

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

July 27, 2007

TO PARTIES OF RECORD IN CASE (C.) 05-11-011 AND C.05-11-012

At the Commission Meeting of July 26, 2007, Commissioners John A. Bohn and Rachelle B. Chong were granted permission to file a concurrence in Decision 07-07-020, issued at the July 12, 2007 Commission Meeting.

The joint concurrence is now available and is attached herewith.

/s/ ANGELA K. MINKIN

Angela K. Minkin, Chief  
Administrative Law Judge

ANG:hl2

Attachment

**Joint Concurrence of Commissioner Bohn and Commissioner Chong  
in Support of D.07-07-020**

We strongly support this decision finding that AT&T California (AT&T) and Cox California Telecom (Cox) violated the Public Utilities Code and the Commission's Rules of Practice and Procedure by engaging in impermissible *ex parte* communications. We write separately to support the majority view.

In 2005, the Utility Consumer's Action Network (UCAN) filed separate complaints against AT&T and Cox for violations of Public Utilities Code Section 2883 (Section 2883) concerning the defendants' obligations to provide 911 warm line access. Both proceedings were categorized as adjudicatory, and no challenge to that ruling was made. By statute, *ex parte* communications are prohibited in adjudications. The violation of the *ex parte* ban for adjudicatory proceedings is the basis for finding a violation of law in this decision.

An *ex parte* communication involves any written or oral communication between a decisionmaker and an interested person in a matter before the Commission regarding a substantive issue that does not occur in a public setting or on the record of the formal proceeding. In this case, there is no dispute that (1) AT&T's and Cox's meetings with Commissioners' advisors using a PowerPoint presentation as a basis of discussion constitute both oral and written communications; (2) the complaints, C.05-11-011 and C.05-11-012, and the Local Competition Docket, R.95-04-043/I.95-04-044, are formal proceedings pending before the Commission; (3) AT&T and Cox are interested persons; (4) advisors are considered decisionmakers under our *ex parte* rules; and (5) these meetings took place privately. The only issue in dispute is whether the communications with the advisors involved substantive matters at issue in the complaint cases. They were, in fact, the same issues and known by the parties to be so.

We have carefully reviewed the proposed decision, the relevant portions of the record in the complaint cases and the Local Competition Docket, and transcripts from the hearing on the alleged *ex parte* violations, and we have no doubt that AT&T and Cox, in their communications discussed and provided a written presentation that involved substantive matters at issue in the complaint proceedings and concerning the proper forum for considering AT&T's and Cox's compliance with Section 2883. While AT&T and Cox requested the *ex parte* meetings in the rulemaking proceeding which is quasi-legislative, in that meeting as part of a PowerPoint presentation, they made arguments that went directly to the issue of the appropriate forum for dealing with their Section 2883 obligations and the substance of the two complaints. *This is where Cox and AT&T crossed the line.* There should be no doubt that forum selection in an attempt to affect issues germane to a complaint proceeding is a substantive issue under the Public Utilities Code. In fact, AT&T and Cox had previously filed a variety of pleadings in the adjudicatory complaint proceedings raising the identical forum selection issue. In so

doing, they themselves had made forum selection a substantive and contested issue in the adjudications.

Let us be clear. We have no trouble with vigorous advocacy as long as parties are open, straightforward, and follow the rules. We do not believe that this is the case here. In fact, AT&T and Cox failed to take the most obvious and transparent actions to secure the opening of a rulemaking and the dismissal of the complaints. They did not appeal the categorization of the complaint cases as adjudicatory and they did not petition the Commission for a new rulemaking proceeding to address warm line access issues pursuant to Public Utilities Code Section 1708.5 and Rule 14.7 of the Commission's Rules of Practice and Procedure.

We also support the fines levied against both companies for this improper conduct. The \$40,000 penalty assessed against AT&T and Cox is based on the application of the statutory penalty provisions to the two *ex parte* meetings that were held. Public Utilities Code Section 2107 (Section 2107) allows assessment of \$500 to \$20,000 per offense. Pursuant to Public Utilities Code Section 2108, each of the two *ex parte* meetings constitutes an offense. This decision fines AT&T and Cox \$20,000 each per violation for a total of \$40,000 for each carrier.

Use of the higher range of the amount authorized under Section 2017 is appropriate for several reasons. First, this was a serious violation impacting the integrity of the regulatory process in an adjudicatory matter, where the Commission acts solely in a judicial role, and must ensure the protection of the litigants' due process rights. Second, the *ex parte* communications by Cox and AT&T had the potential of adversely affecting substantive rights of the complainant UCAN in the adjudications, just weeks before the evidentiary hearings were scheduled. Third, the utilities' violation of the *ex parte* rules constitutes interference with the impartial resolution of a complaint based on the record before a decisionmaker. Fourth, there was no disclosure of the communication as required by our *ex parte* rules. In our view, the remedy is proper in light of the seriousness of these multiple factors.

We understand that there are a few concerns with this decision. Some contend that the amount of the penalty is too high given the severity of the violation. The record demonstrates that AT&T and Cox attempted repeatedly to have the coordinated complaints dismissed, and after all of their efforts failed, they made a decision to hold meetings on the same substantive issues in another context in an attempt to change the Commission's mind. We concluded that what AT&T and Cox did in this case, obscuring their true intentions, is very troubling and warrants a fine in the higher range permitted by Section 2107.

Some may believe that the Commission needs to do more to make parties and its own staff aware of the potential consequences of *ex parte* violations. In this situation, we do not believe that the advisors could have known beforehand that the meetings at issue would touch upon substantive issues in the coordinated complaint cases because AT&T and Cox had artfully camouflaged the subject of the meetings as being about an issue in a

rulemaking proceeding where there are no prohibitions or limitations to *ex parte* communications. Moreover, both AT&T and Cox are sophisticated parties, well-represented by counsel, who practice before the Commission regularly and are very familiar with our *ex parte* rules. We expect those who appear regularly before us to refresh their understanding of the *ex parte* rules and abide by them. We recognize the statute's complexities, but compliance is required by law if parties wish to do business before us.

We agree that the Commission needs to ensure that its staff is well-versed in our *ex parte* rules, and we have been making great strides in this area. Within the past few weeks, the ALJ Division trained the Commissioners' staff on the *ex parte* rules, and we urge it to continue this good work with other PUC staff. We also encourage practitioners, through the Conference of California Public Utility Counsel or other similar groups, to focus on professional training for attorneys and regulatory staff who practice before us, to make sure that they are aware of how the *ex parte* rules work and where the pitfalls lie. We hope that a proactive approach will minimize future problems in this area.

Finally, claims that the Commission has overreached its authority by assessing a \$40,000 penalty against each carrier for *ex parte* violations are ill-conceived. Contrary to the arguments of AT&T and Cox, this decision is narrowly tailored and based on the unique facts of these proceedings. In reaching our determination, we looked at AT&T and Cox's past conduct and interpreted existing rules; we did not promulgate new rules.

For all of the aforementioned reasons, we strongly support this decision.

/s/ JOHN A. BOHN

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John A. Bohn  
Commissioner

/s/ RACHELLE B. CHONG

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Rachelle B. Chong  
Commissioner