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Report by GGU and UC Berkeley Faculty Finds CPUC ex parte Rules Unusual and Needing Reform

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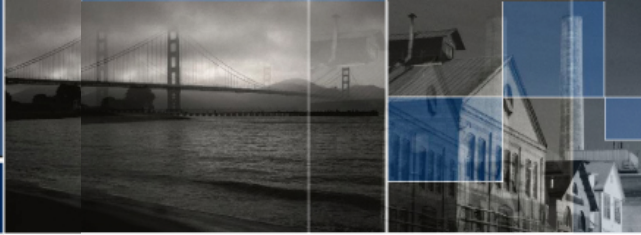
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REPORT BY GGU AND UC BERKELEY FACULTY FINDS CPUC EX PARTE RULES UNUSUAL AND NEEDING REFORM

Posted on [January 20, 2015](#) by [alanramo](#)

By GGU Assoc. Prof. Deborah Behles

The California Public Utilities Commission (CPUC) has an unusual way of doing business. Most state and federal regulatory agencies prohibit private, closed-door discussions with interested parties about contested matters (ex parte communications). The CPUC largely does not even though it makes decisions affecting the welfare of Californians and the disposition of billions of dollars. To the contrary, most commissioners and their advisors encourage such private meetings in all but the most judicial, “adjudicatory” cases. These ex parte conversations occur in proceedings that may have had many elements of a traditional judicial process including formal testimony, discovery, evidentiary hearings, and pleadings. The agency’s procedures and process is intended to ensure fair treatment for all effected parties, and the ultimate decision is required to be based solely on the public record in the proceeding. Nonetheless, interested parties communicate with decision-makers by phone and email, and socialize with those same decision-makers conferences and retreats.

This way of doing business has become awkward for the agency in the last few months, as stories have surfaced about various discussions of substantive issues in pending proceedings. In some instances, even the existing rules would have prohibited the conversations. In others, the rules allow them, but public notice should have been provided. As the revelations continue to mount, state and federal law enforcement agencies are investigating, legislation is being considered, and the CPUC is trying to figure out what changes in its protocols are in order.

University of California Berkeley School of Law Lecturer in Residence Steven Weissman and I have released a new study, which compares California’s ex parte rules with the rules for other similar state and federal agencies. This report shows how the CPUC’s approach is at odds with the way other similar entities do business. Most other regulatory bodies in California must adhere to the California Administrative Act, which prohibits decision-makers from communicating with interested parties about pending contested proceedings. The Federal Energy Regulatory Commission – the closest parallel on the federal level to the CPUC – bans such communications in all but notice-and-comment rulemaking proceedings. With the exception of one state in our study, New York, the other states examined employed restrictions similar to FERC. New York has no formal rules, but several of the commissioners impose ex parte restrictions on themselves and parties anyway.

The recent problems in California involve not only communications that are prohibited in most other jurisdictions – they also involve instances where the existing rules are violated. One factor likely contributing to these violations relates to another way in which the CPUC’s approach is an outlier. In the majority of other entities we studied, the ban applies to the public official, and the public official is obligated to report violations of the ban. In contrast, at the CPUC, the ex parte rules apply only to parties, and parties must report on private communications, appropriate or otherwise. The CPUC also prohibits parties from reporting on anything a commissioner or other decision-maker might have said during the private communication. One obvious fix would be to put the responsibility on the decision-makers, as it is just about everywhere else studied in our analysis.

Our report compares various components of ex parte rules in different jurisdictions and recommends changes to the CPUC’s rules to restore public

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confidence in the process. The problems are both statutory and rule-based. An ultimate solution may involve legislation, although the CPUC could adopt many of the recommended changes voluntarily.

The report is available [here](#).

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