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OPEN MEETING AGENDA ITEM

ARIZONA CORPORATION COMMISSION

OFFICE OF THE GENERAL COUNSEL

Memorandum

To: Arizona Corporation Commission

From: Thomas Van Flein, General Counsel

Dated: October 16, 2024

CC: Mike Dailey, Deputy General Counsel
Maureen Scott, Associate General Counsel, Chief of
Litigation and Appeals

Re: Docket No.: ACC-00000A-24-0181
Interim *Ex Parte* Advisory Policy Statement

Attached to this Memorandum is a draft *ex parte* advisory policy statement for the Commission to review and discuss. Several issues with the *ex parte* rule, and the ethics rule, regarding *ex parte* communications, have arisen. Ultimately, the Office of General Counsel recommends that the Administrative Rule and the Ethics Rule be amended and that both be identical. Currently, they are substantively different and incomplete, leading to confusion, for example, when the *ex parte* cloture should be or could be applied.

The Commission has requested an advisory policy that can reconcile the two rules in the interim.

**ARIZONA CORPORATION COMMISSION ADVISORY POLICY
STATEMENT REGARDING RECONCILIATION OF THE
ADMINISTRATIVE *EX PARTE* RULE AND THE ETHICS *EX PARTE*
RULE APPLICABLE TO THE COMMISSION AND THE ARIZONA
POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE**

Pursuant to 41-1091B, the following notice is provided:

“This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. . If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under section 41-1033, Arizona Revised Statutes, for a review of the statement.”

I. Background

Currently there are two provisions pertaining to *ex parte* communications applicable to the Commission and the Line Siting Committee. The Administrative Rule provides:

R14-3-113. Unauthorized communications

- A.** Purpose. It is the purpose of this rule to assist the members of the Arizona Corporation Commission and its employees in avoiding the possibility of prejudice, real or apparent, to the public interest in proceedings before the Commission and hearings before the Arizona Power Plant and Transmission Line Siting Committee.
- B.** Application. The provisions of this rule apply from the time a contested matter is set for public hearing before the Commission

and from the time a notice of siting hearing is published pursuant to R14-3-208(A). The provisions of this rule do not apply to rulemaking proceedings.

C. Prohibitions.

1. No person shall make or cause to be made an oral or written communication, not on the public record, concerning the substantive merits of a contested proceeding or siting hearing to a commissioner or commission employee involved in the decision-making process for that proceeding or siting hearing.
2. No commissioner or commission employee involved in the decision-making process of a contested proceeding or siting hearing shall request, entertain, or consider an unauthorized communication concerning the merits of the proceeding or siting hearing.
3. The provisions of this rule shall not prohibit:
 - a. Communications regarding procedural matters;
 - b. Communications regarding any other proceedings;
 - c. Intra-agency or non-party communications regarding purely technical and legal matters;
 - d. Comments from the general public;
 - e. Communications among hearing officers, non-party staff, and commissioners.

D. Remedy.

1. A commissioner or commission employee who receives an oral or written offer of any communication prohibited by this rule must decline to receive such communication and will explain that the matter is pending for determination and that all communication regarding it must be made on the public record. If unsuccessful in preventing such communications, the

recipient will advise the communicator that the communication will not be considered, a brief signed statement setting forth the substance of the communication and the circumstances under which it was made, will be prepared, and the statement will be filed in the public record of the case or proceeding.

2. Any person affected by an unauthorized communication will have an opportunity to rebut on the record any facts or contentions contained in the communication.
3. If a party to a contested proceeding or siting hearing makes an unauthorized communication, the party may be required to show cause why its claim or interest in the proceeding or siting hearing should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation. Historical Note Adopted effective January 3, 1986 (Supp. 86-1). Amended by final rulemaking at 12 A.A.R. 4181, effective December 25, 2006 (Supp. 06-4).

The Ethics Rule provides:

Ethics Rule 7.3: *Ex parte* rules prohibit communications to or from a Commissioner, not on the public record, concerning the substantive merits of a contested proceeding. The *ex parte* rules commence when a matter is set for a public hearing and terminate once an application for rehearing has been denied. Commissioners shall not initiate or knowingly participate in *ex parte* communications with any public service corporations and their lobbyists, or any party to a pending case. Any violation of this rule requires immediate recusal and participation from the matter by the Commissioner(s) that violated this rule.” Source: A.A.C. R14-3-113

Comment: The *ex parte* rule similarly applies to communications to or from agents of the Commissioner involved in the decision-making process, such as

the Commissioner's policy advisors and interns. The *ex parte* rule does not prohibit discussions about procedural matters or comments from the public. For example, Commissioners can communicate or inquire about scheduling issues, docket filing issues, or other case administration issues, without violating the *ex parte* rule."

There is ambiguity on the termination of the *ex parte* status. The Ethics Rule and the Administrative Rule provide that *ex parte* status commences when a matter is set for a public hearing, and the Ethics Rule terminates the *ex parte* status "once an application for rehearing has been denied." The Administrative Rule has no closure date.

The OGC has concluded there should be a clear termination date under both rules. The OGC recommends: (1) *ex parte* terminates 60 days after the time for rehearing has passed, unless there is a timely appeal process, in which case the *ex parte* rule should remain in force until the matter has been resolved on appeal with finality, sent back to the Commission with a mandate, and if further action by the Commission or Committee is mandated, 60 days after the expiration of the rehearing process before the Commission.

Advisory Policy Statements

1. (1) *Ex parte* terminates 60 days after the time for rehearing has passed, unless there is a timely appeal process, in which case the *ex parte* rule should remain in force until the matter has been resolved on appeal with finality, sent back to the Commission with a mandate, and if further action by the Commission or Committee is mandated, 60 days after the expiration of the rehearing process before the Commission.¹

¹ The quasi-judicial nature of contested proceedings before the Arizona Corporation Commission has been recognized by the court in *Western Gillette, Inc. v. Arizona Corp. Comm'n.*, 121 Ariz. 541, 592 P.2d 375 (App.1979). *Western Gillette* was a rate case appeal. On appeal, the appellate court did not reach the merits of the Commission's decision, but reversed and remanded the matter for further proceedings before the Commission because of "flagrantly improper *ex parte* communication"

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2. This advisory policy clarifies the *ex parte* rule and preserves transparency to a greater extent than the existing rules. In this regard, these policies are more aligned with the overall state policy of maximum transparency.² This policy also instructs the parties, the Commission, and the hearing officers, of a clear end date. The Commission should revise and update both the Administrative Rule and the Ethics Rule to be reconciled and consistent, and to clarify other issues that have arisen.
 3. Maintaining impartiality is a fundamental aspect of due process, and the *ex parte* rules are intended to promote impartiality in fact and in appearance. The Commission reiterates its commitment to transparency and neutral decision-making.³

between the rate applicant's counsel and the Commission staff concerning proposed forms for the Commission's decision."

The court in *State ex rel. Corbin v. Arizona Corp. Com'n*, 143 Ariz. 219, 226 (Ariz. App. 1984), concluded that "it is apparent that a party's right to due process is violated when the agency decision-maker improperly allows *ex parte* communications from one of the parties to the controversy."

² The general policy in Arizona favors transparency of all public business. See § 38-431.09(A) ("A. It is the public policy of this state that meetings of public bodies be conducted openly").

³ The rules of professional conduct for attorney's makes it unethical to engage in *ex parte* communications with adjudicators. The canons of judicial conduct make it unethical for judges to participate in *ex parte* communications. Judges are generally prohibited from initiating or considering such communications in pending cases. *McElhanon v. Hing*, 151 Ariz. 403 (1986).