Decision 07-07-020 July 12, 2007

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)

REVISED PROPOSED INTERIM DECISION ON ALLEGED EX PARTE VIOLATIONS

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REVISED 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 Case (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of the complaint and, after this Proposed Interim Decision is finalized by the Commission, the complaint may be withdrawn.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 in these proceedings 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[3] 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)

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[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. Unless otherwise noted, Rules references in this decision are to the pre-September 13, 2006, version.

[3] All subsequent section references are to the Public Utilities Code unless otherwise specified.

on January 4, 2006. Both proceedings were preliminarily categorized as adjudicatory. Pursuant to 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 had appeared in this proceeding or were named on the service list. For purposes of this decision, however, the following persons are discussed: Fassil 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.

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,[4] perhaps in the first phase of a bifurcated proceeding.[5] The Scoping Memo adopted this

[4] 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 . . . .").

[5] 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.[6]

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 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.[7] 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.[8] Cox,

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

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

[8] *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 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

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.[9] 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."[10]

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).[11] This tendered pleading was not filed by the Docket Office because, as

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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 . . . .").

[9] 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.

[10] ALJ Ruling on Motion to Dismiss at 5 (April 6, 2006).

[11] 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).

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."[12]

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.[13]

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 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

[12] 1 RT 6:20-22 (Tobias).

[13] 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…"

rejected those arguments.[14] This was a significant omission, particularly in light of the timing of events and interrelatedness of issues, because it failed to provide a complete picture to the full Commission of the actual state of the controversy.

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 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:

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[14] 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.

[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).

[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).

> (a) "[t]he foregoing determinations should be made generically in an industry-wide forum and not in the context of individual bilateral complaint proceedings";
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> (b) "[a] complaint proceeding is unsuitable for considering such broad, industry-wide policy mandates";
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> (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
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> (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]

It is unclear why the defendants (along with other telecommunications carriers) did not petition the Commission for a new rulemaking proceeding addressing "warm line" access, a more appropriate procedure that is available under Public Utilities Code Section 1708.5 and Rule 14.7.

Up to this point, defendants had properly utilized the procedures available to them under the Commission's pleading rules. Even the omissions in the May Motion would have become apparent to the Commission once the other parties filed their responsive pleadings. Beyond this point, however, the defendants embarked on impermissible conduct which violates the Public Utilities Code and the Commission's *ex parte* rules.

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

4. Relevant Meetings

Prior to Wednesday, June 14, 2006, Fenikile, who previously worked for the Commission for 14 years and as a personal advisor to a Commissioner for eight years, contacted Lester Wong, personal advisor to President Peevey, and Timothy Sullivan, personal advisor to Commissioner Chong, to schedule a meeting about the pending Rules Motion and the request for generic review of Section 2883 issues. 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 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

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

unaware of either meeting and 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.

5. Discussion

5.1. Elements of an Impermissible Ex Parte Communication

Pursuant to Section 1701.1(c)(4) and Rule 5(e), an *ex parte* communication involves any written or oral communication, between a decisionmaker and "interested person" in a matter before the Commission regarding a substantive (not procedural) issue that does not occur in a public hearing, workshop, other public setting, or on the record of the formal proceeding. Further, Section 1701.2(b) and Rule 7(b) prohibit any *ex parte* communication in an

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[20] 1 RT 34:18-19 (Fenikile).

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

adjudicatory proceeding, such as the pending complaint proceedings involved here.

Consistent with these parameters, there is no dispute that the defendants' meetings with the personal advisors (Holland did not attend either meeting), using a PowerPoint presentation as a basis of discussion, constituted both oral and written communications. There is no dispute that the two complaints and the Local Competition Docket are formal proceedings pending before the Commission, that defendants are "interested persons" as defined under the statute and our rules,[22] and that advisors are considered decisionmakers for purposes of communications involving adjudicatory proceedings.[23] Finally, there is no dispute that these meetings took place privately rather than in a public setting, and outside the official record.

The only remaining element to be determined as to finding a violation of the *ex parte* rules is whether the communications with the advisors involved *substantive issues at issue in the adjudicatory proceeding*.

5.2. Substantive Issues

Neither the statute nor the Commission's rules attempt to enumerate every type of communication that may be considered substantive. However, consistent with its statutory authority, the Commission has defined types of communications that are considered procedural, *i.e.*, nonsubstantive and not subject to the *ex parte* restrictions and reporting requirements. These are defined

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[22] *See also* Section 1701.1(c)(4). Consistent with § 1701.1(c)(4)(A) and (B), Cox and AT&T were parties to the complaint proceeding and had a potential financial interest in the outcome of the proceedings.

[23] *See* Rule 5(f) of the Commission's Rules of Practice and Procedure.

as inquiries regarding schedule, location or format for hearings, filing dates, identity of parties, and other such nonsubstantive information. (Rule 5(e).) The rules also specify that issues concerning category of a proceeding are substantive rather than procedural. (Rule 5(g).)[24]

We find that Defendants' conduct, both on the record and in the private, off-the-record communications at issue here, challenged the appropriateness of the forum in which the Commission was reviewing Section 2883 implementation and compliance issues and effectively acted to challenge the category of the complaint proceedings.

The selection of a forum, embodied in the categorization provisions of Section 1701.1, is consequential. Forum selection significantly impacts the nature, extent, and scope of the Commission's decision making inquiry, and its remedial consequences. An adjudicatory proceeding, such as the complaints, is retrospective and can trigger remedies that address violation of statute, rule, or law. In contrast, a quasi-legislative proceeding is prospective and more policy oriented. In mandating the reporting of *ex parte* communications relating to category, the Commission implicitly recognizes these significant consequences as substantive matters.

AT&T and Cox, both individually and jointly, pursued an aggressive legal strategy designed to secure the commencement of a rulemaking with the hope

[24] Rule 5(g), effective in June 2006, provided: "'Ex parte communication concerning categorization' means a written or oral communication on the category of any proceeding, between an interested person and any Commissioner, any Commissioner's personal advisor, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, or the assigned Administrative Law Judge that does not occur in a public hearing, workshop, or other public setting, or on the record of the proceeding."

that the complaints would ultimately be stayed or dismissed.[25] Their pleading strategy was completely consistent with this overall goal. As the assigned ALJ noted in ruling on the January 27 motion to dismiss, essentially defendants refused to accept the initial categorization of this matter as adjudicatory, although the time for challenging the Commission's determination had passed. Thereafter defendants attempted through a variety of motions to change the nature and scope of the forum in which the Commission would formally review the issues related to their implementation of Section 2883, as raised by UCAN.

There is nothing inherently wrong with such formal advocacy to achieve a desired outcome, assuming it is done forthrightly. Here defendants pursued a convoluted course, seeking to inject the issue in an older outstanding rulemaking. Indeed defendants took all but the most obvious and direct approach: to file a Petition for Rulemaking under Section 1708.5 in order to develop more clearly defined rules, policies, and practices for broader industry-wide implementation of Section 2883 - while allowing the initially filed complaints to be resolved independently.

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[25] For example, 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." 1 RT 25:20-26:2 (Holland); *see also* 1 RT 27:11-16 (Holland), 1 RT 21:23-22.5 (Holland), and 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.

Even assuming such collateral pleading challenges were permissible, a clear violation occurred when -- within weeks of the scheduled evidentiary hearings on the complaints -- defendants opted to pursue the issues in private meetings with the advisors outside the formal record. As noted, forum selection was a substantive issue in these adjudicatory proceedings. Defendants violated Section 1701.2(6) when they held unnoticed private meetings with advisors to discuss this identical forum selection issue under color of a quasi-legislative docket.[26]

We take this opportunity to clarify any potential uncertainty as between the implementing provisions of our rules and the statute. Specifically, Rule 7(f) states that *ex parte* communications regarding categorization are allowed, if reported (Rule 7.1(b)). This language is not in the statute, which strictly proscribes *ex parte* communications in adjudicatory proceedings. We do not view the implementing language of Rule 7(f) as applicable to, or creating an exception to, the adjudicatory prohibition. That said, even if it did act as an exception, it is of no import here because defendants failed to report the *ex parte* communications. As discussed in Section 7 of this Order, these actions further amounted to a violation of UCAN's due process rights because they enabled defendants to engage, without UCAN's knowledge, in *ex parte* communications having a potential detrimental impact on UCAN's adjudicatory claims as well as the integrity of the adjudicatory process.

Finally, apart from matters related to category, there is no dispute that the topic of the unnoticed and unreported meetings was the interpretation of

[26] *Ex parte* communications are unrestricted in quasi-legislative proceedings, which are governed by Section 1701.4(b) and Rule 7(d).

Section 2883, which is also at the center of the complaints. AT&T and Cox stood accused of violating Section 2883 in the complaint dockets. Table 1 (below) reflects that the communications also involved an inextricable overlap of other substantive legal and policy issues that were central to the adjudicatory proceeding and discussed during the private meetings with advisors.

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.
"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) "Section 2883 imposes industry wide obligations. Industry-wide obligations require industry wide solution." (Ex. No. 3 at 15)	"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).
"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)	"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) "[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)
"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)	"[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)
"Number shortages exist throughout the State" (Ex. No. 3 at 14)	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)
"The Commission has not determined or specifically defined what exclusions would apply in providing access to 911 emergency service." (Ex. No. 3 at 12)	"[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 service…." (AT&T Motion to Dismiss 6)

5.3. Local Competition Docket v. Adjudicatory Proceeding

Defendants who participated in the off the record meetings seek to cordon off their discussions, in an effort to draw a distinction between issues discussed regarding the Local Competition Docket where *ex parte* communications are permissible, and issues contested in the adjudicatory proceeding where discussion would be prohibited. 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.)

In our view, this is an artificial distinction. As indicated by Table 1, regardless of how carefully one might attempt to characterize the issues discussed, it is impossible to avoid the fact that defendants' request in the Rules Motion was inextricably interrelated with the categorization, legal, and policy issues at issue in the complaint proceedings. The Rules Motion itself contained many references to the pending complaint proceedings, as delineated on pages 8 - 9. For instance, in the adjudications, the Presiding Officer had rejected defendants' efforts to dismiss the complaints in favor of a rulemaking; one of the PowerPoint slides 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]

6. Restraints on Communicating with Commission

Defendants urge that their meetings 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, 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."[28] 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

[27] 1 RT 33:27-34 (Fenikile).

[28] AT&T Opening Brief at 12.

moving parties, between the adjudication and the requested rulemaking. The overlap of people involved here , 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 Motion and Stay Motion, 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 the defendants' strategy to defeat the adjudications as a main, if not paramount, goal.

These defendants and other major utilities are far from powerless in getting their views communicated to Commissioners and their advisors. In this instance, they 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. Joined by other telecommunications carriers, they could have petitioned for a new, freestanding rulemaking under Section 1708.5 and Rule 14.7. They could have sought to arrange for such discussions in an open and public forum. These methods would have allowed Cox and AT&T to communicate their views and perceived problem areas to Commission offices in a permissible manner. Instead, by resorting to private meetings with advisors, the communications at issue evidence a strategy which would almost certainly act to disadvantage UCAN in the adjudications.

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.

Contrary to defendants' suggestion, it is not necessary to rely on any broad definition of "interested person" in order to find defendant's meetings within the scope of an impermissible communication under the rules. As previously indicated, defendants fit squarely within the statutory definition under Section 1701.1(c)(A) as participants and parties in both the adjudicatory proceeding and Local Competition Docket. Additionally, consistent with Section 1701.1(c)(B) they have a potential financial interest in the outcome of the adjudicatory proceedings. By this Order, we do not intend to establish any standard by which all communications of the nature referenced by the defendants would be in violation of our Rules. In instances such as this, a determination must be guided by the actual events and specific facts involved. Thus, in addition to the above, pertinent facts in this case include:

- The *ex parte* communication occurred in close proximity in time to a pending adjudication.
- There was 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 was reasonably foreseeable that granting the relief requested in the *ex parte* communication would have detrimental consequences to parties in the pending adjudication who were not present during the *ex parte* communication.

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 impart and the context in which it will be presented. Advisors and Commissioners, who may be asked to participate in such meetings or conversations, attempt to be responsive to these overtures but they cannot be expected to foresee all the possible linkages of the formal proceedings that may be touched upon by interested persons in these meetings. The duty to foresee

potential improprieties rests with the parties seeking the meeting, especially when they are represented by sophisticated 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.)

Further, as we have mentioned, 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 if it occurs in one of these public settings. 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 or parties and nonparties to communicate with Commissioners on matters of importance and the protection for parties' substantive rights in adjudicatory proceedings.

7. Due Process Concerns

We now turn to the due process 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."[29] These due process considerations are present even in a rulemaking proceeding, if there is a detriment to a party's adjudicatory claims.[30]

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 administration and are completely appropriate so long as they do not frustrate judicial review or raise serious issues of fairness."[31]

The facts of this case do not evidence that the communications were consistent with these principles of impartial judicial review and fairness. As discussed, the communications were carried out in connection with the defendants' overall legal strategy to ultimately achieve a stay or dismissal of the

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[29] 55 Cal. App. 4th at 1319.

[30] *See*, *e.g.*, Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959) involving a Federal Communications Commission (FCC) 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. The FCC claimed that because the proceeding was a rulemaking, the attempts to influence the decisionmakers 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." (*Id.* at 224.) The court also indicated, "Interested attempts 'to influence any member of the Commission…except by recognized and public processes' go 'to the very core of the Commission's quasi-judicial powers…" (*Id. quoting* Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 56 & 67 (D.C. Cir. 1958).

[31] Louisiana Ass'n of Indep. Producers v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992).

complaints. A similar opportunity to influence the outcome did not exist for parties who were 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. As a consequence, the communications had the potential to distort the ultimate outcome of the adjudications and constituted a violation of UCAN's due process rights. Law professor Michael Asimow describes the harm such *ex parte* contacts threatens to adjudicatory processes where due process concerns should be foremost:

> 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.[32]

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

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

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 Section 1701.2(b) and Rule 7(b) of the Commission's Rules of Practice and Procedure.

8. 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 have violated the *ex parte* provisions of state law and Commission rules. The impermissible conduct was the *ex parte* communication with the advisors of Commissioners 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 financial resources 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* proceedings. 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.

9. Comments on Revised Proposed Decision

The revised 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 (Sept. 2006). 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. These comments were addressed in the proposed decision identified as Item 37 on the Commission's January 25, 2007, agenda.

This revised proposed decision was also mailed to the parties in accordance with Section 311 and Rule 14.2(a). Comments were received from Cox and AT&T on May 29, 2007, and from Margaret Tobias on May 30, 2007. Margaret Tobias filed a Motion for Leave to Late-File her Comments on the revised proposed decision due to unavoidable computer problems experienced by her attorneys on the filing date. No party opposes this motion and we grant it in order to fully consider Tobias' comments.

On May 29, 2007, Cox and AT&T also filed a Joint Motion for Oral Argument before the full Commission concerning the revised proposed decision. The motion was filed pursuant to Rules 11.1(a) and (b) and 13.13(a) of the

Commission's Rules of Practice and Procedure (2006 version).[33] By joint ruling, the assigned Commissioner for these *ex parte* matters and the Presiding Officer denied this motion.

While any party may file a motion under Rule 11.1 seeking the Commission to take specific action, the decision whether to hold an oral argument under Rule 13.13(a) is discretionary with the Commission, the assigned Commissioner or Administrative Law Judge. Having allowed ample opportunity for public review and comment on the original, and then the revised proposed decision, we do not believe an oral argument before the full Commission is necessary to our decision making process in this case. Therefore, we concur in the denial of the Cox and AT&T Joint Motion requesting oral argument.

We proceed now to consider the comments. All of the commenting parties argue that the two meetings in question occurred in reliance on the Commission rules governing quasi-legislative proceedings wherein *ex parte* communications are allowed without restrictions (Section 1701.1(4)(b)), or reporting requirement (Rule 7(d)). They assert that the communications occurred in a rulemaking and not in the adjudications. They assert that the participants agreed not to discuss the complaint proceedings alleging violations of Section 2883, and that the meetings went forward on that basis. (AT&T Comments, p. 1.) The parties also express concern that the revised proposed decision imposes new obligations on

[33] The May 29 Motion also cites Rule 16.3(a)(3) which governs requests for oral argument by a party who has filed an application for rehearing of a Commission decision where the appeal presents legal issues of exceptional controversy, complexity, or public importance. However, we are not dealing with a decision on rehearing, so the citation is inapposite.

parties in rulemaking proceedings to be aware of all substantive issues in other adjudicatory cases that might be affected by communications made in the rulemaking proceeding, leaving parties to guess (at the risk of incurring penalties) which communications are prohibited and which are not (Margaret Tobias Comments, p. 9).

The parties also assert that they did not urge the Commission to take any action in the complaint cases during the two meetings in question; rather they urged the Commission to conduct a separate rulemaking (Cox Comments p. 3). The parties reject the revised proposed decision's treatment of the *ex parte* meetings "as if" they had occurred in the complaint proceedings, arguing that there was no improper subject matter overlap between the relief sought in the Rulemaking and the issues in the complaint cases (Cox Comments, p. 7).

Our decision is based on the narrow but compelling set of facts presented in these proceedings. Contrary to the commenter's assertions, we are not promulgating new *ex parte* rules. We are interpreting existing rules. We reject the contention that we are creating a rule that puts parties at peril whenever they wish to have *ex parte* communications in quasi legislative proceedings where related complaint proceedings are pending. The unique facts of these proceedings are what drive us to our conclusion today that *ex parte* violations occurred. AT&T and Cox were dissatisfied with the forum in which their compliance with Section 2883 was being reviewed. Within a short period of time and anticipating an evidentiary hearing, they pursued several unsuccessful and alternative pleading approaches to have the forum for compliance review changed from an adjudicatory context (retrospective review) to a rulemaking context (prospective review) although they had shown no interest in rulemaking in the decade since Section 2883's enactment. Because of the pending

adjudications, important due process rights of an absent party were jeopardized.[34] In view of the chronology set forth in this decision and the issues discussed in the meetings, defendants' argument that the communications were limited to a rulemaking proceeding elevates form over substance and would license the very conduct we seek to proscribe here: communications nominally made in one proceeding but designed to affect substantive outcomes in pending adjudications.

As stated earlier we regard the forum selection dispute as a substantive issue in adjudicatory proceedings pending before this Commission. For that reason, AT&T's and Cox's oral and written communications with decisionmakers on this forum selection issue in a non-public setting constituted *ex parte* communications (Section 1701.1(c)(4)). Further, we find that these *ex parte* communications implicated substantive issues in both the rulemaking and the adjudicatory dockets. Standing alone in the rulemaking proceeding, the *ex parte* communications would have been permissible under Section 1701.4(b), as the commenting parties note. However, these *ex parte* communications did not stand alone: the dispute over forum selection and the interpretation of Section 2883 overlapped and linked the rulemaking and the complaints. For this reason,

[34] AT&T comments that UCAN's due process rights were not affected by defendants' conduct. The defendants' communications risked compromising the Commission's impartiality in its adjudicatory process. *See* Golden Day Schools, Inc. v. State Dep't of Education, 83 Cal. App. 4th 695 (2d Dist. 2000) (child care contractor with the state had a due process liberty interest entitling it to a hearing on justification for the debarment before an impartial arbiter or tribunal); *cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenant constitutes Equal Protection violation).

the communications also occurred in the adjudicatory dockets, where they were prohibited under Section 1701.2(b). We so find.

10. Assignment of Proceedings

John A. Bohn is the assigned Commissioner on issues addressed in the Proposed Interim Decision on Alleged Ex Parte Violations. Michael R. Peevey is the assigned Commissioner on all remaining issues in both proceedings. 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 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.

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 Motion and Stay Motion, 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. The selection of a forum, embodied in the categorization provisions of Section 1701.1, is consequential, as it determines the nature, extent, and scope of the decision making inquiry and the remedial consequences of that inquiry. The Commission recognizes the substantive nature of private, off–the-record communications between parties or interested persons and decisionmakers on forum selection controversies by requiring such communications be reported under Rule 7.1(b).

37. Defendants AT&T and Cox failed to report their June 14 and 15, 2006, private, off-the-record oral and written communications with advisors, leaving UCAN in the dark about the fact that such communications had occurred.

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.

40. The normal statutory deadline for resolving these proceedings was previously extended to July 12, 2007. An additional extension of time is required because of the Commission's consideration of the impermissible *ex parte* communications determined in this proceeding.

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 Section 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. The meetings on June 14 and 15, 2006, dealt with the question of AT&T's and Cox's preferred forum to address questions of the meaning and interpretation of Section 2883, issues embodied in the categorization provisions of Section 1701.1, and as such recognized by the Commission as substantive matters. These specific substantive issues were matters also pending in the adjudications in which AT&T and Cox were party litigants.

8. Defendants AT&T and Cox failed to report these *ex parte* communications in violation of the Commission's Rules of Practice and Procedure.

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 concerning categorization and other substantive issues in the pending adjudications (C.05-11-011 & -012), in violation of Public Utilities Code Section 1701.2(b) and Rule 7(b), Rules of Practice and Procedure, by AT&T and by Cox.

15. By engaging in impermissible *ex parte* communications, AT&T and Cox violated Section 1701.2(b), Rule 7(b), and the Scoping Memo and ruling issued by the assigned Commissioner and Administrative Law Judge in each proceeding.

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

17. 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.

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

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

20. Effectively immediately, the statutory deadline imposed by Section 1701.5(a) should be extended for an additional 90 days. Pursuant to Rule 14.6(c)(4) (2006 version), the otherwise applicable period for public review and comment on this extension is waived.

I N T E R I M 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 to date, not exceeding $7,500, are assessed, jointly and severally, against AT&T and Cox (and chargeable against shareholders). 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 Case (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. C.05-11-011 is returned to the Presiding Officer for further proceedings and remains open.

6. The statutory deadline for completing these proceedings is extended until October 18, 2007.

This order is effective today.

Dated July 12, 2007, at San Francisco, California.

DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

I will file a dissent.

/s/ MICHAEL R. PEEVEY
President

I will file a concurrence.

/s/ TIMOTHY ALAN SIMON
Commissioner

Commissioner Simon, concurring:

I concur that the actions of Cox and SBC, now AT&T, constitute a violation of the prohibition on ex parte communications in this proceeding. Despite the fact that I agree with the outcomes reached in today's order, I wish to bring a special focus to some of the complexities that this matter presents to the Commission.

First, the recommendation of Cox and AT&T that the Commission open a rulemaking proceeding to set policy and rules concerning "warm-line" telecommunications services that reflect current technologies and market conditions – the communication that led to this fine – is a reasonable recommendation. In general, I do not believe that a complaint case involving one or two parties is the appropriate forum for setting policies that will apply to an entire industry, including companies who cannot make their voice heard in the complaint proceeding. As a consequence, parties should note that I will review with deep skepticism any outcomes of this complaint proceeding that move beyond the facts of this case and attempt to fashion policies for the entire state.

Second, the Commission's ex parte rules and statutory requirements are very technical. Commissioner Peevey's view that the custom and practice here at the Commission have made it difficult to draw a clear line separating a permissible communications on procedure from an impermissible communication concerning the substance of a complaint is one that I share. Given the technical nature of our ex parte rules and the lack of a bright line and enforcement procedures that can ensure that the current rules are followed, it is difficult to see the transgression by Cox and AT&T as anything but a technical violation of very technical rules.

Nevertheless, I agree that in the matter before us a violation of ex parte rules has occurred. I therefore support the findings and sanctions reached here. It is my hope that today's actions will cause all parties in our proceedings to pay closer attention to the ex parte rules and communications.

/s/ TIMOTHY A. SIMON
Timothy A. Simon
Commissioner

Pres. Michael R. Peevey, dissenting on Interim Decision on Alleged Ex Parte Violations:

The decision finds that representatives of AT&T California (AT&T) and Cox California Telecom (Cox) violated our *ex parte* rules, and imposes a fine of $40,000 on each carrier, based on the seriousness of the violations.

I voted "no" on this decision for the following reasons.

1. Even if AT&T and Cox violated the *ex parte* rules, the size of the penalty assessed to each carrier is unsupported by any Commission precedent, and is wildly disproportionate to other sanctions we have imposed for *ex parte* violations.

2. Secondly, the decision makes abundantly clear that this Commission needs to do more work to make parties and its own staff aware of the potential consequences of *ex parte* violations before imposing severe penalties like the ones proposed in this order.

In support of these points, let me review the **single case** cited in the decision as the basis for the proposed fines against AT&T and Cox.

In 2002, Pacific Bell and WorldCom, Inc. (WorldCom) engaged in *ex parte* contacts involving all five Commission offices during the "quiet time" associated with a rate-setting deliberative meeting. The Commission reasoned a "severe" penalty was in order because the violations were so blatantly clear, and because they occurred very close to the end of the decisional process, where *ex parte* violations can do the most harm to the due process rights of others. Even under these circumstances, the total fine assessed against Pacific Bell was $22,000 and against WorldCom was $1,000.

By contrast, it is unclear from the record in the matter before us whether AT&T and Cox were deliberately violating the Commission's *ex parte* rules. From the outset of the complaints filed by UCAN, these two carriers made clear that they believed the Commission needed to set rules for "warm line" access in a generic proceeding, and should not go forward with hearing and deciding the complaints, which are clearly adjudicatory matters, until these rules had been adopted. UCAN, the Commission and other parties were aware of this position due to numerous pleadings filed in the complaint cases, the local competition

docket, and elsewhere. The types of proceedings envisioned for adoption of generic rules would certainly not be classified as adjudicatory, and therefore the carriers might reasonably assume that the meetings with Commissioner advisors were appropriate under our *ex parte* rules. Furthermore, as noted on page 17 of the decision, the representative from AT&T took affirmative steps to comply with these very rules. In each of the two meetings, he announced that the discussion was to be about a generic rulemaking regarding Section 2883 in the local competition docket, and, specifically **"I cautioned all in attendance that we were not there to, and could not discuss substantive issues of UCAN's complaint proceedings…"**

While none of our advisors were asked to testify for the record, there is no indication that the declarations of the AT&T representative were untruthful. If a violation occurred, I place it closer to the "inadvertent error" category than the "deliberate violation" category. Moreover, rather than occurring toward the end of our decision-making process, the meetings here occurred before evidentiary hearings had even begun. Thus, in contrast to the 2002 case, the problematic contacts here occurred during the initial procedural portion of the UCAN complaint cases, rather that immediately before the Commission is poised to decide the pending UCAN complaints.

Even if one were to allow that an incidental violation of our *ex parte* rules may have occurred, the fines imposed by the PD are both excessive and unreasonable. Based on the facts of the 2002 case involving Pacific Bell and WorldCom, the fines in this matter should be less than $20,000 per carrier, and not more. In our 2002 decision, we weighed mitigating factors before assessing monetary penalties. In the proposed decision, there is **no** discussion of mitigating factors, such as the carriers' obvious efforts to comply with our rules, the Commissioners' advisors raising no objections in either of the meetings, the fact that the alleged violations occurred early in the complaint cases, or the complete cooperation of the carriers after concerns about the possible violations were raised.

I am not satisfied with the enforcement process we have for assuring adherence with our *ex parte* rules. Some violations are clear, others are not. Some are cured with a late-filed notice, others with a mere apology and a promise to do better the next time. It is in this context that, all of a sudden, somebody feels it is time to make a point by concocting a decision imposing a

very significant penalty for what appears to me to be an unintended violation. Just to keep all parties guessing, as to the "message" sent by the proposed fines, the decision makes clear at page 20 that "…we do not intend to establish any standards by which all communications of the nature referenced by defendants would be in violation of our rules."

Until the Commission or its staff produces such standards, I will continue to be very skeptical of arbitrary outcomes such as the ones in this decision.

/s/ MICHAEL R. PEEVEY
Michael R. Peevey, President

San Francisco, California
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