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### *Ex Parte Communications and the CPUC Rule Making Process*

#### **Introduction and Overview**

On September 9, 2010, a natural gas pipeline owned by Pacific Gas and Electric Company (PG&E) exploded under a residential neighborhood in the City of San Bruno. Eight people died, dozens were injured, 38 houses were destroyed and many more were damaged.

The California Public Utilities Commission (CPUC), as the state agency responsible for regulating PG&E's provision of natural gas service, investigated the explosion. As a result of the investigation, CPUC found that PG&E mismanaged their pipeline over decades, failed to adequately test the strength of the pipeline and, more generally, valued profits over safety.<sup>1</sup>

Following the investigation, in May of 2013, the Safety and Enforcement Division (SED) of the CPUC formally recommended the CPUC to levy fines of \$2.25 billion against PG&E, the full amount of which to be used to enhance safety.<sup>2</sup> PG&E protested, contending they neither could have nor should have known the gas pipeline was installed incorrectly and that SED based the amount of the recommended penalty on "the deeply flawed analysis of one consultant."<sup>3</sup> The CPUC referred the SED's proposed penalty against PG&E to the Administrative Law Division for assignment to an administrative law judge (ALJ). The ALJ was to review the recommendation and, eventually, propose a final decision on the matter, including how any fines would be allocated among PG&E's shareholders and ratepayers. Eventually, the five commissioners of the CPUC would vote on whether to adopt, modify, or reject the ALJ's proposed decision.

During the summer and fall of 2014, PG&E, bowing to legal pressure from the City of San Bruno, began to release a growing number of emails between the utility and CPUC officials. PG&E released 65,000 emails from over a five year period that PG&E says it believes "violated

<sup>1</sup> <http://www.cpuc.ca.gov/NR/rdonlyres/28720A78-1DC7-4474-B51F-00C5E8BB5069/0/AgendaStaffReportreOIIIPGESanBrunoExplosion.pdf>

<sup>2</sup> <http://www.cpuc.ca.gov/NR/rdonlyres/A26792EF-3C58-4344-BCCB-10E53E6260BC/0/CPUCStaffRecommend2QtrBillionTotalPenaltyAgainstPGEforSanBrunoPipelineRupturePenalty.pdf>

<sup>3</sup> <http://www.cpuc.ca.gov/NR/rdonlyres/BD0D6BD8-7E28-471F-A40A-C533A53B02A6/0/PGECoordinatedRemediesBriefPublicVerison.pdf>



California Public Utilities Commission rules governing ex parte communications.”<sup>4</sup> The initial release of emails revealed efforts by PG&E executives to influence the CPUC’s assignment of ALJ to the San Bruno proceeding. Many of the other emails exposed regular, private, familiar communications between PG&E and certain CPUC commissioners, including former CPUC President Michael Peevey and current commissioner Peter Florio, as well as senior CPUC officials.

Since PG&E’s initial release of the emails, both the state Attorney General and the United States Department of Justice have opened investigations into communications between the CPUC and regulated entities. PG&E has fired three senior executives. A senior CPUC official has resigned, while other top CPUC officials – including longtime CPUC President Michael Peevey and Executive Director Paul Clannon – have retired under pressure. Attorneys in CPUC’s legal division requested CPUC commissioner’s direct staff on how to properly cooperate with ongoing law enforcement investigations and to ensure CPUC staff preserves evidence relative to the investigations.<sup>5</sup> Recently appointed Interim Executive Director Timothy Sullivan, who described the emails as “shocking to the organization,” is considering personnel action against CPUC employees. Newly appointed CPUC President Michael Picker acknowledged the communications have damaged the public’s trust in the regulatory agency and that changes are needed.<sup>6</sup>

The release of the emails reveal an amicable familiarity between regulated utilities and CPUC, which has led to calls for greater scrutiny of the rules governing communications between CPUC decisionmakers and staff, on the one hand, and regulated entities on the other. The purpose of this hearing is to: (1) review the types of decisionmaking the CPUC undertakes and the rules regarding ex parte communications that apply to each; and (2) explore alternative models to managing communications between regulators and the regulated, as well as related recommendations that might be applied to the CPUC.

### **Decisionmaking at the California Public Utilities Commission and Applicable Ex Parte Rules**

As a protest to the corrupting influence of Southern Pacific Railroad on state politics, California voters, in 1911, amended the State Constitution to create the entity that would become known as the CPUC.<sup>7</sup> Today, the CPUC is governed by five full-time commissioners, appointed by the governor and confirmed by the Senate, and staffed by approximately 1,000 individuals who, together, regulate privately owned electric, natural gas, telecommunications, water, railroad, rail transit, and passenger transportation companies. CPUC staff includes numerous personal advisors to each commissioner, as well as the 42 judges of the ALJ Division – attorneys, engineers and accountants who prepare the docket for all CPUC official filings, including maintenance of the official record of proceedings.

Central to the CPUC’s regulation of service is decisionmaking based upon the public record. Accordingly, the CPUC is to conduct its business in public hearings, workshops and other public

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<sup>4</sup> [http://www.pge.com/en/about/newsroom/newsdetails/index.page?title=20141006\\_pge\\_self-reports\\_additional\\_emails\\_to\\_cpuc](http://www.pge.com/en/about/newsroom/newsdetails/index.page?title=20141006_pge_self-reports_additional_emails_to_cpuc)

<sup>5</sup> <https://www.documentcloud.org/documents/1314504-oct-15-memo-from-cpuc-attorneys.html>

<sup>6</sup> Senate Committee on Energy, Utilities and Communications oversight hearing on March 3, 2015.

<sup>7</sup> <http://www.cpuc.ca.gov/NR/rdonlyres/B45EF187-16F8-4C90-96B0-2CA15C441170/0/ABriefHistoryoftheCaliforniaPublicUtilitiesCommission8152014Final.pdf>

proceedings. Substantive communication outside of the public record that occurs between a decisionmaker and a party with an interest in a CPUC proceeding are known as “ex parte” communications. Such private communication is antithetical to public decisionmaking. Fairness is compromised; well-informed judgment impaired. This is because ex parte allows uncontested access to decisionmakers without opportunity for rebuttal or presentation of alternative views.

Statute recognizes that ex parte communications can conflict with the need for public decision at the CPUC. Statute directs the CPUC to adopt regulations requiring the reporting of ex parte communications.<sup>8</sup> The statute states that CPUC’s ex parte regulations shall require the interested party to report the communication within three working days of the communication and include:

- The date, time, and location of the communication, and whether it was oral, written, or a combination.
- The identity of the recipient and the person initiating the communication, as well as the identity of any persons present during the communication.
- A description of the party’s, but not the decisionmaker’s, communication and its content.

Statute does not require a CPUC decisionmaker to report ex parte communication with an interested party.

Statute directs CPUC to identify each of its proceedings according to one of three categories – adjudicatory, quasi-legislative, and ratesetting – and provides ex parte rules applicable to each type of proceeding. The types of proceedings and the statutory ex parte rules applicable to each are:

- **Adjudication cases** – enforcement cases and complaints, except those challenging the reasonableness of rates or charges. Statute expressly prohibits ex parte communication related to an adjudicatory proceeding.<sup>9</sup>
- **Quasi-legislative cases** – those that establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry. Statute expressly allows for ex parte communication without restriction in these types of proceedings.<sup>10</sup>
- **Ratesetting cases** – cases in which rates are established for a specific company. Statute expressly prohibits ex parte communication related to ratesetting cases. However, despite the prohibition, statute provides circumstances in which ex parte communication is permitted and procedures for reporting and managing such communication.<sup>11</sup>

In keeping with statute, CPUC has adopted regulations regarding ex parte communications. The regulations define ex parte communication as oral or written communication that: (1) concerns any substantive issue in a formal proceeding, (2) takes place between an interested person and a decisionmaker, and (3) does not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the proceeding, or on the record of the proceeding. The regulations define “decisionmaker” as any Commissioner, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion

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<sup>8</sup> See California Public Utilities Code Section 1701 et seq.

<sup>9</sup> See Public Utilities Code Section 1701.2.

<sup>10</sup> See Public Utilities Code Section 1701.4.

<sup>11</sup> See Public Utilities Code Section 1701.3.

Administrative Law Judge.<sup>12</sup> The ex parte regulations applicable to decisionmakers are also applicable to commissioners “personal advisors,” with certain exceptions regarding ratesetting proceedings.

The CPUC’s ex parte regulations generally conform to statutory requirements and prohibitions. The regulations prohibit ex parte communications in adjudicatory proceedings and allow them without restriction in quasi-legislative proceedings. Notably, the regulations explicitly prohibit ex parte communications regarding assignment of ALJs. Regarding ratesetting proceedings, however, the regulations depart from statute in that they make no mention of a general prohibition on ex parte communications in ratesetting proceedings. Rather, the regulations describe, in detail, circumstances in which ex parte communications are authorized and the reporting requirements for such communication.<sup>13</sup>

### **Are Existing Rules Enough?**

The regular, familiar communications between CPUC officials and PG&E executives occurred in a context of extensive rules regarding ex parte communications, as outlined above. Obviously, the rules did not prevent communications that many regard as inappropriate, at best. An important consideration before this committee is the adequacy of those rules to prevent inappropriate communications between regulators and regulated. Both statute and regulation address ex parte communications around CPUC proceedings. However, other models exist.

As some commentators have noted, the ex parte rules applicable to CPUC proceedings differ from similar rules applicable to comparable regulatory agencies operating at the federal level, in other states, and in California. Many comparable ratesetting entities prohibit all ex parte communications in ratesetting proceedings. Many regulatory bodies, including the California Air Resources Board and the California Energy Commission, prohibit ex parte communications in any proceeding in which the regulator is to consider conflicting points of view and contested facts; and the obligation to report ex parte communications falls on decisionmakers and interested parties alike.<sup>14</sup> Interestingly, the CPUC’s ALJ Division, as a matter of practice, prohibits all ex parte communication between the ALJs, their staff, and parties in official proceedings.

Are changes to the rules governing ex parte communications at the CPUC needed? Some have called for an outright ban on ex parte communications related to ratesetting proceedings.<sup>15</sup> Others have cautioned that banning ex parte communications in ratemaking proceedings would strengthen the influence of large, well-resourced regulated utilities to the detriment of other interested parties, such as advocates for consumers, ratepayers and the environment. These individuals, instead, counsel a reform of existing ex parte rules to bolster rules around notification and reporting.<sup>16</sup> And in the Legislature, already there are bill proposals that would require changes to the CPUC’s ex parte rules. This hearing will provide members of the committee and the public a better understanding of the political, regulatory and statutory context for such proposals when it turns its attention to them.

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<sup>12</sup> See California Code of Regulations Title 20, Rule 8.1.

<sup>13</sup> See California Code of Regulations Title 20, Rule 8.3.

<sup>14</sup> Behles, Deborah and Weissman, Steve. *Ex Parte Requirements at the California Public Utilities Commission: A Comparative Analysis and Recommended Changes*. 2015.

<sup>15</sup> See, for example, D. Behles, 2015 and Robert Fellmeth Supplemental Communication to LHC, October 23, 2014.

<sup>16</sup> Michael B. Day letter to LHC Chairman Pedro Nava, March 2, 2015.