TESTIMONY OF PROFESSOR ROBERT C. FELLMETH

BEFORE THE LITTLE HOOVER COMMISSION

August 26, 2014

Interest of the Center for Public Interest Law (CPIL)

Our interest in the subject matter of this inquiry includes both of its elements, the Bagley Keene Open Meeting Act (BK Act) and the Public Utilities Commission (PUC). I am a graduate of Stanford University and the Harvard Law School and currently hold the Price Chair in Public Interest Law at the University of San Diego School of Law. I have been the Executive Director of CPIL since its founding in 1980. We at CPIL are familiar with the BK Act, supporting its sustenance in the legislature and bringing suit to enforce its requirements. We have monitored agency compliance of it for some 29 state agencies, including the PUC, over the past 34 years. Most of these agencies are governed by boards or commissions subject to its terms. The BK Act has also long been a part of the curriculum of our yearlong Public Interest Law and Practice course, which includes students assigned to specific agencies who attend the applicable meetings, monitor agendas, rulemaking, relevant legislation and court cases, and write for our *California Regulatory Law Reporter*.[1]

I personally spent four years as Chair of the Athletic Commission, subject to the terms of the BK Act. I have taught "regulated industries" which focuses on PUC-type monopoly regulation and am co-author of a treatise entitled *California Regulatory Law and Practice*.[2] I also have some experience with the PUC, am a previous expert witness in cases before the Commission, and in 1983 helped to found the Utility Consumer Action Network (UCAN), the state's largest membership entity representing ratepayers before it

The Nature and Importance of the BK Act Generally

The BK Act, along with the California Public Records Act and the Administrative Procedure Act (APA), form the "sunshine laws" triumvirate of California. Because the BK Act applies to "meetings," its provisions are most relevant to boards and commissions that must meet to make decisions. Departments and bureaus with single person governance do not meet publicly to decide most relevant public policy within their respective domains (except for adoption of rules which can require a public hearing where one is requested). A "meeting" does not occur with a conversation between two board members. But it is broadly interpreted and where a conversation between two concerning an aspect of board business that is then extended to a third, there can be a "sequencing" of conversations (also called "serial communications") that amounts to a "prearranged decision" in violation of the purpose of the BK Act. And such an ordering is particularly problematical with a small board or commission, in this case where a third person forms a determinative majority of three.

[1] The *Reporter* has been in hiatus in recent years, but back issues are now being completed and it is expected to be updated to current in the near future.

[2] CALIFORNIA REGULATORY LAW AND PRACTICE, with Folsom (treatise) (Butterworths 1983, Supplements 1985, 1987, 1989)

The major elements of the BK Act include the requirement to publish an agenda 10 days before any meeting. That critical provision allows the public to know what may be decided and to allow interested persons to attend. Generally, no "action may be taken" (a broadly defined term) on any item that is not on the agenda in a form allowing disclosure of what will happen. Importantly, the "meeting materials" given to Board members must be made available to the public before the meeting starts (with possible redactions where warranted). That information is critical to understanding what is happening at any meeting since oral references that "I agree with the warnings of staff on page 3 of its memo" will be incomprehensible without the meeting materials. In addition, the public has a right to speak on agenda items during the meeting, although the time allocated for speakers may be limited. The PUC adopted 18 rules guiding this part of BK Act compliance.[3]

There are exceptions to these requirements. Very summarily, they include "special meetings" (allowed where there is not time to wait the ten days between agenda and decision), "emergency meetings" for extraordinary circumstances, and "closed sessions." The last is most often used. The BK Act allows part of a noticed meeting to be "closed" to the public for specified reasons, such as receiving advice pertaining to current litigation, discussing the evaluation of staff, and considering examination questions, *et al.* Among allowable closed session discussion (and of importance to the PUC), is the actual quasi-adjudicative "deliberations" of a multi-member body to reach a decision on a disciplinary matter. This is analogous to a Supreme Court or three judge panel considering a final opinion. They are written and shared and edited by the members of the panel or court within their own domain.

The underlying purpose behind the BK Act is to allow transparency to decisions as they are being made. The public (including the media) is able to see the debate or discussion, have some sense of the basis for the decision and to observe who voted which way. And there is opportunity to know in advance what subject matter will be decided so public comment can be obtained (both before and at the final decisionmaking meeting). In this way, a board not only solicits comments that may limit unintended consequences, but it also provides a crucial element of legitimacy, where the governed see the government intended to serve them as it acts.

Distinctive Features of the PUC Regarding BK Act Application

Some of the characteristics of the PUC underline the importance of BK Act application, while others may suggest some variation. The most compelling reason for its application is that its rationale applies *in extremis* to this agency. It makes decisions of portentous public impact. It regulates monopoly enterprises which lack market check or consumer choice for basic modern necessities. It creates and enforces standards of profound relevance to public safety, whether train crossings, a nuclear power plant or gas lines under extreme pressure beneath our communities and within feet of our homes and children.

Adding to the importance of public accountability is the imbalance in bargaining and advocacy power between the agency and those it regulates. Ironically, there has been a general historical pattern to allow liberal "prudent cost" allowance for utility advocacy before the PUC. Such costs generally do not come from stockholders whose interests are necessarily advanced by the private corporate utility

[3] See Resolution ALJ-252, 6-24-2010.

entity. That fiduciary duty of each utility to maximize profit for its stockholders is not an accusation, it is simply the factual setting for their operation. Any corporation has a primary fiduciary duty to protect the investment of its owners (stockholders) and to maximize dividends (profit) for their benefit. That is not stated with pejorative intent. It is what properly constitutes a corporation and its structural, intended orientation. But where its expert witnesses and counsel and lobbyists are able to take their expenses from the "prudent" cost side of revenue, it comes from ratepayers, not from the stockholders who benefit from the utility private corporation's necessary orientation. And to the extent that assessment is allowed, it effectively can become a blank check.

The PUC does have some ameliorating factors to the underlying imbalance in the advocacy before it. First, it has an Office of Ratepayer Advocates (ORA) to provide some internal consumer interest representation, although its budget and reach are quite limited.

Second, the PUC may pay "intervenor compensation" to groups (such as UCAN, TURN and others) where they represent a large group without a profit stake in a proceeding and constructively contribute to the outcome. And it does have a record of seriously considering their contentions – although its unconscionable delay making deserved awards undermines this important check on utility advocacy domination.

Third, the agency has an *ex parte* check unusual among agencies -- wherein visits to commissioners include a log where the lobbyist, subject matter of the visit, and time parameter are recorded. But it is unclear how this "appointment" information lessens the imbalance. And, indeed, the overwhelming balance of legal, expert, and lobbying advocacy remains with the profit-stake utilities who are regulated. And the importance of transparency is only heightened by these features.

Additional characteristics disproportionately commend public transparency for this agency. The complexity of its procedures and subject matter form yet another advantage for those with expertise in economics, rates, rulemaking, and the complex worlds the agency regulates. This complexity gives an advantage to those who engage in the affected services, and who have experts who are employed or retained to defend prior decisions made. For example, to demonstrate that a capital investment, such as a nuclear plant, met and continues to meet the seminal requirement that each capital asset financed by ratepayers be "used and useful" for consumers. Only if it passes this test, does that capital investment warrant an assessment to cover a "rate of return" to the stockholders and bond holders who have financed it. In addition to this assessed return on investment, direct operational costs that are "prudent" are also covered by ratepayers, who are involuntarily paying for a monopoly provided necessity. Contesting the applications, rates and claims of a typical monopoly utility requires the retention of experts, effective discovery into operations, and substantial legal resources otherwise.

Having said this, there are some aspects of PUC regulation that can raise BK Act issues not typical of other agencies. First is its basic structure. Most state board and commission appointees are essentially volunteers who are paid a symbolic *per diem* and meet once every month or two. The "Executive Officer" they select does virtually all of the administration. Hence, there is natural coordination throughout the agency without the need for any coordination among board or commission members. But the PUC functions differently. It has a limited number of commissioners who are, in fact, full time state employees, and hence more of a part of the agency's administration. Each commissioner has staff. Each one may be designated a particular case to engage in some supervisory function. This is

not normally the case, and it can raise issues of agency coordination where a collection of offices is (perhaps with excessive independence) in essence responsible for coordinating a proceeding.

Second, most PUC decisions are not made from meeting materials or witness testimony in a *tabula rasa* fashion. They are rather the end product of proceedings starting with an in-house administrative law judge (ALJ) and creating a record of testimony and a proposed decision. That process can allow for input from outside of those who are regulated, but that outside contribution is usually from the ORA or intervenors as noted above, and with discussed limitations. Nevertheless, the decision points are generally not secret nor sudden. And there is an information gathering structure, such as it is.

Third, the variety of subject matter and expertise required in the PUC's regulatory world is perhaps without peer. The PUC is regulating part of intrastate rail and passenger bus/car transport, household movers, aspects of telecommunications, private water companies, electricity and natural gas. Complicating matters further is the radically changing competitive scenario in many of these venues. Regulating telephone land lines was rather a different function in 1960 -- before cable, the Internet, satellite transmission, and cell phones – most of it outside effective PUC jurisdiction. And the same dilemma infects every aspect of PUC jurisdiction – from the growth of "ride sharing" enterprises (within PUC transportation jurisdiction) to figuring out how the traditional monopoly power lines are to accommodate new power generation not within the control of major utilities, or emanating from one million roof tops. [4]

Fourth, the PUC is not clearly divided into the functions typical of most agencies. Most have quasi-judicial "adjudications," usually involving the discipline of "licensees." The agency will file an "accusation" against a licensed person that is then subject to an ALJ evidentiary hearing and review or appeal before the board or commission, and then possibly to court through the CCP Section 1094.5 writ of administrative mandamus. They function administratively to investigate complaints, choosing what to enforce how as an executive branch prosecutor does. Finally, they function in a quasi-legislative

[4] CPIL respectfully contents that a rational restructuring of the areas of PUC regulation would:

(a) build an agency around a single body of expertise and economic enterprise (or in this case multiple agencies, one over each area where necessary); and

(b) then bring all aspects of that more manageable sector into the regulatory ambit of that agency.

While we favor using market forces wherever possible, the regulatory presence is ideally over subject matter that allows market restoration or regulation without irrational intermodal or other displacement, and with some commonality of the subject matter each agency regulates. There is no synergy between household carriers, power, telecommunications, private water companies, or rail crossing, *et al*. that commend their joinder into a single system or agency.

What we have now is the obverse of both requirements: jurisdiction that is too varied in its ambit, and for each of those subject areas, too fragmented for optimum market restoration or correction.

manner to adopt "rules" that apply statutory intent for their regulatory function. The application of the BK Act to these three areas of common activity is well understood.

But the PUC has some differences. It does not just license individual persons or licensees; it also regulates utility corporate "persons" whose operations are not amenable to the simple application of a rule requiring a performance bond of a swimming pool contractor or the posting of a notice in a doctor's office. The major telecommunication and power utilities are not very similar to the persons commonly licensed by BK Act covered boards and commission. Each is a universe unto itself. Nor is the remedy usually going to be the common outcomes of a "warning letter, suspension or license revocation." The former is not going to overly impress a utility and the latter two are impractical.

Accentuating that quantitative size/complexity difference is the qualitative difference of its rather unusual "types" of proceedings. It has "ratemaking" authority, setting a schedule of allowable rates for utilities that is to be followed, and which are subject to a change application. Only the Insurance Commissioner has somewhat similar maximum price power. In addition, it also has authority over the utility's operations that will directly affect rates. For the stockholders of the utility actually have a constitutionally based right to a "fair rate of return" on their investment (assuming used and useful capital investment and prudent costs). Such considerations are not part of other agency oversight (other than some aspects of insurance). Accordingly, it necessarily becomes involved in operational decisions that are going to create costs (or savings) for ratepayer obligation. That is not a typical concern of most agencies. Hence, decisions to borrow, to contract out expenses, to create a new physical facility, may be subject to PUC review. And, indeed, the utility is generally wise to seek that advance permission because it needs a judgment that it meets regulatory standards for ratepayer assessment.

The PUC very often opens an "investigation" into a utility practice or issue. It may or may not end in rulemaking. It may take the form of a policy, or influence a ratemaking proceeding, or investigate possible non-compliance with a statute or rule. A large number of major PUC proceedings are under this "investigative" rubric. The PUC may initiate such a proceeding itself, or in response to requests. They may end up as rulemaking. Other proceedings are "rulemaking" from start to finish. The first part of many of these proceedings is a "scoping" process to determine exactly the parameters and purpose of the inquiry.

Under the APA governing most agencies, the procedures governing quasi adjudicative discipline are set forth in a discrete part of that statute from the procedures governing quasi-legislative rulemaking. And they are very different. In adjudicative hearings, *ex parte* communications from parties to decision-makers are prohibited on the subject of the proceeding. However, note that these limitations are more difficult to police where the same utility has many issues before the PUC and only one or two of them are so limited. Moreover, the PUC has a large gray area – with aspects of ratesetting arguably in the nature of rulemaking, and not merely the setting of a maximum charge. Such decisions may not specify a rate, but they may affect or even determine its likely level. Complicating it further, the ratesetting, to the extent it is quasi judicial, may be decided after oral argument and submission of arguments by all parties to a deliberation process that is closed.

What about an investigation with findings and recommended action? What about a change in ratesetting standards or criteria? There may not be a rate figure result, but a decision about how things should be measured. What about rulemaking applicable to safety or other standards that are more

typically quasi-legislative? On the legislative side, the BK Act principles more easily apply since the idea is to make decisions in public and subject to public hearing and input.[5] And, indeed, the APA has its own separate requirements quite apart from the BK Act concerning public hearings in adopting rules or regulations. In fact, such hearings apply not only to the boards and commissions subject to the BK Act, but to any department, bureau or agency – even those that do not "meet" to conduct business and to whom the BK Act does not routinely apply. Any person may request a hearing on any rule proposed in the *California Regulatory Notice Register* and it must be provided under the APA.

Application to the Instant Issue of Individual Communications Violating the BK Act

In 2006, a California Court of Appeal decided *Wolfe v. City of Fremont,* 144 Cal.App.4th 533 (2006). Previously, the problem of "serial communications" described above was thought to apply to two-person communications that were then expanded to a third or more parties, effectuating a discussion in private of an issue properly discussed in a public venue. The case limited the serial communication limitation only to circumstances where it resulted in a final decision influenced by those previous communications. That limitation alarmed public interest advocates for many reasons, including the fact that such communications may influence non-final vote decisions, and indeed, may influence the body such that a decision is NOT made that would otherwise have occurred. The obvious flaw in the holding resulted in corrective legislation (SB 1732 Romero) to overturn it as to the Brown Open Meetings Act applicable to local agencies (now Chapter 63, 2008). AB 1494 (Eng) was then enacted the following year. The relevant change it made to the state BK Act (applying not to local but to state agencies) in response to *Wolfe* is to amend the relevant section as follows:

> Section 11122.5 of the Government Code is amended to read:
> 11122.5. (a) As used in this article, "meeting" includes any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains.
> (b) (1) A majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, **to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body.**

The problem with the change is the possible overreach involved in its bright line formulation of "discuss" that applies not just to commissioners, but "any intermediaries" (such as staff). Combine that with the very broad "within the subject matter of the state body" and the breadth of the serial communications prohibition becomes rather apparent. The dangerous *Wolfe* decision warranted

[5] To be candid, those of us familiar with the legislative process can amply document that it is not a public process at all, that *ex parte* contacts proliferate, and that final decisions are made in private discussions with lobbyists and the Governor's office with no disclosure, and no check on undue influence or last second radical changes with momentous but unexamined consequences. But the BK Act is intended to limit these abuses in the quasi-legislative functioning of executive branch agencies.

reversal or clarification, but it may have been over-corrected by AB 1494 when applied to this particular agency. On the one hand, we note that the danger of serial communications to undermine the BK Act is of great concern with a five member Commission. Here, as noted above, two have but to communicate with a third in order to achieve a voting majority and thus undermine the statute. But, on the other hand, you here have an agency with an atypical structure, with five commissioners who, in fact, do not totally delegate to an Executive Officer, but run an important part of the agency through their individual offices and staffs. That administration would reasonably require legitimate communications that would be a "discussion" "within the subject matter of the state body," especially by staff. Those communications would properly not involve a final substantive decision, but might pertain to allowable logistical, procedural, formatting and a whole set of administrative arrangements that may be facilitated by communications between the offices of the five commissioners. Given its structure and the fragmentation and complexity of its proceedings, as discussed above, such discussions would not necessarily violate the purposes behind the BK Act. On the other hand, any license for communications that might take the form of a "series" reaching just three commissioners as to a preset arrangement for a policy decision would violate it.

The sensible resolution of this issue, as with many issues, is to follow the wisdom of Aristotle "moderation, moderation in all things." Perhaps revise the "discuss" (anything) "within the subject matter" of the PUC to something more circumscribed, but not so circumscribed so as to allow effective evasion of the BK Act. One possible solution might be a subsection [pertaining only to the PUC] that provides that "discussion" within Section 11122.5 means any "communication that proposes, advocates, opposes, or comments upon the merits of any substantive decision, or any element of such a decision, that is proposed or pending before the agency." That would seem to preserve the substantive purposes of the BK Act, while recognizing the somewhat more compelling need of this agency to coordinate its operations between the offices of the five commissioners.