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The Serial Meeting Prohibition in the Bagley- Keene Act

Thank you for the opportunity to comment on amending the serial meeting prohibition in the Bagley-Keene Act. This was a result of the passage and signing of AB 1494 authored by Assemblyman Mike Eng in 2009.

AB 1494 was sponsored by CNPA and introduced by Assemblyman Eng to align the serial meeting provision of the Bagley-Keene Act, the state's open meeting law that applies to state agencies, with a similar provision in the Ralph M. Brown Act, the state's open meeting law applicable to local government agencies.

Presumption of Public Access to the Meetings of Government Officials
The various laws that govern open meetings have five basic tenets: (1) The public has a presumptive right to attend meetings of a legislative body, which are required to be open unless a specific exemption allows the body to meet in closed session; (2) The public is entitled to advance notice of the date, time and location of open and closed meetings, as well as an agenda describing the items the legislative body intends to discuss or act upon; (3) The public has the right to obtain copies of memos, background materials and any other writings related to matters for public discussion as soon as the materials are distributed to members of the legislative body; (4) The public has the right to speak at a meeting of a legislative body; and (5) After meeting in closed session, legislative bodies are required to publicly disclose the actions taken and any documents approved in closed session.

In the very first section of the Bagley-Keene Act (California Government Code Section 11120), it says, among other things that, "In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly."

In 2004, the presumptive right of access to meetings and records of public officials became a constitutional right when 83% of the voters passed Proposition 59, which added Article I, Section 3 to the State Constitution. Subsection (b)(1) of Article I, Section 3 states, "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."

History of the Serial Meeting Prohibition
Some government agencies began to use a series of communications among the members of the legislative body as a preferred method of discussing, deliberating or acting on certain items of business to avoid public scrutiny. The single purpose of conducting a serial meeting serves only to evade the central thrust of the public meeting law.

The prohibition of serial meetings was first articulated by the courts and the published opinions of the Attorney General (Stockton Newspapers, Inc. v. Redevelopment Agency, 171 Cal App. 3d 95, 105 (1985); 65 Ops. Cal. Atty. Gen. 63). The interpretation of the prohibition by the Attorney General, public and media counsel and agency practitioners was the same as what later became part of the California Government Code.

In 2001, the Legislature codified the serial meeting prohibition in the Bagley-Keene Act (California Government Code Section 11122.5) to prohibit any use of direct communication, personal intermediaries or technological devices that is employed by a majority of the members of the body to develop a collective concurrence as to action to be taken. (Stats.2001, chap. 243 (AB 192), § 6.) This provision was modeled on the parallel provision in the Brown Act, (Gov. Code section 54952.2 subdivision (b)) which was codified in 1994. (Stats.1993, chap. 1137 (SB 36) § 2.)

Again, the Attorney General, public and media counsel and agency practitioners interpreted this provision in the same manner as current law with the exception of its application to staff briefings.

Amending the Serial Meeting Provision of the Brown Act and the Bagley-Keene Act
In 2006, however, an appellate court in *Wolfe v. City of* Fremont, 144 Cal. App. 4th 533 (2006), arrived at a more restrictive interpretation regarding the serial meeting provision of the Brown Act pertaining to local government bodies. The court concluded that serial communications did not violate the Brown Act if a majority of members of the agency did not commit to an action to be taken.

Because a wide range of public and media attorneys believed that the *Wolfe* court erred in its interpretation, many groups including CNPA and the League of California Cities collaborated to sponsor legislation to ensure that a majority of a body's members could not use a series of communications outside of a noticed meeting to discuss, deliberate, or take action on a matter under the body's jurisdiction under the Brown Act. (Stats. 2008, chap. 63 (S.B.1732), § 1; Stats. 2009, chap. 150 (A.B.1494), § 1.). The legislation specifically eliminated the language on which the *Wolfe* court had based its interpretation, and in an uncodified section of SB 1732, expressly rejected the *Wolfe* decision:

> "(a) The Legislature hereby declares that it disapproves the court's holding in *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, 545, fn. 6, to the extent that it construes the prohibition against serial meetings by a legislative body of a local agency, as contained in the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code, to require that a series of individual meetings by members of a body actually result in a collective concurrence to violate the prohibition rather than also including the process of developing a collective concurrence as a violation of the prohibition.
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> "(b) It is the intent of the Legislature that the changes made by Section 3 of this act supersede the court's holding described in subdivision (a)."

CNPA strongly believes the rights of the public should be no different whether established in the Bagley-Keene Act or the Brown Act. To ensure that the open meeting law applicable to state agencies paralleled the open meeting law governing local agencies, CNPA approached Assemblyman Eng to introduce AB 1494 to amend the Bagley-Keene Act. The legislature passed and the Governor signed the bill into law. The language in existing Government Code Section 11122.5 mirrors Government Code Section 54952.2 (b).

The CPUC Problem and Proposed Solutions

As we understand it, several members of the CPUC and several practitioners have interpreted the changes made to Government Code Section 11122.5 by AB 1494 as prohibiting the Commissioners from talking to each other and otherwise inhibiting their ability to work.

This interpretation may be overly narrow in that the law allows the Commissioners to talk to each other. What the law prohibits is the use a series of communications of any kind, directly or through intermediaries, outside of an open and public meeting, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body.

It has been suggested that one of the ways for the Legislature to "fix" the problem is to simply repeal the language enacted by AB 1494. This solution, however, would create an incubator for government dealings completely outside of public view. If the Legislature decided to repeal the language in Section 11122.5, every state agency in California would no longer be prohibited from engaging in serial meetings to conduct the public's business.

If the solution is to revert back to the language that existed in Section 11122.5 prior to the AB 1494 amendments, the CPUC commissioners would still not be allowed to engage in a series of communications to develop a collective concurrence as to action to be taken.

If the solution is to exempt the CPUC from Section 11122.5, it would result in the CPUC being the only agency in California that would not be required to conduct its business openly and publicly.

All of these solutions would likely be unconstitutional, contrary to the will of the people and would promote a public policy that embraces secret government. In light of recent reports describing the coziness between the CPUC and the utilities it regulates, it shocks the conscience that this issue is worthy of consideration.

CNPA firmly believes that the public is well served by the requirement that Commissioners discuss, deliberate or reach consensus on an item, in an open and public meeting and we would stridently oppose any proposed change to existing law.