

BEFORE THE ARIZONA CORPORATION COM



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DOCKET
ACC-00000A-00-0030

IN THE MATTER OF THE GENERIC
INVESTIGATION OF THE EX PARTE
COMMUNICATIONS RULES

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DOCKET NO. ACC-00000A-00-0030

COMMENTS OF AT&T
COMMUNICATIONS OF THE
MOUNTAIN STATES, INC.

AT&T Communications of the Mountain States, Inc. ("AT&T") files its comments on the Arizona Corporation Commission's ("Commission") ex parte rule (A.A.C. R14-3-113) in response to the Procedural Order dated February 9, 2000. AT&T also responds to a number of the concerns/objectives raised in the Procedural Order.

I. INTRODUCTION

The present rule on unauthorized communications, or ex parte rule, is generally consistent with rules in other states. The rule generally recognizes the dual roles of the Commission as a decision-maker (contested proceedings) and a policy maker (rulemaking proceedings), by denying communications in contested proceedings and permitting them in rulemaking proceedings. This distinction should be retained. With this distinction, there is no reason or need to relax the current rules.

II. COMMENTS

The Procedural Order identifies 9 concerns/objectives raised at Commissioner/Staff Open Meetings. The first two items identify what should be the

primary and paramount objectives of the Commission: “[t]o protect and maintain the integrity of the decision-making process” and “[t]o assure the preservation of the due process rights of all parties.” Procedural Order at 2. The Commission must adhere to these two fundamental goals, above all else.

The Procedural Order also identifies the concern/objective of “maintain[ing] the Commission Staff’s status as an independent party to Commission proceedings.” This goal is well intentioned but ill-defined within the current rule.

R14-3-113(C)(3)(c) permits “[i]ntra-agency or non-party communications regarding purely technical and legal matters.”¹ The problem with the current rule is that it does not define what role the Staff is acting in once it becomes involved in a proceeding. Once members of the Staff get involved in a contested proceeding, those members can no longer be considered independent.

Any position Staff takes in a contested proceeding requires a balancing of conflicting interests. Even the simple filing of a motion or the cross-examination of a witness reflects an opinion that may be adversarial to, or opposed by, a party to a proceeding. It is not proper for the Commissioners or their assistants to have contacts with such adversarial Staff.

At the beginning of a contested proceeding that the Staff intends to appear or participate in, the Staff should be required to notify and provide to all parties the names of the Staff members that will be participating in the contested proceeding in any manner or capacity. These Staff members would be prohibited from any unauthorized communications with the Commissioners and their assistants. The Staff also should be

¹ This rule is ambiguous regarding “non-party communications.” Commissioners should not be permitted to discuss contested proceedings with anyone. Contested proceedings should be decided based only on the record.

required to identify the Staff members that will provide assistance to the Commissioners and their assistants, to deter unauthorized communications. This is the process used in Colorado. *See* 4 CCR 723-1-Rule 9(d).

Staff members cannot have it both ways and remain independent; they cannot advise the Commissioners and participate in a contested case. The Commissioners and their assistants would remain free to discuss legal or technical matter with advisory Staff that have been identified to fulfill this role.

The rule states that once a contested proceeding is set for public hearing the rules apply. This is an acceptable demarcation point. However, it would be helpful if the procedural order setting the hearing referred to in A.C.C. R14-3-113 stated explicitly that the rules apply to the remainder of the proceeding. An order that initiates a rulemaking proceeding should state explicitly that the proceeding is a rulemaking, and R14-3-113 does not apply.

The remainder of the concerns/objectives appear to suggest that communications between the parties and the Commissioners and their assistants should be permissible at certain times during a contested proceeding. AT&T disagrees. A contested proceeding must be decided based entirely on the record. Off-the-record communications between the decision-maker and the participants in a contested proceeding should not be permitted. Such communications undermine the entire process and the purpose of a verbatim transcript. Furthermore, there is no justification for permitting such communications other than to influence decision-makers off-the-record without the other interested parties being in attendance and having the opportunity to respond.

However, the proper place to advocate one's positions is before the Hearing Officer. The Hearing Officer is required to sift through and weigh the evidence and

submit a recommended decision. Exceptions are permitted. If after reviewing the record the Commissioners still have questions, they are free to submit questions to the Hearing Officer and ask the Hearing Officer to obtain answers to those questions from the parties. There is no apparent need to permit communications between the parties and the Commissioners and their assistants.

III. CONCLUSION

AT&T sees no reason to make wholesale changes to the current rule. Amendments to better define the Staff's role in a contested proceeding would ensure Staff's independence when providing legal or technical advice to the Commissioners. AT&T would oppose any attempt to permit communications between parties and the Commissioners or their assistants during a contested proceeding.

Dated this 15th day of March, 2000.

Respectfully submitted,

AT&T COMMUNICATIONS OF THE
MOUNTAIN STATES, INC.

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CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of the Comments of AT&T Communications of the Mountain States, Inc. regarding Docket No. ACC-00000A-00-0030, were sent via overnight delivery this 15th day of March, 2000, to:

Arizona Corporation Commission
Docket Control - Utilities Division
1200 West Washington Street
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and a true and correct copy was sent via Overnight Delivery this 15th day of March, 2000, to:

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