

ACC-000004-00-0030



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NEW APPLICATION

Memorandum

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PUBLIC UTILITIES COMMISSION

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To: Docket Control

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From: Deborah R. Scott  
Director, Utilities Division

Date: January 14, 2000

DOCKET NO. ACC-000004-00-0030

Re: GENERIC DOCKET OPENING

This is a request to open a generic docket "In the Matter of Ex Parte Communications Rules".

DRS:mi

CARL J. KUNASEK  
CHAIRMAN  
JIM IRVIN  
COMMISSIONER  
WILLIAM A. MUNDELL  
COMMISSIONER



BRIAN C. McNEIL  
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

**MEMORANDUM**

**TO:** Chairman Kunasek  
Commissioner Irvin  
Commissioner Mundell

**FROM:** Lyn Farmer  
Chief Counsel, Legal Division

**DATE:** December 6, 1999

**RE:** Executive Summary of Memo on Ex Parte Communications Rules.

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The possible revision to the Commission's ex parte rules has been a subject of recent Commission/Staff meetings, and at the last such meeting, the Commissioners discussed concerns and objectives. The Commission's Legal Division was asked to draft a memorandum on the subject. That memorandum is attached, and an executive summary of the memorandum is set forth below.

At the recent Staff meetings and in informal discussions, the staff of the Utilities, Hearing, Securities, and Legal Divisions have formulated some objectives in the event that a revision to the current ex parte rule is initiated. In addition to those identified by the Commissioners, the Staff's objectives include: to protect and maintain the integrity of the decision-making process of the Commission; to assure the preservation of the due process rights of all parties to Commission proceedings; and to maintain Commission staff's status as an independent party to Commission proceedings.

## EXECUTIVE SUMMARY

- ◆ Dual goals of ex parte rules are: 1) to codify constitutional right of due process of law for all parties bound by decisions of a decision-making body; and 2) to ensure the integrity and legitimacy of the decision-making body.
- ◆ Arizona Administrative Procedures Act requirements: In contested cases, all evidence received or considered shall be included in the record, and findings of fact must be based exclusively on the evidence. A.R.S. § 41-1061.
- ◆ Purpose statement of current ACC ex parte rule: "It is the purpose of this Rule to assist the members of the Arizona Corporation Commission and its employees in avoiding the possibility of prejudice, real or apparent, to the public interest in proceedings before the Commission."
  - ◆ Oral or written communications, to Commissioners or employees involved in the decision making process, concerning substantive merits of a contested proceeding must be made on the public record.
  - ◆ Prohibited communications, if received, are reported and placed on the record.
- ◆ FCC's new (1997) ex parte rule purpose statement: "To ensure the fairness and integrity of its decision-making, the Commission has prescribed rules to regulate ex parte presentations in Commission proceedings."
  - ◆ FCC classifies proceedings as "restricted," "permit-but-disclose," or "exempt."
  - ◆ Regardless of classification, once a matter has been scheduled for FCC decision, all substantive communications to decision makers are prohibited.
- ◆ FERC's new (1999) ex parte rule purpose statement: "This section governs off-the-record communications with the Commission in a manner that permits fully informed decision making by the Commission while ensuring the integrity and fairness of the Commission's decisional process." The FERC Order states that a hearing is not fair when one party has private access to the decision maker and can present evidence or argument that other parties have no right to rebut.
  - ◆ FERC classifies ex parte communications as either "prohibited" or "exempted."
  - ◆ Prohibited ex parte communications are not allowed, in either direction, in a contested on-the-record proceeding.
- ◆ Defines "contested on-the-record proceeding." This definition does not include rulemaking.

- ◆ Exempted communications are subject to disclosure and are placed in the decisional record, with notice to all parties.
- ◆ Prohibited communications are also reported and placed in the non-decisional record.
- ◆ CPUC rule adopted pursuant to Senate Bill 960 classifies all proceedings as either "adjudicatory," "quasi-legislative," or "ratesetting." Proceedings are categorized upon CPUC receipt of an application, and categorization is subject to appeal.
  - ◆ Adjudicatory proceedings: Ex parte contacts regarding substance prohibited.
  - ◆ Quasi-legislative proceedings: Ex parte contacts permitted.
  - ◆ Ratesetting proceedings: Any ex parte personal meetings or conference calls require invitation of all parties, with minimum three day notice. Any ex parte meeting or call with one party creates right in every other party to the proceeding to a meeting of equal duration with the Commissioner.

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### MEMORANDUM

TO: ACC Staff

FROM: Jerry Porter *JJP*

DATE: January 10, 2000

RE: Proposed Ex Parte rules policy

#### Ex Parte Objectives:

1. Preserve the integrity of the process by limiting the nature and scope of discussions between intervenors (staff included) and decision makers and their aides, while at the same time, providing for an opportunity to gather and discuss information in order to make an informed decision.
2. The Hearing Officer should establish whether or not the rule applies at the time the matter is set for hearing so that all parties are aware of their obligations pursuant to Commission rule.
3. Establish clear time frames so that the parties know when the Ex Parte rule applies.
4. Allow Ex Parte communications on the record (by the filing of a letter outlining matters discussed that would be docketed and sent to all parties) until sometime shortly before the matter is taken up by the full Commission.
5. Provide for a period of time in which any other party to a proceeding would have an opportunity to discuss items that have been taken up in an Ex Parte discussion that was held just prior to the close of the permissible Ex Parte window.
6. The rule should not mandate meetings; instead, it should be solely within the province of a Commissioner as to whether or not to meet. This would include requests to come in and discuss matters that were discussed between a particular Commissioner and another party.