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Before the Little Hoover Commission

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Mr. Chairman and Members of the Commission:

Thank you for the invitation to appear today to describe our work for the California Public Utilities Commission. The CPUC has retained our firm to conduct an independent evaluation of its ex parte practices and rules and to recommend possible reforms. Our engagement is part of the Commission's broader initiative to ensure fair, open, and ethical practices in its administration of the laws regulating public utilities. Because our work is in progress and we have not yet tendered our report and recommendations to the Executive Director and Commissioners, we are not in a position today to report any findings. However, we can describe how we are approaching our task and the goals of our efforts.

Our specific charge is to provide the Commission independent advice and counsel on CPUC ex parte rules and practices, including:

- Assessment of the nature and extent of compliance with existing Commission rules and requirements regarding ex parte communications;
- Evaluation of existing Commission practices and whether they are adequate to ensure compliance, and whether, assuming compliance, they suffice to ensure transparency, due process, and public accountability, or whether changes to existing regulations or statutes are necessary to better accomplish these objectives;
- Recommendations for better monitoring of, and ensuring compliance with, existing Commission ex parte rules and requirements;
- Assessment of best practices in regard to ex parte communications in utility regulatory agency practice, of how existing Commission ex parte rules compare to best practices, and, potentially, of what changes would be required to conform to best practices.

Please note that our mission is entirely forward-looking. We are not being asked to assess who may have acted improperly, what actions ought to be taken with respect to past conduct, or how the Commission should address legal disputes that may arise from past conduct. The CPUC is engaging other resources to address those questions. Our own undertaking must and will, of course, be sufficiently aware of relevant history to formulate appropriate reforms. But we believe that by making clear what is and is not within the scope of our inquiry, we are receiving from the CPUC staff and others less

guarded accounts of current and past practices, problems with those practices, and suggestions going forward.

At the outset, please let me relate how impressed we have been with the earnest desires of everyone we have encountered at the CPUC to reform its ex parte practices. There appears to be a widespread recognition that the Commission has lost public confidence in the fairness and independence of its regulatory actions and in the ethical behavior of its officials. There seems to be a sense that the path to restored public confidence lies in increased transparency and accountability. We have been given independence in our investigation and formulation of recommendations, and we intend to provide the Commission with a report that contributes to its worthy objectives.

Your February 10, 2015 letter inviting my participation today has posed questions to which I now turn.

1. The Legal Landscape

In administrative law generally, and California law in particular, a key distinction is drawn between "quasi-adjudicatory" and "quasi-legislative" actions.[1] Quasi-adjudicatory proceedings (sometimes called "quasi-judicial" or simply "adjudicatory") generally concern the rights of individual parties and are conducted under procedures similar to those employed in courts. Quasi-legislative proceedings (sometimes referred to as "rulemaking") generally concern the adoption of rules of general applicability and employ procedures akin to those of a legislative body.

In California, adjudicatory proceedings are usually conducted under the Administrative Procedure Act,[2] which consists of two parts: a set of general provisions applicable to all state-agency adjudications not exempt from its provisions,[3] and what are called the formal-hearing provisions of the APA,[4] which the Legislature has applied to certain agencies expected to conduct more formal, trial-type hearings. Article 7 of chapter 4.5 contains the APA's provisions regulating ex parte communications, which generally prohibit any direct or indirect substantive communications between the decision-makers (e.g., board or commission members) and other officers presiding over a hearing

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[1] See generally Asimow, Strumwasser, Bolz, & Aspinwall, California Administrative Law (The Rutter Group 2014) ¶¶ 4:55-4:81, pp. 4-8 to 4-12.
[2] Gov. Code, tit. 2, div. 3, pt. 1, chs. 4.5 & 5; see *id.*, § 11400.
[3] *Id.*, §§ 11400-11475.70. Article 6 of chapter 4.5 contains the Administrative Adjudication Bill of Rights, ensuring parties basic rights such as open hearings (§ 11425.20), unbiased decision-makers (§ 11425.40), and a written decision based on the record evidence (§ 11425.50).
[4] *Id.*, §§ 11500-11529.

(typically administrative law judges) on the one hand, and representatives of the agency and other interested parties on the other.[5] The CPUC has been exempted by the Legislature from the general provisions of the APA[6] and has not been made subject to the APA's formal-hearing provisions.[7] Instead, the Legislature has enacted CPUC-specific legislation, which itself provides for formal hearings before the Commission, employing many of the trial-type procedures found in the APA's formal-hearing laws.[8]

Quasi-legislative proceedings of state agencies are generally conducted pursuant to the rulemaking provisions of the Government Code.[9] They prescribe a procedure for adopting regulations (defined as any rule "to implement, interpret, or make specific the law" administered by the agency[10]). The core of the process is a notice-and-comment procedure whereby the agency promulgates a draft regulation and supporting material, the public is afforded an opportunity to comment, the agency makes any changes in response to the comments, and the agency then may adopt the regulation, which is reviewed by the Office of Administrative Law for legal sufficiency.[11] These statutory procedures and requirements, which apply broadly across state government, are more restrictive than those applicable to the Legislature, but the nature of the proceedings is decidedly not like a trial, lacking, for example, sworn testimony, cross-examination, and detailed factual findings. The CPUC is exempt from most of the rulemaking chapter of the APA.[12] Rules regarding substantive utility regulation, including those pertaining to utility rates and tariffs, are adopted in rulemaking proceedings conducted under the CPUC's own Rules of Practice and Procedure.[13] Adoption and amendment of the Rules of Practice and Procedure themselves are, however, subject to the APA.[14]

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[5] *Id.*, §§ 11430.10-11430.80.
[6] Pub. Util. Code, § 1701, subd. (b).
[7] We consider the possibility of our recommending to the Commission that it seek legislation to alter the CPUC's exemption from these provisions to lie within the scope of our engagement. We have not yet formulated any opinion on such questions.
[8] *Id.*, div. 1, pt. 1, ch. 9, art. 1.
[9] *Id.*, tit. 2, div. 3, pt. 1, ch. 3.5.
[10] *Id.*, § 11342.600.
[11] See Gov. Code, §§ 11346-11349.6.
[12] *Id.*, § 11351, subd. (a); see also *id.*, § 11340.9, subd. (g) [exempting any "regulation that establishes or fixes rates, prices, or tariffs"].
[13] Cal. Code Regs., tit. 20, §§ 6.1-6.3.
[14] *Id.*, § 11351, subd. (a) [excluding from the APA exemption "the rules of procedure"]; see also Pub. Util. Code, § 311, subd. (h) [expressly requiring changes in the Rules of Practice and Procedure to be submitted to the Office of Administrative Law for review and prescribing procedures for judicial review].

In this paradigm distinguishing adjudication from rulemaking, the process of setting rates has sometimes proven difficult to categorize. In some respects it resembles an adjudication, commencing as it does with an application by a company proposing to set the rates it charges the public, often proceeding through the finding of specific historical and technical facts, and culminating in an administrative decision subject to judicial review. In other respects, however, it resembles the enactment of a statute or regulation, determining future charges to be borne by members of the general public, with many of the determinative "facts" tending to look more like the weighing of policies than to the finding of historical facts. The mixed nature of ratesetting has challenged courts at least since Justice Holmes' 1908 opinion in *Prentis v. Atl. Coast Line Co.*[15]

The California Legislature has addressed this question of categorization by recognizing ratesetting as its own separate category, establishing different ex parte rules for adjudicatory hearings,[16] ratesetting hearings,[17] and quasi-legislative hearings.[18] In general, ex parte contacts are prohibited in adjudicatory cases,[19] are "permitted without restriction" in quasi-legislative proceedings,[20] and "are prohibited in ratesetting cases," but with significant exceptions. Those exceptions are conditioned on notice and opportunity for opposing parties to participate and to have their own ex parte meetings.[21] In practice, there are thousands of reported ex parte contacts in ratesetting cases each year.

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[15] 211 U.S. 210, 226, 29 S.Ct. 67, 69 [decision of Virginia Corporation Commission setting railway passenger rates, while adopted by a body with judicial powers under procedures requiring fact-finding, was legislative in nature and not subject to res judicata because the product would have prospective, not retrospective application]; see also *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292, 93 Cal.Rptr. 455, 481 P.2d 823 ["in fixing rates, a regulatory commission exercises legislative functions . . . and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions"]; *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 909, 160 Cal.Rptr. 124, 134, 603 P.2d 41, 51 [setting of prospective rates and of refunds pursuant to a prior order contemplating subsequent refunds was quasi-legislative].
[16] Pub. Util. Code, § 1701.2.
[17] *Id.*, § 1701.3.
[18] *Id.*, § 1701.4.
[19] *Id.*, § 1701.2, subd. (c).
[20] *Id.*, § 1701.4, subd. (b).
[21] *Id.*, § 1071.3, subd. (c); see also art. 8 of the Commission's Rules of Practice and Procedure (Cal. Code Regs., tit. 20, §§ 8.1-8.6), further defining permissible and impermissible ex parte communications.

2. Our Review and Report

Our review of the law governing ex parte contacts and actual practices before the CPUC has begun with a legal analysis of the statutes and regulations, analysis of the law of other federal and state agencies (including states other than California), and an assessment of what lessons can be learned from those other jurisdictions. Simultaneously, we are interviewing a broad range of people knowledgeable about ex parte practices before the Commission, including parties appearing before the CPUC, the Commission's own employees, and others who have expressed views on the topic. We have also obtained data from the CPUC's web site on which parties are required to report their ex parte contacts, and we have been analyzing those data to discern the extent, nature, and trends characterizing ex parte communications with CPUC decision-makers. As I noted earlier, that work is presently underway.

If our report concludes that changes in ex parte practices before the Commission are necessary, we expect to offer three kinds of recommendations: actions the Commission can take on its own through changing its practices within existing law, changes that can be achieved by the Commission amending its own rules, and changes that will require revisions to statutes that the CPUC may wish to consider sponsoring.

3. Principles Guiding Our Review

You have asked what principles guide us and the CPUC in the review of ex parte policies. The Commission will ultimately speak for itself on this question, but we can identify some of the principles that are guiding our review and are likely to inform our recommendations.

First, we view ex parte rules as fundamental to the fairness of Commission hearings and decisions. Open-government laws like the Bagley-Keene Open Meeting Act[22] are aimed at ensuring the general public open access to the conduct of government business.[23] Rules regulating ex parte contacts in adversarial proceedings such as formal CPUC ratesetting hearings—like their counterparts governing judicial proceedings—are intended in the first instance to ensure fairness *to the parties*.[24] Those parties are entitled

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[22] Gov. Code, §§ 11120-11132.
[23] *Id.*, § 11120.
[24] E.g., *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-11 [setting forth rationale for limitation on ex parte contacts in adjudicatory proceeding as required for fairness and to preserve the exclusivity of the record].

to know what their opponents are saying to the decision-makers, what the decision-makers said in response, and to have a realistic, meaningful opportunity to respond. To be sure, restricting ex parte communications may (or may not) enhance transparency and improve the public's access to government decisions, but the first job of ex parte rules is to give each party a genuinely equal opportunity to persuade the agency of the merits of the party's position.

We are also mindful that ex parte contacts can serve a useful function for the tribunal, expediting proceedings and responding to genuine exigencies. However, the interest in speed and efficiency can be at odds with the interest in fairness to all parties, and how the Commission resolves this tension will indicate the relative importance it assigns to those interests.

We intend to carefully examine claims that certain ex parte practices are necessary to achieve timely, effective communication that cannot be achieved other than by ex parte contacts. Before accepting these claims, we will independently assess whether adjustments in Commission procedures and practices would meet the Commission's need for timely information without compromising parties' rights.

Ultimately a serious examination of ex parte practices requires a frank discussion of why members of a multi-member tribunal like the CPUC may be averse to holding all substantive discussions with individual parties in the presence of all parties. Communications *between decision-makers* outside of public view may serve important purposes, such as facilitating compromise on policy issues and a more thorough airing of ideas before they become official policy. Indeed, the need for such intra-tribunal exchanges is recognized and sanctioned in both the Bagley-Keene Act and the Public Utilities Code, which permit deliberation in closed session on final adjudicatory decisions.[25] But it does not necessarily follow that private communications *between decision-makers and litigants* serve those same interests.

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[25] Gov. Code, § 11126, subds. (c)(3); Pub. Util. Code, § 1701.2, subd. (d) [adjudication cases]. Under rule 15.5, subd. (b) of the CPUC's Rules of Practice and Procedure (Cal. Code Regs., tit. 20, §15.5), the Commission permits such closed sessions only if an appeal of a presiding officer's decision in an adjudication proceeding is filed at the conclusion of the proceeding and only regarding the specific issues raised in the appeal.

Closed-session deliberations are also permitted by statute in certain ratesetting cases. (Pub. Util. Code, § 1701.3, subd. (c).) Under rule 15.1, subdivision (b) of the Rules of Practice and Procedure (Cal. Code Regs., tit. 20, §15.1), the Commission has limited such closed sessions to ratesetting proceedings in which hearings have been held. We have been informed that the majority of ratesetting proceedings generally do not involve such hearings.

We also should acknowledge that ex parte rules have far-reaching implications for the allocation of authority within the Commission. A change in those rules can redistribute discretionary power, for example between Commissioners and staff, between Commissioners and ALJs, and between the President and other Commissioners. It is the Commissioners who have been appointed by the Governor to their constitutionally established positions. To the maximum extent consistent with fundamental fairness and legal compliance, it should be they who make policy for the Commission.

Thank you, Mr. Chairman and Members, for this opportunity to update you on our efforts to assist the CPUC in addressing the law and practice of ex parte contacts before the Commission.