

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). Even though it makes decisions affecting the welfare of Californians and the disposition of billions of dollars, the CPUC does not discourage ex parte meetings - to the contrary, most commissioners and their advisors encourage such meetings in all but those proceedings with the most judicial process, the, "adjudicatory" cases. The allowed ex parte conversations occur in proceedings that also have many elements of a traditional judicial process including formal testimony, discovery, evidentiary hearings, and pleadings. The agency's procedures and process are 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, lobbyists of various stripes regularly work the hallways at the CPUC, communicate with decision-makers by phone and email, and socialize with those same decision-makers at all-expenses-paid conferences and retreats.

This way of doing business has become awkward for the agency in the last few months, as stories have surfaced about inappropriate emails, vacation-home conversations over cocktails, and various discussions over lunch - all involving substantive issues in pending proceedings. In some instances, even the existing rules would have prohibited the conversations. In others, the rules allow them, but the required public notice of the discussion and content was not provided. In all instances, the conversations that took place seem to violate the prevailing understanding of ethical conduct. These revelations have led to the dismissal of at least three utility vice presidents and the reassignment of the CPUC president's chief of staff. They also were closely followed by the CPUC president's retirement announcement.

As the revelations continue to mount, state and federal law enforcement agencies are investigating, legislation is being drafted, the utility in question faces heavy penalties, and the CPUC is trying to figure out what changes in its protocols are in order. The new CPUC president was quoted in California Energy Markets as saying that the improper communications were "troubling and very painful to read." How should the agency revise its approach to closed-door communications related to contested proceedings? What, if anything, should the legislature do?

Golden Gate University Law School Associate Professor Deborah Behles 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 rules are at odds with the way just about everyone else does 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), all of the other states we looked at employed similar restrictions. New York has no formal rules, but several of the commissioners impose ex parte restrictions on themselves and parties anyway. In addition, there currently is a call to apply the state’s administrative procedures act to the New York commission. That act also imposes restrictions similar to those in other states.

The recent problems in California involve not only communications that are prohibited in most other jurisdictions – they also involve instances where the Commission’s existing rules were violated. One of the factors no doubt 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 on any violation of the ban. In contrast, at the CPUC, the ex parte rules apply only to parties, and it is parties that 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. Under this approach, there is no one guarding the hen house, and many commissioners take little or no responsibility to ensure that the law is followed. One obvious fix would be to put the responsibility on the decision-makers, as it is just about everywhere else we studied.

Our report compares various components of ex parte rules in different jurisdictions and recommends changes to the CPUC’s rules to restore public confidence in the process. The problems are both statutory and rule-based. An ultimate solution may involve legislation, although the CPUC could adopt most of the recommended changes voluntarily.