March 2, 2015

Pedro Nava, Chairman
Milton Marks Commission on California
State Government Organization and Economy
925 L Street, Suite 805
Sacramento, CA 95814

**Re: Commentary and Recommendations related to the Bagley-Keene Open Meeting Act and ex parte communication rules as applicable to the Public Utilities Commission of the State of California**

Dear Mr. Nava:

With the understanding that the Little Hoover Commission is conducting an inquiry into the effect of the Bagley-Keene Open Meeting Act and examining the impact of ex parte communication rules at the Public Utilities Commission of the State of California ("CPUC"), as well as other State agencies, the undersigned contributors would like to provide some commentary and recommendations on these issues for the Commission to consider. While the specific recommendations in this letter deal with the rules applicable to the Public Utilities Commission, we believe that our comments have relevance for any multi-member State agency that issues decisions on quasi-legislative matters, particularly where the decisions are complex and many competing interests appear before the agency.

The undersigned are individuals with substantial experience in matters before the CPUC, who collectively represent a wide variety of consumer, business, environmental, and governmental interests, including parties who frequently appear before the CPUC. However, these individuals primarily represent non-utility stakeholders at the CPUC, rather than the large energy utilities (PG&E, SoCal Edison, SDG&E and SoCalGas). In submitting these comments, we are offering our collective personal recommendations, and we do not purport to represent the views of any of our respective clients, employers, or organizations. A short explanation of each member's background and experience before the CPUC is attached to this letter. It is our hope that we can bring a perspective to your inquiry that will assist in the process of reinforcing transparency and public participation in CPUC proceedings, while steering clear of reform proposals that may result in unintended consequences that actually reduce the ability of smaller stakeholders to have their concerns considered by the CPUC in a meaningful way.

Each of the undersigned has spent many years interacting with the CPUC and its Commissioners and staff. Our experience has lead us to have to great respect for the dedication of the Commissioners and staff of the CPUC, as well as a real appreciation for the importance

and the difficulty of the task assigned to the agency. The CPUC is charged with developing a deep base of knowledge about multiple industries of central importance to the California economy, and monitoring and regulating these industries they undergo constant and dynamic change due to technological innovation, economic fluctuations, and even global forces such as climate change. All of the undersigned want to see the CPUC succeed in its mission. Indeed, all of California needs the CPUC to succeed for our State to grow and prosper. That is the overriding motivation for our submission to your Commission.

Bagley-Keene Open Meeting Act

The amendment of the Bagley-Keene Open Meeting Act ("Bagley-Keene") in 2009, and the subsequent interpretation of that law by the CPUC and the Attorney General, has led to a marked reduction in the efficiency of CPUC decision-making. This is not an inconsequential development. The workload of the CPUC is one of the heaviest assigned to any State agency, with biweekly agendas frequently exceeding 40-50 substantive decisions covering a wide variety of issues from the full range of entities subject to the CPUC's jurisdiction, including electric, gas, and water utilities, telecommunications providers, moving companies, an increasing variety of transportation services, rail safety issues, as well as funding for a number of boards and non-governmental entities that provide essential services or subsidies to many types of utility customers.

This substantial workload requires that every two weeks the Commissioners and their personal staffs of advisors must absorb and critically analyze (for purposes of reaching a decision on each matter) lengthy proposed decisions based on evidentiary records that routinely run into the tens of thousands of pages. The process requires Commissioner review and ultimate approval or modification of proposed decisions drafted by the Administrative Law Judges at the CPUC, who preside over evidentiary trial-type hearings in certain cases, and who draft decisions based on notice and comment rulemaking in other types of proceedings. In addition, the Commissioners receive hundreds of pages of comments on the proposed decisions filed by the parties to the underlying cases. Since the creation of the CPUC, the Commissioners have discussed these proposed decisions with their colleagues, both within and outside of public meetings, to arrive at a majority or consensual decision that can be approved in a relatively timely manner. This process was profoundly changed by the 2009 Amendment to Bagley-Keene.

The 2009 amendment to Bagley-Keene was designed to apply to all State agencies the same open meeting requirements that local governments must follow under the Brown Act. However, this specific amendment has been interpreted to bar the CPUC Commissioners from speaking to more than one other Commissioner about substantive matters outside of a noticed public meeting. The interpretation of the amendment has also been extended to impose the same ban on discussions between Commissioners' advisors, so as to prevent the development of a collective concurrence by means of serial meetings between advisors and Commissioners. As a result, Commissioners frequently attend business meetings of the Commission with little or no idea as to their colleagues' views on the important and complex

technical issues within the proposed decisions before them. This has led to the need to hold items for subsequent reconsideration, and has dramatically slowed the process of reviewing and amending proposed decisions in order to obtain the support of a majority of the Commissioners. The Commissioners themselves have publicly expressed their real frustration with the current provisions of Bagley-Keene that limit their deliberations on policy and substantive issues to a few moments on the dais during a business meeting with a heavy agenda of decisions.

It is important to note that the type of decision-making prevalent at the CPUC shares many characteristics with the legislative process, and includes significant policymaking and rulemaking. It is well understood that discussion and debate, both in public and in private, is essential to the legislative process, and it is equally essential for CPUC decision-making. That has been made extremely difficult by the current iteration of Bagley-Keene. While some emphasize the adjudicatory role of the CPUC in certain enforcement cases, and point to the trial type hearing procedures that are frequent in its many ratesetting cases, the U.S. Supreme Court and the Supreme Court of California have made it very clear that regulatory ratesetting is in essence a legislative act.[1] As such, the opportunity for full and frequent discussion of substantive issues among the decision-makers themselves should be encouraged, not severely limited.

Nor are transparency or public participation jeopardized by permitting the CPUC to return to the free discussion of pending cases that prevailed before the 2009 amendment to Bagley-Keene. The CPUC has adopted many procedures, most in compliance with statute, to ensure that the public is well aware of its decision-making process. The Commission's biweekly agenda is available on its website, and includes links to the majority of the proposed decisions under consideration. In addition, hard copies of proposed decisions are made publicly available at the CPUC's offices prior to every business meeting. Every party to a proceeding is served with proposed decisions when they are first released, and written comments and reply comments on the proposed decisions may be submitted by all parties to a proceeding before the

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[1] "Ratemaking is an essentially legislative act . . ." New Orleans Public Service Inc. v. Council of New Orleans, 491 U.S. 350, 109 S.Ct. 2506; (1989 U.S. LEXIS 3043); "The fixing of a rate and the reducing of that rate are prospective in application and quasi-legislative in character." Southern Pacific Co. v. Railroad Com., 194 Cal. 734, 739; "In adopting rules governing service and in fixing rates, [the] commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions ....", Wood v. Public Utilities Commission (1971) 4 Cal.3d 288, 292, 93 Cal.Rptr. 455, 481 P.2d 823; "The rules of practice and procedure promulgated by the commission are liberal in allowing public participation in ratemaking proceedings. (E.g., Cal. Admin. Code, tit. 20, rule 54.) Hence there may be a number of interveners in such matters, representing a wide variety of public positions. The commission's primary task is to assimilate those views into a composite "public interest," a give-and-take process often producing a result that cannot be deemed a clear-cut victory for any party", Consumers Lobby Against Monopolies v. Public Utilities Com., 25 Cal. 3d 891 (1979); 603 P 2d 41.

Commission may vote on the item. These comments routinely result in modifications of proposed decisions and serve as evidence that the public does have a significant role in the CPUC decision-making process.

A Recommendation for Amendment of Bagley-Keene

Our specific recommendation for revision of the Bagley-Keene Act has two main elements. First, we believe that the specific language should be added to the Public Utilities Code[2] to clarify that a discussion between Commissioners and advisors of the merits of a proposed decision, ruling or order of the CPUC does not constitute a collective concurrence in violation of the Act, so long as the Commissioners do not disclose or commit to their decision or intention to vote a particular way on an item. Such an amendment is consistent with the spirit of the existing version of the Act, in that substantive discussions would be broadly permitted, but the Commissioners are still required to announce their final position and cast their votes in a properly-noticed public meeting.

The second element of our recommendation is to broaden the applicability of what the CPUC refers to as Ratesetting Deliberative Meetings, which are closed meetings in which Commissioners are allowed to discuss substantive matters pursuant to Public Utilities Code Section 1701.3(c). Under current law, such meetings are only permitted in cases categorized as "ratesetting" and only if the Commission has determined that a hearing must be held in such a case. Our recommendation is to make more liberal use of Ratesetting Deliberative Meetings by permitting them to be held in the case of ratesetting cases where no hearing is required, and to permit such meetings in the case of quasi-legislative proceedings as well.

A draft of an amendment to the Public Utilities Code that would address our recommendations regarding the application of Bagley-Keene is attached to this letter.

The Content and Application of Ex Parte Communication Rules

As a result of the recent controversy regarding ex parte communications between CPUC Commissioners and utility executives a number of proposals have surfaced proposing a ban on ex parte communications in CPUC proceeding. Consideration of such proposals should start with the recognition that there are existing statutory rules and CPUC regulations that strictly limit ex parte communications. The recent controversy regarding ex parte communications appears to stem almost entirely from violations of those existing rules. Accordingly, our recommendations in the area of ex parte rules focus on improving the application and

[2] This proposed amendment would address the current ban on discussions between commissioners of the Public Utilities Commission. If the Commission intends the revised rules on deliberation to apply more generally to all multi-member state agencies, similar language could be inserted into the Government Code.

enforcement of the existing framework of ex parte rules, rather than banning ex parte communications generally.

There is an important principle at work in preserving the right of all parties, not just the larger utilities, to have direct communication with Commissioners. As indicated previously in our discussion of Bagley-Keene, the work of the CPUC primarily consists of the legislative task of ratemaking, and balancing the interests of an ever-increasing number of parties who are directly affected by the energy, telecommunications, water, transportation, and safety decisions of the CPUC. The undersigned feel very strongly that *banning ex parte contacts in ratemaking proceedings at the CPUC would have the direct effect of strengthening the power of the large incumbent utilities* to bend the decisions of the CPUC to their will. This is because the largest utilities have a substantial advantage in the resources they bring to the ratesetting process, particularly when it involves trial-type evidentiary hearings. Companies such as PG&E, SoCal Edison, and Sempra have enormous regulatory and legal departments, and routinely offer up dozens of expert witnesses to support their positions, supported by small armies of attorneys. Strikingly, these legions of utility regulatory experts and attorneys are funded by utility customers, as participation in rate cases has been deemed a legitimate cost of doing business for the utilities. The practical consequence of the utilities' ability to muster such resources is that other parties, including the CPUC's own staff, are outgunned in the hearing room. Even large industrial customers who can afford to provide their own attorneys and expert witnesses are simply unable to match the resources of the larger utilities. Added to this is the fact that the utilities control the most important single element in a ratesetting case--the information about the utilities' own rates, expenses, activities, and actions. The utilities' twin advantages of having more legal and expert resources and sole control of the key information needed for ratemaking lead to evidentiary records in hearings that are frequently dominated by the information the utility wants to put before the CPUC.

A broad ban on ex parte communications in ratesetting cases would prevent non-utility parties from communicating directly with CPUC Commissioners, denying them a crucial means of highlighting their particular concerns, which might otherwise be overwhelmed by the evidentiary record consisting primarily of testimony from utility witnesses. The undersigned are all familiar with numerous examples of cases in which it was only possible for a non-utility party to succeed in focusing the attention of the Commissioners on issues of great importance to their client or organization by means of a face to face meeting with a Commissioner or advisor. As a result, our recommendations are aimed at ensuring there is appropriate disclosure of ex parte communications that do occur, rather than banning them outright.

Proposals for Revised Ex Parte Communication Rules

The first recommendation we offer is to retain the basic scope of the existing ex parte rules for ratesetting, quasi-legislative, and adjudicatory proceedings at the CPUC. Specifically, the existing rules permit ex parte communications in ratesetting proceedings so long as the content of the oral communication is reported within three days of the contact, and written ex parte communications are served on all parties when the communication is made. If the ex

parte communication in a ratesetting case involves a Commissioner, then advance notice of the granting of the meeting must be served three days prior to the meeting, thereby creating a right to equal time meetings for other parties to the same proceeding.

There are no limitations or notice requirements for ex parte communications in quasi-legislative (rulemaking) proceedings at the CPUC. We do not propose to change the open access to Commissioners and advisors in such cases.

Nor do we propose any change to the ex parte rules related to adjudicatory cases, which generally prohibit all ex parte communications during the proceeding, and it does not appear that compliance with the rules in these types of cases has been an issue.

There is a particular situation involving ex parte communications in ratesetting cases that we believe requires special attention. There have been controversies when a Commissioner grants an ex parte meeting less than three days prior to a CPUC business meeting at which the case at issue will be voted upon. In some such cases, the required advance notice of the granting of the meeting has apparently not been served in a timely manner, and the notice of the content of the ex parte meeting is not received by other parties until after the business meeting. This effectively deprives other parties of the right to claim their equal time meeting, or even to make a last minute contact to address final modifications to a proposed decision. Our recommendation is to supplement the ex parte communications rules on ratesetting cases to specifically state that no ex parte communication with a Commissioner may be held within three days of a business meeting at which the case at issue will be addressed, unless the meeting had been granted and the proper advance notice of the granting of the meeting had been served more than three days prior to the scheduled business meeting. This change would eliminate a last minute ex parte communication with Commissioners under circumstances that would prevent other parties from being able to respond. It should be noted that all parties would remain able to make last minute contacts with the Commissioners' advisors, and that this is frequently an appropriate way for parties to raise last minute concerns about a proposed decision.

We also recommend that the Commission amend its Rules of Practice and Procedure to emphasize that notices of oral ex parte communications in both ratesetting and quasi-legislative cases must provide a detailed substantive description of the contact with the Commissioner or advisor. In many cases such notices are filed with only a general description of the subject matter of the contact. Other parties are not able to respond to a particular argument or issue because the notice is far too vague about the content of the communication. For that reason, we believe the CPUC should clarify in its rules that notices that contain insufficient detail about the substantive content of an oral communication will be required to file a supplemental notice. We suggest that the CPUC specifically require that ex parte notices regarding oral communications should provide a full summary of the advocacy that occurred during the ex parte contact, including a list of the principal arguments or points made to the regulator(s). Existing rules also require that copies of any written materials distributed at the meeting be attached to the notice. For this change in ex parte reporting to work, it will require diligent supervision and enforcement by the Commission itself, and by parties "policing" each others' ex parte notices.

However, we believe this change could both enhance the transparency of the CPUC's decision-making process and level the playing field for large and small parties involved in ratesetting and rulemaking cases.

Lastly, we offer a recommendation that is related to ex parte communications, but deals more with the procedure for releasing CPUC proposed decisions prior to a business meeting. While existing rules require the service of a proposed decision or alternate proposed decision on all parties, the Assigned Commissioner frequently makes changes both large and small to a proposed decision before the business meeting. These changes are reflected in "Revisions", which are new versions of the proposed decision with strikeout and underlining to indicate the changes made from the last version. However, these Revisions are frequently not available to the parties until the morning of the CPUC business meeting, at which point there is only an hour or less before the item is voted upon. Last minute changes to CPUC decisions can be controversial or inconsequential, but it is important for all parties to have notice if substantive changes are being made to a proposed decision. As a result, we recommend that the Commission serve by email revisions of proposed decisions and alternate proposed decisions on all parties to a proceeding up until the close of business on the day before a CPUC business meeting. This means that the CPUC will bear a larger burden to identify revisions in a timely manner and have their Process Office electronically serve them, but it will substantially increase the transparency in the critical last days of the decision-making process. We specifically recommend that the CPUC only be required to serve parties who have provided their email address (which is the vast majority of parties) and that no email service be required for Revisions distributed for the first time after 5 pm the evening prior to a business meeting. Revisions produced later than this time should be discouraged, or the matter could be held to the subsequent meeting.

Conclusion

We greatly appreciate the opportunity to offer our collective recommendations to the Commission, and stand ready to provide additional information if it would be helpful to the work of the Commission. We would endeavor to have one of our group available to speak at a Commission meeting if that would assist in explaining the rationale for our recommendations. In closing, we wish to offer our strong support for the Commission's examination of these issues. We all feel that it is very important that the rules which govern state agency decision-making work to enable an agency to operate in an efficient manner, while preserving the opportunity for

stakeholders of every description to have an equal opportunity to understand what decisions are proposed for adoption and to bring the pressing concerns of their community or interest group to the attention of the agency in a timely manner.

Very truly yours,

Michael B. Day
on behalf of

Michael B. Day
Ralph Cavanagh
Barbara O'Connor
William Kissinger
Barbara Barkovich
William Schulte

Attachments (2)

## Background Information on the Authors

Please note: In submitting these comments, the authors are offering their collective personal recommendations, and do not purport to represent the views of any of their respective clients, employers, or organizations.

**Michael B. Day** is a partner in the firm of Goodin, MacBride, Squeri & Day, LLC, which specializes in California regulatory law. Mr. Day represents a wide variety of clients before the CPUC, in cases addressing electric transmission, natural gas, telecommunications, rail safety, and water matters. From 1980-91, he held several positions in the Legal Division at the CPUC, including Deputy General Counsel, where his responsibilities included supervising all decisions issued by the Commission, and Acting General Counsel. In 1999-2000 Mr. Day served as President of the Conference of California Public Utility Counsel, a regulatory bar association with public, private and utility attorney members.

**Ralph Cavanagh** is Energy Program Co-Director for the Natural Resources Defense Council, which he joined in 1979; he has worked frequently in subsequent years with all of California's major energy regulatory agencies, with a particular focus on the California Public Utilities Commission and the California Energy Commission. He has held appointments as a visiting professor of law at Berkeley and Stanford. He is a recipient of the state's Flex Your Power award for lifetime achievement in energy efficiency, and a member of the boards of the Center for Energy Efficiency and Renewable Technologies and the California Clean Energy Fund.

**Dr. Barbara O'Connor, Ph.D.** is a nationally recognized expert in the fields of political communication and telecommunications policy and applications. She has served as chair of the California Educational Technology Committee and the California Public Broadcasting Commission, and served on many other boards and commissions dealing with the media and technology. Dr. O'Connor has served as an expert consultant to the California Legislature, the Congress of the United States, The Federal Communications Commission, The Office of Technology Assessment, The U.S. Department of Commerce, and National Public Radio, as well as a large number of Fortune 500 media, energy and telecommunications companies. Dr. O'Connor is an Emeritus Professor of Communications, and Director of the Institute for the Study of Politics and Media at the California State University. She was elected as a member of the AARP National Board in 2010, and was appointed to serve as a Director of the California Emerging Technology Fund by the California Public Utilities Commission.

**William Kissinger** is a partner in the firm Morgan, Lewis & Bockius and regularly appears before the CPUC, among other California and federal energy agencies, representing a wide range of clients including California state agencies, natural gas and renewable energy generation developers, storage developers, municipal utilities and transmission developers. During the 2000-2001 California energy crisis, Mr. Kissinger served in the Office of Governor Gray Davis as Senior Deputy Legal Affairs Secretary and a member of the Governor's Energy Task Force. Mr. Kissinger also served as a board member of the California Energy Oversight Board.

**Dr. Barbara R. Barkovich, Ph.D.** worked for the California Public Utilities Commission from 1975 to 1983, in positions ranging from Commissioner's advisor to Director of Policy and Planning. She also represented the Commission at the Legislature, the Governor's Office, and Congress. After two years working in the finance industry, in 1985 Dr. Barkovich began a consulting practice that has primarily focused on electric industry matters before the California Public Utilities Commission. She has developed a large body of expert witness testimony on many matters and has also submitted numerous comments in CPUC proceedings and participated in many settlements. Dr. Barkovich is currently Chairperson of the Board of the restructured California Power Exchange, a position she has held since 2003. She has also served on the California Independent System Operator Governing Board, on the Trust Advisory Committees that set up the reorganized California electricity structure and markets, as well as the Energy Engineering Board of the National Research Council.

**William Schulte** worked for over 28 years with the California Public Utilities Commission. Subsequent to his retirement as Director of the CPUC's Consumer Protection Division, he has been engaged by a number of telecommunications companies and associations, transportation companies, and real estate developers assisting in resolving regulatory issues. He has served as a consultant to state regulatory commissions throughout the country on a variety of issues, including consumer protection. Mr. Schulte has also been engaged by the US Agency for International Development and the World Bank in assisting developing countries in Western and Southern Africa and Southeast Asia. He is also on the Board of Directors of Sustainable San Mateo County and Self Help for the Elderly.

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**Proposed Amendments related to the Bagley Keene Open Meeting Act:**

**A new Section 311.6 of the Public Utilities Code is enacted to read as follows:**

311.6 Notwithstanding the provisions of Section 11122.5 (b)(1) and (c)(1) of the Government Code, members of the Public Utilities Commission shall be subject to the following provisions regarding meetings:

(a) Except as authorized pursuant to Section 11123, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the commission to develop a collective concurrence as to action to be taken on one item by the commission is prohibited. This prohibition shall not apply to individual contacts or conversations between a member of the commission and any other person.

(b) A discussion by a member of the commission of the merits of any item of business within the subject matter jurisdiction of the commission, including a discussion of modifications to any proposed decision, ruling or order, does not constitute a collective concurrence if the member of the commission does not disclose his or her decision or intention to vote on the item.

**A new subsection 1701.3(f) shall be added at the end of Section 1701.3 of the Public Utilities Code, to read as follows:**

(f) The provisions of subsection (c) above shall apply in all proceedings classified by the commission as quasi-legislative cases or ratesetting cases, whether or not a hearing is required.