



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.