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June 20, 2005

Honorable Don Perata
Room 205, State Capitol

EXECUTIVE REORGANIZATION PLANS: TRANSFER OF FUNCTIONS FROM THE CALIFORNIA PUBLIC UTILITIES COMMISSION - #15145

Dear Senator Perata:

You have asked the two questions, separately stated and considered below, relating to the Governor's authority to submit executive reorganization plans.

QUESTION NO. 1

What authority does the Governor possess, under an executive reorganization pursuant to Article 7.5 (commencing with Section 12080) of Title 2 of Division 3 of the Government Code, to transfer to another agency functions that are assigned by existing law to the Public Utilities Commission?

OPINION AND ANALYSIS NO. 1

Section 6 of Article V of the California Constitution provides for the enactment of statutory authorization for the Governor to assign and reorganize functions among the executive officers and agencies of state government, other than elective officers and agencies administered by those elective officers. Pursuant to that constitutional provision, the Legislature has enacted Article 7.5 (commencing with Section 12080) of Chapter 1 of Part 2 of Division 3 of Title 2 of the Government Code (hereafter Article 7.5), which establishes the method by which the Governor may reorganize the executive branch of state government. More specifically, Article 7.5 prescribes the various matters that may be, or are required to be, included in a reorganization plan (subd. (b), Sec. 12080 and Sec. 12080.3, Gov. C.) and the purposes for which the changes proposed by a reorganization plan may be made (Sec. 12080.1, Gov. C.). In addition, Article 7.5 prescribes the matters that may not be included in a reorganization plan (Sec. 12080.4, Gov. C.). Specifically, Section 12080.4 of the Government Code provides that no reorganization plan may provide for, and no reorganization under Article 7.5 may have the effect of, "[a]uthorizing any agency to

exercise any function which is not expressly authorized by law to be exercised by an agency in the executive branch at the time the plan is transmitted to the Legislature" (subd. (c), Sec. 12080.4, Gov.C.). An "agency" is defined for these purposes as any statewide office, nonelective officer, department, division, bureau, board, commission, or agency in the executive branch of the state government, except any agency whose primary function is service to the Legislature or judicial branches of state government or any agency that is administered by an elective officer (subd. (a), Sec. 12080, Gov.C.). An "agency that is administered by an elective officer" includes the State Board of Equalization, but does not include a board or commission on which an elective officer serves in an ex officio capacity (Ibid.).

Of particular significance to the question posed here, the statutory provisions authorizing Governor's reorganization plans specifically preclude the plans from abolishing any agency created by the California Constitution, or "transferring to the jurisdiction and control of any other agency any function conferred by the California Constitution on any agency created by that Constitution" (subd. (e), Sec. 12080.4, Gov. C.; emphasis added.).

The Public Utilities Commission is a regulatory body of constitutional origin and derives certain of its powers by direct grant from the California Constitution (*Southern Cal. Gas Co. v. Public Utilities Com.* (1979) 24 Cal.3d 635, 656; Secs. 1-9, incl., Art. XII, Cal. Const.). The California Constitution confers broad authority on the commission to regulate utilities, including, among other things, the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 914-915; Secs. 2, 4, and 6, Art. XII, Cal. Const.). Thus, public utility regulation is a function expressly conferred by the California Constitution on the Public Utilities Commission. The published court decisions have described the Public Utilities Commission's traditional regulatory authority over public utilities as falling generally within the following three categories: (1) The regulation of tolls and charges to the end that fair compensation may be returned and excessive charges prevented; (2) the prevention of discrimination upon the part of the public utility directed against those who employ it, or make use of its agencies, or the commodity which it furnishes; and (3) the making of orders and formulation of rules governing the conduct of the public utility, to the end that its efficiency is maintained or increased and the public and its employees are provided safeguards and conveniences (*East Bay M. U. Dist. v. Railroad Com.* (1924) 194 Cal. 603, 612; *Pacific Telephone etc. Co. v. Eshleman* (1913) 166 Cal. 640, 663; *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 149).

The Legislature has plenary power, unlimited by the other provisions of the California Constitution, to confer additional powers on the commission that are cognate and germane to the regulation of public utilities (*Southern Cal. Gas Co. v. Public Utilities Com.*, supra, at p. 656; Sec. 5, Art. XII, Cal. Const.). Pursuant to this authority, the Legislature has enacted the Public Utilities Act (Div. 1 (commencing with Sec. 201), P.U.C.) and related provisions of the Public Utilities Code (*San Diego Gas & Electric Co. v. Superior Court*, supra, at p. 915). The additional powers conferred on the commission by these statutory provisions are adjunct to the commission's constitutional authority to regulate public utilities. Under the constitutional scheme, the commission is designated as the entity to exercise these additional statutory powers to regulate

public utilities. Therefore, it is our opinion that the authority to regulate public utilities set forth in these statutes falls within the scope of the functions conferred by the California Constitution on the commission (see, *Atchison, etc. Ry. Co. v. Railroad Com.* (1916) 173 Cal.577, 582, stating that "Its [the PUC's] function ... is to regulate public utilities and compel the enforcement of their duties to the public.").

As indicated above, the Governor's statutory authority to reorganize state government does not include the transfer of any function constitutionally conferred (subd. (e), Sec. 12080.4, Gov. C.). In our view, the use of the term "function" in that statute is significant. The term "function," in the context of Section 12080.4 of the Government Code, is a broad term and includes not only the general powers to regulate all public utilities conferred upon the commission by Sections 2 and 6, and the special powers over transportation companies conferred upon the commission by Section 4, of Article XII of the California Constitution, but also those powers to regulate public utilities which are conferred upon the commission by the Legislature by statute and are not limited by any other provisions of the California Constitution. The word "function" has a multitude of meanings depending upon its context (Webster's Third New International Dictionary (2002), at pp. 920 and 921). In the context in which it is used in subdivision (e) of Section 12080.4 of the Government Code, we think that the term means "11. an organizational unit performing a group of related acts and processes: ACTIVITY ..." (Id., at p. 921) with that activity being the regulation of public utilities.

We, therefore, are of the view that, because the California Constitution confers the function of public utility regulation on the commission, the Governor is precluded from transferring the statutory and constitutional authority of the commission that relates to the regulation of public utilities to any other entity of state government pursuant to the Governor's statutory authority to reorganize state government. As indicated above, that authority expressly excludes transfers of constitutionally conferred functions (subd. (e), Sec. 12080.4, Gov. C.). This interpretation of Section 12080.4 of the Government Code is consistent with the constitutional provision that a "city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission" (Sec. 8, Art. XII, Cal. Const.; emphasis added.), although the Legislature, by statute, can vest regulatory authority over aspects of a public utility's operations in another agency (*Orange County Air Pollution Control District v. Public Util. Com.* (1971) 4 Cal.3d 945, 953-954).

Accordingly, we conclude that a Governor's reorganization plan adopted pursuant to Article 7.5 (commencing with Section 12080) of Chapter 1 of Part 2 of Division 3 of Title 2 of the Government Code may not transfer to another agency the statutory and constitutional authority of the Public Utilities Commission that relates to the regulation of public utilities.

QUESTION NO. 2

May Governor's Reorganization Plan No. 3 of 2005 lawfully transfer to a proposed Department of Energy the current authority of the Public Utilities Commission to approve utilities certificates of public convenience and necessity for powerplants, transmission lines, natural gas pipelines, and natural gas storage facilities owned or operated by public utilities?

OPINION NO. 2

Governor's Reorganization Plan No. 3 of 2005 may not lawfully transfer to the proposed Department of Energy the current authority of the Public Utility Commission to approve certificates of public convenience and necessity for powerplants and transmission lines owned or operated by public utilities.

ANALYSIS NO. 2

Governor's Reorganization Plan No. 3 of 2005 (hereafter GRP No. 3 or the plan)[1] would create the Department of Energy, headed by a Secretary of Energy, and would create the California Energy Commission and the Office of Energy Market Oversight within the department. The plan would abolish the State Energy Resources and Conservation Commission, the California Consumer Power and Conservation Financing Authority, and the Electricity Oversight Board. It would vest the new department and the California Energy Commission with the powers, duties, responsibilities, obligations, liabilities, and jurisdiction of the State Energy Resources Conservation and Development Commission and the California Consumer Power and Conservation Financing Authority and would vest the Office of Energy Market Oversight with the powers, duties, responsibilities, obligations, liabilities, and jurisdiction of the Electricity Oversight Board.

GRP No. 3 would also transfer jurisdiction of certain energy-related matters from the Office of Planning and Research, the Department of Water Resources, the Department of General Services, and the Office of the State Architect to the Department of Energy or the California Energy Commission. Regarding certificates of public convenience and necessity, GRP No. 3 would amend Section 1001 of the Public Utilities Code as follows:[2]

> "1001. (a) No railroad corporation whose railroad is operated primarily by electric energy, street railroad corporation, gas corporation, electrical corporation, telegraph corporation, telephone corporation, water corporation, or sewer system corporation shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require ~~such~~ that construction.

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[1] GRP No. 3 was submitted to the Legislature on June 13, 2005, and will become effective the first day after 60 calendar days of continuous session of the Legislature unless either house adopts by a majority vote of the membership a specified resolution rejecting it (Sec. 12080.5, Gov. C.).

[2] Proposed changes are shown in strike out and underline.

"This article shall not be construed to require any ~~such~~ corporation described in the preceding paragraph to secure ~~such~~ a certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations, or for an extension into territory either within or without a city or city and county contiguous to its street railroad, or line, plant, or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility or of the water system of a public agency, already constructed, the commission, on complaint of the public utility or public agency claiming to be injuriously affected, may, after hearing, make ~~such~~ an order and prescribe ~~such~~ terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable.

"(b) Notwithstanding subdivision (a) or any other provision of law, all responsibilities of the commission with respect to the certification of a natural gas line, storage facility, plant, or system, or any extension thereof, not owned by a public utility, and with respect to an electric transmission line, plant, or system, or any extension thereof, carrying electricity to the interconnected grid or that is part of the interconnected grid, but not including electric distribution facilities, are hereby transferred to the exclusive jurisdiction of the Department of Energy. All applications for certification regarding a line, facility, plant, or system described in this subdivision shall be heard and decided by the California Energy Commission within the department. A decision of the department or the California Energy Commission with respect to matters transferred pursuant to this subdivision shall be conclusive as to all matters determined.

"(c) For the purposes of this section, an electric line, plant, or system, or extension thereof, shall be considered 'electric transmission' for either of the following:

"(1) It has a maximum rated voltage of 200 kilovolts or greater.

"(2) It has a maximum rated voltage of 100 kilovolts or greater and certification is sought following inclusion of that facility as an element of a final transmission expansion plan for the Independent System Operator.

"(d) In hearing and deciding any application pursuant to this section, the California Energy Commission shall consider and make any necessary findings on all factors required by Sections 1001 to 1005.5, inclusive, and any other provision of law, including the anticipated effects of any proposed project on consumer rates, on the environment, and on the public benefits expected to result from any project.

"(e) The Department of Energy, in consultation with the Public Utilities Commission, shall promptly establish a mechanism for the Public Utilities Commission to timely advise the department regarding the retail rate impacts of the decision made by the California Energy Commission and the department."

Thus, GRP No. 3 would transfer to the Department of Energy, the current authority of the Public Utilities Commission to approve certificates of public convenience and necessity for powerplants and transmission lines owned or operated by public utilities, and natural gas pipelines and natural gas storage facilities not owned or operated by public utilities. In addition, the plan would make a number of conforming changes to reflect this transfer of functions from the commission to the Department of Energy (see Secs. 25107, 25110, 25208, 25519, and 25531, P.R.C., and Sec. 411, P.U.C. as proposed to be amended or added by GRP No. 3). GRP No. 3 additionally would make a decision of the Department of Energy or the California Energy Commission with respect to the certification matters transferred, conclusive upon the Public Utilities Commission.

The traditional role served by the issuance of certificates of public convenience and necessity in the regulation of public utilities has been described as follows:

> "The general purposes of certificates in utility regulation are to protect the public from speculation and duplication of facilities, and to protect utilities from competition. The certificate of public convenience and necessity is the means by which protection against ruinous competition is afforded a utility that renders adequate service at a reasonable rate. It requires its holder to operate its service at such times and in such manner as is prescribed by the certificate, with a view of securing uniform and efficient service to the public. By granting or withholding the certificate the state, through the Public Utilities Commission, determines whether the interests of the general public will be advanced by the enterprise proposed to be carried on. The grant or denial of the certificate is germane to the power to regulate and control public utilities, and is therefore within the jurisdiction of the commission." (Vol. 53, Cal.Jur.3d, "Public Utilities," Sec. 36, at pp. 56-57.)

The requirement that the Public Utilities Commission, formerly the Railroad Commission, issue a certificate of public convenience and necessity dates back to the original Public Utilities Act (see *Oro Electric Corporation v. R.R. Commission* (1915) 169 Cal. 466, 471-472), and traditionally played a central role in the regulation of public utilities (Id., at p. 475). As expressly stated by the California Supreme Court, "the granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public" (Ibid.). Thus, the issuance of certificates of public convenience and necessity fit within the third category of the commission's traditional regulatory authority over public utilities previously described in Analysis No. 1, that is, the making of orders and formulation of rules governing the conduct of the public utility, to the end that its efficiency is maintained or increased and the public and its employees are provided safeguards and conveniences (*East Bay M. U. Dist. v. Railroad Com.*, supra; *Pacific Telephone etc. Co. v. Eshleman*, supra; *Pratt v. Coast Trucking, Inc.*, supra).

Therefore, we conclude that Governor's Reorganization Plan No. 3 of 2005 may not lawfully transfer to the proposed Department of Energy the current authority of the Public Utilities Commission to approve certificates of public convenience and necessity for powerplants and transmission lines owned or operated by public utilities.

Very truly yours,

Diane F. Boyer-Vine
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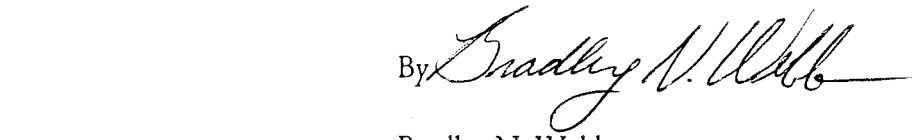
By 

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