Comments for Workshop on Government Decision-making add Open Meetings

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Introduction

Thank you to the Governor's Office of Planning and Research for holding this workshop and for giving me the opportunity to speak. Thank you to Ed O'Neil, Michael Strumwasser, and Carole D'Elia for their thoughtful remarks.

My name is Timothy Sullivan, and I am the Executive Director of the California Public Utilities Commission. As a new Executive Director, each week I drop in on Commission workers at their cubicles. This provides a concrete picture of their work and work issues. At these meetings, employees, particularly the more committed ones, take the opportunity to ask me questions to make sure that I am doing my job. Just last week, an analyst asked me "What are you doing to restore trust?"

This exchange came to mind because the central issue today is how we can best establish formal rules for regulatory agencies that achieve a workable balance between openness and transparency, on the one hand, and the need for effective and efficient regulatory decision-making, on the other hand. Moreover, the rules should engender public trust.

At the Public Utilities Commission, positions on policies and laws are set by a vote of the Commissioners, and are largely outside the portfolio of the Executive Director. For this reason, my remarks will not address what reforms I support, but will instead talk about the real problems that arise from our current Bagley-Keene and "ex parte" rules, rules intended to promote trust in the work of public agencies by making deliberation public and by eliminating back channel communications.

The comments of our speakers indicate that both the Bagley Keene Act, as recently amended, and the ex parte rules, neither produce the intended effects nor engender trust in California decisionmaking.

For the Public Utilities Commission, this lack of trust is a major problem. At the heart of our work, the Public Utilities Commission approves infrastructure investments, costs and prices, and safety programs that it concludes best serve the public interest. This approval grants the legal authority that utilities need to proceed. Nevertheless, the public's acceptance of the Public Utilities Commission's approval depends on its trust that the decision has the public interest at heart. My hope is that today's workshop will lead to actions that help us restore the trust that we need to do our jobs.

In addition, lest we forget, public trust arises not just from Bagley Keene and ex parte rules and processes, but from the day to day operations of an agency. I will conclude by describing some reforms that the Commission is using to begin to restore trust.

The first major point that I wish to make is that the current form of the Bagley Keene Act discourages the deliberation and involvement of Commissioners in decisions.

Ed O'Neill, our first speaker, presents a series of recommendations from his modernization and reform project for the Public Utilities Commission. A key part of his analysis focuses on the perverse consequences of the Bagley Keene Act, in its current form, for the work of the Public Utilities Commission.

A purpose of the Bagley Keene Act is that "actions of state agencies be taken openly and that their deliberation be conducted openly." (Gov. Code § 11120) To accomplish this, the act prohibits a majority of Commissioners from discussing in a meeting or a series of meetings, either directly or indirectly through intermediaries, anything within the jurisdiction of the Public Utilities Commission outside formally noticed meetings open to the public.

An effect of this requirement, as reported in both the O'Neill and Strumwasser Reports, is to discourage deliberation or discussion among Commissioners of items that come to the Public Utilities Commission for review. Instead of open deliberation, the act stifles deliberation.

This perverse outcome occurs for a number of reasons which are best understood from a workflow and organizational perspective.

The major reason for avoiding public deliberation is the press of business. If a matter is discussed in a public session during the business meeting and leads to a consensus for change in a proposed decision, then that decision cannot be considered until the next Commission meeting, commonly two weeks or more into the future.

Moreover, because of the number of the matters appearing before the Commission (often 60 items or more), there is insufficient time to address more than one or two items in the public session. If more items were discussed, the Commission would be unable to finish its workload.

In addition, public business meetings, where discussions of matters can have major implications for the price of a company's stock, it is imprudent to speculate or consider alternatives outside a narrowly constrained window.

Finally, in the public meeting, it proves difficult to elicit the involvement of technical staff to answer technical matters that need resolution before a vote.

Even outside of the public meeting, the Bagley Keene act discourages deliberation, exactly as Carole D'Elia, the Executive Director of the Little Hoover Commission has pointed out. Here points were brought home to me by Rachel Peterson, the chief of staff of Commissioner Liane Randolph, our newest Commissioner, who has told me how the prohibition on discussion affects their work in developing policies to reach Governor Brown's goal to reduce greenhouse gas emission to 40% below 1990 levels by 2030:

> The goals are unprecedented in scale and complexity, they link actions on electricity, gas, buildings, and vehicles, and they will require significant political leadership by the Commissioners. Achieving the goals requires interactions between several proceedings: Long-Term Procurement Planning, the Renewable Portfolio Standard, Energy Efficiency, Electric Vehicles, Energy Storage, and Demand Response. Those proceedings are distributed among all 5 Commissioners today, and are moving forward in silos as presently required by Bagley-Keene. There is no way that Energy Division and ALJ Division can coordinate cross-cutting actions within silos - every meeting with a Commissioner office would have to be repeated 4 more times. Siloed decision-making about planning and procurement of gas, electricity, electric vehicles, storage, energy efficiency, etc. deprives the Commissioners of the opportunity to lead as a body and may jeopardize meeting the Governor's goals.

The chilling effect of the Bagley Keene provisions on deliberation is most clearly seen when considering instances in which the Bagley Keene Act permits deliberation in closed sessions, such as ratesetting proceedings in which evidentiary hearings were held and in adjudicated proceedings in which a presiding officer's decision has been issued and an appeal filed. In two recent proceedings – the proposed decision revising electric rate structure and the decisions regarding the investigation into PG&E's pipeline rupture in San Bruno – the deliberations on these matters, which took placed in closed sessions with Commissioners and staff sitting around a table, were characterized by openness and a spirit of inquiry. The Commissioners queried staff to acquire whatever information they needed. In the resolved matter, it was easy to see how the deliberation and cooperative inquiry helped the Commissioners come together on what was otherwise a highly controversial issue.

In summary, from a work flow and managerial perspective, the Bagley Keene provisions hinder decisionmaking and deliberation. Instead of encouraging public deliberation, they have stifled any deliberation. Furthermore, they have done little, if anything, to maintain public trust in the Public Utilities Commission's decisions for they have reduced our public meetings to little more than a voting ritual.

My second major point is that ex part rules have failed to prevent backchannel communications and their ambiguity engenders suspicion.

Michael Strumwasser provides major support for this conclusion. He has prepared a comprehensive report on ex parte issues for the Public Utilities Commission. The Public Utilities Commission solicited this independent work because it wanted an external view of what was happening with our ex part rules, what practices other states followed, and what was considered to be the best practice. The report clearly exhibits Mr. Strumwasser's independence – it presents both a harsh view of recent practice at the Commission and a vision of a very different future. To the extent that the ex parte rules had goals of promoting trust in Public Utilities Commission's decisions and of discouraging backchannel communications, they have proved a remarkable failure on both counts. Instead of promoting trust in the independence of Public Utilities Commission deliberations, Strumwasser finds that there was an absence of "a culture of compliance at the top." The report amply supports these conclusions.

But, what problems do employees have with ex parte rules on the ground? It should not surprise you that the rules are complex and, in parts, vague. One of the results of this vagueness is that people are unclear about what communications are permissible, and what are forbidden. This has several consequences: First, people do not know what they can or cannot say. Second, people whose jobs require communication are subject to internal second guessing of these communications, even when the communications are not only permissible, but required. Third, the same staff will wonder whether they are "being used" as a conduit – an illegal practice – without their knowledge.

Many complaints about the ex parte rules cited by Michael Strumwasser, such as complaints about communications initiated by Commissioners or staff and passage of information through attendance at conferences, cut both ways. Not only do some participants believe that these are inappropriate avenues of communication, but Commissioners and staff also have major complaints. One Commissioner and her staff complain of "drive-by ex parte's" – someone will say something to a Commissioner or advisor with no acknowledgement that they are representing a party in a proceeding and three days later they will learn that an "ex parte notice" has been filed. When the Commissioner, who did not want to entertain an ex parte communication, asks why a communication was reported, he or she will be told that it was posted "out of an abundance of caution" – an answer that reflects the ambiguity and complexity of the rules.

Even by their very name, the ex parte rules evoke suspicion. In most judicial contexts, "ex parte" communications are forbidden. For this reason, many lawyers are shocked when they hear of our communications rules. This situation alone produces suffering and distrust. We need rules with greater clarity and transparency, and rules not at odds with common practice.

My third major point is that changes in rules will only resolve part of the problem. Government agencies must maintain or restore public trust independent of formal rules.

Many of you are likely familiar with the press coverage of the 65,000 emails between PG&E and the Public Utilities Commission that were released publicly. As part of a managerial response, a team of managers reviewed the emails of about 80 individuals who served in a high-level capacity during the level covered by the emails and identified emails requiring review because of their seriousness. Human Resource personnel and I then examined the emails of those still working for the Public Utilities Commission. I can report that in the emails of those still working for the Public Utilities Commission, not a single one constituted a prohibited ex parte communication – many inappropriate and embarrassing communications, but none prohibited by current rules

The fact that none of these emails violated the ex parte rules, however, does not restore trust. Instead, the unprofessional tone of some of the emails and the many personal communications indicated that some staff members were too familiar with PG&E. Perhaps it is an artifact of age, but I have trouble understanding how an

emoticon could appear in a professional communication. My review of these emails led to a number of personnel actions and a new focus on training in the professional use of the state email system.

The point here is that the law and the rules can only do so much in creating a culture that will secure public trust. Since the beginning of the year, the Public Utilities Commission has initiated steps to ensure that professionalism characterizes all communications and interactions with regulated entities and parties to our proceedings. In addition to the training on email use, the Public Utilities Commission is developing training for new employees to explain what the Public Utilities Commission does, how the employee serves the public trust, and the Commission's expectations concerning how they should act.

In many ways, establishing trust requires that the Public Utilities Commission focus on performance, on holding people accountable, and on communicating in a transparent way. Across a wide variety of technologies and programs, the Public Utilities Commission has made changes to shift our focus from our "process" to our performance and responsibilities in serving Californians. We are ensuring that each employee's performance is assessed year, and we are now reviewing an employee and management "code of conduct" for dealing with the public and each other.

Conclusion

The Public Utilities Commission has large tasks that it must perform to advance the governor's greenhouse gas and environmental policies. Changes in Bagley-Keene rules can help the Public Utilities Commission to do its part in meeting California's ambitious goals for reductions in greenhouse gas emissions.

The changes in policies that result from today's workshop can produce benefits for California by building trust in government deliberations in general and in the Public Utilities Commission's deliberations in particular. I am confident that the Public Utilities Commission can operate in new ways under new open meeting rules or new ex parte rules. If other states can operate with different rules, so can California.

So, this brings us back the question that has brought us together today: how can we can best establish formal rules for meetings and communications that achieve a workable balance between openness and transparency, on the one hand, and the need for effective and efficient regulatory proceedings, on the other hand in a way that evokes public trust?

The answers that the governor's office and the legislature are now developing will be critical to the work of the California Public Utilities Commission. Surely, these laws and rules should change. But, we must keep in mind that these changes are only a first step. Organizations, leaders and workers, must take steps to maintain and produce public trust.

There is one thing that I am sure of – with more public trust, the Commission will find it easier to implement the policies that California needs.

Thank you for providing this opportunity to speak. I look forward to the discussion.