[MC-0398.035.009.001]

STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, Governor

CALIFORNIA COASTAL COMMISSION
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MEMORANDUM

July 23, 1992

TO: Commissioners and Interested Parties

FROM: Ralph Faust, Chief Counsel RF by DD
Dorothy Dickey, Deputy Chief Counsel DD

SUBJECT: Regulation of Ex Parte Communications

The subject of whether and how to regulate ex parte communications was scheduled for consideration by the Commission on September 14, 1988. On that date the Commission voted to table discussion of the issue. Recently, the Commission has requested that the question of whether to take the subject of ex parte communications "off the table" be scheduled for the Commission's consideration. If the Commission votes to take the issue off the table, the attached staff report prepared for the September 1988 meeting will automatically be before the Commission.

Attachment

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STATE OF CALIFORNIA—THE RESOURCES AGENCY GEORGE DEUKMEJIAN, Governor

CALIFORNIA COASTAL COMMISSION
631 HOWARD STREET, 4TH FLOOR
SAN FRANCISCO, CA 94105
(415) 543-8555

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MEMORANDUM

August 25, 1988

TO: Commissioners and Interested Persons

FROM: Ralph Faust, Chief Counsel
Dorothy Dickey, Staff Counsel D. Dickey

SUBJECT: Possible Approaches to the Regulation of Ex Parte Communications

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The Commission has requested a briefing on possible approaches to the regulation of ex parte communications in Commission proceedings. This memorandum is based upon a survey of the statutes and regulations of various state and federal agencies. The survey also included legislation that would have amended the Coastal Act. We have analyzed some possible approaches the Commission may wish to consider in regulating ex parte conduct by summarizing issues that are commonly addressed in such rules, and identifying the approaches used by the agencies surveyed.

The ex parte rules identified as a result of that survey are included in the appendix of this report. Most state and federal rules concerning ex parte communications included in this report were adopted through the rulemaking process. In only one case were the ex parte restrictions set forth in a statute. That statute is Government Code section 11513.5, which was adopted in 1986. Section 11513.5 is part of the adjudication provisions of the Administrative Procedure Act (APA), which are applicable to a number of state agencies that are required to conduct trial type hearings in such matters as professional licensing.[1/] Additionally, a bill was proposed in the 1987-88 legislative session that would have amended the Coastal Act. (Assem. Bill No. 4639 (1988-89 Reg.Sess.).) One federal agency (Department of Commerce) has

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[1/] The Coastal Commission is not subject to APA procedures for adjudicatory hearings, thus section 11513.5 does not apply to the Commission. (Government Code section 11501.) The Commission is subject to APA rulemaking requirements, which are set forth separately in Government Code section 11340 *et seq*.

adopted a policy statement in memo form. One state agency (Public Utilities Commission) has adopted ex parte rules in various individual proceedings. It has also proposed to adopt a regulation that would govern virtually all PUC proceedings.

1. Type of Proceeding Covered by Rule.

A. Quasi-judicial Proceedings.

The Commission must determine at the outset what types of proceedings should be subject to ex parte rules. It may elect to adopt a rule that would apply only to quasi-judicial proceedings, such as proceedings concerning permits, appeals and LCP's. The Attorney General's Office has advised the Commission that ex parte contacts should be disclosed in those types of matters. (Appendix, pp. 1-8.)

Various state and federal agencies are either subject to statutory ex parte rules or have elected to adopt ex parte regulations which apply to quasi-judicial proceedings. Thus, for example, the Energy Commission and the San Francisco Bay Conservation and Development Commission have adopted ex parte rules for permit proceedings. (Calif. Code of Regs., Title 20, section 1216 (Appendix, p. 21.), Title 14, Appendices F & G, (Appendix, pp. 18-20.).) A wide range of agencies are subject to the formal adjudicatory hearing provisions of the Administrative Procedure Act, which include ex parte rules. (Government Code section 11513.5 (Appendix, p. 22).) (The Commission is not subject to those formal hearing requirements.)

B. Quasi-legislative Proceedings.

The Commission may wish to regulate communications in quasi-legislative proceedings. An agency acts in a quasi-legislative capacity when it adopts regulations or positions on general policy issues.

It does not appear that administrative agencies have generally adopted ex parte regulations that cover communications concerning quasi-legislative actions.[2/] The Public Utilities Commission has proposed, but not adopted, a rule that would not only cover quasi-judicial proceedings but would also cover certain types of quasi-legislative proceedings such as rulemaking proceedings. (Appendix, p. 23, section 1.1(a).)

[2/] Although rulemaking proceedings are not subject to the same due process requirements as are applicable to quasi-adjudicatory proceedings, there may be legal constraints on commissioner communications outside the record of rulemaking proceedings. (See Western Oil and Gas Association v. Air Resources Board (1984) 37 Cal.3d 502, Building Code Action v. Energy Resources Conservation and Development Commission (1980) 102 Cal.App.3d 577.

2. When Would Rule Become Applicable?

In drafting an ex parte rule, the Commission should evaluate when the requirements would become applicable.

A. While Matter is Pending.

A number of state agencies regulate ex parte communications while a proceeding is "pending" before the agency. (Government Code section 11513.5 (Appendix, p. 22.); Calif. Code of Regs., Title 20, section 1216 (Appendix, p. 21.).) If the Commission chooses to regulate ex parte contacts in "pending" proceedings, it may wish to define the word "pending."

A possible definition would be that a matter is pending when it has actually been submitted to the Commission's jurisdiction in the form of an application, appeal or LCP. Assembly Bill No. 4639 followed that approach. (Assem.Bill No. 4639 (1987-88 Reg.Sess.) sec. 1 (Appendix, p. 12.).) It provided that a matter "within the Commission's jurisdiction" was subject to ex parte rules. It defined a matter "within the Commission's jurisdiction" to mean:

> ...any permit action, federal consistency review, appeal, local coastal program, port master plan, public works plan, long-range development plan, categorical or other exclusions from coastal development permit requirements, or any other quasi-judicial matter requiring commission action, for which an application has been submitted to the commission. (Appendix, p. 14, section 30321.)

A similar approach was considered by the PUC when it circulated proposed regulations in 1986. The PUC proposed to regulate communications after "a proceeding begins," which was defined to mean:

> ...when an application, complaint, or other initiatory pleading is filed with the Docket Office, or the Commission issues an investigatory order, rulemaking order, order to show cause, or order setting hearing. (Appendix, p. 23, section 1.1(a).)

B. During Period in Which Appeal May Be Filed.

The Commission may wish to regulate communications concerning potential appeals to the Commission during the period following local action on a coastal development permit which is appealable to the Commission. Alternatively, the Commission may wish to regulate communications concerning developments that are appealable to the Commission during the time such coastal development permits are pending before local government. Our survey did not indicate that other agencies have followed either approach.

A third approach would be to regulate communications after the Commission has received an appeal. (See "While a Matter is Pending" above.) The Department of Commerce has adopted that approach when it considers possible appeals of Commission objections to certifications and determinations of consistency under the Coastal Zone Management Act. It regulates only those communications which occur after the Secretary of Commerce has received a Notice of Appeal. (Memorandum from Robert H. Brumley to Secretary of Commerce et al., April 15, 1988 (Appendix, p. 28.).)

3. What Type of Communications Should Be Subject to Regulation?

A. Substantive and Procedural Matters.

The Commission may wish to regulate all communications, whether their content is substantive, procedural, or both. The PUC has followed that approach in a rule adopted in the Diablo Canyon rate case. (Application 84-06-014, Decision, February 5, 1985.)

The San Francisco Bay Conservation and Development Commission (BCDC) has prohibited "all contacts outside the formal hearing process" in its enforcement proceedings. (Cal. Code of Regs., Title 14, section 11333 (Appendix, p. 18.).) Ex parte procedural discussions are allowed only if they occur between BCDC members and the staff or Deputies Attorney General who are assigned to the investigation. Similarly, BCDC's rule concerning discussion of permit matters discourages all communications outside the hearing process and does not exempt procedural matters. (Cal. Code Regs., Title 14, Apps. F & G (Appendix, pp. 19-20.).)

B. Substantive Matters.

Alternatively, the Commission may prefer to regulate only communications on substantive issues, while exempting procedural communications. Such a rule would mean that conversations would not be subject to disclosure if they were limited to procedural issues such as time limits or locations, speakers, meeting, schedules, etc.

A number of state and federal agencies have adopted that approach. The Assembly Bill Number 4639 would have expressly exempted communications limited to procedural issues from the ex parte rules it would have imposed. (Appendix, p. 12, section 30322(b)(2).)

4. Who Should Be Subject to the Rule?

A. Individuals on Any Side.

The Commission may want to consider specifying exactly who would be subject to ex parte rules. BCDC regulates commissioners' communication with "individuals or groups on any side" but authorizes commissioners to discuss "applications with one another and with staff outside the public hearing." (Cal. Code Regs, Title 14, Apps. F&G (Appendix, pp. 19-20.).)

B. Persons With an Interest in the Outcome.

The Commission may wish to regulate communications between commissioners and persons who have an "interest in the outcome" of Commission proceedings. Many state agencies are subject to such a requirement, pursuant to the adjudicatory hearing provisions of the Administrative Procedure Act (APA). (Govt. Code section 11513.5 (Appendix, p. 22.).)

The APA prohibits presiding officers in the agencies subject to its formal hearing procedures from communicating "directly or indirectly ... with any person who has a direct or indirect interest in the outcome of the proceeding ... including employees of the agency that filed the accusation ...." (Govt. Code section 11513.5.)

Assembly Bill Number 4639 incorporated such an approach. It would have regulated conversations between a member of the Commission and an "interested person," which it defined as:

> (a) Any applicant, an agent or an employee of the applicant, or person receiving consideration for representing the applicant, or a participant in the proceeding on any matter before the commission.
>
> (b) Any person with a financial interest, as described in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9 of the Government Code, in a matter before the commission, or agent or employee of the person with a financial interest, or person receiving consideration for representing the person with a financial interest.
>
> (c) A representative acting in (sic) behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization who intends to influence the decision of a commission member on a matter before the commission. (Appendix, p. 15, section 30323.)

C. Any Person Who Knows That a Matter Within the Commission's Jurisdiction is Pending Before the Commission.

The Commission may want to adopt the approach proposed in the Attorney General's bill analysis of the Assembly Bill Number 4639. (Appendix, p. 10.) The analysis suggested that the definition of "interested person" be expanded to include "any person who knows that a matter within the Commission's jurisdiction is pending before the Commission." Under that approach, the persons subject to ex parte requirements would include, but not be limited to, the persons specified in the bill.

D. Any Person.

During the Commission's discussion of Assembly Bill Number 4639, a Commissioner suggested that the bill would be strengthened by defining more broadly the category of persons covered by the bill to include "any person."

E. Any Person Who Communicates With a Commissioner for the Purpose of Trying to Influence a Decision.

The Commission also discussed the possibility of recommending that Assembly Bill Number 4639 cover the communications of any person who communicates with a commissioner for the purpose of trying to influence a decision on a matter pending before the Commission.

F. Staff.

The Commission may wish to subject communication with staff members to disclosure. In deciding whether to include staff in the category of persons regulated, the Commission may want to consider whether the Commission staff has a role in Commission proceedings that is analogous to either that of a "party" or "decision-maker," the two categories of persons who are subject to ex parte restrictions.

(1) Staff as a party, administrative law judge or advisor.

All of the agencies surveyed which regulate staff communications have more formal, trial-type proceedings than those employed by the Commission. In those proceedings, agencies generally designate certain staff members to serve as an independent party in the proceeding, and designate others to assist the decision-makers directly, either as administrative law judges or personal advisors to the decision-makers. The staff members who serve as an independent party have the same rights and obligations as any other party. Thus, they may sponsor expert witness testimony, conduct cross-examination of other witnesses, make objections, file motions, etc. (See, for example, Calif. Code of Regs., Title 20, section 1216 (Appendix, p. 21,); PUC Proposed Regulations (Appendix, p. 23, section 1.1(d)(3).).)

Agencies may regulate the communications of the staff members who serve in those roles in formal hearings because those staff members have the same relationships to the decision-maker as do the other parties who are covered by ex parte rules. Thus, staff who participate in hearings as an independent party would be subject to the rules concerning parties' communications with decision-makers. Similarly, staff who serve as administrative law judges or personal advisors to decision-makers are subject to the rules which apply to decision-makers. They are required to report any off-the-record communications with parties, but not with decision-makers.

(2) All staff.

During the Commission's discussion of the Assembly Bill Number 4639, it was suggested that the exemption provided therein for discussions between staff members and interested persons should be deleted. Such communications are not typically addressed in other agencies' ex parte regulations.

The state agencies surveyed do not have statutes or regulations which require disclosure of communications of staff members who are not employed as advisors to commissioners and who are not designated as parties. The only federal agency surveyed which imposes such a requirement is the Federal

Energy Regulatory Commission, which regulates parties' communications with any employee of that agency, except the "staff counsel assigned to the proceeding..." (18 C.F.R. section 385.2201(a)(b)(5) (Appendix, p. 35).)

G. Non-voting Commissioners.

The Commission may wish to indicate whether the communications of non-voting commissioners are subject to disclosure.

5. Reporting Requirements.

A. Written Notice Filed With Executive Director Within Specified Time Limits.

The Commission may wish to specify that a written report of ex parte communications must be filed with the Executive Director within a specified time period. The PUC proposed that communications be reported in the form of a "Notice of Ex Parte Communication" filed within three days in the PUC's formal file of the proceeding. (Appendix, p. 23.) The Commission could set a longer or shorter deadline than three days.

The CEC's rule does not specify a deadline but provides that the report to the public file shall be made "to permit rebuttal of the matter on the record by any party affected," thus it may be inferred that the report must be made sufficiently in advance of the decision to permit rebuttal. (Calif. Code of Regs., Title 20, section 1216 (Appendix, p. 21.).)

B. Notice to Parties.

Those agencies which conduct trial-type administrative hearings in which "parties" are formally designated may impose the additional requirement that an official must notify all parties of the receipt of a communication. (Appendix, p. 24.) Notice is typically accomplished by a written notice which is served by mail upon all parties, but could be accomplished by an oral statement on the record.

Because the Commission does not have formally designated parties, service by mail on all parties would be infeasible. The Commission could adopt a policy of providing written notice to applicants, appellants, local governments in LCP proceedings, and to individuals who have requested receipt of such notice in a particular proceeding.

Alternatively, notice could be provided on the record during the Commission's hearing on a quasi-judicial matter. Commissioners or staff could report orally on any ex parte communications pertaining to that matter.

C. Copy of Written Communications Forwarded to Executive Director.

The Commission may wish to consider creating procedures for forwarding written ex parte written communications to the Executive Director.

(1) By individual commissioners.

The Commission could specify that a letter would be presumed to be ex parte if it is addressed to an individual commissioner and does not indicate on its face that it was forwarded to the staff. The Commission could require that each commissioner who receives such a letter should forward it to the Executive Director.

(2) By the Chairman.

The Commission has discussed the question of whether the Chairman should forward letters on behalf of the Commission to the Executive Director, when those letters indicate that copies were provided to all commissioners, but are silent with respect to whether a copy was forwarded to the staff. A regulation that established such a procedure would relieve every other commissioner of the responsibility of forwarding identical letters to the Executive Director.

6. Rebuttal.

The Commission may wish to consider adopting a rule to assure interested parties that they have the right to rebut orally or in writing an ex parte communication that has been reported. The Energy Commission has clarified that parties have the right to rebut both oral and written communications. (Cal. Code of Regs., Title 20, section 1216 (Appendix, p. 21.).)

APPENDIX

Table of Contents

Memo from Anthony M. Summers, Supervising Deputy Attorney General, to Members of the California Coastal Commission, February 6, 1988 1

Letter from Richard C. Jacobs, Deputy Attorney General, to Commissioners, California Coastal Commission, September 11, 1981 7

Department of Justice Bill Analysis, AB 4639, April 15, 1987 (sic) 9

Assembly Bill No 4639, February 19, 1988, Amended April 19, 1988 12

San Francisco Bay Conservation and Development Commission Regulations 18

Energy Commission Regulation 21

Government Code Section 11513.5 22

Public Utilities Commission Proposed Regulations 23

Memorandum from Robert H. Brumley to Secretary of Commerce, et al. Concerning Restrictions on Communications Pertaining to Consistency Appeals 28

Nuclear Regulatory Commission Regulations 31

Interstate Commerce Commission Regulations 32

Federal Energy Regulatory Commission Regulations 35

Federal Communications Commission Regulations 37

State of California

Department of Justice
110 West A Street, Suite 700
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M E M O R A N D U M

To : Members of the California Coastal Commission

Date: February 16, 1988

File No:

Telephone: ATSS 631-7590

From : Office of the Attorney General - Anthony M. Summers
Supervising Deputy Attorney General

Subject: Ex Parte Communications

In January the Commission raised a number of questions relating to ex parte communications.[1/] This memorandum attempts to address those questions. However, the Commission should understand that many of the questions do not have definitive answers.

Attached is copy of a letter sent to each of the Commissioners in 1981 dealing with ex parte contacts on permit applications. It set forth the general rule that judicial review of a quasi-judicial decision of the Commission will normally be limited to the record of the administrative proceedings. Consequently, that record must contain all of the material considered by the Commission. Moreover, as stated by the Supreme Court in English v. City of Long Beach (1950) 35 Cal.2d 155, administrative agencies which are required to make a determination after a hearing cannot act upon their own information, and nothing can

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1. In this memorandum, "ex parte" is used to refer to communications to one or more Commissioners which are made by any person involved in a matter before the Commission without notice to other interested persons.

Material supplied to the Commission staff in advance of a hearing does not fall into this category. That material is included in a public file which all parties may examine, and may then challenge or rebut either by submitting their own statements to the staff or testifying before the Commission. Information made part of the public record at or prior to the hearing does not fall within the definition of ex parte contact. Rather, an ex parte communication is one which is not part of the public file or the public hearing, is not available to all parties, and is not included in the administrative record.

be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present.

On the other hand, in City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, the California Supreme Court found it proper for elected members of a city council to act in a hearing on an application for a use permit to construct a shopping center despite the fact they had publicly expressed their opposition to the granting of the permit prior to the hearing. Indeed, that had been an issue in their election campaigns. The Supreme Court indicated that a city council member has a right and an obligation to discuss issues of vital concern with constituents, and to state views on matters of public importance.

Obviously, the messages from English v. City of Long Beach and City of Fairfield v. Superior Court are difficult to reconcile. One legal commentator has criticized the Fairfield decision, noting that the city council was not required to adjudicate disputed facts. He questions whether the Supreme Court would reach the same result if factual issues were contested, or if appointed, rather than elected, officials had drawn the prehearing conclusions. (Deering, California Administrative Agency Practice [Supp. 1982], p. 43.)

All California Coastal Commissioners are appointed. However, six are required by law to hold an elective local office. There has been no guidance from the courts as to whether Coastal Commissioners who are not elected officials may "discuss issues of vital concern" with interested persons, or whether elected officials appointed to the Commission fall within the rule established in City of Fairfield. Even if they do, it is uncertain whether they may deal with persons who are not their constituents in their local official capacity.

Despite these uncertainties, there are a few things which can be definitively stated:

1. Both in acting on permit applications and in acting on local coastal programs the Coastal Commission performs a quasi-judicial function. (City of Chula Vista v. Superior Court, (1982) 133 Cal.App.3d 472.)

2. The Commission is required to hold hearings prior to making its determinations on both coastal development permits and local coastal programs. (Pub. Resources Code, § 30621 [permits] and §§ 30512-30513 [local coastal programs].)

3. Commission decisions are subject to judicial review. A decision may be set aside if a court concludes the

Commission failed to provide a fair hearing. (Pub. Resources Code, § 30801; Code Civ. Proc., § 1094.5(b).)

With these rules in mind, and with the intention of assuring that a court will find the Commission's hearings are fair, the specific questions raised by the Commission will be addressed.

A. What are the rules? The Commission must make sure that its hearings are fair, and that courts and the public can perceive they are fair. Information which affects a Commission decision must appear in the record, and must be presented at a time when the parties have the opportunity to rebut, contest, and comment upon the information. The Commission's regulations provide:

> "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Unduly repetitious or irrelevant evidence shall be excluded upon order by the chairperson of the commission." (Cal. Coastal Com. Reg. 13065, Oral Hearing Procedures, Evidence Rules.)

Any information which is presented to the Commission which falls within this broad definition of "evidence" must be made known to the parties and included in the record.

B. What must be reported? Anything which influences, or which can be perceived as influencing, the Commission which is not presented as part of the public hearing process, or is not otherwise included in the public record, should be reported.

1. Written Communications. Written communications should be provided to the staff for inclusion in the public record where they can be examined by any interested person. Even if a Commissioner concludes they have no influence on a decision, disclosure of written materials will prevent speculation as to their content or possible effect.

2. Oral Communications. Oral communications should also be disclosed. The disclosure should include information as to who engaged in the communication, when and where it took place, and what the substance of the communication was. This can be

disclosed either by writing a memorandum and including it in the public file, or by disclosure at the meeting. (See ¶ H below.)

C. When can it be assumed that a communication has been made public? In the case of written materials which show on their face that copies have been delivered to the staff, or to the chairman, members of the Commission can assume that appropriate steps have been taken to include the information in the public record. Commissioners are not required to make an independent investigation when the written communication leads them to conclude that it is already included in the public record. (The Chairman, of course, should provide staff with the materials he receives.)

D. Do the rules regarding disclosure apply both to permits and LCPs? Decisions on both permits and LCPs are quasi-judicial actions, and both are subject to the same kind of judicial review. The rules relating to disclosure apply to both types of hearing.

E. Is a Commissioner required to report an ex parte communication? The general concern with ex parte communications is that they are not part of the public proceedings, and may therefore lead a court to conclude that the hearing was not fair. The purposes of disclosure are to make the communications public, to include them in the record, and to demonstrate that the hearings are fair. While a Commissioner cannot be compelled to do this (in the absence of legislation or regulations), the failure to do so may cause a court to invalidate a Commission decision on the grounds that the hearing was not fair.

F. What if a Commissioner receives a very large number of ex parte communications? The disclosure process is burdensome, and becomes even more so if numerous communications are received. However, the more communications which are made outside of the hearing process, the more important disclosure becomes. If a court were to learn of multiple communications relating to a matter before the Commission, concern as to the fairness of the hearing would undoubtedly increase as the number of communications increased.

G. Do contacts regarding procedural questions have to be reported? Theoretically, communications relating only to Commission procedures, which do not affect a substantive decision, need not be disclosed. This is so because they do not affect the fairness of the proceedings or the rights of the parties. Nevertheless, disclosure of even this type of communication can avoid an appearance of unfairness.

H. At what point must ex parte communications be disclosed? One purpose of disclosure is to assure that all members of the Commission have the same information upon which to base their decisions. Another is to provide parties the opportunity to refute, test, and explain information which may affect the Commission's decision. Disclosure should take place at a time when both of these objectives can be satisfied. Ideally, written communications should be disclosed at a time when they can be distributed to other Commissioners and to the public prior to the hearing. If this is not possible, or if oral communications are involved, they should be disclosed at a time when the parties, other interested persons, and voting Commissioners can be expected to be present: that is, at the time the hearing is opened. Disclosure at that point allows the parties to use a portion of their alloted time to address the substance of the communications.

I. How should disclosure be made? Some agencies of the federal government have dealt with this problem by requiring agency members, within 48 hours of receiving any ex parte communication, to write a memorandum detailing the nature of the communication and have it included in the public record. This is done pursuant to regulations adopted by the agencies.

In the absence of regulation, there is no specific method which must be followed. Written communications should be delivered to the staff for inclusion in the public record and appropriate distribution as soon as possible. All communications can be disclosed either by preparing a memorandum for the staff, or by disclosure on the record as discussed in paragraph H above.

While a form could be devised to disclose when communications have been received and whether they have been transmitted to staff, a form is not likely to be helpful in reporting the substance of an oral communication. Of course, the substance is the most critical aspect.

There are several pending cases where Commission decisions are being challenged in part based upon allegations of improper ex parte communications. The most notable of these involves the certification of the Chula Vista local coastal program, which was the first case to include such allegations. Eventually one of these cases is likely to result in an appellate decision which provides more guidance than the Commission presently has available. However, the Commission need not wait to deal with the issue. If the Commission wishes to adopt specific procedures to govern ex parte contacts, it can hold public hearings with a view toward adopting appropriate regulations.

Even in the absence of an adopted procedure, individual Commissioners are certainly free to decline participation in any ex parte communications and to forward any written communications to the staff. Given the burdens of disclosure and the legal issues which arise from ex parte contacts, we adhere to our long-standing advice set forth in our 1981 letter as well as earlier communications to the state and regional commissions: we strongly advise you to avoid discussions outside of the public hearing with either proponents or opponents of permit applications or LCPs. If such discussions do occur, they should be made a matter of public record.

ANTHONY M. SUMMERS
Supervising Deputy Attorney General

AMS:lyc

cc: Peter Douglas
Ralph Faust
Andrea Ordin
N. Gregory Taylor
Steven H. Kaufmann

GEORGE DEUKMEJIAN
ATTORNEY GENERAL

STATE OF CALIFORNIA

RECEIVED
SEP 14 1981
CALIFORNIA
COASTAL COMMISSION

OFFICE OF THE ATTORNEY GENERAL
Department of Justice
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(415) 557-2544
(415) 557-0285

September 11, 1981

Commissioners
California Coastal Commission

Re: Ex Parte Contacts on Permit Applications Pending Before the Commission

Because of the number of new Commissioners joining the Commission in recent days, I write to point to a recurring problem, and to reiterate advice which we have given since the passage of Proposition 20.

The courts have described your role in acting on permit applications as "quasi-judicial." The statutes under which you operate specify that permits may be granted only after public hearings, and only after you have considered the evidence offered to you in your quasi-judicial role. If judicial review is sought of one of your permit decisions, the courts will limit that review, except in narrow circumstances, to only the record of your administrative proceedings.

For these reasons, the courts have consistently stated that evidence received in ex parte communications by agency members outside the public hearing process violates the rights of the parties to the proceeding, and may invalidate the agency's decision. In English v. City of Long Beach (1950) 35 Cal.2d 155, for example, the Court stated:

> "Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing which the parties had notice or at which they were present . . . . A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the

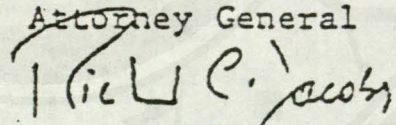
> tribunal were permitted to base its determination upon information received without the knowledge of the parties. A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced."

For these reasons, we strongly advise you to avoid discussions outside of the public hearing, with either proponents or opponents on permit matters. If such discussions do occur, they should be made a matter of public record during the public hearing on the application; if they are not, and if the non-prevailing party becomes aware of them and seeks judicial review of the Commission's decision, it is almost certain that a court would invalidate the Commission's action. As one Court has explained, "[e]ven the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable." Home Box Office, Inc. v. Federal Communications Commission (D. C. Cir. 1977) 567 F.2d 9, 54. Rather than helping a party's chances, discussions outside the public hearing may thus seriously jeopardize them.

If you would like, this subject may be one which we can discuss at the Asilomar conference. If you have any questions before then, please feel free to give me a call.

Yours very truly,

GEORGE DEUKMEJIAN
Attorney General



RICHARD C. JACOBS
Deputy Attorney General

RCJ:jl

cc: Michael L. Fischer
Roy Gorman

DEPARTMENT OF JUSTICE (X)

BILL ANALYSIS

Date: April 15, 1987

BILL NO.	AB 4639	ANALYST	Anthony M. Summers
BILL AUTHOR	Friedman	SECTION/BRANCH	DPR/Lands
DATE LAST AMENDED	2-19-88	TELEPHONE	(619) 237-7590 ATSS 8-631-7590

I. Summary of Bill and Existing Law

The bill prohibits most ex parte communications with members of the California Coastal Commission.

Existing law does not clearly delineate rules applicable to ex parte communications with Coastal Commission members. The Commission does perform quasi-judicial functions in issuing permits and approving Local Coastal Programs, and the Supreme Court has indicated that in such cases all of the evidence relied upon by an administrative agency must be "on the record." (English v. City of Long Beach (1950) 35 Cal.2d 155.) On the other hand, City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, allowed elected city officials to act on a quasi-judicial matter even though they had previously stated their views as to the result which should be reached. The Supreme Court there held that elected officials had a right and an obligation to discuss matters of community concern with their constituents.

Since six of the twelve Coastal Commissioners are required by law to hold locally elected office, it is unclear whether Fairfield allows them to discuss matters which are pending before the Commission. It is also unclear whether there is any application of Fairfield to Commissioners who do not hold local offices.

Our advice to the Commission based on current law is that ex parte contacts should be discouraged, and if they do occur, they must be disclosed on the record to assure that all parties receive a fair hearing. Our most recent advice was given to the Commission by memorandum in mid-February 1988. The memo was public, and Assemblyman Friedman's office requested a copy of it shortly after AB 4639 was introduced. A copy is attached.

II. Background Information

There are several law suits pending against the Commission where it is alleged that ex parte contact with Commission members occurred, and that the hearing before the Commission was therefore unfair. Discovery is in progress in one of the cases. (Sierra Club v. California Coastal Commission, San Diego Superior Court No. 521775, relating to Commission approval of the Chula Vista Local Coastal Program.)

In addition, there have been allegations in newspaper articles about the Commission (most notably in the L.A. Times) concerning ex parte contacts.

Presumably these factors, together with the uncertain state of the law, prompted AB 4639.

III. Impact of the Bill

The impact of the bill on the Commission would be to reduce, if not eliminate, ex parte communications. Substantial penalties are provided for violations. The bill would provide a clearer statement of Commissioner obligations than can be gleaned from existing law.

The impact on existing litigation (and therefore on the Department of Justice) is not as great. Specific requirements of notification to the Executive Director, or penalties for failure to meet that requirement, would be prospective only. Pending cases should still be decided on the basis of existing law.

If adopted, AB 4369 should have the effect of limiting contacts, and therefore reducing litigation over this issue in the future.

IV. Recommendation AP

This bill is generally consistent with the position taken by the Attorney General before the Public Utilities Commission in the hearings regarding Diablo Canyon nuclear plant. Having expressed the view that ex parte contacts should be prohibited in those proceedings in order to insure that the hearings are fair in fact and have the appearance of fairness as well, the Attorney General will undoubtedly wish to support the principle advanced by AB 4639.

Nevertheless, there are some defects in the bill in its present form. These are:

1. The definition of "interested party" in section 30323 is limited in scope. As a result, only persons acting on behalf of an applicant, or those who have a financial interest in a project, would be prohibited from communicating ex parte with a Commissioner. Citizen groups not acting as agents of an applicant (whether in support of or opposition to a pending matter) who do not have a financial interest would not be precluded from contacting Commissioners. Major projects and controversial Local Coastal Programs often have many such supporters and opponents, as evidenced in the hearings relating to the Occidental Petroleum permit and the Malibu Land Use Plan.

2. The last sentence of the bill enables a court to remove a member of the Commission who violates the provisions governing ex parte contacts. This is hardly the usual way of trying title to an office, and it completely by-passes the procedures applicable to quo warranto actions. It allows any person who brings an

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administrative mandate action to seek removal of Commissioners. No approval of the Attorney General is required, as is the case with a quo warranto action, and no procedural protection (e.g., right to jury trial) for the Commission members is set forth.

3. The potential monetary penalties for a violation ($50,000) are greater than the typical penalties for violating the Coastal Act by performing development without a permit. ($10,000--Pub. Resources Code, § 30821.) While the amount of penalty is a policy choice for the Legislature, perhaps there should be some parity between the penalty for violating ex parte rules and the penalty for violating the substantive requirements of the Coastal Act.

V. Amendments

Recommended amendments are:

1. Section 30323: Re-define "interested person" to be any person who knows that a matter within the Commission's jurisdiction is pending before the Commission. The definition should include, but not be limited to, those persons within the current definition.

2. Section 30824: Delete the final sentence. Existing law allows removal of a Commissioner at the pleasure of the appointing authority, and proposed section 30327 explicitly allows removal of a Commissioner by the appointing authority for knowing violation of the proposed ex parte rules. That fact and the monetary penalty would seem to provide sufficient deterrent to ex parte contacts. Removal from office by a court should be a last resort for dealing with misconduct, and then only when adequate procedural safeguards are established.

3. Section 30824: The proposed penalties should be reviewed in light of the other penalties in the Coastal Act.

AMENDED IN ASSEMBLY APRIL 19, 1988

CALIFORNIA LEGISLATURE—1987–88 REGULAR SESSION

ASSEMBLY BILL No. 4639

Introduced by Assembly Member Friedman

RECEIVED
JUN - 8 1988
CALIFORNIA
COASTAL COMMISSION

February 19, 1988

An act to add Section 30824 to, and to add Article 2.5 (commencing with Section 30320) to Chapter 4 of Division 20 of, the Public Resources Code, relating to the California Coastal Commission.

LEGISLATIVE COUNSEL'S DIGEST

AB 4639, as amended, Friedman. California Coastal Commission: ex parte communication.

The California Coastal Act of 1986 gives the California Coastal Commission specified powers, duties, and responsibilities under the act. The commission consists of 12 voting members and 3 ex officio nonvoting members.

This bill would prohibit a commission member and any interested person, as defined, from conducting; ~~or attempting to conduct,~~ an ex parte communication, as defined. The bill would require a commission member to report an ex parte communication, as specified. A commission member or alternate would be prohibited from influencing a commission decision if the member or alternate has knowingly had an ex parte communication which has not been reported. The bill would authorize an aggrieved person to seek a writ of mandate with regard to a violation which would require the commission to revoke its action and rehear a matter. Any person who knowingly commits an ex parte communication violation would be subject to a civil fine not exceeding ~~$50,000 and a court could remove a commission member from office for a knowing violation~~ *$15,000.* ~~The~~

~~appropriate appointing authority could also remove a commission member for a knowing violation.~~

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

The people of the State of California do enact as follows:

1 SECTION 1. Article 2.5 (commencing with Section
2 30320) is added to Chapter 4 of Division 20 of the Public
3 Resources Code, to read:
4
5 Article 2.5. Fairness and Due Process
6
7 30320. (a) The people of California find and declare
8 that the duties ~~and responsibilities~~*, responsibilities, and*
9 *quasi-judicial actions* of the commission are sensitive and
10 extremely important for the well-being of current and
11 future generations and that the public interest and
12 principles of fundamental fairness and due process of law
13 require that the commission conduct its affairs in an
14 open, objective, and impartial manner free of undue
15 influence and the abuse of power and authority. It is
16 further found that, to be effective, California's coastal
17 protection program requires public awareness,
18 understanding, support, participation, and confidence in
19 the commission and its practices and procedures.
20 Accordingly, this article is necessary to preserve the
21 public's welfare and the integrity of, and to maintain the
22 public's trust in, the commission and the implementation
23 of this division.
24 (b) The people of California further find that in a
25 democracy, due process, fairness, and the responsible
26 exercise of authority are all essential elements of good
27 government which require that the public's business be
28 conducted in public meetings, with limited exceptions
29 for sensitive personnel matters and litigation, and on the
30 official record. ~~This article restricts communications~~
31 ~~between interested persons and individual commission~~
32 ~~members.~~ *Decisions of the commission have to be made*
33 *on the basis of information available to all commission*

members and the public. Nothing in this article is intended to otherwise discourage communications between commission members and interested parties or other members of the public. However, reasonable restrictions are necessary and proper to prevent future abuses and misuse of governmental power so long as all members of the public are given adequate opportunities to present their views and opinions to the commission through written and oral communications on the official record either before or during the public hearing on any matter before the commission.

30321. For purposes of this article, "a matter within the commission's jurisdiction" means any permit action, federal consistency review, appeal, local coastal program, port master plan, public works plan, long-range development plan, categorical or other exclusions from coastal development permit requirements, or any other quasi-judicial matter requiring commission action*, for which an application has been submitted to the commission.*

30322. (a) For purposes of this article, an "ex parte communication" is any oral or written communication between a member of the commission and an interested person about a matter within the commission's jurisdiction and which does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.

(b) The following are not ex parte communications:

(1) Any communication between a staff member acting in his or her official capacity and any commission member or interested person.

(2) Any communication limited entirely to procedural issues, including, but not limited to, matters such as the hearing schedule, location, format, or filing date.

~~(3) Any communication between a commission member, who is acting in the member's official capacity as a city counsel person or a county supervisor, and any interested person about a matter pending before the official's local government, if that communication does not involve any decision the local official is required to~~

~~make or review on appeal.~~

30323. For purposes of this article, an "interested person" means any of the following:

~~(1)~~

(a) Any applicant, an agent or an employee of the applicant, *or person receiving consideration for representing the applicant,* or a participant in the proceeding on any matter before the commission.

~~(2)~~

(b) Any person with a financial interest, as described in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9 of the Government Code, in a ~~decision~~ *matter* before the commission*, or agent or employee of the person with a financial interest, or person receiving consideration for representing the person with a financial interest.*

(c) A representative acting in behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization who intends to influence the decision of a commission member on a matter before the commission.

30324. ~~(a)~~ No commission member nor any interested person shall conduct ~~,~~ ~~or attempt to conduct,~~ an ex parte communication ~~:~~*, except as follows:*

(a) If an ex parte ~~communication is attempted or conducted, the interested party and the commission member shall immediately terminate the attempted ex parte communication. The commission member shall report the ex parte communication to the executive director within three working days or to the commission on the record of the proceeding at the next commission meeting if the matter involved is not scheduled for hearing at that meeting. The report required by this section shall include~~ *communication occurs, the commission member shall notify the interested party that a full report of the ex parte communication will be entered in the commission's official record.*

(b) Communications shall cease to be ex parte communications under this section when fully disclosed and placed in the commission's official record.

(c) The commission member shall fully disclose and make public an oral or written communication by providing a full report of the communication to the executive director within seven days after the communication or, if the communication occurs within seven days of the next commission hearing, to the commission on the record of the proceeding at that hearing.

(d) The commission shall adopt standard disclosure forms for reporting oral communications pursuant to this section which shall include, but not be limited to, all of the following information:

(1) The date, time, and location of the communication.

(2) The identity of the person or persons initiating and the person or persons receiving the communication.

(3) A complete description of the content of the communication, including the complete text of any written material which was a part of the communication.

~~(b) The executive director shall place in the public record any report of an ex parte communication.~~

30325. Nothing in this article prohibits any person or any interested person from testifying at a commission hearing, workshop, or other official proceeding, or from submitting written comments for the record on a matter before the commission. Written comments shall be submitted by mail or delivered to a commission office, or may be delivered to the commission at the time and place of a scheduled hearing.

30326. Any person, including a commission member, may request the commission staff to conduct a workshop on any matter before the commission or on any subject that could be useful to the commission. When the executive director determines that a request is appropriate and feasible, a workshop shall be scheduled at an appropriate time and location.

~~30326.5~~

30327. No commission member or alternate shall make, participate in making, or any other way attempt to use his or her official position to influence a commission

decision ~~in~~ *about* which the member or alternate has knowingly had an ex parte communication which has not been reported pursuant to Section 30324.

~~30327. Notwithstanding Section 30312, the appropriate appointing authority may remove an appointee if the appointee has knowingly violated Section 30324.~~

30328. If a violation of this article occurs and a commission decision may have been affected by the violation, an aggrieved person, as described in Section 30801, may seek a writ of mandate from a court requiring the commission to revoke its action and rehear the matter.

SEC. 2. Section 30824 is added to the Public Resources Code, to read:

30824. In addition to any applicable penalties, any person who knowingly violates Section 30324 is subject to a civil fine, not to exceed ~~fifty thousand dollars ($50,000)~~ *fifteen thousand dollars ($15,000)*. Attorneys fees and costs may be granted pursuant to Section 1021.5 of the Civil Code. ~~A court may, in its discretion, remove a commission member from the commission for a knowing violation of Section 30324.~~

O

11333. Policy on Informal and Ex Parte Contacts.

After a hearing on an enforcement matter is scheduled, Commission members and the administrative law judge, if one were appointed, shall avoid all contacts outside the formal hearing process with reported parties and with the staff members assigned to the investigation regarding any aspect of the proposed cease and desist order or the investigation except contacts with staff regarding procedural aspects of the order or investigation. When such contacts are unavoidable or are made unintentionally, they shall be identified for the record and the substance of the contact shall be made part of the record. When such contacts result in a Commission member becoming so embroiled in the matter that he or she can no longer act fairly and impartially, that member shall either remove himself or herself from further consideration of the matter and shall refrain from voting or shall be subject to removal by a majority vote of either the full Commission or the committee if the Commission member is acting as a committee member. Removal of an administrative law judge shall comport with Cal. Government Code Section 11512(c). Commission members and the administrative law judge, if one were appointed, may discuss procedural aspects of the enforcement proceedings with the assigned representative of the Attorney General's Office or the staff members assigned to the enforcement proceedings.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66637–66642, Government Code; Section 29601, Public Resources Code; and Commission Resolution 76.

HISTORY:

1. New section filed 5-18-87; operative 6-17-87 (Register 87, No. 30).

(Register 87, No. 30—7-25-87)

APPENDIX F

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
30 Van Ness Avenue
San Francisco, California 94102

Telephone: (415) 557-3686

TO BE FILLED IN BY BCDC:

1. Application Number: _____
2. Date Application Filed with BCDC: _____
3. 90th Day After Filing: _____
4. Date Fee Posted: _____ Amount: _____
5. Receipt Number: _____
6. Amendment Fee Posted: _____ Amount: _____
7. Amendment Fee Receipt Number: _____

APPLICATION FOR BAY PERMIT FROM SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

This form is for use in applying for a permit for any project within the McAteer-Petris jurisdiction of the San Francisco Bay Conservation and Development Commission. The application form is long, but only parts of it will have to be completed for any particular project. Many of the questions asked in the application form relate to (1) the McAteer-Petris Act (Cal. Govt. Code Sections 66600 through 66661), which is the law under which the Commission operates, (2) the Commission's San Francisco Bay Plan, and (3) the Commission's regulations (14 California Administrative Code Division 5). Copies of the law, the plan, and the regulations may be obtained from the Commission at its office at 30 Van Ness Avenue, Suite 2011, San Francisco, CA 94102. The Commission's staff can help explain these documents as they affect any particular project. An applicant should also consult the Commission's information booklet entitled Applying for Permits. Applicants for projects in the Suisun Marsh should use the Marsh Permit Application form, not this application form.

COMMISSION POLICY REGARDING CONTACT BETWEEN COMMISSIONERS AND APPLICANTS:

Commissioners should avoid to the greatest possible extent any discussion of permit application matters with individuals or groups on any side when such discussions are not part of the public hearing process. Non-voting Federal Commissioners may discuss applications with applicants. Commissioners may discuss applications with one another and with the staff outside of the public hearing. The Executive Director shall inform applicants of this policy at the time applications are provided.

TO THE APPLICANT:

The applicant must completely answer all questions relevant to the project and must attach to the application all required supporting materials. Until the needed information and materials are supplied, the Commission will be unable to file or act on the application. The applicant may also attach any additional materials (statements, drawings, maps, etc.) that the applicant believes may be helpful to the Commission in processing the application.

APPENDIX G

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
30 Van Ness Avenue, Suite 2011
San Francisco, California 94102
Telephone: (415) 557-3686

TO BE FILLED IN BY BCDC:

1. Application Number: _____
2. Date Application Filed with BCDC _____
3. 90th Day After Filing: _____
4. Date Fee Posted: _____
   Amount: _____
5. Receipt Number: _____
6. Amendment Fee Posted: _____
   Amount: _____
7. Amendment Fee Receipt Number _____

APPLICATION FOR MARSH DEVELOPMENT PERMIT FROM SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

This form is for use in applying for a permit for a development within the primary management area of the Suisun Marsh, Solano County and within any tidelands, submerged lands, or other trust lands within the secondary management area of the Suisun Marsh, which is the jurisdiction of the San Francisco Bay Conservation and Development Commission. The application will be reviewed and analyzed for the proposed development project's conformity with the Suisun Marsh Preservation Act (Cal. Pub. Res. Code Sections 29000 through 29612), the Suisun Marsh Protection Plan, the San Francisco Bay Plan, the Commission's certified Suisun Marsh Local Protection Program, and the Commission's regulations located at 14 California Administrative Code Division 5. Copies of the Act, the Plans, and the Commission's regulations are available at the Commission's office. Copies of the Local Protection Program are available at the applicable local agency. An applicant should also consult the Commission's information booklet entitled Applying for Permits. The Commission staff can also help explain these documents as they affect any particular project.

COMMISSIONER POLICY REGARDING CONTACT BETWEEN COMMISSIONERS AND APPLICANTS:

Commissioners should avoid to the greatest possible extent discussion of permit application matters with individuals or groups on any side when such discussions are not part of the public hearing process. Non-voting Federal Commissioners may discuss applications with applicants. Commissioners may discuss applications with one another and with the staff outside of the public hearing. The Executive Director shall inform applicants of this policy at the time applications are provided.

TO THE APPLICANT:

The applicant must completely answer all questions and must attach to the application all required supporting materials. Until the needed information and materials are supplied, the Commission will be unable to file or act on the application. The applicant may also attach any additional materials (statements, drawings, maps, etc.) that may help the Commission in processing the application.

1216. Ex Parte Contacts.

Commissioners and assigned hearing officer (s) shall avoid any oral or written communication with a representative of any party to an adjudicatory proceeding pending before the commission including those members of the commission staff who have been involved or are likely to be involved as principals in case management or who have participated or are likely to participate in the preparation or presentation of staff testimony, documentary evidence, or cross-examination concerning any substantive issue involved in the proceeding; provided, however, that communications contained in the formal record at a commission hearing shall not be prohibited.

(a) If such a communication occurs, the commissioners or hearing officer shall include a description of the substance of the discussion in the public file on the proceeding to permit rebuttal of the matter on the record by any party affected.

(b) All of the written communications received by a commissioner or hearing officer which relate to substantive issues raised in an adjudicatory proceeding before the commission shall be included in the public file on the proceeding and shall be subject to rebuttal on the record by any party affected.

(c) An adviser to a commissioner or any other member of a commissioner's own staff shall not be used in any manner that would circumvent the purposes and intent of this section.

NOTE: Authority cited: Section 25213, Public Resources Code. Reference: Section 25210, Public Resources Code.

HISTORY:

1. Repealer of Section 1216 and renumbering and amendment of former Section 1218 to Section 1216 filed 1-11-83; designated effective 2-1-83 pursuant to Government Code Section 11346.2(d) (Register 83, No. 3).

ing. Douglass v. Board of Medical Quality Assur. (1983) 190 Cal.Rptr. 506, 141 C.A.3d 645.

11. Fair hearing

College chemistry instructor was not deprived of fair hearing on charges of unfitness to teach by request that she perform experiments which she had been responsible for teaching over a number of years, particularly when they were the subject of complaints giving rise to proceedings against her. Bevli v. Brisco (App. 2 Dist.1985) 212 Cal. Rptr. 36, 165 C.A.3d 812.

Where administrative law judge stated, at outset of hearing with respect to denial by public employees' retirement system of retired public employee's request to change status of his retirement pensions from "service" to "disability," that existence of employee's disability was not at issue, and so found in his findings of fact, but yet his determination of issues addressed the disability question by finding that employee was not incapacitated when he retired, such finding was improper, as the hearing therefore lacked fairness as required by due process. Button v. Board of Administration of Public Emp. Retirement System (1981) 176 Cal.Rptr. 218, 122 C.A.3d 730.

§ 11513.5. Presiding officer; ex parte communication with party or interested person prohibited - in absence of notice and participation opportunity

(a) Except as required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any party, including employees of the agency that filed the accusation, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, including employees of the agency that filed the accusation, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any person serving as administrative law judge, without notice and opportunity for all parties to participate in the communication.

(c) If, before serving as administrative law judge in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subdivision (d).

(d) An administrative law judge who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any person desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(e) The receipt by an administrative law judge of an ex parte communication in violation of this section may provide the basis for disqualification of that administrative law judge pursuant to subdivision (c) of Section 11512. If the administrative law judge is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order by the disqualified administrative law judge.

(Added by Stats.1986, c. 899, § 2.)

§ 11514. Affidavits

Administrative Code References

Evidence rules for denial, suspension and revocation of children's center permits, see 5 Cal.Adm.Code 17946.

Evidence submitted to the commission, see 2 Cal.Adm. Code 1187.5.

§ 11515. Official notice

Administrative Code References

Evidence rules for denial, suspension and revocation of children's center permits, see 5 Cal.Adm.Code 17946.

Evidence submitted to the commission, see 2 Cal.Adm. Code 1187.5.

Notes of Decisions

1. In general

Evidence, including proof that patient was high-risk patient who suffered pulmonary complications after prior operations, that the operation itself was major and serious, that physician expected complications, including pneumonia, and that hospital had no intensive care unit, cardiac care unit, or

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Article 1.5 Ex Parte Communications In Formal Proceedings

1.1 Definitions

For purposes of this Article, the following definitions apply:

(a) "A Proceeding Begins" when an application, complaint, or other initiatory pleading is filed with the Docket Office, or the Commission issues an investigatory order, rulemaking order, order to show cause, or order setting hearing.

(b) "Communication" is an oral or written comment after a proceeding begins and before the decision is final, by a party, made to any decisionmaker or by a decisionmaker, made to a party, addressing the substance of the pending proceeding. A procedural inquiry is not a communication but relates solely to such matters as the hearing schedule, location and format, and filing dates.

(c) "Decisionmaker" means any Commissioner, Commissioner's advisor, or the Administrative Law Judge assigned to a proceeding.

(d) "Party" means (1) an applicant, respondent, complainant, defendant, intervenor, or protestant and their agents; (2) any person or corporation submitting an appearance form in a proceeding, and their agent(s); and (3) the Commission staff members submitting an appearance form in a proceeding, and staff witnesses, but not other members of the staff.

(e) "Submission" of a formal proceeding is the date the formal record is closed for receipt of evidence by ruling of the Administrative Law Judge under Rule 77.

1.2 The Record

The Commission shall render its decision based on the evidence of record. The record is closed for the receipt of evidence after the proceeding is submitted under Rule 77, unless it is reopened under Rule 84.

1.3 Complaint Proceedings

After a complaint proceeding begins, communication between parties and decisionmakers outside the formal record is prohibited.

1.4 Other Proceedings (Pre-Submission)

In other proceedings, until they are submitted, the following standards shall govern communication:

(a) No decisionmaker shall communicate or attempt to communicate, directly or indirectly, with any party on any substantive issue, unless the communication is reported within 3 working days.

(b) No party shall communicate or attempt to communicate, directly or indirectly, with any decisionmaker, on any substantive issue, unless the communication is reported within 3 working days.

(c) Communications shall be reported by the party within 3 working days by filing a "Notice of Ex-Parte Communication" (Notice) with the Docket Office with a certificate showing service on all parties. The Notice shall include:

(1) the date, time, and location of the communication;

(2) the identity of the persons receiving and initiating the communication;

(3) a full description of the content of the communication, and if any written material or text was used during the communication, it shall be appended to the Notice.

(d) Any party shall have the right to effective written or oral rebuttal of any of the matters raised in such communication, as prescribed by the Administrative Law Judge.

1.5 Other Proceedings (Post-Submission)

After submission of a proceeding, communication between parties and decisionmakers outside the formal record is prohibited, except that communications initiated by decisionmakers with the Public Staff Division for the following limited purposes are not prohibited and need not be reported:

(a) To check proposed decision language and calculations for accuracy;

(b) To quantify the impacts on particular rates and revenue requirement of given inputs;

(c) To obtain an objective technical understanding of the inter-relationships of the various results of operations elements, and an understanding of the technical aspects of determining revenue requirement, utility rates, and charges, and;

(d) To determine the revenue impact of changing utility rates.

1.6 Requests For ALJ Draft Decisions

At any time prior to submission of a proceeding subject to Rule 1.5, a party may file a Request For Release of ALJ's Proposed Decision with the Docket Office.

1.7 Release of Draft Decisions

When a request is filed pursuant to Rule 1.6, the ALJ's proposed decision will be served upon the parties at such time as the technical review process has been completed and all appendices are available.

1.8 Exceptions To Draft Decision

Where a party requests an ALJ's proposed decision and it is served upon the parties, Exceptions may be filed under the following conditions:

(a) Exceptions may be submitted only by parties who have filed briefs. An original and 12 copies shall be filed in the Docket Office and copies shall be served on all parties within 10 working days of the date the draft decision is mailed to the parties.

(b) Exceptions may not exceed seven pages.

(c) Exceptions shall focus solely on findings of fact and conclusions of law, since their purpose is to provide information to the Commission that will allow for the correction of factual and technical errors in the draft decision.

(d) In pointing out particular factual and technical corrections, a party shall make specific references to the record.

(e) Responses to Exceptions shall not be filed, and the Docket Office shall reject responses presented for filing.

1.9 Applicability

This Article applies to all formal proceedings pending on the date it is adopted, and to all formal proceedings commenced after that date.

1.10 Cross-References

(a) Form and Size of Pleadings - Rule 2

(b) Caption, Title of Pleading, and Docket Number - Rule 3

(c) Case Information System Identification Number - Rule 3.5

(d) Signatures - Rules 4 and 6

(e) Copies to be filed - Rule 7

(f) Issuance of Decisions - Rule 77

(g) Petition to Set Aside Submission - Rule 84

(END OF APPENDIX 5)

RECEIVED
APR 28 1988
CALIFORNIA
COASTAL COMMISSION

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

APR 15 1988

MEMORANDUM FOR: Secretary of Commerce
Deputy Secretary-Designate
Under Secretary for Oceans and Atmosphere
Assistant Secretary for Oceans and Atmosphere
Assistant Administrator for Ocean Services and Coastal Zone Management, NOAA
General Counsel, NOAA
Deputy General Counsels, NOAA
Assistant General Counsel for Ocean Services, NOAA
Special Assistants and Staff Officers of the the above officials

FROM: Robert H. Brumley RHB

SUBJECT: Restrictions on Communications Pertaining to Consistency Appeals before the Secretary under the Coastal Zone Management Act

The Secretary[1] has before him under the Coastal Zone Management Act appeals of State objections to consistency certifications filed by various applicants for Federal permits. None of you should discuss the merits of any such appeal with any party to the appeal or with any other person interested in the appeal unless all parties and persons involved have advance notice of the discussion and a reasonable opportunity to be present. This restriction does not apply to discussions of the procedures applicable to the appeal.

Should you receive any written communication regarding an appeal after a notice of appeal has been received by the Secretary, you are required to place a copy of this communication in the public record file for the appeal. The public record files are maintained by the Office of the Assistant General Counsel for Ocean Services, NOAA, Suite 603, Universal South Building.

If a prohibited conversation takes place, you are required to write a memorandum summarizing the substance of the conversation and place a copy of that memorandum in the public record file.

These "ex parte" restrictions are designed to ensure the completeness of the administrative record and the fairness and

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[1] The Secretary has delegated his decisional authority for some of these appeals to the Deputy Secretary.

impartiality of the decisional process. The restrictions in this memorandum do not apply to the Director, Office of Ocean and Coastal Resource Management, NOAA. The Director does not participate in decisions and proceedings on the merits of these appeals in order to remain available to perform mediation functions under the Coastal Zone Management Act.

Attached is a list of the consistency appeals currently pending before the Secretary.

Attachment

cc: Director, Office of Ocean and Coastal Resource Management, NOAA

§ 0.735–48 Ex parte contacts.

Certain ex parte contacts by an employee are prohibited in quasi-judicial proceedings under §§ 2.719 and 2.780 of this chapter.

§ 2.719 Separation of functions.

(a) A presiding officer shall perform no duties inconsistent with his responsibilities as a presiding officer, and will not be responsible to or subject to the supervision or direction of any officer or employee engaged in the performance of investigative or prosecuting functions.

(b) In any adjudication, the presiding officer may not consult any person other than a member of his staff or a special assistant as provided for in § 2.722 on any fact in issue unless on notice and opportunity for all parties to participate, except: (1) As required for the disposition of *ex parte* matters as authorized by law and (2) as provided in paragraph (c) of this section.

(c) In any adjudication for the determination of any application for initial licensing, other than a contested proceeding, the presiding officer may consult (1) the staff and (2) members of the panel appointed by the Commission from which members of atomic safety and licensing boards are drawn. *Provided, however,* That in adjudications in which an appeal from the initial decision may be taken to the Atomic Safety and Licensing Appeal Board, the presiding officer shall not consult any member of the Atomic Safety and Licensing Appeal Panel on any fact in issue.

(d) Except as provided in paragraph (c) of this section and § 2.780(e), in any case of adjudication, no officer or employee of the Commission who is engaged in the performance of any investigative or prosecuting function in the case or a factually related case may participate or advise in the initial or final decision, except as a witness or counsel in the proceeding. Where an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a consultation or communication authorized by paragraph (c) of this section or § 2.780(e), the substance of the communication shall be specified in the record in the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert such fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing an appeal from the initial decision, or a petition for reconsideration of a final decision, clearly and concisely setting forth the information or agrument relied on to show the contrary.

[27 FR 377, Jan. 13, 1962, as amended at 31 FR 12776, Sept. 30, 1966; 35 FR 11459, July 17, 1970; 45 FR 62028, Sept. 18, 1980; 48 FR 52285, Nov. 17, 1983]

Ex Parte Communications

§ 2.780 Ex parte communications.

(a) Except as provided in paragraph (e) of this section, neither (1) Commissioners, members of their immediate staffs, or other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions will request or entertain off the record except from each other, nor (2) any party to a proceeding for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit, or any officer, employee, representative, or any other person directly or indirectly acting in behalf thereof, shall submit off the record to Commissioners or such staff members, officials, and employees, any evidence, explanation, analysis, or advice, whether written or oral, regarding any substantive matter at issue in a proceeding on the record then pending before the NRC for the issuance, denial, amendment, transfer, renewal, modification, sus-

pension, or revocation of a license or permit. For the purposes of this section, the term "proceeding on the record then pending before the NRC" shall include any application or matter which has been noticed for hearing or concerning which a hearing has been requested pursuant to this part.

(b) Copies of written communications covered by paragraph (a) of this section shall be placed in the NRC public document room and served by the Secretary on the communicator and the parties to the proceeding involved.

(c) A Commissioner, member of his immediate staff, or other NRC official or employee advising the Commissioners in the exercise of their quasi-judicial functions, to whom is attempted any oral communication concerning any substantive matter at issue in a proceeding on the record as described in paragraph (a) of this section, will decline to listen to such communication and will explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof will advise the communicator that a written summary of the conversation will be delivered to the NRC public document room and a copy served by the Secretary of the Commission on the communicator and the parties to the proceeding involved. The recipient of the oral communication thereupon will make a fair, written summary of such communication and deliver such summary to the NRC public document room and serve copies thereof upon the communicator and the parties to the proceeding involved.

(d) This section does not apply to communications authorized by paragraph (e) of this section, to the disposition of ex parte matters authorized by law, or to communications requested by the Commission concerning:

(1) Its proprietary functions;

(2) General health and safety problems and responsibilities of the Commission; or

(3) The status of proceedings.

(e) In any adjudication for the determination of an application for initial licensing, other than a contested proceeding, Commissioners, members of their immediate staffs and other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions may consult the staff, and the staff may communicate with Commissioners, members of their immediate staffs and other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions.

(f) The provisions and limitations of this section applicable to Commissioners, members of their immediate staffs, and other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions are applicable to members of the Atomic Safety and Licensing Appeal Board, members of their immediate staffs, and other NRC officials and employees who advise members of the Appeal Board in the exercise of their quasi-judicial functions.

(g) In the case of an application for a license under Part 60 of this chapter (relating to disposal of high-level radioactive wastes in geologic repositories), this part requires a proceeding on the record prior to the issuance of a construction authorization. Unless the Commission orders otherwise, the issuance of a construction authorization (or a final decision to deny a construction authorization) shall be deemed, for purposes of this section, to terminate all proceedings on the record then pending before the NRC with respect to such application.

[27 FR 377, Jan. 13, 1962, as amended at 31 FR 12777, Sept. 30, 1966; 34 FR 13361, Aug. 19, 1969; 35 FR 19502, Dec. 23, 1970; 37 FR 15137, July 28, 1972; 40 FR 2974, Jan. 17, 1975; 40 FR 8776, Mar. 3, 1975; 46 FR 13973, Feb. 25, 1981]

ATOMIC SAFETY AND LICENSING APPEAL BOARD

§ 2.785 Functions of Atomic Safety and Licensing Appeal Board.

(a) The Commission has authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission, including, but not limited to, those under §§ 2.760 through 2.771, 2.912, and 2.913 in (1) proceedings conducted

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§ 2.786 Review
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sion releases are not considered parties to the proceeding.

(e) "Proceeding" includes: (1) An "informal complaint" filed under §§ 1130.1, or 1130.3 or a "formal complaint" alleging violation of any provision of the Act or of any regulation or requirement made pursuant to a power granted by such Act, including petitions on special dockets;

(2) An "application" for (i) the granting of any right, privilege, authority, or relief under or from any provision of the Act or of any regulation or requirement made pursuant to a power granted by such Act, or (ii) the consideration of any submission required by law to be made to the Commission;

(3) An "investigation" instituted by the Commission;

(4) A "rulemaking" proposal instituted by the Commission; or

(5) A petition for exemption filed under 49 U.S.C. 10505 requesting the Commission to exempt from application all or part of subtitle IV of Title 49 of the United States Code any person, class of persons, transaction, or service related to a rail carrier.

[47 FR 49548, Nov. 1, 1982, as amended at 50 FR 30275, July 25, 1985]

§ 1101.3 Construction.

The rules of construction contained in chapter 1 of Title 1 of the United States Code (1 U.S.C. 1 et seq.) apply in this chapter. Among other things, they provide that the singular includes the plural, and vice versa; that the masculine includes the feminine; that the word "person" includes corporations, associations, and the like; that "county" includes parish and similar subdivisions; and that "company" includes successors and assigns.

PART 1102—COMMUNICATIONS

Sec.
1102.1 How addressed.
1102.2 Ex parte communications prohibited; penalties provided.

AUTHORITY: 49 U.S.C. 10321; 5 U.S.C. 559.

§ 1102.1 How addressed.

All communications should be addressed to the Secretary of the Commission, Interstate Commerce Commission, Washington, DC 20423 unless otherwise specifically directed by another Commission regulation. All communications should designate the docket number and title, if any. The person communicating shall state his address, and the party he represents.

[47 FR 49548, Nov. 1, 1982]

§ 1102.2 Ex parte communications prohibited; penalties provided.

(a) *Definitions.* (1) "On-the-record proceeding" means any matter described in Sections 556-557 of the Administrative Procedure Act (5 U.S.C. 556-557) or any matter required by the Constitution, statute, Commission rule, or by decision in the particular case, that is decided solely on the record made in a Commission proceeding.

(2) "Person who intercedes in any proceeding" means any person, partnership, corporation, or association, private or public, outside of the Commission which is neither a party nor party's agent, that volunteers a communication that it has reason to know may advance or adversely affect the interest of a party or party's agent in any proceeding before the Commission.

(3) "*Ex Parte* communication concerning the merits" means an oral or written communication by or on the behalf of a party which is made without the knowledge or consent of any other party that could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.

(b) *Communications that are not prohibited.* (1) Any communication to which all the parties to the proceeding agree, or on which the Commission formally rules, may be made on an *ex parte* basis;

(2) Any communication of facts or contention which has general significance for a regulated industry if the communicator cannot reasonably be expected to have known that the facts or contentions are material to a substantive issue in a pending on-the-record proceeding in which it is interested;

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(3) Any communication by means of the news media that in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publication with respect to pending on-the-record proceedings.

(c) *Prohibitions.* (1) No party, counsel, agent of a party, or person who intercedes in any on-the-record proceeding shall engage in any *ex parte* communication concerning the merits of the proceeding with any Commissioner, hearing officer, joint board member, employee board member or employee of the Commission who participates, or who may reasonably be expected to participate, in the decision in the proceeding.

(2) No Commissioner, hearing officer, joint board member, employee board member or employee of the Commission who participates, or is reasonably expected to participate, in the decision in an on-the-record proceeding shall invite or knowingly entertain any *ex parte* communication concerning the merits of a proceeding or engage in any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

(d) *When prohibitions take effect.* The prohibitions against *ex parte* communications concerning the merits of a proceeding apply from the date on which a proceeding is noticed for oral hearing or for the taking of evidence by modified procedure, or when the person responsible for the communication has knowledge that the proceeding will be so noticed, or at any time the Commission, by rule or decision, specifies.

(e) *Procedure required of Commission members and employees upon receipt of ex parte communications concerning the merits of a proceeding.* Any person who receives an *ex parte* communication concerning the merits of a proceeding must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Secretary of the Commission. The Secretary shall place all of the material in the correspondence section of the public docket of the proceeding. A recipient of such *ex parte* communication, who has doubt as to the nature of the communication, may request a ruling on the question from the Commission's General Counsel. The General Counsel shall promptly reply to such requests. The Secretary shall promptly notify the Chairman of the Commission of such *ex parte* communications sent to the Secretary. The General Counsel shall promptly notify the Chairman of all requests for rulings sent to the General Counsel. The Chairman may require that any communication be placed in the correspondence section of the docket when fairness requires that it be made public, even if it is not a prohibited communication. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

(f) *Sanctions.* (1) The Commission may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited *ex parte* communication concerning the merits of a proceeding.

(2) The relief or benefit sought by a party to a proceeding may be denied if the party, or his agent knowingly and willfully violates the foregoing rules.

(3) The Commission may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Commission employee who knowingly and willfully violates the foregoing rules.

[47 FR 49548, Nov. 1, 1982]

§ 1103.13 Attempts to exert political or personal influence on the Commission are prohibited.

(a) It is unethical for a practitioner to attempt to influence the judgment of the Commission by threats of political or personal reprisal.

(b) Marked attention and unusual hospitality on the part of a practitioner to a Commissioner, administrative law judge, or other representative of the Commission, which is unwarranted by the personal relationship of the parties, is subject to misconstruction of motive and should be avoided.

§ 1103.14 Private communications with the Commission are prohibited.

To the extent that the Commission acts in a quasi-judicial capacity, it is improper for litigants, directly or through any counsel or representative, to communicate privately with a Commissioner, administrative law judge, or other representative of the Commission about a pending case, or to argue privately the merits thereof in the absence of the adversaries or without notice to them. Practitioners at all times shall scrupulously refrain from going beyond *ex parte* representations which are clearly proper in view of the administrative work of the Commission in their communication with the Commission and its staff.

Subpart V—Ex Parte Communications; Separation of Functions

§ 385.2201 Ex parte communications (Rule 2201).

In order to avoid all possibilities of prejudice, real or apparent, to the public interest and persons involved in proceedings pending before the Commission:

(a) Except as permitted in paragraph (b) of this section, no person who is a party to, or his or her counsel, agent, or other person acting on his or her behalf, and no interceder in, any on-the-record proceedings, shall submit ex parte, off-the-record communications to any member of the Commission or of his or her personal staff, to the administrative law judge, or to any other employee of the Commission, regarding any matter pending before the Commission in any contested on-the-record proceeding, and no Commissioner, member of his or her personal staff, Administrative Law Judge, or any other employee of the Commission, shall request or entertain any such ex parte, off-the-record communications. For the purposes of this section, the term "ex parte communication" means an oral or written communication relative to the merits of an on-the-record proceeding pending before the Commission which is not on the public record and with respect to which reasonable prior notice to the parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this section; the term "decisional employee" means a commissioner or member of his or her personal staff, an administrative law judge, or any other employee of the Commission who is or may be reasonably expected to be involved in the decisional process of the proceeding; the term "contested on-the-record proceedings" means a proceeding required by statute, constitution, published Commission rule or regulation or order in a particular case, to be decided on the basis of the record of a Commission hearing, and in which a protest or a petition or notice to intervene in opposition to requested Commission action has been filed; the term "interceder" shall include any individual outside the Commission, whether in private or public life, partnership, corporation, association, or other agency, other than a party or an agent of a party, who volunteers a communication.

(b) The prohibitions contained in paragraph (a) of this section do not apply to a communication:

(1) From an interceder who is a local, State, or Federal agency which has no official interest in and whose official duties are not affected by the outcome of the on-the-record proceedings before the Commission to which the communication relates;

(2) From an interceder relating to matters of procedure only;

(3) From a party to, or his or her counsel, agent, or other person acting on his or her behalf, in an on-the-record proceeding, if the communication relates to matters of procedure only and is directed to the Secretary of the Commission, staff counsel, or any other employee in the presence of or with the prior approval of staff counsel;

(4) From any person when otherwise authorized by law;

(5) When the communication is between the staff counsel assigned to the proceeding or, in the presence of or after coordination with such staff counsel, any other employee of the Commission (except a decisional employee) and any party or counsel to any party or parties to the proceeding or, in the presence of or after coordination with such counsel or party, and agent of any such party: *Provided*, That any employee of the Commission who may reasonably be expected to participate in the decisional process may waive such participation by entering a staff appearance in the proceeding: *Provided further*, That non-unanimous settlement offers shall thereafter be served on the participants in the proceeding prior to the submission of such offers to the Commission;

(6) Which the participants agree may be made on an ex parte basis;

(7) Related to routine safety, construction, and operational inspections of project works by the Commission staff not undertaken to investigate or study a matter pending in issue before the Commission in any on-the-record proceeding;

(8) Related to routine field audits of the accounts or any books or records of a company subject to the Commission's accounting requirements not undertaken to investigate or study a matter pending in issue before the Commission in any on-the-record proceeding;

(9) Which relates solely to a request for supplemental information or data necessary for an understanding of factual materials contained in documents filed with the Commission in a proceeding covered by this section and which is made in the presence of or after coordination with counsel, except a communication with a deci-

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sional employee, in the absence of waiver of participation;

(10) The Commission may, by rule or order, modify any provision of this subpart, or Rule 1415, as it applies to all or part of a proceeding, to the extent permitted by law. The prohibitions of paragraph (a) of this section do not apply to oil pipeline proceedings which are governed by Rule 1415.

(c) All written communications prohibited by paragraph (a) of this section, sworn statements reciting the substance of all such oral communications, and all written responses and sworn statements reciting the substance of all oral responses to such prohibited communications must be delivered to the Secretary of the Commission who will place the communication in public files associated with the case, but separate from the material upon which the Commission can rely in reaching its decision. The Secretary will serve such communications upon parties to the proceeding. The Secretary will also serve a copy of the sworn statement to the communicator and allow him or her a reasonable opportunity to file a response.

(d) A Commissioner, member of his or her immediate staff, administrative law judge, or any other employee of the Commission who receives an oral offer of any communication prohibited by paragraph (a) of this section shall decline to listen to such communication and shall explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof shall advise the communicator that he or she will not consider the communication. The recipient shall prepare a sworn statement setting forth the substance of the communication and the circumstances thereof within 48 hours and deliver the statement to the Secretary of the Commission for compliance with the procedures established in paragraph (c) of this section.

(e) Requests for an opportunity to rebut, on the record, any facts or contentions contained in an ex parte communication which the Secretary has associated with the record may be filed in writing with the Commission. The Commission will grant such requests only where it determines that the dictates of fairness so require. Where the communication contains assertions of fact not a part of the record and of which the Commission cannot take official notice, the Commission in lieu of receiving rebuttal material normally will direct that the alleged factual assertion on any proposed rebuttal be disregarded in arriving at a decision. Nor will the Commission normally permit any rebuttal of ex parte endorsements or oppositions by civic or other organizations by the submission of counter endorsements or oppositions.

(f) Upon receipt of a communication knowingly made in violation of paragraph (a) of this section, the Commission, administrative law judge, or other employee presiding at the hearing may require, to the extent consistent with the interests of justice and the policy of underlying statutes, the communicator to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(g) The prohibitions contained in this section shall apply from the time at which a proceeding is noticed for hearing or the person responsible for such communication has knowledge that it will be noticed for hearing or at the time at which a protest or a motion or notice to intervene in opposition to requested Commission action has been filed, whichever occurs first.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21707, May 23, 1984]

§ 385.2202 Separation of functions of staff (Rule 2202).

In any proceeding in which a Commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.

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SOURCE: 52 FR 21052, June 4, 1987, unless otherwise noted.

GENERAL

§ 1.1200 Introduction.

(a) *Purpose.* To ensure that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process, the Commission has prescribed rules and regulations governing ex parte communications. These rules and regulations, which are designed to deter improper communications and maintain the utmost public confidence in Commission proceedings, specify standards of conduct and procedures to be followed with regard to ex parte presentations in Commission proceedings and provide for the imposition of sanctions for violations of these standards and procedures. Where the public interest so requires in a particular proceeding, the Commission retains the discretion to issue public notices setting forth modified or more stringent ex parte procedures.

(b) *General applicability.* These rules set forth the ex parte requirements that apply in various types of Commission proceedings. Following § 1.1202 (Definitions), the rules describe three general classes of FCC proceedings. First, § 1.1204(a) lists types of proceedings in which there are no ex parte restrictions. In these proceedings, parties and Commission decision makers may communicate freely, without regard to the prohibitions and disclosure requirements of these ex parte rules. Next, § 1.1206(c) lists proceedings that are classified as "non-restricted." In non-restricted proceedings, parties and Commission decision-makers are permitted to engage in ex parte communications but certain disclosure requirements must be met. Finally, § 1.1208(c) lists proceedings that are classified as "restricted." In restricted proceedings, ex parte communications are generally prohibited. In all proceedings, including exempt proceedings, certain periods are set aside during which all communication with Commission personnel is prohibited. *See* § 1.1203. In addition, the prohibitions and requirements applicable to "restricted" and "non-restricted" proceedings are subject to certain general exceptions, which are listed in § 1.1204(b). Therefore, § 1.1204(b) should always be examined to determine whether a seemingly prohibited ex parte communication may be permissible.

NOTE: Inquiries concerning the propriety of ex parte communications should be directed to the Office of General Counsel.

§ 1.1202 Definitions.

(a) *Presentation.* Any communication directed to the merits or outcome of a proceeding. Excluded from this term is a communication which is inadvertently or casually made, or a communication which is an inquiry or request for information relating solely to the status of a proceeding. A status inquiry which states or implies a preference for a particular party or position in a proceeding, or which states why timing is important to a particular party, or which in any other manner is intended as a means, direct or indirect, to address the merits or outcome, or influence the timing, of a proceeding is a presentation.

(b) *Ex parte presentation.* Any presentation made *to* decision-making personnel but, in restricted proceedings, any presentation *to* or *from* decision-making personnel, which:

(1) If written, is not served on the parties to the proceeding, or

(2) If oral, is made without advance notice to the parties to the proceedings and without opportunity for them to be present.

Comments and reply comments in informal rule making proceedings pursuant to §§ 1.415 and 1.419 are not considered ex parte presentations even if they are not served on other parties.

(c) *Decision-making personnel.* Any member, officer or employee of the Commission who is or may reasonably be expected to be involved in the decisional process in the proceeding. Unless otherwise specified, such persons usually include the Commissioners, their assistants, and other professional personnel of the Commission. Any person who has been made a party to a proceeding or who otherwise has been excluded from the decisional process shall not be treated as a decision-maker with respect to that proceeding. Thus, any person designated as part of a separated trial staff shall not be considered a decision-making person in the designated proceeding. Unseparated Bureau or Office staff who may reasonably be expected to become involved in the decisional

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Comments and reply comments in informal rule making proceedings pursuant to §§ 1.415 and 1.419 are not considered ex parte presentations even if they are not served on other parties.

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(d) *Adjudicative proceeding.* Any proceeding, other than a rule making or a tariff proceeding involving future rates or practices, initiated upon the Commission's own motion or upon the filing of an application, a petition for special relief or waiver, or a complaint or similar pleading that involves the determination of rights and responsibilities as between specific parties.

(e) *Formal opposition or formal complaint.* (1) A pleading opposing the grant of a particular application, waiver request, petition for special relief or other request for Commission action, or a pleading in the nature of a complaint (other than a section 208 complaint), which meets the following requirements:

(i) The caption and text of a pleading make it unmistakably clear that the pleading is intended to be a formal opposition or formal complaint;

(ii) The pleading is served upon the other parties to the proceeding or, in the case of a complaint, upon the person subject to the complaint; and

(iii) The pleading is filed within the time period, if any, prescribed for such a pleading;

(2) A formal complaint under section 208 of the Communications Act if it meets the requirements of § 1.721 *et seq.* of the Commission's Rules (formal complaints against common carriers).

(f) *Sunshine Agenda period.* For purposes of this subpart, the Sunshine Agenda period is defined as the period of time that commences with release of a public notice that a matter has been placed on the Sunshine Agenda and that terminates when the Commission:

(1) Releases a final order, or

(2) Issues a public notice stating that the matter has been deleted from the Sunshine Agenda, or

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

whichever one of the above occurs first.

SUNSHINE PERIOD PROHIBITION

§ 1.1203 Sunshine period prohibition.

(a) Unless exempted under § 1.1204(b), the making of any presentation, whether ex parte or not, to decision-making personnel concerning matters listed on the Sunshine Agenda is prohibited during the Sunshine Agenda period. *See* § 1.1202(f).

(b) The prohibition on presentations in § 1.1203(a) above shall not apply to responses to ex parte presentations that are requested under § 1.1204(b)(7) or to presentations regarding settlement agreements.

GENERAL EXEMPTIONS

§ 1.1204 General exemptions.

(a) *Proceedings in which no ex parte restrictions apply.* Subject to the provisions of § 1.1203 (Sunshine Period Prohibition) and § 1.1208(b) (Restricted Proceedings), there are no ex parte restraints or disclosure requirements in the following types of proceedings:

(1) An adjudicative proceeding as defined in § 1.1202(d) unless it

(i) Is formally opposed or involves a formal complaint (*see* § 1.1202(e)); or

(ii) Involves mutually exclusive applications; or

(iii) Has been designated for hearing (*see* § 1.1208(c)(1)(i)).

(2) A pending petition for rule making unless it

(i) Involves the allotment of a channel in the radio broadcast or television broadcast services, and

(ii) Is formally opposed (*see* § 1.1208(c)(2)).

(3) A request for information which is filed pursuant to the Freedom of Information Act, 5 U.S.C. 552, unless it is formally opposed.

NOTE: In proceedings exempted by § 1.1204(a)(1) through (3), oral ex parte communications are permissible, but only between the Commission and the formal party involved or his representative. Any informal objectors (whether their objections are oral or written) are subject to ex parte procedures set forth in § 1.1208 barring oral ex parte contacts except where confidentiality is necessary to protect these persons from possible reprisals. Oral communications between Commission staff and advisory coordinating committee members with respect to coordination of assignment of fre-

quencies in the private land mobile services and fixed services authorized under section 331 of the Communications Act are not prohibited.

(4) A notice of inquiry proceeding unless the Commission states otherwise, *see* § 1.1206(b)(2).

(5) A proceeding involving an informal complaint against a carrier under section 208 of the Communications Act (*see* § 1.711 of the Rules) unless it has been designated for hearing.

(6) A tariff proceeding under section 203, 204, or 205 of the Communications Act unless it has been set for investigation, (*see* § 1.1206(b)(6).

(b) *Exempt Ex Parte Presentations.* The following types of ex parte presentations are exempt from the prohibitions and requirements in § 1.1206 (non-restricted proceedings) and § 1.1208 (restricted proceedings) as follows:

(1) The presentation is authorized by statute or by the Commission's Rules, *see, e.g.,* § 1.333(d).

(2) The presentation is made by or to the General Counsel or his or her staff and concerns judicial review of a matter which has been decided by the Commission.

(3) The presentation directly relates to an emergency in which the safety of life is endangered or substantial loss of property is involved; provided however, that if the presentation is oral, a written summary of the presentation shall be filed within a reasonable period of time thereafter.

(4) The presentation involves a military or foreign affairs function of the United States or classified security information.

(5) The presentation is to or from staff of an agency of the Federal Government and involves a matter over which that agency and the Commission share jurisdiction.

(6) The presentation is between Commission staff and an advisory coordinating committee member with respect to the coordination of frequency assignments to stations in the private land mobile services or fixed services as authorized by section 331 of the Communications Act.

(7) The presentation is requested by the Commission or staff for the clarification or adduction of evidence or for resolution of issues, and the proceeding is a restricted proceeding which has not been designated for hearing, a non-restricted proceeding or an exempt proceeding.

NOTE In a restricted proceeding, any new written information elicited from such a request and a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding. Where such service would be unduly burdensome because parties to the proceeding are numerous or because the materials relating to the presentation are voluminous, the Commission may waive such service by issuing a public notice which states that copies of the presentation and/or materials relating to it are available for public inspection and by including copies of the presentation and/or materials relating to it in the record of the proceeding. In a non-restricted proceeding, any new information elicited from such a request shall be disclosed in accordance with the procedures set forth in § 1.1206. Any new information received during the Sunshine period shall be fully disclosed in accordance with the above procedures or by other adequate means of notice the Commission deems appropriate.

NON-RESTRICTED PROCEEDINGS

§ 1.1206 Non-restricted proceedings; ex parte presentations generally permissible but subject to disclosure.

(a) Except as provided during the Sunshine Agenda period (*see § 1.1203*), *ex parte presentations are permissible in non-restricted proceedings if the following disclosure requirements are met:*

(1) *Written ex parte presentations made by persons outside the Commission.* Any person who makes or submits a written ex parte presentation shall provide on the same day it is submitted a copy of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation must indicate on its face the docket number of the particular proceedings(s) to which it relates and the fact that a copy of it has been submitted to the Secretary.

(2) *Oral ex parte presentations made by persons outside the Commission.* Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that

ing is a restricted proceeding which has not been designated for hearing, a non-restricted proceeding or an exempt proceeding.

NOTE: In a restricted proceeding, any new written information elicited from such a request and a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding. Where such service would be unduly burdensome because parties to the proceeding are numerous and because the materials relating to the presentation are voluminous, the Commission may waive such service by issuing a public notice which states that copies of the presentation and/or materials relating to it are available for public inspection and by including copies of the presentation and/or materials relating to it in the record of the proceeding. In a non-restricted proceeding any new information elicited from such a request shall be disclosed in accordance with the procedures set forth in § 1.1206. Any new information received during the Sunshine period shall be fully disclosed in accordance with the above procedures or by other adequate means of notice the Commission deems appropriate.

NON-RESTRICTED PROCEEDINGS

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(a) Except as provided during the Sunshine Agenda period (*see § 1.1203*), *ex parte presentations are permissible in non-restricted proceedings if the following disclosure requirements are met:*

(1) *Written ex parte presentations made by persons outside the Commission.* Any person who makes or submits a written ex parte presentation shall provide on the same day it is submitted a copy of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation must indicate on its face the docket number of the particular proceedings(s) to which it relates and the fact that a copy of it has been submitted to the Secretary.

(2) *Oral ex parte presentations made by persons outside the Commission.* Any person who in making an oral ex parte presentation presents data or arguments not already reflected in the person's written comments, memoranda, or other previous filings in the proceeding shall provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments.

(3) *Ex parte presentations requested by persons within the Commission and spontaneous ex parte presentations.* A decision making person who requests an ex parte presentation should advise the person making the presentation that the presentation must be reflected in the public record before the Commission issues a final order in the relevant proceeding. Any person who makes a presentation under this paragraph shall comply with the requirements of paragraph (a)(1) or paragraph (a)(2), whichever is applicable.

(4) *Notice of ex parte presentations.* The Commission's Secretary shall place in the public file or record of the proceeding written ex parte presentations and memoranda reflecting oral ex parte presentations. The Secretary shall issue a public notice listing any written ex parte presentations or written summaries of oral ex parte presentations received by his office during the preceding week relating to any non-restricted proceeding.

(b) Unless otherwise ordered by the Commission, a non-restricted proceeding includes the following:

(1) An informal rule making proceeding conducted under section 553 of the Administrative Procedure Act (upon Commission adoption of a notice of proposed rule making), unless the proceeding concerns the allotment of a specific channel in the radio or television broadcast services, *see* § 1.1208(c)(2).

(2) An inquiry proceeding (upon Commission adoption of a notice of inquiry) where the Commission specifically states the proceeding is "non-restricted" because it contemplates adoption of a binding policy determination.

(3) A proceeding conducted pursuant to section 220(b) of the Communications Act for prescription of common carrier depreciation rates (upon release of a public notice of specific proposed depreciation rates for a carrier or carriers).

(4) A petition or request for declaratory ruling at the time a formal opposition to the petition has been filed.

(5) A rule making proceeding conducted pursuant to section 201(a), 213(a), 221(c) or 222 of the Communications Act or section 201(c)(2) or 201(c)(5) of the Communications Satellite Act of 1962, if the proceeding has been formally opposed or has been set for investigation by the Commission.

(6) A tariff proceeding which has been set for investigation by the Commission under section 204 or 205 or a rate of return proceeding under Title II of the Communications Act.

NOTE: Proceedings under the statutory provisions listed in § 1.1206(b)(5) and § 1.1206(b)(6) that pertain primarily to *past* rates or practices of common carriers may be adjudicative proceedings subject to the provisions of § 1.1208. *See* 5 U.S.C. 551(4); 47 U.S.C. 409(c)(1)(2)(d); *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971).

(7) A proceeding under section 221(a) (telephone acquisitions and consolidations) of the Communications Act from the time a formal request for hearing has been made by an entity specified in that section.

(8) A proceeding under section 214(a) (extension of lines) of the Communications Act at the time a formal opposition has been filed and prior to designation for hearing, *see* § 1.1208(c)(3).

(9) A proceeding involving a request for information filed pursuant to the Freedom of Information Act, 5 U.S.C. 552, upon the filing of a formal opposition to the request or, in a proceeding where the requested information is the subject of a request for confidentiality, upon the filing of the FOIA request.

RESTRICTED PROCEEDINGS

§ 1.1208 Restricted proceedings.

(a) Unless exempted under § 1.1204(b), ex parte presentations are prohibited in restricted proceedings. The prohibition continues in effect until the proceeding has been decided or a settlement or agreement by the parties has been approved by the Commission and such decision or approval is no longer subject to reconsideration

by the Commission or to review by any court.

(b) No person shall make an ex parte presentation in a proceeding that could become restricted even though the proceeding is not restricted at the time if:

(1) That person intends to file a mutually exclusive application which would cause the proceeding to become restricted; or

(2) That person intends to file an opposition, complaint, or objection which would cause the proceeding to become restricted.

NOTE: The prohibition in § 1.1208(b)(2) is inapplicable to complaint proceedings under section 208 of the Communications Act.

(c) Unless governed by § 1.1204 or § 1.1206, the following are restricted proceedings:

(1)(i) Any adjudicative proceeding, including any proceeding conducted pursuant to section 303(l) (classification and qualifications of radio station operators); section 303(m) (suspension of radio licenses); sections 308 and 309 (application for licenses); section 310 (holding and transfer of licenses); section 312 (administrative sanctions); section 315 (facilities for candidates for public office); section 316 (modification of construction permits or licenses) of the Communications Act; special relief or waiver proceedings under the above sections; or cable television special relief or waiver proceedings.

NOTE: *See also* Note to § 1.1204 (a)(1) through (3).

(ii) Any proceeding under section 206 (liability of carriers for damages); section 207 (recovery of damages); section 208 (complaints); section 212 (interlocking directorates); section 214(d) (line extensions); section 224(b)(1) (pole attachments) of the Communications Act.

(iii) Any proceeding under section 201(c)(6), (7), (9) or 304(f) of the Communications Satellite Act of 1962.

(iv) From the day on which any of the following has occurred:

(A) The release of an order designating the proceeding for hearing (unless a hearing has been subsequently waived pursuant to § 1.92 of this chapter);

(B) The filing of a formal opposition or formal complaint;

(C) The release of a public notice apprising the public of the filing of a mutually exclusive application *Provided, however,* That if a person has actual knowledge that a mutually exclusive application has been filed prior to the release of the public notice, that person is prohibited from making an ex parte presentation from the moment of such actual knowledge. The term "public notice" as used in this subsection means the public notice issued at regular intervals listing all applications and major amendments thereto which have been tendered (or, in non-broadcast services, accepted) for filing. (*See* §§ 1.564(c), 1.962(e) and 21.27(b) of this chapter.) When the Commission issues a specific public notice stating that there is a possibility of conflict between the applications, then the term "public notice" shall refer to the specific public notice rather than that issued at regular intervals.

(2) An informal rule making proceeding concerning the allotment of a channel in the radio broadcast or television broadcast services (*see Sangamon Valley Television Corporation v. United States*, 269 F.2d 221, 224 (DC Cir. 1959)) at the time of adoption of the notice of proposed rule making or the filing of an opposition to a petition for rule making, whichever is earlier.

(3) A proceeding conducted pursuant to section 214(a) of the Communications Act that has been designated for hearing.

(4) Any other proceeding that the Commission designates as restricted.

PROHIBITION ON SOLICITATION OF EX PARTE PRESENTATIONS

§ 1.1210 Prohibition on solicitation of ex parte presentations.

No person shall solicit or encourage others to make any ex parte presentation which he or she is prohibited from making under the provisions of this subpart.

(B) The filing of a formal opposition or formal complaint;

(C) The release of a public notice apprising the public of the filing of a mutually exclusive application *Provided, however,* That if a person has actual knowledge that a mutually exclusive application has been filed prior to the release of the public notice, that person is prohibited from making an ex parte presentation from the moment of such actual knowledge. The term "public notice" as used in this subsection means the public notice issued at regular intervals listing all applications and major amendments thereto which have been tendered (or, in non-broadcast services, accepted) for filing. (*See* §§ 1.564(c), 1.962(e) and 21.27(b) of this chapter.) When the Commission issues a specific public notice stating that there is a possibility of conflict between the applications, then the term "public notice" shall refer to the specific public notice rather than that issued at regular intervals.

(2) An informal rule making proceeding concerning the allotment of a channel in the radio broadcast or television broadcast services (*see Sangamon Valley Television Corporation v. United States*, 269 F.2d 221, 224 (DC Cir. 1959)) at the time of adoption of the notice of proposed rule making or the filing of an opposition to a petition for rule making, whichever is earlier.

(3) A proceeding conducted pursuant to section 214(a) of the Communications Act that has been designated for hearing.

(4) Any other proceeding that the Commission designates as restricted.

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PROCEDURES FOR HANDLING OF PROHIBITED EX PARTE PRESENTATIONS

§ 1.1212 Procedures for handling of prohibited ex parte presentations.

(a) If a prohibited oral ex parte presentation is initiated, the person to whom it is addressed shall advise the person initiating it that the presentation is prohibited and terminate the discussion.

(b) If a prohibited oral ex parte presentation has been made, the Commission personnel to whom the presentation was made shall forward to the Managing Director a statement containing the following information:

(1) The name of the proceeding.

(2) The name and address of the person making the presentation and that person's relationship (if any) to the parties to the proceding or to their attorneys.

(3) The date and time of the presentation, its duration, and the circumstances (telephone, personal interview, casual meeting, etc.) under which it was made.

(4) A brief summary of the substance of the presentation.

(5) Whether the person making the presentation persisted in doing so after having been advised that the presentation was prohibited.

(6) The date and time at which the statement was prepared.

(c) Written ex parte presentations that are prohibited shall be forwarded by the person receiving them to the Managing Director. If the circumstances in which such a presentation was made are not apparent from the presentation itself, a statement describing those circumstances shall be submitted to the Managing Director with the presentation.

(d) Prohibited *written* ex parte presentations, all statements and correspondence relating thereto, all statements and correspondence relating to prohibited *oral* ex parte presentations shall be placed in a public file which shall be associated with, but not made a part of, the file or record of the proceeding to which the presentations pertain. In a proceeding which has not yet been designated hearing, no such presentations, statements or correspondence relating thereto, shall be considered in determining the merits of the proceeding except upon notice and disclosure to the parties to the proceeding. Once a proceeding has been designated for hearing, such materials may be considered in determining the merits of a restricted proceeding only if they are made a part of the record of the proceeding.

(e) If the Managing Director determines that an ex parte presentation is prohibited by this subpart, he shall notify the parties to the proceeding that a prohibited ex parte presentation has occurred. If the Managing Director determines that the public interest so requires, he shall serve upon the parties to the proceeding copies of the presentation or, if it was oral, a summary of the presentation, as well as any statements or correspondence describing the circumstances in which it was made. Service by the Managing Director shall not be deemed to cure any violation of the rules against prohibited ex parte presentations.

(f) If circumstances satisfy the Managing Director that notice of a prohibited presentation under paragraph (e) of this section would be unduly burdensome because the parties to the proceeding are numerous, he may (in lieu of notice to the parties) issue a public notice that a prohibited presentation has been made in the proceeding. Where a determination has been made that disclosure of the prohibited presentation would be appropriate under paragraph (e) of this section and circumstances satisfy the Managing Director that service of copies of the prohibited presentation would be unduly burdensome because the parties to the proceeding are numerous or because the materials relating to the presentation are voluminous, he may issue a public notice that copies of the presentation and/or materials relating to it are available for public inspection.

(g) A copy of any statement describing the circumstances in which any prohibited ex parte presentation was made shall be forwarded to the person who made the presentation. Within 10 days thereafter, the person who made the presentation may file with the Managing Director a notarized statement regarding the presentation and

the circumstances in which it was made. If the Managing Director deems it appropriate, he shall serve copies of the notarized statement upon parties to the proceeding.

§ 1.1214 Disclosure of information concerning violations of this subpart.

Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed, shall promptly advise the Managing Director in writing of all the facts and circumstances concerning the matter which are known to him.

SANCTIONS

§ 1.1216 Sanctions.

(a) *Parties.* (1) Upon notice and hearing, any party to a restricted proceeding who directly or indirectly violates or causes the violation of any provision of this subpart, or who fails to advise the Managing Director of the facts and circumstances concerning any such violation, may be disqualified from further participation in that proceeding. Such alternative or additional sanctions as may be appropriate may be imposed.

(2) To the extent consistent with the interests of justice and the public, a party who has violated or caused the violation of any provision of this subpart may be required to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected.

(b) *Commission personnel.* For violations of the provisions of this subpart by Commission personnel refer to Administrative Order No. 10.

(c) *Other persons.* Such sanctions as may be appropriate under the circumstances shall be imposed upon other persons who violate the provisions of this subpart.

(d) The sanctions outlined in paragraphs (a)(1), (b), and (c) of this section shall also apply in non-restricted rulemaking proceedings, but the sanction outlined in paragraph (a)(2) of this section shall not apply in such proceedings.