BEFORE THE LITTLE HOOVER COMMISSION
OF THE STATE OF CALIFORNIA

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TESTIMONY OF MICHEL PETER FLORIO
COMMISSIONER, CALIFORNIA PUBLIC UTILITIES COMMISSION

Personal Reflections on the Impact of the 2009 Bagley-Keene Amendments[1]

Thank you for the opportunity to express my views here this morning. I am one of the five governor-appointed members of the California Public Utilities Commission (CPUC), having served in that capacity since January of 2011. Prior to my appointment, I appeared before the commission as a practicing attorney for over 30 years, so I have lengthy experience with the agency and how it operates. My professional background is summarized in an attachment to this testimony.

In short, it has been my observation that the impact of the 2009 Bagley-Keene amendments embodied in Assembly Bill 1494 (Eng, 2009) has been to make the CPUC's decision-making less transparent to the public, rather than more. Worse, it has made the commission's already cumbersome processes more difficult and less timely. I also fear that the commission's decisions may be less well-informed than in the past, and that accountability has been diffused due to the lack of internal communication.

Before explaining the basis for my concerns, I would like to briefly describe the work of the CPUC, an agency that is one of the most impactful in state government but often little understood.

For more than 100 years, the CPUC has worked to protect consumers and ensure the provision of safe, reliable utility service and infrastructure at reasonable rates, with a commitment to environmental enhancement and a healthy California economy. The commission's jurisdiction encompasses essential public services such as electricity, natural gas, water, telecommunications, railroads, rail crossings, light rail transit systems, passenger carriers,

[1] The views expressed here are entirely my own, and have not been reviewed by or discussed with the other CPUC commissioners.

and household moving companies. California's economy is highly dependent on the infrastructure and the utilities that the California Public Utilities Commission (CPUC) oversees.

Specifically, the CPUC:

- Oversees the safety of electric and communications facilities, power plants, natural gas and propane gas systems, railroads, light rail transit systems, highway/rail crossings, and motor carriers of passengers and household goods, and enforces regulations concerning consumer protection. Ultimately, safety is the responsibility of every member of the CPUC staff, and safety is being actively integrated into every aspect of the CPUC decision-making.
- Regulates rates for 70 percent of California's retail electric sales and 99 percent of the state's natural gas deliveries. Through its oversight over these utilities, the CPUC has played a key role in making California a national and international leader on a number of energy-related initiatives designed to benefit consumers, the environment, and the economy.
- Performs audits of utilities from all regulated industries, providing financial and accounting analysis and information, and investigations of utility compliance with CPUC orders.
- Oversees telephone companies by supporting Universal Service; safe and reliable communications services; and ubiquitous deployment of advanced networks and services.
- Oversees private water utilities companies serving about 20 percent of California retail consumers, with an emphasis on highly reliable water supplies; efficient use of water; and reasonable rates and viable utilities.
- Regulates the safety of railroads and grade-level rail crossings, rail transit systems, moving companies, and passenger carriers such as limousines and airport shuttles.
- Provides direct outreach to community and civic organizations, to small business and ethnically diverse suppliers, and to non-English speakers regarding CPUC proceedings. CPUC staff also monitors and approves certain communications, such as bill inserts, between the regulated companies and consumers to ensure full and accurate representations are made. Finally, the CPUC operates a robust consumer complaint service, facilitating informal dispute resolution with regulated utilities.

Clearly this is an extremely broad mandate, and the commission struggles to keep up with the workload, which typically includes roughly five hundred active proceedings at any given time. Further, many of the industries that the commission oversees are undergoing unprecedented technological change, as the digital revolution transforms century-old business and regulatory models. And each of the industries that the CPUC oversees operates under a somewhat different regulatory model. Staffing levels have not changed appreciably over the last few decades, despite the increasingly challenging environment in which the CPUC operates.

Against this backdrop, the 2009 Bagley-Keene (B-K) amendments have altered the manner in which the commission had conducted its business in recent decades in important ways. An individual commissioner is assigned, along with an administrative law judge (ALJ), to oversee each particular proceeding. That means that each commissioner is responsible for roughly one hundred proceedings at any given time. The assigned commissioner presents the proposed decisions in his/her cases for consideration at the CPUC's biweekly business meetings, which typically consist of 50 to 90 agenda items. These may be as short as a few pages, but often extend to hundreds of pages in major proceedings. A single decision may incorporate dozens or even hundreds of discrete issues that must be addressed to fully resolve the matter Each commissioner has four advisors (the president has five) to assist with managing the assigned proceedings and reviewing the agenda items prepared by other commissioner's offices. Clearly this is a very heavy workload under the best of circumstances, and the pace of change in the industries the CPUC regulates means that the complexity of its work has increased exponentially.

Prior to the 2009 amendments, B-K provided that no three commissioners could, directly or indirectly through intermediaries, communicate with each other to develop "a collective concurrence" as to the action to be taken an item of business. Under this rule, three commissioners rarely if ever met privately to discuss an item of business, but the advisors to the various commissioners communicated regularly to keep each of the offices apprised of ongoing activities and to explain proposed decisions that would be coming up for a vote. This process worked well for decades to ensure that all commissioners were kept well-informed about the full range of the CPUC's business. Because advisors cannot commit the vote of the commissioners

for whom they work, it was impossible to develop a "collective concurrence" under this structure.

Under the revised statute, the restrictions on communications among commissioner offices are much stricter – no three commissioners (or their advisors) can, through a series of direct or *indirect* communications, take action, deliberate on, or even ***discuss***, any item of business that is within the subject matter jurisdiction of the agency. The restriction is not limited to matters that are pending for decision – no "item of business that is within the subject matter of the state body" can be discussed by more than two commissioners or their advisors. In an agency with jurisdiction as broad as the CPUC, this is a significant limitation on communications among offices.

As a means of coping with these new restrictions, a commissioner may sometimes form a "B-K alliance" with another office, such that those two commissioners and their advisors may discuss a particular matter. However, once such an alliance is formed, neither the commissioners nor their advisors can discuss that matter at all with any of the other three commissioners or their advisors. This becomes especially problematic when multiple commissioners are overseeing cases that interact with each other in terms of policy or rate impacts. For example, when I was the assigned commissioner for the Long-Term Procurement Planning proceeding for electricity, I could form a B-K alliance with the commissioner overseeing Renewable Portfolio Standard energy procurement but, if I did so, neither I nor my advisors could speak with the commissioner offices that were overseeing energy efficiency, demand response, or the California Solar Initiative, even though all of these matters are integrally related. The risk of inconsistent decision-making is increased substantially, and at best the commission's actions may appear (and actually be) siloed and uncoordinated. At a time when, increasingly, "everything is connected to everything else" the lack of communication and coordination can be especially damaging.

The 2009 B-K amendments have the unintended consequence of limiting the internal information flow on proceedings and policies that come before the Commission, and as such conversely increases the influence of outside parties' lobbying efforts. The inability of Commissioners' advisors to discuss the substance of important cases makes it difficult for decision-makers to understand the rational for positions taken in proposed decisions sponsored

by other offices, or the background and context of those decisions. Instead commissioners are increasingly forced to rely on the representations of interested parties and staff.

For example:

- In quasi-legislative proceedings (broad policy rulemakings) there are no *ex parte* prohibitions and parties are free to lobby all decision-makers without any reporting. However, due to B-K, the commissioners and their advisors have less access to their fellow decision-makers than the parties do, and do not even know when meetings with other commissioners may be occurring. In fact, it is sometimes the case that everyone in the audience at a commission meeting knows what the outcome of a vote on a particular matter will be before it occurs – everyone that is except the five commissioners and their advisors.

- In the Sunrise Powerlink proceeding, SDG&E shareholders paid $920,000 to settle accusations that they misled decision-makers in their *ex parte* communications. SDG&E's misrepresentation of facts might never have been discovered if the commissioner advisors had not been able to discuss the matter among themselves after being lobbied, as they were able to do prior to the recent changes in B-K.

- When an ALJ releases a proposed decision, he/she can brief all the commissioners on it and ensure they understand it. But when a commissioner issues an alternate decision for consideration he/she cannot do so. Thus, other commissioners may, and sometimes do, have misperceptions about the content or intent of the Alternate.

- ALJs and staff would like to be able to brief all commissioner offices on a topic at the same time in order to conserve resources; however, in that setting, the commissioners/advisors cannot ask probing questions that might indicate the substantive thoughts of the commissioner on one of the issues.

- In complex cases, different commissioners may have different understandings of underlying facts. For example, in the Transportation Network Company (TNCs, such as Uber and Lyft) proceedings, insurance is a major issue but none the commissioners typically deals with insurance matters, so different decision-makers may have different

ideas about what level of insurance is needed. The matter can be discussed in public session during the business meeting, but that usually means waiting until the next business meeting to draft a revised decision, resulting in substantive delay in setting policy. If disagreements persist, even more costly delay can occur.

Public transparency of decision-making is a value that I and my colleagues all strongly support. However, at least in the context of an agency whose mandate is as broad and complex as the CPUC's, it is a practical impossibility for **all** discussion on **all** matters within the commission's jurisdiction to be conducted in a public voting session. Commissioners need to be able to gather background and educate themselves on the issues outside of formal meetings, and need a mechanism by which to communicate in doing so. That does not mean that we should have "secret backroom deals" or other collusive practices, but the old rule against "collective concurrence" was sufficient to ensure that did not happen. Today, as I read the law, it would be a violation of B-K for me to ask two of my colleagues, "what do you think about the future of solar energy?" even though I could ask that question of any other person on the planet. That seems unduly restrictive and counter-productive to me.

Looking forward, I see two possible approaches to improving the situation. The narrower approach would be to expand the opportunity for closed session "Ratesetting Deliberative Meetings" (RDMs), allowed under Section 1701.3(c) of the Public Utilities Code, beyond their current limited application in ratesetting proceedings where hearings have been held. This could be accomplished through amendment of the Public Utilities Code rather than B-K itself, and would allow the commissioners to meet and discuss pending matters. However, such meetings are difficult to schedule and occur rarely even when they are permissible. Their expanded usage could also be viewed as a substantial reduction in public transparency.

The better alternative in my view would be to return to the prior provisions of B-K that banned only "collective concurrence" among the commissioners outside of a public meeting, and allowed communications among commissioner advisors as long as no such concurrence was formed. Perhaps such a reform could be limited to only the CPUC. In any case, I believe that something needs to be done, or we risk a future of even longer delays in commission decision-

making and more uncoordinated, siloed decisions that fail to provide the People of California with the best utility regulation possible.

Thank you for this opportunity to present my thoughts.

SHORT BIOGRAPHY OF MICHEL PETER ("MIKE") FLORIO

Michel Peter "Mike" Florio was appointed to the California Public Utilities Commission (CPUC) on January 27, 2011 by Governor Jerry Brown. During his tenure on the commission he has served as the lead commissioner on natural gas pipeline safety issues arising out of the September 2010 San Bruno pipeline explosion, both ratemaking and Long-Term Procurement Planning (LTPP) issues resulting from the unexpected closure of the San Onofre Nuclear Generating Station, the 2014 test year Pacific Gas and Electric Company general rate case, and a wide variety of electric transmission permitting cases.

Prior to his appointment, Commissioner Florio served for over 30 years as an attorney for The Utility Reform Network (TURN), the leading utility consumer advocate group in California. In that position he participated in the development of TURN's policy positions on most natural gas and electricity issues and litigated a wide range of proceedings before the CPUC. He also testified as an expert witness on a wide variety of topics including ratemaking policy, utility revenue requirements, natural gas and electric power procurement policy, cost allocation and rate design.

Commissioner Florio also served on the stakeholder governing boards of both the California Independent System Operator (CAISO) and the California Power Exchange as a residential end-user representative from their creation in May of 1997 until January of 2001. In January of 2001 he was appointed by Governor Gray Davis to serve on the CAISO's new five-member independent governing board, and was reappointed in January of 2002 for a full three-year term, which expired in early 2005.

Commissioner Florio is currently a member of Western Conference of Public Service Commissioners, the Committee on Regional Electric Power Cooperation and the State/Provincial Steering Committee of the Western Governors' Association, the Transmission Expansion Planning Policy Committee and Scenario Planning Steering Group of the Western Electricity Coordinating Council, and the Natural Gas Committee of the National Association of Regulatory Utility Commissioners.

Commissioner Florio received a B.A. in political science and sociology from Bowling Green State University (Ohio) in 1974. From 1974 through 1978 he participated in a joint degree program sponsored by New York University School of Law and the Woodrow Wilson School of Public and International Affairs at Princeton University. In 1978 he received a J.D. from New York University and a Masters of Public Affairs (M.P.A.) from Princeton. He was admitted to the California State Bar that same year.