

Limitations on Ex Parte Communications in New England

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Agenda

- Materials Overview
- Sources of Law Governing Ex Parte Communications
- Application of Ex Parte Rules in New England
- Case Studies for Discussion
- Questions

Disclaimer

- This presentation is a high-level, multi-state overview
- Please read the statutes and rules for your jurisdiction carefully

Materials Overview

- Package of Materials is Organized by State
- Includes
 - Statutes and Regulations Governing Ex Parte Communications
 - Code of Professional Responsibility Excerpts
 - Code of Judicial Conduct Excerpts

Sources of Law Governing Ex Parte Communications

- Constitutions
 - Due Process Clause
- Statutes
 - State APA
 - State Statutes Creating/Governing Public Utility Commissions
- Regulations
 - Agency Rules of Practice and Procedure
 - Must Comply with APA
- Professional Codes
 - Attorneys: Rules of Professional Responsibility
 - Commissioners: Rules of Judicial Conduct (Guidance)

State Statutes

- APA For Your State
- Statutes that Create/Govern Public Utility Commissions
 - E.g., New Hampshire RSA 363:12 (Ethical Conduct Required):

In addition to any other type of behavior or activity of a commissioner that is proscribed by RSA 363, a commissioner shall conduct himself and his affairs in accordance with a code of ethics that shall include, but not be limited to, the following elements:

 - I. Avoidance of impropriety and the appearance of impropriety in all his activities;
 - II. Performance of his duties impartially and diligently;
 - III. Avoidance of all ex parte communications concerning a case pending before the commission;
 - IV. Abstention from public comment about a matter pending before the commission and require similar abstention on the part of commission personnel;

Agency Regulations

- Regulations in New England generally share core concepts
 - Parties and their representatives cannot communicate with Commissioners and advisors about the proceeding
 - Generally, hearing officers can be contacted about procedural issues
- E.g., Rhode Island:
Section 1.2 (The Commission)
(h) Ex Parte Communications.
 - (1) Except as permitted below, no person who is a party to or a participant in any proceeding pending before the Commission, or the person's counsel, employee, agent, or any other individual acting on the person's behalf, shall communicate ex parte with any Commissioner about or in any way related to the proceeding, and no Commissioner shall request or entertain any such ex parte communications.
 - (2) The prohibitions contained above do not apply to a communication from a party or participant or counsel, agent or other individual acting on the person's behalf, if the communication relates solely to general matters of procedure or scheduling and is directed to the Clerk or the Commission Counsel.

Agency Regulations (cont'd)

- Ex parte communications are generally allowed between Commissioners and staff advisors
 - E.g., CT PURA (Sec. 16-1-28):

... neither the commissioners nor any member of the Authority staff designated as a presiding officer shall communicate directly or indirectly with any person or party concerning any issue of fact or law involved in any contested case that has been commenced under these rules, except upon notice and opportunity for all parties to participate. The Authority staff member designated as presiding officer and the commissioners may severally communicate with each other ex parte and may have the aid and advice of such members of the Authority staff as are designated to assist them in such contested case.

Application of the Ex Parte Rules

- Type of Proceeding
- Role of Staff in Proceeding
- Stage of Proceeding

Type of Proceeding

- Any Proceeding/Adjudicative Proceeding
 - Jurisdictions Differ on Application of the Ex Parte Rule
 - Rhode Island (Rules of P&P Section 1.2(h)(1)): “no person who is a party to or a participant in any proceeding pending before the Commission,”
 - Connecticut: (Sec. 16-1-28): “neither the commissioners nor any member of the Authority staff designated as a presiding officer shall communicate directly or indirectly with any person or party concerning any issue of fact or law involved in any contested case”
- Not always clear whether/when proceeding is contested/adjudicative
- Rulemaking
 - Some Jurisdictions Apply Ex Parte Rule in Ground Rules

Role of Staff in Adjudicatory Proceedings

- Advisory Staff (Non-Party)
 - Advise Commissioners
 - Develop record
 - Provide recommendations (published/unpublished)
- Advocacy Staff (Party)
 - Typically advocacy is performed by separate entity in New England (e.g., OPA, OCA, AG)
 - “Prosecutor” may be appointed in enforcement proceedings

Stage of Proceeding

- Pre-Filing Meeting
 - New England states generally do not allow today
 - Quasi-judicial tribunal
- Settlement
 - Advisory staff communications with Commissioners can be tricky when advisors are participants in settlement discussions
 - Staff-Party communications
 - Staff-Commissioner communications

Professional Codes - Attorneys

- New England States Generally Follow the Model Code

- E.g., Massachusetts Rule 3.5 (Impartiality and Decorum of the Tribunal)

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

Professional Codes - Commissioners

- Code of Judicial Conduct May Be Used as Guidance
 - E.g., Connecticut Rule 2.9 (Ex Parte Communications; excerpt):
 - (a) A judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
 - (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
 - (A) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
 - (B) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond.
- Guidance is available in non-binding authorities and resources

Case Study #1

Behind-the-meter solar power is subject to strict limits in your state, but those who invest are getting full retail credit for their net exports to the grid. The solar power industry lobbies the state legislature to lift the cap on such distributed generation. The legislature instructs the public utilities commission in your state to open an adjudicative proceeding to come up with a new compensation regime that will allow the solar industry to thrive without undue cross-subsidization.

In addition to the state's electric utilities, the proceeding attracts an unusually large group of intervenors – solar companies based both in-state and elsewhere, nonprofits organizations whose missions include addressing climate change and promoting renewable energy, a municipality, an independent ratepayer advocate and the governor's energy office. The state's official ratepayer advocate also enters an appearance.

After the submission of prefiled written testimony and lengthy, contentious discovery, settlement negotiations ensue. Although the procedural schedule includes several formal settlement conferences, weeks before that, talks begin outside of the Commission's space. Commission Staff is invited to participate, but declines.

At the last of two formal settlement conferences, it becomes apparent the case will not be settled in its entirety. Instead, two separate settlement agreements are filed. They have many elements in common but differ on the amount of compensation for net exports to the grid and the manner in which the amount of such exports will be calculated. One coalition consists of electric utilities, ratepayer advocates and the governor's energy office. The other coalition consists of the solar industry representatives, the municipality, and the nonprofit organizations. Unsurprisingly, the latter's terms are more favorable to the solar industry and its customers than is the settlement proposed by the utilities and ratepayer advocates.

Can and, if so, should the Commissioners play any role in helping the parties find settlement terms that would be acceptable to all?

Can and, if so, should employees of the PUC attempt to bridge the gap between the two settlement agreements by suggesting a compromise agency staff would sign?

If PUC staff members participate in the settlement discussions, should there be any limitations on their ability to advise the PUC Commissioners on how to resolve the case once it is under advisement to them?

Assuming the two rival settlement agreements are ultimately presented to the Commissioners unchanged, to what extent should the PUC treat the case as one that has been settled as opposed to fully contested?

Case Study #2

A company that specializes in providing gas distribution service in rural areas is seeking to expand to a new state and it has narrowed its decision to two states. The company can only invest in one of the two states, and your state is one of the finalists. The company prefers a particular rate design when starting out in a new jurisdiction, but your state has a 20 year-old Commission decision that criticized a similar rate design approach. Since that decision, the Commissioners who issued it have retired, shale gas has become prolific and your Legislature has enacted a statute that expresses a state energy policy that promotes the development of natural gas availability to underserved areas of the state.

The company contacts your Commission to ask for a meeting. As the Commission's General Counsel, your Chairman stops by your office to ask your advice on whether to take the meeting.

Case Study #3

A farmer who owns acreage that is not suitable for cultivation seeks to secure a contract with a solar developer to install a 10 MW solar field that will generate a stream of income for the farmer and generate renewable energy for the town. The field in question is situated on a hillside above the town center. The proposed project is heatedly contested by the town's residents due to the potential visibility of the solar panels from a variety of locations within the town itself and its impact on home values.

The application to site the solar field has been filed with your public utilities commission and the review process is underway. The parties are showing no interest whatsoever in seeking a compromise settlement arrangement for the siting of the field. A small group of residents have hired an attorney for joint representation. Several other residents are participating *pro se*. Not all of the protesting residents have intervened in the case.

What role can the Commissioners at your commission play in helping to resolve the impasse?

What is the Commission staff's role?

Can staff assigned to the case mediate the dispute?

Questions?

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