Ex Parte Ethical Considerations

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What does Ex Parte Mean?

• Latin phrase meaning “on one side only; by or for one party”
• Ex Parte communication occurs when:
  • One Party to a case
  • Talks or writes or communicates directly with a Commissioner, Administrative Law Judge, or other decision maker in the Commission
  • About the issues in a pending case
  • Without the knowledge of other Parties to the case
NARUC Jurisdictions

• California - New statute was adopted post-problems (July of 2019)

• Ex parte communications prohibited during rate setting case or catastrophic wildfire proceeding – whether initiated by a decisionmaker or an interested person – requires all of the following:
  • Report communication within three working days – file notice
  • Date, time and location – type of communication
  • Identity of the decisionmaker, interested person and others present
  • Topic of the communication
  • Substantive description and copy of the communication
  • Shall not apply to meeting if all Parties present
If Ex Parte Occurs at a Conference

• California applies the same requirements if ex parte occurs at a private dinner, entertainment event, or tour.

• If ex parte occurs – and not disclosed:
  • Party not participating may petition to rescind or modify a decision
  • Commission shall issue decision within 180 days
  • Proof that the ex parte communication occurred?

• In Pennsylvania – ex parte must be in writing
  • Gift Ban prohibiting golf, sports tickets, dinners, gifts over $50
  • But allowed to attend a “WAG” (Widely Attended Gathering)
Other Jurisdictions

- Minnesota – focuses on “decision making personnel”
- Missouri – anticipate a contested case 60 days before filing
- Michigan – siting authority of pipelines
- Texas – prohibited unless emergency exception
- Nevada – Limitations but regulatory staff can appear in contested case with benefit of counsel
- FERC – generally more strict than other federal agencies
- FCC – allows ex parte communications - must be disclosed in writing
Practice in Multiple Jurisdictions

• Avoid Pitfalls:
  • Procedural vs. Substance – most states distinguish between the two
  • Social Media – can engage in ex parte inadvertently
  • FCC permits but disclose – well-funded organizations can engage in the most communications to get the regulators attention
  • Know the difference between the litigation staff and policy staff – in most states – parties can communicate with litigation/prosecutorial staff for settlements and negotiations
  • Are the advisory and prosecutorial functions of the Commission separated?
  • Pre-filing briefings – give no signals on possible decisions
PA Public Utility Code Section 334(c)

• In Pennsylvania – this is where ex parte communications are statutorily prohibited

• To any member of the Public Utility Commission, Administrative Law Judge, or employee of the Commission’s advisory staff

• Regarding the merits or any fact in issue of any matter pending before the Commission

• In any “on the record contested proceeding”
How Does This Affect PUC Staff?

- If a Commissioner, Administrative Law Judge, or Commissioner’s Assistant, or advisory staff – with the responsibility of advising and drafting recommendations – AFFECTED BY EX PARTE
- Ex parte communications are prohibited due to the decision-making duties and responsibilities of these positions
- Prosecutorial staff cannot talk to advisory staff due to 1994 PA Supreme Court decision called Lyness
- Prosecutorial staff may interact with advisory staff only on procedure
- Secretary of the Commission and Legislative Staff - Procedural
Open Records Laws and Ex Parte

• If ex parte is prohibited – and an open records/Right to Know request is filed:
  • What information is the request asking for? Docketed or contested proceeding? Ongoing investigation?
  • Look at who the request is directed to when gathering information requested
  • Does the request target both advisory and prosecutorial staff?
  • Does the request target Administrative Law Judges or other decision-makers?
  • Instructions to staff on how to gather records and send for review must be sent separately to avoid impropriety or mingling of functions
  • In PA – Secretary and Law Bureau are neutral, central gathering places
In Pennsylvania – Ex Parte Emergency Orders

• Petitions for Emergency Order are permitted
• 52 Pa. Code Section 3.2
• Facts must be supported by verification that establishes the existence of an emergency situation
• Commissioner must issue/ Secretary must serve/ Commission must ratify an Emergency Order
• Hearing must follow the issuance of the Emergency Order
• Administrative Law Judge can stay the effect and issue decision
How to Cure Ex Parte

• Tell everyone else in the case – SHARE WITH ALL PARTIES!
• Once the ex parte is public – it is no longer ex parte!
• If ex parte is received – Secretary can cure on the record.
• In Pennsylvania:
  • Secretary sends letter to offender with warning
  • Pro Se Complainants and Protestants
  • Legislative intervention
  • Administrative Law Judge can cure by sharing with all Parties on the record.