

MEMORANDUM

Date : January 24, 1992

To : All DRA Staff  
All Attorneys in the Staff Counsel Sections

From : Edmund J. Texeira, Director <sup>ET</sup>  
Ira R. Alderson, Assistant General Counsel 

Subject : Implementation of the Commission's *Ex Parte* Rules

On January 20, 1992, the Commission's recently adopted *ex parte* rules became effective. It is essential that every Legal Division staff counsel and every employee in DRA should be familiar with these rules and with the procedures we are going to use to ensure that DRA and its counsels comply with both the technical requirements and the spirit of the rules. It is also essential that in addition to ensuring compliance with the reporting requirements, we should carefully avoid inadvertent communications that must be reported.

Your cooperation is greatly appreciated. If you have any questions about the rules and the DRA/Staff Counsel procedures, please discuss them with us or with the Deputy Directors or branch chiefs. We may also schedule a meeting if questions or experience indicates a need.

This may be a somewhat difficult procedure for some of us to adjust to since many of us have a genuinely casual communication relationship with our fellow Commission employees, including ALJs and advisors. Many of these individuals are former members of DRA or the Legal Division who we count as not only fellow employees but friends. The rules are not intended to disrupt such personal relationships but to ensure fairness in the decision process, something we all support.

## GUIDELINES FOR LIVING WITH THE EX PARTE RULES

A copy of the Rules is attached. They constitute Article 1.5 of the Commission's Rules of Practice and Procedure.

### Summary of the Rules:

#### 1. What is "Ex Parte"?

*Ex parte* is a legal term which means, simply, any form of communication with a decisionmaker about issues in a case involving DRA without the opportunity for all parties to be present, such as in a hearing room. Put another way, *ex parte* describes any situation of this kind when no other parties in the proceeding are there to listen in and, if they choose, to challenge the truth of what is being said.

#### 2. Who is Covered?

All DRA staff and all staff counsels are covered by the rules when they communicate about issues in a covered proceeding with a "decisionmaker," defined to be:

- a. The assigned ALJ, any assistant chief ALJ or the Chief ALJ.
- b. A Commissioner
- c. A Commissioner's advisor
- d. CACD staff contacted for the purpose of conveying information to an ALJ, Commissioner or advisor. CACD staff, in general, is not considered a "decisionmaker" for the purpose of the rule.
- e. Any other person, if your intention is to use that person as an agent to communicate with an ALJ, Commissioner or advisor.

Under the rules it does not matter whether or not you are assigned to the proceeding, because DRA as a whole is covered. (Rule 1.1(b).)

#### 3. What proceedings are covered?

Any normal proceeding, beginning on the day an NOI is tendered with the Commission, an application or complaint is filed, or an OII is issued.

There are exceptions, of course, which are not covered by the *ex parte* rules. These exceptions include:

- a. Rulemaking proceedings (OIRs),

- b. OIIs consolidated with an OIR and which have identical issues, and
- c. Proceedings which would otherwise be covered, except there is no protest or answer, or for which there will be no hearing. They are covered for the entire time up to the date for filing an answer, protest or request for hearing has passed.

4. What communications must be reported?

ANY SUBSTANTIVE COMMUNICATION WITH A DECISIONMAKER as defined above, no matter who initiated the communication.

Nonsubstantive inquiries, typically those which deal with procedures, schedules and the like, are not subject to the reporting requirements. The rules explicitly exempt communications "limited to the hearing schedule, location, and format, filing dates and identity of parties". You are urged, however, to be very careful when discussing these matters with decisionmakers. The Chief ALJ has noted a great many "gray areas" in which even procedural inquiries may be considered to be substantive saying,

...procedural inquiries are sometimes borderline substantive, especially when scheduling issues are controversial or important to the outcome of the proceeding. When in doubt, or in borderline situations, you are wise to err on the side of reporting the communication.

from: Commonly Asked Q&A, No. 8

5. What is a "communication"?

A communication is anything written, spoken, sent in electronic form (such as OA) or otherwise used to convey information that goes from you to a decisionmaker. Thus, it is not just a meeting or a phone call, but includes a note forwarded on OA, or an internal memo with a Commissioner's name on the distribution list. You should take care to review and to change, as needed, any text or OA distribution lists that you use now.

6. When are they covered?

In general, the *ex parte* rules and reporting requirements take effect as soon as an NOI is tendered, an application or complaint is filed, or an OII is issued. They lose their effect as soon as the Commission issues a final order in a case. A "final order" is defined to be either the decision on rehearing, the decision denying rehearing, or the last date for filing an application for rehearing and none is filed.

There is an exception dealing with enforcement proceedings: After submission of the case, a complete prohibition on any

"substantive" *ex parte* communications is mandated. Enforcement proceedings are defined to be OIIs or complaint proceedings which raise the alleged violation of any provision of law, or of any order or rule of the Commission. A proceeding has the status of having been submitted when hearings, and scheduled briefs and oral arguments have all been completed.

7. How is the reporting done?

If DRA staff or staff counsels have engaged in an *ex parte* communication with a decisionmaker, the reporting is done by the DRA staff or staff counsels, whether or not the communication was initiated by the DRA staff or the decisionmaker.

Reporting is done by filing an original and 12 copies of a "Notice of *Ex Parte* Communication" with the Docket Office and giving a copy to the assigned ALJ. Staff counsels will complete the actual filing, based on the initial report prepared by the DRA staffer. We are preparing a form to make it easier to capture the essential information as soon as the communication is made. This process is described in the next section. The report must include the following information.

- a. Date, time and location of the communication,
- b. Whether it was written, oral or a combination of both,
- c. The identity of all persons present, indicating who initiated the communication,
- d. A description of the communication from the DRA/Staff counsel perspective, and
- e. Attachment of any written materials used during the communication.

While the rules do not require service of the notice on other parties, DRA policy will be to mail a copy of the notice to all appearances on the service list.

The reporting must be done within 3 (yes, only three) working days of the communication.

## DRA'S APPROACH TO EX PARTE RULES

DRA's basic approach, if followed by everybody concerned, will greatly assist us to manage our *ex parte* communications. This approach will give DRA the flexibility needed when *ex parte* communications help us represent ratepayers' long-term interests.

Getting started with these rules is new for us -- the Commission, the ALJs, the utilities, other parties, the public and DRA -- and they will evolve as we gain experience with them.

### The Essential Steps:

1. **Log In All Communications With Decisionmakers** -- Each DRA staffer shall keep a personal log of any communications with ALJs, Commissioners, and advisors about procedures and issues in any proceedings.

This is for your personal protection as well as good practice for DRA. The log should contain the information required by the rule. We will be providing everyone with a standard report form which you should use to write down what happened during the communication. The log should cover every communication, even ones that seem clearly not to be covered by the rule. An example of this is an inquiry about whether or not a date for a prehearing conference has been set, where will hearings be held, or what is the expected filing date for testimony. This information will prove useful if any question later arises about whether or not a communication which was not reported should have been reported.

These forms are attorney/client communication materials:

You should not disclose, discuss or otherwise reveal your log form to anyone outside DRA or Legal Division staff counsel group.

2. **Ex Parte Communications Initiated by DRA are Restricted** -- We will start this system by restricting *ex parte* communications, making all of them subject to your getting prior approval from a deputy director or the director of DRA for DRA staff, or the assistant general counsel for staff counsels. We expect that a project manager or the assigned counsel will continue to handle the communications on procedural matters with the ALJ. For emphasis, we repeat here that procedural communications are "limited to the hearing schedule, location, and format, filing dates and identity of parties". All DRA staff will be as responsive as possible (and, of course, report) whenever the communication is initiated by a decisionmaker.

We intend that *ex parte* communications should happen only when the benefits to DRA's interests are enough to offset the burden of public disclosure that will be required. We intend to conduct all communications as though parties in the proceeding are actually present. While past practice has permitted a great deal of informal discussion between DRA staff and counsels,

particularly where many advisors and ALJ's have come from our own ranks and are also friends, adopting these rules must, of necessity, change those practices.

3. If A Decisionmaker Initiates the Contact, Tell The Boss -- DRA staff engaged in an *ex parte* communication that they did not initiate shall immediately notify at least one of these people:

- o their supervisor,
- o their program manager
- o the project manager and the assigned counsel for the relevant proceeding, or
- o their deputy director,

indicating the the nature of the communication. You can easily notify all of them over OA with a text report to follow. You will be expected to help write the notice if it is required and your log will be the starting point.

4. Staff Counsel Will Handle Required Formal Reporting -- If a communication clearly must be reported, staff counsel (or designee) will draft the notice and the Legal Division will handle the filing and service on all parties. A standard form will be provided to assist staff to prepare such notices. This form would then have dual uses: an initial alert and a draft outline for use by staff counsel. There will be staff counsel available at all times in the Legal Division to do this.

5. Staff Counsel Will Review The Borderline Cases -- If a communication has an uncertain status for reporting requirements, staff counsel will recommend to the DRA supervisor, branch chief and deputy director whether or not a notice should be filed. The Chief ALJ has repeatedly advised that when in doubt, a notice should be filed. DRA will follow that procedure.

6. Put This Language In A Data Request -- Starting January 20, 1992, DRA project managers and/or assigned counsels should issue a data request in each formal proceeding in which DRA has an interest which includes this language:

If you engage in a reportable *ex parte* communication as described in Article 1.5 of the Commission's Rules of Practice and Procedure and file a notice of such communication, at the same time such notice is docketed with the Commission please provide a copy of such notice, complete with attachments, to DRA.

7. We're Going To Be Keeping Track -- DRA will keep a file of all *ex parte* communications, both those prepared by DRA and other parties. We will soon establish a computerized indexing system to allow ready access to this information.

# DRA

Division of Ratepayer Advocates

## Personal Log of Ex Parte Communication

Your Name:	
Today's Date:	

Date of Ex Parte Communication:	
Time of Ex Parte Communication:	
How Long Did You Talk?	

Proceeding Number:	<input type="text"/>	.	<input type="text"/>	-	<input type="text"/>	-	<input type="text"/>
Proceeding Name:	<input type="text"/>						

### PERSONS PRESENT/INVOLVED IN COMMUNICATION

<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>

### FORM OF COMMUNICATION

(✓ All Applicable Boxes)

<input type="checkbox"/>	IN PERSON	<input type="checkbox"/>	TELEPHONE	<input type="checkbox"/>	ELECTRONIC (OA)
<input type="checkbox"/>	WRITTEN	<input type="checkbox"/>	FAX	<input type="checkbox"/>	OTHER

### DESCRIBE THE COMMUNICATION

- Who initiated the communication?
- Topics.
- Summary of the entire discussion.
- Attach a copy of any material presented or exchanged!

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(Attach additional sheets if necessary)  
Attach copies of any materials involved in the communication:

FILED

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

JAN 14 1992

Rulemaking on the Commission's )  
own motion for purposes of )  
compiling the Commission's )  
rules of procedure in )  
accordance with Public )  
Utilities Code Section 322 and )  
considering changes in the )  
Commission's Rules of Practice )  
and Procedure. )

SAN FRANCISCO OFFICE  
R.84-12-028  
(Filed December 19, 1984)

**NOTICE FOLLOWING WORKSHOPS RE ADOPTED EX PARTE CONTACT RULE**

TO ALL INTERESTED PARTIES:

In December, 1991, the Commission held workshops to discuss implementation of the rule. In those workshops, some issues not addressed in our November 25, 1991 informational Notice were raised. We have augmented the "List of Commonly Asked Questions and Answers" in response to these additional issues. As an aid to those practicing before the Commission, we are now transmitting an expanded version of the earlier informational notice. We hope this information will facilitate compliance with the ex parte rule which goes into effect on January 20, 1992.

This notice includes the text of the rule from D.91-10-049, commonly asked questions and answers about the implementation of the rule, a sample notice of ex parte communication and a sample calendar showing how notice will be reported.

Notices will be reported in the Daily Calendar starting on January 25, 1992. For those who are not subscribers, the text of the calendar is available through the Commission's ComPUCall, an on-line information service, which can be reached at (415) 703-1297. Further information on calling this service can be found in the commonly-asked questions and answers about the rule.

Dated January 14, 1992 at San Francisco, California.

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LYNN CAREW  
Chief Administrative Law Judge

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**Article 1.5 Ex Parte Communications  
In Commission Proceedings**

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**1.1 Definitions**

For purpose of this Article, the following definitions apply:

- (a) "Commencement of a proceeding" is the tender to the Commission of a notice of intention, the filing with the Commission of an application or complaint, or the adoption by the Commission of an order instituting investigation (OII).
- (b) "Commission Staff of Record" means
  - (i) all members of the staff organization or division created pursuant to Public Utilities Code § 309.5, except those temporarily assigned to other staff organizations or divisions; and
  - (ii) members of other staff organizations or divisions not specifically covered under § 309.5, who are appearing as advocates or as witnesses for a particular party in covered proceedings, but excluding other members of such staff organizations or divisions. The Executive Director, General Counsel, and Division Directors (except the director of the staff division created pursuant to § 309.5) are not Commission Staff of Record.
- (c) "Covered Proceeding" is any formal proceeding other than a rulemaking, or an OII consolidated with a rulemaking to the extent that the OII raises the identical issues raised in the rulemaking. An OII is otherwise a covered proceeding. Except for OIIs, if no timely answer or protest or request for hearing is filed in response to a pleading initiating a covered proceeding, the proceeding ceases to be covered. If an answer or protest is withdrawn, the proceeding ceases to be a covered proceeding. However, if there has been a request for hearing, the proceeding remains covered until the request has been denied.
- (d) "Date of Issuance of a Final Order" is

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- (i) the date when the Commission mails the decision after rehearing or denying rehearing; or
  - (ii) where the period to apply for rehearing has expired and no application for rehearing has been filed, the last date for filing an application for rehearing under PU Code Section 1731. However, where a decision does not close a docket, there has been no issuance of a final order with respect to any issues that remain pending in the proceeding.
- (e) "Decisionmaker" means any Commissioner, Commissioner's Personal Advisor(s), the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, and any Administrative Law Judge assigned to the proceeding.
- (f) Enforcement-related proceedings are those OIIs and complaint proceedings where
- (i) the order instituting investigation or (ii) the complaint raises the alleged violation of any provision of law, or of any order or rule of the Commission. Complaints solely challenging the "reasonableness of any rates or charges" pursuant to Public Utilities Code § 1702 are not enforcement-related proceedings.
- (g) "Ex parte communication" means a written or oral communication on any substantive issue in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication.
- (h) "Party" means any applicant, protestant, respondent, petitioner, complainant, defendant, interested party who has made a formal appearance in the proceeding, or Commission staff of record in covered proceedings, and their agent(s) or employee(s). A member of the public who is not acting as the agent or employee of a party is not a party.
- (i) "Submission of a proceeding" is as described in Rule 77 of the Commission's Rules of Practice and Procedure.

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**1.2 The Record**

The Commission shall render its decision based on the evidence of record. Any notice filed pursuant to Rule 1.4 is not a part of the record of the proceeding. 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 Applicable Proceedings**

- (a) In any enforcement-related proceeding, no decisionmaker shall have any oral or written ex parte communication with any party to the proceeding concerning any substantive issue involved in the proceeding, unless the communication is reported within three working days in accordance with the reporting requirements set forth in Rule 1.4. Communications limited to the hearing schedule, location, and format, filing dates and identity of parties are procedural inquiries which need not be reported. This rule shall apply from the commencement of such proceeding to its submission to the Commission. After such proceeding has been submitted to the Commission, and until the date of issuance of a final order in such proceeding, ex parte communications between parties and decisionmakers concerning any substantive issue involved in the proceeding are prohibited.
- (b) In all other covered proceedings, any oral or written ex parte communication between a decisionmaker and any party to the proceeding concerning any substantive issue involved in the proceeding, shall be reported within three working days, in accordance with the reporting requirements set forth in Rule 1.4. These reporting requirements shall apply from the commencement of the proceeding to the date of issuance of a final order in that proceeding.
- (c) Where proceedings covered by subsections (a) and (b) above are consolidated, the ALJ shall by ruling prior to the date of submission determine the extent to which the prohibition provisions of subsection (a) shall apply.

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**1.4 Reporting Ex Parte Communications**

- (a) Reportable communications shall be reported by the party, whether the communication was initiated by the party or the decisionmaker. They shall be reported within three working days of the communication by filing (but not serving) the original and 12 copies of a "Notice of Ex Parte Communication" (Notice) with the Commission's San Francisco Docket Office. Such Notice shall be provided simultaneously to the assigned ALJ. The Notice shall include the following information:
- (1) the date, time and location of the communication, and whether it was oral, written or a combination;
  - (2) the identity of the recipient(s) and the person(s) initiating the communication, as well as the identity of any persons present during such communication;
  - (3) a description of the party's, but not the decisionmaker's, communication and its content, to which shall be attached a copy of any written material or text used during the communication.
- (b) The filing of a Notice will be reported promptly thereafter in the Commission's Daily Calendar.
- (c) Parties may obtain a copy of the Notice and any attachments from the Commission's Central File room or from the filing party, who must provide it to the requesting party without delay.

**1.5 Sanctions**

The Commission may impose such penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest.

**1.6 Specific Proceedings**

In augmentation of the provisions of this Article, the Commission, or the assigned Administrative Law Judge with the approval of the assigned Commissioner, may issue an ex parte communications ruling tailored to the needs of any

specific proceeding.

1.7 Applicability

This article applies to all covered proceedings (as set forth in Rule 1.3) pending on the date it is effective, and to all covered proceedings commenced on or after the date it is effective.

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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WORKINGS OF THE RULE

1. When does the rule go into effect?

The rule takes effect on January 20, 1992. All ex parte communications, as defined in section 1.1(g) of the Rule, made **on or after January 20, 1992** must be reported by the filing of a Notice of Ex Parte Communication, as defined in section 1.4(a) of the Rule.

2. What proceedings does the rule affect?

Covered proceedings are defined in section 1.1(c) of the Rule. These proceedings are any formal proceeding **other than a rulemaking or an OII consolidated with a rulemaking**. This means that OIIs **not consolidated with a rulemaking are covered proceedings**.

3. When is a case open?

A case is open, or "commences", as discussed in section 1.1(a) of the Rule, when an application or complaint is filed, when a Notice of Intention is tendered or when the Commission issues an OII. Commencement of a proceeding triggers application of the Rule. Issuance of an OIR does **not** trigger the rule as rulemakings are not covered proceedings.

4. When is a case closed?

A case is closed when the docket is closed. When the docket is closed, the rule is no longer in effect. If a party files a petition to modify a decision in a covered proceeding which is closed, the rule is triggered **even if the original proceeding was closed prior to the effective date of the Rule**.

5. What is meant by a "written ex parte communication" to a decisionmaker?

A written ex parte communication to a decisionmaker is **any written material of a substantive nature** provided to a decisionmaker, whether at the request of the decisionmaker or on the initiative of the communicating party. Written ex

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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parte communications include, but are not limited to, the following: letters, briefing packets or booklets, "slides" which accompany an oral presentation, copies of pleadings, summaries of the party's position, charts, graphs, tables, and FAX transmittals of any type.

6. When does the rule affect advice letters?

The rule does not affect advice letters at all. The filing of an advice letter does not commence a "covered proceeding", so advice letters per se are not covered by the rule. However, if an advice letter is converted to a formal proceeding, the rule would attach.

7. How should consolidated proceedings be handled?

If an OII and rulemaking are consolidated, to the extent that the OII and the rulemaking address identical issues, the OII is **not** covered. If the OII addresses issues **separate** from those raised in the companion rulemaking, the OII **is covered** by the rule, while the companion rulemaking is not. See p. 9, D.91-07-074. The presiding officer will provide guidance if questions should arise about the applicability of the rule to consolidated proceedings (e.g., applications and complaints, etc.)

8. What is the definition of "substantive"?

An ex parte communication is, by definition, confined to a written or oral communication on **any substantive issue** in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication. Issues relating to the facts and/or the legal questions in dispute, the merits of the parties positions or arguments, and the outcome of the proceeding are considered substantive. In contrast, communications which are **solely** related to procedural matters such as the hearing schedule, location, and format, filing dates and identity of parties, are not reportable ex parte communications. However, procedural inquiries are sometimes borderline substantive, especially when scheduling issues are controversial or important to the outcome of the proceeding. When in doubt, or in borderline situations, you are wise to err on the side of reporting the communication.

January, 1992

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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9. When is the date of submission of a proceeding?

The date of submission of a proceeding for purposes of the rule, is as described in Rule 77 of the Commission's Rules of Practice and Procedure (see section 1.1(i) of the Ex Parte Rule). Rule 77 states that "[a] proceeding shall stand submitted for decision by the commission after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the commission or the presiding officer".

10. Does the rule now permit ex parte communications with ALJs prior to submission?

ALJs, and other decisionmakers, may of course still choose to rebuff ex parte communications at any stage of the process, notwithstanding that the generic rule does not prohibit such communications. This is a matter of "personal code of conduct" for some, and concerns about legal ethics for others. This issue is likely to arise in complaint cases since some decisionmakers may prefer to engage in no ex parte communications in adjudicative matters.

NOTICE

1. If an ex parte communication is initiated by a decisionmaker, must a party report that contact?

Yes. The obligation to report all ex parte communications, whether initiated by the party or by the decisionmaker, rests with the party.

2. What is the form of the Notice? How should the details of the communication be disclosed?

As noted above, we expect the Notice to follow the pleading format. Rule 1.4(a)(1) through (3) sets forth the requirements for reporting the details of a communication. You are expected to make full and complete disclosure, and the notice must contain the following items at a minimum:

- (1) date, time and location of communication, and whether it was oral, written, or a combination;
- (2) identity of recipient(s) and persons initiating the

January, 1992

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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- communication, AND the identity of any persons present during the communication; and
- (3) a description of the party's (not the decisionmaker's) communication and its content. Attach a copy of any written material or text used during the communication.

Although it is not mandatory, we strongly encourage the filing party to include the name and telephone number of a contact person to facilitate requests for copies of the notice.

3. What are the procedures for handling notices of ex parte communications?

The original and twelve copies of the Notice must be filed in the San Francisco Docket Office within three working days of the ex parte communication (See Rule 44.2 (excluding first day and including last day) to calculate the time for compliance with this requirement). You are also required to submit a copy of the Notice to the Assigned ALJ at the time of filing. You are not required to serve a copy of the Notice on other parties. While Article 2 of the Rules of Practice and Procedure is not applicable to a Notice of Ex Parte Communication, we expect Notices to follow the format of other pleadings and to include the case caption, the docket number, and a title "(Notice of Ex Parte Communication" is sufficient). This format will facilitate calendaring. A sample notice is attached.

Notices will be reviewed and summarized by the ALJ Division for purposes of ensuring their timely inclusion in the Daily Calendar. We encourage you to submit a draft summary to expedite our task. The ALJ Division will advise you by ruling or letter, as appropriate, of any deficiency in your notice that may require augmentation, but this will not delay the calendaring of the original notice. If an augmented notice is required, a notation of its filing will appear in a subsequent Daily Calendar.

Once you read the Notice Summary in the Daily Calendar, you may request a copy of the Notice from the Central Files Room (Room 2002; (415)703-2045) or from the reporting party's designated contact person, whose name and telephone number will appear in the Daily Calendar.

January, 1992

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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During the December workshops, several parties noted that the Commission's requirement that Notices to be filed only in San Francisco may burden Southern California parties, effectively reducing the 3-working-day notice period to two working days. Since the San Francisco filing requirement was imposed to facilitate prompt calendaring of the Notices, and in any event is now part of the newly adopted Article 1.5, we are not in a position to modify the requirement at this time. However, on a trial basis we will provide the following alternative mode of compliance with Rule 1.4(a):

1. Parties may tender the original and twelve copies of a notice for filing in Los Angeles or San Diego.
2. Parties must provide an extra copy of the notice at time of filing. This extra copy will be date-stamped by the Los Angeles or San Diego office.
3. A facsimile copy of the date-stamped notice must be transmitted to the San Francisco Docket Office within the 3-working-day period specified in Rule 1.4. The faxed copy must be received in San Francisco no later than 3:00 PM on the third working day. **The responsibility to transmit the copy is that of the party, not the Los Angeles or San Diego Docket Office staff.** The fax number is: (415) 703-1723.

Hopefully, this modification will ensure that notices tendered for filing in San Francisco, Los Angeles, and San Diego on a given day are calendared at the same time; however if it does not work, we will suspend the trial in favor of explicit compliance with Rule 1.4. Parties should be aware that notices tendered for filing in Los Angeles and San Diego may not be immediately available in the San Francisco Central Files room and they should contact the reporting party directly if they require a copy of the notice immediately.

4. Rule 1.4(c) states that parties may obtain a copy of the Notice of Ex Parte Communication from the Commission's Central File Room or from the filing party, who must provide it to the requesting party without delay. What does

January, 1992

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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"without delay" mean?

The term "without delay" means exactly what it says. If you have designated a contact person in your notice, you should expect that parties may begin to submit requests to that individual as soon as they read the Daily Calendar summary of your notice. You should respond to all requests in a timely manner and provide a copy of your notice (including any attached written materials or text) as soon as reasonably possible.

The particular mechanics of how you respond to requests are between you and the requesting party. If the requesting party asks you to drop the notice in the mail, you should do so at the next opportunity, consistent with your normal office procedures for mailing other Commission filings. If the requesting party asks for overnight mail or other special mailing arrangements, you are free to request the necessary billing information from the requesting party, and if the requesting party does not provide it, you are free to follow your normal office procedures for mailing other Commission filings. However, if the requesting party asks for a facsimile copy, and you have facsimile capability, you should comply with the request and fax the notice "without delay."

DEFINITION OF ISSUES

1. Who is a party?

A party is the person or firm named in the appearance form filed in all proceedings. Those in the categories of State Service and Information Only on a proceeding's service list are not considered to be parties, unless they would otherwise be covered under Rule 1.1(b) or (h).

2. When is someone an agent of a party?

Someone is an agent of a party if they:

- (1) Are employed by the party or its representative and act in that capacity on behalf of the party or the party's position. See also, Black's Law Dictionary, Fifth Edition at p. 59, "Agent. ....One who represents and

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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acts for another under contract or relation of agency  
(q.v)....; or

- (2) Contact a decisionmaker on behalf of a party to advocate a party's position.
3. What is the status of CACD's Water Branch?  
  
Members of CACD's Water Branch who are appearing as advocates or witnesses for a particular party in contested proceedings are subject to the rule.
4. Will notices be considered as part of the record?  
  
Section 1.2 of the rule provides that notices are **not** part of the evidentiary record on which the decisionmaker bases their decision.
5. What is meant by sanctions?  
  
The Commission intended the wording of Section 1.5 of the rule to be interpreted broadly in order to preserve maximum flexibility to impose sanctions as appropriate. It specifically did not define categories of sanctions (such as issue sanctions, etc.).

January, 1992

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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Additional "Most Commonly Asked Questions and Answers"  
About Issues Raised in December, 1991 Workshops

1. The definitions of "Party" (Rule 1.1(h)) and "Commission Staff of Record" (Rule 1.1(b)(ii)) exclude from the rule CACD staff members who do not appear as advocates or witnesses for a particular party. However, CACD Water Branch staff members who appear as advocates or witnesses in a proceeding would be covered by the rule. Are those who supervise CACD Water Branch advocates or witnesses covered by the rule?

Those who supervise CACD Water Branch advocates or witnesses do not by that fact become "parties" under the rule. It is possible that a CACD supervisor could become an "agent" of CACD or some other party (See earlier discussion of agency).

2. Ex parte communications are defined in Rule 1.1 (g) as written or oral communications on any substantive issue in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication. Are there circumstances where exchanges between decisionmakers and parties in a legislative forum or in a public conference or educational forum could fall within this definition?

This is a gray area, not explicitly addressed by the Commission in its decisions or in the rule. The standard advice when you are in a gray area is to err on the side of reporting the communication. If you do not do so, you risk becoming embroiled in a dispute if some party files a motion seeking to require the filing of a notice reporting the communication. While it is not clear that the Commission intended or wishes to cover such communications under the ex parte rule, the only thing we can say at this point is that the Commission has not decided the issue.

3. The ex parte rule requires reporting within 3 working days; however the Commission's Rule 44.2 which is used to compute time for purposes of filing does not employ the "working day" concept. How is this disparity to be reconciled?

The Rule 44.2 computation "exclude[s] the first day and

January, 1992

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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include[s] the last day." It also specifies that if the last day falls on Saturday or Sunday or a state holiday, the computation shall omit such day and include the first business day thereafter. As at least one party pointed out during the workshops, strict adherence to Rule 44.2 at times might be inconsistent with the adopted "3 working day" reporting requirement.

**For example:** Ignoring the Commission's "3 working day" proviso, if an ex parte communication occurs on a Thursday, the three-day period would begin on Friday, and the ex parte communication notice would be due for filing on Monday, under a literal application of Rule 44.2. However it is possible to reconcile Rule 44.2 with the "working day" proviso adopted by the Commission: **Using the example above,** if a communication occurs on Thursday, the notice would be due for filing on Tuesday (excluding the first day, which is Thursday, and counting Friday as working day 1, Monday as working day 2 and Tuesday as working day 3.

4. On its own initiative, Billie Bob Water Company, a non party, contacts a decisionmaker to express concern about the outcome of a generic "gain on sale" issue which will be decided in a proceeding involving Water Company A. Water Company A did not ask Billie Bob Water Co to make the contact, and the latter is not acting on behalf of Water Company A. Is Billie Bob Water Company required to report the communication?

Billie Bob is not acting at the request of a party, but rather on its own initiative. It is not an agent of Water Company A, and has no reporting obligation. Further, since the Commission must base its decision on the record in the gain onsale proceeding, in order for Billie Bob's views to be considered in the decision, Billie Bob should become a party to the proceeding.

5. What types of pleadings might be filed by parties in response to the filing of Notices of Ex Parte Communication?

It is realistic to expect that parties may file motions to cure defects in Notices of Ex parte Communications; motions to compel production of materials that should have been

January, 1992

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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attached to Notices but were not; petitions to set aside submission to take additional evidence concerning information raised in an ex parte communication (Rule 84); and motions for imposition of sanctions (Rule 1.5). This list is by no means exclusive. In addition, in complex or contentious proceedings, similar to the Diablo Canyon prudency review or the Edison/SDG&E merger application, parties may file motions requesting imposition of an ex parte communications rule tailored to the needs of the specific proceeding (Rule 1.6).

6. Are Notices of Ex parte Communications subject to discovery?

This depends upon whether the information sought is relevant to the subject matter of a proceeding or likely to lead to the discovery of admissible evidence (cf. Rule 1.2, which provides that the Commission shall render its decision based on the evidence of record). Notices of ex parte communication are not evidence of record (Rule 1.2).

7. A party sends a mailing to a large constituency, requesting that individuals write to the Commission **supporting or endorsing the party's position in a particular proceeding**. Such request arguably makes the individual who subsequently engages in an ex parte communication in support of a party's position an agent of the party. Where does the reporting obligation lie?

It is impractical to require that individual members of the public report; therefore while the obligation to report in an agency situation rests with the agent or the party, in this instance it is only practical to require the party to report. The party must make as complete an ex parte Notice filing as is possible in these circumstances.

8. How can a party who uses proprietary information in an ex parte communication protect that information from disclosure?

The Commission must make its decision based on the evidence of record. If the party wishes the Commission to rely upon the information conveyed in an ex parte communication, the information must be made part of the evidentiary record, and if the information is relied upon in the decision it must be

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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public.

9. Can an ALJ approve a Notice of Ex parte Communication that is procedurally defective (eg., is filed late or is incomplete)?

No. The ALJ can only entertain motions (to accept a late filed notice or whatever) and make the appropriate ruling or recommendation to the Commission after hearing from all parties who wish to respond to such a motion.

10. How can parties get quick access to the Daily Calendar if they are not subscribers?

The California Public Utilities Commission's CompUCall allows anyone with a computer and modem to access the CPUC Daily Calendar.

To reach CompUCall:

1. Using your communications program, dial 1-(415) 703-1297.
2. Set communication parameters as follows:
  - Baud rate 300, 1200 or 2400
  - Seven (7) data bits
  - Parity EVEN
  - One (1) stop bit
3. At the CONNECTED TO message, press Return key twice.
4. At LOGIN PLEASE, type in: LOGIN PUC (No password is needed).
5. At the TERMINAL TYPE: type the ID which most closely conforms to your terminal type -- VT, PX, TTY, or T5.

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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6. The CompUCall menu will be displayed. Select an option:
  - News Releases
  - CPUC Calendars - choosing this will allow you to select from these two options:
    - Daily Calendar
    - Transportation Calendar
7. When you choose an option, another menu shows up of various items and directions for displaying them.
8. Once you choose an item, to read it:
  - Press Spacebar once to display one screen at a time.
  - Press Spacebar and hold it down to scroll through the entire document.
  - Escape (ESC) will cancel your viewing and return you to the previous menu.

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January, 1992

COMMONLY ASKED QUESTIONS AND ANSWERS  
ABOUT THE COMMISSION'S NEW EX PARTE RULE

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ADDENDUM

(at the suggestion of the Public Advisor)

Copies of the following notice will be available in the Commission's hearing rooms.

On January 20, 1992, California Public Utilities Commission (CPUC) decision D.91-10-049 took effect. This decision adopted an ex parte rule, which in certain CPUC cases, requires:

1. that all parties to the case shall file a notice of ex parte contact with the Docket Office if they contact CPUC decisionmakers about substantive issues in the case outside the hearing room.
- 2) that in certain enforcement proceedings, no party shall contact a CPUC decisionmaker after the case has been submitted.

If you have any questions about the Rule, please consult Article 1.5 of the Commissions Rules of Practice and Procedure or contact the Public Advisor's Office.

[END]

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Gas & Electric )  
Company, increase base rates )  
by \$11.1 million and gas base ) A.90-05-003  
rates by \$3.6 million on ) (Filed on \_\_\_\_\_)  
1/1/91 to recover costs as a )  
result of October 17, 1989 )  
Northern California earthquake )  
and related events. )  
\_\_\_\_\_ )

NOTICE OF EX PARTE COMMUNICATION

Pursuant to Rule 1.4(a) of the Commission's Rules of Practice and Procedure, Pacific Gas & Electric Company ("PG&E") hereby gives notice of the following ex parte communication.

The communication occurred on January 20, 1992 at 10:00 AM in the CPUC's San Francisco offices. The Communication was oral, but written materials were also used and provided to each Commissioner in attendance. [Rule 1.4(a)(1)]

PG&E's regulatory manager Mr. Bob Jones initiated the communication. Ms. Betty White of PG&E's regulatory office was also present, as were Commissioners Fessler and Ohanian. [Rule 1.4(a)(2)]

Mr. Jones discussed PG&E's opposition to DRA's position on allowable depreciation costs. The written materials used during this meeting are attached to this notice.

In expressing PG&E's opposition to DRA's position, Mr. Jones relied on three arguments: First, DRA has failed to include in its estimate over \$25 million in service vehicles which PG&E has yet to fully depreciate. Second, DRA's position is inconsistent with its proposal in PG&E's last general rate case, a position that was adopted in total by the commission. Finally, DRA's suggestion that a 40 year service life should be assumed for PG&E's gas-fired generating units is inexplicably inconsistent with the uniform system of accounting. In addition, Mr. Jones informed the Commissioners of a recent decision of the FERC affecting its treatment of depreciation costs (FERC 91-107) and

invited them to tour several of PG&E's gas-fired generating facilities to gain a greater understanding of the challenges involved in trying to extend plant life. [Rule 1.4(a)(3)]

To obtain a copy of this notice, please contact:

PG&E Contact Person

Telephone: (415) 555-5555

Respectfully submitted,

/s/ JANE HILL  
Attorney for PG&E

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Neal Shulman  
Executive Director

State Office Building  
505 Van Ness Avenue  
San Francisco, CA 94102

State Office Building  
107 South Broadway  
Los Angeles, CA 90012

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DAILY CALENDAR

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PUBLIC MEETINGS

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NOTICE OF EX PARTE COMMUNICATION

Copies of tendered notices are available in the Central File Room for review and/or reproduction under existing procedures. They are also available from the filing party who is under the obligation to provide copies of the notice without delay.

1/23/92	A.90-05-003	Pacific Gas & Electric Company, increase base rates by \$11.1 million and gas base rates by \$3.6 million on 1/1/91 to recover costs as a result of October 17, 1989 Northern California earthquake and related events. PG&E contacted Commrs. Ohanian and Fessler on 1/20/92 regarding DRA's position on allowable depreciation costs.
	PG&E filed	Contact: PGE Contact Person Tel: (415) 555-5555

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NEW FILINGS

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CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Notice of Workshops Re Adopted Ex Parte Contact Rule on all parties of record in this proceeding or their attorneys of record.

Dated January 14, 1992, at San Francisco, California.

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Kale Williams

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number of the service list on which your name appears.

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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.