

Decision 08-06-023

June 12, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utility Consumers' Action Network,

Complainant,

vs.

SBC Communications, Inc., dba SBC Pacific Bell Telephone Company (U-1001-C) and related entities (collectively "SBC"),

Defendants.

Case No. 05-11-011  
(Filed November 14, 2005)

Utility Consumers' Action Network,

Complainant,

vs.

Cox California Telecom II, LLC, dba Cox Communications (U 5584 C), and related entities (collectively "Cox"),

Defendants.

Case No. 05-11-012  
(Filed November 14, 2005)

**ORDER MODIFYING DECISION (D.) 07-07-020,  
DENYING REHEARING OF DECISION, AS MODIFIED**

**I. INTRODUCTION**

In this Order we dispose of the applications for rehearing of Decision (D.) 07-07-020 ("Decision") filed by Margaret Tobias ("Ms. Tobias"), and jointly by Pacific Bell Telephone Company dba AT&T California and Cox California Telecom LLC.

In D.07-07-020, we imposed a penalty of \$40,000 on both SBC Communications, Inc. dba SBC Pacific Bell Telephone Company dba AT&T California (“AT&T”) and Cox California Telecom LLC (“Cox”) for violations of the statutes and Commission rules governing ex parte communications.<sup>1</sup>

Our Decision evaluated ex parte communications which occurred during meetings on June 14 & 15, 2006, between representatives of AT&T and Cox (collectively, the “Utilities”), and certain Commissioner Advisors. The communications involved the meaning and scope of Public Utilities Code section 2883, including implementation and compliance issues.<sup>2</sup> At the time of the communications, these issues had been raised in two concurrent Commission proceedings: (1) the Local Competition/rulemaking proceeding;<sup>3</sup> and (2) the adjudicatory/complaint proceedings filed by the Utility Consumers’ Action Network (“UCAN”), alleging the Utilities had violated section 2883.<sup>4</sup>

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<sup>1</sup> The statutory provisions regarding ex parte communications are contained in Public Utilities Code sections 1701.1 – 1701.4. (Pub. Util. Code, §§ 1701.1 – 1701.4.) The Commission’s implementing rules largely reiterate and reorganize the statutory provisions. On September 13, 2006, the Commission’s Rules of Practice and Procedure were reorganized and renumbered, with minor substantive changes. Because the communications in question took place before September 2006, this order discusses rules effective at that time: Rules 5, 7 and 7.1. (Cal. Code of Regs., tit., 20, §§ 5, 7 and 7.1.) The analysis in this order would be unchanged under the current rules.

<sup>2</sup> All subsequent section references are to the Public Utilities Code, unless otherwise specified. Section 2883 generally requires 911 emergency services to be available even in residential units where an active account has been voluntarily or involuntarily terminated (generally referred to as “warm line” service). An example is where the occupancy of a residential unit is changing due to sale or lease expiration.

<sup>3</sup> *Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service. Order Instituting Investigation on the Commission’s Own Motion into Competition for Local Exchange Service* (R.95-04-043/I.95-04-044). (See D.07-07-020, at pp. 30-31, 39 [Conclusion of Law Numbers 5 & 6], & p. 40 [Conclusion of Law Numbers 9 & 14].)

Shortly after the complaints were filed, the Utilities filed pleadings in both the adjudicatory and rulemaking proceedings to argue that section 2883 issues should be resolved via a rulemaking process. The pleadings requested that the Commission develop rules clarifying carriers’ “warm line” obligations under section 2883. (See AT&T and Cox Joint Motion for the Commission to Establish Industry-Wide Local Competition Rules Regarding Carriers’ Warm Line Obligations, dated June 2, 2006 (“Rules Motion”), filed in the Local Competition Docket. See also AT&T and Cox Joint Motion to Stay the Coordinated Complaint Proceedings, dated June 2, 2006 (“Stay Motion”), filed in the adjudicatory/complaint proceeding.) As explained in the Decision, the Administrative Law Judges in both proceedings rejected the Utilities attempts to have the complaints dismissed in lieu of a more generic

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Under the relevant statutes and rules, ex parte communications are permitted without restriction in quasi-legislative (rulemaking) proceedings.<sup>5</sup> However, ex parte violations were deemed to occur in this instance because the relevant statutes and rules strictly prohibit any ex parte communications in adjudicatory (complaint) proceedings.<sup>6</sup>

Timely applications for rehearing were filed by Ms. Tobias and the Utilities.<sup>7</sup> No responses were filed.

In her rehearing application, Ms. Tobias challenges the Decision on the grounds that: (1) it is not supported by adequate findings; (2) the record does not support the findings; and (3) the Commission failed to weigh the evidence and arguments.<sup>8</sup>

The Utilities challenge the Decision on the grounds that: (1) it is not supported by the record or adequate findings; (2) it fails to apply the relevant rules and statutes; (3) it erroneously applies the rules regarding categorization; (4) it erroneously suggests it was improper to file the Rules Motion; (5) it will have broad and serious implications; (6) its due process theory and attempt to shield advisors are erroneous; and

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rulemaking. (See D.07-07-020, at pp. 4-9.)

<sup>4</sup> The complaint proceedings are C.05-11-011 & C.05-11-012.

<sup>5</sup> See section 1701.4 (b) and Rule 7(d) (Cal. Code of Regs., tit. 20, § 7, subd. (d)).

<sup>6</sup> See section 1701.2(b) and Rule 7(b) (Cal. Code of Regs., tit. 20, § 7, subd. (b)).

<sup>7</sup> It is undisputed that: (1) the meetings (discussion with use of a PowerPoint presentation) constituted both oral and written communications; (2) the consolidated complaints and the Local Competition Docket are formal proceedings pending before the Commission; (3) the Utilities are “interested persons” as defined under the statute and rules (see also, section 1701.1(c)(4)(a) & (b) and Rule 5(h) (1) & (2) under which AT&T and Cox were parties to the complaint proceeding having a potential financial interest in the outcome, and also a parties to the Local Competition Docket); (4) advisors are decisionmakers for purposes of communications involving adjudicatory or complaint proceedings; and (5) the meetings took place privately rather than in a public setting or on the formal official record. The dispute relates to whether the communications in question involved substantive issues at issue in the adjudicatory/complaint proceeding. (See D.07-07-020, at p. 12.)

<sup>8</sup> Ms. Tobias also claims the Decision errs because: (1) it wrongly finds that the June 14 & 15 meetings concerned the categorization of meetings; and (2) erroneously suggests that the filing of the Rules Motion was somehow improper. (Tobias Rhg. App., at p. 13.) These issues are addressed below in connection

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(7) the remedies imposed are wrong. In addition, the Utilities request oral argument. We have carefully considered the arguments raised in the applications for rehearing and are of the opinion that while the Decision is lawful, good cause exists to modify two conclusions of law to eliminate specific reference to named individuals. Good cause has not otherwise been established to grant rehearing of D.07-07-020. Accordingly, the applications for rehearing of D.07-07-020, as modified, are denied. We also deny the Utilities request for oral argument.

## **II. DISCUSSION**

### **A. MS TOBIAS' ARGUMENTS**

#### **1. The Findings Support The Decision**

Ms. Tobias is retained counsel for Cox and attended the meeting which took place on June 14, 2006.<sup>2</sup> She contends the Decision violates section 1705 because it fails to find that she actually participated in any improper oral and/or written communications. (Tobias Rhg. App., at pp. 4-11.) As described below, although our findings are lawful, we will clarify certain conclusions of law.

Section 1705 provides in pertinent part that a Commission order or decision ...shall contain separately stated, findings of fact and conclusions of law...on all issues material to the order or decision. (Pub. Util. Code, § 1705.)

In particular, Ms. Tobias objects to Conclusion of Law ("COL") Numbers 5, 6, and 14. COL 5 states:

The meetings between Fenikile, Garrett and Tobias and the personal advisors constituted oral communications as defined

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with the Utilities arguments. (See Sections C & D of this Order)

<sup>2</sup> See D.07-07-020, at pp. 10, 36 [Finding of Fact Number 27]; see also Exhibit ("Exh.") 1, at p. 3, para. 10 & 11.

by Rule 5(e).<sup>10</sup> (D.07-07-020, at p. 39 [Conclusion of Law Number 5].)

COL 6 states:

The PowerPoint presentation distributed at the meetings between Fenikile, Garrett and Tobias and the personal advisors constituted a written communication as defined by Rule 5(e). (D.07-07-020, at p. 39 [Conclusion of Law Number 6].)

COL 14 states:

The meetings with personal advisors constituted impermissible *ex parte* communications concerning categorization and other substantive issues in the pending adjudications (C.05-11-011 & -012), in violation of Public Utilities Code Section 1701.2(b) and Rule 7(b), Rules of Practice and Procedure, by AT&T and by Cox. (D.07-07-020, at p. 40 [Conclusion of Law Number 14].)

Ms. Tobias does not contest that the *ex parte* violations occurred, or that she attended the June 14 meeting.<sup>11</sup> Rather, Ms. Tobias objects to any implication that

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<sup>10</sup> Rule 5(e) of the Commission's Rules of Practice and Procedure states:

(e) "Ex parte communication" means a written communication (including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:

- (1) concerns any substantive issue in a formal proceeding,
- (2) takes place between an interested person and a decisionmaker, and
- (3) does not occur in a public hearing, workshop, or other public setting, or on the record of the proceeding.

(Cal. Code of Regs., tit. 20, § 5, subd. (e).)

See also section 1701.1(c)(4). The rules include Commissioner advisors as decisionmakers for purposes of *ex parte* communications involving adjudicatory proceedings and/or categorization issues. (See Rules 5(f) and (g), respectively.) Section 1701.1(c)(4) and Rule 5(h) define "interested person" to include, among other entities, the agents and representatives of any applicant, complainant, or defendant in a Commission proceeding as well as a person or entity (including their agents, employees and representatives) with a financial interest in a matter at issue before the Commission.

<sup>11</sup> Ms. Tobias does not contest that the same issues were involved in the adjudicatory and rulemaking proceedings, or that the Utilities were directly involved in the adjudicatory proceeding as defendants. (See e.g., regarding overlap of issues: Tobias Application for Rehearing, at p. 3; D.07-07-020, at pp. 5-9,

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she personally contributed to, or engaged in, the substantive communications in question. She argues the rules don't specify that mere attendance at ex parte meetings could constitute a violation, thus the Decision violates the principle of *McMurtry v. State Board of Medical Examiners* ("*McMurtry*") (1960) 180 Cal.App.2d 760, 766, requiring a reasonable degree of certainty before one can be fined for violating a statute.<sup>12</sup> (Tobias Rhg. App., at p. 5.)

*McMurtry* is not controlling here. That case hinged on interpretation of a specific term used in a statute. The Court found that the term was too vague and uncertain to convey a clear standard of conduct. There is no issue here regarding the interpretation of any particular term. Rather it concerns the reasonableness of our general construction and application of the relevant ex parte rules.

Regardless of whether any specific statement can be traced to Ms. Tobias,<sup>13</sup> even she concedes it is reasonably "...obvious that *anyone* present at a meeting with a decisionmaker is deemed to endorse and embrace the communications made by others during the meeting." Indeed, the rules were clear enough that the Utilities themselves knew the meetings and communications could be deemed impermissible. For that reason,

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17 [Table 1], & pp. 32-36 [Finding of Fact Numbers 12-24]. Compare also Prehearing Conference Transcript, dated January 4, 2006, pp. 4-5, 11-12, and Exh. 11, p. 2 [Describing issues in the adjudicatory proceedings] with Exh. 1, pp. 3-4, para. 14 [Describing issues discussed by Mr. Fenikile in June 14, 2006 meeting regarding the rulemaking proceeding].)

<sup>12</sup> Ms. Tobias also claims that our core determination went to the Utilities "purpose" regarding certain pleadings and communications. (Tobias Rhg. App., at p. 4 & fn. 7.) Ms. Tobias misconstrues the Decision. It is neither improper nor irrelevant to take note of actions and statements which convey a certain purpose or desired result. However, we found that the subject matter of the communications directly conflicted with Rule 5(e) and Rule 7(b) given the facts and circumstances of this case. (See D.07-07-020, at p. 39 [Conclusion of Law Numbers 5 & 6] as modified herein, & pp. 39-40 [Conclusion of Law Numbers 8-14].)

<sup>13</sup> The record and the Decision indicate that the written PowerPoint presentation was drafted by Mr. Fenikile (D.07-07-020, at pp. 10, 37 [Finding of Fact Number 23]). In addition, the record indicates that the oral communication was primarily presented by Mr. Fenikile and Mr. Garrett. (Exh. 3, pp. 4-5, para. 13-16. Ms. Tobias does not claim to have said nothing, only that she "did not address any matter in detail." See also, Exh. 1, pp. 3-4, para. 14.) In testimony, Ms. Tobias clarified that she did review the PowerPoint presentation and suggest changes to the document. (R.T. Vol. 1, p. 14:8-9.)

they attempted to protect themselves by stating at the outset that they only intended to discuss the rulemaking proceeding.

Our rules are not required to enumerate every circumstance that might give rise to impermissible conduct. We view the circumstances here as similar to those in *Cingular*, where we imposed penalties on the utility for improperly charging early termination fees to its customers and failing to provide accurate information in violation of sections 451, 702, and 2896 for.<sup>14</sup> Cingular claimed that the statutes, and particularly section 451, were too broad for it to reasonably anticipate that its actions were unjust and unreasonable. While the Court agreed the statutes were broadly written, it rejected the notion that Cingular could not reasonably discern that its conduct would be deemed improper. Quoting *Carey v. Pacific Gas and Electric Company* (1999) 85 Cal.P.U.C.2d 682, 689, the Court stated:

It would be virtually impossible to draft section 451 to specifically set forth every conceivable service, instrumentality and facility which might be defined as “reasonable” and necessary to promote the public safety. That the terms are incapable of precise definition given the variety of circumstances likewise does not make Section 451 void for vagueness, either on its face or in its application to the instant case....

(*Cingular, supra*, 140 Cal.App.4<sup>th</sup> at pp. 740-742.)

Like the situation in *Cingular*, it would be impossible for our rules to set forth every conceivable instance or manner of conduct that might be impermissible. It is also unreasonable to suggest the rules can or should be applied differently depending on the exact substance or number of words spoken by any particular attendee at a meeting.

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<sup>14</sup> Section 451 requires in pertinent part that utilities provide “adequate, efficient, just, and reasonable service...and facilities...as necessary to promote the safety, health, comfort and convenience...of its patrons, employees, and the public.” (Pub. Util. Code, §451.) Section 702 requires in pertinent part that “[E]very public utility shall obey and comply with every order, decision, or direction, or rule made or prescribed by the commission...” (Pub. Util. Code, § 702.) Section 2896 requires in pertinent part that telephone corporations must provide customer service to its customers sufficient to make informed choices. (Pub. Util. Code, § 2896.)

The ex parte rules are sufficiently clear that Ms. Tobias should have been able to discern a potential violation simply by virtue of her role as a representative of Cox in the June 14 meeting.

Ms. Tobias presents no compelling argument or evidence that she should be viewed differently than any other representative at the meeting. She attended the meeting as a representative of Cox and in support of the joint position of the Utilities. There is no evidence Ms. Tobias was unaware of the planned subject matter of the discussion as reflected in the PowerPoint presentation.

While we believe our conclusions were reasonable and lawful, there is merit to the argument that it is unnecessary for COLs 5 and 6 to specifically name individuals. We note that for purposes of assessing penalties, the relevant statute places responsibility on the Utilities. Specifically, section 2109 states:

In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility.

(Pub. Util. Code, § 2109.)

Consistent with section 2109, our Decision found that AT&T and Cox violated the applicable statutes and rules, and are liable for the associated penalties. (D.07-07-020, at p. 40 [Conclusion of Law Number 15] & p. 41 [Ordering Paragraph 2].) Accordingly, we will modify COL 5 and 6 as follows:

D.07-07-020, at p. 39, COL 5 should be modified to state:<sup>15</sup>

Oral communications as defined by Rule 5(e) took place during the meetings on June 14 & 15, 2006, between representatives of Cox and AT&T, and certain Commissioner Advisors.

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<sup>15</sup> Our modifications to the Decision which eliminate the identification of individuals in COLs 5 & 6 also resolves Ms. Tobias' argument that the Decision disparately treats individuals to the extent Ms. Johnson was present at the June 14, 2006, meeting but not identified in the COLs. (Tobias Rhg. App., at p. 6, fn. 12, & p. 9.) To the extent Ms. Johnson was not included in the COLs, it appeared to be inadvertent error.

D.07-07-020, at p. 39, COL 6 should be modified to state:

The PowerPoint presentation distributed during the June 14 & 15, 2006, meetings constituted a written communication as defined by Rule 5(e).

**2. The Record Supports The Commission's Determination**

Ms. Tobias contends there is no evidence that she personally drafted the PowerPoint or made any specific improper oral statement, thus the Decision violates section 1757(a)(4). (Tobias Rhg. App., at pp. 11-12.) We disagree.

Section 1757(a)(4) states that “review by the court shall not extend further than to determine” whether “[t]he findings in the decision of the commission are not supported by substantial evidence in light of the whole record.” The Court has interpreted the “substantial evidence” standard as follows:

Conflicts of evidence are to be resolved in favor of the findings of the administrative agency, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. Moreover, if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record, and it will not be reversed.

(*Toward Utility Rate Normalization v. Public Utilities Commission* (1978) 22 Cal.3d 529, 538; *City of Los Angeles v. Public Utilities Commission* (1972) 7 Cal.3d 331, 351.)

As discussed above, it was lawful to conclude based on the record that an improper ex parte communication occurred in the June 14 meeting, and it was reasonable to apply the rules equally to all utility representatives attending the meeting. Here, examples of the pertinent portions of the record were enumerated in D.07-07-020, at pp. 5-9, 17, 32-33 [Finding of Fact Numbers 12-16, 18], pp. 35-36 [Finding of Fact Number 24] & p. 37 [Finding of Fact Number 32].<sup>16</sup>

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<sup>16</sup> Overlapping subject matter in the record included: section 2883 interpretation and implementation; technological and facilities limitations impacting section 2883 service and obligations; number shortages;

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### 3. The Commission Considered All The Evidence and Arguments

Ms. Tobias contends the Decision violates section 1705 and 1757(a)(3) because it does not make findings on, or address, two points she raised in comments on the Proposed Decision. Thus, she argues we failed to meet our obligation to weigh opposing evidence and arguments. (Tobias Rhg. App., at p. 12 relying on *Industrial Communications Systems, Inc. v. Public Utilities Commission* (“*Industrial Communications*”) (1978) 22 Cal.3d 572, 582.)

Ms. Tobias misunderstands the statutory requirements. While the statutes require us to make findings on all material issues, there is no requirement that we must make legal and factual findings as to each and every comment or issue raised by a party to a Commission proceeding.<sup>17</sup> We fully considered and weighed all comments and the evidence in the record.

We also do not agree *Industrial Communications* is determinative here. In that case the Court found that relevant evidence had been improperly excluded.<sup>18</sup> Ms. Tobias does not claim we excluded any relevant evidence here.

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exclusions or exceptions under section 2883; a determination of best practices; and whether the issues should be determined in an industry-wide rulemaking rather than complaint proceedings. (See AT&T Answer to UCAN Complaint, dated December 22, 2005; Cox Motion to Dismiss Complaint, dated January 27, 2006; Cox Reply to UCAN Opposition to Motion to Dismiss Complaint, dated March 14, 2006; Rules Motion, Stay Motion, and PowerPoint presentation.)

<sup>17</sup> See *In Re San Diego Gas & Electric Company* [D.03-08-072] (2000) \_\_ Cal.P.U.C.3d \_\_, 2000 Cal. PUC LEXIS 1136, \* 20, \* 21; see also *Toward Utility Rate Normalization v. Public Utilities Commission* (“*TURN v. PUC*”) (1978) 22 Cal.3d 529, 538, 540-541.

<sup>18</sup> *Industrial Communications, supra*, 22 Cal.3d at pp. 582-583.

## **B. THE UTILITIES' ARGUMENTS**

### **1. The Record And Findings Support The Decision**

#### **a) Record Evidence**

The Utilities contend the Decision is unsupported by the record evidence. They claim the record consistently shows they made every effort to comply with the ex parte rules, and in fact did so. (AT&T/Cox Rhg. App., at pp. 9-17) We disagree.

The Utilities merely cite to excerpts from their own testimony which disavowed that any improper communications occurred. They also reference a statement reportedly made at the start of each meeting to warn advisors the adjudicatory proceeding could not be discussed. The Utilities contend we disregarded that evidence, and there was nothing in the record to contradict it.<sup>19</sup> That is incorrect.

The Decision specifically references the Utilities' testimony in many instances, demonstrating that we fully considered that testimony. However, we need not discuss every statement to prove it was considered.<sup>20</sup> We also disagree there was no evidence contradicting the Utilities testimony. We properly looked to the whole of the record and all sources of relevant information, not just specific statements made by the Utilities which supported their position. For example, we considered: pleadings which demonstrated the overlap of issues between the two proceedings; the PowerPoint presentation which evidenced the subject matter of discussion in the ex parte meetings; the overlap of people involved in the two proceedings; the close succession of events; and the pendency of evidentiary hearings in the adjudicatory proceeding. It is lawful for agencies to consider a breadth of relevant information in the record and weigh the

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<sup>19</sup> The Utilities criticize the determination not to take testimony from the Commissioner advisors who attended the meetings. However, there is no legal requirement to do so and the Commissioner advisors were not the source of the communications. The Utilities also suggest the decisionmakers in question (particular Commissioner advisors) had the responsibility to stop any improper communication. The burden regarding ex parte communications is discussed in Section F of this Order.

<sup>20</sup> See *In Re San Diego Gas & Electric Company* [D.03-08-072, pp. 20-21 (slip op.)] (2000) \_\_ Cal.P.U.C.3d \_\_, 2000 Cal. PUC LEXIS 1136.

evidence accordingly, and reach factual determinations based on their own expertise. It is also lawful to make findings based on inferences reasonably drawn from the record.<sup>21</sup>

The Utilities also argue we failed to discuss what was *actually said* in the ex parte meetings, which is all that matters for purposes of finding an ex parte violation. They claim nothing was said about the merits of the complaint proceedings or how section 2883 should be interpreted. (AT&T/Cox Rhg. App., at pp. 15-16.)

The Utilities wrongly suggest we must identify specific quotes in order to determine the subject matter was impermissible under our rules. We reasonably relied on the PowerPoint as evidence of the subject matter discussed. No one has suggested nothing was *actually said* about those issues. Further, the Decision took great care to explain the connection between the ex parte communications and the adjudicatory proceeding based on the overlap of issues identified in the PowerPoint and documents evidencing contested issues in the adjudicatory proceeding. (See e.g. D.07-07-020, at pp. 4-9, 14-18.) It is unrealistic to suggest the adjudicatory proceeding could be impacted only if the Utilities explicitly mentioned the complaints. Should we accept that illusion, it could, as a matter of practice and policy, send troubling signals regarding the standards applicable to practitioners seeking ex parte contacts with decisionmakers.

### **b) Findings of Fact**

The Utilities contend the FOFs violate section 1705 and *California Manufacturers Association v. Public Utilities Commission* (1979) 24 Cal.3d 251 because they are merely “high level generalities.”<sup>22</sup> (AT&T/Cox Rhg. App., at pp. 16-17.)

Section 1705 provides in pertinent part that Commission decisions:  
shall contain, separately stated, findings of fact and  
conclusions of law by the commission on all issues material  
to the order or decision.

<sup>21</sup> See e.g. *TURN v. PUC*, *supra*, 22 Cal.3d at p. 538; *Solis v. Kirkwood Resort Company* (2001) 94 Cal.App.4<sup>th</sup> 354, 361.

<sup>22</sup> Also citing to *California Motor Transport Company v. Public Utilities Commission* (1963) 59 Cal.2d 270.

(Pub. Util. Code, § 1705.)

In order to comply with section 1705, the Commission's findings must be adequate to:

afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as to assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action.<sup>23</sup>

(California Manufacturers Association v. Public Utilities Commission (1979) 24 Cal.3d 251, 259.)

The Utilities contend the Decision contravenes these standards because “there are no findings at all as to what actual communications during the June 14-15 meetings resulted in a violation and why.” (AT&T/Cox Rhg. App., at p. 16.) This is not correct.

As indicated above, it is not necessary to identify specific quotes to find there were improper communications. And the FOFs and conclusions of law (“COLs”) are otherwise fairly specific. They set out, among other things, the ex parte meetings in question,<sup>24</sup> the document reflecting the subject matter of the ex parte communications,<sup>25</sup> the overlap of substantive issues as between the PowerPoint presentation, the adjudicatory proceeding, and the rulemaking proceeding,<sup>26</sup> and the applicable statutes

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<sup>23</sup> See also *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 65 Cal.2d 811, 813; and *California Motor Transport Co. v. Public Utilities Commission, supra*, 59 Cal.2d at p. 273 [Also stating: “Every issue that must be resolved to reach that ultimate finding is ‘material to the order or decision,’ and findings are required of the basic facts upon which the ultimate finding is based”].

<sup>24</sup> D.07-07-020, at pp. 36-37 [Finding of Fact Numbers 27, 29].

<sup>25</sup> D.07-07-020, at p. 37 [Finding of Fact 32].

<sup>26</sup> D.07-07-020, at pp. 32-35 [Finding of Fact Numbers 12-16, 18, 23, 24].

and rules.<sup>27</sup> These FOFs and COLs are adequate to provide a rational basis for review, and explain the principles we relied upon in reaching our determination.

The Utilities also claim the Decision omits a finding on one material fact, i.e., how a violation could be found if the Utilities said the communications were only made in relation to the rulemaking proceeding. (AT&T/Cox Rhg. App., at pp. 16-17.) However, we have explained why a violation was found despite the Utilities attempted disclaimer. Even if it may be a pertinent issue, it is not a material fact just because the Utilities say it is.<sup>28</sup> And we need not make findings on every issue that is not material. (See e.g., D.07-07-020, at pp. 18-19, 21.)

## **2. The Decision Properly Applies The Relevant Rules and Statutes**

The Utilities contend we wrongly applied the ex parte provisions pertaining to quasi-legislative and adjudicatory proceedings.<sup>29</sup> They assert the provisions are mutually exclusive, and we failed to make a required initial determination of which proceeding the communications occurred in (i.e., here a finding that the communication did *not* take place in the Local Competition rulemaking proceeding). (AT&T/Cox Rhg. App., at pp. 17-20.)

We note the Utilities offer no legal authority to support their notion of a “mutually exclusive” approach to statutory construction. In fact, accepted principles of statutory construction foster an opposite approach when addressing perceived differences or inconsistencies in related statutes or rules. The starting point is the “plain meaning” of

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<sup>27</sup> D.07-07-020, at pp. 39-40 [Conclusion of Law Numbers 5-7, 9-15].

<sup>28</sup> The Commission has discretion to determine what factors are relevant and material to a determination. (See *California Motor Transport v. Public Utilities Commission*, *supra*, 59 Cal.2d at p. 275.)

<sup>29</sup> Section 1701.4(b) and Rule 7(d) permit ex parte communications in quasi-legislative proceedings such as the Local Competition rulemaking proceeding. Section 1701.2(b) and Rule 7(b) prohibit any ex parte communications in and adjudicatory proceeding such as the UCAN complaints.

the language. If the language is clear and unambiguous the plain meaning should be followed. (*People v. Canty* (2004) 32 Cal.4<sup>th</sup> 1266, 1276-1277.)<sup>30</sup>

If differences or ambiguities are deemed to exist, the language of related statutes is to be harmonized to the extent possible. The Courts instruct:

The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. (*Walnut Creek Manor v. Fair Employment & Housing Commission* (1991) 54 Cal.3d 245, 268.)<sup>31</sup>

Additionally, statutes should be construed in a practical manner, to avoid “mischief” or the particular undesired behavior.<sup>32</sup> Where language may be susceptible to two constructions, one which will carry out and the other defeat the purpose or object, the decisionmaker should construe the statutes to carry out the purpose.<sup>33</sup>

The Utilities argue it is novel and extreme to conclude that the same ex parte communication could be subject to different rules (i.e., the permissive rules for rulemakings and the restrictive rules for adjudicatory proceedings). At the very least, they say there no basis to conclude the more restrictive standard applied. (AT&T/Cox Rhg. App., at p. 18.) Yet, the Utilities own application for rehearing discussed several instances where a communication could simultaneously implicate adjudicatory and

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<sup>30</sup> See also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *In Re Petition of K.M. and D.M.* (1995) 274 Ill.App.3d 189, 195 [There is no need to apply other rules of statutory construction where the language of a statute is clear].

<sup>31</sup> See also *Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanism for Generation Procurement and Renewable Resource Development* [D.03-06-074] (2001) \_\_\_ Cal.P.U.C.3d \_\_\_, 2001 Cal. PUC LEXIS 1216, \*\*19-20 citing to *People v. Squier* (1993) 15 Cal.App.4<sup>th</sup> 235, 240-241.

<sup>32</sup> See 2A Sutherland Statutory Construction (7<sup>th</sup> Ed. 2007) § 54:04, pp. 394-395.

<sup>33</sup> See 2A Sutherland Statutory Construction (7<sup>th</sup> Ed. 2007) § 46:5, pp. 220-221.

rulemaking proceedings. (See e.g., AT&T/Cox Rhg. App., at pp. 25-26.) It is irrelevant that these specific circumstances may not have occurred, or at least not come to light, in the past. Our Decision explained at length how the subject matter of the communications triggered issues in both proceedings. The result advocated by the Utilities unreasonably suggests we can, or should, suspend reality to find otherwise.

Finally, the Utilities argue that we were required to find (and by implication establish) that the Rules Motion was a sham and thus, the Utilities intended to influence the adjudicatory proceedings. (AT&T/Cox Rhg. App., at p. 19.) We see no legitimate basis to establish why such findings are relevant, material, or legally required.<sup>34</sup> Further, the argument is again premised on the incorrect notion that because the Utilities *said* the communications were only related to the rulemaking proceeding, we improperly based its decision on “events outside the adjudicatory process.”

### **3. The Decision Properly Applies The Rule Regarding Categorization**

The Utilities contend the Decision erred in finding the communications involved proceeding categorization. (AT&T/Cox Rhg. App., at pp. 20-22.) This argument is without merit.

Rule 5(a) defines “category” or “categorization” as:

...the procedure whereby a proceeding is determined for purposes of this Article to be an adjudicatory, ratesetting, or quasi-legislative proceeding.<sup>35</sup>

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<sup>34</sup> We disagree with any suggestion we were required to determine the Utilities intent or purpose. The subject matter of the of the communications directly conflicted with Rule 5(e) and Rule 7(b) given the facts and circumstances of this case. (See D.07-07-020, at p. 39 [Conclusion of Law Numbers 5 & 6] as modified herein, & pp. 39-40 [Conclusion of Law Numbers 8-14].)

<sup>35</sup> See also section 1701.1. In addition, the rules provide that issues concerning category of a proceeding are substantive rather than procedural. (D.07-07-020, at p. 13 & fn. 24 referring to Rule 5 “Definitions” subdivision (g), which provides in relevant part: “[E]x parte communication concerning categorization” means oral communication on the category of any proceeding, between an interested person and any Commissioner, any Commissioner’s personal advisor, ...that does not occur in a public hearing, workshop, or other public setting, or on the record of the proceeding.” (Cal. Code of Regs., tit. 20, §5, subd. (g).) See also Rule 8.1 “Definitions” of the rules effective September 13, 2006 (renumbering Rule 5), subdivision (c)(1) defining ex parte communication as one that among other things: “concerns any

*(footnote continued on next page)*

(Cal. Code of Regs., tit. 20, §5, subd. (a).)

The Utilities claim they “did argue that the *legal issue* of how to implement section 2883 should be resolved through a rulemaking rather than in an adjudicatory setting.” However, they argue the rules do not provide for legal issues to be categorized. (AT&T/Cox Rhg. App., at p. 20.)

We are not persuaded by the attempt to characterize the discussion in this manner. It is inescapable that the Utilities were advocating for a particular forum or proceeding. By definition, that equates to categorization within the meaning of Rule 5(a). Without categorization as a rulemaking, the issues could not be addressed as the Utilities advocated. It is not dispositive whether the underlying issue(s) were legal, policy, or technical in nature. Many proceedings involve some of each. Ultimately, depending on many factors, all issues must be categorized.

Finally, the Utilities argue that even if the ex parte communications were requests for recategorization, Rule 7(f) would apply. (AT&T/Cox Rhg. App., at pp. 22-23.)

Rule 7(f) states:

Ex parte communications concerning categorization of a given proceeding are permitted, but must be reported pursuant to Rule 7.1(a).

(Cal. Code of Regs., tit. 20, § 7.1, subd. (a).)

The Utilities admit they did not report the June 14-15 meetings, rather they argue the Decision erred in finding Rule 7(f) does not create an exception to the strict

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substantive issue in a formal proceeding, including categorization of a proceeding, or assignment or reassignment of a proceeding to an Administrative Law Judge.” (Cal. Code of Regs., tit. 20, §8.1, subd. (c)(1).)

prohibition against ex parte communications contained in section 1701.2(b).<sup>36</sup> (D.07-07-020, at p. 15.) They argue the Commission cannot rewrite the rules in this fashion.

Contrary to this assertion, nothing in the Decision rewrites the rules. We correctly noted that Rule 7(f) was adopted solely as part of the Commission's implementing provisions. Similar language does not appear in the statutes. Rule 7(f) also does not directly or explicitly implicate adjudicatory proceedings. Nevertheless, we addressed any potential for confusion, recognizing the combination of provisions could be susceptible to two constructions. Consistent with the previously enumerated principles of statutory construction, we merely clarified that the purpose of section 1701.2(b) should control and be carried out in this instance. We are uniquely qualified to clarify that our implementation rule was not intended to create an exception to the statutory mandate in this case.

#### **4. The Decision Reasonably and Lawfully Noted The Rules Motion**

The Utilities take issue with the section of the Decision entitled "Defendants' Efforts to Secure Another Forum." The Utilities contend the discussion is "irrelevant makeweight," and they object to any suggestion that they improperly requested a rulemaking via the Rules Motion in the Local Competition Docket. (AT&T/Cox Rhg. App., at pp. 22-24.)

While the Utilities may be sensitive on this point, our discussion merely describes the procedural history and substantive overlap of issues between pleadings filed in the Local Competition Docket and the adjudicatory proceeding. There is nothing inherently unlawful about a reiteration the facts and events. As the Utilities admit, we

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<sup>36</sup> Section 1701.2(b) states: "[E]x parte communications shall be prohibited in adjudicatory proceedings." (Pub. Util. Code, § 1701.2, subd. (b).) The Utilities also suggest that while 7(f) applied for purposes of allowing the communications, they had no duty to report because they only discussed the rulemaking proceeding in which ex parte communications are allowed without restriction *or* reporting. As previously discussed, such a conclusion requires an unreasonable suspension of reality, given the context and circumstances of this particular case.

explicitly stated that the pleadings were permissible and did not constitute any improper communication. (AT&T/Cox Rhg. App., at p. 22; D.07-07-020, at p. 9.)

Nevertheless, the Utilities object to our expressing the view that a separate petition, not the Rules Motion, would have been the most appropriate and direct method to seek a rulemaking under the statutes and rules. The Utilities suggest the Decision erred because no authority was cited to support such a view. Moreover, they argue even if it is true, it has nothing to do with whether they complied with the *ex parte* rules. Again, we fail to find any discernable legal error.

There is no requirement to cite authority, to support *already cited authority*, i.e., section 1708.5 and Rule 6.3.<sup>37</sup> There is also nothing unlawful in discussing the methods used by the Utilities to seek a rulemaking proceeding versus our established and preferred procedure for doing so. Discussion of the Rules Motion and other pleadings were relevant to the overall context of this matter, and the series of events related to the two involved proceedings.

### **5. The Decision Is Narrowly Tailored**

The Utilities contend the Decision will have broad and serious negative ramifications and that it creates new criteria, not reflected in the rules, for determining *ex parte* violations. (AT&T/Cox Rhg. App., at pp. 24-26.) The Decision does not support that conclusion.

The Decision applied existing rules to the facts and events in question, and explained why the communications were found to run afoul of the *ex parte* rules. The Decision explicitly states it does act to create new rules or standards. (D.07-07-020, at pp. 20-21, 29-30.) The application of law to a set of facts is not synonymous with creating new law. It is a standard analytical process used by administrative agencies.

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<sup>37</sup> Section 1708.5(a) provides in pertinent part: “[T]he commission shall permit interested persons to petition the commission to adopt, amend, or repeal a regulation.” (Pub. Util. Code, § 1708.5, subd. (a).) See also Rule 6.3 of the Commission’s Rules of Practice and Procedures. (Cal. Code of Regs., tit. 20, § 6.3.)

The Utilities also argue the Decision will lead to confusion because it fails to define what would constitute a “demonstrable linkage” between adjudication and rulemaking proceedings in a way that entities can discern potential ex parte problems in any future situations. (AT&T/Cox Rhg. App., at p. 26.)

We reject that argument because it appears to intentionally ignore that our Decision does indicate the types of linkages that should be considered by entities when contemplating their own future ex parte communications. Such circumstances might include: (1) temporal proximity between an ex parte communication and a relevant adjudicatory proceeding; (2) the degree of overlap between the issues and parties; and (3) the potential that relief sought via the ex parte communication could detrimentally impact parties in a related adjudicatory proceeding.<sup>38</sup> (D.07-07-020, at pp. 19-21.)

Finally, to argue the Decision will have a chilling effect on all ex parte communications, the Utilities enumerate various instances where a topic in a complaint proceeding has, or could potentially, be related to topics in a rulemaking. We have already rejected similar arguments because general references to other proceedings, unidentified parties and communications, and hypothetical situations, all suppose confusion and violations where none may exist. At the very least the scenarios lack the specificity to meaningfully consider whether or how the ex parte rules could be implicated. (D.07-07-020, at pp. 19-21.) Moreover, they have no bearing on the facts of this case or the lawfulness of D.07-07-020.

## **6. The Decision Correctly Applied Due Process Principles And Burden Requirements**

The Utilities contend the Decision errs because: (1) the Commission’s due process conclusions are unfounded; and (2) it wrongly places the burden for ex parte

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<sup>38</sup> The Utilities ignore a somewhat compelling factor here, i.e., that they were defendants in the adjudicatory proceeding in question. That situation should signal the need for particular caution and discretion regarding ex parte communications. Such parties are also uniquely suited to know that the subject matter of the adjudicatory proceeding may be triggered by certain communications.

violations solely on any “interested person.” (AT&T/Cox Rhg. App., at pp. 26-28.) The Utilities contentions are incorrect.

**a) Due Process**

We relied on *Sangamon Valley Television Corporation v. United States* (“*Sangamon Valley*”) (1959) 269 F.2d 221, 224-225 to reason: “...due process considerations are present even in a rulemaking proceeding, if there is a detriment to a party’s adjudicatory claims.” (D.07-07-020, at pp. 22-25.)<sup>39</sup> *Sangamon Valley* involved a Federal Communications Commission (“FCC”) rulemaking to allocate T.V. channels. During the proceeding, a party (competing station operator) met privately with members of the FCC regarding his interest in a particular channel. In defending the communication, he argued that because the proceeding was a rulemaking, ex parte attempts to influence the members did not invalidate it. The Court disagreed, holding that the communication was not sheltered just because the proceeding was designated as a rulemaking. The Court reasoned that “basic fairness” required the communication to be carried on in the open because it also involved the resolution of conflicting private claims to a valuable privilege. (*Sangamon Valley, supra*, 269 F.2d at pp. 224-225.)

The Utilities cite to *Action for Children’s Television v. FCC* (“*Action for Children’s Television*”) (D.C. Cir. 1977) 564 F.2d 458, 474-478, to argue *Sangamon Valley* does not apply to apply.<sup>40</sup> They assert *Action for Children’s Television* acted to limit the principle in *Sangamon Valley* to rulemakings which award a license or other privilege. They argue the rulemaking in this case (the Local Competition proceeding) differs because it only involved the formulation of general policy. (AT&T/Cox Rhg. App., at p. 27.)

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<sup>39</sup> D.07-07-020, at p. 40 [Conclusion of Law Number 16] stating: “[T]hese impermissible ex parte communications have violated the due process rights of UCAN in the adjudicatory proceeding.” The Decision also references *Massachusetts Bay Telecasters, Inc. v. Federal Communications Commission* (D.C. Cir. 1958) 261 F.2d 55, 66, 67.

<sup>40</sup> The Utilities also cite to *Air Transport Association v. FAA* (“*Air Transport*”) (D.C. Cir. 1999) 169 F.3d 1, 7 fn. 5, and *Sierra Club v. Costle* (D.C. Cir. 1981) 657 F.2d 298 400-402.

We believe the Utilities have misstated the import of *Action for Children's Television*. We see nothing in that case that distinguished between rulemakings involving privileges from those involving policy development. The case involved ex parte restrictions applicable to rulemakings under the Administrative Procedure Act (the "Act"). The distinction drawn was between "formal" and "informal" rulemakings under the Act. The Court merely held that more lenient rules were permissible in "informal rulemakings," as opposed to the rules that otherwise apply to formal rulemakings or adjudications which take place on the record.<sup>41</sup> (*Action for Children's Television, supra*, 564 F.2d at pp. 470-471, 474-475.)

Finally, the Utilities argue *Garfinkle v. Superior Court* ("Garfinkle") (1978) 21 Cal.3d 268 establishes that they could not have deprived UCAN of any due process rights, because only the government can deprive a person of due process. (AT&T/Cox Rhg. App., at p. 28.)

*Garfinkle* has no bearing here. *Garfinkle* involved rights associated with nonjudicial property foreclosure procedures. Such procedures were deemed private rather than state actions, thus the Court held they are exempt from the Constitutional due process requirements. To that end, the Court merely stated: "[T]he Fourteenth Amendment prohibits the State from depriving any person of life, liberty, or property, without due process of law; but adds nothing to the rights of one citizen against another. (citation omitted) (*Id.* at pp. 272, 276-277)

Unlike *Garfinkle*, the communications, procedures and proceedings here involved state (Commission) actions subject to the Fourteenth Amendment. In addition, the Utilities ignore that our analysis, like in *Sangamon Valley*, properly focused on the action and its potential effect on due process. In both instances, it was determined that it

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<sup>41</sup> The Utilities reliance on *Air Transport, supra*, and *Sierra Club v. Costle* is similarly flawed as those cases also pertain only to "informal rulemakings" under the Administrative Procedure Act.

was the ex parte communication which posed the potential detrimental effect on the due process rights of another.<sup>42</sup>

**b) Burden**

The Utilities assert that even if the ex parte rules were violated, we erred in finding that only the Utilities had violated them. The Utilities see Rule 5(e) and section 1701.1(c)(4) as placing the burden for compliance on both a “decisionmaker” and an “interested person.” The Utilities are wrong.

Neither Rule 5(e) nor section 1701.1(c)(4) address the burden. They merely define the term “ex parte communication.” Rule 5 states:

(e) “Ex parte communication” means a written communication (including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:

- (1) concerns any substantive issue in a formal proceeding,
- (2) takes place between an interested person and a decisionmaker, and
- (3) does not occur in a public hearing, workshop, or other public setting, or on the record of a proceeding.

Communications limited to inquiries regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries not subject to any restriction or reporting requirement in this Article.<sup>43</sup>

(Cal. Code of Regs., tit. 20, § 5, subd. (e).)

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<sup>42</sup> See also *Air Transport, supra*, and *Sierra Club v. Costle, supra*.

<sup>43</sup> Section 1701.1(c)(4) is substantially the same, and provides in pertinent part:

“Ex parte communication,” for purposes of this article, means any oral or written communication between a decisionmaker and a person with an interest in a matter before the commission concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter.”

(Pub. Util. Code, § 1701.1, subd. (c)(4).)

To the extent it is addressed at all, the rules support a conclusion that the responsibility and burden for any ex parte communication reasonably falls on the entity intending to influence a decisionmaker. For example, we noted Rule 7.1 which states in pertinent part:

(a) Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person.”<sup>44</sup>

(See D.07-07-020, at pp. 21-22.)

The Utilities acknowledge they have the burden to report, but suggest that it shifts or is shared for purposes of the content of the communication. They offer no legal basis for that claim. Further, it is not a reasonable, logical or practical burden to impose. It would, for example, result in decisionmakers being held responsible for documents they did not write and for the utterances of others, which can neither be known nor controlled in advance. We continue to reject such efforts to shift or share the burden under the ex parte rules.<sup>45</sup> That the Utilities may have cautioned there was a potential ex parte problem given the adjudicatory proceeding does not shift the burden or change the rules.<sup>46</sup>

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<sup>44</sup> See also section 1701.1(c)(4)(C) defining interested person to include: “[A] representative...who *intends to influence* the decision of a commission member on a matter before the commission. (Pub. Util. Code, § 1701.1, subd. (c)(4)(C) (emphasis added); See also Rule 5(h)(3), Cal. Code of Regs., tit. 20, § 5, subd. (h)(3).)

<sup>45</sup> *Rulemaking on the Commission’s own motion for purposes of compiling the Commission’s rules of practice and procedure in accordance with Public Utilities Code section 322 and considering changes in the Commission’s Rules of Practice and Procedure* [D.91-10-050] (1991) 41 Cal.P.U.C.2d 602 [Finding that attempts to shift the burden to decisionmakers acting in their impartial role were merely “suggested changes to the rule.” Further stating: “We have considered these suggestions and have concluded that they are based on incomplete understanding of our Rules of Practice and Procedure or on incorrect readings of the ex parte rule, and we decline to adopt them.”]

<sup>46</sup> The Utilities suggest they “clearly explained the linkage” between the adjudicatory proceedings and the Rules Motion submitted in the Local Competition Docket at the outset of both meetings. (AT&T/Cox Rhg. App., at p. 28.) However, the record reflects that the Utilities merely stated they could not talk about the adjudicatory proceeding. (See e.g., Exh. 3 pp. 3-4, para. 10 (Mr. Fenikile).) That erroneously presumes that the listeners had a thorough understanding of the substantive overlap of the two different proceedings.

## 7. The Imposed Remedies Were Lawful

The Utilities request that we reconsider the imposition of penalties. Instead, they ask that we either: (1) merely issue a reproof; and/or (2) initiate a rulemaking to clarify the meaning and scope of the ex parte rules. (AT&T/Cox Rhg. App., at pp. 29-30.)

It is understandable that the Utilities would prefer no penalties. However, as we have discussed, the Decision is lawful and the penalties are consistent with amounts authorized by section 2107. We properly considered the criteria under *Re Standards of Conduct* [D.98-12-075] (1998) 84 Cal. P.U.C.2d 155, 168-169 in evaluating amounts to be assessed,<sup>47</sup> as well as the policy stated in *In Re AT&T Communications of California, Inc. and WorldCom, Inc.* [D.02-12-003] (2002) \_\_ Cal.P.U.C.3d \_\_, 2002 Cal. PUC LEXIS 858, \*13 [“...violations which do not involve harm to consumers, but instead harm the integrity of the regulatory process...will be accorded a high level of severity”]. Here, we reasonably concluded the communications had the potential to harm both the complainants in the adjudicatory proceeding and the regulatory adjudicatory process itself.<sup>48</sup> (D.07-07-020, at pp. 22-24, 25-28.)

For these reasons, we decline to change our determination regarding penalties. We are also disinclined to act on a request for rulemaking in a rehearing order.<sup>49</sup>

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<sup>47</sup> See also *In Re AT&T Communications of California, Inc. and WorldCom, Inc.* [D.02-12-003] (2002) \_\_ Cal.P.U.C.3d \_\_, 2002 Cal. PUC LEXIS 858, \*\* 5 – 13 [The relevant criteria are: (1) the severity of the offense; (2) the financial resources of the utility; (3) the degree of harm to the public interest; (4) precedent; and (5) the totality of the circumstances].

<sup>48</sup> In *In Re AT&T Communications of California, Inc. and WorldCom, Inc.* [D.02-12-003] (2002) \_\_ Cal.P.U.C.3d \_\_, 2002 Cal. PUC LEXIS 858, \*\* 11-12, the Commission similarly rejected the utility’s request for mere reproof, warning, and/or reminder of the ex parte rules [“Neither do we agree with WorldCom’s suggestion that the Commission should simply provide a reminder of the rules and a warning that sanctions will apply to future violations. The Commission should not have to provide reminders to the parties that they need to follow the rules. As we have already stated, confusion over the rules does not justify a violation.”]

<sup>49</sup> The Utilities application for rehearing also includes a separate section alleging approximately 16 individual and miscellaneous errors in the Decision. (AT&T/Cox Rhg. App., at pp. 30-34.) The alleged

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## 8. Request For Oral Argument

The Utilities request oral argument on the application for rehearing pursuant to Rule 16.3 of the Commission's Rules of Practice and Procedure.

(AT&T/Cox Rhg. App., at pp. 29-30.)

Rule 16.3 provides that the Commission has complete discretion to determine the appropriateness of oral argument in any particular matter.<sup>50</sup> The Rule provides the following criteria as guidance:

- (1) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:
  - (a) adopts new precedent or departs from existing Commission precedent without adequate explanation;
  - (b) changes or refines existing Commission precedent;
  - (c) presents legal issues of exceptional controversy, complexity, or public importance; and/or
  - (d) raises questions of first impression that are likely to have significant precedential impact.

(Cal. Code of Regs., tit. 20, § 16.3, subd. (a).)

The Utilities broadly contend that each of the above criteria are triggered in this case. However, they do not establish how that is so, or explain how oral argument will assist us in resolving the application. Instead, they argue the Decision will have a

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errors mirror or are subsumed in arguments already discussed and rejected in this Order. Accordingly, they are not reiterated or addressed again here.

<sup>50</sup> See Rule 16.3(a) of the Commission's Rules of Practice and Procedure, Cal. Code of Regs., tit. 20, § 16.3, subd. (a).

significant precedential effect because apart from the assessment of penalties, there is no similar case like it.<sup>51</sup>

It may be correct that we have not previously considered an identical factual situation. However, most cases present at least some factually unique aspects. That does not necessarily suggest they all merit oral argument. The Decision does not adopt new rules or standards, or depart from existing precedent. It merely applies existing rules to the circumstances and facts presented in this case. It is unclear how oral argument could shed any new light on the issues since the Utilities have already presented their positions during evidentiary hearings, in their opening and responding briefs, and in their opening and reply comments on the proposed decisions.

The Utilities also assert oral argument is warranted “in light of the unusual and improper proceedings that led to the Decision.” (AT&T/Cox Rhg. App., at p. 30.) First, they suggest the outcome was predetermined before any evidence was taken by the June 26, 2006, Joint Ruling of the Assigned Commissioner and the Presiding Officer (“Ruling”).

Contrary to the Utilities suggestion, we find the Ruling to be devoid of conclusions or preliminary findings of wrongdoing. It enumerates several preliminary *facts* which describe relevant pleadings and substantive issues in the proceedings in question. It explains what precipitated the Ruling, i.e., the receipt of information that ex parte meetings took place. However, it goes on to state: “no information is yet available as to whether the meeting or other communications addressed the two complaint proceedings, the parties’ Stay Motion, or any relationship between the parties’ Rules Motion and the proceedings and remedies sought in the complaint proceedings.” (Ruling, at p. 4, para. 7.) The Ruling went only so far as to state there was some reasonable basis to suggest a violation may have occurred, thus further investigation was warranted. (Ruling, at p. 5.)

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<sup>51</sup> The Utilities also argue the Decision will have a broad chilling effect. This argument is addressed and rejected in Section B.4 of this Order.

Second, the Utilities rely on *Fremont Indemnity Company v. Workers' Compensation Appeals Board* (“*Fremont Indem.*”) (1984) 153 Cal.App.3d 965, 974 to contend that the Presiding officer improperly acted as an advocate during the evidentiary hearings.

*Fremont Indem.* is inapplicable here. The case involved an employee's claim for workers compensation benefits. The Court annulled the decision of the workers compensation judge (“WCJ”) because after testimony and evidence had already been submitted for determination, the WCJ contacted the independent medical examiner and obtained additional evidence regarding the employees medical condition. The Court found that the post-submission contacts by the WCJ acted to deprive the employee of his due process right to rebut the evidence and conduct cross-examination. (*Id.* at pp. 970-972.)

Unlike *Fremont Indem.*, there is no suggestion here of any evidence sought after the matter was submitted, or any improper contacts by the Presiding Officer. Rather, during the pendency of an open proceeding the assigned Presiding Officer was informed of a potential violation of the ex parte rules. The Presiding Officer acted reasonably and necessarily to investigate that possibility by taking evidence and conducting hearings to ensure the integrity of the adjudicatory process had not been compromised. That action was a lawful exercise of the Presiding Officer's duties.

### III. CONCLUSION

For the reasons stated above, we will modify two conclusions of law to eliminate references to named individuals. We deny the applications for rehearing of D.07-07-020, as modified. The request for oral argument is also denied.

Therefore **IT IS ORDERED** that:

1. D.07-07-020 is modified as follows:
  - a. Conclusion of Law 5 on page 39 is modified to state:

Oral communications as defined by Rule 5(e) took place during the meetings on June 14, 2006, between representatives of Cox and AT&T, and certain Commissioner Advisors.

- b. Conclusion of Law 6 on page 39 is modified to state:

The PowerPoint presentation distributed during the June 14 & 15, 2006, meetings constituted a written communication as defined by Rule 5(e).

2. The applications for rehearing of D.07-07-020, as modified, are hereby denied.

3. This proceeding, Case Nos. (C.) 05-11-011 and C.05-11-012, is closed.

This order is effective today.

Dated June 12, 2008, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners