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Time to modernize federal and state *ex parte* rules

COMMENTARY

BY WILLIAM S. SCHERMAN
AND JENNIFER C. MANSH

Like the swallows of Capistrano, every few years allegations of improper *ex parte* communications come back to roost at FERC or a state utility commission. The cases are familiar. Grand Gulf. Iroquois. Williamsport. And most recently, the California Public Utilities Commission (CPUC). The list could go on. And this comes on the heels of widespread concerns that the FERC's *ex parte* rules are unfair to investigation targets and hinder the settlement of FERC enforcement cases.

At the same time, the single biggest complaint we hear from FERC and state commissioners, especially those new to their agencies, is how isolated they are by *ex parte* rules that stifle their access to what is actually going on in the complex energy markets they regulate. Indeed, FERC and state commissions often engage in rule and policy-making in contested proceedings where *ex parte* rules prohibit them from discussing important policy issues with the relevant parties. Instead, decision-makers must sift through a complex set of facts from a record simply certified up from below.

At a time when everyone wants greater transparency and efficiency from our government, FERC and many state commissions deserve credit for holding technical conferences on major policy issues. But antiquated *ex parte* rules even hinder these conferences, as seen during FERC's recent Clean Power Plan conferences, where presenters are forced to shy away from important issues because they relate to pending cases.

We propose, as Princess Anna of Frozen

fame said, to "open up the gates" to the kingdom and let the sunshine in and to do so in a way that will streamline the administrative process and hopefully improve agency decision-making.

What Are *Ex Parte* Communications Anyway?

The term "*ex parte*" means "on one side only." An *ex parte* communication occurs when one party communicates directly with a decision-maker about a case-related topic without the other party's knowledge and with no record.

Ex parte communications are generally not permitted in contested legal proceedings. This makes sense. Prohibitions on *ex parte* communications are meant to protect litigants from secret discussions and perceptions of unfairness. It isn't fair, for example, for a plaintiff to communicate alone with the judge, without any record of what was said and without allowing the defendant to respond.

Such prohibitions are relatively easy and straightforward to implement in a court setting. But, as we have seen, the same is not true when a regulatory agency is simultaneously acting in an adjudicatory and rule-making capacity, making important public policy pronouncements. These so-called "rulemakings-by-adjudication" are particularly challenging because commissioners are prohibited from directly communicating with relevant parties about the implications of the policies being decided.

Current *Ex Parte* Rules

The *ex parte* rules at FERC, like most regulatory agencies, currently prohibit parties that are participating in a contested proceeding from having "off-the-record communications" about matters "relevant to the merits" with FERC commissioners (and their

personal staff) or any other employee of the commission that could reasonably be expected to advise the commission's decision-making process in that proceeding. This also applies to administrative law judges hearing contested cases.

Outside of the formal hearing process, this policy is burdensome and confusing to apply in practice. Topics in contested proceedings frequently overlap with major public policy issues before the commission. FERC's *ex parte* rules thus often prohibit the people who have the best information available from sharing highly relevant information with decision-makers.

The Iroquois controversy started this way. In that case, several companies sought to update FERC on the need for more natural gas and gas pipelines in the Northeast (Sound familiar?). But, because of the commission's *ex parte* rules, these lawful communications became a lightning rod for those opposed to more natural gas pipelines. The needless procedural wrangling diverted FERC away from the substance of key public policy issues and needlessly added years to the process. This one example alone highlights how imprudent it is to leave an agency's most important decision-makers in the dark and deny them critical information on pressing public policy issues.

In enforcement cases, FERC's current *ex parte* rules allow enforcement staff unfettered and confidential access to commissioners and decisional staff throughout the course of an investigation (until a show cause order is issued). Similarly, during the settlement process, enforcement staff may discuss their views of the case and settlement position directly with the commission whereas investigation targets are denied similar rights. Not surprisingly, investigation targets often feel like the proverbial car buyer when the sales person says he has to check with his manager. The process is one-sided and unfair. Reasonable settlements are hindered as a result.



Time to modernize federal and state *ex parte* rules... (Continued from p. 1)

A Proposal to Modernize and Simplify Outdated Agency *Ex Parte* Rules

We want agency *ex parte* rules to ensure that commission decision-makers and advisors have sufficient flexibility to obtain the information needed to effectively oversee the energy industry, while maintaining the integrity and fairness of the process. Modernized *ex parte* rules must be easier to comply with and enforce, leading to more open and transparent proceedings.

We recommend that the *ex parte* rules be revised as follow:

- Parties may engage in *ex parte* communications with FERC commissioners and decisional staff in contested proceedings so as long as each commissioner and/or staff member that participated in the discussions submits into the official record, within one business day:
 - Copies of any written presentations that were provided, and

- A summary of any oral discussions that occurred. Such summary should utilize a standard form, and give interested parties sufficient notice of the issues discussed so that a meaningful response can be made.
- FERC's current *ex parte* rules should continue to apply to:
 - Commissioners (and staff) from the time a sunshine notice is issued until the order in the contested proceeding is issued (typically a seven-day period), and
 - FERC administrative law judges from the time the proceeding is set for hearing through the issuance of the initial decision.

This approach is similar to the *ex parte* rules used by the Federal Communications Commission and can be tailored to fit the FERC's work load. This proposal would be far simpler to apply and would promote greater transparency than FERC's current

system.

In the Twitter era, where communications already occur in ways never anticipated, wouldn't it be better if more open communications to regulators were generally permitted and reported in an open and transparent manner? Given the stakes, wouldn't it be better if regulators had more information rather the less? And wouldn't it be better if a sitting commissioner would never have to admit again, as a CPUC commissioner just did, that he "didn't know the [*ex parte*] rules" and had "screwed up" after engaging in prohibited *ex parte* communications?

—William S. Scherman, a former general counsel at FERC, is chair of the Energy, Regulation and Litigation practice group at the law firm of Gibson, Dunn & Crutcher LLP. Jennifer C. Mansh is an associate in Gibson Dunn's Energy, Regulation and Litigation practice group.