

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Investigation on the Commission's Own Motion Into the Operations and Practices of Southern California Edison Company; Notice of Opportunity For Hearing; and Order to Show Cause Why the Commission Should Not Impose Fines and Sanctions For Major Power Outages In the City of Long Beach on July 15 to July 20, 2015, and on July 30 to August 3, 2015.

Investigation 16-07-007
(Filed July 14, 2016)

**THE SAFETY AND ENFORCEMENT DIVISION'S RESPONSE TO
ADMINISTRATIVE LAW JUDGE RULING**

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September 12, 2016

I. INTRODUCTION

The California Public Utilities Commission's Safety and Enforcement Division ("SED") hereby submits this response to Administrative Law Judge ("ALJ") Michelle Cooke's oral ruling at the September 6, 2016 prehearing conference ("PHC").¹ ALJ Cooke's ruling requested that the Commission's Safety and Enforcement Division ("SED") file, by Monday, September 12, 2016, a description of the ethical wall in SED between Advisory and Advocacy staff as well as a list of staff who fall under each category.² SED provides a list below of staff whose functions would be categorized under Adjudicatory and Advisory for the duration of this proceeding. In addition, SED has erected an internal ethical wall between staff in the Advocacy and Advisory list for all matters related to the substantive matters in this proceeding and subsequent rehearings or appeals of this proceeding, Investigation ("I") 16-06-007, to ensure that other parties' due process rights are not harmed.

II. DISCUSSION

A. Ethical Wall

1. Implementation of Internal Separation of Functions

For the duration of the current proceeding, in order to protect parties' due process rights and prevent any appearance of bias, SED has implemented internal separations of functions and an ethical wall between staff who perform Advisory work and staff who perform Advocacy work. SED's advocating and advising staffs are walled off from each other and those staff members listed in each group in Section II.B below are prohibited from discussing the substantive matters of the case.³ The attorneys that represent each group are also walled off from each other. Further, the supervisors of the staff within each group are also walled off from each other.

¹ Pre-hearing Conference, Tr. 11:14, Sep. 6, 2016.

² *Id.*

³ *See*, California Public Utilities Commission Rules of Practice and Procedure, Rule 8 (ex parte rules); *See also*, Public Utilities Code ("P.U. Code") §§ 1701, 1701.1, 1701.2 (defining the prohibitions on ex parte communications in adjudicatory proceedings).

2. Functional Separation

The case law permits the limitation of this functional separation and ethical wall between SED's Advisory and Advocacy staff to a case-by-case basis, thus permitting staff to perform different Advisory or Advocacy functions in unrelated matters. In *Morongo Band of Mission Indians v. State Water Resource Control Board*, the California Supreme Court overturned a lower court's ruling that it was a violation of a licensee's due process rights for a prosecuting agency attorney to advise the agency on an unrelated matter.⁴ The Court in *Morongo* held that so long as there are internal separations between advocates and decision makers on a case-by-case basis there is no violation of due process.⁵ The Court stated, "In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias."⁶ In the present case, the functional separation and ethical wall between SED's Advisory and Advocacy staff, listed in Section II.B below, upholds the presumption of impartiality and, therefore, parties' due process rights.

3. Timeline

The timeline of this functional separation and ethical wall began on the day the Commission adopted the Order Instituting Investigation ("OII"), I.16-07-007.⁷ The Commission, like other agencies, distinguishes between informal fact-finding investigations and formal adjudicatory cases. Following the July 14, 2016 vote by the full Commission, the Commission confirmed that this proceeding is formally

⁴ See, *Morongo Band of Mission Indians v. State Water Resource Control Board*, 45 Cal. 4th 731 (2009).

⁵ See, *Id.* at 737-39.

⁶ *Id.* at 741.

⁷ *Order Instituting Investigation on the Commission's Own Motion Into the Operations and Practices of Southern California Edison Company; Notice of Opportunity For Hearing; and Order to Show Cause Why the Commission Should Not Impose Fines and Sanctions For Major Power Outages In the City of Long Beach on July 15 to July 20, 2015, and on July 30 to August 3, 2015*, adopted on July 14, 2016.

adjudicatory.⁸ The preliminary investigation which preceded the OII, however, was not. The Federal courts and California courts have recognized this distinction is common for regulatory agencies and does not violate any due process rights.²

B. List of SED Staff in Advocacy and Advisory Functions

Advocacy	Advisory
Charlotte TerKeurst	Elizaveta I. Malashenko
Fadi Daye	Leslie L. (“Lee”) Palmer
Benjamin Brinkman	Arthur J. O’Donnell
Derek Fong	Junaid Rahman
Richard Kyo	
Niki Bawa	

III. CONCLUSION

The separation of functions and creation of an ethical wall for SED staff and management for the duration of this proceeding, and subsequent rehearings or appeals of this proceeding, will impose the obligations described above on SED to protect the due process rights of parties.

⁸ *Id.*

² *See, Hannah v. Larche* (1960) 363 U.S. 420, 445-452 (informal investigatory function and subsequent adjudicatory function of regulatory agencies does not violate parties’ due process rights); *Ash Grove Cement Co. v. FTC* (1978) 577 F.2d 1368, 1376-1377 (FTC’s prior exposure to investigatory phase did not make it biased in the adjudicatory phase, because an administrative agency has a presumption of honesty and integrity); *McCartney v. Comm. on Judicial Qualifications* (1974) 12 Cal.3d 512, 519 and n.5 (distinction between investigatory phase and adjudicatory phase is to decide whether to initiate a formal proceeding); *Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, 98 (administrative adjudicatory proceeding after investigatory proceeding does not violate due process.)

Respectfully submitted,

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