Senator, so perhaps I should yield.

CHAIRMAN ROSENTHAL: Okay.

ASSEMBLYMAN TERRY FRIEDMAN: Can I ask ...?

CHAIRMAN ROSENTHAL: Yes, Assemblyman.

ASSEMBLYMAN FRIEDMAN: Thank you very much, Senator. Professor Asimow, my interest is back to your initial area of testimony regarding ex parte communications. I've had legislation in regards to the Coastal Commission similar to Senator Rosenthal's.

PROFESSOR ASIMOW: Yes.

ASSEMBLYMAN FRIEDMAN: One, I have an interest in knowing how the whole range of regulatory bodies approach the ex parte issue. Are they all, like the PUC and the Coastal Commission, in a position to leave ex parte communications wholly unregulated? Or do we have any experience here in California or if not, elsewhere in other states,

or in the federal system where either ex parte communications or the middle ground, which Senator Rosenthal's legislation and my legislation is taken, to require the disclosure of all ex partes has proven to be an effective approach?

PROFESSOR ASIMOW: Well, Assemblyman Friedman, my understanding of the Coastal Commission's practice is that they do that now. That is, the written ex parte contacts are in the record and oral ex parte contacts have to be written down and placed in the record.

ASSEMBLYMAN FRIEDMAN: Without any sanction, though, so as I understand it, it's at the discretion of the commissioners to -- and some of whom are quite interested in abiding by that policy; and others who object to it have indicated that they could not possibly abide by it.

PROFESSOR ASIMOW: That's my understanding, too. But at least they have the aspiration of ...(cross talking)... on the record.

ASSEMBLYMAN FRIEDMAN: Some of them do.

PROFESSOR ASIMOW: But as you say, it isn't required by anything, by rule or by statute. And so it's often honored in the breach.

There are other California agencies that where ex parte is a problem. But by and large, the practice is quite different. They're viewed as wrong, demeaning to the process that -- to the adjudicatory process, and they are generally prohibited, particularly oral ex parte contacts. The PUC and perhaps the Coastal Commission are at the other extreme.

ASSEMBLYMAN FRIEDMAN: Has there been experience to show any serious problems impeding the work of either of those bodies, or the interest that come before those bodies as a result of such a broad band that they have on ex parte communications?

PROFESSOR ASIMOW: Certainly, as far as I can tell, in asking questions like that many times, Senator (sic), the answer is no, no problem. It simply -- you have to change the prevailing culture of the agency. The culture has to become one. At the federal level, these are generally prohibited in these kinds of proceedings: telephone ratemaking, utility ratemaking by the Federal Energy Regulatory Committee. They don't allow ex parte contact. And the culture ... (cross talking)

ASSEMBLYMAN FRIEDMAN: ... is really an aberration from the general approach in the state and across the country.

PROFESSOR ASIMOW: I believe it is a very serious aberration, yes.

ASSEMBLYMAN FRIEDMAN: One other question. Have you been able to analyze the difference in appellate court review of decisions by the PUC or the Coastal Commission where perhaps, though we don't know, much of the basis for those decisions are ex parte communications that are not on the record as compared to those bodies whose decisions are reviewed by appellate courts where the entire basis for their decisions is on the

record? It's always seemed to me that one of the problems is how can the court of appeals or supreme court adequately review a record that is incomplete because of the possibility or actual reality of ex parte communcations? Is there any way to compare?

PROFESSOR ASIMOW: Well, I wholeheartedly agree that judicial review is indeed a sham. I've not been able -- there's really no way to know how ultimate decisions are skewed because you don't know what the ex parte contacts were. In California we don't have any cases involving the PUC or the Coastal Commission where the litigants have raised this issue. I think they should raise it. And I think when they do, you're going to find the appellate court emphatically reversing the decision as has often occurred at the federal level. In famous cases involving, for example, the FCC and the Federal Labor Relations Authority, the decisions tainted by ex parte contacts are simply set aside. But I do not know, it's really hard to say whether particular outcomes have been skewed by this.

ASSEMBLYMAN FRIEDMAN: It's my understanding, at least in regard to the Coastal Commission, perhaps the PUC as well, that as Attorney General George Deukmejian and now current Attorney General John de Kamp have warned by letter the Coastal Commission that continuing to permit any sort of ex parte communications raises serious legal problems for the commission and for their decisions as a result of the sort of point that you just made.

PROFESSOR ASIMOW: Oh, I ...

ASSEMBLYMAN FRIEDMAN: Has that happened with the PUC? Have any attorney generals communicated that to the ...

PROFESSOR ASIMOW: That I do not know. But I do know that the staff of the commission has repeatedly and emphatically told the commission that this is a risk. And the commission chooses to ignore that advice.

If I might add just one last point because I forgot to make it before on the ALJ issue, Senator.

In the course of my work, I took a survey. I actually sent a questionnaire to every PUC judge and asked them how they felt about being switched to an independent agency. And because ALJs have always favored this kind of move, I expected that they would vote for it unanimously. But they did not. I got about a 70 percent response; and of the judges who responded, they voted to switch to an independent agency by a vote of only 10-to-8. It was almost split down the middle. So you don't have, even among the ALJs, the clear-cut consensus for the switch that you might want.

CHAIRMAN ROSENTHAL: Okay. We ran longer on the particular presentation because we're laying some groundwork ...

SENATOR RUSSELL: Because I asked all the questions.

CHAIRMAN ROSENTHAL: No, no, that's all right. That's fine. That's what we're

here for is to ask questions. However, because we're laying some groundwork. But I am going to hold the rest of the participants to the time allotted to them.

The next -- Honorable Litt, Chief Judge of U.S. Department of Labor.

JUDGE NAHUM LITT: Thank you, Senator Rosenthal ...

CHAIRMAN ROSENTHAL: And formerly an administrative law judge at FERC.

JUDGE LITT: Yes, sir.

CHAIRMAN ROSENTHAL: Federal Energy Regulatory Commission. Please, and welcome to Sacramento -- or to Los Angeles. I thought I was in Sacramento.

JUDGE LITT: Thank you. I've submitted a resume which I request be made a part of the record. I appear as a representative of the National Conference of Administrative Law Judges for the American Bar Association, and in my personal capacity. None of my views reflect those of the Department of Labor.

On ex parte communications, I would like to say that I too support Professor Asimow's statement that they should be absolutely prohibited. The hallmark of fair adjudications and procedures is the right for all litigants to appear and file on a public record at the same time, place and level as all other parties. That record, the so-called on-the-record hearing becomes the sole basis for all subsequent review.

The evils of ex parte communications can be seen easily in a case alluded to by Professor Asimow which is the so-called PATCO case -- it's 685 F.2d 547 -- where the ex parte communications from one of the parties is if you decide this case against me, you'll never get another job in this industry. When that came to light, it obviously became a problem.

SENATOR RUSSELL: What's the PATCO case?

JUDGE LITT: It's a Federal Labor Relations Authority case which involved the air traffic controllers. I would invite you to read that case if you want to see where the evils of ex parte communications flow and what they do and how corrosive they are to the procedures.

SENATOR RUSSELL: Who was saying that you'll never get another job?

JUDGE LITT: One of the parties went to one of those who was going to decide the case and literally threatened them, is what the underlying cause was in that case. That was the ex parte communication, as I understand it.

SENATOR RUSSELL: And if this recommendation that you're suggesting were to be a force of law, were there have to be then some penalties for those kinds of communications? Suppose ...

JUDGE LITT: The penalty's public exposure, sir, normally.

SENATOR RUSSELL: Public what?

JUDGE LITT: Ex parte communications are usually cured by public exposure, which is one of the ...(cross talking)... SB 1125.

SENATOR RUSSELL: So, if I came to you and made that kind of a statement that you would have to -- you would put that on the record ...

JUDGE LITT: That's correct.

SENATOR RUSSELL: ... that I had said this.

JUDGE LITT: That's correct. As it turns out, it became known, and there was a subsequent board of appeals decision where they appointed a master to investigate those facts and the decision was highly suspicious as far as the agency was concerned.

Ex parte communications have been rejected on the federal system in every form whether formal or informal adjudication as the antithesis of fair procedures and as corrosive and destructive of the public expectations and understanding of fairness. I know of no place on the federal system -- and I will have 30 years of federal service, and 19 of those as an administrative law judge, as of January 4 of this coming year -- where ex parte communications are allowed and the fact discovered are not roundly criticized. As a matter of fact, part of the FOIA, the Freedom of Information Act legislation that was passed was in order to give a better handle on parties to ex parte communications where they might have existed and where they were not publicly disclosed.

I would like to turn to Senator Russell's questions because I think that they go to the heart of the question of the independence of the administrative law judges. The Federal Energy Regulator Commission right now is where Professor Asimow would like to take the Public Utilities Commission of California. It is where the Public Utilities Commission of New Jersey was 10 years ago when they moved from what they had to what SB 1126 would do today, an independent office of administrative law judges handling public utilities commission work as well as others. The New Jersey experience was that after they were in business about five years, the public utilities commission basically mounted a public campaign in the press and before the governor to get their judges back. And what happened was a blue ribbon panel was put together. That blue ribbon panel held hearings and the blue ribbon panel issued a report, which I had hoped to bring with me today. I asked that it be faxed down, but it did not arrive in time before I left, and I will supply it to the committee. I think it would be instructive and helpful if the committee could read what happened in New Jersey. And the subsequent attack which was then investigated.

Secondly, I was at the Federal Energy Regulatory Commission for seven years working under the type of system that Professor Asimow <u>now</u> suggests would be appropriate as against what they currently have at the California Public Utilities Commission. That system was somewhat flawed, but certainly better than what occurs now. And the Federal Energy Regulatory Bar, which also is very active here in California, recently adopted the American Bar Association recommendation which would take the judges out of the

agencies and move them to the type of process suggested by SB 1126.

Now, the question of how independent judges are and what's the role of the judge in an agency, I worked for 17 years as either the chief judge or a working judge or a working attorney at agencies that handled public utility-type regulation: the Interstate Commerce Commission for roughly 10 years; and seven years at the -- actually 19 years -- 10 years at the -- seven years at the Federal Energy Regulatory Commission and its predecessor the Public Utility Commission; and two years as chief judge CAP. And we all did utility ratemaking and licensing and most of the other processes which are done here.

Judges do not make policy. They do recommend policy. And the courts do not defer to judges when the policy and discretion as to whether or not you're going to have a high indebted rate of return or low indebted rate of return, and whether or not you're going to encourage growth or not encourage growth. The judge can make a recommendation based upon the materials put in the record. But it's a commission which makes that decision and the courts will defer uniformly to the commission decision as long as it's reason, and they give any reasons for it. But the judges do and what the agencies expect them to do is marshal the record and the facts presented in a meaningful way and to the extent that these issues are raised, to present what the alternatives are and to decide among those alternatives what they will recommend. If the agency chooses to accept that recommendation or not on the policy is up to the agency and the political appointees who bring with them the leavening factors of where the public interest lies and the political realities in the state in which they're appointed.

What it does say is that the commissions can't ignore record. There are few areas where administrative law judges have finality. And the reason for it is if you have 15 or 25 judges and they come out all over the board, there is no uniformity of decisions; and secondly, you have a tremendous burden when the courts -- it's most of the cases involving hundreds of millions of dollars will certainly be appealed and will go into the courts where without any direction, without any focus they will become a tremendous burden in the courts' more complex cases. As a matter of fact, the Department of Labor which -- and my office administers roughly 80 different statutes arising through labor protective legislation that has been passed -- we have had administrative finality in one area which was the immigration area, so-called card certification, the alien certification appeals. It didn't work. Each judge -- we had 85 judges -- issued their own decisions. And what we had was pick and choose between 15 or 20 judges on one side of an issue and 15 or 20 on the other. There was no predictability for the Bar, and it got to be a serious problem. We created a board of alien certification of appeals in order to avoid that problem. And those are simple adjudications essentially as the state from these complex litigation problems arise here.

I support, the American Bar Association supports, the American Medical Association supports, the Association of Retired People supports a core of administrative law judges on the federal system which is what SB 1126 would do for California. This has been pending for roughly six years before the Senate of the Unites States, has had three sets of hearings, has been reported out with a favorable recommendation twice from the subcommittee, and we're told will probably be reported out by Senator Heflin in Subcommittee on Judiciary to the full committee sometime in January or February. It is moving on the federal system, but this type of amendment that you're wrestling with is not an easy problem, is a long term problem that has to be addressed. And I think where you are now is a heck of a lot further along in some ways than that process has occurred in five years in the federal system. I think you're to be commended for wanting to come to grips with it.

CHAIRMAN ROSENTHAL: Thank you, Judge Litt. Our next witness ...

SENATOR RUSSELL: May I ask a question?

CHAIRMAN ROSENTHAL: Yes, certainly.

SENATOR RUSSELL: The Professor apparently didn't go as far as you're advocating. You're advocating an SB 1126 type of a procedure where they're completely separate. The Professor did not advocate that. The law judges were split on that. Why do you feel that that system -- let's assume we don't allow ex parte, but we keep the present law judge system where they do their own thing and present it -- what's wrong with that as opposed to a complete separate agency?

JUDGE LITT: There's several things. First, there's a public perception that it isn't very fair. The agency basically knows its own judges and it uses those judges. It has control over them administratively whether they get parking spaces or don't, how they're housed, where they're housed, all the little perks that go along with what creates a feeling of independence or not independence.

The second problem with it is what you've had at social security where judges were directed to ignore courts of appeal decisions, even in the same circuit, which turned out to be serious problem, intra-circuit nonacquiescence, inter-circuit nonacquiescence. The abuses have been known. In this PATCO case, if you should read it, you'll find that what the commissioner did when he was approached and threatened, was he went and he had lunch with the chief judge and suggested to the chief judge that he take the case himself and because he'd know how it'd come out. Now that's the vice that you have to address.

The system, with the split among the judges, is that there's been an evolution of the bill that Senator Heflin has. The major problem with most judges is the unpredictability of whether they would be moved from an area of their expertise and whether they could be physically moved from where they live. The current Heflin bill

says that you can't do that for more than 120 days in a two-year period against the will of the judge, and you can't physically move the judge. Had it been a problem also in the federal system and we had a split among our judges as to whether they would support it. I would suggest that if you went back to the PUC judges with the current Heflin proposal and also stated that you would grandfather in current appointees -- some of them, I'm informed, are not necessarily lawyers -- that you might have a different response to Professor Asimow's request, well, you know, and survey.

SENATOR RUSSELL: Mr. Chairman, I don't imagine you want to take the time, but I would find it, I think, instructive or interesting to determine why in New Jersey, the PUC felt so strongly that they mounted a campaign to get their judges back; one of two things, either they wanted to completely control them; or they found that the judges were being completely independent from the kinds of decisions that the appointed board would expect. And I think there's problems in both cases. And I don't imagine you want to take the time to get into that today, but I think that ...

CHAIRMAN ROSENTHAL: Well, maybe we can ...

SENATOR RUSSELL: ... staff would ...

CHAIRMAN ROSENTHAL: ... get that information for us.

SENATOR RUSSELL: ... get that information and ...

CHAIRMAN ROSENTHAL: Yes, I would like that.

What about the provision which only asks that the commission need not approve an ALJ decision before it becomes public? Isn't that more important than a physical move?

JUDGE LITT: Well, that would be certainly a necessary step in any move towards independence of the judges and the decisionmaking authority. I know of no federal agency where a judge's decision is circulated to the agency prior to publication. I mean, if a judge walks in and he asks me to read it, I'll read his decision and give him my opinion. But he does not submit it to me as the chief judge, nor submit it to the agency for any type of review or input. I mean, you do the best job you can; you write your decision; you say what you have to say; and then it goes on appeal if the parties don't like it. Every case I ever wrote at the Federal Energy Regulatory Commission went on appeal. I mean, there were literally -- in one case, the Alaska gas transportation case which affected California, there were billions of dollars at stake. My decision certainly wasn't going to be final. And I was under no illusion either.

SENATOR RUSSELL: Do you look at the ... Excuse me, Mr. Chairman.

CHAIRMAN ROSENTHAL: Yes. You see, that's one of the things that I'm trying to get at in our PUC, for example, before it's released. I mean, a form is filled out before it gets to the public in which the judge has to indicate to the commissioner and then they review it before anything happens. Just seems to me that that's almost getting to the point of where the commissioner determines what the judge will do, which is the

thing that I'm trying to deal with in discussing this subject.

See, I don't have any problem with a judge making a decision and the commission doing whatever they want to do about it. That's the commission's decision. But I think there appears to be too much collusion as to what the judge's decision is going to be based upon the relationship with that particular commissioner and what that particular commissioner would like to see happen in that case. That's the perception, real or unreal, that I'm trying to deal with.

JUDGE LITT: Well, I would fully agree with that observation.

CHAIRMAN ROSENTHAL: Okay.

SENATOR RUSSELL: I have one more ...

CHAIRMAN ROSENTHAL: Yes, okay.

SENATOR RUSSELL: It sounds like you're advocating that the PUC be merely an appellate court. The law judges do their thing and then it goes up on appeal. Is that what you're advocating?

JUDGE LITT: The PUC is a regulatory body and also has appellate authority and policy making authority. You know, Profesor Asimow refers to the fact that if you have judges that are in another agency there will be differences with that agency as an adjudicative-type body. But the reality is is that where that has occurred, both with the federal system -- and I would even say on the example he gives in his report -- on the state system that the regulatory body, the PUC, could change its regulations or if in fact there is a difference of interpretation in statutory it would go to court which always places difference on what the PUC would say and not what the judge would say was the statutory meaning.

SENATOR RUSSELL: Well, in the real world of just living a life and being in politics, we're all confronted with the issue of power. And every individual human being has that to confront with. Some are more apt to be power trips than others. And that applies to politicians certainly; it applies to law judges; it applies to the judiciary, and so forth. I'm getting the feeling, for good reasons, but nevertheless I'm getting the feeling the administrative law judges -- and you're an advocate for them -- want to be in a position where they make an important decision. Maybe not <u>the</u> decision, but you want to make it as difficult as possible for the commission to do other than what the law judge says. And that's a very powerful position to be in. And I'm struggling with that. I can see a lot of the reasons why you come to that conclusion, but I ...

JUDGE LITT: Well, I can't tell you about all judges. I guess I know one or two that might reflect what you've suggested. But I can tell you that most judges, and myself included, are interested only in going about the best job we can; and what happens to it afterwards I don't usually care about, when it goes on appeal. The

decision is changed on a political basis or political reason. Whatever I had to say is going to stay or fall on what I had to say. I wouldn't consider it that I was doing my job well and my position well if, in fact, I tried to block an agency in so it could not make a political decision or a decretionary decision that was before it. That would ...

CHAIRMAN ROSENTHAL: Okay. Thank you.

We'll move on now to an administrative law judge at the PUC, Judge Weiss.

JUDGE JOHN B. WEISS: Thank you. Mr. Chairman, Senators, Assemblymen, ladies and gentlemen. The views and opinions that I give you are based on 8 years prior experience as a member of the California Unemployment and Insurance Appeals Board, and 14 years present service as an ALJ with the commission. The views and opinions are my own. I am not authorized to represent the commission. I am a member of ACSA and a member of the California Bar.

When asked to appear I was asked to give my views on SB 1125 and 1126. As to 1125, the ex parte bill requiring prohibition but disclosure -- requiring not prohibition, but disclosure of ex parte contacts, I am in full support, but would argue that it does not go far enough. Where Rule 7-108 of the Rules of Professional Conduct of the State Bar, a rule which is approved by the State Supreme Court and has a force of law, if this were followed by the commissioners, their aides, and all ALJs, there would be no need for SB 1125. But most commissioners, some of the aides, and a number of ALJs are not members of the Bar, and therefore are not subject to the rule. The rule prohibits direct or indirect communication in the absence of opposing counsel and requires furnishing opposing counsel with a copy of any written communication on the merits of contested matter.

The commission's staff today is divided between the Division of Ratepayer Advocates and the Commission Advisory and Compliance Division. DRA is a full litigate as well as being a part of our staff, and it is also a conduit to other parties who are participating in a case. There is also interchange between the divisions, promotional opportunities and transfers between these divisions and career opportunities involved. And finally, the commission's chief counsel, the legal advisor to the commissioners, is also head of all of the legal division including DRA. Therefore, I would enlarge 1125 to require commission practice by all commissioners, all their aides, all ALJs to conform to State Bar Rule 7-108. Such a requirement would not matter to the good guys, but is needed so that bad guys when caught could be punished.

As to 1126, transfer of all PUC ALJs to the Office of Administrative Hearings. This proposed resolution of the problem that exists of interference with ALJs' conduct of cases and their attainment of independent decisions causes me to have some personal reservations, I must say. There exists some very real morale problems amongst a number

of the PUC ALJs. They largely derive from interference with the ALJs' conduct of the case under the guise within the ALJ division of supervision, desire for consistency and conformity, as well as from the not always repressed natural desire of the assigned commissioner and/or his aides to control the content or conclusions in the ALJs' opinion. This unhappiness in the PUC ALJ group has developed into a degree of acceptance ranging from reluctance to resigned acceptance by a number of the ALJs of this proposed tranfer to out of the PUC. ACSA has responded to this urgent dissatisfaction, but supports a transfer only if a number of changes are incorporated into SB 1126. These principally are guarantees that personnel and their administrative headquarters would remain in San Francisco; assurances of grandfathering present nonlawyer ALJs; and more importantly, provision for the filing and publication of the ALJs' own decision without prior review, consent, or approval of the commission, a commissioner, or any supervisor before it is filed. I understand that access propose changes have already been provided to the committee independent of my appearance today. The concept of a state ALJ core capable of fungible application as need dictates, but afford economies. But I don't think it is workable given the divergent specialized legal and technical knowledge that characterizes agencies such as the PUC.

The single most valuable aspect of the ALJ concept rests in the knowledge and the independence of the ALJ in hearing the evidence and reaching the decisions which he presents to the commission. Workmen's comp comes closer to this goal with the ALJ decision, the initial decision of record. The PUC ALJs are not yet free of interference, although the PU Code 311 changes were a good initial step. Our value to the commission, I think, necessitates our being a part of it. But it should be as a quasi-independent appendage with access to the commissioners and support staff.

Two short other items. I very strongly believe that full due process can never be assured until appeal from a commission final decision can be taken as a matter of right to a court of appeal rather than direct to the Supreme Court. The latter just cannot review more than a couple matters a year, and the commission, frankly, has counted on that fact in the past. And I think due process suffered in different cases.

Lastly, the commissioners' aides play a very powerful part because of the vast number of cases before the commission, and they determine to some extent their principals' vote on decisions. And by the process of closed mini-conferences, their decisions are an important factor in their principals' final vote. I would require that these weekly conferences be subject to the same open-meeting laws as apply to their principals' conferences.

Thank you for this opportunity to be heard.

CHAIRMAN ROSENTHAL: Judge, your Honor, are you aware of an assigned commissioner at the beginning of a case indicating to the ALJ what the outcome should be based upon

ex parte discussions that may have taken place before the case?

JUDGE WEISS: I have been told within the past week when I have discussed the fact that I was going to be here in the absence of Judge Jarvis with a number of my associates, and several have led me to understand -- and these are newer ALJs who are still within their probation period and we now have a two-year step, so that you're under probation for two years, so the hold is pretty strong -- several have been assigned very important cases and it has been inferred to them at least that they should follow direction in reaching these decisions. This has been reported to me by several within the past week.

CHAIRMAN ROSENTHAL: Yes, Senator Russell.

SENATOR RUSSELL: On that point. You've been with the PUC did you say 14 years?

JUDGE WEISS: Yes, sir.

SENATOR RUSSELL: In that 14 years, is what you've just told us, a new phenomenon? Or is it something that has been a part of the PUC process for that 14 years that you've been there?

JUDGE WEISS: It has been a part of the process, sir, with some ALJs and some commissioners, during my entire tenure, and I believe extended before that. I know of at least one instance where the hearings were held, and when it came down to the final number the percentage that was to be applied, the president of the commission -- it is not the present President, it is a prior president -- gave the ALJ the figure that was to be used.

SENATOR RUSSELL: So, basically ...

JUDGE WEISS: Regardless of the record.

SENATOR RUSSELL: Yeah. In those cases then, over that 14 year period, the situation is that the commissioner comes in, regardless of what the facts may show, says this is what I want it to be, in general terms?

JUDGE WEISS: Yes, sir. Very recently, another ALJ -- or last week another ALJ reported to me that very recently he had a 311 decision; he drafted his decision; it went to the commissioner's office and the commissioner said he would not release for it unless it was changed. The ALJ refused to change it. As it turned out, the commissioner then did change his mind and released it.

SENATOR RUSSELL: Thank you.

CHAIRMAN ROSENTHAL: Can you comment? Give me your feeling on this particular form, not necessarily yours, but the general concept ...

JUDGE WEISS: I have no problem with the concept, sir. I do feel that the ALJ's decision should be signed by the ALJ and should be issued by the ALJ, not subject to a review by his supervisor, the assistant chief or the chief ALJ, or as it now happens where it goes to a department. In one case that I had not very long ago, one of the

witnesses for the staff drafted a decision which he then sent to the commissioner's aide after my decision had been turned in. This was a witness to one of the parties. Now, that was not used. The aide did not use it. But it was there.

CHAIRMAN ROSENTHAL: Okay, thank you very much. Any further questions?

Aaron Read, Legislative representative of the Association of Administrative Law Judges. Welcome.

MR. AARON READ: Thank you very much. Senator Rosenthal, Mr. Chairman, members. I am here representing the Association of California State Attorneys and Administrative Law Judges. I'm pleased to be invited by the committee and also pleased to be on a panel with such distinguished representatives.

Much of what I was going to say has already been said, so I'll try not to repeat all of it, simply try to underscore some of those issues that are important to the judges that I represent.

The ex parte communication issue is a big issue. We believe the legislation is tremendously needed. We're astounded at the breadth and scope of ex parte contacts that are currently going on.

SENATOR RUSSELL: Which bill do you refer to, Aaron?

MR. READ: That's the ...

SENATOR RUSSELL: 1125?

MR. READ: ... 1125, correct.

So, we favor, as the other witnesses have mentioned, legislation in this area.

As to -- Senator Russell, you raised a question a little bit earlier about the decisions, and there was some question about the legislation that changed the way they do things. I believe it was a Duffy bill, and it was more than 10 years, a dozen years at least, that Assemblyman Duffy carried that legislation. So it's been a good while that that legislation has been on the books.

SENATOR RUSSELL: Can you say what basically that legislation said? Paraphrase it.

MR. READ: Maybe I'll let Judge Weiss explain it. The 311 Procedure is what it established in law.

JUDGE WEISS: The 311 Procedure, sir, came later. I beg your pardon. The 311 Procedure followed the Duffy bill. It was a clarification or addendum in effect. The Duffy bill first provided for the distribution and -- well, for the placing in the record of the ALJs' decision. At first it was put in the record, but only when the commission issued its decision. The 311 Procedure provided for the ALJs' decision to be -- to this yellow form that Senator Rosenthal showed us -- to be reviewed, if you will; and there was some question about whether it is review or merely a conference as to that; and there are differing opinions in the commission as to that. But it provided that that decision would be sent out to the parties and there would be a

20-day comment period by the parties and a 5-day rebuttal period. At the end of that time, the ALJ -- as my understanding and the way I have followed it -- the ALJ reviews the comments, revises his decision if he feels the comments are too well taken, and it then goes to the assigned commissioner who may put it on or he may issue his alternate.

SENATOR RUSSELL: Before that procedure became law, what was the practice?

JUDGE WEISS: Before that procedure, the ALJ finished his decision; it then went to the internal review, if you will, sir, of the ALJ division; it then went to the departments that were concerned through the commission even though sometimes they were parties; it then went to the assigned commissioner; and the assigned commissioner may or may not distribute it amongst his associates or he could put his own version before or he could put both.

SENATOR RUSSELL: He could bury it and never see the light of it.

JUDGE WEISS: He could bury.

SENATOR RUSSELL: Well, it sounds like the Duffy proposal was certainly a step in the right direction. But ...

JUDGE WEISS: I said that, sir.

SENATOR RUSSELL: Yeah. But what I'm asking now is that when you make your decision and it goes through this process -- what'd you call it, a 311 process?

JUDGE WEISS: Yes, sir.

SENATOR RUSSELL: Could not we keep that and after both parties, in other words, both sides or all sides get to review and make comments and so forth, don't you think as an administrative law judge, that you're having the ability to read those conflicting statements might help you make an even better decision? And then at that point, after you modify that, outside the PUC commissioners' involvement, then you present that to the commissioner, and then he must -- that must be part of the record. Can't we keep that process?

JUDGE WEISS: I would like to see that process be adopted, sir. It is not necessarily so at this time. I have a memorandum here which was sent by one of the assistant chief judges to one of the administrative law judges and this is a well experienced judge who handles some very, very important cases. And amongst the things he is telling him is that: I need to review and approve all written work products which you prepare for distribution outside the ALJ division before they are distributed.

SENATOR RUSSELL: This is a senior judge?

JUDGE WEISS: This is an assistant chief. We have a chief judge, three assistant chiefs, and I think there are about 27 or 28 ALJs. So, we are grouped in groups of roughly 7 or 8 under an assistant chief.

SENATOR RUSSELL: And you're observations on this kind of a thing are what?

JUDGE WEISS: I think that this -- telling him that he has to decide whether or not

-- that is, the assistant chief has to decide whether or not the judges' rulings and orders are legally correct and conform to policies of the commission are justified departure from same. And that he has to review with him what he is going to discuss with the commissioner before he discusses it with the commissioner is grossly improper.

SENATOR RUSSELL: If that review were allowed, but that had to be made -- in other words, if your superior disagreed in some areas and that had to be part of the written record, that you could either say well, yes, I disagree or no, I'm going to keep it as it is, which then along with all the parties giving you the information and you take all this together and you come up with your final decision, which would include all the other stuff, would that be a good thing to do? And then present that and require that to be part of the record?

JUDGE WEISS: I have no problems with that at all, sir. But in one instance here, this one ALJ had three commissioners tell him -- he had conferred with three commissioners and they had agreed with what he proposed to do, but this particular assistant chief disagreed with that, and stymied that even to the point of holding workshops over the head of the ALJ, which delayed a decision.

SENATOR RUSSELL: Was it on a matter of technical interpretation of the law? Or was it more a policy philosophy?

JUDGE WEISS: A matter of what he felt the outcome should be.

SENATOR RUSSELL: I see. Well, it would be interesting ...

JUDGE WEISS: Let me say this, sir. I firmly believe that the commissioners, the five commissioners are necessary and absolutely necessary. They represent the voice of the people through the elected governor and through your process of approving them through your committee. They give social, economic, and political guidance to decisions. And as the judge here explained, the courts will follow their decision, not ours. But I think that the point is that the commissioners must act at least in -- can't ignore the record. They cannot ignore our -- the facts that we develop easily. They must come up with a reason and something for it.

SENATOR RUSSELL: Do you support the assigned commissioner process that some of the other have raised questions about?

JUDGE WEISS: No.

SENATOR RUSSELL: You do not?

JUDGE WEISS: No, sir. The assigned commissioner is -- it's a temptation always to influence the outcome.

SENATOR RUSSELL: To be a king maker. I mean a ...

JUDGE WEISS: Well, I don't think -- I don't think there are any ulterior motives or evil motives in this. I think this is just a natural function. They're involved deeply in their work and they want to see it come out the way they think it should.

SENATOR RUSSELL: Thank you.

CHAIRMAN ROSENTHAL: Summarize, Mr. Read.

MR. READ: Thank you. Relating to the bill on separating the ALJs. You've heard mention of a survey; the judges though narrowly do support that concept and think it's viable. However, there are certain amendments that we think we would recommend. We've talked to your staff about them. Some of those include that we believe the judges ought to be lawyers with five years of experience which is the pattern generally used in other state agencies and at the federal level. And your bill currently doesn't require that. We would strongly make that recommendation to you.

And the second has been mentioned already, and that is about the location of the judges in San Francisco.

SENATOR RUSSELL: More lawyers.

MR. READ: Not more members, Senator Russell. But really, it's a new ...

CHAIRMAN ROSENTHAL: Doesn't want any more lawyers.

MR. READ: Well, we really do see it as a fairness, a due process issue and one -- things are so complex. And you're talking about due process here. We think lawyers add to that, obviously.

CHAIRMAN ROSENTHAL: Like to thank you very much for your presentation. Thank you again.

We'll now have the PUC, Mr. President.

SENATOR RUSSELL: We've loaded the dice there, Mitch, and now let's hear what you have to say.

PRESIDENT G. MITCHELL WILK: That's right. I must admit, it's the first time in my life I'm glad I'm not a lawyer.

First, Mr. Chairman and members, I want to thank you very much for accommodating my schedule today. As you well know, this is our busiest time of year. We have to get all cases done by Monday. And so I do appreciate accommodating the schedule.

I'd like to begin, Mr. Chairman, by suggesting to you that, number one, I represent the unanimous view of my five colleagues on both these measures.

CHAIRMAN ROSENTHAL: People resist change.

PRESIDENT WILK: That's true. But we don't resist it where we think we need it. And I think if you take a look at some of our decisions, we've been more than willing to change things where we feel change is necessary and appropriate.

But, in this particular instance, Mr. Chairman, we don't think that these measures represent solutions to problems that exist. And frankly, nothing I've heard this morning convinces me to change my view on these bills. In fact, if anything, I'm deeply disturbed by some of the views I heard this morning. I think they confuse entirely who is constitutionally responsible to make the decisions. The process of the

California Public Utilities Commission, all of the staff functions exist to support and to assist us in making those decisions.

Now, I am very concerned that these bills, as currently drafted, Mr. Chairman, would not really open up the process. I think you have very desirable objectives, but I think that these bills might in fact even conflict with some of those. And I think, in fact, the doors would be shut, the curtains would be drawn, and in the final analysis our decisionmaking process would become more convoluted and time-consuming.

Let me first turn to SB 1125, the ex parte bill. Let me say at the outset that the California Public Utilities Commission does not object to restrictions on ex parte communications. We do so on a case by case basis, upon a motion by any party, or by order of the ALJ or assigned commissioner. Indeed, the commission has imposed such orders on several proceedings very recently where the circumstances of those particular cases warrants it. My colleagues and I, however, unaminously object to the -- frankly, the imposition of a statutory ex parte rule on all commission proceedings. Such a rule is both, in our judgment, unnecessary and potentially harmful to the ability of the commission to reach informed decisions on very complex matters. California is not New Jersey. And I should know, I come from both places.

Such concerns are shared, as I understand it, by most other states, by virtue of the fact that we can find only two states that have imposed a statutory rule. We have come to this conclusion after careful examination of this issue over the past four years.

SENATOR RUSSELL: What's the other state?

PRESIDENT WILK: Well, there are two other states. There's Minnesota, as I understand it and Pennsylvania. In fact, I think it's either Pennsylvania or Minnesota that in fact may not even be a statutory rule. It just simply says, the commission should; it doesn't say how.

Let me go on to this. We have, as I said, issued ex parte rules in five cases and conducted a proceeding to explore a generic ex parte rule, as many of you know. Based upon this experience, we reached three conclusions: there is no convincing evidence that a general rule applicable to all proceedings is necessary or appropriate; secondly, no consensus on what form a generic rule would take could be reached by any of the dozens of parties that were involved in our rulemaking; thirdly, a case-by-case approach which tailors a rule to the specific circumstances of a proceeding works best for all parties.

SB 1125, on the other hand, is flawed in our judgment and unnecessary. It is portrayed as a simple disclosure matter and thus similar to the FCC, but I fear that these characterizations are not accurate. In fact, SB 1125 is dramatically different from the FCC rule and goes well beyond anything comtemplated by the FCC rule.

SB 1125 is not simple disclosure, but rather applies to all persons, including the general public, not just parties to a proceeding. At the same time, SB 1125 ignores the fact that the DRA is a party to cases by exempting them from the rule, thereby clearly disadvantaging all other parties.

All of this could lead to the -- frankly, I'm sure, unintended but nonetheless absurd result that while DRA could lobby commissioners without obligation, a commissioner's wife could be subject to criminal prosecution should she ask her husband how his day was. The penalty provisions, together with the bill's all inclusive reach, would create an unfair trap with terribly harsh consequences for the less sophisticated participants and our proceedings at the very time that we're trying to encourage public participation and representation.

Rather than encouraging such participation, it is clear in my judgment that the provisions of SB 1125 would discourage the openness and the equity that this bill in its current form seeks. In fact, the only results I can envision from enactment of SB 1125 are mountains of paper work of practical little consequence or interest to just about anybody, and the emergence of a new cottage industry. Litigation and investigation of suspicions on who talked to whom, about what, and when. And I frankly fear this to be a colossal waste of time for everybody.

The final analysis, a statutory rule along the lines of SB 1125, if enacted, would seriously and deeply impair the ability of this commission and its staff to reach timely and informed decisions. Such rules also ignore the fact that the vast majority of our proceedings are in fact quasi-legislative, not judicial. We are not a court. For example, I could cite a litany of court cases holding that our most frequent proceeding, ratemaking, is considered a legislative process in California and virtually every other state in the country. And I believe that ex parte rules have no place in legislative matters.

We cannot establish regulatory policy in a vacuum. California deserves better and deserves informed decisions and an open decisionmaking process. Given the complexity and broad impact of our decisions, anything less, I fear, would be a travesty for ratepayers' utilities and California's economy as a whole.

Turning very briefly to SB ... I'm sorry, Mr. Chairman?

CHAIRMAN ROSENTHAL: Let me just break in.

PRESIDENT WILK: Yes.

CHAIRMAN ROSENTHAL: Do you find something wrong with the FCC's form?

PRESIDENT WILK: I beg your pardon?

CHAIRMAN ROSENTHAL: Would you find something wrong -- disclosure about the subject matter that now takes place at the FCC?

PRESIDENT WILK: Along the lines of the FCC, I have some problems with the FCC as

well. But I fear that your bill does not do that, Senator. Your bill goes beyond simple disclosure and it contains very punitive penalty provisions applies to all parties.

CHAIRMAN ROSENTHAL: Well, but we could work to eliminate ...

PRESIDENT WILK: Okay. But, Senator ...

CHAIRMAN ROSENTHAL: ... consider to be a problem if, in fact, you would support this kind of a concept. All I'm trying to get at, basically, is that when someone says something to you about a subject matter that others who are party should know about that subject matter. I mean, I'm not trying to get into details.

PRESIDENT WILK: Well, Senator, I, as you know, canvassed all of my colleagues at your request, and we believe that our case-by-case approach works best, not a generic rule, and that what I would assume reaching the minds of my colleagues to the FCC rule itself.

CHAIRMAN ROSENTHAL: Well, tell me how you do operate; tell me what the process is.

PRESIDENT WILK: The process is that anybody -- a party, an ALJ, or an assigned commission -- can impose an ex parte rule. I did so, through the ALJ, on the San Diego Southern California Edison merger case; we imposed that. We also imposed it on Diable Canyon. We imposed it on Pacific Bell's rate case. We imposed it on the Women Minority Business Enterprise for reasons that, frankly, address the specific circumstances of that case. For example, in the merger case. We imposed the ex parte rule, Senator, because of the complexity of that case, the obvious controversy, and the fact that there are a lot of very -- and I hate to say because it sound derogatory and it's not meant to be that way -- but there are unsophisticated parties involved for the very first time that don't understand our process. And I felt, as did the administrative law judge, that this would be inappropriate -- that it would be more appropriate to have an ex parte rule on that particular case.

But I don't think we'd want to impose an ex parte rule, for example, on our Telco investigation on alternative regulatory frameworks. I think that would have been a travesty for this commission to try to decide an issue that complex without an ex parte rule -- with an ex parte rule, pardon me.

CHAIRMAN ROSENTHAL: Well, it appears, at least protection-wise, that you implement an ex parte situation when the attorney general is involved in that particular case.

PRESIDENT WILK: I don't recall that we did it because the attorney general was involved. There's nothing in the rationale, at least that I used, to support the imposition of that ex parte rule because the attorney general was involved.

CHAIRMAN ROSENTHAL: Well, how do the individual commissioners deal with ex parte? That's the question.

PRESIDENT WILK: Well, I mean, if we get written materials on a case -- and we get

written materials all the time on all our cases -- most of that is copied to all other parties; we send all of our written material to the central office to the extent we can identify the proceeding and make sure that is in the file for that proceeding. Now, I have not received an ex parte oral contact from anybody, otherwise it would have to be disclosed.

If I could just turn very briefly to SB 1126 ...

CHAIRMAN ROSENTHAL: Senator Russell.

PRESIDENT WILK: Yes, Senator Russell.

SENATOR RUSSELL: If some constituents come to me about a case that's before the PUC and I call you to relate to you their concerns and let's say, mine, too, yeah, I think they're right; and what are you going to do about this; I think you ought to do this or that or the other thing? Under current procedures now, how is that treated? Do you just take that in and that's fine and ...?

PRESIDENT WILK: Well, you take it into consideration, Senator. But in the final analysis, our decisions on any case have to be decided completely consistently with the record. Despite what you heard earlier this morning, if we did not do that, there'd be a lot more application for rehearing and successful actions taken to the California Supreme Court, and there haven't been.

SENATOR RUSSELL: Under this proposal that's before us, the lawyers who were advocating it, under those same circumstances, that communication by telephone to you, what would you have to do with it? Would you have to reduce it to writing?

PRESIDENT WILK: You would, as I understand it, and that is one of the problems with ex parte bills of this sort. As I understand the legislation, you have to fill out a document by the close of that day. So if you called me at 5:45p.m. and you didn't get it into our office by 5:00, assuming that we close at 5:00 and I guess we do, you'd find yourself up against criminal penalties and fines. That's the way we read the bill right now. And I understand that this is a draft legislation.

SENATOR RUSSELL: The burden's on me, not on you then.

PRESIDENT WILK: Well, as I read the legislation, that's exactly right. But of course, that doesn't mean that we don't have a burden ourselves because we do. My biggest fear in the generic ex parte rules like this -- and I'll give you a practical instance, Senator. And that's this merger case that's pending right now. The practical effect of even just disclosure only, and that rule was basically disclosure, sunshine, totally legitimate in this instance, has been to throw a bucket of cold water on any communication. Now, I'm concerned about that, frankly, because that's a very complex, convoluted issue with a lot at stake. And that's one of the consequences. It's one that I, frankly, felt in that particular instance, we should live with simply because of the complexity of the issue and the number of people who are involved in

that proceeding that have never been involved in PUC proceeding previously.

SENATOR RUSSELL: You say you're a legislative agency rather than a judicial agency. But you have to follow the record ...

PRESIDENT WILK: That's what the court says, yeah.

SENATOR RUSSELL: Now, my understanding is that the administrative law judge presents the record, and we've also understood today that you can then add your own philosophical, social, whatever, twist to it and come up with some other decision other than what the law judge makes. That doesn't jive with what you just said about you've got to follow the record.

PRESIDENT WILK: Well, in the first place, I'm not aware of the severity of the problem that has been described to you. We don't twist -- we make no changes. At least I can speak for myself. I have never made a change to anything that was not consistent with the record, at least as far as I know. In the first instance, that just opens it up to potential Supreme Court action, and we don't want that. We don't want that at all. But the testimony that you heard earlier seems to suggest an independent rule for the administrative law judges that I, frankly, think was never contemplated by the people of this state with respect to the process of the California Public Utilities Commission. We, the five commissioners, are the only constitutionally authorized body to make any decisions. And I again, I look at our staff as existing, as talented as they are, and I would like to make this perfectly clear to all of the committee that I think -- I've been around government for a while now -- that I think -- and I'm not saying this just because our executive director is sitting next to me here -- but I think our staff is among the most talented of any governmental agency that I've ever seen or been associated with. Very proud of them. Obviously, there are some who disagree with us, and you're always going to have that in any large organization. But the fact remains that that staff exists, including the independent Division of Ratepayer Advocates, frankly, to assist the commission in reaching a decision based upon a record.

SENATOR RUSSELL: Do you think that is appropriate for an administrative law judge, let's assume an administrative law judge -- and they call all shades and hues and philosophical events, and so forth, and they hear things differently -- that's coming up with a decision that's at variance with the philosphical overtones of the commission that is appropriate for their superiors to review that and mold it into a shape that is more consistent with what the commission may agree to? Do you think that's appropriate?

PRESIDENT WILK: Senator, I'm not sure that the administrative law judge should not have the right to issue his decision as he sees fit. Now, he should be advised that it's inconsistent with commission policy. He should be advised that it may have other

problems. These judges, administrative law judges exist in an organization with a hierarchical of managerial oversight, as they should. These are not members of the judicial bench. These are civil servants accountable, frankly, not to the public. We're accountable to the public for our decisions. And therein lies, I think, the basic flaw in all due respect with SB 1126. It confuses who is accountable.

SENATOR RUSSELL: So, the supervisorial role of the administrative law judges is to generally shape their decision or encourage their decisionmaking process to take the facts as they see it and relate it to the commission's philosophy or rules or direction.

PRESIDENT WILK: Well, I can just kind of share, Senator, my view, my own personal view in the way I manage the cases I'm assigned to. Incidentally, I think assigned commissioners play an exceedingly important role when you deal with the complexity of the issues that the California PUC has to deal with.

The way I deal with these cases is that obviously I want the administrative law judge to share with me periodically the status of the case to which I'm assigned and I am responsible. And I want, on occasion, to find out the path that that administrative law judge might take, and encourage them if they want to seek guidance from me if they chose. And many of our administrative law judges, I think, do go to the commissioners to get their view, and I think that's entirely appropriate, entirely appropriate. I think it results in a better decision in the final analysis. What good is it to have an administrative law division, independent from the commission more or less, promulgating draft decisions that are constantly and consistently overturned or dramatically changed by the full commission? What possible public good and benefit is there in that?

SENATOR RUSSELL: Well, my ...

CHAIRMAN ROSENTHAL: Well, it may be based upon facts at the hearings.

PRESIDENT WILK: Well, but, Senator, that implies that our decision wouldn't be. And if that were the case, where is the track record that demonstrates that we have consistently abandoned the record in our decisions. There is none, I submit. In fact, I don't know of a recent case where the California Supreme Court has overturned any of our decisions based upon some kind of ...

CHAIRMAN ROSENTHAL: That may be one of the concerns. What would you think -- you know, there's some people who are thinking about that maybe it shouldn't go to the U.S. Supreme Court; maybe it ought to go to the appellate division to take a look at the situation.

PRESIDENT WILK: Senator, we very strongly oppose that because we feel as a practical matter that will increase litigation, not decrease it. And I think that the record is virtually clear on that. We sympathize with the California Supreme Court,

and you know philosophically I want them to concentrate on the big issues. But the fact of the matter is I do fear going to an appellate court will not achieve the objectives that we all have in mind, which is speedier resolution of these cases. I think it would not only delay judicial review, I think it in fact would invite more litigation by the parties. And I'm not sure that that's good either.

SENATOR RUSSELL: Mr. Chairman.

CHAIRMAN ROSENTHAL: Yes.

SENATOR RUSSELL: What I'm struggling with, Mitch, is that if this chairman and I were both administrative law judges, we would view things and hear things through our own particular philosophical and social views. And we take the same information and we'd come up with some divergent, probably divergent opinions on what it should be, each one with his own integrity and honesty and so forth. And it would seem to me that it is appropriate then for, in that process, for there to be some shaping or some understanding on both of our parts as to what the goal of the commission is. And I think then that perhaps Senator Rosenthal as the law judge may disagree with that objective, but then could take the facts as he saw them and present them in a manner that's consistent with his integrity in view of what the commission objectives are, and I could do the same. That's what -- you think that's appropriate.

PRESIDENT WILK: Well, let's -- Senator, I don't want to confuse integrity and philosophical orientation. My view is that obviously we should maintain, preserve, protect -- anything you want to call it -- the integrity of the hearing officers at the California Public Utilities Commission or for that matter any other administrative agency. They have to be of the highest caliber. But to suggest that, in some fashion or another, that administrative law judges should be free independently to pursue their own philosophical, their own <u>philosophical</u> orientation in a case where they in fact exist basically to build a record of fact, I think is wrong.

SENATOR RUSSELL: Do you believe that the administrative law judges' report should be presented and publicized before this yellow review sheet is circulated around and everybody gets to ...?

PRESIDENT WILK: Yellow? I'm not sure what you're talking about.

SENATOR RUSSELL: Well, apparently as I understanding it, the law judge makes his recommendation, and then he presents it to his administrators and to you, the commission ...

PRESIDENT WILK: Oh, the cover -- you're talking about the cover sheet, the signature sheet, okay.

SENATOR RUSSELL: ... and that it comes back to him saying well, we don't agree with this; we've changed that; do something else. And then he takes it back and modifies it.

PRESIDENT WILK: Again, let me speak for myself and how I manage cases like that. I'll sign off on that -- I mean, if I read the case, I think it's appropriate. I don't see the problem that would exist to the extent that the assigned commissioner in the case, the one who has been not unlike legislators who carry bills, these people are assigned to that proceeding to read that case. If they have problems with it or questions, perhaps it is not a bad idea to go and talk to the administrative law judge. I have not imposed, as far as I can remember, I have not imposed a requirement on the administrative law judge that they should change that draft decision to suit me. Now, if I see a major philosophical difference with where I think the commission might go, I'm going to forewarn the administrative law judge, do you want to be overturned by the commission? It's up to you.

But again, I just want to make sure that we're all kind of on the same level here, and that is that, you know, who is responsible for public policy at the California Public Utilities Commission? Who makes the decisions? We're the ones that are appointed; we are confirmed by your esteemed body; we are accountable to the people of this state, not the administrative law judges.

CHAIRMAN ROSENTHAL: And that's the way it ought to be. There's no question about that. And you've indicated ...

PRESIDENT WILK: Well, some days I'd like to see it changed. (chuckles)

CHAIRMAN ROSENTHAL: You've indicated how you deal with that particular subject matter. But is there any policy that would create that same way of dealing among the other four commissioners, for example? In other words, is there a process by which they deal with it the same as you? We just heard that that's not necessarily so. And so I don't know whether there is a policy set down.

PRESIDENT WILK: Senator, if there were abuses that occurred on a regular basis or even on infrequent basis along the lines that you heard this morning, I would personally urge my colleagues to avoid situations like that. But frankly, I don't know the circumstances behind that allegation. I don't even know, even though Judge Weiss I'm certain is very sincere about this, I have absolutely no knowledge of the circumstances or facts in those instances. And if I thought there was an abuse, an abuse that was inconsistent with good government, not just constitutional authority, but just good government and good practice and good management, then I would urge my colleagues to take on a certain action. I'm not sure that in itself justifies a statutory approach to resolving -- if there is a problem, and I still don't think there is -- solution.

CHAIRMAN ROSENTHAL: There continues to be complaints from PUC staff, from judges, about the kinds of things that are taking place, and I'm sure you've heard of them as well as I have. There's a perception that there's something wrong, whether there is or

not. And it seems to me that the PUC ought to be moving in some sort of a direction which tries to calm the waters of that perception.

PRESIDENT WILK: Senator, until these bills were introduced, until this morning, I've never heard that there was a widespread perception, that we had a problem with our administrative law judges, and I doubt that there is. You also heard this morning, frankly, a very close quote unquote "vote" of a small sample of our administrative -- a small sample of our administrative law judges. And so I don't think there's any consensus that a problem exists at all.

CHAIRMAN ROSENTHAL: Do you know why the chief ALJ did not want to testify at this hearing today?

PRESIDENT WILK: I have no idea. I think you've got the person that you need, both her boss and the President of the commission.

CHAIRMAN ROSENTHAL: Okay. So, since you have not heard of any problems, there are no problems.

PRESIDENT WILK: I've heard -- I mean this morning I heard of a problem.

CHAIRMAN ROSENTHAL: Okay.

PRESIDENT WILK: But I'm not sure -- I think to justify a statutory -- a permanent statutory change along the lines of SB 1126, I think you would want to have far greater evidence of a severe problem and a consistent pattern of mismanagement than you have. I don't think that the record of this proceeding will show that. It might show some problems.

CHAIRMAN ROSENTHAL: Yeah. That's why we're having the hearing. I'm not suggesting that there are major problems, I'm just saying that there's a perception that there is something wrong, and I'm trying to see about what we can do about helping you clean up that situation. And if in fact the legislation goes further than it ought to ... You know, talk to me.

PRESIDENT WILK: I am. I'm telling you, Senator, I don't think there's a problem.

CHAIRMAN ROSENTHAL: Well, okay.

ASSEMBLYMAN FRIEDMAN: Senator, excuse me.

CHAIRMAN ROSENTHAL: Yes.

ASSEMBLYMAN FRIEDMAN: Before Mr. Franklin speaks, if I could just ask a question that ...

CHAIRMAN ROSENTHAL: Yes, sir.

ASSEMBLYMAN FRIEDMAN: ... I'm going to have to leave and I want to just focus on the 1125, which I'm most interested in.

I think Senator Rosenthal touched on one of the most important rationales for some regulation of ex parte communication and that's public confidence. No one here is accusing you or any of the commmissioners of making decisions based on anything outside

of the record. But we don't know. Nobody knows. We're taking your word for it. And I know your word is good, but there's an important relationship between the public and those that have constitutional authority to act and make decisions for the public. And the way that that confidence can be achieved and maintained is through open information. And I would submit that in the long run, the integrity of the commission and the integrity of all present and future commissioners rests upon their ability to convince the public that's interested in the matter that's before you that you are making the decision based solely and entirely upon the record.

Now, you can't tell me that anything besides what your own experience has been. You can tell me that no ex parte communication has influenced your decisions on past matters, but you can't assure me, it's impossible to, it's not within your ability unless you have ESP, to say that the other commissioners are the same. They may state that they have not done so, but we don't know. So it seems to me that the public policy rationale for either a ban or more prudently perhaps a requirement of disclosure of ex parte communications is to assure us that there aren't some cases, few perhaps, but maybe important, where there's been influences that produce a result different than they otherwise would have been.

And as for the point that, well, you're going to throw a lot of cold water on the participation of necessary individuals or parties. Well, what are they afraid of? I wonder about any party to a matter before the commission that so fears the public knowing about the communication that they've had with a commissioner, that they don't want it to be known, and don't want it to be on the public record. What are they hiding? Maybe nothing. But maybe something. And I think natural human suspicion based upon all of our experiences teaches us that in some of those cases there probably is something, embarrassment perhaps, maybe nothing illegal, but something that we ought to have a chance as members of the public to know about, to comment upon, to be able to evaluate the performance of the commission and therefore make determinations on who ought to be in the position to appoint commissioners.

So, I think that your absolute resistence to any statutory regulation on ex parte communications is a disservice to the commission and to the people of the state's need to know of the basis for commission decisions.

PRESIDENT WILK: Assemblyman Friedman, I appreciate your views on this, and let me share with you with respect to the public perception of what we do, that no one, no one that I know of is more sensitive to public perception about their job than the people that are affected by that perception. And in this instance, it's the commissioners. We are all very concerned that the public have a positive perception and confidence in our process, that we will reach just and reasonable conclusions based on the record, based on the facts. And in fact, one of the things I did a couple of years ago when I

first got on the commission, is I asked our staff to include some questions in a field poll about the California Public Utilities Commission and what the people thought of the California Public Utilities Commission, what they knew about the California Public Utilities Commission and what our role was, so that in fact we could target educational programs, outreach programs, public participation hearings to help better inform them of what we do, how we do it, and also to get an idea of what we're doing. Now, admittedly, polls, even Mervin field's polls, have had their biases and problems. But overwhelmingly, Assemblyman, overwhelmingly the people of this state that were asked those questions approved, strongly approved of the job the California Public Utilities Commission was doing and thought that we were fair.

ASSEMBLYMAN FRIEDMAN: I bet you, Commissioner, that if one of the questions in there had been as follows that the answer might have been more consistent with what I have been saying. Let's say the question was: "Do you believe that it should be put on-the-record whenever there is a private conversation between an individual interested in a matter before the commission and a commissioner?" And I'll bet you just as, if not more overwhelming, a majority of the persons polled would have said yes.

PRESIDENT WILK: Well, after I designed some questions that would reach the same issue, but perhaps a very different conclusion. Polls work.

ASSEMBLYMAN FRIEDMAN: ... makes the whole idea of polls as a justification ...

PRESIDENT WILK: I'm just trying to ...

ASSEMBLYMAN FRIEDMAN: ... of your public perception suspect and not convincing.

PRESIDENT WILK: Well ...

SENATOR RUSSELL: Mr. Chairman. You know, it seems to me that maybe there's a similarity here. We are a legislative body. They are a legislative body. And if we had to put -- if we were to prohibit ourselves from meeting with any lobbyists or any constituents about the issues on which we pass laws which affect the lives of the people of this state, I don't think we could function. And I'm wondering how similar that would be as it relates to the PUC's responsibility. Maybe you can help ...

ASSEMBLYMAN FRIEDMAN: Senator, if I could just make one quick comment and then I'll unburden everyone because I'm going to have to leave. I think that there is a difference. When we make a decision on how to vote on the Floor or in a committee, we're not bound by a particular record. We make our decision based on our conscience, based on representation of our constituents, based on what we think is best for the policies for the State of California. And we can give a reason for it, advised to give a reason for it if we want to be reelected. But we don't have to. We're not bound in the same way as the commission is to make a decision based on a particular factual record which is why our legislative responsibilities are different from the commission's responsibilities which are termed legally to be quasi-judicial and

quasi-legislative. And therefore, I think that whereas I totally agree with you, it would not make sense, it would be anti-democratic for us to have that responsibility to disclose. I think that it's a different situation and therefore justifiable to have the commission make such a disclosure.

SENATOR RUSSELL: Do you agree, Mitch?

PRESIDENT WILK: Not entirely, at all, actually. I feel that even though we're constrained by our record, we still need to deal on facts, and presumably so should you as the Legislature. We also have philosophical orientation; we also have a view of regulatory policy that as we all know factual circumstances in records do allow discretion. That discretion has to be exercised. And so I'm not certain that I totally agree with you, Assemblyman Friedman, about the ...

ASSEMBLYMAN FRIEDMAN: I like the implication that you may possibly agree, though. (laughter)

PRESIDENT WILK: Well, always leave doors open.

In this particular instance, once again I would urge the committee to give careful thought as to whether or not you want to pursue a permanent, fairly harsh ex parte rule, when in fact most other states have not. The vast majority have not for reasons I'm sure that can be explained by those states on a process that requires openness and public participation. If a problem existed, we would see a trend in Supreme Court; we would see people taking these cases to the Supreme Court alleging ex parte contact. No one has done it.

SENATOR RUSSELL: Ask the Executive Secretary.

CHAIRMAN ROSENTHAL: Yes, why don't we hear from Mr. Franklin, Acting Executive Director of PUC.

MR. WESLEY FRANKLIN: Well, I just wanted to say that I think the main problem, Senator -- and I'm going to be talking about the role of the ALJ -- stems from how the organization is viewed. You view it as our president views it and as I know commissioners have viewed it over the 15 years that I've been there; the staff, being there to serve the commission, exists for that purpose. Then you have to put the ALJ role in perspective. They're an element of staff. They are responsible for putting the record together. They come from staff, mostly. They are lawyers who have been appointed by the chief ALJ in consultation with both the assistant chiefs and in an advise and consent fashion with the commissioners. And so the perception problem I think stems from how the phrase "administrative law judge" is striking people. It means something very different, at least at our agency, than what you would have if you were looking at a judge in the state system. Commissioners are the ones who make the decisions, and the ALJs' role is to gather the information, gather the record and bring that forward through the process.

As to the assistant chiefs and the chief, it's not so much going into what they do to rewrite it for the sake of rewriting it. A lot of that review has to do with the vast body of commission policy that's been built up and to make sure that the drafts that come through before they are published as a Section 311s are consistent with what's gone before.

Now, again, it goes back to how do you view the ALJ? If you view the ALJ as being totally independent, then they don't have to adhere to the policy that's been built up over the years or the most recent policy. They could strike out at any point in time that they wanted.

CHAIRMAN ROSENTHAL: The difference is that all the policies are changing. All the policies are changing. And so there's a different perspective then on what's happening. In other words, most everything that's now happening because of the multitude of issues are all changing from what they used to be. And because of it, we run into what I think are some of the problems, because it's not the same as it always was.

PRESIDENT WILK: Excuse me, Wes, if I could. Mr. Chairman, I think that's precisely the reason why we need to leave it the way it is. Things are changing because the philosophy of this commission is being exercised.

CHAIRMAN ROSENTHAL: And I don't ...

PRESIDENT WILK: I know, Senator. I know you don't. You and I have talked quite often about the philosophical changes that are taking place.

I think that in fact if you have SB 1126 in place, you could find almost a paralysis existing in the decisionmaking process. I think it would be an absolute travesty given the kinds of things that are occurring in California and indeed throughout this country with respect to utilities and the advance of technology and the options that people have now. It ain't what it used to be. It's very different. And I think if you were to separate the decisionmaker from the decisionmaking process, it would be a travesty for the ratepayers of this state; and not just the ratepayers, but frankly, everybody else is involved.

SENATOR RUSSELL: Do you see, Mr. Franklin, that if we separated the judges, they would no longer be there to serve the commission, but they'd be there to render their own independent views as they see the facts?

MR. FRANKLIN: What you would be setting up is what Professor Asimow suggests and that is an appellate -- you'd be in effect making the commission an appellate group. I disagree with that concept for a number of reasons. I think the primary reason why I disagree with that is my view that the commission is responsible to the public, as much as our President has stated. It's an appointed group coming through from the Governor and being approved by the Legislature. To remove the ALJs from the internal workings

of that, the creators of the record, to me, makes the process inefficient. You remove them from the technical people that they have to interact with.

But again, it depends on how you want to structure it. I could sit here all day and say I like the current system, I think it works. If you disagree with me, then you're going to have a perception problem because you're going to see a judge different than I do. They're a member of staff, much like the Division of Ratepayer Advocates, whose charge it is not to be totally independent; they're charged by the commission, if you're talking DRA, is to look after the interest of the ratepayers, have that interest developed on the record. It's the commission ultimately that's going to take all of this stuff, including what DRA has put together, and arrive at a decision. But again, it gets back to how you view the role. If you want to make the commission appellate board, so to speak, or an appellate agency, then sure you could remove the ALJs, put them in a separate group. I don't think that's an efficient way to go.

PRESIDENT WILK: I think in essence what you would end up with, Senator, if I might add on that, is two PUCs.

MR. FRANKLIN: Yes.

PRESIDENT WILK: You'd have the ALJs ...

SENATOR RUSSELL: That's my concern.

PRESIDENT WILK: Yeah. Well, it certainly is mine. I mean, again, let's take a look at the Constitution, something frankly that surprised me by some of the statements made in the earlier panel, by people, frankly, I think should take another look at the State Constitution. Who did the people of this state entrust with the responsibility and the accountability for regulatory policy in terms of utilities? It's the five commissioners. If the people of the state want to change that, that's fine, we all work for the people. But so far, my reading is they want one commission; they want to hold five people accountable for the results and the policies as it should be; and they've given us, through the generosity of the Legislature, the funds and the staff to carry out our responsibilities. That's the way I read the balance right now.

CHAIRMAN ROSENTHAL: And that's the way it should be. Commissioners should make the final decision. But I come back again to a commissioner which tells the ALJ what sort of a decision to make that they can approve. That bothers the hell out of me.

SENATOR RUSSELL: But maybe, Senator, maybe that's if we have given the commission the responsibility to make those ultimate decisions, whether we agree with them or not.

CHAIRMAN ROSENTHAL: That's right.

SENATOR RUSSELL: If that is the case, and they have a philosophy going in this direction, maybe it's appropriate that the staff, the supervisors of the ALJ, communicate to the ALJ the direction they want them to go, based upon the record that's presented. Maybe that's in keeping with the philosophy that the PUC makes those

decisions. We may not agree with them, but the PUC is appointed to make those decisions and the ALJs are employees who serve the commission.

CHAIRMAN ROSENTHAL: Then you don't need an ALJ. If in fact a commissioner says to an ALJ, I want the following decision to come out, why do you need the record?

PRESIDENT WILK: Well, no. Senator, I think there's a difference here. I don't think any commissioner has ever said: The conclusion is X, build the record that way. At least as far as I know. But let me -- can I just build one other thing just very quickly.

CHAIRMAN ROSENTHAL: Okay.

PRESIDENT WILK: There are a lot of states in fact, Mr. Chairman, that don't have ALJs. Their commissions are small, their jurisdictions are relatively narrow, that the commissioners hear all the cases. Now, frankly, given the complexity of this state, we just simply couldn't handle it, and that's why I think the Legislature provides the funds to allow us to have hearing examiners who will go in and run the hearing to make sure that the record is built. The record is going to contain discretion; that discretion should be exercised by the person accountable for the decision, and that is the commissioner, not the judge.

CHAIRMAN ROSENTHAL: That's right. And I ...

PRESIDENT WILK: And that means telling the judge, Senator, you're going too far.

SENATOR RUSSELL: I think Senator Rosenthal feels that the facts that the judge hears should be presented in that he questions, there's some concern on my part that the PUC comes and says, you're going too far. Well, that may be the decision that the PUC member may ultimately make. I think where he's coming from and what we're struggling with is that at what point do we allow the PUC to say to a law judge, your judgment stops here because this is the policy we want to make.

PRESIDENT WILK: Well, that's a very difficult decision, except in my mind, in my mind again the discretion and the decisionmaking authority rests with the commission, not the staff. Staff exists solely to assist the commission in building the record. And I think if I were going to err on this side, to try to find where that correct balance is, I think you might waste a lot of time. My feeling is you ought to error on the side of the fact of who is accountable to make the decision. If the error is that the assigned commissioner or the commission tells the judge, no, it goes this way, then at least the person that's accountable for the result is making that choice as opposed to the administrative law judge saying, hey, look it, I get my discretion right up to this point, point X.

I'm not sure that it's worth trying to carve out an exception to, frankly, a problem that I don't see really exists. Certainly there are going to be some judges who believe in their mind that they ought to be on the bench, that they view their job

as a judge. And I frankly do, too, in all do respect. I have a lot of respect for the ALJ division, even those who may disagree with me, for example, Judge Weiss. But the fact of the matter is that I think this is a distinction without a difference. If I were the Legislature, what I would be primarily interested in is that the person that the people are going to hold accountable is the one that's making all the decisions, not staff.

SENATOR RUSSELL: Mr. Franklin then. What do you -- what kinds of things do the supervisors -- whatever you call them -- of the ALJs do in terms of reviewing, working with, overruling, shaping, whatever you want to call it, the decisions that the judges make. We've heard a couple of references where there was workshops and so forth. What's that all about.

MR. FRANKLIN: I'm not aware of the examples that Judge Weiss mentioned, but just in the overall, what I've been able to observe -- both as Acting Executive Director and as a long time member of staff and as heading up certain areas and being on the advocate as well as the adversarial side of the staff -- the review process that's been alluded to here, again is to make -- again if you buy off on a concept ...

SENATOR RUSSELL: Yeah, but what I want to ask you, what do these people do? Here's a judge comes up and presents his findings. Let's say it's off in left field somewhere from what the philosophy or rules or the record has been built up. What do then these administrators do to work with that judge to overrule, to whatever?

MR. FRANKLIN: Okay. A lot of that depends on the interaction between the particular judge and the supervisor. What the supervisor would probably do is say you're going off course. If you get a real resistent ALJ who is a permanent civil servant, they can say this is as far as I'm going to take it. Mitch alluded to that earlier. At that point, what's happening is, what's going to go out as a Section 311 matter, even if it's not consistent with past policy or the direction that the commission is going in.

SENATOR RUSSELL: What does go out then? He says, forget you, this is my decision, I'm going off in left field; and your supervisor thinks it should go off in right field, let's say. What happens in that circumstance?

MR. FRANKLIN: I am not aware of that happening recently on anything significant where an ALJ has gone in this direction and the commission wants to go in that direction. It's usually been worked out, to my knowledge. I'm not aware of cases where that's ...

SENATOR RUSSELL: What kinds of things then are worked out where there are these smaller differences?

MR. FRANKLIN: Let me come up with a hypothetical example. You have a case where an issue might be something that the commission has decided on in prior cases. It's a

clear case there that the commission is not going in this policy direction. I could see a situation where a supervisor would say, it's not going to fly. I could see a judge also taking this very independent role saying, this is my view of the matter. I haven't seen any of those get so bad that what you have out there is schism where you've got this incredible difference.

CHAIRMAN ROSENTHAL: Let me ask, follow up on that.

MR. FRANKLIN: Sure.

CHAIRMAN ROSENTHAL: How about a judge being removed because the decision he made was contrary to what the commission wanted.

MR. FRANKLIN: Again, I am not aware of a situation where a judge has been told, hey, you're off of this.

CHAIRMAN ROSENTHAL: Okay. Then you ought to take a look at what's happening at the PUC in terms of the ALJs. Okay?

SENATOR RUSSELL: Is that happened?

CHAIRMAN ROSENTHAL: Yes, it happened. And so -- and I'm not suggesting that that goes on all the time. What I'm suggesting is that's beginning to percolate now into the general community about what's happening. And so, all I'm suggesting, and if the legislation is the wrong way to go, you know, that the PUC ought to be at least reviewing, ongoing, what ought to take place in terms of ALJ proceedings.

And Mr. President, in your responsibility as the head, ought to be talking with the commissioners about what you would expect should happen from the other commissioners over whom you don't have, you know, body and soul, but you certainly as the President of the commission can be influential in terms of allaying the perceptions that are percolating out of your commission all over the place, from ALJs, from staff, from parties to the proceedings. And I don't want to see that happen. I want you to close those kinds of things off. And the fact that you have not heard about them, maybe because you haven't been in that position long enough, doesn't mean that things are not happening. How do we clean it up? How do we shape it up? How do we get away from the perception, which is a growing one, which the press is beginning to look at as well, that something is happening that ought not to be happening? And I want the commission to be responsible and make those decisions without having anybody cast dispersions of you.

PRESIDENT WILK: Senator, you and I have exactly the same concerns. We are concerned about perception, as I said to Assemblyman Friedman. There is no one in this room, no one in this state that's concerned more about public perception of the California Public Utilities Commission than the members of that commission. As a practical matter, and I have to disagree with you, Senator, if there is such a severe problem that warrants a legislative solution, it is amazing to me that it has <u>never</u>

been brought to my attention, considering the kinds of problems that are brought to my attention, and they include staff problems. They include staff problems and there is no reluctance on the part of many staff people to come directly to me to air complaints. I have never heard of, other than isolated, and you know, we're an organization of 1,100 people who have a lot of -- there are a lot of legitimate ego-interests in their own job, professional interest, they want to be able to do the best job possible, they get frustrated by management. I mean, we've all been employed and we know what the frustration of management can be. That's where I think the problem exists. We can handle that to the extent that there's a persuasive problem. In fact, I want to avoid it before there's a persuasive problem. But so far I've heard a couple of gripes that I don't happen to like to hear. We can handle them. If somebody feels that they are being inappropriately constrained, inappropriately constrained--that's a very important distinction, then they do have avenues of remedy. They can go to the Executive Director, and they also know that I have an open door policy as well.

CHAIRMAN ROSENTHAL: Okay.

PRESIDENT WILK: Mr. Chairman, thank you very much. Senator, thank you.

SENATOR RUSSELL: 1126, so you're not through yet.

PRESIDENT WILK: Oh, oh, I'm through. I've said everything I think I need to say, probably not as eloquently as I prepared in my address, but we oppose that as well, obviously.

CHAIRMAN ROSENTHAL: Right.

SENATOR RUSSELL: Okay.

CHAIRMAN ROSENTHAL: The commission is opposed to anything which -- they're opposed to change. We all are opposed to change. (laughter)

PRESIDENT WILK: We are opposed -- as you said, Senator, we are opposed to change for change sake. We don't oppose change where change is appropriate.

CHAIRMAN ROSENTHAL: And I agree with you. We should not change for change sake. I will have some private conversation with you regarding some specifics.

PRESIDENT WILK: Very good.

CHAIRMAN ROSENTHAL: Okay?

PRESIDENT WILK: Absolutely.

CHAIRMAN ROSENTHAL: I did that once before, and I was told there was no problem.

PRESIDENT WILK: Where?

CHAIRMAN ROSENTHAL: Among commissioners.

PRESIDENT WILK: Okay, you'll need to fill me in, Senator, because I don't know what you're referring to.

CHAIRMAN ROSENTHAL: Okay. I related a situation and the answer came back, you

know, you checked it out and it wasn't so. And so I don't know how to deal with that.

PRESIDENT WILK: Okay. Well, we'll have to talk about that perhaps privately.

CHAIRMAN ROSENTHAL: Okay, correct.

PRESIDENT WILK: That will be an ex parte contact, however, Senator. (laughter) Thank you.

SENATOR RUSSELL: No ex parte discussion.

PRESIDENT WILK: You'll have to put that on ...

SENATOR RUSSELL: I'll sign.

PRESIDENT WILK: Okay. Thank you, again, very much.

CHAIRMAN ROSENTHAL: Thank you. Okay, now James Wheaton and Audrie Krause. Okay, this is James Wheaton, Executive Director of Center for Public Interest Law (CPIL). Welcome.

MR. JAMES WHEATON: Thank you, Senator. I should correct my title. Professor Robert Fellmeth, Director of the Center will be surprised to learn that I have replaced him. I'm actually the Supervising Attorney of the San Francisco office.

CHAIRMAN ROSENTHAL: Oh, Supervising Attorney. Okay. For the record.

MR. WHEATON: Thank you. The Center for Public Interest Law has been in existence for 10 years. It's an academic center at the University of San Diego School of Law. It's Director is Professor Robert Fellmeth, a recognized expert in administrative and public interest law. The center monitors all the boards and bureaus in the State of California professions or the economy of California. Currently, there's in excess of 40 different boards regulating everything as diverse from the guidedogs for the blind to the Public Utilities Commission, the Coast Commission and others. In addition to that, we have an active advocacy program in Sacramento; and my office in San Francisco which participates heavily in many different aspects of the Public Utilities Commission. In transportation, we've been active in the household goods, dump trucks, general freight; and over on the other side we've been very, very active in the telecommunications hearings and the PacBell rate case.

We're here to provide our input on the two bills and also the question of appellate review of decisions. We bring to that not only our experience with the other boards and bureaus and PUC, but also experience with the State Bar. Professor Fellmeth is the State Bar discipline monitor. We recently reformed the Bar's system; and also the Board of Medical Quality Assurance, which we are currently in the process of seeking a reform. In addition to that, the Department of Insurance. The Center was quite active in the Proposition 103 debate and, in fact, wrote the administrative procedure portions of Proposition 103 which contain an explicit ex parte rule.

By way of background, we wish to join in the comments of Professor Asimow. Indeed, I had the pleasure of rereading his testimony just last night and it is a scholarly and

excellent review of ex parte rules and I urge it upon you in the strongest terms. Rather than repeat what he has said, I will simply highlight the concerns of the Center. We see two problems with ex parte communication. They're first, they're secret, they're off-the-record. That contains two sub-elements. First of all, it is deeply unfair, for one party to a proceeding to have a back channel to one of the decisionmakers. Second sub-part of that is that review becomes truncated and difficult by whatever judicial body reviews the decision. If portions of the thinking process are off-the-record, so too the review cannot review that.

The second portion, the second problem we see with ex parte is the opportunity to respond. Where an ex parte communication occurs, it necessarily involves factor argument which the opposing parties have no opportunity to rebut. It has been said that cross-examination is the finest devise ever created by the mind of man to get at the truth. The testing of assertions, facts, argument in the crucible of the hearing is really the best way we have to distinguish between the true and the untrue, the believable and the unbelievable, the probitive and the unprobitive. That does not occur in an ex parte proceeding. Indeed, we believe that we should drop the use of Latin here in ex parte and call them what they are, secret communications. A secret communication does not help the process. It does not help the integrity of the commission.

Touching upon each of these problems in order. The unfairness and the secrecy are particularly damaging for the public. It's a well known fact that the individual consumers have only the most modest ability to participate in the proceedings. The PUC does have a Division of Ratepayers Advocates which is an outstanding example of protection for the public, but it's role is necessarily a balanced one. There are groups such as TURN which have a history of providing outstanding representation for consumers. But again, the resources available are always limited. There is no way that we can compete with PG&E, with PacBell and with the others in ex parte communication at the same time we're trying to compete down in the hearing room.

Indeed, the unfairness has become so manifest that if a young lawyer came to me today and said how shall I participate in a PUC proceeding, what is the best way to do it? I would say with all candor that if you want to serve your client well, you'll make a showing down on the first floor of the hearing room, but the real action's up on the fifth floor; that is where you should spend your time because in five minutes with the commissioner you can do more work than you can do in three weeks down in the hearing room because of the availability of an ex parte communication. A single argument up top where no one can test it, no one can rebut you, where you have the undivided attention of a commissioner is so much more effective than three weeks of argument with the attorneys down on the first floor.

Indeed, I have to tell you that an attorney who I regret will have to stay unnamed, when I myself went to the PUC for the first time as a young attorney, went and asked him, how shall I participate in these proceedings, where are the rules of procedure for the PUC? He reached upon his shelf in his office and he pulled down a volume from Lewis Carroll and said these are the rules of procedure for the PUC, and he handed me Alice's Adventures in Wonderland. That was in jest, and I knew that was not true. But I also know that there are two sets of procedures at the PUC. There are those which are written and which are subject of the OAL procedures, whichever one falls and there's the other set on the fifth floor. And as the other set on the fifth floor were to address on the unfairness. The review, the judicial review, the problem of judicial review has been well stated. And I think Professor Asimow is correct, at some point the California Supreme Court will take a case, the issue of ex parte will be raised, and they will treat it both as an ethical matter for the attorneys involved if any, but also as a matter which effects their review. I do not think that a review in court will take kindly to finding out that the real decision is not in the record, is not in the papers in front of them, but occurred somewhere else.

The last, and most important, I think, is the opportunity to respond.

SENATOR RUSSELL: May I ask a question?

CHAIRMAN ROSENTHAL: Yes, Senator Russell.

SENATOR RUSSELL: Do you have any evidence that these ex parte communications -- because they're confidential maybe you don't -- but that these ex parte have been the pivotal factor of which cases? It's easy to come up here and make all these allegations about what's going on on the fifth floor, and Lewis Carroll. It makes very good headlines and so forth, and it sort of denigrates the people who are on the PUC, which may be what you're getting at in the first place, but do you have any evidence that you can point to for this case?

MR. WHEATON: I have a three-part answer for that, if I might. The first is a concern that I felt listening to Commissioner Wilk for whom I have nothing but the highest regard. The concern is that Commissioner Wilk indicated that he was not aware. Yet those of us who practice there do know of instances where ex parte communications occur, do know of instances in which decisions have changed between an ALJ and a commissioner. Indeed, I suspect that the committee has that information.

The fact that the Commissioner does not know is the second part of my answer. The problem is we do not know. These are secret communications. No one can know. It is proving not just a negative, but a negative which is secret. No one can ever know what the effect of a five-minute conversation in the midst of a hearing might be later. It is never provable. It is, indeed, the concern. It is -- in the judicial sphere it is not just a fact of bias or impropriety, but the appearance of it.

And with the third part of my answer, I wish to be very circumspect about this is, yes, I know about them. I know of one that I did and it worked. And I don't feel comfortable about that. But to serve my client, I must do that.

SENATOR RUSSELL: Well, obviously, you wouldn't go to the Supreme Court on your own ex parte communication. But the ones you've heard about and your colleagues have heard about, if they have -- why hasn't somebody in the public interest law section taken it to the Supreme Court and said this is going on and it's terrible and awful.

MR. WHEATON: The dual problems are, first of all, that to amass the evidence if the fact of a communication is per se impossible. I cannot point to a conversation I do not know about and disclose the contents which are secret to me. Nor can I prove that that was the precise thing which turned a commissioner's mind to turn a vote or which turned a phrase in a decision which resulted in the particular evidence going on way or the other. I can't prove that. I can never get that to Supreme Court. And the problem of review, of course, is insurmountable at the Supreme Court.

SENATOR RUSSELL: Then you're asking us, though, or you're suggesting that we make a decision on the basis that the perception is that it's going on and we ought to change the rules so that perception would be dealt with. Is that basically what you're saying?

MR. WHEATON: As I understand SB 1125, which we support, the principle virtue of it is precisely to bring those out of the darkness, bring those communications out of the darkness and simply have them disclosed. Then we will know if there is a problem. We will know how they effect. That kind of sunshine rule is what the APA has, and it seems to work very, very well in the other agencies where there is a problem. It comes to the fore where it is no longer hidden. And that to me is the principle virtue. I think no one would argue with the principle that the best government is open government. And that sunshine as Justice Black said is the best disinfectant. And so a sunshine rule like that proposed in 1125 will have that effect to bring them out and then we will know and then we shall see them. And if there is a problem such as occurred in the grotesque case of the PATCO case, where an actual threat was made, that kind of thing will either be disclosed or probably will not occur in the first place. It is to bring those out so that we can know better what is happening, so the decisions can be more open that were supported.

SENATOR RUSSELL: Did I ever hear correctly, and as a lawyer you would certainly know, somebody said once I thought when I was taking business law or around the Legislature that you never make a law or a case on the basis of one instance? Is that for you lawyers, does that ever ring any kind of bell?

MR. WHEATON: The one that rings a bell for me is, hard cases make bad law, where you have one specific bad act, you tend to make a whole law based on the one bad act.

SENATOR RUSSELL: Right. And that PATCO case sort of rang a bell that maybe that's what we might be doing.

MR. WHEATON: If it was only PATCO, I think you'd be absolutely right, and I think that the President of the commission would be absolutely correct that this is a solution searching for a problem. But that is not what we have. We have representatives from the consumer side; representatives from the Attorney General; from the actual utilities themselves; and not just this large stationary utilities, but also the transportation utilities; the staff; the ALJs. It is becoming nearly unanimous that we need to do something.

SENATOR RUSSELL: And they're all basing their concerns on ex parte communications which nobody knows about because they're secrets.

MR. WHEATON: That is one of the concerns.

SENATOR RUSSELL: But they're saying it's going on.

MR. WHEATON: That is correct.

SENATOR RUSSELL: How do you know it's going on if it's all secret?

MR. WHEATON: I can tell you there are two sources for the information: one are, those of us who participate in the proceedings know that they go on either because we ourselves have to do it; and the ALJs certainly know it goes on. In fact, the instances of hall walking, as they're called -- that's the informal term that I've heard, hall walkers -- moving up and down the fifth floor, is so renown that indeed when this particular piece of legislation was debated two years ago a memorandum surfaced from one of the large stationary utilities in Southern California which depicted a chart. On one side we had the executives of the utility ranging from the CEO down to a vice president, there were about 10 of them as I recall; on the other side we had the staff of the PUC, ranging from the commissioners down to the executive director of legal counsel, ALJs, with lines between how often they were supposed to contact each person, daily as needed, weekly, monthly, weekly during cases. It was an extraordinary document. It was a little road map for how we do our ex parte contacts. Now, I understand that that utility disbanded that practice, but the fact that it did go in and can still go on is the problem. That was about the hardest evidence I've ever seen.

SENATOR RUSSELL: That's the kind of evidence I'm looking for.

MR. WHEATON: I think what I need to do is go back into the files and provide that to the committee, and I will do so immediately upon my return to San Francisco.

Coming to the specific legislation, 1125, we do support that with two modest changes. One, is that we would require not merely that the notice provided by the party go into the docket, which would then be distributed because I can tell you the docket of the PUC is so enormous, the number of things that are before the commission

are so tremendous that for a party in one proceeding to have to dig through all the ex parte contacts to find the one about their case is nay unto no notice. The better practice would be to do what we do when we have a contact at all with the judge, with a pleading or a piece of evidence or anything else, and that is, you serve it on the parties. If you have an ex parte contact, you simply notice it and you serve it on the parties just like you do with a brief or a piece of evidence or a letter, or anything else. It happens all the time, that I have to write a letter to an ALJ or perhaps to a commissioner. And I simply notice all the parties. That is a burden and I can tell you that that is a burden that is enormous on us small groups. And the effect of that I can tell you will be that I will diminish my ex parte contacts because my secretary will strangle if I have to put out letters every time I talk to a commissioner.

The second piece of advise I would have for 1125 would be, however, to retain a publication in the public docket to come from the commissioners themselves or the ALJ. The reason for this, and it may be hard cases making bad law, is as an example the PATCO instance. I can assure you that a notice to the parties in that particular proceeding from the official involved who made the threat, would have been no more suspicious than a simple statement that a discussion was had about the case and its potential outcome on the union involved. That does not disclose what in fact the communication was. So, to have a dual disclosure, a simple one by the commissioner, a quick memorandum simply publishing the written material right into the docket is of no administrative burden. Coupled, though, with the disclosure from the individual, the individual knows that they have to be absolutely forthright and forthcoming what was in there. That dual kind of disclosure ensures the fullest kind of disclosure.

Turning quickly -- I realize time is short -- to the other two issues here, judicial review. We do support the institution of appellate review so long as the PUC insists that it is not going to operate like a judicial body, we should not treat it as a judicial body. The fact of appellate review exclusively in the California Supreme Court is rare and carries with it the notion that the body being reviewed should have a very, very high degree of trust if we're only going to review at the very highest level the discretionary only, particularly given the heavy docket of the Supreme Court with other matters, Bar matters, death penalty cases, and so forth. We want to be sure that what comes up is the very best possible. The very best possible is an appellate-like review.

Therefore, we would support either direct review to an appellate or discretionary review with the Supreme Court with the ability to refer it back down to an appellate court for preliminary review. Either of those, in our mind, is worthy of review.

SENATOR RUSSELL: Why do you think the tradition has been to go directly to the Supreme Court rather than an appellate review?

MR. WHEATON: I think it's an anomaly stemming from the PUC's existence of around the turn of the century as a constitutional body, not an administrative body, created by statute. There are a couple of other boards that go directly to the Supreme Court. One is the Bar because of the unique position of the Bar as an Article 6 agency and Supreme Court's power to regulate attorneys. But I know of no particularly good public policy reason that should be so.

SENATOR RUSSELL: Well, I can give you one that appears to me that you've got a rate case that's $500 million and it goes to an appellate court. How long do you think it will take the appellate court to get to that decision and to render a decision?

MR. WHEATON: The best way I could see to do it would be to require that the review be by extraordinary writ which gets a fast track in the Courts of Appeals.

SENATOR RUSSELL: What's a fast track in the Courts of Appeals in terms of time?

MR. WHEATON: I have actually a writ in the First District Court of Appeals, which has the most loaded docket, that got filed in July, just argued it yesterday, and I'll have a decision next month. That's about six months from start to finish which is about as fast as an appellate court can physically operate.

SENATOR RUSSELL: And you'd advocate that that same kind of requirement would be on the -- in this case?

MR. WHEATON: I would advocate very swift review in that court of appeals. I can tell you that the mere magnitude of the decision, though, is not what determines it. For instance, the Department of Insurance is in the process of making decisions that amount to some $25-to-$30 billion for auto consumers and those are going to go first to the superior courts, and then to the appellate court and then to the Supreme Court. That's a worrisome thing to me, but I don't know what to do about it.

SENATOR RUSSELL: So, six months in the appellate court, which then might get appealed to Supreme Court.

MR. WHEATON: Which has the opportunity to review or not review within 60 days.

The third issue here is the question of the administrative law judges. We do not support 1126 in its present form, but we do believe that some reform is necessary. The principle concern we would have is moving the ALJs out of the PUC. We believe that the Public Utilities Commission is so specialized that to having the ALJs within the commission and that come from within the commission and return to the commission is part of career paths and so forth, is an important thing. Indeed, we have supported the creation of separate classes of ALJs within sub-agencies, in other instances, for instance the Bar, the Medical Board for review of decisions, and others. And we would continue to support here at the PUC, but we're happy to work on amendmentory language with you.

Thank you for the opportunity.

CHAIRMAN ROSENTHAL: Thank you very much. Audrie Krause, Executive Director of TURN. Welcome.

MS. AUDRIE KRAUSE: Thank you. I want to start out by contradicting something that Commissioner Wilk told you, which is that there is no problem with the processes at the Public Utilities Commission. TURN believes that there are a lot of problems at the Public Utilities Commission with their processes, with the lack of a general ex parte rule, with the way the ALJs must now have their decisions reviewed. And I'd like to take the opportunity and just go over briefly what some of the concerns we have with the process are. We were asked to indicate what those concerns are, as well as talk specifically about the two bills.

TURN is concerned that the expedited -- the increased use of expedited proceedings and workshops in place of formal proceedings is creating problems because there's a loss of the due process, there's a loss of the right to file and receive testimony, and to cross-examine witnesses under oath. And in the case of workshops, there are no transcripts provided, so there is no record available of those, of what happened in these proceedings. And if commission action is based on them, there should be a record.

SENATOR RUSSELL: What's the purpose of a workshop? Workshop sounds like you just -- stirring up the facts so everybody knows what we're talking about. What is a workshop?

MS. KRAUSE: Well, the commission seems to, in recent years, be holding workshops more and more on a lot of issues related to the cases.

SENATOR RUSSELL: As opposed to a formal hearing?

MS. KRAUSE: As opposed to a formal hearing with a record. In the decision on the Phase II of the alternative regulatory framework for telephones, for example, a number of items were left up in the air pending workshops next year. Those workshops will take place off-the-record. And yet, they are ...

SENATOR RUSSELL: What's the objective of a workshop? As opposed to a formal hearing? What's the objective? What is the difference, in your opinion, what is the difference?

MS. KRAUSE: In our opinion, it just appears to be a way of getting around the more formal proceedings and create a record. We don't see any particular advantage to doing that at all. We're not in support of having informal workshops.

SENATOR RUSSELL: What are they trying to achieve in a workshop?

MS. KRAUSE: That would depend specifically on what the workshop's about and who ordered it. I mean, they will ...

SENATOR RUSSELL: Well, give me an example. What the workshop you attended, what was the objective, what was discussed, what are they trying to achieve in a workshop

that you've attended?

MS. KRAUSE: I haven't been to any workshops. I'm not a member of the legal staff at TURN. The lawyers on our staff attend the workshops if they're involved in a proceeding and a workshop is scheduled. In some cases, it allows an opportunity for all the parties to informally present their views; but they could also do so formally on-the-record, and then there's a record of what they've said. There won't be in a workshop.

SENATOR RUSSELL: Well, it sounds like the difference between a workshop and a formal hearing may be a lot of record keeping and published documents resulting from what went on. Is that the difference?

MS. KRAUSE: There are no records. There is no ...

SENATOR RUSSELL: But what you're saying is that you want those records, you want a bigger case, you want a 6-foot high stack of information rather than a 4-foot.

MS. KRAUSE: The stacks are already well over 6-feet high. What we ...

SENATOR RUSSELL: You want more than that then, 12-feet.

MS. KRAUSE: That's not what I'm saying. We would like the proceedings on which decisions about rates are going to be made, to be conducted in -- we would like the process to involve a public record in all cases.

SENATOR RUSSELL: Is Mr. Franklin still here?

CHAIRMAN ROSENTHAL: He's still here.

SENATOR RUSSELL: Oh.

MR. FRANKLIN: Unfortunately. (laughter)

SENATOR RUSSELL: May I ask you a question, please?

MR. FRANKLIN: Yes, sir.

SENATOR RUSSELL: If you would come up. I guess you'd better speak into the microphone. Come forward, please. And as you're coming forward, what I'm trying to get is what, in your opinion, as the Acting Executive Director, is the difference between a workshop where there are no official records and a formal proceeding where there are records. Why do you use a workshop rather than a formal proceeding?

MR. FRANKLIN: The workshop is an informal -- it is a vehicle by which the commission is trying to facilitate the process. There are a number of items that could best be talked out among the parties. Usually workshops, all the ones that I'm aware of, are chaired by staff people.

SENATOR RUSSELL: To get the facts ...

MR. FRANKLIN: It's to get the facts. It's to, in effect, the informality is not to avoid the record. It is to -- sometimes the formality itself keeps the process from moving along. It's an attempt to again facilitate our processes.

SENATOR RUSSELL: Then, when you have a workshop and the wheat is separated from

the chaff and everybody knows then what the facts are or what the issues are, then you go back into a formal hearing. Is there any relationship then from what was deduced at the workshop into the record of the formal hearing? Or is it just information that everyone knows?

MR. FRANKLIN: Well, the results of the workshop to the extent that they find their way back into the formal record. Workshops, again, sometimes relate to implementation. Take the telephone case that's just come out. There are a number of workshops. There are a number of things that still have to be worked out in implementation. Should you do that formally?

SENATOR RUSSELL: I see.

MR. FRANKLIN: Or do you allow the staff that's going to implement this, along with the utilities, to sit down and work some of the implementation concerns ...?

SENATOR RUSSELL: In other words, we think these ought to be the rules in the formal thing. Then you go to workshop, how practical is this going to work out?

MR. FRANKLIN: Practical implementation is often addressed in the workshop.

SENATOR RUSSELL: And then you discuss back and forth all sides being part of the workshop, and you find out that the rule or the goal or whatever it was, is not practical, won't work out for the various reasons developed in the workshop, and then you go back and you take a second cut at it in the formal hearing?

MR. FRANKLIN: Yes.

SENATOR RUSSELL: Okay.

MR. FRANKLIN: The workshop itself is not going to create new commission policy.

SENATOR RUSSELL: Okay. Thank you.

MS. KRAUSE: Let me just add that nothing that Mr. Franklin has said indicates that there's any reason to have a workshop off-the-record in place of a proceeding on-the-record ...

SENATOR RUSSELL: Unless you like bureaucratic documents to read.

MS. KRAUSE: Well, another way of looking at that is that provides a record for the public to look at if they want to know what the Public Utilities Commission is doing. And they are a public agency, and the public has a right to know.

SENATOR RUSSELL: Do you think the public is interested in a 12-foot high bunch of documents on a policy that can't be implemented because it's impractical?

MS. KRAUSE: I think the public is interested in the results and the results are what you get by going through that process. And if the process is not public, there is no way to question the results or to review them or to know what's going on.

SENATOR RUSSELL: Is the public excluded from these workshops?

MR. FRANKLIN: No, and interested parties are notified of the workshops.

MS. KRAUSE: So, what's the problem?

MS. KRAUSE: The problem is there is no record.

SENATOR RUSSELL: Okay.

CHAIRMAN ROSENTHAL: Following the workshops there are public hearings?

MR. FRANKLIN: It would depend on ...

CHAIRMAN ROSENTHAL: Wait a minute, wait a minute. Yes or no.

MR. FRANKLIN: Well, I can't answer yes or no because there may be or there may not be.

CHAIRMAN ROSENTHAL: Are there sometimes these workshops which do not then go to a public hearing?

MR. FRANKLIN: Pete Arth.

CHAIRMAN ROSENTHAL: Yeah, I'm just curious as to whether or not before anything gets decided officially, whether or not there is a public hearing on subjects that came up in a workshop.

SENATOR RUSSELL: Good question.

MR. PETE ARTH, JR: I don't know -- Pete Arth's my name, representing the commission in part. I think that the use of workshops -- which I would characterize as a collaborative way to solve an issue rather than adversarial hearing room way -- it's a method of resolving disputes, but it's a commission-created device and it doesn't change the law that requires the commission to decide and to base its decision on evidence. So there might not be a formal hearing before an ALJ after the workshop. But there would still be the commission decision based on the workshop results the opportunity to challenge it through rehearing before the commission or judicial appeal.

CHAIRMAN ROSENTHAL: How does somebody challenge it if there's no record and it didn't go to a hearing, but it just had this workshop? How does anybody challenge the decision?

MR. ARTH: Well, let's ...

CHAIRMAN ROSENTHAL: There's no record.

MR. ARTH: A concrete example. An issue we're all familiar with, the trust fund. There has been a continuing effort to reform that. In large part it is for the relay center, for the equipment, telecommunication devises and other equipment. What sort of equipment should we have? Should it have three bells and whistles or two? You could have a hearing of all the parties before an ALJ that might be burdensome for the user community that wishes to use that procedure. It's lengthy. Wouldn't it be better to have a workshop where everybody that's involved can say, well, we all agree that it ought to be this machine? That would be presented to the ALJ that oversees the docket. That would be in the decision where the commission says for the next iteration of the program, based on what the parties have said in the workshop and based on comments on the decision, this is what it is. And if some party was excluded, unhappy with the

result, then they would have the same right-of-review as any other decision.

CHAIRMAN ROSENTHAL: How is a decision made to make a particular subject a matter of a workshop as against a hearing?

MR. ARTH: Sometimes I -- they happen both ways. They happen at the front end of a proceeding where it might be either the administrative law judge or the assigned commissioner that says let's try this to see if we can resolve some facts; or as Audrie was mentioning, a major decision, a milestone decision that says we decide parameters A, B, and C, but we leave to workshops how we're going to settle high cost fund for little telephone utilities, how universal service is going to be affected, that you use it after for implementation purposes as well.

CHAIRMAN ROSENTHAL: So, you're suggesting that the workshops really don't deal with policy?

MR. ARTH: No, it typically -- it's more technical implementation, but it's basically a procedural alternative to having everything done by formal adversarial hearings.

MS. KRAUSE: Everything the commission does has to do with technical implementation. They're talking about ratemaking processes.

The fact that workshop -- the discussions in workshop can then go to the commission for a decision without there being any kind of a formal proceeding afterwards brings up yet another concern we have with the process which is that the commission does not seem to be in compliance with the Bagley-Keene Act in terms of making records public. The process by which the ALJs draft decision has become public was something that took place with encouragement and support and pressure from the Legislature because the commission was not making anything public at one point before they acted. Now what they are doing is circulating a draft decision which is then commented on, and then working on revisions. And when the commission gets together at their conference to take action, they are acting to vote their approval or disapproval of a document that has not been made public to anybody at that point. And TURN believes that this is a violation of the Bagley-Keene Act, which does require that any document that's circulated to the majority of the appointees of a public board be made public. We assume that all five commmissioners have seen what they're voting on before they vote on it. And yet nobody in the public has. Neither, in most cases, have the utilities unless they've obtained it secretly.

SENATOR RUSSELL: What's the penalty for violating the Bagley-Keene Act?

CHAIRMAN ROSENTHAL: I don't know.

SENATOR RUSSELL: Do you know?

MS. KRAUSE: The penalty? No, I don't know. I'm sorry. Do you?

MR. WHEATON: I do actually. It's injunctive and declaratory relief and there's

the possibility of criminal prosecution, but it's never happened. That's Brown Act.

SENATOR RUSSELL: Well, why can't then, if what you say is true and it's a legitimate complaint, why hasn't somebody brought some kind of an action?

MS. KRAUSE: Well, I'd like to point out that when he was on the Public Utilities Commission, Bill Bagley, who is one of the authors of that act, complained about it. I spoke with him about the act recently to clarify the issues we were concerned about, and he indicated to me that there was a difference of opinion between him as author of the bill and the general counsel at the Public Utilities Commission as to the interpretation of that act. The commission simply chooses to interpret it as not applying to themselves in that way.

SENATOR RUSSELL: Why don't you test it, then?

MS. KRAUSE: Why don't we test it? TURN doesn't have the resources to test it at this point.

SENATOR RUSSELL: Why doesn't the Public -- Center for Public Interest Law test it?

MR. WHEATON: Nobody's asked us.

SENATOR RUSSELL: Oh. Well, why don't you ask ...

MS. KRAUSE: We'd be happy to ask ... (laughter) ... the Center for Public Interest Law to test it. We do have some concerns about that, and I understand that for the utilities who aren't able to know in advance what the decision, it would be a problem, too.

In terms of the two bills that you're considering, we do support the ex parte bill and believe that there's a need for the kind of disclosure that it provides in terms of what's been going on at the commission. We think that there's way too much of an opportunity now for private, secret contacts and for decisions coming out of the commission to reflect conversations that were not part of the public record.

And in terms of Senator Russell's earlier question about how do we know that this is happening? I don't think anybody on the commission makes a secret of the fact that they talk to people from the utilities before they make a decision. We certainly talk to them whenever we have the opportunity. We have to, because of the way the system works now. And the commissioners don't deny that utility representatives come in and talk to them about cases. We get calls and letters and inquiries from people who work at the commission who are concerned about this. So we are aware that there is pressure being put on judges to make changes and decisions that reflect comments off-the-record.

SENATOR RUSSELL: It seems to me that everything's on-the-record and they have to follow the record and then they make the decision. Well, in the decisionmaking process, philosophical, social, political, whatever that is over here, it seems to me that these contacts, couldn't they -- they're like lobbyists that come to us. We've got a bill that we're supposed to evaluate the facts; we listen to the facts; and then

the lobbyists on both sides come and say this is this and that's that and so forth; and then we stir that into the pot, and we make our political decision. Facts are part of it, also what the other people say. Aren't these kinds of discussions, couldn't they be categorized in that political, social, philosophical partisan, whatever you want to call it, milieu which is the PUC's function of making those decisions?

MS. KRAUSE: Well, the Public Utilities Commission is not the Legislature, and they aren't making law. They're setting rates. And those rates are supposed to be based on-the-record of the case that is developed during the proceedings.

SENATOR RUSSELL: But we also have agreed -- I think at least everybody is agreed that said -- that's come up here that they have the right to make their decisions, politically, socially, philosophically based upon the record as they interpret it. And I thought that basically what everybody has said is yes, that's right. Is that not right?

MS. KRAUSE: Based on-the-record is the crucial issue here.

SENATOR RUSSELL: Yeah, but they're not, they're not robots. They take the record and they -- Senator Rosenthal and I would take the record and we would come up probably with two different opinions as to what the record says to us. And part of that decision might be from the things that we hear from our constituents, from the lobbyists, from everybody else. That's part of the social, philosophical, political, partisan decisionmaking process which we're involved in, plus the facts.

CHAIRMAN ROSENTHAL: Well, let me just give you an oversimplified idea.

SENATOR RUSSELL: Good, I'd like that.

CHAIRMAN ROSENTHAL: On-the-record there's a decision that a utility overcharged a ratebase by $300 million.

SENATOR RUSSELL: Okay.

CHAIRMAN ROSENTHAL: Okay? Now, somebody from that utility whispers in a commissioner's ear and says, hey, you know, we really -- we're bad guys, but it's not $300 million, it's only $1 million -- or $100 million, it's only $100 million. Now if the decision is based upon that kind of a conversation -- you see what I'm talking about?

SENATOR RUSSELL: Yes, yes.

SENATOR RUSSELL: And that's an oversimplification. I'm not suggesting that that's exactly the way it happens.

SENATOR RUSSELL: No, but you made a good point.

CHAIRMAN ROSENTHAL: But, how do you deal with that? Now the commission comes out and says it's $100 million. But the record and you and I might disagree with whether they should philosophically, but facts are given which both of us could agree should have been $300 million. Anyway, would you sum up.

MS. KRAUSE: Yes, I will.

SENATOR RUSSELL: And I'll shut up.

CHAIRMAN ROSENTHAL: No, I think this have been very helpful.

MS. KRAUSE: Okay. I'd like to point out in terms of the issue of the ALJs and their independence. TURN supports much more independence for the ALJs in their proposed decisions. We believe that they should be able to release their decisions without review. Those decisions then become a part of the public record. And the commission is, of course, free to change them. But I think it's important to point out that the commissioners rarely, if ever, read the full record, if they read any of it. So they are relying on the ALJs who have read the record for their advice. That's the role that ALJs are there for.

We think that one reason possibly that the commissioners want to have these proposals reviewed and circulated is that it allows them to avoid having to explain why they make changes in the judge's proposal. And if those changes are based upon ex parte contact, it would be very difficult for them to explain.

I'll conclude with that, thank you.

SENATOR RUSSELL: Do you both support the individual commissioner, assigned commissioner? Or not?

MS. KRAUSE: We don't. We think that the ALJs would have more independence if they weren't dealing with an assigned commissioner.

SENATOR RUSSELL: But isn't there a problem with just what you said. The commissioners don't read all the report. They rely upon the ALJ. But here you have, at least in theory, a commissioner who is assigned this particular project, so they go into it more deeply than the other four. At least you've got one commissioner who is reasonably well informed. With what you're suggesting, you'll have five commissioners who are partially informed.

MS. KRAUSE: I would hope the commissioners would make enough effort to be well informed on all the decisions they make.

SENATOR RUSSELL: No, no, no. The record will show, if we're keeping a record, that you said, they don't read the full thing. And so I'm saying, well, at least have one who is familiar.

MS. KRAUSE: I doubt even that the assigned commissioner reads the record on a case. In some cases, the record is roomfuls, truckloads of documents.

SENATOR RUSSELL: Okay, I would stipulate that would be the case. But isn't that one commissioner more informed, better informed, more expertise -- he has greater expertise on that subject than the other four?

MS. KRAUSE: I don't know. We do know that the one assigned commissioner could exert influence on the ALJ which we would like to see eliminated.

I think another thing to consider in terms of the commissioners being prepared is that they all do have aides, and their aides are going to informed.

SENATOR RUSSELL: Say you have a commissioner and his aide who is expert in one area, the other four commissioners and their aides are not. Okay.

CHAIRMAN ROSENTHAL: Okay. We will break. We'll be back here after lunch at 2:00.

(LUNCH BREAK)

Okay, witnesses for this afternoon. The next panel is on transportation. Let me indicate that we have now had pretty long dissertations, education, questions, and what have you, and you're all going to be limited to 5 minutes so that we give everybody an opportunity who would like to tell me what their concerns are.

And so we'll start first with Barbara Eastes, who is Director of Legislative Affairs for the California Trucking Association.

MS. BARBARA L. EASTES: Yes, thank you, Senator. I wanted to answer the question of Senator Russell before I go into my testimony. You raised the issue right before the luncheon break. I wanted to clarify something on the question of developing the public record in the case and what that means and why -- and also address why it's important for the commissioners to be bound by the record.

The case law in California, it's been litigated a number of times, and for over 50 years the case law has substantiated that while the commissioners certainly can make policy decisions, that the decision has to be based on what is developed in the record. So it's very, very important that the record be developed fully, that it not be impeded, and that -- so that the bases for appeal can be granted. This has been litigated and won on due process, the basis of due process, but it's at the Supreme Court, the U.S. Supreme Court and the federal district courts. So there's quite a body of case law that requires that.

What I'm going to do is -- I handed out my testimony which I'd like to have made part of the record -- I'll comment on ex parte after I go into the judges and the decisions because I think really you want to hear some examples of what's going on and where the problems are.

CHAIRMAN ROSENTHAL: Right.

MS. EASTES: And what I'd like to go into today is the recent general freight decision in trucking and what's been happening with that and some of the problems.

Recently the general freight decision, the PUC judge opened the proceeding by telling the parties that he had been ordered by the assigned commissioner to have the hearing wrapped up within two months. The ALJ prescribed time schedules which did not allow for discovery of evidence, and he suppressed subpoenas which would have compelled discovery in the proceeding. After issuing his first proposed decision for public comment, the ALJ wrote the decision for the commissioner's eyes only. It was never

seen again by anyone. A substitute ALJ was brought in within the course of the proceeding, and no further hearings were held after that. No public review or comment was allowed. And in fact, the first time that anyone saw the proposed decision again was when the commissioners acted on it on December -- or I'm sorry, on October 12.

SENATOR RUSSELL: Why was the replacement put in? Was there any rationale for that?

MS. EASTES: Well, apparently -- I think the judge resigned, the assigned judge resigned.

SENATOR RUSSELL: Did he make a statement as to why?

MS. EASTES: No, I think he had employment elsewhere. Got a job outside of the commission.

SENATOR RUSSELL: Okay.

MS. EASTES: So during the course of the proceeding he left and he was replaced by a substitute judge who was reassigned to the case.

The final order that was adopted on the 12th, again the first time many of us saw it was on the 12th, contained 195 findings of fact of which over 100 were not based on-the-record and we weren't supported by the record. CTA filed an application for rehearing and stay of the decision on November 1, and we have addressed each of those individual findings within our application for rehearing. I have for you, I handed out an attachment. I asked my staff to prepare for me some of the major findings of fact that were disputed and also some of the major due process violations that were associated with the general freight case, and you have that before you.

SENATOR RUSSELL: What were they based on?

MS. EASTES: Pardon me?

SENATOR RUSSELL: What were they based on, if they weren't on the facts?

MS. EASTES: Some of them were based on policy, some of them were based on nothing that we could find--we could find no basis for the findings. It really ranged the gamut. And again I will deliver to your office, Senator, the almost 200 page application which our association filed which will go into each of those in great detail for you. Again, I just had them pull out some of the very specific -- or some typical examples, both with respect to findings that weren't supported by the evidence and also some of the major problems during the course of the hearing with respect to what the judge allowed and did not allow.

The commission, we believe -- the problem exists or there needs some correction in the area of the freedom of the judges in developing the record. We think that it's very clear that the commissioners do have the ability to come out with the final decision, but as to how the development of the record occurs we think that's where an area of grayness exists and also where some of the abuses are occurring today because

we don't believe that the judges can fully develop a record unless they are given some sort of autonomy. And I've heard some other suggestions today mentioned separate and apart from SB 1126, ranging from removing the judges out of the jurisdiction of the PUC to perhaps modifying how the decisions or proposed decisions are given to the public. That may, in fact, be something that you should pursue. But we think that because the record has to be developed fully and that due process all parties must be allowed to testify. Give you an example of due process violations in the general freight case are a number of our carriers were told that they could not testify even though they raised objections because they are affected parties by this decision. We, in fact, had 79 carriers who wrote in writing asked to be allowed to testify and they were denied the right to testify.

That's just again, we've got four or five examples on the sheet up there for you. Those kinds of abuses that clearly violate due process. And we think that the judges have to be allowed the record from which we can then appeal if necessary. I will find out on the general freight case, we in all likelihood will go to the State Supreme Court if the PUC wants to test it. And will probably already go to the federal -- also go to the federal district court on the general freight case.

CHAIRMAN ROSENTHAL: Thank you very much. Let me just -- so we have on the record, as you begin, tell me whether or not you have access to the commissioners ex parte. Yes.

MS. EASTES: With respect to ex parte, we feel that because they have quasi-legislative we do have access in that area. We don't want to see that altered too much because it's just like my coming to talk to you. And we think in that area clearly there should be open, as in you should be allowed to go in.

Now, with respect to the judicial functions of the commission, we believe right now that there already exists some restraints, and that you should follow the formal judicial guidelines. However, if that needs to be strengthened or specifically clarified, in the hearing arena that may be appropriate.

CHAIRMAN ROSENTHAL: Thank you. Douglas Hill, President of the California Moving & Storage Association.

MR. DOUGLAS HILL: Thank you very much, Mr. Chairman and Senator Russell, members of the committee. First of all, for the record, my name is Douglas Hill, H-I-L-L. And I am President of the California Moving & Storage Association. CMSA is a statewide association with a membership of approximately 600 permitted carriers which represents some 70-75 percent of all the permitted household goods carriers in the State of California.

The household goods industry has been regulated by the Public Utilities Commission for over 50 years. And since 1951, the framework for that regulation has been found

exclusively in the Household Goods Carriers Act. And in 1989 this Act was significantly amended by Senate Bill 210, which was carried by Senator Russell and signed by the Governor in August and is to take effect January 1, 1990. CMSA has represented this industry for all of the years this industry has been regulated.

Now, with all do respect to the various commissioners of the commission, it is the belief of CMSA that in the commission's zeal to expedite some sort of regulatory change, particularly in the area of economic change, the commission has simply lost its sense of fairness and justice towards the transportation industry. Now, a point in fact, in 1988, in November of 1988, this association on behalf of the industry filed a petition for modification to increase costs, to reflect increase -- actually to increase rates -- to reflect increased costs and labor, workers comp, other mandated insurance costs. And it had been over three years since those costs had been addressed. In the first day of the hearings which was the pre-hearing conference on January 11, 1989, one of the commissioners came down to the hearing room and indicated that he felt that these hearings should be postponed because an OII, thorough investigation of this industry was imminent and would be coming down in the next 2-or-3 weeks. Well, we sat there for 1, 2, 3, 4 months and nothing happened.

SENATOR RUSSELL: Investigation by who?

MR. HILL: The PUC. And finally we filed a competition to have the hearing take place. The commission indicated -- the commissioner indicated that he would make a fair and balanced decision on whether to either postpone those hearings or go ahead. Finally, they made a decision that the commission was going to hold those hearings and listen to the evidence as required in this rate increase proceeding. Now, these hearings were held during several days in July; then postponed because some of the people in the transportation division staff were going to be on vacation until October; we got interrupted by an earthquake; and we finally concluded this hearing process on October 31, which was a Tuesday. On the following Friday, November 3, the commission issued its order instituting an investigation. Now, that's one thing, and the timing is kind of a little ludicrous. But in that order, they indicated that they were going to suspend and hold in abeyance any pending or disposition of the investigation which even the commission -- none of this expects to be concluded until the end of 1990. But all of the evidence that have been heard during this year and during the entire process of those hearings, we're going to be suspended and held in abeyance until the disposition of this OII, which is going to be another year down the road.

Now let me say, Mr. Chairman, that this has cost this industry -- and that petition alone cost this industry and this association in excess of $100,000 in attorney's fees, consultanting fees, witness expense, studies, all those other ansolary costs that go into this. And then to make matters worse, it's probably our own transportation rate

fund fees that paid for the transportation division's staff participation as well as the Division of Ratepayers Advocates. In the meantime, this whole thing is held in abeyance.

Now, I think that this whole thing is just a waste by an unjust and inequitable order by the commission which in effect is telling the carrier industry after the fact that you spent your time, your money, your energy and we knowingly allowed this to occur, but we will not decide the issues which were the subject of those extensive hearings. CMSA has told the commission in writing that we view its action as a serious injustice and we feel very strongly that this is true. Mr. Chairman, I brought copies of our petition for rehearing regarding that particular section and left them here with the Sergeant at Arms that I'd like you to take a look at.

CHAIRMAN ROSENTHAL: What I'd like to get to, what do you think is the major process concern that you have?

MR. HILL: I think -- you mean, as far as our industry is concerned?

CHAIRMAN ROSENTHAL: Yes, yes. How do you, you know ...

MR. HILL: Mr. Chairman, we had a prehearing conference on December 4. An administrative law judge has been assigned to this case, and we would invite your committee to conduct some sort of oversight observation in the next prehearing conference, as well as some of the hearings as it goes along, because this administrative law judge, in the most important case that this industry has ever been involved in, this administrative law judge has <u>never</u> heard a transportation case ever. And as far as I can tell, and I haven't been advised anything of the contrary, I'm not so sure this administrative law judge has ever heard a case of any kind. And this is the most important case for this industry. And the way the first prehearing conference was held, I really have to wonder about that.

We also have another procedural problem with respect to this current OII in that it appears that the procedures that are going to be followed in the household goods OII in this particular case are going to be very similar to those that were conducted in the procedural process of the general freight OII, in that the administrative law judge and the commission is going to set hearings dates consecutively for weeks and months on end which is going to preclude interested parties, including our attorney, the California Moving and Storage Association -- I don't have a bunch of inhouse attorneys, I've got a staff of three and myself as a representative of this industry -- from really appearing during the course of all of that testimony. If they do this day in and day out, week in and week out, it's going to preclude interested parties, everybody, except the Division of Ratepayers Advocates, from appearing and monitoring the activity of that.

CHAIRMAN ROSENTHAL: Really what I'd like to ask you. You are not opposing an OII?

MR. HILL: Not especially, no.

CHAIRMAN ROSENTHAL: Okay. What is your concern about what you think will ...? I guess I'd like hear from the witnesses today as to what they think is unfair about the process. I'm not talking about whether some decision is made that you don't like. I'm talking about process.

MR. HILL: Well, we think that the process that evolved out of our petition modification which we started in January of this year, and those hearings were allowed to be conducted and they had to know full well that this was going to come down, and then they wasted all that time and energy, we'd like that to be amended. Now we're concerned about the process or the lack of due process in this OII proceeding that's being undertaken.

Mr. Chairman, as far as the CMSA, and California Movers are concerned relative to SB 1125 and 1126, we're in favor of both of those; and I think that, frankly, the reasons for our favoritism towards both those pieces of legislation have been well spoken on behalf of other witnesses who have testified before you today. Thank you very much.

CHAIRMAN ROSENTHAL: Thank you very much. Mr. Craig Biddle, representing Larry Farrens, California Moving and Storage, and Dump Truck Owners, I believe.

MR. CRAIG BIDDLE: Mr. Chairman, yeah, I think I have several hats, Mr. Chairman and members, not only representing the Moving and Storage, but Larry Farrens was unable to be here today, and I also represent the California Dump Truck Owners Association; and I'm speaking on behalf of Larry Farren's association, the CCA, and I have submitted his written statement, which the Sergeant has, that he prepared and asked me to bring with me because he was unable to be here.

In both situations, the 1,600 carriers from those two dump truck owners associations, they are in support both of 1125 and 1126; and they would even like them strengthened a little bit. They would like to see in 1126 that it be mandatory that the decisions be made public. It's says "may" over on Line 19 on Page 4, and they'd like that mandatory because this is one -- you say what are the major problems? -- this is one of the major problems is that you don't get to see the proposed decision until after it's a fait accompli. And they would like to see -- both associations would like to see that, and also support the ex parte communication.

Let me just tell you that the associations, I think in answer to your question you just asked Mr. Hill about that, I think, two problems. Two major problems that we perceive. One is, that the hearing process is really a sham. What happens is an end result is determined to get to, and then after you want to get to that result, you then hold a hearing and gather evidence to justify that decision that you've already made. That's why you get so much direction, supervision on the ALJ. It's our belief that what happens, whether it's the OII and household goods, or whether it's the dump truck

deviation that they did last year in 1989, that the political or policy decision was made to do that, and then they say, okay, let's have an ALJ look at it, let's hear testimony, and they back up that which they have already decided to get to. So, it's a sham. Why even have the hearing? If that's what they decide to do, then they can go ahead and do it. But the Constitution provides that they must do it, so therefore they're going through the motions of coming up with that result. That's the first thing.

Then the second thing we believe is that there's not adequate supervision or control. You talked about it this morning. Let me tell you what happens. When you disagree with an opinion or decision of the PUC, you have a right to file a petition for a writ before the State Supreme Court. Now what does that entail? That entails that we file a petition and we prepare it and we attach the transcript, those pages and -- 12 feet, Senator Russell, you were talking about -- the entire transcript from months of testimony. You submit it to the Supreme Court. They have 60 days. They have 60 days, the Supreme Court, and you know not one of those seven justices look at it. Some clerk looks at it, reviews it, then says yes or no, we will either hear it or we deny it. Traditionally, they deny it. We in my office have filed several of these over the last few years. They just deny it and they send you a one page petition, denied. That's not a hearing. We don't get a hearing before the Supreme Court. Their alternative is to grant a hearing, then we file briefs and we have an argument before the Supreme Court. You really effectively don't have any remedy.

You were talking this morning, well, why aren't these decisions upset? They're not upset because there is some evidence, some little evidence that somebody can point to of months and months of testimony to justify the decision. What I think you need, and that's what our associations would like to have, all of them, would like to have an intermediate court of appeal take a look at this. Take a look at it. Have a hearing, have argument, have an opportunity, get a judge's eye, not just some clerk who is not going to pay any attention to you, which is really what happens today.

But I think those are the two major abuses we see in the process, is the supervision in the judicial process, and also that the hearings are just a sham.

CHAIRMAN ROSENTHAL: Any questions? Thank you very much.

The next panel has to do with telecommunication witnesses. We'll take the first four: Bruce Jamison, James Lewis, Robert Stechert, and Alan Gardner.

We're doing very well, gentlemen, if you will restrict yourselves to the 5 minutes, we can get out at a reasonable time today.

We'll just hear the -- all right, Mr. Jamison. We'll get to the other four on the telecommunications following this one.

Mr. Jamison, Executive Director, State Regulatory Proceedings, Pacific Bell.

MR. BRUCE JAMISON: Good afternoon, Mr. Chairman, Senator Russell. I'm Bruce Jamison for Pacific Bell.

Relative to SB 1126, the ALJ bill, Pacific believes that the process in place today as described at length this morning is working properly and sees no need for change.

Relative to SB 1125, Pacific is not opposed to instituting ex parte rules, but ex parte rules along the lines that the FCC has. I do not believe this bill meets that criteria, or meets those criteria. If the bill were amended to parallel the FCC, Pacific would not oppose.

CHAIRMAN ROSENTHAL: The FCC, don't they have strict ex parte rules?

MR. JAMISON: They have ex parte rules, but they are clearly divided into various categories of proceedings: certain proceedings have no restrictions; certain proceedings have restrictions that ex parte contacts are permitted, but must be reported; and certain proceedings have no ex parte contacts allowed whatsoever; in addition during certain proceedings there are sunshine periods when there are no ex parte contacts allowed whatsoever. Additionally ...

CHAIRMAN ROSENTHAL: So they actually go farther than my bill.

MR. JAMISON: No, I believe that they actually clarify and make various conditions -- recognize that there are various conditions that under certain circumstances there should be free and open access, and under certain other circumstances there should ...

CHAIRMAN ROSENTHAL: No ex parte.

MR. JAMISON: ... be no ex parte, and there is a middle ground there where there is a requirement to report.

Additionally, all advocates, people providing advocacy for someone else are subject ex parte rules. The way the bill is written now, SB 1125 is written, the DRA would be exempt and that's not acceptable. I believe all advocates should be subject to those rules.

Finally, there was mentioned this morning that there should be a requirement that ex parte contacts be served on all parties to a proceeding. I don't believe that's necessary. The FCC has a procedure where they're filed in an office, the docket office, that kind of thing, that would seem to me to be sufficient.

SENATOR RUSSELL: Question.

CHAIRMAN ROSENTHAL: Okay.

SENATOR RUSSELL: Would it accomplish anything if the PUC were required in every case to make a decision, there shall be, there shall not be, there shall be partial ex parte so that everybody knows up front that they have to a decision one way or the other? Would it accomplish anything?

MR JAMISON: I suppose that would be one way to go at it. At least in that case then you are assured that the question of whether there is a need or not has been

addressed. That's a little bit less stringent than having a structure that says every proceeding has to be assigned to a particular category. You turn that around and say for every proceeding you'll decide whether there will be ex parte.

SENATOR RUSSELL: Heard this morning that the commission in some cases has decided that there shall be no ex parte proceedings. How does -- does that come at the beginning or during or at the end or what?

MR. JAMISON: The one that I'm familiar with, it did not come at the beginning, came -- there was, I believe, a Pacific Bell rate case, a 1986 rate case was mentioned -- there was an ex parte rule established and I believe that was during the case. I was not part of the regulatory organization at that time, but I believe at the beginning of the case, there was no ex parte restriction, and that that was applied during the case. So it can come any time.

SENATOR RUSSELL: And so if it comes based upon certain circumstances which arise which seem to support no ex parte.

MR. JAMISON: Presumably that's correct.

CHAIRMAN ROSENTHAL: Okay. Mr. James Lewis, Director, External Affairs for MCI.

MR. JAMES L. LEWIS: Good afternoon, Mr. Chairman and Senator Russell. With respect to -- I'm going to try and beat the 5 minute limit, Senator.

CHAIRMAN ROSENTHAL: Okay.

MR. LEWIS: With respect to SB 1125, we think that is a reasonable middle ground between the position that was staked this morning by the first panel, and the position that was taken by the commission representatives later on this morning. We think it recognizes that the commission has dual roles, both quasi-legislative and quasi-judicial. And we don't think it would be terribly onerous to require disclosure of ex parte communication.

I would echo Mr. Jamison. Should the commission wish to -- I'm sorry, should the committee wish to hear our views on the FCC's model, I don't think we would oppose an amendment to this bill which would essentially adopt the FCC model for the California Public Utilities Commission. That model recognizes the distinction between ajudicatory proceedings, for example, complaints in which there are no ex parte communications. Those are clearly quasi-judicial proceedings; and quasi-legislative proceedings such as rule makings, in which communications are permitted up to a certain point in time, but must be disclosed. We think that would be appropriate.

With respect to 11 ...

SENATOR RUSSELL: On that point.

CHAIRMAN ROSENTHAL: Yes, Senator.

SENATOR RUSSELL: The FCC, the pink sheet that the Chairman held up, what does that really accomplish? I mean, it says here that _____ receive Southwestern Bell

presented to common carrier bureau some information on a certain docket.

MR. LEWIS: Senator Russell, that ...

SENATOR RUSSELL: How does that ...?

MR. LEWIS: The only thing that accomplishes is it tells the insiders what's going on. It doesn't really tell members of the public what's going on. I would go a little further than the FCC rule in terms of the type of disclosure. Only a telephone company knows what docket appears on that pink sheet. If an interested member of the public happened by that docket office, perhaps he or she could ask and learn. But I would favor a broader disclosure. I'm not sure I would require service on all parties on the service list. But an agency where I used to work, the Federal Energy Regulatory Commission, requires that a summary of an ex parte communication be placed in the record of the proceeding.

CHAIRMAN ROSENTHAL: Yeah.

MR. LEWIS: That kind of disclosure puts the parties on notice, not only that an event occurred, but the nature of the communication which happened.

SENATOR RUSSELL: The general subject matter.

MR. LEWIS: That's right. That's right.

CHAIRMAN ROSENTHAL: I also think that if it's on the record, anybody at a hearing discussing that subject can then say to that individual, you know, tell me about this communication that you had. In other words, I think people would be law abiding if there was a law which said that certain things are permitted and other things are not.

SENATOR RUSSELL: This situation, rather than send it to everybody, this is filed with some public agency, right?

MR. LEWIS: That's filed at the docket office of the FCC.

SENATOR RUSSELL: And so all of those people who are involved in this process know that.

CHAIRMAN ROSENTHAL: Yeah.

MR. LEWIS: That's correct.

SENATOR RUSSELL: And they can get it.

CHAIRMAN ROSENTHAL: They can get it.

SENATOR RUSSELL: So you don't have to burden the government that was putting out reams of this, mailing, and all that stuff.

MR. LEWIS: And then it's possible, for example, MCI has people check the docket office on a daily basis. If we see a contact that we're interested in, and let's say it's from Pacific Bell, we can ask Mr. Jamison or one of his colleagues what was the nature of the communication.

SENATOR RUSSELL: And presumably you may or may not rely upon his representation of what that was, if that's the case, if you ...

MR. LEWIS: If it's Mr. Jamison, I certainly would, Senator. (laughter)

SENATOR RUSSELL: Well, let's say it's not Mr. Jamison, let's say it's Mr. X and you're not -- and he's pretty closed mouthed. What then would you do?

MR. LEWIS: Well, we would probably file a formal information request in the docket with the party, or at the FCC you have to ask the commission for permission to file discovery. We would do that.

SENATOR RUSSELL: So then, what would then happen? Then he'd have to go into the hearing and verbalize or ...?

MR. LEWIS: Well, there wouldn't be a hearing. They would either have to respond or not. And then it would be up to us to decide what to do if they failed to respond.

SENATOR RUSSELL: What could you do?

MR. LEWIS: We could take a compulsory order requiring them to respond. We could also ask the staff member of the FCC who is a party to that communication what his or her side of the story was.

SENATOR RUSSELL: On that process, that's existing now with the FCC?

MR. LEWIS: That is.

SENATOR RUSSELL: Does that get into a lot of nitty-gritty, picky-picky obstruction of process?

MR. LEWIS: Not so far as I understand it, Senator. I don't have direct responsibility for FCC proceedings, but I have talked to the people in the company who do. And I'm advised that that has become a fairly routine part of doing business at the commission. These communications do go on, and when you go over to speak to members of the staff or to a commissioner at the FCC you take with you the written summary of what you're going to present to the commissioner or the staff member, and that is prepared and everybody sees it, and it's not that burdensome.

SENATOR RUSSELL: Bill?

CHAIRMAN ROSENTHAL: Basically.

Okay, thank you very much. Bob Stechert, Vice President of Regulatory Affairs, AT&T.

MR. ROBERT B. STECHERT: Thank you, Mr. Chairman, members of the committee. I am Bob Stechert, Vice President of Regulatory Affairs at AT&T. I should tell you, at least from AT&T's standpoint, we don't see that there are particular issues with respect to the processes and procedures at the commission that give us concern about the fairness of the process.

Now, having said that, I would hasten to add that we do think that there are procedures at the commission that could be substantially streamlined without threatening due process of the parties to the proceedings. I can give you an example of AT&T's case that was concluded a year ago in which the commission granted AT&T a

degree of price inflexibility. That case went on for nearly three years through a whole series of evidentiary hearings, through submission of a number of pleadings and briefs. And we believe that that kind of a proceeding, a rulemaking proceeding in which the commission is establishing rules that have perspective application could better be conducted through a paper process such as existed at the FCC. The FCC, a number of years ago, pretty much moved away from having rulemaking hearings overseen by administrative law judges. And today, instead, parties file written pleadings with the commission. There's an opportunity for responses between parties. And the commission, based on that written record, can reach a decision in a rulemaking proceeding and establish rules and regulations.

SENATOR RUSSELL: Who hears all that stuff if you don't have a judge do that?

MR. STECHERT: No one does, Senator. It's taken into account by the commission and the commission's staff and reviewing the written submissions. Based on those written submissions, a decision is reached by the commission, without the need for an evidentiary hearing. Indeed, many of the evidentiary hearings that exist before that California commission today simply are a process whereby matters are presented and gathered together for ultimate decision by the commission. And in a rulemaking proceeding where you're not dealing with disputed facts primarily, but you're establishing some perspective policy decision, that evidentiary hearing process really doesn't facilitate matters very much.

The FCC's practice and procedure has been upheld as affording parties full and complete due process. And it's worked well to move matters ahead at the FCC much quicker than what was the case when evidentiary hearings were held in the past. Now, we don't believe that that's a substitute for all of the evidentiary hearings at the commission. Indeed, as parties have pointed out, the commission has both a quasi-judicial and a quasi-legislative role to play. And in quasi-judicial proceedings, such as complaints, there is an appropriate role for an evidentiary hearing and oversight by an administrative law judge. But we think that a significant savings could be made if the commission would adopt in more cases and rulemaking proceedings this kind of paper proceeding process that I'm describing.

SENATOR RUSSELL: Do you say then that a staffer of the PUC really then in -- with your proposal or suggestion takes the place of the administrative law judge?

MR. STECHERT: Essentially, that's what happened. At the FCC, it's the commission's common carrier bureau who exercises that role, who assembles the written pleadings filed by the parties and reaches some decision initiately about what the decision of the commission should be, and then that's carried for to the commission as a whole for a final decision. The same kind of process could take place here in California under the auspices of the commission's advisory and compliance division

staff.

SENATOR RUSSELL: And there's no discussion back and forth on the written documents that are put in?

MR. STECHERT: Not before an administrative law judge, no. But there is full chance for parties to present both sides of the question. Usually there is a series of pleadings that are filed. An initial position is filed by all of the parties, and then all of the parties have a right to reply to those initial positions filed by the parties ...

SENATOR RUSSELL: In writing.

MR. STECHERT: In writing, so that a complete record is developed and all sides of the issues are fully illuminated.

SENATOR RUSSELL: So this guy with the green eye shades sits in a cubicle, reads this pile of stuff, and comes up with some conclusion; and everybody's putting in opinions and rebuttals to the other guy's rebuttal, and he's reading all this. And nobody gets in a room together and talks about it.

MR. STECHERT: That's right. But there is a complete written record developed. And the decision that the commission makes must be made on that written record. Rather than have an evidentiary hearing where witnesses appear and testify before an administrative law judge, the record is developed through a series and an exchange of written pleadings.

SENATOR RUSSELL: Bet all these written pleas are written by lawyers.

Do you have any disagreement with what Mr. Lewis said about this FPPC (sic) process and the further steps he would take?

MR. STECHERT: Well, as far as the ex parte rules, Senator, we haven't seen abuses of ex parte process as it exists today.

SENATOR RUSSELL: But, do you have any objections to what he said?

MR. STECHERT: Having said that, I would agree with Mr. Lewis that the procedures at the FCC work very well. And if you were to legislate an ex parte arrangement, that's the kind of arrangement that we would support. We would also want to ensure that all parties to the proceeding, including the commission's Division of Ratepayers Advocates, are subject to those ex parte rules. If contacts are going to be limited or disclosed, they must be limited and disclosed by all the parties including members of the commission staff who participate in the proceedings. But I think a process like the FCC has, which allows for access to the commission, but also provides parties with notice about what those contacts have been is a fair way to go about addressing the kind of ex parte concerns that others have raised.

SENATOR RUSSELL: And the contactee, the one who is supposed to write out what he talked about ...?

MR. STECHERT: That's the way it works at the FCC. And that memorandum of what the contact was about is filed with the commission, and it appears in the kind of a notice that Chairman Rosenthal has there before you, and it provides parties with a reasonable idea of what contacts have been made and a way to go about making contacts of their own if they see that specific contacts have been made in particular proceedings.

SENATOR RUSSELL: Is that process in the law books somewhere?

MR. STECHERT: Yes. It is codified, both, I believe, in statute as well as written FCC rules. The Federal Communications Commission's Restricted Procedures.

SENATOR RUSSELL: Okay. Thank you.

CHAIRMAN ROSENTHAL: Thank you very much. We'll next hear from Mr. Alan Gardner, Vice President, Regulatory Affairs, California Cable Television Association.

MR. ALAN GARDNER: Thank you, Chairman Rosenthal. I have brought along written testimony today which I would appreciate included in the record, along with the two additional exhibits. I'd like to take this opportunity first to thank the members of this committee and the Legislature who were interested in some of the concerns we expressed this year in the Phase II proceedings, and who inquired about them or supported them or otherwise became involved.

Our interest in the future of the regulatory process here in this state is to have a workable structure. One, where there's a full opportunity to be heard, where we have an opportunity to know about contacts, where we have as potential competitor of the telephone companies effective cross-subsidies and anti-competitive protection from the dominant carriers, and where if we think the evidentiary record doesn't support a decision, we have a right of appeal and one that means something.

Our experience in the Phase II process was offering both hope and concern as to how we would view the future. PacTel's original proposal was very aggressive with respect to our interests. We felt that they were looking to cross-subsidize their way into our business. The telecos the last two years have had a very aggressive strategy to enter the cable business by obtaining congressional and modified final judge approval to do so. We felt the closed door that came out in August did not reflect our concerns about cross-subsidy and didn't reflect an opportunity for the commission to review whether such new investment would be cost-effective or in the public interest. And our desire was to have something where the commission did their job and looked at that.

Now, we had the opportunity for ex parte contacts and we did, in fact, employ them. We came to the Legislature and asked for some help with respect to these issues. And the commissioners were very forthcoming in giving us an opportunity to listen because, you know, as a practical matter the commissioners don't read the record; and with the assigned commissioner situation, I think one commissioner is truly very knowledgeable and the others do the best they can. So having the ex parte contact for us meant that

at least our concern was heard by the people who are making the decision because they wouldn't normally read the briefs, they wouldn't normally see the record, and so they wouldn't normally hear about what we want them to be concerned about. And frankly, I don't think there's anything wrong with that. I don't think that in a state this size with the complexity of the issues that PUC would work if there weren't some form of contact permitted. And I think it did work because the final order was fair to our industry and I think to the telephone industry. It lets them go forward with the network to a certain point, and beyond that point makes them come in and if they're ready to do it today there's no time requirement or anything. As soon as they think it's cost-justified to proceed further they're allowed to come in and make a showing and go ahead. And that's fair because that's what we're interested in. This is fair level playing field competition, and that's what we want the process to reflect.

So, in looking at that, the commission now has proceedings that are going to try and implement that, and they're going to try and implement these anti-competitive and cross-subsidy using workshops to do that. It's premature for me to suggest whether or not that's going to be effective. That's the process they've chosen to try and use. And today is the day that the commission (sic) has called for everybody to comment on how that should actually work. We are submitting comments where we think they should have a series of workshops of several days each. For example, where we believe the telephone company should come in, put all the reports on the table, talk about what's needed, and have a real process to try and develop a procedure at that commission that will be effective for the future. Not overburdening to the telephone companies or to the commission, but something that effectively allows the process under this new framework to try and work. Now in about three or four months, we'll have an idea whether that's going to happen or not. And if you ask me the question again then, I might have a different answer.

But, with respect to the specifics that you've asked for today, on the ex parte contact, I think we need some form. But as a participant in the process, what I want to know is when somebody else does it. Now, do I need something as extensive as has been proposed? No, but I could live with it if you had it. What I really need to know is that the contact has happened. And so I'd like somebody to have to file just the name and everybody they saw, and have it on file at the commission office, and if they submitted any documents or used any, that those ought to be part of it. That's all I need to know, otherwise I'm not doing my job right.

With respect to ...

SENATOR RUSSELL: Before you move on there, you've heard what Mr. Lewis said, and Mr. Stechert sort of acquiesced to. Is that okay with you?

MR. GARDNER: Sure, I could live with it. But all I'm suggesting is, is something

that _____ necessary? For me, no. I can do with simply knowing that it's occurred and knowing who with.

SENATOR RUSSELL: Well, as I understand it, the first thing is just Joe Blow saw so and so on such and such, period. And then if you wanted more information you'd ask them; and if they stonewalled you, you could go through some sort of a procedure where you would have a discovery.

MR. GARDNER: Yeah, but as a practical matter, I'm a participant. I mean, I've been doing this since 1972 when I first joined a company. I was 17 years on the side of the house until August 1. And if I'm doing my job right as a regulatory lawyer or in this case a regulatory executive, I'm pretty familiar with the issues and the timing, and I should be able to roughly understand what's going on and to be very specific and go through that. You know, it's interesting, but it's expanding the process. I can live with it. I can do it. I've done it before the FCC and understand how it works. But I personally really want to know is simply the fact that it happened, and if paper went across, that should be public record paper and I should get a copy because I'm not trying to ...

SENATOR RUSSELL: You should get a copy or you should be able to go ...

MR. GARDNER: I got my copy, I mean it's available there in the clerk's office and if I want a copy in the clerk's office I can do that. That's effective knowledge for the people that are involved. If the public wants to go by and look, they can get it.

On the ALJ issue, I think that some relationship may be necessary simply to keep two left field orders from coming out. And I think that a solution for that really isn't clear although several of the ideas that have been discussed today, you know, might be effective. So on that one, we kind of think probably some more studies and reviews would be worthwhile to the board to try to put a definitive idea out.

I do have two ideas, though, that I'd like to mention further. The first is, we do think that the appeal as a matter of right is a good idea. I think the most recent Phase II order is probably bullet proof as far as an appeal goes. They did a good job of putting it together and if anybody happened to disagree with it, I think they'd have a heck of a time overturning it. But there's going to be occasions when anyone's going to disagree with the result, and they're going to disagree based on the evidence and the record. And when that happens, they ought to have a right to appeal it. And right now there's simply no effective appeal. So that's one, I think, is worthwhile.

And the second one is ...

SENATOR RUSSELL: You don't think that will slow grind the process down into a crawl?

MR. GARDNER: I've practiced utility law in Oregon, Washington, Idaho, Colorado, North Carolina, Washington, D.C., New York. Many of those allow for that, I mean, so

my answer is based upon experience, no, I don't because granted that there's -- if there were an order from the appellate court saying it's so obvious there's a problem that we will not allow this order to go into effect, the commission's order to go into effect, then it would grind into a halt for a short time. You could require the expedited procedure that was discussed before, and I think that would be very effective, but to deny the intermediate appeal denies any effective appeal. There is no effective appeal in this state right now, and I think that's an honest issue. You know, this commission or any commission occasionally they make a mistake or they do something that's simply not based on record evidence, and when they do that folks who are aggrieved ought to be entitled to call them on it. And you can't effectively do that now, and I think it's fair that you be entitled to do it. And I don't think that's going to tie things down.

SENATOR RUSSELL: You don't think all the disgruntled losers would be immediately run to the appellate court?

MR. GARDNER: Sure, but that's not going to stop the decision from going into effect.

SENATOR RUSSELL: Does it stay the decision?

MR. GARDNER: Not if anybody disagrees with me let me know, but that normally doesn't stay a decision unless they obtain a specific order doing so. The only way they're going to do that is to take such as sufficient showing that they have a likelihood of prevailing on the merits of appeal and that's not very common, very rare. So I don't think as a practical matter that does it because it makes more work for sure, but that's writing some briefs and lawyers are used to writing briefs and the commission has a general counsel's office can handle that. I don't think it expands it that much. It provides for reasonable remedy.

The last point I'd like to make is with respect to commission staff under the new framework. You know, the order in Phase II changes where the responsibility -- at least from our view is going to be. It's been in the ALJs which were a pretty good group of folks. And it changes it to the ...

CHAIRMAN ROSENTHAL: Would you pull the mike a little closer. I hear people trying to reach ...

MR. GARDNER: Okay. It changes it to the CACD group. And in shifting away from the general rate case to what is going to become a series of smaller type proceedings, that puts a much heavier burden on those folks. And the commission has the responsibility for managing their own staff. But I would suggest that they may need some additional help for budget or staff in that area because that group is now going to undertake a new and significant burden in making this regulatory framework work properly. And it's simply an area that we think bears some watching sometime later in

1990.

Thank you for the opportunity to ... (cross talking)

CHAIRMAN ROSENTHAL: Thank you very much. We'll now call the next four: Kevin Payne, Sam Williams, John McDonald, and John Ayers. And gentlemen, if you'll restrict yourselves to the same time of 5 minutes, we'd appreciate it. We'll keep moving and we'll be out of here at an earlier hour than anticipated.

Okay, Mr. Payne, Director of State Regulatory Affairs for GTE.

MR. KEVIN PAYNE: Thank you, Chairman Rosenthal, members of the committee. My name is Kevin Payne and I'm here on behalf of GTE California this afternoon.

I'd like to begin by saying that GTE California does not perceive any problems with the current process as we employ it in terms of fairness or access to the commission. And I'd like to explain why we've taken that position.

We currently feel that the PUC does indeed have the authority to impose ex parte communications rules on an ad hoc basis or on a case-by-case basis, and has clearly done so in the past. And as long as those rules do not compromise anyone's rights to due process, they certainly have every right to do so. And we think they've done so very responsibly.

Unilateral ex parte communications rules we feel could potentially restrict the provision of information to the decisionmakers at the commission as well as the commissioners themselves in obtaining information that is very valuable in the decisionmaking process that has become increasingly complex. The issues involving new technologies, the velocity of some of the changes are such that we are involved in some rather broad based issues that do involve the consideration of a good deal of data. We think that the commission has responded very favorably in terms of broadening the access, frankly, for the public in conducting public witness hearings. They open what we commonly refer to as open mike sessions or commission meetings throughout the state. They have instituted the office of the public advisor which encourages public participation in the ratemaking process.

CHAIRMAN ROSENTHAL: They didn't create that office. I did.

MR. PAYNE: Okay. I stand corrected. But, with all do respect, they have been very successful, and I believe that the public advisor has submitted a report to you this year chronicling that success and their activities.

In closing I would say that, if anything, the commission has sought to broaden access to the ratemaking process, at the very same time they are making strides in streamlining that process and actually reducing the cost of regulation prospectively, which I believe we would all agree are very commendable activities.

On the subject of SB 1126 regarding the relocation of the ALJ division to the Department of General Services. GTE ...

CHAIRMAN ROSENTHAL: The bill will not be in that form.

MR. PAYNE: Okay.

CHAIRMAN ROSENTHAL: Indicate to me what you think about the relationship of ALJs wherever they are.

MR. PAYNE: I can state that very quickly and very simply in that we feel that they dispatch their responsibilities appropriately now, and we feel it would make little difference whether they were a part of the commission or a part of the Department of General Services. And frankly ...

CHAIRMAN ROSENTHAL: How would you have felt if the decision had gone against you at the commission?

MR. PAYNE: Over my experience in the regulatory field I've had decisions which you could consider going against GTE and also being favorable to GTE, and it wouldn't change my opinion on that.

CHAIRMAN ROSENTHAL: Okay. Fine.

MR. PAYNE: Thank you.

CHAIRMAN ROSENTHAL: Thank you.

SENATOR RUSSELL: I have a question.

CHAIRMAN ROSENTHAL: Yes.

SENATOR RUSSELL: The discussion we had with Mr. Lewis which was supported by Mr. Stechert and which Mr. Gardner could live with as it relates to this FCC process of exposure, do you have any problem with that?

MR. PAYNE: GTE California would certainly comply with it. We simply feel that the authority the commission has currently and has exercised is sufficient. If there were a different process formalized, we would ...

SENATOR RUSSELL: It was specifically. Did you hear the testimony?

MR. PAYNE: Yes, I did ...

SENATOR RUSSELL: Do you have any problem with it?

MR.PAYNE: ... and we certainly could respond it. Yes.

SENATOR RUSSELL: You don't have any problem with it?

MR. PAYNE: Not materially, no.

CHAIRMAN ROSENTHAL: They deal with it at the FCC right now.

MR. PAYNE: We deal with it at FCC now.

SENATOR RUSSELL: Well, okay. So you don't have any problem with that if we were to institute that in California?

MR. PAYNE: Not materially, no.

SENATOR RUSSELL: Okay.

CHAIRMAN ROSENTHAL: Thank you.

SENATOR RUSSELL: I'll ask you the same question, Mr. Williams, when you get to it.

MR. SAM WILLIAMS: Okay.

CHAIRMAN ROSENTHAL: Mr. Williams, Manager, Governmental Affairs, U.S. Sprint.

MR. WILLIAMS: Okay, Mr. Chairman, Senator Russell, we appreciate the opportunity to testify before you on this 1125 and 1126 in particular.

U.S. Sprint feels that, first of all, we recognize things are becoming very, very complex. We've got the regulatory framework kinds of hearings that have been going on, the number of players, the competition, small and large players, and the impact is becoming that much greater to on all of these players. We feel that it's necessary to ensure a fair and balanced process. We think we certainly have to minimize the paperwork and the duplication. We don't want to -- you have to balance the fairness of the process with not making it too slow.

But basically, we think that what's been going on requires additional safeguards to make sure this balance among the participants is created regardless of the size of the organization. So we're concerned about what we call institutional integrity, and that is the players, all of the players, whether they're large or small, they have to feel that they can believe in a process, that they're going to have access on an equal footing. And if they don't believe in that, you just don't have that kind of integrity, even if a lack of this integrity, it's just not good for the process.

And the process is becoming very, very complex. We think that if you have ex parte, you've got participants who can respond on a timely basis in terms of disclosure. The PUC can see more contrasting views among the participants. There's a better information exchange. Again, you have to worry about how much time this takes. But we think that balance can be worked out.

(SB) 1125 does not prohibit contact. In fact, we're just talking about disclosure. We think this represents good government. It represents sound public policy. And therefore, we support 1125.

As far as the administrative law judges, we believe in the independence of those judges; but at the same time, we're not convinced that putting the law judges in the Department of General Services will really achieve that ...

CHAIRMAN ROSENTHAL: I've come to that conclusion as well.

MR. WILLIAMS: Okay. The judgments of the administrative law judges is that they play an important role as does the PUC, but certainly this physical relocation is not necessarily the answer. But we're willing to work with the commission as to what else can be done to ensure that this kind of independence is maintained.

CHAIRMAN ROSENTHAL: Not removing them from the PUC, do you have any concerns about the relationships that exist and what they might be suggesting?

MR. WILLIAMS: U.S. Sprint is more concerned about the relationship -- we're more concerned about ex parte and the relationship between the commission and the other

parties and the ability to communicate there on sort of an equal footing.

In terms of the administrative law judges, we don't have any real problems there.

We think it really important that whatever comes out of these hearings and further deliberations that it's spelled out with a degree of clarity. We don't think it's -- we don't want to be in a situation where the participants have to feel that there's going to be some sort of regulatory reprisals or they may or may not be following the rules. So we ask that -- we'd like to work with the commission and the Legislature to make sure that that happens. And so basically, in summary, we support 1125; but 1126, not as present. (cross talking)

CHAIRMAN ROSENTHAL: Thank you very much.

SENATOR RUSSELL: You could live with the FCC approach as we've heard today?

MR. WILLIAMS: Yes, we can.

CHAIRMAN ROSENTHAL: Mr. McDonald, Vice President and General Counsel for Reuben Donnelley Corporation.

MR. JOHN P. McDONALD: Well, I, too, appreciate being here, mostly because it's 15 degrees in New York City today. I and my company have been appearing before the Public Utilities Commission for the last four years. And in that time, we have yet to see one matter come to final resolution. It's not a matter of the commissioners not working hard or the staff not being talented. It's become our view that the process itself isn't designed to achieve what needs to be done today. The process as it works today is largely a legislative one. It's designed to cover policy matters and it does that very well. The problem is as the various enterprises that the commission regulates become competitive, become partially in the regulated arena, partially in the competitive arena, there's a second function that the commission must pay much more attention to. That second function is that of dispute resolution. Plain and simple, there are going to be controversies.

The present system is far too cumbersome to handle that. We think that the bills that you gentlemen are considering today are a correct step forward. There has to be more formalization, there has to be more procedure. There has to be separation between the tryer of fact and the ultimate decisionmaker. We think both of the bills proceed in that direction, but would like to see you go further; would like to see the process fully separated; that when a matter comes up before the commission that it should be decided whether it is of a legislative nature or whether it is contested matter. If it's a contested matter, we would like to see it farmed out to an administrative law judge who has separate and quite clear responsibilities. He is to be the tryer of fact to prepare a record for the commission to make its decision on.

For things that are legislative or investigative on the part of the commission, we think the present process works reasonably well.

We do have a modest concern on the ex parte rules simply because matters before the commission presently flow from one docket to another and then back again, and it would almost require that you cover not only the docket that you're in, but the surrounding dockets as well. We think that's part of the underlying problem in dispute resolution. There aren't clear issues put before the commission or its staff to decide.

With respect to the administrative law judges, we'd like to see them have clear responsibility. In the bill, as it's put together now, they still are some sort of agent of a particular commissioner. They're given responsibility for running the hearing, but it's not clear whether they're acting in fulfilling their own discreet role, or whether they're simply acting at the behest of a particular commissioner. You never know whether you're talking to the right person.

The current procedures before the commission, there ought to be a right to appeal a decision to an appellate court other than the Supreme Court. There ought to be better opportunity to contest an administrative law judge's factual findings. The present standards for review are extremely narrow. You have to find a blatant error in order to be able to attack it. These matters are not susceptible to blatant error; there's too much other things going on; it's interpretation.

I had one more thing, but I've forgotten it. Thank you.

CHAIRMAN ROSENTHAL: Thank you very much. Mr. Ayers, President of Bay Area Teleport.

MR. NICK SELBY: Good afternoon, Senator Rosenthal--Mr. Chairman, and Senator Russell. Actually, I wish I were John Ayers, but unfortunately I'm not. My name is Nick Selby. I'm an attorney in private practice, and I have had the pleasure of representing Bay Area Teleport as its counsel before the PUC for the last five years. I used to work for the commission as a commission staff attorney, and I was also a commissioner's legal advisor for over two years. And I believe, unfortunately, Mr. Ayers could not come today. His testimony was given to the marshal.

CHAIRMAN ROSENTHAL: Yes, we have his testimony.

MR. SELBY: I believe the reason he asked me to appear in his place is because of the experience that I did have at the commission, and I would like to offer that experience to the committee this afternoon.

First, wholly apart from my experience as an advocate, simply as an attorney, I've wrestled with the issue of ex parte contacts ever since I began working as a commissioner's legal advisor back in 1980. And the conclusion that I've come to in my own mind is that the contact is necessary to make the commission work. I think that's a regrettable conclusion because I think everybody would feel happier if everything was on the record, absolutely everything could be done from known documents. It just doesn't work that way because the procedure is too -- the matters, the subject matter

is too complex. And the commissioner whom I worked for, the late Richard D. Gravelle, whom I consider one of the great commissioners in the history of the commission, very strongly felt that ex parte contact was necessary to accomplish the commission's business.

CHAIRMAN ROSENTHAL: Would you support the FCC approach?

MR. SELBY: Senator, I believe that more is required for the notice and comment rulemaking which the FCC does, primarily to accomplish its business as a national agency. I think that type of disclosure is fine there. Here, the commission operates pursuant to statute. The statute does not permit notice and comment rulemaking in a large number of proceedings that are going on before the commission right now. Contrary to what Mr. Stechert for AT&T said, I think that on a state level to move in a hurry and substantially toward notice and comment rulemaking would be a mistake; it would remove the commission from the people. I think that cross-examination serves a very useful purpose. And most noticeably in the alternative regulatory framework proceeding, I know from my own experience the cross-examination helped bring out many of the strengths of the general proposal which was essentially adopted and exposed some of the weaknesses of the specific proposal. And at the start of the hearing, many of those things were not known; they would not have been known without cross-examination. If you have cross-examination, then you should disclose more in the nature of ex parte contact than simply the fact that it occurred. I believe it would be ...

SENATOR RUSSELL: On that point.

MR. SELBY: Yes.

SENATOR RUSSELL: Apparently as I understand it, you state the fact that it occurred, and everybody knows where to go get that information. Then if you as an attorney representing somebody want to know more about that, you go ask or you have a means whereby you can get more information. But in every case, we're not required to divulge all that, go through that paperwork. Isn't that satisfactory?

MR. SELBY: I think we need a little bit more of the detail that was disclosed, and I also think that it should be mandatory that any written submission that was given to the commissioners or to a commissioner's legal advisor or to an ALJ should also be disclosed, should also be put in the record of the case or filed with a docket office.

SENATOR RUSSELL: The availability alone would not suffice?

MR. SELBY: That would be helpful. I believe that it would be a more workable process, given the large number of participants, if somewhat more of the substance of the contact was disclosed for the record. The FCC, being a national agency, it just operates differently than the CPUC, and it would not be possible in the proceedings before the commission, by my experience, to call up every single party and try and track down the information that was disclosed. A workable rule would be to require a

party having such contact to prepare a one-page summary of the contact and to file that one-page summary with the docket office.

And I also believe that everybody would feel more comfortable with such a rule because right now we have a higly ambiguous situation where I as an attorney -- and I've represented small parties as well as Bay Area Teleport -- have misgivings about ex parte contact. Yet I know that it has to occur.

Now, in terms of the overall structure of the process at the commission, the one thing that I wanted to bring to your attention which I believe would be a necessary complement to whatever is done with SB 1125 is to approach the process from the point of view of requiring the commission's findings of fact be based upon substantial evidence. If you require -- that is modify Public Utilities Code 1705 to require findings of fact to be based upon substantial evidence, and couple that with intermediate appellate review, then you really have taken the sting out of all ex parte contact by saying it doesn't matter so much that the contact occurred, the decision must be based upon substantial evidence in the record. And forgive me if I'm making an advertisement for my profession, but I really do believe that cross-examinations serves a useful purpose, and I would say substantial evidence should be evidence which has been subject to cross-examination. Thank you.

CHAIRMAN ROSENTHAL: Thank you very much. We'll now call up our final -- dealing with the energy utilities: Joe Kloberdanz, John Hemphill, James Lehrer. These are the energy utilities: San Diego Gas, Southern California Gas, and Edison.

Okay, San Diego Gas & Electric. If you'll identify yourself, please, for the record.

MR. JOE KLOBERDANZ: I'm Joe Kloberdanz, Regulatory Affairs Manager, San Diego Gas & Electric.

Mr. Chairman?

CHAIRMAN ROSENTHAL: Yes.

MR. KLOBERDANZ: My comments focus on the ex parte issue, Senate Bill 1125, and we are opposed to that bill as written. Many speakers before me have said very well many of the points I wanted to make, so I will be brief, and this will come across as summary, I suppose.

The CPUC does act as a quasi-legislative body in most of the proceedings and investigations it conducts, and that puts it in a very similar bailiwick to the Senate and the Assembly in ... (cross talking)

CHAIRMAN ROSENTHAL: Election.

MR. KLOBERDANZ: True. Give you that.

CHAIRMAN ROSENTHAL: Okay.

MR. KLOBERDANZ: Their ready access to significant information is critical to their

ability to arrive at fair and appropriate decisions, just as it is in the Legislature.

Senate Bill 1125 would inhibit the free flow of information, in my opinion.

CHAIRMAN ROSENTHAL: You mean you'd be afraid to divulge to somebody that you wanted to talk to somebody, to a commissioner about an issue?

MR. KLOBERDANZ: I think the extent to which the communications, under the present condition -- and I'll talk about that condition in just a moment -- that the extent of the need for those communications is extensive. And simply the need to document each and every contact, each and everything that might be construed as ex parte contact would have a chilling, hindering effect on the free flow of information. The point that I wanted to get at was that ...

CHAIRMAN ROSENTHAL: How?

MR. KLOBERDANZ: ... the commission in its regulation of five major industries involving literally hundreds of companies, it makes it impossible for five people, any five people no matter how good they are, to be familiar with the written or hearing record in every matter they must decide. It's simply impossible. I have observed them for 10 years, and in my experience I've seen their workload become larger and more complex as they sought to deregulate or re-regulate certain of the industries they're responsible for in the state.

You can often have multiple interpretations of what the facts in a written record mean. That's why we have such a large membership in our legal profession, I'm sure. The commission must be entitled to informal communications to round out its knowledge on these issues, in the time frames they have to deal with these issues.

CHAIRMAN ROSENTHAL: The bill does not disagree with that. The bill doesn't say that we're doing away with ex parte.

MR. KLOBERDANZ: No, it doesn't. But as I mentioned earlier, I believe that the bill would have a chilling effect on the extent to which what is termed ex parte communication needs to occur.

CHAIRMAN ROSENTHAL: I'm trying to understand. You don't want Southern California Gas to know that you spoke to a commmissioner about some particular issue that's relevant to both of you?

MR. KLOBERDANZ: That particular example causes me no concern, no. That's not what I'm getting at.

CHAIRMAN ROSENTHAL: Okay.

MR. KLOBERDANZ: I'm getting at the burden it places in particular on the commissioners and/or the people practicing before the commission.

As I said, I believe ...

CHAIRMAN ROSENTHAL: What about the ratepayer?

MR. KLOBERDANZ: The ratepayer is represented -- and I'm glad you mentioned that --

the ratepayers are represented by a number of advocacy groups, one of whom you heard from earlier today, TURN, well respected ...

CHAIRMAN ROSENTHAL: And they have a problem because you don't want to indicate that you spoke to a commissioner about something you happen to be interested in.

MR. KLOBERDANZ: They have that concern.

Another organization that represents the ratepayers is the Public Utilities Commission staff, Division of Ratepayer Advocates. Interestingly enough, the bill appears to exempt any of the commission staff.

CHAIRMAN ROSENTHAL: Maybe they should be included. I'm looking for a way to deal with a perception that, in fact, because you're able to talk to a commissioner, you're able to influence whatever the decision comes out of the commission. I'm not saying that that happens all the time. But I'm convinced -- you know, one of the things we did in the Legislature a number of years ago, and it's unrelated specifically. The Legislature looked at pharmacies that were owned by doctors, okay? and suggested that there's conflict of interest in a doctor owning a pharmacy, and removed that perception of impropriety. Now that was done because there was a perception that doctors, because they owned this pharmacy -- and there's legislation now trying to deal with doctors owning labs that are doing the testing -- that in fact consciously or unconsciously that you have something to gain by that particular entity that maybe they ought to be separated. More and more in the Legislature we're beginning to look at that kind of a concept which says that because of your size or because you've got some favorable benefit, you know, what took place? How did the independence that you deal with feel about whatever took place which wasn't part of a record in which they were not able to question? You see, if we had a situation of an appellate situation, maybe that wouldn't have the same concern. But attempting to go to the Supreme Court because you think that something -- first of all, they're not going to take the case, have never taken one, I'm not sure they're going to take one even though the trucking industry is going to proceed with it.

When I hear somebody say that they don't think that the subject matter ought to be open to the light of day, I begin to suspect that maybe they've got something they're trying to hide.

Now, tell me when I'm wrong. Give me some indication of why the Legislature shouldn't have that perception. And all I'm trying to do is to allow for an even playing field where anybody who has something to say, you know, just listen by the subject matter. I'm not saying to go into details, as some people have suggested. But if I see that you spoke to somebody on a certain docket and I'm able to question you at the hearing, tell me what you talked about, and you don't necessarily talk about something without presenting some piece of paper because nobody's going to remember

what you talked about. Why isn't that part of the record? I'm struggling to try to solve what is perceived to be an uneven playing field for people dealing in the same issues that you are because of your size, perhaps. Help me.

MR. KLOBERDANZ: I've never been a commissioner at the Public Utilities Commission, but I can presume that to the extent access is allowed to some parties in a case, access is allowed to all parties in a case who choose to approach the commissioner, advisors, staff, whatever.

CHAIRMAN ROSENTHAL: And I don't want to limit that access.

MR. KLOBERDANZ: And I'm not suggesting that it is. And you and I may disagree on the perception, and I think we each have a right to disagree with each other on that perception. My perception is that the commissioners do simply to the complexity of what they're doing and the sheer volume of issues they have to handle in the time frame they have to handle them need more of a free flow of information than is possible simply by their reviewing the record in every case or their relying on one source for a summary of that record. And that multiple sources, multiple views of what the facts suggest are necessary for them to come to the kinds of decisions they need to come to in the public interest. That's all I'm getting at.

If there is to be an ex parte regulation passed, it must cover all parties, and in particular I'm referring to the Public Utilities Commission staff who, under the laws drafted, the bill is drafted, are not included in this provision.

CHAIRMAN ROSENTHAL: Right now they have to lobby the commissioners like anybody else. And maybe they ought to be included as part of that same system, whatever is agreed upon. I don't have any bias in that respect. I'd just like to open up the process.

MR. KLOBERDANZ: My concern with doing that, with limiting the access even ...

CHAIRMAN ROSENTHAL: I don't want to limit the access.

MR. KLOBERDANZ: ... that the Public Utilities Commission staff has is that the commissioners need more information than they can get. (cross talking)

CHAIRMAN ROSENTHAL: I suggest to you that your argument leaves me to believe that we need this kind of a legislation, you see.

MR. KLOBERDANZ: Then I'll stop. (laughter)

CHAIRMAN ROSENTHAL: Well, but you know, we think people test too much. Is there something uncomfortable about not wanting to let anybody else know the subject matter that may be discussed before a commission, I don't want to limit it to ...

MR. KLOBERDANZ: Perhaps I've led you astray there. I have no fear of this kind of a law.

CHAIRMAN ROSENTHAL: Okay.

MR. KLOBERDANZ: You've asked for our input and I've come to give the input. My

concern is that it will hinder the process, not assist it.

CHAIRMAN ROSENTHAL: Okay. All right. The PUC appears to be attempting to move rapidly on a lot of things. As a matter of fact, I've suggested to Mr. Wilk on a number of occasions that in a number of situations where they've made decisions where the Legislature is out of session -- and in my opinion, on purpose, so that we didn't have an opportunity to respond -- that there ought to be a "wait until at least we're back in session." Decisions should not have been made on a number of issues in October and November merely because they want to beat us to making some comments about what they're doing. The PUC also has indicated to me that they really, in some instances, don't think that the Legislature should have oversight on whatever they do. Now, those kinds of things lead to this kind of legislation. Anyway, I'll get off this one.

MR. KLOBERDANZ: Those are all the comments I had. If there are any questions?

CHAIRMAN ROSENTHAL: Thank you. Okay, Mr. Hemphill, representative of Southern California Gas Company, Manager of State Regulatory Affairs.

MR. JOHN HEMPHILL: Good afternoon. I'm glad to be here to testify on behalf of Southern California Gas.

CHAIRMAN ROSENTHAL: I'm glad you're here, too.

MR. HEMPHILL: Thank you. Given this late hour, and the wealth of information, although it being confusing I must admit, that you've received today, I'm not sure there's much I can add. I don't feel like I'm really batting fourth, but rather that I'm in ninth position. I don't want you to think I'm complaining. I used to play baseball as a kid, and I usually batted ninth, but I think ... (cross talking)

CHAIRMAN ROSENTHAL: You're a designated hitter.

MR. HEMPHILL: I'm not sure I understand what you're trying to get at the truth here and I'm not sure that there is the truth in terms of a single answer. And I'm not sure, quite frankly, there's much I can add at this point in time. So let me just cut to the bottom line.

CHAIRMAN ROSENTHAL: Okay.

MR. HEMPHILL: SoCalGas essentially is opposed to SB 1125 primarily because we take the position that the commission does. We think the commission has the discretion, when necessary, to impose ex parte. Otherwise, at other times, on balance we believe there's benefits in having to encouraging the exchange of information. We realize it's a trade-off, but if you want to, you know, if you look at the bottom line, one of the critical points that a commission needs in making a decision is information, information, information. And we think any policy that inhibits the exchange of information -- and unfortunately, we believe this does, even though all it requires is reporting. We think it does have an inhibiting fact, and for that reason we oppose it.

CHAIRMAN ROSENTHAL: Do you deal with the FCC?

MR. HEMPHILL: No, we don't.

CHAIRMAN ROSENTHAL: No, you don't deal with the FCC. How about FERC?

MR. HEMPHILL: FERC is a -- we do. We are not parties directly in FERC activities, but indirectly through the interstate pipelines that supply us, we are parties to FERC settlements, and so on. And I think FERC is a good example of some of the problems that ex parte presents. If you're familiar at all with former FERC commissioner Charles Stalling's position with respect to ex parte, he was very, very concerned and went around stumping against the ex parte for the reasons that I mentioned, that what a commission needs to make an informed opinion is information. And I think that's why we oppose this bill.

CHAIRMAN ROSENTHAL: Yeah. And you don't think that they get the information out of a hearing process?

MR. HEMPHILL: Well, they certainly do. We are not at all suggesting that hearings shouldn't take place, and that hearings aren't an important part of the process, and a very important part of the process. But the fact of the matter is that the commission is not strictly a -- it's a body that combines both legislative-type activities as well as procedural legal-type activities. And I think you have to have both. We personally believe that if one went on-the-record we'd win every time. The problem is the record is not black and white, although it may be black type on white paper, the record is very ambiguous and there isn't a need for clarification.

Let me just make one additional point kind of as an aside. I do want to join with TURN on one issue. It sort of not really has to do directly with ex parte. But we do have a concern about perhaps the potential abuse of workshops as opposed to formal proceedings. We do believe there is a time and place for workshops, but we're becoming concerned that perhaps it may be overly used, and I would join TURN's comment with respect to that. I won't go so far as to say that there is not a place for workshops, but we think it needs to be considered carefully.

CHAIRMAN ROSENTHAL: Yeah, there needs to be a place where there's something on the record so that you can take a look at it.

MR. HEMPHILL: Correct.

CHAIRMAN ROSENTHAL: And perhaps better define what a workshop is or isn't.

MR. HEMPHILL: That is correct.

CHAIRMAN ROSENTHAL: Okay. Thank you. Mr. James Lehrer, the Law Department of Southern California Edison.

MR. JAMES M. LEHRER: Chairman Rosenthal, and members of the committee staff, Good Day. For the record, my name is James M. Lehrer. I am an attorney with Southern California Edison. I've represented the company for almost nine years in matters exclusively before the Public Utilities Commission. I have handled the company's last

two general rate cases. I've appeared in complaint proceedings, commission investigations, rulemakings, and workshops I might add. I hope that some of the perspectives that I bring will also help you in deciding where to go with this legislation. I appreciate the opportunity to present our opinion on Senate Bills 1125 and 1126. I'd also, at the end of my remarks, like to add a few comments with respect to appellate review of commission decisions and workshops of the commission, if I may.

Southern California Edison Company is fundamentally opposed in principle to ex parte rules, including the disclosure rule such as 1125. We believe that those procedures are not needed. PUC process, in our opinion, works well. It produces timely decisions that we believe are responsive to changing conditions, and sometimes rapidly changing conditions. And we believe it does afford due process for all parties. The PUC, as you've already heard, already has the authority to put ex parte rules into effect in cases in which those rules are appropriate.

CHAIRMAN ROSENTHAL: Did you support their position in the merger case?

MR. LEHRER: President Wilk indicated from his perspectives the reasons why the rule was implemented in the merger case.

CHAIRMAN ROSENTHAL: I mean, what was the opinion of Southern California Edison as it relates to that?

MR. LEHRER: I was not the attorney handling that matter ...

CHAIRMAN ROSENTHAL: Oh, okay.

MR. LEHRER: ... so I really don't know.

CHAIRMAN ROSENTHAL: You don't know whether the attorney just said, hurray, that's what should happen? (laughter)

MR. LEHRER: I believe there was a -- well, I just shouldn't speculate on it, Mr. Chairman.

CHAIRMAN ROSENTHAL: Okay. All right.

MR. LEHRER: But to go, we believe that an ex parte rule, such as 1125, would remove the flexibility that the commission now has and hamper it's ability to effectively process literally thousands of cases that come before it. We just don't think there's a need to apply it on a blanket basis.

I'm sure that the intent of the proposed ex parte rule, such as SB 1125, is to improve the regulatory process. But the real problem in my view, and this is going to sound strange coming from a member of the legal profession, is that it tends to overemphasize the legalistic adversarial aspects of the process. And in a time when the commission is trying harder than ever -- and I think with some success -- to make it a more inviting user friendly forum, if you will, for the average person on the street, laying on another layer of rules, particularly with those with criminal sanctions, sends the wrong signal. So we're not just concerned from Edison's

perspective, but from the perspective of the perceptions that everyone has about what it's like to go to the commission.

You've heard people indicate that the commission should have rules like this because courts have rules like this. But the PUC is not a court, and it was never intended to function as a court. The Legislature in its wisdom enacted Public Utilities Code Section 1701 which says that these strict rules of evidence won't apply at the commission. And I have seen the living proof of the wisdom of that decision every day in hearings when a member of the public wants to participate. I have seen administrative law judges and I've seen other counsel, both at the staff and other utilities and interveners, react with a welcoming attitude, if you will, and I haven't seen people treated in a manner that would tell them that they're not welcome in this forum.

CHAIRMAN ROSENTHAL: Were you here earlier when we heard testimony from individuals about how unfair they thought the process was?

MR. LEHRER: Well, yes, I have. And everybody's entitled to their opinion. Sometimes that opinion may be a result of the particular result that they got in a given case. But being there literally day after day for hundreds of hearing days, I have seen examples where people have come in literally off the street and wanted to participate or understand what was going on, and the people that were the more experienced, more sophisticated participants, including Edison, bent over backwards to make them welcome.

CHAIRMAN ROSENTHAL: Well, I'm sure that's true.

MR. LEHRER: An example of this would be the bill insert notices that were required by law to put in our bills when we're coming up on a hearing or when we've filed an application. I remember the days when those were pretty obscure. And in the past few years, I'm very happy to say, we have made a real effort to write those in a more understandable fashion. The public advisor's office, formed as a result of the Legislature's direction, has done an outstanding job in promoting that kind of open communication.

CHAIRMAN ROSENTHAL: Before the law was passed, did you support it?

MR. LEHRER: Did I support the concept of ...?

CHAIRMAN ROSENTHAL: Yeah, did Edison support the concept of that insert?

MR. LEHRER: Oh, the law about having the inserts at all has been there for a considerably long time, Mr. Chairman. (cross talking)

CHAIRMAN ROSENTHAL: I understand, you know ...

MR. LEHRER: The law didn't ...

CHAIRMAN ROSENTHAL: You know, one of the things that we find is that people object vociferously against any kind of a change. We resent change as human beings, but

somehow learn to live with it if it happens. And I'm sure that all the utilities opposed any suggestion that anything could go in that envelope except their own advertising. But somehow or other changes take place and we accommodate. Most people opposed the public advisor bill. Mostly all the utilities opposed it, okay? And that gave me something to understand that they really don't want the light of day on these things. They really don't want the average Joe to understand what's happening. And I find the same thing with these kinds of issues.

Now maybe the bills are not in the proper form, and I've suggested to everybody I'm willing to work with the commission, with the utilities. The average person out there thinks that you are robbing them. Understand what I'm saying? That you are over charging them for their utilities. Unhappy as hell. Somehow or other we need to change that perception. Talking about not a reality, but in many people's minds, perception becomes reality. And so when I hear the arguments that we shouldn't have to tell anybody else the subject matter of what we're talking about, I begin to wonder what is there to hide? I'm not suggesting -- there are others who said there shouldn't be an ex parte at all. That's not what I'm saying.

MR. LEHRER: Mr. Chairman, I agree with you with respect to the importance of perceptions.

CHAIRMAN ROSENTHAL: Okay.

MR. LEHRER: And what I'm getting at is that, from my perspective, from Edison's perspective, the perceptions of our customers and our ratepayers are very important to us.

CHAIRMAN ROSENTHAL: Okay.

MR. LEHRER: We have a very substantial number of people devoted to answering our customers' questions, to helping them understand. And I believe that if you talk to somebody in plain English ...

CHAIRMAN ROSENTHAL: You're doing your job in that respect, yes.

MR. LEHRER: ... again, it sounds strange coming from a lawyer ...

CHAIRMAN ROSENTHAL: Yes, no, I ...

MR. LEHRER: But when you talk to someone in plain English, you treat them with dignity, and you tell them what's on your mind, you communicate openly, then you may be able to perhaps change an enemy into a friend or to convince someone the merits of your position.

But getting back to perceptions, the perception of the commission as a forum which is open to all players and which the average person can participate in as well as anyone else, I think would be hampered by a blanket rule such as this because ...

CHAIRMAN ROSENTHAL: Okay.

MR. LEHRER: ... let me give you an example. If an individual wanted to telephone

a commissioner's advisor and just tell him what's on their mind or clarify a point or ask a question about the process, they would be required under this bill to disclose that. And the great bulk of people out there don't have the secretarial resources; they don't have xerox machines; they're not local to San Francisco; they don't understand the filing process; and on and on down the line. That's the crux of our concern.

I need to move on because ...

CHAIRMAN ROSENTHAL: Go ahead, yes, right.

MR. LEHRER: I realize that we're towards the end here.

CHAIRMAN ROSENTHAL: I've been kind of blowing off a little steam here, taking some of your time. Go ahead.

MR. LEHRER: Thank you, Mr. Chairman. I would just like to move on briefly to 1126.

CHAIRMAN ROSENTHAL: Okay.

MR. LEHRER: There's some important points that I'd like to make there. We believe that the public interest would be better served if ALJs are appointed by the PUC and remain under the control of the PUC. ALJs are generally appointed from within the ranks of the PUC staff. Most serve in supervisory or legal positions and they've had a lot of exposure to the regulatory process and to the policies and to the past decisions of the PUC. And that knowledge and that experience is absolutely invaluable.

Now, under the bill as written the PUC would still have the opportunity to input because they would be providing a list of candidates. However, the final decision about who would be working a particular case or who would be an ALJ at all would be made by someone who is, or an office, or an agency that is completely divorced from the process.

CHAIRMAN ROSENTHAL: Well, that is not the way the bill is going to be. In other words, I'm not moving it to another entity. I just -- I'd like to at least give the impression that the ALJ, based upon their input, makes a recommendation. Now, whether the commission likes it or doesn't like it, that's -- I don't have any problem with that. My concern -- you may have heard me express it before -- is that I am now convinced by a number of individuals who have spoken to me that some of the ALJs are now coming out with a decision based upon what that commissioner wanted to happen. Okay? Does that bother you?

MR. LEHRER: I'm not convinced, having listened to that testimony, Mr. Chairman, that that accurately describes the great bulk or really any part of the commission's process. I just, from my perspective, believe that it is a -- and again, I'm mostly in the area of ratemaking, I believe that it is a legislative function, and I very strongly support President Wilk's comments as to the role of the assigned commissioners

and ...

CHAIRMAN ROSENTHAL: Okay.

MR. LEHRER: ... the way that the decisions are handled. I would point out that the -- my understanding of the assigned commissioner process is that each assigned commissioners generally focused in an area that they either have some expertise in already or they develop some expertise as they go along, whether it be telecommunications or energy or a third party power producers. And that to me is something that facilitates getting the decisions through the PUC process effectively. And that's very important because I think timely decisions are in everyone's interest.

CHAIRMAN ROSENTHAL: Right.

MR. LEHRER: Speaking of timely ...

CHAIRMAN ROSENTHAL: Okay.

MR. LEHRER: I wanted to make a comment about the appellate review. I don't think it's appropriate to assume here that having an intermediate level of review will reduce the number of appeals. I think it will be just the opposite effect; it will increase the number of appeals. Once all the points and authorities and arguments have been drawn for an intermediate level court, it's a very simple matter if you don't get the answer you like there to simply slap on some new covers and submit the thing to the Supreme Court. So what you're doing, if you go that route, in my opinion, is just automatically increasing the time involved in the appellate process.

The reason that's important to Edison -- let me just give you an analogy. If your entire salary for the year were held in abeyance or put in question, you didn't know if you were going to be able to keep down the line, it would be very difficult for you or the average guy to plan his activities in the coming year. Now ...

CHAIRMAN ROSENTHAL: We're not suggesting that anything be held up.

MR. LEHRER: I understand that, but parties do, when they go to appeal, have the ability under various conditions ...

CHAIRMAN ROSENTHAL: Let's not hold it up. Let's after the fact make a decision, sometimes that the PUC does now.

MR. LEHRER: All right, but ...

CHAIRMAN ROSENTHAL: They don't hold up anything.

MR. LEHRER: Well, they do place the utilities revenues at risk because if the commission finds, or if the Supreme Court, let's say, found at the end of an appeal that the commission had incorrectly set rates, then the commission would have to go back and make an adjustment to those rates.

CHAIRMAN ROSENTHAL: They do it all the time. On every rate case, on every procedure. They do it all the time.

MR.LEHRER: But I ...

CHAIRMAN ROSENTHAL: Even determine, for example, and I thought it was kind of incorrect, even suggested retroactively that the gas companies should have paid a different price for gas sometime in the past. And penalized the company. I don't think that that's what should happen.

MR. LEHRER: Maybe I haven't been clear about the adjustments that I had in mind, Mr. Chairman. What you're speaking of are prospective adjustments that the commission makes on an annual basis in the energy cost proceedings, on a three-year basis in general rate cases and on an annual basis in cost of capital proceedings, and those are just to name a few of the regulatory proceedings ...

CHAIRMAN ROSENTHAL: I understand. I understand.

MR. LEHRER: ... that set rates and affect large amounts of money.

CHAIRMAN ROSENTHAL: Okay, so you don't think that the appellate approach is necessary. All right.

MR. LEHRER: Not the intermediate level, because it would be abused by parties who would hang up, if you will, the finality of a decision.

CHAIRMAN ROSENTHAL: Okay.

MR. LEHRER: And it's not in the public interest because the finality of decisions is very important so that the utilities can plan ...

CHAIRMAN ROSENTHAL: Yeah.

MR. LEHRER: ... and more effectively meet their obligation to serve.

CHAIRMAN ROSENTHAL: Right.

MR. LEHRER: Finally, just one brief remark with respect to workshops. I've participated in workshops and I've heard a few statements about what people's perceptions of them are. And I just think it would be helpful for you to know that the outcome of workshops does get in the record eventually. It gets in the record in the form of a summary. Whoever is presiding over it, be it an ALJ or a staffer, will make a presentation to the record, and then the parties all have the opportunity to make a statement or comment on that if they disagree that it hasn't been properly characterized. But we think there's a lot of value in workshops.

CHAIRMAN ROSENTHAL: Okay. Thank you very much, panel. We have at this point an opportunity for anybody who hasn't been on the panel who would like to make a two-minute statement in an open mike.

Mr. Pepper? Anybody else feels ...?

MR. ALAN L. PEPPER: Thank you, Senator Rosenthal. My name is Alan Pepper. I represent the Western Burglar & Fire Alarm Association. And we have been interested parties in telecommunications cases for approximately 20 years.

I just have three comments that I would like to make. First, we do support 1125 with a major exception; we do not believe you can exempt the CPUC staff from its

purview, and I will give you an example. In a recent proceeding ...

CHAIRMAN ROSENTHAL: Yeah, well, that's a fair comment ...

MR. PEPPER: Okay.

CHAIRMAN ROSENTHAL: ... and that's already been made and that would be part of the consideration.

MR. PEPPER: Thank you. I would like to make a second comment with regard to the hearing process. There is a proceeding before the California Public Utilities Commission now that deals with the cellular telephone industry. That entire proceeding has been done without hearing. It was done on comments and rebuttal comments in both Phase I and Phase II. It is a major issue before the commission. In order to expedite it and get it done quickly, the commission unilaterally determined that hearings were not necessary. We think that is an abuse of their power, and it is something that this body and your committee should address.

Finally, I really didn't find anything very disturbing about what anybody had to say in these proceedings until the gentlemen from the energy utilities had an opportunity to speak. All three of them have suggested that the hearing process is insufficient to provide the commissioners with the information they need to render a decision, which either means one of two things. Either they are incompetent to present their case during the hearings and feel that the only way they can make their point known is to walk the halls of the commission to get the information across; or the process itself is fundamentally flawed. I don't believe that is true.

Finally, we believe that 1125 does not go far enough. With respect to complaint cases, there should be no ex parte permitted, period. That's a pure judicial form. With respect to application cases, ex parte comments should be permitted through the hearing process, but should be cut off when the case is submitted for decision. At that point in time, neither the commissioners nor the ALJs should be receiving information off-the-record and ex parte as to how that decision should be rendered.

And I thank you for giving us the opportunity to speak.

CHAIRMAN ROSENTHAL: Thank you, Mr. Pepper. I want to thank those of you who have stayed to the end, who didn't have to do that, for this insightful hearing on a difficult issue. But it is the role of the Legislature, and of this committee specifically, to oversee the PUC and its process and its concept of fairness. I want to thank everybody for being here and staying to the end. Thank you very much.

APPENDICES

WRITTEN TESTIMONY SUBMITTED

TESTIMONY OF MICHAEL ASIMOW

PUBLIC UTILITIES COMMISSION: EX PARTE

CONTACTS AND ADMINISTRATIVE LAW JUDGES

Before Senate Committee on Energy and Public Utilities

December 15, 1989

My name is Michael Asimow. I am Professor of Law at UCLA Law School and have been engaged in teaching and writing about administrative law for many years.[1] I greatly appreciate the opportunity to make my views known on the issues before your Committee.

I am currently engaged as a consultant by the California Law Review Commission to prepare recommendations for a new California administrative procedure act that would cover all agencies, including the PUC. However, the Commission has not yet acted on my recommendations and the views expressed herein are my own, not necessarily those of the Commission.[2] In the course of my research, I have interviewed extensively at the PUC and

---

[1]My address is UCLA Law School, Los Angeles, CA 90024. My phone number is 213-825-1086. I recently published a law school casebook entitled STATE AND FEDERAL ADMINISTRATIVE LAW (West Pub. Co. 1989) with Professor Arthur Bonfield. This book contains discussion of both the ex parte issue (at pp. 163-75) and the ALJ issue (at pp 181-85).

[2]The first phase of my report, entitled "Administrative Adjudication: Structural Issues," was submitted to the Commission on Oct. 24, 1989 and is available from the Commission, 4000 Middlefield Road, Suite D-2, Palo Alto, CA 94303. The Commission's phone number is 415-494-1335. It contains discussion of the ALJ issues at p. 39-49. Discussion of the ex parte issue will be found in the next phase of my report to the Commission which has not yet been completed.

have discussed these issues with PUC staff, administrative law judges, and private practitioners.

I express qualified support SB 1125 on ex parte contacts. As to SB 1126, I support abolition of the assigned commissioner system, but I believe that the PUC's ALJs should not be moved to an independent agency.

1. Ex parte contacts. In my opinion, the existing practice whereby ex parte contacts are tolerated, even encouraged, in PUC on-the-record hearings is unacceptable and should be prohibited. I would prefer a bill that entirely prohibited such contacts in on-the-record ratemaking and other adjudicatory proceedings. SB 1125 does not go this far (in general it calls for disclosure of ex parte contacts rather than prohibiting them); nevertheless, I support it as a politically realistic fallback position. As for rulemaking, my own preference would be to impose no restrictions on oral ex parte contacts; again, I support the disclosure approach of SB 1125 as an expedient compromise.

a. Ex parte contacts in on-the-record proceedings: The PUC determines rates and many other matters relating to California public utilities by conducting on-the-record hearings. Typically, a PUC ALJ conducts detailed adjudicatory hearings that may last for weeks or months. The ALJ prepares a detailed proposed decision after hearing all these arguments and factual submissions. It offends generally accepted notions of fair play and substantial justice that all of this can be brought to naught by a few well chosen words whispered into the

ear of a commissioner. In addition, effective judicial review of a PUC order influenced by ex parte contact is impossible since the decisive facts and arguments may not be in the record that is available to the Supreme Court. Finally, the ex parte practice at the PUC breeds an attitude of cynicism in the minds of the public that PUC adjudicatory decisions are based more on politics and undue influence than on law and discretion exercised in the public interest.

In thinking about this issue, the place to start is with fundamentals: the applicable statute and due process under the federal and state constitutions. The PUC is required by statute to grant a hearing in cases involving rates and many other matters.[3] Even if the statute did not require a hearing, it is well settled that due process applies to individualized ratemaking for public utilities.[4] When an agency sets out to

---

[3] PU Code §728.

[4] Thus in the leading case of United States v. Florida East Coast Ry., 410 U.S. 224, 245-46 (1973), the Supreme Court distinguished generalized and individualized ratemaking: "...these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other...No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances..."

In Morgan v. United States, 298 U.S. 468, (1936), the Supreme Court said: "[Ratemaking] carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such...The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action..." This language (in part) was quoted in La Prade v. Dept. of Water & Power, 27 Cal.2d 47, 52, 162 P.2d 13 (1945).

determine matters relating to a specific utility, such as the value of its assets, its costs or a fair rate of return, it must provide notice, hearing, and an unbiased decisionmaker. If the agency acts through generalized rulemaking, such as a proceeding to establish a fair rate of return for utilities in general, due process does not apply.[5]

One essential element of a trial-type hearing--whether it is a hearing required by statute or one required by due process--is the exclusive record requirement: all of the factual inputs to the decisionmaker must come from the record made at the hearing. It is contrary to the fundamental norms of adjudication embodied in due process for the decisionmaker to receive factual inputs in a form that does not permit opposing parties to rebut them.[6] Even as to non-factual inputs, such as arguments over discretion and policy, it is contrary to due process for one party to make arguments to adjudicatory decisionmakers except in the course of a proceeding at which all parties are represented and can counteract those arguments.[7]

---

[5]United States v. Florida East Coast Ry., supra.

[6]See, e.g., English v. City of Long Beach, 35 Cal.2d 155, 217 P.2d 22 (1950); Safeway Stores, Inc. v. City of Burlingame, 170 Cal. App. 2d 637, 647-48, 339 P.2d 933 (1959). .

[7]In the famous New Jersey case of Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545 (N.J. 1954) the Court said: "That is why it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert."

In my view, profound constitutional issues are implicated by the long-term practice of the PUC not only to tolerate but even to encourage parties to approach adjudicatory decision-makers to make off-the-record submissions. I believe that the Supreme Court of California would set aside a PUC decision upon a showing that the decisionmakers had received such ex parte contacts.[8]

There is a long line of judicial decisions that condemn ex parte contacts (consisting either of factual submissions or arguments about policy).[9] Some of these decisions are based on

---

[8]See generally Alperin, "When Parties Talk to Adjudicators: Ex Parte Contacts in the Administrative Arena," 13 Public Law News 3 (Spring, 1989) (Public Law Section of State Bar).

[9]See, e.g., Prof. Air Traffic Controllers Org. (PATCO) v. FLRA, 685 F.2d 547 (D.C. Cir. 1982); Massachusetts Bay Telecasters v. FCC, 261 F.2d 55, 67 (D.C.Cir.1958) ("Improper influence, if established, going to the very core of the Commission's quasi-judicial powers is certainly critical"). In the PATCO case, supra, the court considered an ex parte contact by the leader of a union that was not a party to the case and that consisted solely of a policy argument (that a striking union should not be harshly punished). The court said: "We think it is a mockery of justice to even suggest that judges or other decisionmakers may be properly approached on the merits of a case during the pendency of an adjudication. Administrative and judicial adjudications are viable only so long as the integrity of the decisionmaking processes remains inviolate. There would be no way to protect the sanctity of adjudicatory processes if we were to condone direct attempts to influence decisionmakers through ex parte contacts." 685 F.2d at 570. A concurring judge used much stronger language. He said, among other pungent comments: "This court should not hesitate to allocate blame squarely where it belongs: at the doorstep of one acting as a judicial officer who, with a solemn responsibility to preserve both the fact and appearance of complete impartiality, first subjected himself to a palpable risk of contamination, and then made no effort to arrest forbidden advocacy when it came...Such remissness on the part of a powerful and highly-placed administrator deserves, by my estimate, a harsher verdict from this court than 'unfortunate.'" Id. at 598, 600.

constitutional law, some on statutory hearing requirements, some on the power of reviewing courts to supervise agencies, some based on administrative procedure acts, some based on the failure to follow agency rules. Numerous statutes ban ex parte contacts in adjudicatory proceedings, including public utility proceedings.[10] Even where no statutes apply, agency rules frequently prohibit ex parte contacts or at least require both oral and written comments to be placed on the record.[11] Finally, ethical guidelines applicable to attorneys prohibit them from making ex parte contacts to judges or judicial officers;[12] administrative adjudicators deserve no less respect.[13] All this reflects an impressive consensus of judges, legislators, agency rulemakers, and commentators: ex parte contacts are improper in an on-the-record proceeding.

---

[10]The general rule banning ex parte contacts in California is set forth in Government Code §11513.5. However, this rule only covers contacts with ALJs, not with agency heads and only applies to APA agencies (mostly licensing agencies, not including the PUC). The federal Administrative Procedure Act (APA) prohibits ex parte contacts at all levels (including decisional advisers) in both formal adjudication and formal rulemaking (it treats individualized ratemaking as the latter). 5 USC §557(d)(1). The Model State APA of 1981 specifically prohibits ex parte contact at the levels of both ALJ and agency heads. §4-213. The Model Act applies this rule to individualized ratemaking. §1-102(5) and Commissioner's Comment. The 1981 Model Act can be found in 14 Unif. Laws. Ann. 69 (1989 Supp).

[11]For example, the Federal Energy Regulatory Commission (FERC), the PUC's federal counterpart, absolutely prohibits ex parte contacts in on-the-record proceedings. 18 CFR §2201.

[12]California Rules of Professional Conduct, Rule 5-300(B).

[13]In an opinion rendered on an earlier version of this rule, the State Bar opined that ALJs and agency heads were judicial officers within the meaning of this rule. State Bar Formal Opinion 1984-82.

In my interviewing at the PUC, I found that the staff members to whom I spoke were deeply embarrassed by the PUC's ex parte practice. They felt that it demeaned the PUC and made a mockery of its hearing processes. The Commission has on several recent occasions banned ex parte contacts entirely in specific highly contentious adjudications and, according to my interviewing, this worked well and could easily serve as a model for all PUC adjudications.[14]

Another fundamental problem with ex parte contact at the PUC is the corrosive effect it has on the internal separation of functions that the PUC has adopted. In general, the staff is split into the Division of Ratepayer Advocates (DRA), whose members serve as advocates in cases, and the Commissioners' Advisory and Compliance Division (CACD), whose members serve as advisers rather than adversaries. Imagine the situation of a DRA attorney who is committed to a particular result in a pending case; he or she cannot approach the commissioners off-the-record. Yet the DRA's opponents (say, utility personnel) are free to approach the commissioners ex parte. This creates an amazing upside-down situation in which staff members have less access to the commissioners than outsiders. Thus, in sheer

---

[14]The fact that the PUC has itself prohibited ex parte contact in certain contentious adjudications must indicate that the PUC recognizes the impropriety of such contacts in adjudication generally. Such contacts may do even more harm in lower-visibility adjudications where the public is less involved, the issues are not as well developed, and decision-makers are more vulnerable to a well timed suggestion made off the record.

self defense, the DRA attorney may flout the PUC's separation of functions and make his or her own informal approach to a key commissioner. If the PUC wants separation of functions to work--and it is in the interests of everybody concerned with PUC adjudication that it should work--it should abandon its practice of tolerating ex parte contacts from either outsiders or from DRA.

The defenders of ex parte contact at the PUC make two basic arguments, both of which I reject.

First, they say that the commissioners are isolated from the realities of the utility industry and need ex parte contacts to obtain information to help them regulate properly. Of course, the Commissioners need information about the regulated industry and nobody favors placing them in an ivory tower. They can and should gather information and hear the views of anybody they want in the course of many regulatory functions, including planning and researching.[15]

However, when the commissioners set out to make the rates for a single utility through a structured adjudicatory decisionmaking process, they should be limited to on-the-record submissions. Anybody who wants to influence them with respect to that matter can do so by offering testimony at the hearing or submitting a brief. There is no need for the commissioners

---

[15]As explained below, I have reservations about restricting oral ex parte contacts about pending rulemaking proceedings, since I think that might well cut off commissioners from needed inputs with the regulated industry and the public.

to get their information or arguments in a form that does not allow other interested parties to know of these inputs and, if they wish, to rebut them. Instead, the process of adjudication is degraded if decisionmakers rely on untested submissions and arguments that may well be false, incomplete, irrelevant, or fallacious. Often, such inputs are submitted ex parte only because they could not survive testing through the adversary process.

The second rationale for ex parte contacts is that ratemaking is quasi-legislative and the norms applicable to legislation and rulemaking should apply rather than those applicable to adjudication. But this argument founders on one basic fact: the PUC is using (and under statute and constitution must use) adjudicatory processes to conduct individualized ratemaking. The fact that rates are made for the future does not convert the process into a quasi-legislative one; future effect is typical of a vast number of adjudicatory processes (such as issuance of a cease and desist order, issuance of a license, or approval of a reorganization plan). If the PUC made greater use of rulemaking to set policy, rather than adjudication, it could and should employ procedures appropriate to a quasi-legislative process; but if it proceeds via adjudication, it is not at liberty to depart from fundamental adjudicatory norms.

For the above reasons, I would personally favor prohibition of all oral and written ex parte contact in all PUC adjudication. SB 1125 does not go this far. It provides only

for disclosure of ex parte proceedings (except that it encourages the Commission to designate specific proceedings in which such contacts are prohibited entirely). I am particularly skeptical of whether the provision relating to disclosure of oral ex parte contacts is workable. The communicator is obligated to supply a written memo of his data and arguments; but it is far from clear whether this memo will accurately reflect the substance of the conversation that actually occurs.

While this bill does not go as far as I would prefer, it represents a politically realistic compromise and it should be adopted since the existence of a disclosure rule will have a major effect in deterring ex parte contacts.[16]

A few technical points: The bill should ban contact with decisionmakers (both Commissioners and ALJs) as well as with staff members who engage in advising these decisionmakers.[17]

The bill appropriately distinguishes contacts by people outside the Commission (which it regulates) from contacts by people inside the Commission (which it does not affect).[18] Contacts by staff members with decisionmakers present more sub-

---

[16]I hope that California will ultimately adopt an APA applicable to all agencies that contains a uniform ex parte rule--one that bans such contacts in on the record proceedings. However, until that day arrives, it would be better to have a provision like SB 1125 in place than to permit unchecked ex parte communication with PUC decisionmakers.

[17]The bill prohibits contacts with an "advisor to a commissioner." In fact it should cover contacts with the Commissioner's Advisory and Compliance Division (CACD) whose function is to furnish advice to the commissioners.

[18]Proposed PU Code §355(a).

tle problems than those presented by contacts from outsiders. In general, it is appropriate to restrict contacts between decisionmakers and staff members who have engaged in an adversary role in the particular case; but decisionmakers should be freely able to contact other, uninvolved staff members for guidance on law, policy, and interpretation (although not for factual submissions). This is generally referred to as "separation of functions" and has been informally adopted by the PUC when it separated its staff members into the Division of Ratepayer Advocates and the Commissioner's Advisory and Compliance Division.[19]

I would suggest some additional sanctions for the bill: the Commission should have discretion to adversely affect the interest of a party who has engaged in a prohibited contact.[20] The Commission should also have discretion to disqualify a decisionmaker who has received a forbidden communication and failed to report it in accordance with the requirements of the law.[21] Finally, reviewing courts should be instructed to set aside the decision of the agency if it is tainted by prohibited ex parte contact and, in the court's discretion, to order a new hearing.

---

[19]It would be desirable if this informal separation were specifically provided for in PUC rules so as to lock it in place. It is not clear that the present informal separation is always adhered to.

[20]Federal APA §557(d)(1)(D).

[21]Model State APA of 1981 §4-213(f).

I would also suggest that the Bill prohibit all ex parte communications (rather than simply require disclosure) until adoption of the rules provided for in proposed §355(a). That would stimulate prompt action by the Commission in adopting the regulations. Otherwise, substantial delay in adopting the rules might be anticipated.

b. Ex parte contacts in rulemaking: SB 1125 treats rulemaking and adjudication identically; thus it requires both written and oral ex parte communications to be disclosed. It is interesting that the rulemaking provisions of the California APA (as revised in 1979) do not limit oral ex parte contacts[22] but do apparently require the inclusion in the record of written ex parte communications and apparently prohibit the submission of such comments after the closing of the public comment period.[23] It seems anomalous to subject the PUC to more severe limitations on ex parte contact in rulemaking than are imposed on any other California agency.

---

[22]The 1981 Model State APA requires the inclusion in the rulemaking record of all written materials submitted to the agency, but it refrained from limiting or requiring disclosure of oral communications. §3-112(b)(3); §3-112, Comment. Similarly, Congress amended the federal APA to ban ex parte communications in formal adjudication and formal rulemaking, 5 U.S.C. §557(d)(1), but it did not ban them in informal rulemaking.

[23]Govt Code §11,347.3(a)(6) requires inclusion in the file of every rulemaking "All...written comments submitted to the agency in connection with the adoption, amendment or repeal of the regulation." The law also prohibits the agency from adding any material to the record of the rulemaking proceeding after the close of the public comment period, unless adequate provision is made for public comment on that matter. Govt Code §11346.8.

The idea of disclosure of ex parte communications in rulemaking traces back to Home Box Office, Inc. v. FCC, an important D.C. Circuit case which disapproved such communications.[24] The court in the Home Box Office case was disturbed by the possibility that the rule under review, which had been the subject of extensive ex parte contact, was probably the result of compromise among contending industry forces, rather than an exercise of the FCC's independent discretion. Thus the notice and comment procedure was in fact a sham; none of the important communications could be found in the record. This in turn made judicial review of the rule futile, since the real reasons for adoption of the rule were not to be found in the record.[25]

Subsequently, the Administrative Conference of the United States recommended that ex parte contacts in rulemaking not be banned but that written comments should be disclosed and the agencies should experiment with disclosure of oral comments. Later cases have indicated that the D.C. Circuit would no longer follow Home Box Office in ordinary rulemaking situations.[26] In Sierra Club v. Costle, the court stressed that agencies should be open to the needs and ideas of the public from whom their authority derives and upon whom their commands

---

[24]567 F.2d 9 (D.C.Cir. 1977), cert.den. 434 U.S. 829 (1977).

[25]The FCC has adopted a procedure very similar to that in SB 1125: disclosure of both oral and written ex parte comments. 47 CFR §1.1206.

[26]Sierra Club v. Costle, 657 F.2d 298 (D.C.Cir. 1981); Action for Children's Television v. FCC, 564 F.2d 458 (D.C.Cir. 1980).

must fall. Contacts that would be unacceptable in a judicial context may well be entirely appropriate in a legislative context.

In line with the Model Act, the California APA, the Administrative Conference recommendation, and the Sierra Club decision, I favor inclusion in the record of written ex parte communications. I think that it is unnecessary and probably counterproductive to limit oral ex parte communications. To do so would cut off the Commissioners too much from the regulated industry and from public interest groups. Rulemaking can and should be more informal, uninhibited, and political than adjudication, and there seems to be little harm in allowing free oral communication with the commissioners.

Nevertheless, SB 1125 seems a defensible compromise. By treating rulemaking and adjudication identically, the Bill has the advantage of avoiding any need to decide whether a particular hybrid proceeding is in fact adjudication or rulemaking.

The rulemaking provision of SB 1125 may well have some desirable effects. It probably will encourage people to submit written, rather than oral, comments on the rule. It may well limit the degree to which people with political influence over the commissioners can get together and negotiate the outcome of the rule. Therefore, it seems a reasonable call for the Bill to treat adjudication and rulemaking the same.

2. Administrative law judge independence. I believe the costs of shifting the PUC ALJs to the Office of Administrative Hearings (OAH) outweigh the benefits of doing so and therefore

I would oppose this measure. Instead, I strongly support the Bill's purpose in safeguarding ALJ independence; consequently, I would suggest that the bill be reformulated to eliminate the assigned commissioner system.

a. The assigned commissioner system. There has been a gradual evolution in the role of PUC ALJs. At an earlier time, they were mere hearing officers who presided over the reception of evidence but whose reports were not disclosed to the parties. The reports were simply viewed as the first draft of the ultimate PUC opinion which was then shaped internally by the staff and hearing officers working together.[27] Recent amendments to the Public Utilities Code have greatly enhanced the position of the ALJ whose decision is now a proposed decision which is disclosed to the parties and which becomes the focus of an appellate process at the level of the commissioners.[28]

Because the role of the ALJs has evolved in piecemeal fashion, there remain several vestiges of the former system. One feature is the assigned commissioner which I believe to be unique to the PUC. A commissioner is assigned to each ALJ to work with the ALJ in shaping the issues in the case, making

---

[27]See Lakusta, "Operations in an Agency Not Subject to the APA: Public Utilities Commission," 44 Cal. L. Rev. 218 (1956).

[28]PU Code §311(d). Equally fundamental was the separation of functions at the PUC between the Division of Ratepayer Advocates (DRA), who serve as advocates in the case, and the Commissioners' Advisory and Compliance Division (CACD), who serve an advisory rather than an adversary role.

procedural decisions, and in writing the proposed decision. I am told that this system works unevenly. Some ALJs resent it and will not work with the assigned commissioner nor negotiate their opinions. Other ALJs like the system and work smoothly with the commissioner. Some commissioners welcome the opportunity to play a role in important matters before they get to the commissioner level; other commissioners have little or no interest in involving themselves in cases at this preliminary stage.

The assigned commissioner system does have some advantages in terms of educating commissioners about pending cases and perhaps avoiding ALJ missteps that must be corrected later at greater cost. However, I believe that the system probably should be abandoned. It is a source of ALJ resentment; ALJs understandably want to be judges and to control their own cases without having to negotiate each step with a commissioner or, in particular, to negotiate the contents of their proposed decision. Moreover, it seems inappropriate for a single commissioner to have such great influence over pending cases when that commissioner's view may or may not be representative of that of his colleagues. Also, in light of the pervasive influence of ex parte contact at the PUC, one wonders whether the assigned commissioner system functions as a conduit for transmitting the views of some of the parties to the ALJ. I also question whether immersion in the nuts and bolts of cases at the ALJ level is an intelligent use of a commissioner's time.

Thus in my view it is time to eliminate the outmoded assigned commissioner system. If that occurred, I believe that many of the problems that trouble proponents of SB 1126 might well be solved.

b. ALJ involvement in writing Commission decisions. Another unique feature of PUC adjudication is that ALJs often play a role in shaping the final decision of the Commission. Again, I believe this is a vestige of the former system in which the Commission's decision was a purely institutional product which the entire staff, including hearing officers and staff advocates, participated in preparing.

Good arguments can be raised in favor of and against ALJ involvement in commission opinion writing. In favor of the practice is the ALJ's intimate knowledge of the hearing record. This can mean a substantial time saving in preparation of the decision since less staff time needs to be invested in learning the record; the ALJ already knows what is in there. More importantly, since the ALJ has lived with a particular case, often for months, he or she can contribute greatly to fashioning a final decision that reflects the evidence taken in the case. Several ALJs I spoke to thought that this provided a highly desirable counterweight to the inevitably political inclinations of the commissioners and to offsetting the influence of ex parte contacts.

However, good arguments can be made in the other direction. An ALJ naturally has the desire to protect his or her own work product. This commitment to maintaining the proposed

decision may cause the ALJ to press the Commission to affirm that decision. Thus the ALJ may, very much like DRA, not be able to approach the process of issuing the final decision with an open mind. Consequently, it might be wise to preclude ALJ involvement in the process, just as the PUC now informally precludes DRA involvement.[29]

My feeling is that ALJ involvement with PUC final decision preparation is valuable, particularly in the existing environment in which decisionmaking is tainted by ex parte contact. It would be less significant if ex parte contacts were banned. Nevertheless, it is important to realize that PUC cases generate vast records that may be inaccessible to anybody who did not sit through the hearing; and it is also important to realize that PUC final decisions often involve exceptionally difficult exercises of prediction and of discretion and are vitally important both to the utilities and to the public. Consequently, I conclude that ALJ participation in final decision preparation is an important resource that should be preserved, even if ex parte contacts are banned. SB 1126, shifting ALJs outside the PUC, would probably inhibit or even prohibit ALJs from taking any role in PUC decisionmaking after the proposed decision is prepared. For that reason, I am inclined to oppose the Bill.

---

[29]The 1981 MSAPA prohibits ALJ involvement with decisionmakers at subsequent stages of the proceeding. §4-213(a).

c. ALJ attitudes. In preparing my report for the Law Revision Commission, I undertook a survey of PUC ALJs about whether they would like to be shifted to an independent agency. Because ALJs have always been at the forefront of the movement toward making ALJs independent of the agencies for which they decide cases, I expected that the ALJs would overwhelmingly support such a change. Much to my surprise, the vote was quite close: 7 strongly supported the idea and 3 supported it; 2 were neutral; 2 opposed it and 6 strongly opposed it. Thus the PUC judges supported the idea of independence by the rather narrow margin of 10 to 8.[30] This does not reflect the sort of pervasive dissatisfaction with the present system that would justify such an important structural change.

d. Other costs and benefits of SB 1126. I see the benefits of SB 1126 as rather slight. The reality is that PUC ALJs are independent in their decisions and attitudes. I seriously doubt that they will actually decide cases any differently if they are rehoused. Still, to the outside world, it may well appear that ALJs situated outside the PUC are more independent of PUC influence than they would be inside because their career path could not be affected by their decisions.

Creating an appearance of impartiality is an advantage, but it is not compelling in the PUC context. The other agencies who must obtain ALJs from OAH are prosecutorial; they are

---

[30]The response rate was excellent. 20 of the 29 judges responded or 69%.

mostly licensing agencies, engaged in professional discipline. A few non-licensing agencies (FEHC, FPPC) also use OAH ALJs, but they also have prosecutorial functions. There is a real need, of course, for independent ALJs when the agency is essentially engaged in prosecution of wrongdoing. In such cases, it seems clear that the functions of prosecution and adjudication are inconsistent.

However, the PUC is seldom engaged in punishing wrongdoing (although a relatively small part of its caseload does concern complaints against utilities). Mostly, its hearings relate to the setting of rates and conditions of service in the future. There is not the same need for an appearance of impartiality when an agency's work consists purely of economic regulation rather than prosecution or discipline.

There are some significant disadvantages of rehousing the ALJs outside the PUC.

First, it would appear that the ALJs would find it much more difficult to call on PUC staff for assistance. At present, ALJs often call upon staff members who are not adversaries in a particular case for help in understanding difficult evidence problems or in understanding prior precedents (but not to add facts to the record). This is a wholly appropriate thing for an ALJ to do, particularly in light of the difficulty of the cases and the enormous litigating resources that utilities can bring to bear.[31] But it seems unlikely that such consulta-

---

[31]See 1981 MSAPA §4-214(a) which prohibits adversaries in a case from advising a presiding officer. Just as the commissioners can consult CACD in rendering their decision, an ALJ should be able to do so too. In responding to my questionnaire, several PUC judges mentioned as a reason for opposing independence the loss of access to PUC staff to help them in

tions can occur freely once the ALJs are working for a different agency.

Second, it would appear that ALJs would find it impossible to work collaboratively with the commissioners in drafting the final opinion. Since I regard this collaboration as a good thing (as discussed above), it would, I think, be regrettable if it were not possible.[32]

A third disadvantage may be that non-lawyers could no longer serve as PUC ALJs. I recognize that SB 1126 preserves the jobs of the existing non-lawyer ALJs,[33] but it seems unlikely that new non-attorney ALJs would be hired by the very lawyer-oriented OAH. Yet my understanding is that non-attorney ALJs are very valuable to the PUC in certain types of technical cases.

Thus I conclude that the case for transferring ALJs from the PUC to OAH simply has not been made. The only significant advantage of making the shift would be to get rid of the assigned commissioner system, but that can be done without actually shifting the ALJs. Otherwise, the costs of the Bill seem to outweigh the benefits.

---

their decisionmaking.

[32]Again, several judges mentioned this factor in answering my questionnaire.

[33]Proposed Govt Code §11,370.6(e).

CALIFORNIA TRUCKING ASSOCIATION

TESTIMONY OF CALIFORNIA TRUCKING ASSOCIATION

BEFORE THE SENATE ENERGY AND PUBLIC UTILITIES COMMITTEE

Herschel Rosenthal, Chairman

Interim Hearing on PUC Process Proposals -- Ex Parte
and Administrative Law Judge Reform: SB 1125 and SB 1126

December 15, 1989

Barbara Eastes, Director
Legislative Affairs
CALIFORNIA TRUCKING ASSOCIATION

SANTA FE SPRINGS, CALIFORNIA 90670
12631 EAST IMPERIAL HWY, #C, STE 109
(213) 868-9454

GENERAL OFFICE
WEST SACRAMENTO, CALIFORNIA 95691
1251 BEACON BOULEVARD
(916) 373-3500

HAYWARD, CALIFORNIA 94545
24301 SOUTHLAND DRIVE, SUITE 309
(415) 783-3870

TO: Barb Eastes DATE: 12/11/89

FROM: Luke Sherwood LS

RE: Due Process and Evidentiary Problems in General Freight Case

A. The major due process problems in the general freight case:

1. The CPUC made a decision changing its regulations without serving the decision on the affected regulated companies. Trucking companies were not even given a digest or executive summary.

2. Seventy-nine regulated motor carriers were denied the right to be heard on the proposals for change in the general freight case. They have the absolute right to notice and hearing under PU Code Section 1708. These carriers made a written request to participate in the hearings. Their requests were denied.

3. There have been no hearings on the changes contained in D. 89-10-039. The notice of hearing did not put forth any proposals for change which could be addressed by interested parties.

4. The CPUC incorporated evidence from outside the record in making its final decision in the case.

5. The regulations adopted by the Commission violates numerous sections of the Public Utilities Code. Regulated companies are not protected from liability for breaking the law, even when they do so pursuant to CPUC permission.

B. Findings of Fact which do not comport with the law or the evidence in the case:

Finding #

41 The argument that a "workably competitive" market exists for trucking services is not supported by the record.

58 Finding 58 states that the "variable cost" floor is reasonable for ratemaking purposes. This finding has no basis in the record; in fact, evidence is incorporated from outside the record for purposes of making this finding. The cost methodology established in the order has no relevance to the way costs are calculated, and makes current rates either too high or too low.

64 The CPUC dodges the question of destructive competition. The record is clear that destructive competition exists in the interstate trucking market, and did exist in California between 1980 and 1986 when Calfornia had similarly deregulated.

71 One of the main features of the regulatory program is open entry. The Commission totally ignores its role as the only state agency with the power and expertise to regulate capacity of for-hire trucking.

75 Finding 75 says that the CPUC is adopting sufficient safeguards against discriminatory pricing practices. In fact, the decision places further pressure on carriers to discriminate by allowing lower rates to those shippers already enjoying the most beneficial deals. The fact remains that carriers must make up losses somewhere. Large, powerful shippers will continue to get the best deals, while smaller shippers will foot the bill.

83 The CPUC tries to make a blanket finding that rates within its new "zone of reasonableness" will be reasonable. Rates which do not cover the total cost of service are unlawful, and therefore unreasonable.

88 Conflicts with Finding 33. Finding 88 says that data used in the TFCI (from outside the record of the case) are reasonable for establishing variable cost floors. The finding itself violates the law because it incorporates evidence from outside the record. Finding 33 says that the TFCI is not reasonable for adjusting rates.

92 Finding 92 directly contradicts the record by saying the variable cost floor will not compromise safety. By encouraging rate reductions to come out of wage payments, the variable cost system directly affects safety in an adverse way.

94 The CPUC tries to establish a ten-day notice period for common carrier rate filings. This violates Public Utilities Code Section 491. In addition, the CPUC transportation staff has said there is no way it can administer to rate filings with a ten-day notice period.

GOOD MORNING. MY NAME IS BARBARA EASTES. I AM DIRECTOR OF LEGISLATIVE AFFAIRS FOR THE 2500-MEMBER CALIFORNIA TRUCKING ASSOCIATION. OUR MEMBERS, WHO ARE PRIMARILY FOR-HIRE INTRA-STATE TRUCKING COMPANIES, TRANSPORT APPROXIMATELY 80% OF ALL PRODUCTS GROWN OR MANUFACTURED IN CALIFORNIA.

WE ARE PLEASED THE COMMITTEE IS HOLDING THIS HEARING TODAY TO REVIEW THE ADMINISTRATIVE PROCEDURES OF THE PUBLIC UTILITIES COMMISSION AND TO EXPLORE ALTERNATIVE PROCEDURES TO CORRECT PROBLEMS WHICH CURRENTLY EXIST AT THE COMMISSION.

WE HAVE BEEN ASKED BY THE COMMITTEE TO COMMENT ON PROPOSED LEGISLATION CONCERNING EX PARTE COMMUNICATIONS, AND SUGGESTED JURISDICTIONAL CHANGES CONCERNING PUC ADMINISTRATIVE LAW JUDGES.

EX PARTE COMMUNICATIONS

OUR ASSOCIATION AND OTHER TRUCKING CONCERNS MEET REGULARLY WITH THE COMMISSION AND ITS STAFF, BOTH INFORMALLY ON GENERAL POLICY AND LEGISLATIVE ISSUES AND FORMALLY ON VARIOUS RATE AND ENFORCEMENT PROCEEDINGS. TO DATE, WE HAVE NOT EXPERIENCED SERI-OUS PROBLEMS WITH ACCESS TO THE COMMISSIONERS OR THE COMMISSION STAFF. WE BELIEVE IT IS IMPERATIVE TO PRESERVE FREE, UNIMPEDED ACCESS TO THE COMMISSION. WE HAVE HISTORICALLY OPPOSED EFFORTS TO ADOPT OVERLY-BROAD EX PARTE COMMUNICATIONS RULES AT THE COM-MISSION. THE PUC HAS BOTH QUASI-LEGISLATIVE AND QUASI-JUDICIAL FUNCTIONS. THERE EXISTS AN ABSOLUTE RIGHT TO MAINTAIN AN OPEN LINE BETWEEN THE PUBLIC AND THE COMMISSION, WHEN THEY ACT IN A QUASI-LEGISLATIVE FUNCTION. IT IS OUR OPINION THAT AN EX PARTE COMMUNICATION RULE IN ANY QUASI-LEGISLATIVE FUNCTION WILL SEVERELY ABRIDGE OUR CONSTITUTIONAL RIGHT TO ADDRESS GOVERNMENT.

ADMINISTRATIVE LAW JUDGES

TODAY, THE PUC IS AUTHORIZED TO EMPLOY ITS OWN ADMINISTRATIVE LAW JUDGES (ALJs) WHO ARE UNDER THE DIRECT CONTROL OF THE COMMISSION. HOWEVER, FOR MOST GOVERNMENTAL AGENCIES, THE OFFICE OF ADMINISTRATIVE HEARINGS OF THE DEPARTMENT OF GENERAL SERVICES EMPLOYS THE ALJs, AND THEN ASSIGNS THE ALJs TO VARIOUS STATE AGENCIES AS NEEDED. JUDGES ASSIGNED BY GENERAL SERVICES ARE UNENCUMBERED IN THEIR EFFORTS TO DEVELOP FACTS AND FINDINGS THROUGH EVIDENTIARY PROCEEDINGS. WE BELIEVE THE PUC's ALJs, WHO ARE EMPLOYEES OF THE COMMISSION, DO NOT HAVE THE SAME DEGREE OF AUTONOMY TO FULLY DEVELOP THE RECORD AND MAKE FINDINGS OF FACTS BASED ON THE RECORD, AS TEMPORARILY ASSIGNED ALJs.

AN EXAMPLE OF THE PROBLEM OCCURRED IN THE RECENT GENERAL FREIGHT DECISION. THE PUC-EMPLOYED ALJ OPENED THE PROCEDING, TELLING THE PARTIES HE HAD BEEN ORDERED BY THE ASSIGNED COMMISSIONER TO HAVE THE HEARING WRAPPED UP WITHIN TWO MONTHS. THE ALJ PRESCRIBED TIME SCHEDULES, WHICH DID NOT ALLOW FOR DISCOVERY OF EVIDENCE, AND HE SUPPRESSED SUBPOENAS WHICH WOULD HAVE COMPELLED DISCOVERY. AFTER ISSUING HIS FIRST PROPOSED DECISION FOR PUBLIC COMMENTS, THE ALJ REWROTE THE DECISION FOR COMMISSIONER'S EYES ONLY. THEN, A SUBSTITUTE ALJ WAS ASSIGNED TO THE PROCEEDING. NO FURTHER HEARINGS WERE HELD AND NO PUBLIC REVIEW OR COMMENT WAS ALLOWED ON THE REVISED DECISION. THE FINAL ORDER ADOPTED BY THE COMMISSION ON OCTOBER 12 CONTAINED 195 FINDINGS OF FACT OF WHICH OVER 100 WERE NOT SUPPORTED BY THE RECORD. (SEE CTA APPLICATION FOR REHEARING AND STAY OF DECISION NO. 89-10-039 WITH POLICY STATEMENT AND POINTS OF AUTHORITIES, NOVEMBER 1, 1989).

IT IS DIFFICULT FOR THE COMMISSION TO ARGUE ITS JUDGE ACTED INDEPENDENTLY WHEN THE ALJ REPEATEDLY SAID HE WAS RECEIVING DIRECTION FROM THE ASSIGNED COMMISSIONER.

WHILE THE PUC COMMISSIONERS CAN ALTER A PROPOSED ALJ DECISION, THEY MUST STILL BASE THEIR DECISION ON FINDINGS OF FACT DEVELOPED IN THE RECORD. IT IS OUR BELIEF THAT IF ALJs ARE TRULY INDEPENDENT, THEY WOULD BE FREE TO MORE FULLY DEVELOP THE PUBLIC INTEREST, AND IT WOULD BE MORE DIFFICULT FOR UNSUPPORTED FINDINGS TO BECOME PART OF THE FINAL DECISION.

WE ARE ALSO CONCERNED ABOUT ADEQUATE DUE PROCESS DURING HEARINGS AND INVESTIGATIONS. AGAIN, IN THE RECENT GENERAL FREIGHT CASE, A NUMBER OF REGULATED TRUCKERS WERE TOLD THAT THEY COULD NOT TESTIFY DESPITE NUMEROUS OBJECTIONS BY AFFECTED PARTIES. IN ALL PROBABILITY, THIS ACTIVITY WOULD NOT HAVE BEEN TOLERATED OR ALLOWED IN ADMINISTRATIVE PROCEEDINGS UNDER THE JURISDICTION OF THE OFFICE OF ADMINISTRATIVE HEARINGS OF THE DEPARTMENT OF GENERAL SERVICES.

IN SUMMARY, WE BELIEVE THAT IMPOSING EX PARTE COMMUNICATION RULES ON THE COMMISSION AND ITS STAFF IN QUASI-LEGISLATIVE FUNCTIONS WILL ABRIDGE ACCESS TO A GOVERNMENTAL CONCERN WHICH MUST BE OPEN TO THE PUBLIC. WE BELIEVE THAT TRANSFERRING THE ALJs AWAY FROM THE CONTROL OF THE COMMISSION WILL ENABLE A TRUE RECORD TO BE FULLY DEVELOPED IN PROCEEDINGS FREE OF POLITICAL PRESSURES FROM WITHIN THE COMMISSION.

WE WOULD LIKE TO THANK THE COMMITTEE FOR THE OPPORTUNITY TO PARTICIPATE IN THIS HEARING TODAY AND LOOK FORWARD TO WORKING ON THESE ISSUES IN 1990.

CALIFORNIA LEGISLATURE
SENATE COMMITTEE ON ENERGY
AND PUBLIC UTILITIES

LOS ANGELES HEARINGS ON
PUBLIC UTILITIES COMMISSION
PROCESS AND PROCEDURES

STATEMENT OF
CALIFORNIA MOVING AND STORAGE ASSOCIATION

My name is Douglas Hill and I am the President of California Moving and Storage Association ("CMSA"). CMSA is a statewide association with membership of approximately 600 entities and including over one-half of the active carriers holding permits issued by the Public Utilities Commission ("PUC") and authorizing the transportation of used household goods.

Household goods carriers have been regulated by the PUC for approximately fifty years. Since 1951, the statutory framework for PUC regulation has been found exclusively in the Household Goods Carriers Act (Sections 5101 et seq. of the Public Utilities Code). In 1989, this Act was significantly amended by SB 210 which was carried by Senator Russell and signed by the Governor in August. CMSA has represented the household goods carrier industry for all of the years this industry has been regulated.

CMSA appreciates the opportunity to offer comments to this Committee on the fairness of the PUC process. With all due respect to the Commissioners of that Commission, it is the belief of CMSA that in their zeal to effect regulatory change, particularly in the area of economic regulation, the Commission has simply lost its sense of fairness and justice toward the transportation industry it regulates. CMSA's belief should come as no surprise to the PUC

because it is the specific subject of a pleading filed by CMSA last month.

Briefly, the circumstances raised in that pleading are as follows: In November of 1988 CMSA filed a petition requesting that the Commission increase rates to reflect increased costs of labor, workers compensation premiums, FICA (Social Security) taxes, and fuel. It had been three years since these increased costs had been reflected in the rates. CMSA's petition was consolidated with other issues in an ongoing proceeding and in January of 1989, a prehearing conference was scheduled to determine the timetable for the presentation of evidence for consideration by the Commission. One of the Commissioners appeared at that prehearing conference and stated that he expected the imminent issuance of a broad-scale investigation of the household goods industry and that he would make a "fair and balanced" decision whether to hold hearings in the rate increase case or further delay hearings in view of the anticipated investigation. Four months later, and after an exchange of correspondence, the investigation order still had not issued and the so-called "fair and balanced" decision was made by the Commission to hold hearings to present evidence in the rate increase proceedings. These hearings were held during several days in July and October and were completed on October 31, 1989 except for some possible rebuttal by the Commission staff.

Then, three days later the Commission issued its investigation order and, in doing so, it ordered the rate increase and other related issues of that proceeding to be suspended and held in abeyance pending the disposition of the investigation which even the Commission doesn't

expect to be resolved until year-end 1990. It cost CMSA approximately $100,000 in attorney and consultant fees, witness expense, studies, and other costs during 1989 to prepare and present evidence and participate in extensive hearings. It is believed considerably more than that was expended out of Transportation Rate Fund Fees by the Commission staff. All of this now appears wasted by an unjust and inequitable order of the Commission which, in effect, is telling the carrier industry, after the fact, that after you've spent your time, money, and energy, and we knowingly allowed this to occur, we will not decide the issues which were the subject of those extensive hearings. CMSA has told the Commission, in writing, that we view its action as a very serious injustice and inequity and we feel very strongly that this is true. Should the Committee wish to review the pleading which CMSA has filed with the Commission and sets forth the circumstances of this injustice in more detail, I have brought some extra copies here to the hearing room. CMSA members are incensed with what the Commission has done.

In addition to the recent and apparent lack of fairness in its process, CMSA also has significant concern with the lack of enforcement by the PUC against unlicensed carriers and even those few licensed carriers who choose to violate the law to the detriment of consumers and the licensed carriers with which they compete. The number of unlicensed carriers holding out household goods services in this state is staggering and the PUC is doing virtually nothing to enforce the law. What results is a frightening number of individuals providing service to the public with no cargo insurance, perhaps no personal injury and property damage insurance, no workers compensation, no

taxes or fees to pay, inadequate equipment, unskilled labor, and a host of other deficiencies to the detriment of the California consumer and the legitimate licensed moving firm. The PUC's lack of effective action in the area of enforcement is truly shocking.

The procedural handling of the current investigation of the household goods industry (I. 89-11-003) is also a matter of significant concern at the present time. This is a major investigation and it should be conducted in a deliberate manner giving interested parties a reasonable opportunity to fully participate. The possibility of this investigation was made public in January but the Commission itself delayed its issuance for ten months. Now there is evidence that the investigation will be pushed to hearing and decision quickly and perhaps with continuous hearings, without interruption, over several weeks or months. No party except the Commission's Division of Ratepayers Advocates will be able to participate if such a continuous schedule is ordered. CMSA's own counsel of 15 years has told us he will be unable to meet a continuous hearing schedule over several weeks or months and will probably be forced to withdraw his representation of CMSA. Yet this concern is very real; it is precisely what happened in the general freight investigation conducted by the Commission during late 1988 and early 1989.

Regarding SB 1125 and SB 1126 presently before the Committee for consideration, CMSA supports both bills.

Regarding SB 1125, CMSA has not made it a practice to engage in ex parte communication. If it foregoes such communications, it does not want persons with divergent views to influence the Commission

or individual Commissioners by a communication of which it is unaware. CMSA would be very pleased if the Commission abided by the first sentence of the Legislative purpose of SB 1125.

> "The Public Utilities Commission is required by law to confine its decisions to the official record of a proceeding."

However, in proposed Section 355(a) of SB 1125, a "member of the Commission's staff" is to be excluded from the ex parte disclosure rules. While it is clear that immediate staff members must be consulted by Commissioners without disclosure requirements, CMSA does have concern that active adversary advocates, such as Division of Ratepayer Advocate personnel might gain the ear of a Commissioner without public awareness and CMSA sees no reason why an active adversary staff member should not be subject to the same disclosure rules as any other participant in a Commission proceeding.

CMSA also supports SB 1126. In the past two years there have been two alarming trends of the present Commission, particularly in major cases involving transportation policy. The first is that the ultimate disposition of a proceeding appears predetermined by the Commission prior to the receipt of evidence and a Judge appears to be selected to simply prepare the decision the Commission wants. CMSA hopes it does not have that situation in the present investigation of household goods where a newly appointed judge, who is still listed in the current PUC telephone directory as a member of the Division of Ratepayer Advocates, has been assigned to hear the case. This individual has never heard a transportation case to my knowledge and may not of even have conducted a prior hearing.

The second trend is that an ALJ hears the evidence and prepares a proposed decision but, rather than being filed and made immediately public, it is "circulated" - sometimes for weeks and even months. During this process, the proposed decision sometimes is modified so it bears little resemblance to the original decision the Judge wrote.

SB 1126 would considerably lessen the pressure upon ALJ's to conform to the current whim or political tendencies of the Commission and decisions could properly be prepared by the tryer of fact based upon the evidence of record and this decision could then be made public without the specific consent or approval of the Commission or a Commissioner. This is necessary for a fair PUC process.

SB 1125 and SB 1126 also lead to another subject raised in the invitation to comment. Access to the court system to review decisions or other actions of the PUC is so restricted it is virtually nonexistent, particularly in transportation related matters. CMSA would support legislation which would allow appeal to the Court of Appeal rather than the sole reliance at present of a discretionary Petition For Writ of Review to the California Supreme Court.

With regard to household goods transportation generally, it is CMSA's view that the Legislature recodified and amended the statutes applicable to this form of transportation in 1989 and the legislation, SB 210, will become effective on January 1. We believe the Commission is mandated to comply with the law. Yet, judging by the text of the investigation order it issued just last month, it appears that the Commission is soliciting proposals for regulatory change that would be completely contrary to the new law that passed through this Legislature without a "nay" vote just a few months ago. CMSA really cannot comprehend this action of the Commission and would like the

opportunity to keep this Committee abreast of developments in connection with this investigation.

CALIFORNIA LEGISLATURE
SENATE COMMITTEE ON ENERGY
AND PUBLIC UTILITIES

LOS ANGELES HEARINGS ON
PUBLIC UTILITIES COMMISSION
PROCESS AND PROCEDURES

COMMENTS OF
CALIFORNIA CARRIERS ASSOCIATION
AND
CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION

My name is Larry Farrens and I offer these comments on behalf of the California Carriers Association ("CCA") of which I am Executive Vice President, and the California Dump Truck Owners Association ("CDTOA"). CCA/CDTOA are statewide associations whose membership consist of both overlying and underlying carriers of dump truck commodities and, combined, the membership of these associations totals approximately 1,600 carriers regulated by the Public Utilities Commission.

I welcome the opportunity to offer comments to this Committee on the fairness of the PUC process and upon SB 1125 and SB 1126, both of which are before your Committee for consideration. The associations which I am representing today are significantly concerned with the PUC process and the inability of the PUC to keep the system of regulation mandated by the governing statutes reasonably current.

For instance, the dump truck carrier industry has been engaged in so-called reregulation proceedings since April, 1985. In 1986, after extensive hearings, the PUC issued its Decision 86-08-030 which adopted various cost gathering methodologies to be used for the gathering of costs upon which to premise dump truck rates. However, except for some preliminary cost gathering work done in 1987, no real effort has been made by the PUC staff to gather current costs to update the dump truck tariffs. The industry has recently completed hearings which were conducted to provide the information for issuance of new dump truck tariffs. But unless the Commission staff gather the costs under the methodologies established in 1986, the industry will see further unconscionable delays in the issuance of the tariffs. To the best of my knowledge, the PUC staff has not even commenced, let alone completed, dump truck studies approved in 1986.

As an outsider, it appears that the Commission is almost completely avoiding the performance of work which would further economic regulation of dump truck carriers in the manner contemplated by the statutes. The dump truck industry pays Transportation Rate Fund Fees which would allow the assignment of several Transportation Division employees dedicated to performance of the work necessary to regulate this industry. The PUC, however, has assigned no such persons and because of staffing levels, retirements, transfers, and the failure to rehire or retrain employees, experienced and capable persons are now almost extinct in the Transportation Division. We need dedicated, capable people in the PUC's Transportation Division to perform the work necessary to regulate this industry. That staff is not available at the present time. We would request that this subject matter be of concern to this Committee. How, in fact, are Transportation Rate Fund Fees paid by this industry being spent?

The dump truck industry supports the intent of SB 1126. Except in very rare instances, the Administrative Law Judge is the only decision-making individual who hears the evidence and has complete knowledge of the record. Consistent with present Section 311(d), the ALJ should prepare, file and serve the Proposed Decision upon the parties within the time frame specified. However, there is an alarming trend in the last year or so whereby the ALJ's decision, as written, does not become public but rather it is circulated to select Commissioners or their staff and modified, sometimes significantly, before it is seen by affected parties.

In our view, SB 1126 would remove the ALJ's from the direct control of the Commission and decrease the apparent need of some of these ALJ's to conform to the politics of a Commissioner on any particular issue rather than decide the case on the record as presented. However, in Line 19, of Page 4 of SB 1126, CCA/CDTOA would suggest that the permissive word "may" be replaced with the mandatory word "shall". A fair PUC process requires that the ALJ's Proposed Report be made public without interference by the Commission. Obviously, the Commission would still retain the ultimate power to adopt, reject, alter, or amend the Proposed Decision.

CCA/CDTOA also support SB 1125. Ex parte communication should not be permitted without disclosure because all too often the rights of parties are severely prejudiced by such communications. Both the occurrence and subject matter of ex parte communications must be disclosed for a fair PUC process.

However, in reviewing SB 1125 (Section 355(a)), we see that a "member of the Commission's staff", would not be subject to the disclosure rules. The dump truck industry has some problem with the exclusion of members of the Commission staff who are active advocates in proceedings. There are individuals, one in particular comes to mind, who are transferred back and forth between the Commission's Transportation Division and its Division of Ratepayer Advocate and who actively advocate against the interests of dump truck carriers. I would suggest that SB 1125 make members of the Commission staff who are active advocates in any particular proceeding to be subject to the same ex parte communication disclosure rules as all other parties.

CCA/CDTOA are, generally, very concerned with the objectivity of the PUC in proceedings involving the dump truck industry. We would be most pleased if the PUC were required to conform to the first line of SB 1125:

> "The Public Utilities Commission is required by law to confine its decisions to the official record of a proceeding."

We are not privileged with sufficient information to determine precisely how PUC decisions affecting our industry are made but there is a growing belief that these decisions are being made to reflect predetermined policy and with only such regard for the record as would support these policies.

This latter comment also raises another subject matter contained in your invitation to comment-access to the court system. The only appeal to PUC decision is a discretionary appeal to the California Supreme Court. Unfortunately, that Court is simply too busy to have mush concern with trucking cases involving the PUC process and the access is purely discretionary. The dump truck industry would support legislation that would provide reasonable access to an intermediate court of appeal and really believe this is necessary for some check and balance on the activities of the PUC.

STATEMENT OF
AMERICAN TELEPHONE AND TELEPHONE COMPANY
BEFORE
SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES

PUBLIC UTILITIES COMMISSION PROCESS PROPOSALS-
EX PARTE AND ADMINISTRATIVE LAW JUDGE REFORM: SB 1125 AND SB 1126
DECEMBER 15, 1989

I am Robert B. Stechert and I am Government Affairs Vice President for American Telephone and Telegraph Company. I am pleased to have this opportunity to express AT&T's views regarding the proceedings and processes employed by the California Public Utilities Commission in its conduct of regulatory proceedings.

My prepared statement will be brief, however, I will gladly answer questions you may have concerning AT&T's views on any issues attendant to the subject at hand.

AT&T generally believes the existing processes and procedures employed by the Commission in its conduct of regulatory proceedings afford parties due process and offer a full and fair opportunity for all interested parties, including the public to participate. Indeed, some Commission procedures could be streamlined without sacrificing due process and fairness. For example, the Commission's December, 1988 Decision granting AT&T a limited degree of pricing flexibility was adopted after nearly three years of proceedings, which encompassed innumerable filings, motions and several weeks of evidentiary hearings before an administrative law judge. Although the proceedings were fair and deliberative, the process of reaching a decision was cumbersome and plodding. AT&T believes such non-adjudicatory, general policy proceedings might be more efficiently conducted as "paper proceedings" without the need for evidentiary hearings before an administrative law judge. Such arrangements have been successfully adopted by the Federal Communications Commission and their proceedings have been streamlined and expedited without adverse consequences to the interest of participants or the public.

With respect to specific pending proposals for process and procedure reform, I have been asked to address SB 1125 and SB 1126.

SB 1125

Access to the Commission staff and Commissioners by parties and the public is important to informed Commission decision-making. The Commissioners and staff should not be insulated from information sources, which illuminate issues thereby permitting well reasoned decisions that best serve the public interest.

Existing arrangements, which allow the Commission to adopt specific ex parte rules, designed to limit or restrict contacts on a case by case basis, have been generally effective. AT&T is unaware of ex parte abuses that would warrant generic legislative restrictions concerning ex parte communications. However, if legislation is adopted, it should curtail ex parte contacts in adjudicatory proceedings, but not in the exercise of the Commission's legislative role. Moreover, ex parte contacts should be permitted even in adjudicatory proceedings, if such communications are disclosed and memorialized in the public record.

SB 1126

This bill would remove administrative law judges from the direct employment of the Public Utilities Commission. The current system has served California well for many years and AT&T is unaware of problems that would warrant a change. The existing system permits close working relationships between the administrative law judges, who are delegated authority to hear evidence in specific proceedings, and the Commissioners, who must ultimately render decisions in the proceedings. Such arrangements are appropriate particularly where the Commission is exercising its legislative function and adopting generally applicable prospective rules or policies.

Thank you for the opportunity to express AT&T's views. I would be pleased to answer any questions.

ALAN J. GARDNER
VICE PRESIDENT, REGULATORY AFFAIRS, CCTA
LEGISLATIVE TESTIMONY
SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES

December 15, 1989

Thank you for the invitation to appear here today. CCTA also wishes to generally extend its appreciation to the members of the Senate and Assembly who are concerned about the issues we raised before the CPUC, and who supported or inquired about our concerns.

CCTA's interest in the future is for a workable regulatory structure, where parties have a full opportunity to be heard, know when others are making contacts, have effective protection against cross-subsidies and anticompetitive behavior by the dominant local exchange carriers, and have an effective opportunity to appeal a ruling if we believe it does not reflect the evidentiary record.

CCTA's recent experience in the Phase II proceeding offers both hope and concern for the future. CCTA's interest in the proceeding generated out of the larger local exchange telephone companies' national campaign over the last two years to posture themselves as a necessary competitor for cable, while in many cases objecting to competition for their own intraLATA services.

However, the only service which Pacific Bell's, and virtually all telephone companies,' existing networks cannot provide is the full motion video signal which is the cable television signal.

CCTA's concern in the Phase II proceeding was Pac Bell's original proposal to push $740,000,000 in fiber optic upgrades into its network, within six years, with $400,000,000 in the first four years, $100,000,000 of which was to be in distribution plant. Pac Bell also asked for a ruling favoring fiber installation, without regard to whether it was cost effective or safe, i.e. fiber unlike copper cannot carry power and will not function in a power outage unless separate power is provided.

Since the existing network could pass Pac Bell's signals, including new futuristic services such as ATT's new ISDN up to 18,000 feet from a central office without any change in plant, CCTA was concerned that Pac Bell was simply using this proposal to put in a new network, which was not necessary for any current telephone services, as a means to cross-subsidize their way into the cable television business.

CCTA's concern was independently reinforced, after the Final Order came out, by two studies, one by Rand Corporation and the

other by Carnegie Mellon, copies of which we are providing for the record. These were released in November and early October respectively. Both indicated that the only way a telephone company could make money in the cable television business was by cross-subsidy.

The CPUC's Proposed Order in August, while providing for unbundling of building block services to provide a more level playing field for some competitors, really did not effectively deal with CCTA's concerns. The Proposed Order could have been used by Pac Bell to make a massive investment in fiber optic cable to the home without Commission review and regardless of whether it would be cost effective. It also did not have any effective oversight or reporting requirements concerning cross-subsidization and anticompetitive conduct.

After much work in the interim by a coalition of 1,000 California businesses, members of this Legislature and the CPUC's Commissioners and staff who were accessible to hear our concerns, the CPUC's October 12, 1989 Final Order in Phase II issued as a truly landmark decision.

The CPUC decided there was a need to make the lengthy rate making

process more efficient and so completely changed the manner in which the dominant local exchange carriers will be regulated in the State of California. The Final Order eliminated the general rate case and substituted a new regulatory framework. This had the effect of discontinuing the traditional opportunity for parties who had rate or other competitive or cross-subsidy concerns to use the general rate case to raise their issues before the Commission.

The Final Order dealt with this loss by calling for a new continuing docket to hear about problems, and a series of workshops to determine and develop standards that will be necessary on an ongoing basis to monitor the local exchange companies with respect to costs, anticompetitive behavior, and other matters. The Commission's request for comment on how that process should proceed is due today and we are making a filing there (a copy of which we will submit for the record here). The successful completion of this workshop process resulting in a clear set of guidelines and reports, and the provision of adequate CPUC enforcement staff will be fundamental to the success of the new framework.

The Final Order recognized and balanced the Telcos push to fiber the network with our concerns that such investment be cost

effective and properly allocated by permitting fibering of the backbone network out through feeder cable and:

Defining feeder cable, even though that definition is not yet final, we anticipate it will be workable.

Requiring prior investment review for all fiber optic installations beyond feeder cable, except for small trials or where the customer pays for the line.

Requiring a determination of cost effectiveness by the CPUC of fiber beyond feeder or for traditional telephone service.

Adopting the FCC's Part 64 Procedures and Pac Bell's FCC cost manual and by outlining a nine point cross-subsidy monitoring and enforcement program which is to be fleshed out in the workshops, as discussed above.

It is only after these workshops are formatted and begin that we will be able to tell whether the process will be effective in providing a good monitoring program. Clearly the Commission has given a tone and thrust which is appropriate. However, until we see the result we will not know whether or not it will work.

CCTA expects to be a continuing participant in the process, particularly in view of the aforementioned telephone companies' massive coordinated push to enter into the cable television industry. We need to make sure that if and when Telco entry occurs it is based on each company's real cost of doing business and not something that the Telcos subsidized by monopoly ratepayers. We must remember that this level field is critical because ANY Regional Bell Operating Company's annual revenues are about one and one-half times the total revenue of the entire cable television industry.

To this end we do have comments with respect to specific legislation, some proposed here and other ideas which we have heard about, which we think might impact the future regulatory process.

First, with respect to SB 1125, while CCTA could live with that process if it was enacted, we do not really think such a detailed process and reporting requirement is necessary. We believe the fundamental interest of groups seeking to have their voices heard at any regulatory agency is to know that others are doing the same thing, and see a copy of any documents submitted or used during such a contact. Therefore, since people who are participating would undoubtedly understand the timing and

necessity of raising particular issues, what is really important is to simply know that a contact has occurred and have any new documents available for review. If there was a requirement to have a contact list and new documents available for review at a location within the Commission by noon of the next business day, we think that would be enough. For people concerned about lobbying expenses, those are already reported elsewhere.

With respect to that aspect of SB 1126 which relates to ALJs, we understand how the sometimes close relationship with Commissioners or their staff can raise this concern. However, since some relationship may be appropriate there does not appear to be any clear solutions as yet. We suggest this is an area where more review is probably necessary before any firm conclusions should be reached.

Perhaps more important than the ALJ issue is one idea not expressed in these two Bills that would give effect to the intent of SB 1126 by helping to insure decisions are based on the existing evidentiary rules. This idea is to permit an appeal as a matter of right to the appellate courts of the State of California. There currently is no effective appeal, except to the Legislature. By providing for intermediate appeal, which is

available in other states, then to the extent that there is any question about the basis for a CPUC decision, the decision would need to stand on the evidentiary record.

Our next area of concern is whether the Commission's compliance division (CACD) and audit staff have sufficient resources to manage under the new framework. We believe that the success or failure of this framework depends first on the responsible action of the regulated parties not overloading the new process as Pac Bell just did in its first compliance filing under the new framework to set the rate floor for January 1, 1990; second, on completing and putting in place an adequate monitoring program; and third, the ability of the Commission to have and use its resources to manage the process.

We suggest that while it may be a little bit early to see what's going to happen with the workshops and monitoring process, it is not too early to start thinking about what additional resources the Commission will need in the two aforementioned areas, including, perhaps, a new independent audit staff charged with after the fact review to insure dominant carrier compliance with the to-be-adopted rules.

Thank you again for the opportunity to appear here and I would be pleased to answer any questions.

BAY AREA TELEPORT
1141 Harbor Bay Parkway
Suite 101
Alameda, California 94501
(415) 769-5300

TESTIMONY OF JOHN AYERS
PRESIDENT, BAY AREA TELEPORT
CALIFORNIA SENATE COMMITTEE ON ENERGY & PUBLIC UTILITIES
INTERIM HEARING
DECEMBER 15, 1989
LOS ANGELES

Senator Rosenthal and members of the Committee, I am John Ayers, President of Bay Area Teleport (BAT) in Alameda, California. I want to thank the Committee for inviting me to share BAT's views on the matters of process and procedure at the California Public Utilities Commission.

BAT is a frequent participant in matters which come before the CPUC. We are acutely aware of the importance of the commission's decisions, not only because of the effect on our business and the industry in general, but indeed on the overall condition of the California economy.

It is for that reason that we commend the Committee for endeavoring to determine the proper level of oversight of the CPUC and to make whatever changes will ensure fairness in the Commission's decision making. Your consideration is even more important because of the Commission's announced intention to conduct increasing amounts of its business by rulemaking and other more informal processes.

I'd like to focus my remarks on SB 1125 and SB 1126, but before I do, let me state that in no way is what I say a reflection on individuals serving on the CPUC or working at the staff level, past or present. I want to talk about structure, process, and fairness -- not personalities.

SB 1125

As you know, Senator Rosenthal, BAT has supported SB 1125 since the bill was introduced. We still do.

We do not oppose *ex parte* contacts. However, we do believe that a record of informal, off-the-record exchanges -- of who said what to whom, and when -- must be created.

The CPUC's business should be conducted in the open, with all parties having an opportunity to know the information -- and sources of information -- on which Commission bases its decisions. Given the millions of dollars which the Commission's decisions entail, and the stakes for both competitive and more heavily regulated companies, it seems to us that fairness and equity are best ensured when business is conducted in the full light of day. That is why we support your bill and its specific requirement that *ex parte* contacts be reported in a timely manner.

However, I'm well aware of the pressures which are on the Commissioners and staff to process the tremendous volume of information which is poured on them by parties to various proceedings, and the pressure to render judgments which are informed by facts from the real world.

The traditional opposition to implementation of *ex parte* rules of any sort has come from the Commission and large regulated utilities. Barriers to *ex parte* contacts were seen as a roadblock to the free exchange of information on complex issues. This was especially true in the past, when the Advisory and Compliance Division (CACD) was not available to advise the Commissioners and ALJs directly. With adequate funding and staffing, CACD can and should be lifting this burden of technical information processing from CPUC decision makers.

The Legislature should enact SB 1125.

SB 1126

The internal pressures at the CPUC that I spoke of earlier -- largely arising from the combination of vast amounts of information and the need to render decisions in a timely manner -- are particularly acute with regard to Administrative Law Judges in the performance of their duties. These pressures are intensified by political or personal forces that are inevitably present within public agencies like the CPUC.

Procedures which insulate the ALJ from these pressures should be considered. Though it subjects them to inevitable pressures, we do not believe that location of the ALJs within the CPUC inherently compromises their decision making. The ALJ's function is to sift through information so as to inform Commissioners' actions. The ALJ is not an independent judicial figure, but serves to augment the duties of the Commissioners themselves.

Removal of the ALJs to another agency would certainly isolate them from some of the informal pressures which come along with the job, but I am afraid the effect of this action might be little more than a new set of pressures. Combined with the ALJ's isolation from the frequent, routine, and proper contact with the Commission's advisory and compliance staff, I believe this reform might be more trouble than it's worth. That is why BAT cannot support SB 1126 in its current form.

A better approach would be to insulate the ALJ from improper influence in another, more efficient way: to strengthen existing law which requires the ALJ to adhere to strict evidentiary and legal standards in the rendering of a decision. Section 1705 of the Public Utilities Code states:

> Except for decisions filed for hearings held under Section 1702.1, the decision shall contain separately stated findings of fact and conclusions of law by the Commission on all issues material to the order or decision.

I propose that "findings of fact" should be carefully defined by the Legislature so that these findings are based on substantial evidence for which the Commission has allowed an opportunity for cross-examination. No amount of internal or political pressure should sway an ALJ from adhering to these legal requirements, and the strengthening of these requirements is, I believe, a more appropriate and efficient focus for the Legislature to take. As is the case for *ex parte* rules, the need for such substantial evidence requirements is heightened as the CPUC embarks on a course of telecommunications regulation which relies on more informal procedures than in the past.

Recommendation for New Legislation

Bay Area Teleport will work closely with the Committee to move SB 1125 and a substantial evidence bill, because we believe that immediate steps need to be taken to ensure fairness in the CPUC's decision making. However, I want to close by recommending a means by which the Committee can take an important step toward improving the Commission's processes.

CPUC decisions are, for all practical purposes, final, and are subject to no meaningful judicial review. The State Constitution allows for appeals of CPUC decisions only to the Supreme Court with no intermediate review allowed by a Court of Appeal.

Since 1987, two legislative attempts have been made to rectify this situation: AB 4237 (Hauser) in 1987 and AB 338 (Floyd) in 1989. Despite the origins of these bills (the Select Committee on Internal Procedures, appointed by Chief Justice Lucas to identify ways in which the Supreme Court's workload could be lightened) and support from the Judicial Council (which makes recommendations to the Legislature and adopts the California Rules of Court), these bills were stalled in committee.

The Supreme Court's workload and the highly technical nature of CPUC cases ensure that virtually no utilities case of major significance brought before it can be heard. Even with *ex parte* rules in place, and even if a means can be found

to insulate ALJs from informal pressures, BAT believes the Committee's agenda with regard to CPUC reforms will be incomplete unless it also includes a guarantee that Commission decisions are subject to meaningful judicial review.

Conclusion

To sum up, BAT:

...supports SB 1125 in its present form because, while we recognize the value of informal and off-the-record contacts at the CPUC, we also believe that a record of contacts, and the substance of those contacts, must be maintained -- especially in an increasingly informal environment of telecommunications regulation;

...believes that SB 1126 is a far less effective means of insulating ALJs from improper influence than new legislation which strengthens existing law with regard to the evidentiary and factual bases for CPUC decisions;

...and urges the Legislature to enact legislation to allow for meaningful court review of CPUC decisions.

Thank you for your consideration of our views. We look forward to working with the member of the Committee and staff in charting a course for necessary reform of CPUC processes. I will be happy to answer any questions you may have.

COMMENTS OF THE

WESTERN BURGLAR & FIRE ALARM ASSOCIATION

My name is Alan L. Pepper, I am an attorney with the law firm of Gold, Marks, Ring and Pepper. I am here on behalf of the Western Burglar & Fire Alarm Association which is a non-profit trade association of security companies in California. These companies are significant users of various telephone services, and the Association has been an active participant in many of the telephone companies rate cases over the past twenty years, and some of its individual members, as well as the association, have been complainants in various cases brought before the CPUC.

We are very concerned about the issue of ex parte contacts with Administrative Law Judges and Commissioners made by any party in certain types of proceedings or during certain phases of proceedings.

Our members are located throughout the state and most are small companies. They have neither the financial resources or the close proximity to the Commission to "work the halls" of the Commission. Their opportunities for personal contact with the Commissioners, ALJs and Staff are significantly less than those afforded the utilities.

I would like to address the issues separately as it may apply to Administrative Law Judges and Commissioners, speaking first to the ALJs.

Although it may be argued that Commissioners have a triple identity, administrative, legislative and judicial, the same can not be said for ALJ's whose function is solely judicial. It is in appropriate to permit most ex parte contacts with ALJ's who are presiding over a contested application or any complaint proceeding. Ex parte contacts should be limited to administrative and procedural matters that have no adversarial impact.

We have no problem with a utility or the Staff contacting an ALJ to answer questions or provide immaterial additional information for an application that is uncontested. However, once a matter of any type is contested or interested parties make an appearance to participate in the proceeding, it is imperative that all such contacts be documented and reported to the parties. Pleadings, applications, etc. cannot be amended ex parte. Clearly, once a matter has been submitted for decision, there should be virtually no contact with the ALJ.

You might ask if the ALJ has a question or needs clarification of an issue in order to facilitate the writing of the decision should the ALJ be permitted to contact a party. In

theory the answer should be no. The parties and the ALJ are bound by the record, the question should have asked during hearings. However, if you elect to permit such contacts they must be done with the utmost discretion, and be fully disclosed so that other parties may properly react to the question and the answer.

The issue of ex parte contacts with Commissioners is not substantially different. They are the ultimate judge in all CPUC proceedings, and their decision making processes should not be encumbered or tainted by ex parte contacts.

Again minor contacts as to procedure or administrative issues are not inappropriate. However, once a proceeding is at issue and is contested by the parties, contacts of a substantive nature must be avoided. This should apply with equal force to the utilities, the DRA and the interested parties or intervenors.

The question of contacts with the Commission staff by ALJ's or Commissioners requires separate consideration. The DRA is often a party in an application or complaint proceeding, and should have not greater access to the ALJ or Commissioners than any other party.

The CACD is generally not a named party in the proceeding, but often acts as one, and certainly adopts positions and

opinions that may be adverse to those expressed by either the utilities or intervenors. If the CACD is called upon by ALJs or the Commissioners to provide ex parte information or opinions regarding proceedings the parties are prejudiced. The parties have been denied an opportunity to test, contest or challenge the information being proffered by the CACD. One hears stories of the Staff being asked to review and "fine tune" proposed decisions. Such a process is wrong so long as the CACD is permitted to offer opinions on policy. If the ALJs need assistance in preparing a decision it should come from a staff position that reports solely to the ALJ, similar to a law clerk for a judge.

We appreciate the fact that this body is reviewing this issue, it is important to develop a process that will maintain the integrity of the decision making process; and we thank you for the opportunity to be heard.