Client Alert

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New Legislation Changes Rules for *Ex Parte* Communications at the CPUC

By Todd Edmister

Anyone with business before the California Public Utilities Commission (CPUC) needs to be familiar with the CPUC's rules governing *ex parte* communications. "*Ex parte* communications," or "*ex partes*," are direct, non-public communications with decision-makers, such as CPUC Commissioners or their advisors *Ex partes* have played an important behind-the-scenes role in many CPUC decisions, and have been at the center of the several CPUC controversies involving allegedly overly cozy relationships with regulated entities.

Senate Bill SB 215 (SB 215) was one of the few CPUC reform-related bills to emerge from the legislature this year. SB 215 makes a large number of changes to the CPUC's procedures and to its *ex parte* rules. This article identifies those changes and discusses what those changes mean for those who practice before the CPUC.

Significantly, SB 215 does *not* impose a blanket ban on *ex parte* communications, nor does it impose a one-size-fits-all framework on all CPUC proceedings. Rather, SB 215 makes nuanced changes to the pre-existing framework governing CPUC processes. While the changes are large in number, the net effect of these changes may not be significant. Most parties with business before the CPUC will likely see little change in their day-to-day dealings with the agency, whether in formal proceedings or in less formal settings like *ex parte* meetings. *Ex partes* are not going away, so it is very important for anyone interacting with the CPUC to know the rules governing them, as modified by SB 215.

1. THE STATUTORY FRAMEWORK PRIOR TO SB 215

The Public Utilities Code, at Section 1701.1 *et seq*.,[1] has long required the CPUC to assign its formal proceedings to one of three categories.[2] These are:

- adjudicatory;
- ratesetting; and
- quasi-legislative.

[1] All statutory references are to the Public Utilities Code, unless noted otherwise.

[2] Somewhat confusingly, these are *not* the categories you will see in the proceedings numbers of CPUC proceedings. There, you will find a completely different set of categories:

- Complaint (C.)
- Application (A.)
- Rulemaking (R.)
- Investigation (I.)

The categories in this footnoted list do not always match up with a particular category from the list in the body text. Applications will usually be ratesetting, rulemakings will usually be quasi-legislative, and investigations will usually be adjudicatory, but these are just rules of thumb. The one exception is complaint proceedings, which are always adjudicatory.

Categorization of proceedings matters to practitioners mainly because categorization determines the applicable *ex parte* rules. *Ex parte* communications are "off-the-record communications between agency decision-makers and interested parties regarding a matter that is before the agency for decision."[3]

As one moves across the spectrum of proceedings, from adjudicatory through ratesetting to quasi-legislative, the *ex parte* rules become progressively more relaxed. *Ex parte* communications are absolutely barred in complaint cases, allowed subject to various notice and reporting requirements in ratesetting cases, and allowed without notice or reporting obligations in quasi-legislative proceedings. There is considerable nuance around these general rules, particularly for ratesetting proceedings (consult an expert for details), but this is the gist.

Categorization has other significance as well. Categorization determines, among other things, the process applicable to draft decisions, who can preside over proceedings, who can issue alternates, and the processes for CPUC review of draft decisions and final decisions.

2. SB 215'S CHANGES TO SECTION 1701.1 *ET SEQ*.

SB 215 leaves the pre-existing general categorization and *ex parte* rules intact. Post-SB 215, the CPUC must still assign proceedings to adjudicatory, ratesetting, or quasi-legislative categories. Different *ex parte* rules still apply to each category. *Ex parte* communications are still absolutely barred in complaint cases, allowed subject to various notice and reporting requirements in ratesetting cases, and generally allowed without notice or reporting obligations in quasi-legislative proceedings. The same distinct rules for finalizing decisions remain in place for each category.

What SB 215 does is change many of the details of Section 1701.1 *et seq*. Specifically, SB 215:

- eliminates the CPUC's statutory exemption from the "technical rules of evidence"
- subjects the CPUC and "persons seeking to influence" the CPUC to the Political Reform Act of 1974 (Title 9 (commencing with Section 81000) of the Government Code), "including, but not limited to, any applicable lobbying obligations";
- makes technical changes to language regarding ALJ/Assigned CPUC roles;
- eliminates the "hearing trigger" for application of the *ex parte* rules in ratesetting proceedings;
- requires that the CPUC define "procedural" communications;
- adds ratings agencies and investors to the ranks of "interested persons";
- bans "one-way" *ex parte* communications from a decision-maker to a party and imposes reporting requirements on CPUC personnel;
- bans communication with the Chief ALJ regarding assignment of an ALJ;
- changes the process for challenging the assignment of an ALJ or CPUC Commissioner to a proceeding;

[3] This quote comes from the June 22, 2015 Strumwasser et al. report to the CPUC. The formal definition can be found at Section 1701.1(c)(4).

- explicitly identifies communications at conferences as *ex parte* communications and applies reporting requirements to communications at conferences even in quasi-legislative proceedings;
- explicitly excludes *ex parte* communications from the formal administrative record;
- prohibits CPUC commissioners from reaching "consensus" or taking votes on "administrative matters" in closed session;
- specifies how to treat public comments in the administrative record;
- restructures the code to more clearly break out different rules for the three different types of proceedings; and
- provides for enforcement by the attorney general against individual CPUC personnel.

3. WHAT SB 215 MEANS FOR PRACTITIONERS

What does this laundry list of changes mean for practitioners before the CPUC? Perhaps less than an initial review would suggest. To get a sense of how SB 215 will impact outside practitioners, consider the current Practitioner's Guide to *Ex Parte* Communications (Guide), available here: http://docs.cpuc.ca.gov/PUBLISHED/REPORT/124510.htm. Peruse the Q&A and you will quickly see that nearly all of the guidance it contains applies equally post-SB 215.

There are several reasons why this is so.

First, *many of SB 215's changes are directed at the CPUC and its staff*, not at outside practitioners. Examples of such changes include:

- reporting requirements for decision-makers;
- banning of "one-way" communications from decision-makers to parties;
- limitations on what can be discussed in closed session; and
- perhaps most significantly, liability for CPUC employees for rules violations of the *ex parte* rules.

Second*, many of the changes SB 215 makes reflect current law, CPUC rules, or CPUC practice*. For instance:

- The CPUC already has a conflict of interest code and statement of incompatible activities, as already required by section 303(b): "The commission shall adopt an updated Conflict of Interest Code and Statement of Incompatible Activities, by February 28, 1998, in a manner consistent with applicable law."
- The CPUC already bans communications with the Chief ALJ regarding the assignment of an ALJ to a proceeding. *See* CPUC Rule of Practice and Procedure (Rule) 8.3(f): "Ex parte communications regarding the assignment of a proceeding to a particular Administrative Law Judge, or reassignment of a proceeding to another Administrative Law Judge, are prohibited."
- The CPUC already has a rule defining a "procedural" communication; *see* Rule 8.1(c): "Communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications."

- CPUC ALJs rarely, if ever, include *ex parte* communications in the administrative record.

Third, *some of the processes that SB 215 affects are rarely invoked*. For instance, challenges to the assignment of an ALJ or CPUC Commissioner to a particular proceeding are unusual, and will probably continue to be so.

Certainly some of the changes here will impact particular practitioners before the CPUC. For instance, ratings agencies and investors are now explicitly included among the ranks of "interested persons" and so are unequivocally subject to the *ex parte* rules. The elimination of the statutory exemption from the formal rules of evidence means that adjudicatory and ratesetting proceedings may now be subject to rehearing and/or appeal on the basis of overly informal hearing procedures, leading to more formality in hearings, as well as new possibilities for appellate lawyers. Finally, the risk of personal liability for CPUC employees, coupled with the new reporting requirements, may lead CPUC personnel to curtail *ex parte* communications, particularly in ratesetting proceedings.

Ultimately, though, SB 215 is more of a surgical strike rather than a radical demolition of the status quo. A radical revamp of CPUC procedures and *ex parte* rules it is not, and most parties with business before the CPUC and practitioners will likely see little change in their day-to-day dealings with the CPUC.

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