

Date of Hearing: March 22, 2023

ASSEMBLY COMMITTEE ON UTILITIES AND ENERGY

Eduardo Garcia, Chair

AB 1068 (Valencia) – As Introduced February 15, 2023

**SUBJECT:** Public Utilities Commission: ex parte communications

**SUMMARY:** Exempts certain meetings from ex parte rules at the California Public Utilities Commission (CPUC), specifically by removing the three day notice requirement for meetings with commissioners' staff, removing the oral ex parte prohibition during quiet periods for meetings with commissioners' staff, and removing the written ex parte prohibition during quiet periods.

**EXISTING LAW:**

- 1) Requires the CPUC to determine whether each proceeding is a quasi-legislative, an adjudication, a ratesetting or a catastrophic wildfire proceeding. (Public Utilities Code § 1701.1)
- 2) Defines ex parte communications as any oral or written communication between a decisionmaker and an interested person that does not occur in a public hearing, workshop or other public proceeding. Specifies that decisionmakers, for purposes of ex parte communications, shall include the personal staff of a commissioner if the staff is acting in a policy or legal advisory capacity. (Public Utilities Code § 1701.1)
- 3) Requires the CPUC to establish a “quiet period” in a ratesetting or catastrophic wildfire proceeding during the three business days before the CPUC’s schedule vote on a decision, during which no oral or written ex parte communications are permitted and during which the CPUC is authorized to meet in closed session. (Public Utilities Code § 1701.9)
- 4) Prohibits individual ex parte meetings during the three business days before the CPUC’s scheduled vote on a decision in a ratesetting proceeding. (Public Utilities Code § 1701.3)
- 5) Authorizes the CPUC to meet in closed session during the quiet period of a ratesetting case and at any point during the pendency of the catastrophic wildfire proceeding, as specified. (Public Utilities Code § 1701.8)

**FISCAL EFFECT:** Unknown. This bill is keyed fiscal and will be referred to the Assembly Committee on Appropriations for its review.

**BACKGROUND:**

*CPUC proceedings* – CPUC proceedings are formal judicial processes used to evaluate a variety of requests related to the industries that the CPUC regulates. A proceeding can be a request,

complaint, or application, or it can be a CPUC initiated investigation or rulemaking. The purpose of a proceeding is to establish an evidentiary record on which to base CPUC decisions. Statute directs the CPUC to identify each of its proceedings according to the following categories:

- Adjudication – enforcement cases and complaints, except those challenging the reasonableness of rates or charges.
- Quasi-legislative – those that establish policy, including, but not limited to, rulemakings and investigations that establish rules affecting an entire industry.
- Ratesetting – cases in which rates are established for a specific company.
- Catastrophic Wildfire – those involving recovery of costs related to damages associated with a wildfire caused by electric investor-owned utility (IOU), as added and defined by AB 1054 (Holden, Chapter 79, Statutes of 2019).

*Ex parte communications* – Ex parte communications are oral or written communication about an issue before the CPUC that is stated or provided outside the formal proceeding process. Ex parte communications include communications that are one-way from a decisionmaker to an interested person. One of the primary purposes of placing restrictions on ex parte conversations is to prevent a party from gaining an unfair advantage in a contested matter. Violations of ex parte rules are subject to fines and other penalties. There are many statutory and CPUC rules and restrictions governing ex parte communications within proceedings, and are specific to the different proceeding types:

- Adjudication – ex parte communications are prohibited.<sup>1</sup>
- Quasi-legislative – ex parte communications are permitted and not subject to disclosure requirements, except if the CPUC determines otherwise.<sup>2</sup>
- Ratesetting and Catastrophic Wildfire – ex parte communications are permitted, subject to certain disclosures and limitations. Ex parte communications are forbidden from being part of the evidentiary record of the proceeding. Ex parte communications are also forbidden during the three business days before the CPUC’s scheduled vote on a decision, known as a “quiet period.” Parties are required to file advanced notice of a planned ex parte meeting—if allowed in the proceeding—three working days’ prior to the meeting.<sup>3</sup> Following an ex parte communication, parties and decisionmakers are both required to file a notice within three days specifying the date, time, location, type of communication, decisionmaker and party involved, topic and a substantive description of the communication, and provide a copy of any written material shared.<sup>4</sup> The CPUC is prohibited from taking a vote on a matter if a prohibited ex parte communication occurs

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<sup>1</sup> PUC § 1701.1 (e)(3) and PUC § 1701.2 (g)

<sup>2</sup> PUC § 1701.4 (c)

<sup>3</sup> PUC § 1701.3 (h)

<sup>4</sup> PUC § 1701.1 (e)(3)(A)

until all parties have been provided a reasonable opportunity to respond to the communication.<sup>5</sup>

*Quiet period* – A “quiet period” is a period, in a ratesetting or catastrophic wildfire proceeding, during which no oral or written ex parte communications is permitted and the CPUC is authorized to meet in closed session. Recent statutory changes mandate that the CPUC establish a quiet period three business days before the CPUC’s scheduled vote on a decision in a ratesetting or catastrophic wildfire proceeding.<sup>6</sup> The quiet period expires at the end of the CPUC meeting for which the matter was scheduled to be voted upon. If the CPUC holds the decision to a future voting meeting, it shall establish a subsequent quiet period in advance of the next voting meeting. Statute requires that if the CPUC holds a closed session meeting during the quiet period it must provide a public notice three days in advance.<sup>7</sup>

## COMMENTS:

- 1) *Author’s Statement.* According to the author, “Good government practice should allow a transparent process for interested stakeholders to “petition the government” at any time. California Public Utilities Commission (CPUC) decisions affect every Californian. Given its impactful role, open and transparent communications between the CPUC and the public are constructive and necessary. AB 1068 will provide greater accountability and transparency to the CPUC’s decision-making process by ensuring all interested stakeholders are able to participate, which is beneficial to all stakeholders and good for our democracy.”
- 2) *How did we get here?* Rules governing CPUC practice have been around since its creation; however, over the last decade, a period of enormous reform to the CPUC’s rules arose in response to the tragic natural gas pipeline explosion in San Bruno, California, and the public revelations of CPUC violations during subsequent investigations. During the summer and fall of 2014, Pacific Gas and Electric Company (PG&E), bowing to legal pressure from the City of San Bruno, began to release a growing number of emails between the utility and CPUC officials. PG&E released 65,000 emails from over a five-year period that PG&E says it believes “violated CPUC rules governing ex parte communications.” The initial release of emails revealed efforts by PG&E executives to influence the CPUC’s assignment of the administrative law judge to the San Bruno proceeding. Many of the other emails exposed regular, private, familiar communications between PG&E and certain CPUC commissioners, including former CPUC President Michael Peevey, as well as senior CPUC officials. Following PG&E’s initial release of the emails, both the state Attorney General and the United States Department of Justice opened investigations into communications between the CPUC and regulated entities. Investigators working with the Attorney General’s Office even raided the CPUC offices

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<sup>5</sup> PUC § 1701.1 (e)(5)

<sup>6</sup> PUC § 1701.9 (b), as changed under SB 599 (Hueso, Chapter 703, Statutes of 2022)

<sup>7</sup> PUC § 1701.9 (a)

and the homes of former CPUC Commissioner President Peevey and PG&E former-Vice President Brian Cherry.

In early February 2015, after a newspaper published details of the search warrant, Southern California Edison disclosed a meeting that occurred two years prior in Warsaw, Poland between then-CPUC President Peevey and a utility executive in which they discussed how to resolve the shutdown plans for the San Onofre Nuclear Generating Stations (SONGS). The facility had a failed steam generator that required SONGS to be permanently retired. In November 2014, the CPUC approved a settlement agreement between utilities and ratepayer advocates that split the costs of retiring the facility and the associated replacement power, with ratepayers shouldering \$3.3 billion of the \$4.7 billion total costs. In light of the information about the meeting in Poland, some of the parties to the settlement agreement rescinded their support. In early December 2015, the CPUC voted 4-0 to fine Southern California Edison \$16.7 million for violations of ex parte communications rules regarding the SONGS closure proceeding.

Following these revelations, numerous legislative reforms were introduced to “clean-up” the rules governing the CPUC, especially its ex parte rules. The most relevant to this bill was the passage of SB 215 (Leno & Hueso, Chapter 519, Statutes of 2018) which includes requirements that the CPUC adopt procedures on the disqualifications of commissioners due to bias or prejudice; redefines a “decisionmaker” for purposes of ex parte communication to include the personal staff of a commissioner acting in a policy or legal advisory capacity; provides for penalties for violations of ex parte communication rules; and prohibits ex parte communication from being part of the proceeding’s record, among other changes.

- 3) *Talking during a Quiet Period.* This bill makes two changes related to CPUC quiet periods in ratesetting cases, during which ex parte communication is currently forbidden. First, it relaxes the quiet period ban on oral ex parte communication for ratesetting agenda items, by allowing in-person meetings with commissioner advisors. Second, it permits written ex parte communication at any time *without restriction* during the proceeding, including the quiet period, as long as copies of the communication are transmitted to all parties on the same day as the original communication. This is a large shift away from previous reform efforts meant to tighten the rules around communication, in order to keep CPUC decisions as true to the public record as possible and to provide all interested parties the ability to contribute to the discussion. From a transparency perspective, this bill creates the opportunity for parties to meet with an advisor—who often plays an influential role in CPUC decisions—to get the last word, without other parties knowledge or ability to weigh in. Moreover, this bill exempts ex parte communication with advisors from the three-day advanced notice requirement, meaning any public notice of an ex parte communication occurring during a quiet period would likely only be provided after the vote is taken.

Opponents to the bill take issue with these changes, noting that without these protections and limits on side communications, heavily resourced parties, like the IOUs, would “be able to rely on back-channel communications with the Commissioners’ personal advisors to influence Commission decisions up until the last moment before a Commission vote.” Such a change seems outside the spirit of transparency and good governance, and would signal a roll-back of the large reforms that arose after egregious violations impacted public safety and cost ratepayers billions of dollars.

Proponents of this bill note circumstances where modifications to CPUC decisions arise during quiet periods, and parties to the proceeding are given no opportunity to respond. For instance, they cite a 2020 decision<sup>8</sup> where the proposed decision approved a \$5 residential fixed charge for both San Diego Gas & Electric (SDG&E) and SoCalGas. The proponents claim the day before the voting meeting, a revised decision was issued denying the charge for SDG&E, and instead adopting a \$1 increase to the minimum bill.<sup>9</sup> The proponents note the proceeding was “a 17-month process, the direction of which [was] reversed in the eleventh hour without stakeholder input.” Like this example, it is accurate to note the CPUC does have the ability to revise ratesetting proceeding decisions during the quiet period, at which point no party is able to weigh in.

Given this balance to ensure due process and transparency, it may be appropriate to permit some form of communication during a quiet period, especially under circumstances where a revised decision is issued. The proposed changes in this bill to permit written ex parte communication creates the opportunity for a flurry of letter writing leading up to a vote; however the CPUC currently has minimal control over written ex parte filings. Current statute states that if ex parte violations occur, the CPUC is prohibited from taking a vote on a matter until all parties have been provided a reasonable opportunity to respond to the communication.<sup>10</sup> As such, written ex parte communication could be used as a tactic by parties to delay decisions the CPUC sees as being ready to be voted on. Such opportunities to abuse ex parte rules seem problematic. *Given the desire to ensure due process and transparency, the author and committee may wish to consider amending this bill to remove any exemptions for oral ex parte communications, including striking the three-day notice exemption for communications with advisors, while retaining the exemption for written ex parte communications.*

#### 4) Prior Legislation.

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<sup>8</sup> D. 20-02-045, *Decision Addressing San Diego Gas & Electric Company and Southern California Gas company Triennial Cost Allocation Proceeding Application*, A. 18-07-024, February 27, 2020;

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M328/K289/328289863.PDF>

<sup>9</sup> Order #15, pg. 105, D 20-02-045, *Ibid.*

<sup>10</sup> PUC § 1701.1 (e)(5)

SB 599 (Hueso) revises and recasts provisions relating to “quiet periods” and the authority for closed session meetings during ratesetting cases and catastrophic wildfire proceedings at the CPUC. Status: Chapter 703, Statutes of 2022.

SB 605 (Hueso, 2020) contained, among other provisions, similar provisions as this bill related to quiet periods and closed sessions for CPUC ratesetting and catastrophic wildfire proceedings. Status – Died, Assembly Utilities and Energy Committee.

SB 1358 (Hueso) required the assigned commissioner, rather than the full CPUC commission, to determine whether a proceeding requires a hearing. Status – Chapter 519, Statutes of 2018.

SB 215 (Leno & Hueso) proposed a suite of reforms of the rules, operations and procedures of the CPUC pertaining to the laws and rules related to ex parte communications and criteria and process for disqualification of commissioners to a proceeding. Status – Chapter 807, Statutes of 2016.

SB 660 (Leno & Hueso, 2015) would have proposed a suite of reforms of the governance, rules, operations and procedures of the CPUC, including reforming laws and rules related to ex parte communications, criteria and process for disqualification of commissions to a proceeding, and authorizing the CPUC to appoint the chief administrative law judge. Status – Vetoed.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

CalChamber

Sempra Energy and its Affiliates: San Diego Gas & Electric Company and Southern California Gas Company – *sponsor*

### **Oppose**

The Utility Reform Network (TURN)

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