

Decision **PROPOSED DECISION OF ALJ THORSON** (Mailed 12/26/2006)

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 05-11-011
(Filed November 14, 2005)

Utility Consumers' Action Network,

Complainant,

vs.

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

Defendants.

Case 05-11-012
(Filed November 14, 2005)

PROPOSED INTERIM DECISION ON ALLEGED EX PARTE VIOLATIONS

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PROPOSED INTERIM DECISION ON ALLEGED EX PARTE VIOLATIONS

The assigned Commissioner and the assigned Administrative Law Judge, (ALJ) who is the Presiding Officer issued a joint ruling requiring the defendants in these coordinated adjudicatory cases, as well as certain of their officers, attorneys, and employees, to file declarations concerning alleged impermissible *ex parte* communications with personal advisors of certain Commissioners. Additionally, the assigned Commissioner and Presiding Officer conducted an evidentiary hearing to gather more information about the alleged violations. Testimony was not elicited from the Commission's personal advisors because (1) the assigned Commissioner and Presiding Officer relied on the parties and their representatives to provide truthful declarations and testimony; (2) the basic, material facts were not at issue; and (3) without an indispensable need for their testimony to resolve disputed material facts, the testimony of personal advisors, whose work often occurs under the protection of the deliberative process privilege, was not necessary.

These proceedings are complaints; and the merits of the complaints will be resolved with a forthcoming Presiding Officer's Decision (POD), unless a party appeals or a Commissioner desires review.¹ Because of the importance of the *ex parte* issue raised in these proceedings, this Interim Proposed Decision has been submitted to the Commission for its consideration. We agree with the Presiding Officer and determine that, in violation of the Public Utilities Code and

¹ The parties in C.05-11-012 have agreed to the withdrawal of the complaint and, after this Proposed Interim Decision is finalized by the Commission, the complaint may be withdrawn.

our Rules of Practice and Procedure,² impermissible *ex parte* violations have occurred and the Commission should impose sanctions including a fine of \$40,000 against each defendant.

1. Background

On November 14, 2005, the Utility Consumers' Action Network (UCAN) filed separate complaints (C.05-11-011 & C.05-11-012) against SBC Communications, Inc. dba SBC Pacific Bell Telephone Company (now known as AT&T California; hereinafter "AT&T") and Cox California Telecom, LLC dba Cox Communications (Cox) (defendants). UCAN's complaints allege violations of Public Utilities Code Section 2883 concerning defendants' obligations to provide 911 "warm line" access. While the meaning and scope of Section 2883 are at the heart of these proceeding, Section 2883 generally requires that 911 emergency services be available even in those residential units where an active account has been voluntarily or involuntarily terminated (for example, where the occupancy of a residential unit is changing because of a sale or lease expiration). The complaints seek reimbursements, penalties, punitive damages, and other remedies.

While not formally consolidated because of different factual settings, these proceedings have been coordinated since the first prehearing conference (PHC) on January 4, 2006. Both proceedings were preliminarily categorized as

² Our Rules of Practice and Procedure were amended on September 13, 2006, to reorganize and renumber the rules. Very few substantive changes were made. The events considered in this decision occurred before that date; hence, the rules in effect before September 13, 2006, apply. Rules references in this decision are to the pre-September 13, 2006, version.

adjudicatory. Pursuant to Public Utilities Code Section 1701.2(b) and Commission Rules of Practice and Procedure 7(b), the Scoping Memo issued on January 20, 2006, confirmed the preliminary categorization and indicated that “*ex parte* communications with the assigned Commissioner, other Commissioners, their advisors and the ALJ are prohibited.”

Many people associated with UCAN, AT&T, and Cox have appeared in this proceeding or are named on the service list. For purposes of this decision, however, the following persons are frequently discussed: Fasil Fenikile, Director of Regulatory for AT&T; Stephanie E. Holland, in-house counsel for AT&T; Margaret L. Tobias, retained counsel for Cox; and Doug Garrett, Vice President, Western Region, Cox (except where otherwise noted, these individuals are referred to as “respondents”).

2. Preliminary Proceedings

Beginning with their PHC statements, defendants advanced the argument that only legal issues and not factual disputes were presented by UCAN’s complaints. They urged that these legal questions be addressed early,³ perhaps in the first phase of a bifurcated proceeding.⁴ The Scoping Memo adopted this

³ AT&T, PHC Statement 2-3 (Dec. 30, 2005) (“[T]he core dispute simply involves a legal interpretation of Section 2883. Moreover, because the requirements of Section 2883 apply to all local exchange carriers in California, SBC [AT&T] is unlikely to agree to an ADR compromise solution . . .”).

⁴ Cox, PHC Statement 4 (Dec. 30, 2005) (“The Commission should adopt a bifurcated schedule that permits Cox to file a motion to dismiss or equivalent pleading.”).

recommendation, divided the case into two phases, and scheduled early consideration of defendants' motions to dismiss.⁵

Pursuant to the Scoping Memo, the defendants filed their motions to dismiss on January 27, following by UCAN's opposition on March 8, and the defendants' replies on March 14, 2006. In resolving these motions on April 6, the Presiding Officer determined that UCAN had alleged facts sufficient to state one or more causes of action under subsections (a) and (c) of Public Utilities Code Section 2883, but that UCAN had failed to state sufficient facts supporting an alleged violation of Section 2883(b) or of Sections 2875 to 2897. The defendants' motions were, accordingly, granted in part and denied in part.⁶ UCAN thereafter filed a First Amended Complaint reasserting its Section 2883(b) claim with additional facts, and the defendants did not again seek dismissal of this cause of action. The parties continued their testimony preparation and discovery in anticipation of the evidentiary hearing scheduled to commence on July 31, 2006.

3. Defendants' Efforts to Secure Another Forum

Beginning with their early pleadings, defendants urged that another venue, other than an adjudicatory action, would be more appropriate for the legal and policy issues they believed to be raised by UCAN's complaints.⁷ Cox,

⁵ Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge 5-6 (Jan. 20, 2006).

⁶ ALJ Ruling on Motions to Dismiss (April 6, 2006).

⁷ See AT&T California, Answer to UCAN Complaint 8 (Dec. 22, 2005) (Sixth Affirmative Defense: "A bilateral Complaint proceeding is not the proper venue for the Commission to promulgate its interpretation of Section 2883, which will have general

Footnote continued on next page

in particular, advanced this argument in its January 27 motion to dismiss as one of the principal reasons UCAN's complaints should not go forward.⁸ In responding to this argument, the Presiding Officer ruled, "Cox's argument is essentially a challenge to how this proceeding is categorized. An appeal for recategorization is authorized by Rule 6.4; however, Cox did not avail itself of that remedy; and it is now deemed to be waived. Additionally, adjudicatory proceedings before the Commission often produce outcomes that modify industry practices."⁹

On May 18, 2006, AT&T and Cox, in a pleading signed by Holland and Tobias, attempted to file a motion in the complaint proceedings. The motion was captioned "Joint Motion . . . to the Full Commission to Dismiss the Coordinated Complaint Proceeding and Establish a Single Rulemaking Proceeding" (May

applicability to the entire LEC [local exchange carrier] community in California."); Cox, Motion to Dismiss Complaint 1 (Jan. 27, 2006) ("[B]ecause resolution of the issues raised by UCAN would have an impact industry-wide, applicable law, fairness and due process all require the Commission to open a *rulemaking proceeding* if it were to address the issues raised in the Complaint.") (emphasis in original); *Id.* at 6 ("UCAN is abusing the Commission's process by filing a complaint against Cox instead of filing a petition for rulemaking"); Cox California Telecom, Reply to UCAN's Opposition to Motion to Dismiss Complaint 1 (Mar. 14, 2006) ("[I]t would be more appropriate for the Commission to address such issues in industry-wide workshops instead of this complaint proceeding . . .").

⁸ Cox, Motion to Dismiss at 6-9 (*e.g.*, "the Commission must dismiss the Complaint on the grounds that an adjudicatory proceeding is not the proper venue for consideration and adoption of policies and rules that affect an entire class of carriers . . ."). AT&T did not make this argument in its motion to dismiss.

⁹ ALJ Ruling on Motion to Dismiss 5 (April 6, 2006).

Motion).¹⁰ This tendered pleading was not filed by the Docket Office because, as Tobias related, the pleading “sought the type of relief that wasn’t allowed in the type of proceeding it was filed in. And that it requested two types of relief.”¹¹

The May Motion, although not filed, asked the Commission to commence a rulemaking “to promulgate a comprehensive, reasoned set of rules delineating the specific obligations of local telephone companies under Section 2883 to provide warm dial tone.” More importantly for this decision, the motion also asked that UCAN’s complaints be *dismissed*, which appears to be the second form of requested relief used by the Docket Office as an additional reason for rejecting the pleading.¹²

The May Motion set forth many of the same arguments relied upon by AT&T and Cox in their earlier pleadings, *e.g.*, the interpretation of Section 2883 is a matter of first impression, other affected carriers should be heard, and the narrow scope of the complaint proceeding would preclude a consideration of broad policy issues. The May Motion, which was addressed to the “full Commission,” and presumably was intended to be acted upon by the full Commission and not the Presiding Officer, did not mention that motions to dismiss had been filed and resolved by the Presiding Officer, that the Cox

¹⁰ Ex. No. 6; 1 RT 3:26-5:14 (Tobias). References to RT are to the Reporter’s Transcript of an evidentiary hearing conducted on July 7, 2006; see p. 10).

¹¹ 1 RT 6:20-22 (Tobias).

¹² Our rules require a “separate document” for a “separate action.” *See* Rule 2.1(b): “Separate documents must be used to address unrelated subjects or to ask the Commission or the administrative law judge to take essentially different types of action...”

motion to dismiss had specifically argued that UCAN's complaints should be dismissed in lieu of a rulemaking, or that the Presiding Officer had specifically rejected those arguments.¹³ The failure to provide this information represents a troubling omission by the two attorneys who signed the pleading that could be considered as violating Rule 1's underlying premise that communications to the Commission be truthful and complete.¹⁴

On June 2, 2006, defendants filed a joint motion (Rules Motion) in the Commission's Local Competition Docket, R.95-04-043/I.95-04-044, requesting that the Commission promulgate rules in that docket regarding carriers' "warm line" obligations under Section 2883.¹⁵ Simultaneously, defendants filed a joint motion (Stay Motion) in these two adjudicatory proceedings asking for a stay pending a determination "as to whether the Commission will address the requirements of Section 2883 in a generic, industry-wide proceeding" in the

¹³ ALJ Ruling on Motion to Dismiss at 5. The May Motion does cite to UCAN's pleadings in response to the earlier motion to dismiss.

¹⁴ "Any person who signs a pleading . . . agrees to . . . never mislead the Commission or its staff by an artifice or false statement of law or fact." Rule 1, "Ethics," Rules of Practice and Procedure.

¹⁵ AT&T California & Cox California Telecom, Joint Motion for the Commission to Establish Industry-Wide Local Competition Rules Regarding Carriers' Warm Line Obligations (June 2, 2006) (Rules Motion).

Local Competition Docket.¹⁶ The Rules Motion and the Stay Motion were eventually denied in separate rulings in the respective proceedings.¹⁷

In their Rules Motion, the defendants specifically referred to the two pending adjudicatory proceedings and repeated arguments AT&T had made in its answer to UCAN's complaint, Cox had made in its motion to dismiss, and they both had made in their attempted May Motion. Among other things, they argued:

(a) "[t]he foregoing determinations should be made generically in an industry-wide forum and not in the context of individual bilateral complaint proceedings";

(b) "[a] complaint proceeding is unsuitable for considering such broad, industry-wide policy mandates";

(c) "the topics raised in UCAN's two Section 2883 complaints currently pending before the Commission would be more appropriately aired in technical workshops where various networks, capabilities, and carrier practices can be discussed The proper forum is the Local Competition docket"; and

(d) [u]nless the Commission addresses Section 2883 generically in the Local Competition docket, rules will be fashioned in an ad hoc manner on a carrier-by-carrier basis in individual complaint proceedings, such as the two complaint cases currently pending before the Commission" ¹⁸

¹⁶ AT&T California & Cox California Telecom, Joint Motion to Stay the Coordinated Complaint Proceedings 3 (June 2, 2006) (Stay Motion).

¹⁷ ALJ Ruling, R.95-04-043/I.95-04-044 (June 29, 2006); ALJ Ruling, C.05-11-011/C.05-11-012 (June 28, 2006).

¹⁸ Rules Motion at 7, 9-10. *See also* Finding of Fact 24.

It is unclear why the defendants did not petition the Commission for a new rulemaking proceeding addressing “warm line” access, a procedure that is available under Public Utilities Code Section 1708.5 and Rule 14.7.

Up to this point, defendants, through respondents, had properly utilized the procedures available to them under the Commission’s rules. Even the lack of candor apparent in the May Motion would likely have been rectified by responsive pleadings filed by other parties. Beyond this point, however, defendants and certain of the respondents embarked on impermissible conduct intended to disadvantage UCAN in the complaint proceedings, which conduct violates the Public Utilities Code and the Commission’s *ex parte* rules.

4. Relevant Meetings

Prior to Wednesday, June 14, 2006, Fenikile, who previously worked for the Commission for 14 years and as a personal advisor for eight years, contacted Lester Wong, personal advisor to President Peevey, and Tim Sullivan, personal advisor to Commissioner Chong, to schedule a meeting. That meeting was held on June 14, starting at 10:00 a.m., at the Commission’s offices, and lasted for one hour. The meeting was attended by Fenikile, Wong, Sullivan, Garrett, Tobias, Rhonda Johnson (AT&T), and Alex Camargo, a summer intern in Commissioner Chong’s office. On his way to the meeting, Fenikile indicated he ran into Robert Lane, personal advisor to Commissioner Bohn, and informed Lane that he was there to meet with Sullivan and Wong on a motion concerning a section of the Public Utilities Code. Fenikile testified that he had no other meeting with Lane on the subject. Fenikile also encountered Aram Shumavon, personal advisor to Commissioner Brown (the assigned Commissioner for these complaint proceedings) and again mentioned his meeting with Wong and Sullivan.

Fenikile invited Shumavon to meet with them; Shumavon accepted and said he was available the following day.

The second meeting was held on Thursday, June 15, also at the Commission and also lasting one hour. This meeting involved Fenikile, Garrett, Shumavon, and Peter Hanson, another personal advisor to Commissioner Brown.

Fenikile had prepared a seven-page PowerPoint presentation that was presented at both meetings.¹⁹ He received revisions from Garrett.²⁰ UCAN was unaware of either meeting and, of course, did not attend.²¹ No *ex parte* notice was filed concerning either meeting.

On Monday, June 19, 2006, the Presiding Officer in these adjudicatory proceedings learned of the Thursday, June 15, 2006, meeting between AT&T's and Cox's representatives and personal advisors for one or more Commissioners. The Presiding Officer received this information in a non-privileged communication from Hanson. The Joint Ruling of the assigned Commissioner and the Presiding Officer was issued on June 26. An evidentiary hearing on the allegations set forth in the Joint Ruling was held on July 7, 2006, before the assigned Commissioner and the Presiding Officer. Fenikile, Holland, Garrett, and Tobias were examined under oath and afforded the opportunity to supplement the record.

¹⁹ See Attachment A, Declaration of Fassil Fenikile (June 30, 2006) (Ex. No. 3).

²⁰ 1 RT 34:18-19 (Fenikile).

²¹ Declaration of Alan M. Mansfield (June 30, 2006).

5. Discussion

5.1. Elements of an Impermissible Ex Parte Communication

Pursuant to Rule 5(e), an *ex parte* communication in practice before the Commission involves a (a) a written or oral communication, (b) concerning a substantive issue, (c) in a formal proceeding, (d) between an interested person, (e) and a decisionmaker, (f) that does not occur in a public hearing, workshop, or other public setting, or on the record of the formal proceeding.²² Rule 7(b) prohibits an *ex parte* communication in an adjudicatory proceeding, such as the pending complaint proceedings.²³

²² See also Pub. Util. Code § 1791.1(b)(4).

²³ See also Pub. Util. Code § 1701.2(b). Defendants' attorneys argue that it was improper for the Joint Ruling of the Assigned Commissioner and the Presiding Officer also to allege possible violations of Rule 5-300, "Contact with Officials," Rules of Conduct of the State Bar of California. AT&T cites *Mathew Zaheri Corp. v. New Motor Vehicle Bd.*, 55 Cal. App. 4th 1305 (3d Dist. 1997), for the proposition *ex parte* contacts with an ALJ might violate common law ethical principles but not Rule 5-300. However, the court indicates, "There is no principled basis to distinguish between ALJ and a judge in the judicial branch for purpose of ethical strictures against *ex parte* contacts. Hence, we find the same standard applicable." *Id.* at 1317. Of course, AT&T's and Cox's *ex parte* contact was with personal advisors (who advise decisionmakers), not ALJs. The *Zaheri* court addresses this as well: "the standard generally bars any *ex parte* communication by counsel to the decisionmaker of information relevant to issues in the adjudication." *Id.* We do not have jurisdiction to adjudicate violations of the Rules of Conduct; however, we do use the Rules of Conduct and common law ethical principles to inform our application of our own *ex parte* rules.

Respondents also argue that it was improper for the Joint Ruling of the assigned Commissioner and Presiding Officer to even mention possible violations of the Rules of Conduct. The identification of these potential violations was not designed to secure an advantage in litigation, as respondents seem to suggest, but to caution the attorney respondents of the possible referral of the record to the state bar following the Commission's inquiry concerning the alleged *ex parte* violations.

There is no dispute that, with the exception of Holland (who did not participate), the meetings of the other respondents with the personal advisors, using a PowerPoint presentation as a basis of discussion, constituted both oral and written communications. There is no dispute that these meetings did not occur during a hearing or other public setting. There also is no dispute that the two adjudications and the Local Competition Docket are “formal proceedings” pending before the Commission.

Assuming that the *ex parte* meetings did involve substantive issues pending in the adjudications, there is also no dispute that the defendants and their attorneys (Holland and Tobias) and employees (Fenikile and Garrett) are “interested persons” as Rule 5(h) defines that term.²⁴ Based on the same assumption, the personal advisors satisfy the definition of “decisionmakers” as defined by Rule 5(f).

The critical question, upon which the foregoing assumptions are based, is whether respondents (with the exception of Holland) discussed *substantive issues pending in the adjudications* with decisionmakers.

²⁴ See also Pub. Util. Code § 1701.1(c)(4)(B).

5.2. Substantive Issues

Neither our rules nor the statute defines a substantive issue.²⁵ A substantive provision is generally one that creates, defines, or concerns the rights, duties, and powers of the parties.²⁶ Fenikile's PowerPoint slides, distributed in the presence of Tobias and Garrett to the personal advisors, document the discussion with the personal advisors of substantive matters concerning the interpretation of Section 2883 and the reasons why defendants may not have complied with the section, based on the absence of Commission rules and telephone number shortages. Specifically, Table 1 (first column) lists the overlap of substantive issues discussed during the meetings and disputed issues in the adjudications.

²⁵ However, the court of appeal in *Mathew Zaheri Corp.*, *supra* note 22, at 1317, has discussed a definition: "The basic standard is stated several different ways, e.g., 'regarding any issue in the proceeding,' 'upon the merits of a contested matter,' 'concerning a pending or impending proceeding.' We do not assign significance to the varying terminology. 'It is, in essence, a rule of fairness meant to ensure that all interested sides will be heard on an issue.'" [citation omitted] It extends to communication of information in which counsel knows or should know the opponents would be interested."

²⁶ Black's Law Dictionary at 1443 (7th ed. 1999). The Federal Energy Regulatory Commission (FERC) uses a similar concept, "relevant to the merits," which is defined as "capable of affecting the outcome of a proceeding, or of influencing a decision, or providing an opportunity to influence a decision, on any issue in the proceeding," 18 C.F.R. § 385.2201 (2006).

Table 1: Comparison of Fenikile PowerPoint Slides, Used in Both Meetings, With Disputed Substantive Issues in Pending Adjudications

POWER POINT PRESENTATION	DISPUTED ISSUES IN COMPLAINTS
Title page, "An Industry-Wide Issue Deserves an Industry-Wide Proceeding" (Ex. No. 3 at 9)	AT&T's Answer & Cox Motion to Dismiss were based, in part, on arguments for industry-wide rulemaking; Presiding Officer rejected this argument.
<p>"Unless the Commission addresses Section 2883 generically in the Local Competition Docket, rules will be fashioned in an ad hoc manner on a carrier-by-carrier basis [and] would create disparate treatment." (Ex. No. 3 at 12)</p> <p>"Selection 2883 imposes industry wide obligations. Industry-wide obligations require industry wide solution." (Ex. No. 3 at 15)</p>	<p>"This argument is flawed because it would permit Cox to escape liability for its past and continuing refusal to comply with the statutory requirements of Section 2883. A rulemaking proceeding only addresses issues on a going forward basis; it does not hold companies such as Cox accountable for past violations of the law." (UCAN Opposition to Motion to Dismiss Complaint 18 (Mar. 8, 2006).</p>
<p>"The Commission has not defined or adopted best practices with respect to (a) technological and facilities limitations in Section 2883(a)." (Ex. No. 3 at 12)</p>	<p>"Existing technologies and facilities permit [AT&T and Cox] to provide "warm line" 911 services to every residential unit in California." (UCAN, First Amended Complaint against AT&T ¶ 15; Complaint against Cox at ¶ 16)</p> <p>"[T]he statute carves out certain circumstances under which a LEC has no obligation to provide warm line service, including when doing so is not 'permitted by existing technologies or facilities'" (AT&T, Motion to Dismiss Complaint 6)</p>
<p>"The Commission has not defined or adopted best practices with respect to . . . (b) a carrier not providing access to 911 because doing so would preclude it from providing service to subscribers of residential telephone service under Section 2883(e)." (Ex. No. 3 at 12)</p>	<p>"[T]he statute carves out certain circumstances under which a LEC has no obligation to provide warm line service, including when doing so "would preclude providing service to subscribers of residential telephone service." (AT&T, Motion to Dismiss Complaint 6)</p>
<p>"Number shortages exist throughout the State" (Ex. No. 3 at 14)</p>	<p>AT&T "does not need to re-assign such numbers, nor is it required by law to do so." (UCAN, First Amended Complaint against AT&T ¶ 17)</p>
<p>"The Commission has not determined or specifically defined what exclusions would apply in providing access to 911 emergency service." (Ex. No. 3 at 12)</p>	<p>"[T]hese actions do not constitute automatic violations of Section 2883, as UCAN contends. Again, the statute carves out certain circumstances under which a LEC has no obligation to provide warm line</p>

service....” (AT&T Motion to Dismiss 6)

5.3. Which Formal Proceeding

Respondents who attended these meetings seek to cordon off their discussions with the personal advisors and maintain that these discussions had nothing to do with the pending adjudications. As Fenikile indicates in his declaration, he cautioned attendees at both meetings that “the purpose of the meeting was to discuss the joint AT&T California/Cox request *set forth in the Rules Motion* for a generic rulemaking regarding Section 2883 . . . in the Local Competition Docket. I cautioned all in attendance that we were not there to, and could not discuss substantive issues of UCAN’s complaint proceedings” (Emphasis added). The barrier they seek to erect between the two sets of proceedings is, upon closer examination, quite permeable.

Despite Fenikile’s claimed effort to limit the discussion to the Rules Motion in the Local Competition Docket, a proceeding classified as a rulemaking, the discussion also addressed substantive issues pending in the two adjudicatory proceeding, where *ex parte* communications were prohibited. The Rules Motion itself contained many references to the pending complaint proceedings, as delineated on page 8. The PowerPoint slides also indicate that the substantive issues under discussion were inextricably interrelated with the substantive, contested issues pending in the complaint proceedings (*see* Table 1). For instance, in the adjudications, the Presiding Officer had rejected defendants’ efforts to dismiss the complaints in favor of a rulemaking; one slide used in the meetings with the personal advisors indicates that the subject “deserves an Industry-Wide Proceeding.” The complainant in the adjudications had alleged that the defendants have the necessary technology and facilities to provide “warm line” 911 services to all California residential units; another slide argued

that the Commission had not adopted “best practices with respect to . . . technological and facilities limitations.” UCAN had argued that AT&T did not need to reassign telephone numbers to meet the Section 2883 obligation; Fenikile’s slide stated, “Number shortages exist throughout the State.” His personal notes from the meeting also include the name of the Presiding Officer in the adjudications.²⁷

Defendants have argued that, at any moment, the Commission is involved in policy matters that may also be implicated in pending adjudications. In their view, to bar interested persons from contacting Commissioners or their personal advisors about these policy matters would deprive them of access to government officials and leave these officials without important information. This argument is addressed in Part 7, *infra*.

6. Respondents’ Intent

In some instances, an interested person may violate the Commission’s *ex parte* prohibition, claiming no intent to do so. Nevertheless, such conduct threatens the integrity of the formal record, as well as the rights of absent parties, and usually requires some curative measure to correct the record and restore the rights of injured parties. For instance, in Decision (D.) 02-12-003, the Commission penalized WorldCom, Inc. even though it claimed unfamiliarity with the application of the Commission’s rules. While actual intent to influence a substantive issue in a covered proceeding is not necessary to constitute an *ex parte* violation, intent may be examined to determine whether there are mitigating or aggravating factors associated with the violation.

²⁷ 1 RT 33:27-34 (Fenikile).

In these proceedings, we do examine the respondents' intent, both to test respondents' arguments that contacts concerning the Local Competition Docket were not meant to influence adjudicatory proceedings and to assess the relative seriousness of the *ex parte* allegations we weigh today.

Intent can be determined from a person's own words or from reasonable inferences drawn from their conduct or other relevant circumstances. We look for a preponderance of evidence indicating that the person initiated the communication with the actual objective to influence a substantive issue pending before the Commission in an adjudicatory matter. In this proceeding, we have afforded respondents the opportunity to discuss their actual intent, subject to any reasonable inferences that may be drawn from their testimony, declarations, and conduct. While respondents deny any intent to affect substantive outcomes in the adjudications, several of them were aware that such communications could have detrimental effects on complainant's case. Indeed, in advance of the meetings, defendants' attorneys unsuccessfully filed the May Motion specifically seeking dismissal of the complaints in favor of a rulemaking.

We first review the testimony of Fenikile, Holland, Garrett, and Tobias and then summarize our conclusions regarding their communications with advisors.

6.1. Fenikile

Fenikile was aware of the *ex parte* ban imposed in the complaint proceedings.²⁸ He sought to portray his intent in organizing and conducting the meetings to have been limited to the need for a generic rulemaking. However, Fenikile indicates that he arranged the meeting with Wong (of President

²⁸ Declaration of Fasil Fenikile ¶¶ 5, 10 (June 30, 2006).

Peevey's office) because that office is assigned the Local Competition Docket. His PowerPoint slides repeatedly indicate that the "Local Competition Docket is the Proper Venue," suggesting by inference that a complaint proceeding is not the proper venue. With the Rules and Stay motions filed at the same time and the Rules Motion pending in the Local Competition Docket at the time of these meetings, the most reasonable interpretation of Fenikile's intent, which is consistent with Holland's testimony (see below) and the close sequence of all these activities, is that he sought to obtain a rulemaking in the Local Competition Docket with the desire of disadvantaging UCAN in its complaints.

In his testimony, Fenikile suggests that Wong gave advance clearance for the meetings. Wong asked Fenikile whether AT&T would have filed the Rules Motion even if the complaint against AT&T were not pending. Fenikile says he responded to Wong, "I mentioned to him that this is an issue of generic importance applicable to other industry [sic]. And yes, we would have – filing a motion similar to the one we filed in the local competition proceeding. On that basis, he agreed [to the meeting]." ²⁹ This statement from Fenikile, in response to a question by AT&T's own attorney, strongly suggests that Fenikile very much intended the meeting to be about the disposition of the pending Rules Motion, which was fatally intermixed with issues pending in the adjudications (*see* Table 1 & Finding of Fact 24).

Fenikile's professed intent of not affecting the adjudications would be more credible if other carriers, not parties to the complaints, had participated in the meeting to articulate their own concerns about complaint-specific

²⁹ 1 RT 42:9-18 (Fenikile).

consideration of industry-wide issues. After all, they potentially would be the next candidates for UCAN's complaints. But only AT&T and Cox organized and joined in this meeting, and the timing is suspicious: not earlier in the twelve year history of Section 2883³⁰ but only after being named in the complaints, losing their motion for outright dismissal of the complaints, two weeks after the filing the Rules Motion and Stay Motion, and within six weeks of the upcoming evidentiary hearing.

The preponderance of evidence supports the conclusion that Fenikile, in his participation in the meetings, intended to influence the substantive outcome in the adjudications.

6.2. Holland

Holland, the attorney for AT&T, also indicated that she was aware of the *ex parte* ban imposed on the complaint proceeding by the Scoping Memo of January 20, 2006.³¹ She was also aware that UCAN's complaint sought monetary damages (perhaps even punitive damages) that, if granted by the Commission, would have financial consequences for her client.³²

³⁰ Section 2883 was adopted in 1994 (Senate Bill 1630) and amended in 1995 (Senate Bill 975).

³¹ 1 RT 21:9-12 (Holland).

³² "[I]f a complaint was proven – if the allegations in the complaint were proven, your client would be at financial risk as a result of the proceeding? A: If that's what the Commission determined. Q: But if the complaint were stayed indefinitely or if it was dismissed by the Commission, any financial exposure would evaporate or be postponed. Is that right? A: In relation to the complaint proceeding, that's correct." 1 RT 21:23-22:5 (Holland).

Along with Tobias, Holland was a signatory to the attempted May Motion, the Rules Motion, and the Stay Motion. She reiterated Tobias' testimony as to the apparent reasons for the Docket Office's rejection of the May Motion.³³ She explained that the Rules Motion was filed in lieu of the May Motion but did not seek the dismissal of the complaints.³⁴ When asked what she expected to happen to the complaint proceedings in the face of these motions, Holland testified that "we sought for the complaint cases to be stayed Stayed at least pending the Commission's determination as to whether or not it would establish a rulemaking, and then, from there, we would see if the Commission would then at that point think it was worth going forward with the complaint proceeding, or continuing to stay the complaint proceeding, or perhaps dismiss it, given that a rulemaking would be occurring on the same – on a similar subject."³⁵

Holland provides a candid acknowledgement, which is attributable to her client (note the repeated use of "we"), that the defendants' legal strategy was to secure the commencement of a rulemaking with the anticipation that the complaint proceedings would be stayed or dismissed. When asked, "So your advocacy to try to get the joint [Rules] motion for rulemaking started would have the effect of possibly securing the dismissal of the complaints?" she

³³ 1 RT 23:5-9 (Holland).

³⁴ 1 RT 25:7-13.

³⁵ 1 RT 25:20-26:2 (Holland). "Q: So one of the possible outcomes would be a possible dismissal of the complaints? A: Yes." *Id.* at 26:3-5.

responded, “I don’t know that it would have, but that is certainly something that we sought.”³⁶

Unlike the other respondents, Holland did not attend either meeting with the personal advisors.³⁷ She did not review the PowerPoint slides prepared for the meetings.³⁸ She indicated that she was aware of the June 14 meeting before it occurred,³⁹ but learned of the June 15 meeting after the fact.⁴⁰ She also indicated that she was aware that the meeting on June 14 was to address the Rules Motion and that Fenikile and Garrett were going to attend.⁴¹

In filing (and attempting to file) motions in the complaint and Local Competition Docket proceedings, Holland engaged in legitimate advocacy. While her intent was admittedly to seek the dismissal of the complaints through the commencement of rulemaking, UCAN was afforded the opportunity to respond to her motions. Because the attorney-client privilege protects her communications with her client, there is no evidence that she suggested, encouraged, or discouraged her client’s meetings with the personal advisors. Holland did not attend these meetings and did not engage in impermissible *ex parte* communications with the personal advisors.

³⁶ 1 RT 27:11-16 (Holland).

³⁷ 1 RT 27:17-19 (Holland).

³⁸ 1 RT 28:3-4 (Holland).

³⁹ 1 RT 27:20-24 (Holland).

⁴⁰ 1 RT 27:25-27 (Holland).

⁴¹ 1 RT 28:18-27 (Holland).

6.3. Garrett

Garrett, who manages regulatory affairs for Cox in several states, was present at the PHC when the *ex parte* ban in the complaint proceedings was announced. He was also present for both meetings with the personal advisors. Garrett had also verified the answer to UCAN's complaint filed by his company.⁴² The answer states, "UCAN raises policy issues and new, sometimes novel interpretations of Public Utilities Code Section 2883, which would potentially affect all telecommunications carriers providing residential wireless voice services. But UCAN fails to make specific factual allegations specific to Cox. Additionally, UCAN mischaracterizes Section 2883 to allege that Cox has violated rules that do not exist."⁴³ Footnote 3 to the answer adds, "If the Commission wants to address UCAN's novel policy proposals, it should do so through a rulemaking proceeding requested by UCAN and not through complaint proceedings."

Garrett testified that the meetings with the personal advisors were "focused on the merits of the rulemaking and spent more time discussing how technology has evolved and how competition has evolved."⁴⁴ His declaration adds, "We also discussed in some detail how technology developments, competition among facilities-based providers had altered *how carriers complied with the statute*. We explained why we believed the Local Competition Docket

⁴² Cox, Answer to Complaint and Request for Cease and Desist Order (Dec. 22, 2005) (Ex. No. 11).

⁴³ *Id.*

⁴⁴ RT 48:2-4.

was the appropriate proceeding to consider these issues” (Emphasis added.)

Two things are striking about these statements. First, Garrett admittedly was urging the personal advisors to accept the proposition that the Local Competition Docket, and by reasonable inference, not the complaint proceedings, was the appropriate venue for these issues – an argument that he had subscribed to in Cox’s answer, had been made and lost before the Presiding Officer, and was at that moment pending in the Rules Motion. He was aware that, if the rulemaking proceeded, it was “certainly possible” that the complaints could be dismissed.⁴⁵

Second, Garrett was suggesting to personal advisors a defense to any claimed violation of Section 2883, one based on competitive and technological changes since the statute was enacted. Those personal advisors would likely consult with and advise Commissioners if the Presiding Officer’s decision (that would address claimed violations and defenses) were eventually appealed to the full Commission.⁴⁶

The preponderance of evidence supports the conclusion that Garrett, in his participation in the meetings, intended to affect substantive results in the adjudication.

6.4. Tobias

When Tobias testified, she indicated that she was aware that an *ex parte* ban had been imposed in the complaint proceedings. She acknowledged that she

⁴⁵ RT 49:21-26.

⁴⁶ See Rule 8.2(b).

was also aware that UCAN's complaints sought financial remedies and, if the complaint against Cox were stayed or dismissed, that potential financial liability would be removed or reduced.⁴⁷

Tobias was questioned on her role in submitting three pleadings to the Commission: the May Motion (ultimately rejected by the Docket Office), the Rules Motion (filed in the Local Competition Docket), and the Stay Motion (filed in the complaint proceedings). As Cox's attorney, she had signed all three motions.

When asked to explain her purpose for submitting the May Motion, she indicated that she was seeking both to establish a rulemaking and to secure the dismissal of UCAN's complaint.⁴⁸ Tobias also testified that, by filing the Rules Motion, she was also seeking to establish a rulemaking proceeding, but she rejected the suggestion that she believed at the time that the complaints would be dismissed if the rulemaking commenced but was less certain whether the rulemaking would "tend to dampen the force and effectiveness of the complaint."⁴⁹

However, Tobias' statement that the Local Competition Docket rulemaking would not lead to the dismissal of the complaints is discredited by

⁴⁷ 1 RT 3: 15-25 (Tobias).

⁴⁸ "Q: So by filing this you and AT&T were seeking to establish a rulemaking by the Commission? A: Yes. Q: And to simultaneously seek the dismissal of the pending complaints filed by UCAN? A: That appears correct." 1 RT 5: 9-14.

⁴⁹ 1 RT 7:28-8:3; 8:14-22 ("Not necessarily"). Tobias also testified that another possible outcome was the consolidation of the complaint with the rulemaking, so that the complaint would not be dismissed. 1 RT 19:5-12 (Tobias).

her preparation of the Stay Motion, signed the same day as the Rules Motion. The Stay Motion indicates, “In the event the Commission grants the Local Competition [Rules] Motion, it follows that the Complaints ultimately would be dismissed.” When asked, “Here you clearly contemplate that if the rulemaking is established, it would follow that the complaints ultimately would be dismissed?” Tobias responded, “I think AT&T and Cox had the right to make that argument. Whether it would be accepted or rejected, I can’t say.”⁵⁰ Tobias clearly *intended* to seek that outcome.

How the Commission might have dealt with the pending complaints if a Local Competition Docket rulemaking was commenced is beside the point. Because they were signed on the same day and refer to one another, the Rules Motion and Stay Motion are most reasonably explained as part of Cox’s coordinated legal strategy to secure an alternative forum for Section 2883 issues and, if successful, to leverage that pending rulemaking to reduce Cox’s potential liability in the complaint proceeding. Cox may have also intended to secure a rulemaking, believing that such a proceeding would improve Section 2883 policies; but the coordinated filings of the motions, followed within two weeks by meetings with the personal advisors, strongly suggests that a main purpose, if not the predominant purpose, was to detrimentally affect the timing or outcome of the July 31 evidentiary hearing.

Defendants’ drafting of the Rules Motion virtually ensured that the discussions with the personal advisors concerning the need for rulemaking in the Local Competition Docket would implicate the adjudications. Tobias agreed that

⁵⁰ 1 RT 9: 14-28.

the June 14 meeting she attended included the purpose of asking that the Rules Motion be favorably considered.⁵¹ The Rules Motion included repeated and extensive references to the pending complaints, *e.g.*, “unless the Commission addresses Section 2883 generically in the Local Competition docket, rules will be fashioned in an ad hoc manner on a carrier-by-carrier basis in individual complaint proceedings, such as the two complaint cases currently pending before the Commission (C.05-11-011 and C.05-11-012).”⁵² Formulating the Rules Motion in this fashion, and interweaving the inadequacies of the complaints proceedings with the desirability of a rulemaking, ultimately made it impossible for the respondents (with the exception of Holland) to artificially separate their discussions with the personal advisors from potentially adverse impact on UCAN’s case if the rulemaking commenced.

The preponderance of evidence supports the conclusion that Tobias, in her participation in one meeting, intended to influence substantive outcome in the adjudications.

⁵¹ “Q: Were you advancing the motion? Were you asking that the motion be favorably considered, the joint motion for rulemaking in the Local Competition Docket? A: Yes. Because we were asking – we were explaining why there should be rules for implementing 2883.” 1 RT 11:4-10 (Tobias). *Compare*, “A: Did I or anyone ask whether the [complaint be dismissed]? A: No . . . My recollection is that was not discussed in the meeting.” 1 RT 11:16-21 (Tobias).

⁵² Rules Motion at 1-2. The Rules Motion is replete, almost on every page, with arguments about why a generic rulemaking would be preferable to the pending complaints. *See* page 8, *supra*, and Finding of Fact 24, *infra*.

6.5. Summary

In summary, the most reasonable inference of Fenikile's intent, drawn from his statements in support of the Rules Motion (which had many overlapping issues with the adjudications), compounded by Holland's testimony, the close sequence of events, and the lack of broader industry participation, is that he sought to use the meetings with the personal advisors to influence substantive issues pending in the adjudications. Garrett, by consistently urging a rulemaking and addressing potential defenses in meetings with personal advisors, addressed substantive issues that had been urged in the adjudications. Similarly, Tobias' participation in the first meeting in support of the Rules Motion, which stated, "it follows that the Complaints ultimately would be dismissed," indicates her intent to influence the substantive outcome of the adjudications. Pursuant to Public Utilities Code Section 2109,⁵³ Fenikile's intent and conduct are attributable to his employer, AT&T, and Garrett's and Tobias' intent and conduct are attributable to Cox.

7. Restraints on Communicating with Commission

Defendants urge that respondents' meetings (with the exception of Holland) with the personal advisors cannot be construed as *ex parte* violations because, to do so, would (a) deny them their right to communicate with the Commissioners on important policy matters, and (b) deprive the Commissioners of important information from the regulated community about problems,

⁵³ Pub. Util. Code § 2109 provides: "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."

solutions to problems, and needed policies. The defendants argue that wide-ranging Commission rulemakings often occur while specific adjudications involving the same issues are also pending before the agency. In their view, an overly strict application of the *ex parte* rules, in a large, complex regulatory agency as this, might always implicate pending adjudications.

Defendants cite D.06-03-013, adopting Market Rules to Empower Telecommunications Consumers and to Prevent Fraud, which they say put “at issue the interpretation of virtually every consumer protection provision of the Code.”⁵⁴ The rulemaking (R.00-02-004) that produced this decision, however, is very different from the situation confronting us on this record. The rulemaking in R.00-02-004 was commenced on the Commission’s own motion; not on the motion of parties as contemplated in the Rules Motion. Also, in R.00-02-004, there was not such a demonstrated linkage, in time, substantive issues, and moving parties, between the adjudication and the requested rulemaking. The overlap of people involved here (Tobias, Holland, Garrett), the close succession of events (April: failure to secure complete dismissal of complaints; May: attempt to file joint rulemaking motion with Docket Office; June: filing of Rules and Stay Motions, meetings with personal advisors; July: scheduled evidentiary hearing date), and the close relationship of issues pending in the complaints and discussed at the meetings all convincingly indicate that the defendants’ intent to defeat the adjudications was a main, if not paramount, purpose.

These defendants and other major utilities usually are not powerless in getting their views communicated to Commissioners. In this instance, they

⁵⁴ AT&T Opening Brief at 12.

could have waited the few months for the Presiding Officer's decision to be available and then appeal and brief the Section 2883 issues to the full Commission. They could have petitioned for a new, freestanding rulemaking under Section 1708.5 and Rule 14.7. They could have invited UCAN to attend the meetings with the personal advisors in a public setting. To mitigate their own violation, they even could have filed an *ex parte* notice so that UCAN would have been apprised of the meetings and could have asked for permission for a meeting of its own.

In all of these ways, AT&T and Cox could have communicated their views to personal advisors close to the Commissioners and informed Commissioners of problem areas. That AT&T and Cox did none of these strongly implies that they sought to gain a hidden, strategic advantage over UCAN in the adjudications. Indeed, it must have appeared to be a "win-win-win" strategy. At a minimum, they would have first crack at educating Commissioners' offices about the meaning of Section 2883. If they actually obtained a generic rulemaking, they might secure a more favorable interpretation of Section 2883 that could directly or indirectly influence the final resolution of UCAN's complaints. If they succeeded in securing a rulemaking and the simultaneous dismissal of UCAN's pending complaints, they would have hit a home run.

Defendants argue that, because of the broad definition of "interested person" in the *ex parte* rules, our interpretation would preclude other nonparty groups, such as other carriers (who might have a financial interest, as described under Rule 5(h)(2)) or consumer groups from meeting with Commissioners or personal advisors about these issues while an adjudication is pending somewhere in the Commission. Admittedly, "interested persons" is defined quite broadly, and the Commission's non-statutory, pre-1998, formulation of the

term would strike a different balance among competing interests. However, there are two immediate responses to the argument.

First, the defendants' impermissible conduct was closely related, both in time and the scope of issues discussed, to the pending adjudications. We leave for another day, based on an actual incident, to specify when a nonparty's contact with Commissioners or their personal advisors is so obviously intended to influence the Commissioners' consideration of pending adjudicatory issues that it runs afoul of the *ex parte* prohibitions.

Until we are faced with such an actual incident, we believe that interested persons, nonparties, and Commission decisionmakers should be alert to the possibility of deliberate or unintentional, impermissible *ex parte* communications when several of the following factors are present:

- The *ex parte* communication occurs in close proximity in time to a pending adjudication.
- There is an overlap of substantive issues discussed in the communication and a pending adjudication (*e.g.*, interpretation of same statute, same allegations and defenses), as well as an overlap of many of the same parties.
- It is reasonably foreseeable that granting the relief requested in the *ex parte* communication will have detrimental consequences to parties to a pending adjudication who are not present during the *ex parte* communication.
- It is reasonably foreseeable that an *ex parte* communication with a decisionmaker may predispose the decisionmaker to accept the communicator's views and perspectives on substantive issues pending in a pending adjudication, if and when those substantive issues are before the decisionmaker.

Second, communications by parties or nonparty interested persons do not become impermissible *ex parte* communications if they take place in a hearing, workshop, on the record of the proceeding, or "other public setting." If

reasonable, advance notice is given to parties in other pending proceedings where substantive issues might reasonably be affected by a meeting with a Commissioner or personal advisor, an *ex parte* communication has not occurred under the rules. While additional thought must go to arranging such meetings, the availability of the Commission's website, electronic service lists, and e-mail substantially reduces the time and cost of providing advance notice. The use of this procedure in the appropriate case strikes the necessary balance between the rights of parties and nonparties to communicate with Commissioners on matters of importance and the protection for parties' substantive rights in adjudicatory proceedings.

8. Due Process Concerns

We now turn to the substantive rights of parties in an adjudicatory proceeding. As the California Court of Appeal has indicated, *ex parte* prohibitions are necessary to avoid the use of "evidence" received outside the record and to preserve "the due process requirement of an unbiased tribunal and the related public interest in avoiding the appearance of bias on the part of public decisionmakers."⁵⁵

These due process considerations are present even in a rulemaking proceeding, if there is detriment to a party's adjudicatory claims. For instance, a federal appeals court case decided under the federal Administrative Procedure Act indicated that *ex parte* communications in a rulemaking proceeding may violate the due process rights of a party excluded from an *ex parte* meeting between another party and an agency decisionmaker. In *Sangamon Valley*

⁵⁵ 55 Cal. App. 4th at 1319.

Television Corp. v. United States,⁵⁶ the Federal Communications Commission (FCC) was conducting a rulemaking to allocate TV channels in various locations (similar to the assignment of 911 responsibilities sought by defendants in their Rules Motion). During the proceeding, one of the competing applicants met privately with Commission members and gave them private letters attempting to secure an advantage in the allocation. In defending its decision, the FCC argued that the proceeding was a rulemaking, and that attempts to influence Commissioners did not invalidate the result. The federal court of appeals disagreed, observing that “whatever the proceeding may be called it involved not only allocation of TV channels . . . but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried out in the open.”⁵⁷ The case stands for the proposition that a “rulemaking” nomenclature does not excuse *ex parte* communications when a party’s valuable rights (such as a cause of action for refunds and damages, as in these proceedings) are at stake.⁵⁸

The public interest does acknowledge that “[a]gency officials may meet with members of the industry both to facilitate settlement and to maintain the agency’s knowledge of the industry it regulates. . . . [as] ‘such informal contacts between agencies and the public are the “bread and butter” of the process of

⁵⁶ 269 F.2d 221 (D.C. Cir. 1959).

⁵⁷ *Id.* at 224.

⁵⁸ The court also indicated, “Interested attempts ‘to influence any member of the Commission . . . except by the recognized and public processes’ go ‘to the very core of the Commission’s quasi-judicial powers” 269 F.2d at 224, *quoting* *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55, 66 & 67 (D.C. Cir. (1958)).

administration and are completely appropriate so long as they do not frustrate judicial review or raise serious issues of fairness.”⁵⁹ In the proceedings before us, however, the communications were intended to distort the outcome of the adjudications, a due process violation if not rectified by the Commission.⁶⁰ Had not the *ex parte* communications come to light, no reviewing court would know of factors that might have determined the Commission’s final decision on UCAN’s complaints.

As delineated above, opportunities abound for persons to communicate their perception of the need for rulemaking to Commissioners and their personal advisors. A similar opportunity does not exist for adjudicatory parties who are never aware of a meeting held between their opponents and Commissioners or their personal advisors who may ultimately decide or advise on the ultimate fate of the adjudication. Law professor Michael Asimow describes the harm such *ex parte* contacts threatens to adjudicatory processes where due process concerns should be foremost:

⁵⁹ Louisiana Ass’n of Indep. Producers v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992).

⁶⁰ Noting that “certain agency proceedings ... bear a striking resemblance to litigation,” Professor John Allison explains that “adversarial positions are always at their most intense in litigatory proceedings. This adversarialness exacerbates not only the damage done by *ex parte* communications to the appearance of fairness, but also the damage done to decisional accuracy. The rendition of law or evidence offered by one in an intensely adversarial position is likely to stray from the truth more than that offered by one in a less adversarial posture, and is in greater need of counterbalancing by the other side. Another reason that *ex parte* communications are likely to intrude upon process values to a greater extent in litigation-type proceedings than in typical administrative ones is that legal consequences are more likely to be retroactive in the former and prospective in the latter.” J.R. Allison, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1207 (1993).

The rationale for a prohibition on *ex parte* contact is familiar to all lawyers: it is deeply offensive in an adversarial system that any litigant should have an opportunity to influence the decision-maker outside the presence of opposing parties. The parties may spend weeks or months conducting a detailed adjudicatory hearing and an administrative law judge may prepare a painstakingly detailed proposed decision. Yet all this can be set at naught by a few well chosen words whispered into the ear of an agency head or the agency head's adviser. *Ex parte* contacts frustrate judicial review since the decisive facts and arguments may not be in the record or the decision. Finally, *ex parte* contacts contribute to an attitude of cynicism in the minds of the public that adjudicatory decisions are based more on politics and undue influence than on law and discretion exercised in the public interest.⁶¹

In summary, the focus of the complaints is the meaning of Section 2883 and its several subsections and terms. By discussing Section 2883 with the personal advisors, under the rubric of supporting a rulemaking, AT&T and Cox were seeking a rulemaking that would possibly supplant the adjudications. They obtained an exclusive listening audience to their interpretation of Section 2883. They also had the exclusive opportunity to plant the seeds for Commission consideration of a possible appeal from the Presiding Officer's decision based on these and other of their arguments. Their conduct constitutes an impermissible *ex parte* communication in violation of the Public Utilities Code Section 1701.2(b) and Rule 7(b) of the Commission's Rules of Practice and Procedure.

⁶¹ M. Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1127-28 (1992).

9. Remedies

When ex parte violations are found, the Commission has broad authority under the Public Utilities Code to 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. Also, Public Utilities Code Section 2107 provides that any public utility “which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission” may be penalized for no less than \$500 and no more than \$20,000 for each offense.”

UCAN requests a penalty of \$120,000 be assessed against AT&T and a similar penalty against Cox (each penalty calculated as six separate offenses, i.e., two meetings involving three personal advisors). UCAN also asks for attorneys’ fees in the amount of \$7,500 for its preparation of pleadings and involvement in the hearing pertaining to the ex parte matter.

In D.98-12-075, the Commission identified the severity of the offense, the utility’s conduct, the financial resources of the utility, the degree of harm to the public interest, and precedent as factors to be considered in determining the appropriate fine for an ex parte violation. Regardless of the effect on the public interest, the Commission has accorded a high level of severity to conduct that harms the integrity of the regulatory process.

As previously discussed, AT&T and Cox, through their attorneys and agents, have violated the ex parte provisions of state law and Commission rules. The impermissible conduct was the ex parte communication with the Commission on two separate occasions. The conduct is serious because it had the potential of adversely affecting complainant’s substantive rights in adjudicatory proceedings. Such conduct interferes with impartial resolution of

complaints based on the record before the decisionmaker. The defendants did not disclose their conduct. Had not a personal advisor disclosed these communications, they may not have come to light. In this instance, the number of personal advisors involved (representing three Commissioners' offices) is also a relevant factor that we have considered.

The Commission has imposed penalties in excess of \$20,000 for comparable ex parte violations (see D.02-12-003; penalty against Pacific Bell), and a penalty in that range against these defendants is entirely appropriate. The imposition of a \$20,000 penalty against each carrier for each meeting is sufficient in view of the seriousness of the offense. We take official notice, pursuant to California Evidence Code § 452(h), of AT&T, Inc.'s Form 10-K filing with the Securities Exchange Commission indicating shareholders' equity, as stated on the company's consolidated balance sheet, of \$54.7 billion at the end of 2005. We take similar official notice of Cox Communications' Form 10-K filing with the SEC indicating shareholder equity, as stated on the company's consolidated balance sheet, of \$5.9 billion at the end of 2005. The defendants have sufficient wealth to pay these penalties.

Additionally, UCAN's attorneys' fees will be assessed against AT&T and Cox. UCAN was necessarily involved in the ex parte hearing and briefing to understand the circumstances of the ex parte communications, argue for corrective action, and protect the integrity of the adjudications it had filed.

UCAN is conclusively entitled to reasonable attorneys fees and costs for its participation in these ex parte proceeding. UCAN may claim specific amounts, not to exceed \$7,500, in its post-proceeding claim for intervenor compensation. The amount will be assessed jointly and severally against AT&T and Cox. The

penalties and attorneys' fees are chargeable to shareholders and not to ratepayers.

10. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. Opening comments were filed by AT&T, Cox, Margaret Tobias, and UCAN on January 16, 2007. Reply comments were filed by AT&T and Cox on January 22, 2007. The following discussion responds to the major issues identified by the parties in their comments.

Relationship of Proceedings

The comments of AT&T and Tobias identify supposed legal and practical problems of interpreting the Commission's *ex parte* rules to prevent communications in a rulemaking docket if it is reasonably foreseeable that the contact will have detrimental consequences for absent parties in a pending adjudication. These commenting parties apparently see the Commission's formal proceedings as a series of self-contained silos where the price of wheat or infestation in one silo can never have an adverse effect on neighboring silos. The Proposed Decision discusses this "cordoning" argument extensively in Sections 5.3 and 7 and rejects this overly narrow interpretation of our rules.

Elaborating on their view, these parties argue that the enforcement of our previously numbered Rule 5(e)(1) must be limited to communications in the very proceeding to which the communication relates. Such an interpretation would give unrestricted license to the very conduct we seek to proscribe here: communications nominally made in other proceedings but designed to affect outcomes in pending adjudications. At its extreme, such an interpretation would

allow a defendant to an adjudicatory action to blatantly urge, in an *ex parte* meeting, the outright dismissal of a separate complaint, so long as the meeting was in the guise of a separate quasi-legislative proceeding. By analogy, our legal system does not allow an attorney, who sits with a judge on a civil court rulemaking committee, to use those committee meetings as an opportunity to urge the dismissal of a lawsuit, which the attorney defends, pending before the judge.

These commenting parties suggest that immunity from *ex parte* concerns is available to them so long as their efforts are not a sham, they did not specifically address the adjudicatory proceeding or the merits of such a proceeding, and their actions were not corrupt. As the Proposed Decision notes, regardless of good or bad intent, a person still may violate the Commission's *ex parte* rules and that conduct may threaten the formal record and rights of absent parties. As the Arizona Supreme Court has observed, *ex parte* rules may be violated even when an attorney contacts a judge with no apparent intent to influence the judge improperly or gain a favorable advantage. (*See In re Bemis*, 938 P.2d 1120 (Ariz. 1997) (attempt to speak to judge because of belief that judge had not properly reviewed proposed order).)

Substantive Issues

The defendants' comments take exception to the Proposed Decision's findings and conclusions concerning the substantive issues discussed with the personal advisors. Cox even goes so far as to argue that the discussion with decisionmakers of a desired Commission action that may result in the dismissal of the complaint proceedings should not be considered the discussion of a substantive issue. This is akin to a defense attorney arguing that he did not engage in *ex parte* communications with a judge because he urged outright dismissal of the complaint rather than the imposition of a nominal monetary award. We consider communications to secure dismissal of a complaint filed by an absent party to be the discussion of substantial issues under our rules.

AT&T comments that the meetings with advisors involved no discussion of substantive issues in the UCAN proceedings [and t]here is no evidence to the contrary"; and Cox makes similar arguments. The comments ignore Table 1 documenting the numerous substantive issues identified in the PowerPoint slides that were also at issue in the complaint proceedings: *e.g.*, the merits of interpreting Section 2883 in carrier-specific proceedings rather than a rulemaking, whether exemptions to Section 2883 requirements were available, whether number storages provide a defense.

Tobias makes a similar argument that the meetings with the advisors never addressed any of the substantive issues set forth in the scoping memo for the complaint proceedings. Without reviewing the multiple areas of overlap between issues pending in the adjudications and the subjects discussed during the meetings with advisors (which are set forth in the table on page 14), we share the Presiding Officer's finding that the utilities' representatives intended fatal consequences for UCAN's entire action (*see, e.g.*, Finding of Fact No. 36:

“Fenikile, Tobias, and Garrett all intended that an important outcome of their meetings . . . was to secure a rulemaking that would form the basis for the stay or dismissal of the adjudications.”).

Tobias also suggests vagueness in the definition of “substantive issue” set forth in the Proposed Decision. In the context of adjudicatory matters, however, the type of permissible communications is very narrow, as the concluding sentence in previous Rule 5(e) indicates: “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” *ex parte* restriction. The meetings with the advisors cannot be construed as such a nonsubstantive, procedural inquiry.

An Oregon Supreme Court decision is especially relevant to this discussion. In *In re Schnenck*, 879 P.2d 863 (Or. 1994), an attorney represented conservators of an estate in two separate civil proceedings. After being disqualified by the court in one case, he continued his representation in the second case. He wrote the judge in the first case but did not sent the letter to the other party in that case. The court held that the attorney’s conduct violated the state’s *ex parte* ban:

The accused’s letter stated that further delay in disposing of the main case, to await the outcome of the ancillary proceeding, was not necessary under the law and was just an effort to force a settlement. That is a communication on the merits of the cause. A communication may concern procedure as well as substantive law and still be on the merits of the cause. The communication indicated disagreement with a judge's decision to delay the case and argued that that decision was not well founded in law. That is a comment on the merits. That the letter serves some secondary purpose, even a supposedly salutary one, does not prevent it from being a

communication about the case directed to the judge before whom the proceeding was pending.

(*Id.* at 103). This decision both indicates that impermissible conduct can arise in related proceedings and that even a comment on timing may constitute a substantive matter.

Tobias raises other issues in her comments, most of which were addressed in the Proposed Decision. She argues that there is no finding of an oral or written communication specifically from her to the advisors. This is a curious argument, as it suggests that no meaning whatsoever should be attributed to her presence at the June 14 meeting. While we do not presume to enforce California's Rules of Professional Conduct, we do look to the professional rules and decisions in California and other jurisdictions to reach reasonable interpretations of our own ethical rules. Numerous authorities suggest that an attorney's obligations in such a circumstance should not be as narrowly construed as urged by Tobias.⁶²

For instance, California Rule of Professional Conduct 5-300(B) indicates that an attorney "shall not directly or indirectly communicate with or argue to a judge or judicial officer" Certainly, even silence or acquiescence during an *ex parte* meeting, where the previously discussed PowerPoint slides formed the basis of discussion, can be deemed an indirect, adoptive communication. Also, California Rule of Professional Conduct 1-120 indicates that an attorney "shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act." The essence of this rule seems to be that an attorney cannot sit by and

⁶² *Cf.* Pub. Util. Code § 2109 which indicates that Tobias' omission or failure to act is still attributable to her client, Cox.

watch his or her client violate the rule of a tribunal. (*See also* Rule 8.4, ABA Model Rules of Professional Conduct (2003) (“It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .”).) Such an interpretation was announced in Missouri Ethics Opinion 20000185 (9/00-10/00) where an attorney learned that his client had urged a friend to contact the judge before whom the client’s case was pending. The Missouri ethics panel ruled that the attorney should obtain the client’s agreement that these *ex parte* communications would cease. If the client did not so agree, the attorney was obligated to withdrawn from representation.

The record does not disclose what specific comments Tobias made at the June 14 meeting. Her presence at this meeting, where substantive matters affecting the complaints were unquestionably discussed, amply supports findings of her participation, endorsement, and sponsorship of the communications to the advisors.

Allegations of Discriminatory Effect

The commenting parties also point to the perceived discriminatory burden on defendants such as AT&T and Cox if they have to either abstain from meetings with Commissioners and advisors or notify parties in other dockets about such meetings. Entities such as AT&T and Cox are different from other persons seeking to communicate with the Commission because they are parties to adjudicatory matters and important due process rights of absent adjudicatory parties must be protected.

As the Proposed Decision explains on pages 28-29, these defendants are not seriously disadvantaged by such as interpretation as they still retain multiple opportunities to communicate with the Commission in ways that are protective

of other parties' rights. Also, the possible need to file notices of such meetings in multiple dockets would not be a requirement unique to this Commission. (*Cf.* Calif. Code Civil Proc. § 403 (requiring a party seeking coordination of separate actions in separate courts to notify all parties in each action).)

Procedural Issues

AT&T identifies several of what they perceive to be procedural irregularities surrounding the July 7 hearing before the assigned Commissioner and Presiding Officer: issuance of the joint ruling setting the hearing without prior notice or hearing; preliminary findings set forth in the Joint Ruling, and perceived indications of prejudgment by the Presiding Officer as supposedly evidenced by the advance marking of exhibits, an exhibit list, and the calling of witnesses.

Notably, the Commission's inquiry did not result from information brought to the Presiding Officer's attention by UCAN. Rather, information about the meetings with advisors was brought to the attention of the assigned Commissioner and Presiding Officer by one of the Commission's own employees. With such information in its possession, Commission officials have an obligation to further inquire to ensure that justice is done in formal proceedings (*see* Rule 1.2, "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented"), much as a general jurisdiction judge has an obligation to investigate alleged jury tampering during a trial. (*See generally* *People v. Hayes*, 21 Cal. 4th 1211, 1255 (1999)).

The Joint Ruling outlined the preliminary information that had come to the attention of the assigned Commissioner and Presiding Officer. The Joint Ruling indicated that this information "may be modified or corrected through further investigation or hearing." The Joint Ruling provided notice to the respondents of

the possible legal provisions that might be violated. The Joint Ruling provided opportunities for the respondents to respond in affidavits filed before the hearing and in testimony during the hearing. In order to conduct an orderly proceeding, the Presiding Officer marked for identification eleven exhibits limited to the declarations that the respondents and UCAN had filed and the motions that were to be discussed in testimony. The Presiding Officer (with additional questions from the assigned Commissioner) conducted the direct examination of the respondents to avoid a less dignified process of having UCAN's attorney engage in extensive examination of his opposing counsel. Respondents were represented by counsel. Before the hearing concluded, all parties were asked, "Is there any further presentation of factual nature this morning?" (Record Transcript 53:15-17 (July 7, 2006).) All parties were allowed to submit, and did submit, post-hearing briefs.

All these procedures were established to allow respondents to be heard before the Commission decided the matter and imposed any sanction. None of these steps indicates a prejudgment of material issues. These steps were all undertaken to afford procedural protections to respondents while fulfilling the Commission's obligation to determine whether *ex parte* violations had occurred. (See *Goldberg v. Kelly*, 397 U.S. 254 (1970).)

UCAN's Due Process Rights

With reference to Conclusion of Law 16, AT&T comments that only governments and not private persons or entities can violate the due process rights of another individual or person. While AT&T states the general rule, there are instances where courts have refused to make their processes available to private parties who seek to deprive other persons of constitutional rights. (Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of racially

restrictive constitutes Equal Protection violation).) Conclusion of Law 16 has been restated to indicate that UCAN's due process rights were violated by *ex parte* meetings held in violation of the Commission's own rules.

Other Arguments

Remarkably, AT&T also comments that the Proposed Decision "conflates" individual events starting with motions and rulings in the complaint proceedings and through the May Motion, Rules Motion, and Stay Motion, and ending in the meetings with the advisors. The content of the PowerPoint slides alone is sufficient to determine that *ex parte* violations occurred, regardless of defendants' intent. That these defendants undertook a series of steps (culminating in impermissible meetings with the advisors), during a relatively short time, to gain a rulemaking addressing many of the same substantive issues at stake in the complaint proceedings is not the conflation of random events but represents strong collaborating evidence as to the ongoing purpose of their efforts.

Cox comments that the defendants relied on the personal advisors as to the propriety of the meetings and it would be inequitable for the Commission now to sanction the defendants for the communications. When persons such as defendants and their agents initiate a meeting with an advisor or Commissioners, they have command of the information they seek to depart and the context in which it arises. Advisors and Commissions, who may participate in dozens of such meetings or conversations each day, attempt to be responsive to these overtures but they cannot be expected to understand all possible implications of their meetings. The duty to foresee such potential improprieties rests with the persons seeking the meeting, especially when they are represented by counsel. (*See, e.g.,* Rule 7.1, "Reporting Ex Parte Communications,"

indicating that the burden of reporting such communication is upon the interested person who initiated the communication.)

In its comments, UCAN requests clarification that its Section 2883(b) claim is still before the Commission. UCAN indicates that it filed a First Amended Complaint, following the Presiding Officer's earlier dismissal of a Section 2883(b) claim, and the amended Section 2883(b) claim has not been challenged by AT&T. Since this comment is correct, the text in section 2 (page 5) of this decision has been clarified and a paragraph in Section 5 (page 17) of this decision has been deleted.

UCAN also comments that it will not avail itself of a proposed remedy described in Section 9 (page 37) and ordering paragraph 4 (original number) of this decision. Under the earlier language, UCAN would be afforded an opportunity to meet with personal advisors from the offices involved in the June 14 and 15 meetings to respond to the arguments made in the PowerPoint slides. Because UCAN indicates it does not desire such a meeting, the last paragraph of Section 9 and ordering paragraph 4 of this decision have been deleted.

Finally, UCAN urges that the defendants' representatives in the meetings be barred from further participation in these proceedings, as well as from participation in any proposed rulemaking on Section 2883 issues in the Local Competition Docket. We believe the sanctions already set forth in the Proposed Decision are appropriately tailored to the impermissible conduct. Since C.05-11-011 has been submitted and C.05-11-012 is expected to be dismissed, such an additional sanction would both interfere with defendants' presentation of their case and procedurally complicate the completion of both proceedings.

11. Assignment of Proceedings

Michael R. Peevey is the assigned Commissioner and John E. Thorson is the assigned ALJ and the Presiding Officer in both proceedings.

Findings of Fact

1. AT&T and Cox provide telecommunications services within California.
2. On November 14, 2006, UCAN filed its Complaint and Request for Cease and Desist Order Against Cox Communications (Cox) for Failure to Comply With Public Utilities Code Section 2883 Regarding 911 Emergency Service Access for Residential Units. UCAN filed an almost identical complaint on the same date against SBC Communications, Inc., now known as AT&T California (AT&T).
3. As remedies for the alleged violations, UCAN's complaints requested, among other things, "any and all reimbursements and penalties" available under the Public Utilities Code, punitive damages upon a showing of intentional conduct, and "all other remedies and penalties and costs" as determined by the Commission.
4. On April 17, 2006, UCAN filed a first amended complaint against AT&T requesting the same remedies as set forth in its initial complaint.
5. Cox answered the complaint and AT&T answered the complaint and the first amended complaint.
6. The proceedings have been coordinated but not consolidated.
7. Both complaints were preliminarily categorized as adjudicatory and that categorization was confirmed in the Scoping Memo on January 20, 2006.
8. No party appealed the categorization of the proceedings as adjudicatory. Indeed, in its prehearing conference statement, AT&T indicated that it agreed that its proceeding should be categorized as adjudicatory.

9. Representatives of AT&T and Cox appeared at the PHC held on January 4, 2006, including Stephanie Holland, attorney for AT&T; Margaret Tobias, attorney for Cox; and Douglas Garrett, Western Regulatory Vice President for Cox.

10. Counsel and other representatives of AT&T and Cox were served with the Scoping Memo of January 20, 2006. The Scoping Memo indicated, "Since both cases are adjudicatory proceedings, *ex parte* communications with the assigned Commissioner, other Commissioners, their advisors and the ALJ are prohibited. (See Rule 7(b).)"

11. Tobias, Holland, and Fenikile all testified that they were aware of the *ex parte* ban imposed in the Scoping Memo. Garrett was present at the prehearing conference when the *ex parte* ban was discussed.

12. In its answer of December 22, 2005, AT&T asserted as one its affirmative defenses that "[a] bilateral Complaint proceeding is not the proper venue for the Commission to promulgate its interpretation of Section 2883, which will have general applicability to the entire LEC [local exchange carrier] community in California."

13. In its answer of December 22, 2005, AT&T defended its Section 2883 practices, in part, by indicating that warm line access was discontinued after six months to allow telephone numbers, central office equipment, and loop facilities to be redeployed. AT&T indicated, "These practices constitute reasonable and practical compliance with Section 2883(a), which mandates warm line access only 'to the extent permitted by existing technology or facilities' and Section 2883(e), which relieves LECs from warm line obligations if providing it 'would preclude providing service to subscribers of residential telephone service.'"

14. In its answer of December 22, 2005, Cox asserted, “UCAN raises policy and new, sometimes novel, interpretations of Public Utilities Code Section 2883 which would potentially affect all telecommunications carriers The Commission should not waste its valuable resources by reviewing novel policy matters in a misplaced complaint proceeding.” In footnote 3 to the answer, Cox indicated, “If the Commission wants to address UCAN’s novel policy proposals, it should do so through a rulemaking proceeding . . . and not through the complaint proceedings.”

15. In explaining its positions at the PHC, AT&T indicated that numbering resource problems were one of the reasons for its policy of not providing warm line access generally after six months.

16. In explaining its positions at the PHC, Cox argued that UCAN’s complaint was misplaced because it ignored two limitations on a carrier’s warm line obligations: (1) technological and facilities limitations; and (2) limitations when warm line services prevent service to other subscribers. Cox also indicated that it had renumbering and number harvesting issues similar to those of AT&T.

17. Pursuant to the schedule adopted at the PHC, the defendants filed motions to dismiss the complaints, arguing that, as a matter of law, UCAN had failed to state a cause of action. UCAN briefed and responded to the motions.

18. In its motion to dismiss and reply, AT&T argued that it could avail itself of defenses based on the absence of a residential telephone connection in newly constructed residences, limitations on existing technology or facilities, limitations on phone numbers, and the need to redeploy resources to preserve its ability to serve subscribers of residential telephone service. Additionally, AT&T indicated that “a complaint proceeding is not the proper venue for pursuing industry-wide

policy mandates” of the type UCAN, in AT&T’s view, was seeking to litigate in these proceedings.

19. In its motion to dismiss and reply, Cox set forth in a discussion running three pages, the following argument: “UCAN is abusing the Commission’s process by filing a complaint against Cox instead of filing a petition for a rulemaking.”

20. In its motion to dismiss and reply, Cox argued at length that technical and facilities limitations, including the need to efficiently use limited numbering resources, constrained its ability to provide indefinite warm line access.

21. In ruling on the motions to dismiss, the Presiding Officer determined that UCAN had alleged facts sufficient to state one or more causes of action for violations of Section 2883(a) and (c). The Presiding Officer ruled that UCAN had not alleged facts sufficient to state a cause of action for any violations of Section 2883(b) or Sections 2875 to 2897. In addressing the argument that the complaints should be dismissed because the issues are more appropriate for a quasi-legislative proceeding, the Presiding Officer determined that, because Cox had not previously sought to recategorize the proceeding, the argument was waived.

22. On May 18, 2006, AT&T and Cox, in a pleading signed by Holland and Tobias, attempted to file a motion in the complaint proceedings. The motion was captioned “Joint Motion . . . to the Full Commission to Dismiss the Coordinated Complaint Proceeding and Establish a Single Rulemaking Proceeding” (May Motion). This tendered pleading was not filed by the Docket Office. The May Motion, although not filed, asked the Commission to commence a rulemaking “to promulgate a comprehensive, reasoned set of rules delineating the specific obligations of local telephone companies under Section 2883 to provide warm dial tone.” The motion also asked that UCAN’s complaints be dismissed.

23. On June 2, 2006, defendants filed a joint motion (Rules Motion) in the Commission's Local Competition Docket, R.95-04-043/I.95-04-044, requesting that the Commission promulgate rules in that docket regarding carriers' "warm line" obligations under Section 2883. Simultaneously, defendants filed a joint motion (Stay Motion) in the two adjudicatory proceedings asking for a stay pending a determination "as to whether the Commission will address the requirements of Section 2883 in a generic, industry-wide proceeding" in the Local Competition Docket. The Stay Motion indicated, "In the event the Commission grants the Local Competition [Rules] Motion, it follows that the Complaints ultimately would be dismissed."

24. The Rules Motion contains numerous arguments as to why a rulemaking proceeding would be preferable to the pending complaints including the following:

- "[A]ny determination in these complaint cases . . . will have generally applicability to all local telephone companies Yet, because of the nature of the complaint proceedings, only AT&T California and Cox will have a voice";
- "Significantly, many of the constraints applicable to complaint proceedings are not applicable in generic rulemaking proceedings";
- "In its complaint cases . . . , UCAN has argued for a virtually limitless interpretation The appropriate forum for soliciting such input is an industry-wide rulemaking";
- "UCAN argues that this imposes a broad obligation on AT&T California and Cox to notify not only their respective residential customers but all consumers generally by any and all means possible. AT&T California and Cox believe that interpretation is belied by the plain language of the Statue . . . [conditioned] upon the Commission first determining the manner in which telephone

corporations should do so . . . [such as in] a generic, industry-wide proceeding in this docket”;

- “The foregoing determinations should be made generically in an industry-wide forum and not in the context of individual bilateral complaint proceedings”;

- “A meaningful determination cannot be made in complaint proceedings”; and

- “Moreover, the topics raised in UCAN’s two Section 2883 complaints currently pending before the Commission would be more appropriately aired in technical workshops The proper forum is the Local Competition docket.”

25. Section 2883 was enacted in September 1994. Prior to filing the Rules Motion, neither AT&T nor Cox had sought a rulemaking on Section 2883 issues during the previous 12 years.

26. Prior to Wednesday, June 14, 2006, Fenikile, who previously worked for the Commission for 14 years (and as a personal advisor for eight of those years), contacted Lester Wong, personal advisor to President Peevey, and Tim Sullivan, personal advisor to Commissioner Chong, to schedule a meeting.

27. The meeting was held on June 14, starting at 10:00 a.m., at the Commission’s offices, and lasted for one hour. The meeting was attended by Fenikile, Wong, Sullivan, Garrett, Tobias, Rhonda Johnson (AT&T), and Alex Camargo, a summer intern in Commissioner Chong’s office.

28. On his way to the June 14 meeting, Fenikile encountered Aram Shumavon, personal advisor to Commissioner Brown (the assigned Commissioner for the complaint proceedings). A meeting was arranged for the following day.

29. The second meeting was held on Thursday, June 15, also at the Commission and also lasting one hour. This meeting involved Fenikile, Garrett,

Shumavon, and Peter Hanson, another personal advisor to Commissioner Brown.

30. UCAN was not invited to, and did not attend, either meeting.

31. Fenikile said that he cautioned attendees at both meetings that “the purpose of the meeting was to discuss the joint AT&T California/Cox request set forth in the Rules Motion for a generic rulemaking regarding Section 2883 . . . in the Local Competition Docket. I cautioned all in attendance that we were not there to, and could not discuss substantive issues of UCAN’s complaint proceedings”

32. Fenikile had prepared a seven-page PowerPoint presentation that was distributed at both meetings. The PowerPoint presentation included such text as “An Industry-Wide Issue Deserves an Industry-Wide Proceeding,” “[u]nless the Commission addresses Section 2883 generically in the local competition docket, rules will be fashioned in an ad hoc manner on a carrier-by-carrier basis which would create this disparate treatment,” and the “local competition docket is the proper venue.”

33. The Presiding Officer had previously ruled that the adjudicatory matters could go forward even though they might have industry-wide implications.

34. At the time of the Rules and Stay Motions and meetings with personal advisors, Fenikile, Holland (although not present at the meetings), Garrett, and Tobias all believed or hoped that a rulemaking proceeding, if commenced, would result in a stay or dismissal of the pending complaints.

35. The overlap of people involved (Tobias, Holland, Garrett), the close succession of events (April: failure to secure complete dismissal of complaints; May: attempt to file joint rulemaking motion with Docket Office; June: filing of Joint and Stay Motions, meetings with personal advisors; July: scheduled

evidentiary hearing date), and the close relationship of issues pending in the complaints and discussed at the meetings) all convincingly indicate that their purpose was to seek a rulemaking proceeding in the Local Competition Docket so as to defeat, weaken, or postpone relief in the adjudications.

36. Fenikile, Tobias, and Garrett all intended that an important outcome of their meetings with the personal advisors was to secure a rulemaking that would form the basis for the stay or dismissal of the adjudications. They also intended to discuss issues with the personal advisors that could leave a receptiveness in these advisors' minds to defendant's interpretation of Section 2883 and potential defenses.

37. The possibilities of stay or dismissal of UCAN's complaint, statutory interpretation of Section 2883, and potential defenses to alleged violations of Section 2883 are all substantive issues pending in the adjudications.

38. On December 31, 2005, AT&T had shareholders' equity, based on the company's consolidated balance sheet, of \$54.7 billion. On the same date, Cox had shareholders' equity, based on the company's consolidated balance sheet, of \$5.9 billion.

39. UCAN participated in the evidentiary hearing concerning *ex parte* issues and in the post-hearing briefing and has, therefore, incurred attorneys' fees claimed in the amount of \$7,500.

Conclusions of Law

1. AT&T and Cox are public utilities subject to regulation by the Commission.

2. Since the conduct addressed in this decision occurred prior to September 13, 2006, it is evaluated under the Rules of Practice and Procedure in

effect at that time. The substance of the current *ex parte* rules (effective September 13, 2006), however, is unchanged from the earlier version.

3. These proceedings are adjudicatory proceedings under Public Utilities Code 1701.1(b)(2) and Rule 5(b) and were so categorized by the Commission.

4. Public Utilities Code Section 1701.2(b), prohibits *ex parte* communications in these proceedings.

5. The meetings between Fenikile, Garrett and Tobias and the personal advisors constituted oral communications as defined by Rule 5(e).

6. 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).

7. A substantive issue is one that creates, defines, or regulates the rights, duties, and powers of a party.

8. Because the meetings on June 14 and 15, 2006, addressed the meaning, interpretation, alleged weaknesses in Section 2883, defenses or exceptions to the statute (based on technology and facilities limitations and numbering constraints), and the need for a rulemaking to be substituted for pending adjudicatory proceedings, all matters pending in the adjudications, the meetings involved substantive issues, involving the claims, defenses, rights and duties of the parties, all pending in formal proceedings.

9. The oral and written communications during the meetings concerned substantive issues in C.05-11-011 and C.05-11-012, pending formal adjudicatory proceedings, as defined by Rule 5(e)(1).

10. AT&T and Cox were interested persons as defined by Rule 5(h)(1).

11. Fenikile, as an agent or employee of AT&T, an interested person, was also an interested person as defined by Rule 5(h)(1).

12. Tobias and Garrett, as agents or employees of Cox (an interested person), were also interested persons as defined by Rule 5(h)(1).

13. Since the proceedings are adjudicatory, Wong, Sullivan, Hanson, and Shumavon, as Commissioners' personal advisors, were decisionmakers defined by Rule 5(f).

14. The meetings with the personal advisors constituted impermissible *ex parte* communications, in violation of Public Utilities Code Section 1701.2(b) and Rule 7(b), Rules of Practice and Procedure, by AT&T and its agent Fenikile and by Cox and its agents Garrett and attorney Tobias.

15. By engaging in impermissible *ex parte* communications, Fenikile, Garrett, and Tobias violated the Scoping Memo issued in each proceeding.

16. These impermissible *ex parte* communications have violated the due process rights of UCAN in an adjudicatory proceeding pending before the Commission.

17. Pursuant to Public Utilities Code Section 2109, the violation of the Public Utilities Code, the Commission's Rules of Practice and Procedure, the Commission's order, and UCAN's due process rights by Fenikile, Garrett, and Tobias, all acting within the scope of their duties or employment, are deemed the acts, omissions, or failures of AT&T (in the case of Fenikile) and Cox (in the case of Garrett and Tobias).

18. Based on the foregoing findings of fact there is predominance of evidence to conclude that Holland did not engage in impermissible *ex parte* communications with the Commission's personal advisors.

19. When *ex parte* violations are found, the Commission has broad authority to "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.

20. Based on the seriousness of the violations, the imposition of a \$20,000 penalty against each carrier for each meeting is just and proper.

21. Because UCAN was justified in participating in proceedings involving these *ex parte* violations, UCAN is entitled to recover reasonable attorneys' fees for its participation.

O R D E R

IT IS ORDERED that:

1. AT&T California and Cox California Telecom (defendants), their officers, agents and attorneys are prohibited from engaging in any *ex parte* communications with covered persons (as those terms are defined in Rules 5(e) & (f)) concerning substantive issues in these adjudicatory proceedings or with the intent of influencing substantive issues in these adjudicatory proceedings.

2. Pursuant to Public Utilities Code Sections 701 and 2107, a penalty of \$40,000 is imposed against AT&T and a penalty of \$40,000 is imposed against Cox. This amount shall be paid, within 60 days of the effective date of this decision, to the Commission's Fiscal Office, for the benefit of the state's General Fund.

3. Pursuant to Public Utilities Code Section 701, UCAN's reasonable attorneys fees for participating in these *ex parte* proceedings, not exceeding \$7,500, are assessed, jointly and severally, against AT&T and Cox. UCAN may claim specific fees and costs, plus interest from the effective date of this decision, as part of its post-proceeding claim for intervenor compensation.

4. UCAN's complaint against Cox in C.05-11-012 may now be withdrawn and the proceeding dismissed pursuant to the Executive Director's order, at which time that proceeding will be closed.

5. Complaint 05-11-011 is returned to the Presiding Officer for further proceedings and remains open.

This order is effective today.

Dated _____, at San Francisco, California.