



**FILED**

09/05/18  
04:59 PM

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric  
Company for Authority, Among Other  
Things, to Increase Rates and Charges for  
Electric and Gas Service Effective on  
January 1, 2017. (U39M)

Application 15-09-001  
(Filed September 1, 2015)

**NOTICE OF EX PARTE COMMUNICATION  
BY SCOTT J. RAFFERTY**

SCOTT J. RAFFERTY

1913 Whitecliff Court  
Walnut Creek, California 94596  
(202)-380-5525  
E-mail: rafferty@gmail.com

Attorney for  
COLLABORATIVE APPROACHES TO  
UTILITY SAFETY ENFORCEMENT

September 2, 2018

On Thursday, August 30, 2018, I participated in a workshop addressing the accessibility of CPUC proceedings. The bulk of my presentation, which is posted [here](#) between 1:36:13 and 1:46:20, involved experiences serving (a) as division director at another commission, (b) as an attorney and/or expert witness advocating for a state agency before 13 other utility commissions, and (c) as deputy director of a federal agency that studies e-rulemaking and archival practices. Although I intended the comments to be general in nature, several observations relate to the intervenor compensation claim outstanding in A.15-09-001.<sup>1</sup>

Commissioners Liane M. Randolph and Clifford Rechtschaffen were present, and a sign-in list of other participants was maintained. I did not submit written materials. For that reason, I substantiated several of the general references and assertions that I made orally in the footnotes to this notice.

#### ELECTRONIC RECORDKEEPING AND DOCKETING PRACTICES

A previous speaker had discussed the need to improve access for the disabled. I stated that this included federal requirements, incorporated into state law<sup>2</sup>, that all agency websites and documents published online comply with standards for digital accessibility (for the disabled). I noted that many pleadings that I filed were rejected because they conformed with a level of PDF/A (PDF/A:3a) that is accessible to screen-readers. Only after more than a year did I learn that the docket office was rejecting these pleadings because they did not use an older level (PDF/A:1b) that is not digitally accessible.

I observed that PDF/A:1b ([ISO 19005-1](#)) is strictly enforced against some parties,

---

<sup>1</sup> Because digital accessibility is so clearly relevant to claims made by ALJ Roscow in Agenda Items 15548 and 16474, I assumed that all parties to A.15-09-001 had been given notice of the workshop. I have since learned that the parties were not notified and am therefore reporting these statements as ex parte communications, subject to Rule of Procedure 8.3(c) and 8.4(a).

<sup>2</sup> [29 U.S. Code §794d\(a\)\(1\)\(A\)\(ii\)](#); [36 C.F.R. 1194, App. C, 504.2.2.](#); [Government Code 11135\(b\).](#); [Civil Code 51\(f\)](#), [Civil Code 54\(c\)](#). [AB 434 \(2017\)](#)

but is unjustified. Over the 30-year preservation period, PDF/A:1b documents are unlikely to be any more readable than normal PDFs.<sup>3</sup> By contrast, PDF/A:3a accommodates more characters, symbols, fonts, and graphic features, and preserves logical tags, which are critical to enable machines to interpret tables, headings and footnotes. The features in PDF/A:1a, 2a, or 3a are legally required and much more important to provide functional public access now and in the future.

I also seconded comments made by other participants that the rigidity of docketing standards, the formality of procedural requirements, and relative frequency of excluding evidence and comments prevents the Commission from having the benefits of a complete record. These barriers to participation are, in my experience, unusual at other state commissions, which use informal procedures and liberal standards to accept a broad range of input for consumers and other non-regulated interests.

#### MODELS OF PARTICIPATION BY INTERVENORS AND INDIVIDUALS

About a dozen states have some form of intervenor compensation, but of these, to my knowledge, only California is without an independent consumer advocate.<sup>4</sup> Most of my experience has been as a contractor to state agencies (independent of the regulatory commission) that advocate for utility consumers. The most efficient and

---

<sup>3</sup> The most critical archival requirements are an embedded font and the omission of encryption, active content, and embedded files in proprietary formats. Neither PDF nor PDF/A precludes links to external references or preserves information contained therein.

<sup>4</sup> I have worked for the Consumer Advocacy Division of the West Virginia PUC, but that Division complied with its statutory mandate to maintain its independence from the Commissioners' offices and ALJs. [West Virginia Code 24-1-1\(f\)\(3\)](#). California Public Utilities Code, [Section 309.5](#), provides for gubernatorial appointment of a "Director of the Public Advocate's Office" and for final budgetary approval by the Department of Finance. Notwithstanding 309.5(d), in my pending intervenor compensation claim, revolving door practices allowed the same individual to supervise the ALJ, represent the Commissioners in response to legislative inquiries, and then represent the PAO in opposing a proposed modification agreed by all other settling parties – all without any notice of recusal.

accountable mechanism for advocacy is an independent agency that retains and timely compensates experts pursuant to competitive contracts, within a budget that is accountable to the legislature.

The model of intervenor compensation has substantial transactions costs, including the costs of qualifying new intervenors and of the uncertainties they face pending qualification and eventual compensation. I urged the Commission to provide clearer guidance to new intervenors, and to decide eligibility within 30 days (as required by law), so that organizations in formation are able to know whether they can retain experts and invest in proceedings. These observations were intended to be general in nature, but may also relate to the merits of the pending claim for intervenor compensation. During the workshop, other new intervenors indicated that the Commission was not complying with the 30-day deadline to determine eligibility

I also urged the Commission to seek more direct input from individual consumers and residents affected by utility safety. [Regulations.gov](https://www.regulations.gov) is a more effective model for public participation than the Commission's physical Public Participation Hearings. PPHs can be dominated by organized interests, and transcripts are not made available to the public. An electronic forum is more transparent and can allow for equal interaction from anyplace and at times convenient to all members of the public. Professor [Stuart Shulman](#) has helped federal agencies use machine-learning algorithms to identify, distill, and assess mass input in rulemakings. I referred to an [e-rulemaking seminar](#) that I organized while in the federal government, and the resulting [recommendation](#) of the Administrative Conference of the U.S.

#### VIOLATION OF SB 215 IN THE DEVELOPMENT OF EX PARTE AND DOCKETING RULES

Commissioner Rechstauffen referred to formal requirements on Commission rulemaking. I observed that Commission rules are actually immune from the requirements of public participation and review by the Office of Administrative Law

that apply to other government agencies – something which the Strumwasser Report did not appear to understand.<sup>5</sup> I complained that the Commission failed to provide effective public notice when it revised its procedures regarding (a) the electronic docket card, (b) ex parte reporting and (c) disqualification of ALJs, nor did it treat the matter as a “rulemaking,” which SB 215 specifically required when it amended Section 1701.1(e).<sup>6</sup> There was no public docket and no public notice of the committee process that revised these critical rules, or even to those who asked to be notified when the Commission implemented the mandate.<sup>7</sup>

Respectfully submitted,



Scott J. Rafferty, September 2, 2018

---

<sup>5</sup> The Strumwasser Report ([at 10 and n.13](#)) states categorically: “Adoption and amendment of the Rules of Practice and Procedure themselves are, however, subject to the APA.” This is inaccurate. OAL review is limited to certain portions of Article 6 (Government Code, Sections 11349-11349.6), so all CPUC rules, including procedural rules, are immune from Article 5 (public participation and adoption procedures, [Sections 11346-11348](#)). **This is why SB 215 specifically required a rulemaking.** See Assembly Committee bill analysis 6/28/16 at 4.

<sup>6</sup> SB215: (e) (1) (A) “Ex parte communication,” for purposes of this article, means any oral or written communication between a decisionmaker and an interested person concerning any matter before the commission that the commission has not specified in its Rules of Practice and Procedure as being a procedural matter ... The commission shall specify in its Rules of Practice and Procedure, **enacted by rulemaking**, the types of issues considered procedural matters under this article.

<sup>7</sup> Even though I asked the general counsel on April 24, 2017 to receive notice of the process to revise the ex parte rules six months earlier, she did not provide notice. I did not learn of the process until after the 15-day comment period in October 2017, when my comments were rejected as untimely. Apparently, “public notice” was restricted to persons who had already signed up to a particular listserv, and referred cryptically to a proposal to “reflect changes in the Commission’s administration, streamline certain procedures, and provide greater clarity.” As a result, only utilities, one union, and one intervenor (TURN) participated. Their proposals are not available on the CPUC website, and their disposition is practically hidden. See drafts of ALJ Res. 344 <http://docs.cpuc.ca.gov/publisheddocs/published/g000/m198/k339/198339033.pdf> (Rev 2) <http://docs.cpuc.ca.gov/publisheddocs/published/g000/m199/k544/199544199.pdf> (Rev 3) <http://docs.cpuc.ca.gov/publisheddocs/published/g000/m199/k606/199606920.pdf> (Rev 4)