

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 2 ADMINISTRATIVE PROCEDURES
PART 3 PUBLIC REGULATION COMMISSION EX PARTE COMMUNICATIONS

1.2.3.1 ISSUING AGENCY: New Mexico Public Regulation Commission.
[1.2.3.1 NMAC - N, 7-15-04]

1.2.3.2 SCOPE: This rule applies to commissioners, hearing examiners, advisory staff, and any party to a commission proceeding.
[1.2.3.2 NMAC - N, 7-15-04]

1.2.3.3 STATUTORY AUTHORITY: NMSA 1978 Section 8-8-17.
[1.2.3.3 NMAC - N, 7-15-04]

1.2.3.4 DURATION: Permanent.
[1.2.3.4 NMAC - N, 7-15-04]

1.2.3.5 EFFECTIVE DATE: July 15, 2004, unless a later date is cited at the end of a section.
[1.2.3.5 NMAC - N, 7-15-04]

1.2.3.6 OBJECTIVE: The purpose of this rule is to implement NMSA 1978 Section 8-8-17 by regulating ex parte communications concerning commission proceedings so as to ensure the fairness and integrity of the commission's decision-making process.
[1.2.3.6 NMAC - N, 7-15-04]

1.2.3.7 DEFINITIONS: As used in this rule:

A. advisory staff means a person hired by the chief of staff, with the consent of the commission, with expertise in regulatory law, engineering, economics or other professional or technical disciplines, to advise the commission on any matter before the commission, including a member of the commission's office of general counsel or an expert or staff hired by the chief of staff on a temporary, term or contract basis for a particular case, but not including persons hired by an individual commissioner who serve at the pleasure of that commissioner;

B. ex parte communication means a direct or indirect communication with a party or his representative, outside the presence of the other parties, concerning a pending rulemaking after the record has been closed or a pending adjudication, that deals with substantive matters or issues on the merits of the proceeding, including any attachments to a written communication or documents shown in connection with an oral presentation that deals with substantive matters or issues on the merits of the proceeding;

(1) ex parte communications do not include:

(a) statements made by commissioners, hearing examiners, or advisory staff that are limited to providing publicly available information about a pending adjudication or rulemaking after the record has been closed; or

(b) inquiries relating solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken;

(2) ex parte communications include a status inquiry which states or implies:

(a) a view as to the merits or outcome of a rulemaking after the record has been closed or a pending adjudication;

(b) a preference for a particular party, or a reason why timing is important to a particular party;

(c) a view as to the date by which a proceeding should be resolved; or

(d) a view which is otherwise intended to address the merits or outcome, or to influence the timing, of a pending adjudication or rulemaking after the record has been closed;

C. hearing examiner means a person appointed by the commission pursuant to NMSA 1978 Section 8-8-14 to preside over any matter before the commission, including rulemakings, adjudicatory hearings and administrative matters, and provide the commission with findings of fact, conclusions of law, and a recommended decision on the matter assigned;

D. non-adjudicatory notice of inquiry means a proceeding commenced by the commission's issuance of a notice entitled "non-adjudicatory notice of inquiry" for the purpose of inquiring into issues of broad applicability to consumers or regulated entities, or to a class or type of consumers or regulated entities, with a view

toward possible future rulemaking or other procedures where the proceeding does not directly concern a dispute between particular parties or company-specific regulatory issues;

E. party, unless otherwise ordered by the commission, means:

- (1) a person who has been given formal party status;
- (2) a person who has submitted to the commission a filing seeking affirmative relief, including, but not limited to, an application, waiver, motion, tariff change or petition;
- (3) a person who has filed a formal complaint, petition for order to show cause, petition for investigation or petition for notice of inquiry;
- (4) the subject of a formal complaint, order to show cause, investigation or notice of inquiry;
- (5) members of the general public, after the issuance of an order closing the record in a rulemaking proceeding; and
- (6) staff of the commission's utility division, transportation division, or insurance division directed by statute to represent the public interest in a proceeding before the commission;

F. pending adjudication means any matter docketed, or, in the case of a party represented by counsel, any matter that an attorney representing such party reasonably believes will be docketed, before the commission, including, but not limited to, formal complaint proceedings, show cause proceedings, investigations, notices of inquiry other than non-adjudicatory notices of inquiry, application proceedings, petitions, and any matter other than a rulemaking or a non-adjudicatory notice of inquiry requiring decision or action by the commission. [1.2.3.7 NMAC - N, 7-15-04; A, 9-1-08]

1.2.3.8 EX PARTE COMMUNICATIONS PROHIBITED:

A. A commissioner shall not initiate, permit, or consider a communication directly or indirectly with a party or his or her representative, outside the presence of other parties, concerning a pending rulemaking after the record has been closed or a pending adjudication.

B. A hearing examiner shall not initiate, permit or consider a communication directly or indirectly with a party or his or her representative, outside the presence of other parties, concerning a pending rulemaking after the record has been closed or a pending adjudication.

C. Advisory staff shall not initiate, permit, or consider a communication directly or indirectly with a party or his or her representative, outside the presence of other parties, concerning a pending rulemaking after the record has been closed or a pending adjudication.

[1.2.3.8 NMAC - N, 7-15-04]

1.2.3.9 EX PARTE COMMUNICATIONS PERMITTED:

A. Procedural or administrative purposes. Where circumstances require, ex parte communications for procedural or administrative purposes or emergencies, that do not deal with substantive matters or issues on the merits, may be permitted if the commissioner, hearing examiner, or advisory staff reasonably believes that no party will gain an advantage as a result of the ex parte communication and the commissioner, hearing examiner, or advisory staff makes provisions promptly to notify all other parties of the substance of the ex parte communication.

B. Uncontested proceedings. Ex parte communications may be permitted concerning pending adjudications in which the matter is ripe for decision and no party to the proceeding, including staff, is in opposition to the relief requested.

C. Internal commission communications. Commissioners, hearing examiners and advisory staff may consult with each other.

D. Nonparty expert. A commissioner or hearing examiner may obtain the advice of a nonparty expert on an issue raised in the rulemaking or adjudication if the commissioner or hearing examiner gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

[1.2.3.9 NMAC - N, 7-15-04]

1.2.3.10 DISCLOSURE REQUIRED: A commissioner, hearing examiner, or advisory staff member who receives, makes, or knowingly causes to be made a communication prohibited by this rule shall disclose it to all parties and give other parties an opportunity to respond. The person to whom the prohibited communication was made shall:

A. disclose the prohibited communication by filing a copy of a written communication or a summary of an oral communication in the record of the proceeding within five (5) calendar days of the communication; and

B. serve the disclosure on all parties to the proceeding in accordance with Subsection C of 17.1.2.10 NMAC, except in proceedings involving numerous parties where the commission or hearing examiner determines that disclosure by publication would better serve administrative economy.
[1.2.3.10 NMAC - N, 7-15-04]

1.2.3.11 SANCTIONS: Upon receipt of a communication knowingly made or caused to be made by a party to a commissioner, hearing examiner, or advisory staff member in violation of NMSA 1978 Section 8-8-17 or this rule, the commissioner or hearing examiner may, pursuant to Subsection E of that section, require the party to demonstrate that no unfair advantage was gained from the communication, may permit other parties the opportunity to respond, and may dismiss, deny, disregard, or otherwise take adverse action on the claim or interest in the proceeding.
[1.2.3.11 NMAC - N, 7-15-04]

HISTORY OF 1.2.3 NMAC: [Reserved]