

REPORT ON KEY FINDINGS FROM CPUC MODERNIZATION & REFORM PROJECT

for

WORKSHOP ON GOVERNMENT DECISION-MAKING AND OPEN MEETINGS

GOVERNOR'S OFFICE OF PLANNING AND RESEARCH

by

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INTRODUCTION & SUMMARY

In June 2014, I was appointed by Governor Brown to the position Senior Advisor on California Public Utilities Commission (CPUC) Modernization & Reform. In this capacity I am responsible, working in collaboration with CPUC President Michael Picker, for reviewing the agency's existing jurisdiction, organization, management, processes and procedures, and recommending changes that may improve its efficiency, effectiveness and accountability.¹

I am an attorney with over 36 years of experience in California utility regulatory matters. Prior to my current appointment, I worked at the CPUC for over 20 years in a number of different capacities, including staff attorney, Assistant General Counsel, Administrative Law Judge and Commissioner's Advisor. Following my departure from the CPUC in 1998, I represented clients, including citizens groups, consumer groups, local government agencies, irrigation districts, independent power producers, large consumers of utility services, telecommunications companies, investors and hedge funds, in a wide variety of matters before the CPUC.

I have undertaken my current responsibilities to the Governor's Office by reviewing prior studies and audits of the CPUC; meeting with and interviewing CPUC employees at every level of the agency; reviewing information and available data regarding certain CPUC programs, policies and formal proceedings; reviewing reports and studies of other state and federal agencies; and reviewing academic literature on pertinent organizational and management issues.

As a result of these studies, I have identified a number of opportunities to improve CPUC efficiency, effectiveness and accountability. Two factors have emerged, however, that contribute to systemic problems at the CPUC that permeate nearly every aspect of the agency and are most in need of

¹ I have been joined and assisted in this project by one full time CPUC staff person, Zhen Zhang, who was made available by loan from the CPUC's Office of Ratepayer Advocates (ORA).

remedial change: (1) impaired internal agency communication; and (2) inadequate agency governance and enterprise management. It is these issues and potential remedies for them that I wish to address today.²

Communication within the agency, especially between Commissioners and staff, but also between senior management and working level staff and across different divisions and working groups, is not as effective as it should be. The agency is currently comprised of a series of organizational and information silos with little meaningful information flow between them. Information flow is constrained by a combination of organizational, physical, cultural and legal constraints, which tend to impair rather than promote individual initiative and creativity, as well as collaboration and collective problem solving, and organizational innovation.

The CPUC also does not currently have an effective governance structure or process for executive level management of the agency's overall mission, goals and objectives or for oversight of its programs, policies or priorities. This type of executive level management oversight is sometimes referred to as "enterprise management" and it is largely missing at the CPUC. As a result, Commissioners have no effective means of evaluating the relative success or lack thereof of existing regulatory programs and initiatives or of making mid-course corrections. And CPUC staff has no sense of common mission or how they can better contribute to the overall success of the agency.

These two overarching deficiencies have had, and continue to have, significant and far-reaching effects on the CPUC's efficiency, effectiveness and decision-making. Unless and until they are effectively addressed, the CPUC will not have a prayer of a chance of achieving its full potential or of discharging its statutory duties and responsibilities in as efficient and effective a manner as it should.

A number of remedial actions can and are currently being undertaken by the CPUC on its own initiative to address these problems. Other remedial measures, including two that are extremely important to restore CPUC efficiency, effectiveness and accountability, cannot be implemented by the CPUC on its own and will instead require legislation. These include:

1. Revisions to the Bagley-Keene Act to relax existing restrictions on discussions among CPUC Commissioners regarding policies, programs, priorities and proceedings; and
2. Revisions to the Public Utilities Code to tighten restrictions on private off-the-record "ex parte communications" between interested parties and CPUC decision-makers in contested rate, licensing, and other formal proceedings of a quasi-judicial nature in which the rights and obligations of an individual utility, other regulated entity, or customer are at issue.

I address both of these proposed remedial measures in discussing the communications and enterprise management issues they are critical to effectively address.

² Since undertaking my review, CPUC Commissioners and management have undertaken a number of initiatives to improve the functioning of the agency. Many of these initiatives are intended to address issues and concerns discussed in this paper and are likely to be helpful in doing so. Discussion of these initiatives is for the most part beyond the scope of this paper.

BACKGROUND REGARDING CPUC

The CPUC is a constitutional agency with extraordinarily broad jurisdiction. It has authority over electric utilities; natural gas utilities and propane systems; telecommunications companies; water utilities; railroads; light-rail transit systems; motor carriers of passengers, including buses, limousines, and transportation network companies; household goods carriers; and for-hire vessel, among others.

Its duties and responsibilities in regard to these entities include, in differing respects: safety; rates; consumer protection; reliability; resiliency; adequacy of service; environmental protection; permitting and licensing; acquisition and mergers; financing; and insurance.

The CPUC discharges these duties and responsibilities through a combination of administrative, quasi-legislative, and quasi-judicial processes and procedures, both on its own and in conjunction with other public agencies through interagency working groups.

The CPUC often acts through issuance of decisions by vote of CPUC Commissioners in formal proceedings before the agency. Such formal proceedings may be either quasi-legislative or quasi-judicial in nature. Quasi-legislative proceedings are generally rulemaking and investigation proceedings, often involving policy and political issues, in which the rights and obligations of an entire class of utility, utility customers, or other stakeholder groups are at issue, and are generally conducted through informal workshops and written notice and comment procedures, although evidentiary hearings may also be held in such proceedings on occasion. Quasi-judicial proceedings, include licensing applications, financing applications, complaint cases and enforcement cases addressing the rights and obligations of an individual utility, consumer or other interested stakeholder, and are generally conducted through more formal means, frequently including formal evidentiary hearings with cross-examination of witnesses under oath before an Administrative Law Judge. Rate proceedings have been held by California courts to be quasi-legislative in nature, but are generally conducted by the CPUC through formal means often including evidentiary hearings before an Administrative Law Judge.

Formal proceedings before the CPUC are often extraordinarily time-consuming, technically complex, and expensive to participate in. They often include dozens of different parties with different interests and issues, thousands of pages of pleadings, extensive written testimony generally prepared by experts in their fields, and take years to complete.³ There are generally something in the neighborhood of 500 formal proceedings pending before the CPUC at any given time.

³ The average length of time required for the CPUC to conclude formal proceedings before the agency varies with the type of proceeding. For example, the average length of time required to complete application proceedings that were concluded during calendar year 2014 was 1.4 years; for investigation proceedings 4.9 years; and for rulemaking proceedings 4.5 years. The average length of time required for the CPUC to conclude formal proceedings has varied somewhat from year to year, but since 2003 has been in the same general range as 2014.

IMPAIRED COMMUNICATION & INFORMATION FLOW

Academic literature is rich with analyses of why government does not work as well as it could and why organizations of different types fail to accomplish their intended objectives and mission.⁴ I have found much that is helpful in understanding the current challenges confronting the CPUC and what could be done to remedy its problems in this literature.

One of the contributing causes most frequently cited in this literature is poor internal communication, particularly between senior, executive level management and working level staff and employees. This is often characterized as a problem of organizational and information siloing and often leads to dissonance between the assumptions, understandings and expectations of senior management and those of employees on the front line who have day-to-day experience with actual work of the organization. These differences can be astonishing and can have a very significant effect on the effectiveness of an organization in accomplishing its mission.

This was dramatically illustrated by the late Prof. Richard Feynman's initiative in piecing together the root causes of the Challenger space shuttle explosion in 1986.⁵ The immediate precipitating cause was the failure of "O" rings that became brittle and failed to properly seal joints in the Solid Rocket Boosters (SRBs) as a result of the cold weather at the time of the launch. Feynman and others suspected that the root cause of the accident, however, was the flawed management decision to go ahead with the launch notwithstanding the cold weather. When Feynman asked senior NASA managers what they thought the probability of a catastrophic failure of the space shuttle was, the individual responses of all of the managers ranged closely around one-in-100,000. When he asked NASA engineers, who were more familiar with engineering issues and had day-to-day experience dealing with damage experienced in prior shuttle launches, the same question, he got a very different answer. The responses of the engineers were consistently around one-in-200. We now know that the actual probability of catastrophic failure of the space shuttle was one-in-67.⁶ The estimate of NASA's engineers was off by a factor of 3, its managers by a factor of 1,493.

These astonishingly different estimates were found to be indicative of serious communications deficiencies within NASA at the time and a culture that came to accept deviance from engineering performance criteria as the norm.⁷ NASA engineers and managers were organizationally somewhat

⁴ See, for example, Hardy, Karen, *Enterprise Risk Management, A Guide for Government Professionals* (2015); Schuck, Peter, *Why Government Fails so Often – And How It Can Do Better* (2014); Stanton, Thomas H., *Why Some Firms Thrive While Others Fail – Governance and Management lessons From the Crisis*, Oxford University Press (2012); Hempling, Scott, *Preside or Lead – The Attributes and Actions of Effective Regulators*, NRRRI (2010); Vaughan, Diane, *The Challenger Launch Decision, Risky Technology, Culture, and Deviance at NASA*, University of Chicago Press (1996); Feynman, Richard P., *Mr. Feynman Goes to Washington*, Engineering & Science (Fall 1987).

⁵ See Feynman, Richard P., *Mr. Feynman Goes to Washington*, Engineering & Science (Fall 1987).

⁶ There were a total of 135 missions during the space shuttle program two of which ended in catastrophic failure. Two of the five space shuttles, Challenger and Columbia, 40% of the shuttle fleet, were lost through catastrophic failures.

⁷ See Feynman, Richard P., *Mr. Feynman Goes to Washington*, Engineering & Science (Fall 1987); and Vaughan, Diane, *The Challenger Launch Decision, Risky Technology, Culture, and Deviance at NASA*, University of Chicago Press (1996).

separate, which tended to result in information siloing and information dissonance between the two groups. Worse still, the information distribution networks within NASA did not match the organizational decision-making network. NASA's engineers had a pretty realistic understanding of relative safety risks based upon their experience with damage to the Solid Rocket Booster "O" rings and other components on prior shuttle launches. NASA management was also aware of prior damage to the "O" rings, but tended to view the success of prior shuttle launches, notwithstanding prior burn damage to the "O" rings and other components, as indicative that these problems were manageable maintenance issues, rather than factors that needed to be seriously considered in determining whether or not to launch. The net effect of these very different perspectives was the very flawed and ultimately fatal decision to launch.

I am convinced that somewhat similar communication deficiencies and flaws in information flow exist at the CPUC.⁸ Communication within the agency, especially between Commissioners and between Commissioners offices and staff, but also between senior management and working level staff and across different divisions and working groups, is not as effective as it should be.

The CPUC's policies and practices with regard to private off-the-record "ex parte communications"⁹ between utilities and other interested parties and CPUC decision-makers have contributed to the agency's internal communications problems. Such ex parte communications are currently permitted, subject to certain notice and disclosure requirements, in ratesetting proceedings and are permitted, without condition or limitation, in quasi-legislative rulemaking proceedings. Ex parte communications are common at the CPUC, particularly after a Proposed Decision has been issued and is up for consideration and approval by vote of CPUC Commissioners. Commissioners and Commissioner's advisors tend to focus a disproportionate amount of their time and attention preparing for the CPUC's twice-monthly business meetings at which the CPUC adopts decisions in formal proceedings before the agency. And a considerable amount of time is typically spent during this period meeting with utilities and other interested parties in private ex parte meetings. The heavy reliance of CPUC Commissioners on these private meetings with stakeholders at this crucial stage of the CPUC's formal decision-making process has tended to drive a wedge between Commissioners and working level staff and has served to impair constructive dialogue between Commissioners and staff.

This dynamic is by no means the only factor contributing to communications problems within the CPUC, but it is an important factor and likely has contributed to failures less public, but not that dissimilar from NASA's Challenger failure, including the San Bruno explosion.

⁸ Internal communications and information flow deficiencies are common problems at public utility commissions. The New York Public Service Commission conducted a comprehensive self-assessment in the 1990s and cited "failures in communication" as one of the key challenges confronting the agency. See, for example, Bradford, Peter, *Regulator, Restructure Thyself*, Presentation to the Harvard Electricity Policy Group, Dallas, TX (January 25, 1996), at p. 4-5.

⁹ "Ex parte communication" is generally defined as a private, off-the-record oral or written communication between an interested party and a decision-maker, pertaining to a substantive issue in a formal proceeding before a judicial or administrative agency. Article 8, Rule 8.1(c) of the CPUC's Rules of Practice and Procedure defines "ex parte communication" for purposes of practice before the agency.

The Independent Panel established by the CPUC to investigate the cause of the San Bruno natural gas pipeline explosion discussed in its report to the CPUC a number of factors the Panel believed contributed to deficiencies in the CPUC's natural gas safety program at the time.¹⁰ These included, among other things: insufficient Safety and Enforcement Division (SED) staffing levels; background and experience among SED staff that may have been adequate for earlier compliance and enforcement regimes, but not well adapted to more recent changes in state enforced federal pipeline safety rules; insufficient training; and insufficient financial support for travel.¹¹

The Independent Panel faulted CPUC Commissioner's for not being more aware of these deficiencies and being more proactive in addressing them.¹²

In my opinion, Commissioners were not aware of and did not respond more appropriately to address them because of internal barriers to effective communication within the agency. Working level SED staff and managers were very much aware that natural gas safety staffing levels at the CPUC were insufficient for the size and geographic scope of the systems they were responsible for inspecting.¹³ They were also aware that insufficient funds had been allocated to permit them to obtain the specialized training they needed and that was only available out-of-state and for ongoing coordination and collaboration between SED's Northern California and Southern California based staff.¹⁴ They were also well aware of the fact, and had voiced complaints about, their having to devote a disproportionately high percentage of their resources to inspections of small mobile home park and propane distribution systems,¹⁵ leaving a disproportionately low percentage for high pressure natural gas transmission systems.¹⁶ Efforts had been made by SED staff and CPUC management to address all of these concerns, although not as aggressively as they could have been. Commissioners were not more aware of and responsive to these problems because, like NASA's management, communications within the agency have long been impaired and Commissioners interpreted the SED's staffing, background and experience, training and travel concerns as ongoing administrative management issues, rather than

¹⁰ See CPUC *Independent Panel Report re San Bruno* (June 24, 2011 revision).

¹¹ See CPUC *Independent Panel Report re San Bruno* (June 24, 2011 revision), at p. 18-22.

¹² The Independent Panel stated in this regard, "(a)rguably, the Commission management should have been more aware of the problem of priorities across the entire organization and made efforts to shift resources," but ultimately placed more blame on the Department of Finance for not approving resources for the CPUC commensurate with its safety responsibilities. See CPUC *Independent Panel Report re San Bruno* (June 24, 2011 revision), at p. 19.

¹³ At the time, the gas safety section of SED was staffed with 18 positions located in two separate offices in San Francisco and Los Angeles and was responsible for inspecting all of the distribution systems of the major natural gas utilities in the state; over 3,200 small mobile home and propane distribution systems; over 11,000 miles of high pressure gas transmission pipeline; and over 2,350 miles of gas transmission pipeline in high impact areas. CPUC *Independent Panel Report re San Bruno* (June 24, 2011 revision), at p. 18.

¹⁴ CPUC *Independent Panel Report re San Bruno* (June 24, 2011 revision), at p. 18-19.

¹⁵ SED inspection resources were allocated in this manner due to statutory requirements existing at the time that both SED management and working level staff felt did not reflect relative safety risks.

¹⁶ SED staff reported to the Independent Panel that in 2008 it had devoted 43% of its inspection days on small mobile home park and propane systems and only 17% on integrity management and high pressure natural gas transmission pipelines. CPUC *Independent Panel Report re San Bruno* (June 24, 2011 revision), at p. 20-22.

safety issues that could impact the integrity of the high pressure gas pipelines SED was not able to effectively oversee or inspect.

The Independent Panel and the NTSB both concluded that deficiencies in the CPUC's natural gas safety program were a contributing cause to the San Bruno tragedy¹⁷ and the independent panel attributed the deficiencies in the CPUC's program, in part, to communications problems within the CPUC. Among other remedial actions, the Independent Panel recommended several specifically intended to breakdown the information silos within the agency and to promote more effective and constructive dialogue between CPUC Commissioners and senior management and working level SED staff. These recommendations included the following:

“6.8.2 Conclusions . . . It is incumbent on the entire organization – safety and ratemaking branches -- to understand the need for investments in safety and reliability, the goals expected from the investments, the alternatives considered, and the progress in system improvements. *The silos between the various disciplines in the agency must be dismantled*”¹⁸

The CPUC has done much to improve its natural gas safety program since the San Bruno incident, but even with the heightened attention to and focus on safety since then, the CPUC has not been able to resolve the communications deficiencies affecting the gas safety program. Communications and information flow deficiencies were identified as a continuing issue in the most recent independent review of the CPUC's natural gas safety program conducted by Crowe-Horwath.¹⁹

The findings of the Independent Panel and Crowe-Horwath regarding communications and information flow deficiencies pertaining to the CPUC's natural gas safety program are symptomatic of much broader communication and information flow issues within the agency. Barriers to constructive communication and information flow appear to be endemic throughout the CPUC. The efficiency, effectiveness and accountability of the CPUC can be improved, but the agency will never achieve anything remotely approaching its potential unless existing barriers to effective information flow and constructive dialogue within the agency are addressed and remedied.

GOVERNANCE & ENTERPRISE MANAGEMENT

Other factors cited in the academic literature as often contributing to institutional and organizational failures are deficiencies in governance and in the process for executive level management of the

¹⁷ See CPUC *Independent Panel Report re San Bruno* (June 24, 2011 revision), at p. 18-19, 24-24 and 98-103; and NTSB Report , at p. 88, 120-123, and 127.

¹⁸ CPUC *Independent Panel Report re San Bruno* (June 24, 2011 revision), at p. 103. (Emphasis added.)

¹⁹ See Crowe-Horwath, *Gas Safety and Reliability Branch, Management and Operations Review, Report & Recommendations* (Feb. 23, 2015), stating that while the CPUC has made progress improving gas safety inspections and addressing the recommendations of the NTSB, a number of “challenges/opportunities” remain and warrant further remedial actions, including: “7. Assignment of staff to multiple tasks without clear prioritization of activities to those with the greatest impact on safety;” “8, Lack of communication;” and “9, Lack of performance measures, clear explanations, and accountability.”

institution's overall mission, goals and objectives and oversight of its programs, policies and priorities. This type of executive level management is often referred to as "enterprise management.

A number of other reviewers, including CPUC President Michael Picker and former CPUC Commissioner Mark Ferron, have noted that the CPUC does not currently have an effective governance structure or system or process for enterprise management.²⁰ I agree with this assessment and believe it to be a critical problem that must be addressed in order for the CPUC to make meaningful and lasting improvements in its efficiency and effectiveness.

The lack of effective enterprise management at the CPUC is manifest in many different ways. For example, the CPUC currently has no integrated strategic plan for the agency as a whole. It also has no effective means of measuring the agency's success or lack thereof in accomplishing its mission, or for tracking such progress and making midstream adjustments in plans and strategies to accomplish such mission. As a result, Commissioners are not currently providing much collective guidance or oversight of the agency and many staff have no sense of common mission or understanding of whether, and if so how, their own duties, responsibilities and work relate to those of others within the agency, or how they can better contribute to the overall success of the agency. Important CPUC programs involving hundreds of millions of dollars in investment are likely not as effective as they could be due to these deficiencies.

The CPUC President is vested with legal authority to direct the Executive Director, General Counsel and staff, subject to vote of a majority of Commissioners,²¹ but until very recently there has been no established process or mechanism for Commissioners to collectively monitor, confer, discuss, direct or reach any collective consensus on on-going or new programs, policies or priorities.²² Until recently, to the extent anything like enterprise management has occurred at the CPUC, it has generally been exercised only through the initiative of the President, working in close collaboration with the Executive Director and some of the Division Directors.²³ This has been helpful to CPUC management and staff, but has had the unfortunate consequence of diminishing the role of the other four Commissioners in

²⁰ See comments of Commissioner Mark Ferron at his last CPUC Business Meeting as a Commissioner, Jan. 16, 2014; comments of Commissioner Michael Picker at his first meeting as President, Jan. 15, 2015; and see also Comments of former CPUC President Daniel Fessler at the Harvard Electricity Forum Conference on "Regulatory Decision-making Reform," reported in 8 Admin. L. J. Am. U. 789 (Winter 1995).

²¹ See Pub. Util. Code sections 305, 307, 308.5 and 310 (re authority of the CPUC President and other Commissioners); but cf section 309.5 (re Office of Ratepayer Advocates, which is an independent entity within the CPUC responsible to the Governor's Office and not subject to direct supervision or control of the CPUC President).

²² Under President Picker's leadership, the Commission recently instituted procedures for addressing this concern. By including all Commissioners in executive level management.

²³ This is beginning to change. Since Commissioner Picker was appointed President he has taken initiative to include all of his fellow Commissioners in considering and implementing changes in the manner and form of enterprise management. Under his leadership three committees have been formed, each consisting of two Commissioners, for addressing CPUC organizational, administrative and other enterprise management issues and concerns. The committees are: (a) Finance & Administration, comprised of Commissioners Picker and Peterman; (b) Policy & Governance, comprised of Commissioners Florio and Randolph; and (c) Modernization, comprised of Commissioners Picker and Sandoval. The Commission is currently in the process of drafting work plans for each of the committees and anticipates that they will begin taking initiative for driving increased executive level management and oversight functions shortly.

enterprise management to close to nothing. It has also precluded the CPUC from obtaining the benefits of the diversity of opinion, collective knowledge, and collective problem solving capability of the agency's five Commissioners as a whole on important executive level management issues and concerns.

Commissioners meet collectively as a body only in formal business meetings conducted pursuant to the requirements of the Bagley-Keene Act and generally hold such business meetings for several hours twice monthly. These public business meetings have traditionally tended to focus almost exclusively on the issuance of decisions in formal proceedings and resolutions on advice letter filings. CPUC business meeting agendas rarely include items that pertain to or focus upon executive level oversight or management of ongoing programs, policies or priorities. And until recently, even when they have, there has generally been relatively little discussion or debate among Commissioners beyond scripted remarks.

In between public business meetings, CPUC Commissioners tend to focus on the specific formal proceedings to which their offices have been assigned to serve as Assigned Commissioner and proceedings in which proposed decisions will be on the agenda for consideration and vote by Commissioners at the next public business meeting. There has been relatively little focus among individual Commissioners, with some exceptions, on the CPUC's broader mission or on programs and priorities that span across multiple proceedings or Divisions within the Commission. As a result, Commissioners and their personal advisors tend to be siloed, often have relatively limited involvement in even the most important of ongoing formal proceedings and initiatives and even less involvement in agency governance and enterprise management.

This concern has long been recognized by CPUC Commissioners and management and attempts have been made in the past to address it. The CPUC committed to do so, for example, in conjunction with its "Vision 2000" reform initiative in 1996.²⁴ Notwithstanding prior recognition of this concern and attempts to address it on the agency's own initiative, the governance and enterprise management challenges at the CPUC have remained remarkably intractable. They were noted again recently by the Senate Committee on Energy, Utilities, and Communication in its October 2013 subcommittee report on the status of the CPUC's safety program and its progress in making needed reforms to this program.²⁵

²⁴ Deficiencies in enterprise management of the CPUC were noted in the CPUC's "Vision 2000" report in which CPUC Commissioners also committed to address the problem in the following manner: "Investigate the feasibility of having each Commissioner take responsibility for oversight of a certain aspect of the Commission's mission, either with respect to an industry or roles and goals of the Commission. Commissioners will ensure coordination of Commission activities and establish clear lines of accountability to stakeholders, consumers and government oversight entities." CPUC, *Vision 2000, A Report on Our Progress Toward Change* (January 10, 1996), at p. 3-21.

²⁵ Among other criticisms of the CPUC, the report stated, "Apart from one commissioner's activities in the gas safety rulemaking and the presence of two commissioners in an adjudicatory role in the San Bruno penalty proceedings, the commissioners have had little involvement in the development of safety policy at the commission. CPUC staff have created a Safety Council whose mission is 'to create and drive the overarching strategies that Commission Management will use for improving public safety,' without direction, guidance, or approval by the Commission." Senate Committee on Energy, Utilities, and Communication, Subcommittee on Gas and Electric Infrastructure Safety Report, *"Slow Progress Toward Safety: Improving Performance and Priorities in the Safety Plans of the California Public Utilities Commission"* (October 2013), at 10. Under the leadership of Commissioner Picker, CPUC Commissioners have since collectively considered and approved a safety policy

REMEDIES

Deficiencies in communications, information flows, governance and enterprise management at the CPUC can and should be address through additional remedial measures.

Remedies the CPUC Can Implement on Its Own Initiative

A number of potential remedies can be undertaken and, in fact, are already being undertaken by current CPUC Commissioners, the CPUC's Executive Director and its management on the agency's own initiative. These include:

1. Expanding the scope of the matters discussed among Commissioners at the CPUC's public business meetings to include ongoing policies, programs, priorities and proceedings;
2. Allocating specific executive level management responsibilities to a broader range of Commissioners and senior management through the organization of several two-Commissioner management committees;
3. Developing more meaningful metrics for tracking and monitoring the agency's success, or lack thereof, in accomplishing goals and objectives material to its overall mission;
4. Developing a strategic plan for the agency with clearer objectives and priorities;
5. Obtaining, on a more regular basis, reports from each of the different divisions within the agency regarding the status of ongoing programs and initiatives; and
6. Increased outreach and more systematic communication by Commissioners and other senior management with working level staff.

These initiatives are promising and should help address the communications and enterprise management deficiencies at the CPUC. More needs to be done, however, to ensure that the remedies are durable and long-lasting.

Remedies That Require Legislation

Other remedial actions critical for restoring efficiency, effectiveness and accountability to the CPUC will require legislation. The two most important reforms of this nature are Bagley-Keene Act reform and ex parte reform.

The Bagley-Keene Act contains broad provisions severely limiting the ability of members of multi-member state agencies and other state bodies, including CPUC Commissioners, to collectively discuss policies, programs, priorities and proceedings with one another. These constraints are a very significant

statement and directed CPUC staff to prepare a safety management plan. The Commission also adopted a "Safety Action Plan and Regulatory Strategy" in February, 2015 and is in the process of implementing it.

contributing factor to the CPUC's current internal communication deficiencies and lack of effective governance.²⁶

The existing rules contained in the Public Utilities Code governing private off-the-record ex parte communications by utilities and other interested parties with CPUC Commissioners and Commissioners advisors also contribute to these problems in a less direct but also significant respect. They have done so, in part, by driving a wedge between Commissioners and their advisors who entertain ex parte communications and other working level Commission staff who generally are not included or party to such communications.

This combination of rules and restrictions makes it easier for CPUC Commissioners to discuss issues pending before the Commission with outside parties than with their fellow Commissioners and has led to the broadly held perception among CPUC staff that CPUC Commissioners are more interested in hearing the lobbying pitches of utility regulatory affairs VPs than the facts and analyses of CPUC staff or the views of the Administrative Law Judges that typically preside over formal proceedings before the CPUC.

These internal CPUC dynamics have resulted in communication lines and an information flow process within the agency that could hardly be better designed to stifle constructive communication, collaboration, collective problem solving and innovation. Current law and CPUC agency practice has produced essentially the worst of all possible results - collective deliberation and collaboration among CPUC Commissioners has been significantly constrained, information flow within the agency impeded, and executive level enterprise management of the agency severely impaired, while little to no meaningful insight into the agency's deliberative process has been provided to the public.

To address these problems two important statutory reforms should be considered:

1. Revisions to the Bagley-Keene Act to relax existing restrictions on discussions among CPUC Commissioners; and

²⁶ Bagley-Keene Act constraints have long been recognized by CPUC Commissioners as significant barrier to effective collaborations and collective decision-making by the CPUC. In its "Vision 2000" reform initiative, CPUC Commissioners recommended Bagley Keene Act reform in conjunction with other reforms to improve the CPUC's decision-making process including, increasing Commissioner involvement in and oversight of proceedings; developing a closer working relationships between Commissioners and the agency's Administrative Law Judges; and tightening agency rules governing private off-the-record ex parte communications. See CPUC, *Vision 2000, A Report on Our Progress Toward Change* (January 10, 1996), at p. 3-10. Other public utility commissioners in other states have made similar observations and found open meeting act requirements to significantly impair constructive dialogue and collective decision-making by their commissions. See Harvard Electricity Policy Group Seminar report, *Forum on Regulatory Decision-Making: Is the Process Too Rigid? Can it Respond to the Dynamics of a Competitive Market? An Array of Perspectives*, San Francisco, CA (April 15, 1994). One professor participating in the seminar noted the importance of candid and continuous communication and debate among PUC commissioners and the fact that open meeting act requirements have not only tended to prevent such communications, but have also resulted in less discussion and less informative discussion in public meetings than before open meeting act requirements were extended to PUCs. See Harvard Electricity Policy Group Seminar report, at p. 30-33.

2. Revisions to the Pub. Util. Code to tighten restrictions on private off-the-record ex parte communications.

Bagley-Keene Act Reform

The Bagley-Keene Act²⁷ contains a number of prescriptive requirements that generally must be met in order for a majority of members of any state agency or state body to discuss or deliberate on any matter within the jurisdiction of the agency. Most importantly, the Act prohibits members of a state body from “meeting” to discuss or deliberate on anything within the jurisdiction of the body unless it is done in a public meeting. The term “meeting” is broadly defined for purposes of the Act and 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.”²⁸

Any meetings for discussion or deliberation among a majority of members must also meet certain public notice, accessibility, and participation requirements, including the following:

- With limited exceptions, all meetings must be open to the public.²⁹
- Meetings must be publicly noticed at least 10 days before the date of the meeting.³⁰
- Meetings must be at locations accessible to the public.³¹
- Members of the public must be given an opportunity to speak on items before the agency.³²
- No item may be discussed unless it is included on the meeting agenda.³³
- Copies of any documents to be considered at the meeting must be made available to the public prior to the commencement of the meeting.³⁴

The Act also prohibits indirect “meetings” and communications among a majority of members through intermediaries or through a series of separate meetings. It states,

“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.”³⁵

²⁷ Gov. Code sec. 11120 et seq.

²⁸ Gov. Code sec. 11122.5 (a).

²⁹ Gov. Code sec. 11123 (a).

³⁰ Gov. Code sec. 11125 (a).

³¹ Gov. Code sec. 11123.1.

³² Gov. Code sec. 11125.7.

³³ Gov. Code sec. 11125 (b).

³⁴ Gov. Code sec. 11125.1 (b).

³⁵ Gov. Code sec. 11122.5 (b)(1).

The Act contains several important exceptions from the generally applicable public meeting requirement for certain specified purposes. Such exceptions include provisions permitting state bodies to discuss in closed sessions of publicly noticed business meetings: proposed decisions in formal adjudication proceedings conducted under the Administrative Adjudication provisions of the California Administrative Procedures Act (APA), and other similar provision of law;³⁶ personnel matters;³⁷ and pending litigation.³⁸ These exceptions are important, but rather limited.

There are also a number of agency-specific exceptions, but these too tend to be rather limited. Three CPUC-specific exemptions permit CPUC Commissioners to meet in “closed sessions” of publicly noticed business meetings for the following limited purposes: (1) to consider institution of formal enforcement proceedings against a utility or other regulated entity;³⁹ (2) to deliberate on the decision in a formal proceeding categorized as a “ratesetting proceeding,” but only if evidentiary hearings have been held in the proceeding and ex parte communications are prohibited during a “quiet time;”⁴⁰ and (3) to deliberate on the decision in a formal proceeding categorized as an “adjudication proceeding,” but only if a “Presiding Officer’s Decision” (POD) has been issued and an appeal of the POD filed.⁴¹

The Bagley-Keene Act does not technically preclude Commissioners from engaging in the kind of active oversight of programs, policies and priorities necessary for effective CPUC enterprise management. It only requires that, to the extent this is done by the Commission in any collective manner, it must be done in meetings noticed 10 days in advance, limited to specific items noticed on the meeting agenda, and conducted in public. The requirements and restrictions in the Act have, however, had the effect of severely impairing and, to a significant extent, effectively precluding such collective discussion and oversight. There are a number of reasons for this.

1. Given the extraordinary breadth and scope of the Commission’s jurisdiction; heavy workload of formal proceedings; and many regulatory programs that require ongoing administration by the CPUC, it is virtually impossible for Commissioners to exercise effective executive level oversight through discussions solely in publicly noticed business meetings. It is so incredibly inefficient to even attempt to manage through public meetings noticed 10 days in advance and with a fixed agenda the many diverse policy initiatives, programs and activities of the CPUC that warrant executive level management oversight that CPUC Commissioners have, for the most part, simply left the task of managing the agency primarily up to its staff, and forgone the kind of executive level governance an enterprise of its size, complexity and importance warrants.
2. Many proceedings and policy initiatives at the CPUC are related to other proceedings that may be assigned to different Commissioner’s offices. For example, the current Renewable Portfolio

³⁶ Gov. Code sec. 11126 (c)(3).

³⁷ Gov. Code sec. 11126 (a)(1).

³⁸ Gov. Code sec. 11126 (e)(1).

³⁹ Gov. Code sec. 11126 (d)(2).

⁴⁰ Pub. Util. Code sec. 1701.3(c); and see also CPUC Rule 8.3(c)(4).

⁴¹ Pub. Util. Code sec. 1701.2(d).

Standard (RSP), Long Term Procurement Plan (LTPP), Distribution Resource Plan (DRP), Energy Efficiency (EE), Demand Response (DR), and Energy Storage proceedings are all interrelated and require coordination on an ongoing basis. It is simply not possible for the different Assigned Commissioners to coordinate with one another, or for the Commission as a whole to exercise executive level oversight of these related proceedings and initiatives through public meetings with fixed agendas scheduled 10 days in advance. As a result, they are being coordinated largely by Energy Division staff with little executive level oversight.

3. Commissioners historically have been reluctant to engage in the type of unscripted, free-wheeling, open discussion and debate of broad ranging issues and concerns in business meetings open to the public that is necessary for effective enterprise management. There are several reasons for this. Some issues and concerns may involve confidential financial, commercial, customer, personnel, security, or other sensitive information not conducive to discussion in public. The Commission frequently must address issues that can have material financial impacts on utilities and other unregulated companies giving rise to concerns that an inartful question or hasty response may be misinterpreted by the public or investors and reported or acted upon imprudently. Commissioners are also often reluctant to ask questions in public that they do not know the answer to and may be perceived as not very well-informed or perceptive. And Commissioners also tend to be reluctant to say anything that may embarrass another Commissioner in public or subject them to public ridicule.
4. Commission staff also tend to be very reluctant to say anything, even in private meetings, that may suggest or imply that a Commissioner does not understand an issue, is not properly prepared, or has asked a “dumb question,” but they virtually never do so in public.
5. Advisory staff and the Administrative Law Judge assigned to particular CPUC proceedings are unable to effectively brief all Commissioners offices on issues or pending proceedings at the same time since the type of questions, answers and discussions necessary for a thorough intellectual interchange may impermissibly convey substantive information from one Commissioner to others, outside the context of a publicly noticed public business meeting. Separate meetings, with no more than two Commissioners, must instead be held which is less efficient and deprives Commissioners and the agency of the benefit that more collaborative briefings would provide.
6. Thorough preparation for public business meetings is virtually impossible since Commissioners and their advisors are precluded from conferring with one another in advance of such public meetings to share information about issues and concerns and what preparation may be warranted in order to facilitate a thorough, thoughtful, vibrant and informative discussion at the public business meetings. CPUC Commissioners who prepare Alternate Decisions are also precluded from briefing fellow Commissioners on the intent, purpose and effect of the Alternate Decision in advance of the public business meeting at which it is to be considered, even though each Commissioner may have been briefed by the assigned Administrative Law Judge on the

Proposed Decision. Under current law, in order for Commissioners offices to engage in the kind of discussions with one another necessary to thoroughly prepare for public business meetings, would require a noticed public preparation meeting prior to the noticed public business meeting.⁴²

Under existing law, CPUC Commissioners can meet privately in closed sessions of publicly noticed open business meetings for certain purposes, including discussion of proposed decisions in ratesetting proceedings that have gone to hearings, and adjudication proceedings in which a POD has been issued and appealed.⁴³ These CPUC-specific exemptions from open meeting act requirements have been extremely beneficial in facilitating collective discussion and collaborative decision-making among Commissioners. These closed sessions have also contributed to more informative and substantive comments and discussions among Commissioners during subsequent open public business meetings at which Commissioners have approved decisions on matters previously discussed in closed session.

The Commission's public meeting at which it approved \$1.6 billion in sanctions on PG&E for the San Bruno incident is a prime example of how collective discussions among CPUC Commissioners and advisory staff all in the same room at the same time, in closed sessions conducted pursuant to the existing exemption from open meeting act requirements for adjudication proceedings, can increase the efficiency and quality of the Commission's deliberations and the ultimate decision later approved in open public business meetings. In this instance, the private deliberations among Commissioners in closed session clearly and unquestionably facilitated more informative and thoughtful public comment and discussion among Commissioners in the subsequent open public business meeting at which the vote was taken and final decision issued.

The existing CPUC-specific exemptions from open meeting act requirements are quite limited, however, and apply only to a small minority of formal proceedings before the CPUC and only during limited periods of time and for limited purposes.⁴⁴ And there are no exemptions permitting collective discussion among Commissioners of issues necessary for executive level management of ongoing

⁴² The CPUC has recently instituted a somewhat similar process by including items on its business meeting agendas for discussion without a vote. Such items are indicated by the notation on the agenda, "discuss and hold." This has been helpful in stimulating discussion among Commissioners, but is not a satisfactory substitute for less formal coordination prior to public business meetings. It is much more time-consuming and inefficient than meeting less formally and is not very well suited to soliciting, obtaining or integrating input from or discussion with others Commission staff, including Administrative Law Judges and technical advisory staff, who often have much that could be contributed to such discussions.

⁴³ See Pub. Util. Code sec. 1701.3(c) and Pub. Util. Code sec. 1701.2(b).

⁴⁴ The existing CPUC proceeding-specific exemptions from Bagley-Keene Act apply to adjudication proceedings in which a POD has been issued and appealed; ratesetting proceedings in which hearings have been held; and enforcement investigation proceedings, but only during deliberations on whether the Commission should issue a formal Order Instituting Investigation. PODs in most adjudication proceedings are appealed, but adjudication proceedings constitute a very small percentage of formal proceedings pending before the CPUC at any given time. Investigation proceedings are also a relatively small percentage of the formal proceedings before the Commission. Ratesetting is the most common type of formal proceeding before the Commission, but most do not go to hearing.

policies, programs and priorities that are not pending in a proposed decision in an adjudication or ratesetting proceedings.

It is also important to note that, at least in the case of the CPUC, the Bagley-Keene Act is not currently accomplishing its intended purpose. It was intended to provide public access to the deliberations of multi-member state agencies and to better enable the public to observe the conduct of the public's business. Since the CPUC began rigid adherence to the provision of the Bagley-Keene Act prohibiting what has been characterized as "seriatim meetings," the CPUC's public business meetings have evolved from collective working sessions among CPUC Commissioners into largely ceremonial events with little actual discussion or debate among Commissioners. Most items considered by the Commission are approved on its "consent agenda" with no discussion whatsoever. And public comments by Commissioners on "Regular Agenda" items are often limited to scripted remarks read into the record. As a result, under current policy and practice, information flow within the agency has been severely impaired, collaboration and collective deliberation among Commissioners constrained, and the public is obtaining little or no meaningful insight into the CPUC's deliberative process.

Two revisions to the Bagley-Keene Act warrant consideration to remedy these deficiencies.

1. Relaxing Restrictions on Discussions - The restrictions in the Bagley-Keene Act on the ability of CPUC Commissioners to confer with one another on agency goals, objectives, programs, and priorities impairs constructive communications among executive level and senior CPUC management and significantly impairs enterprise management at the CPUC. Relaxing the prohibition on such discussions, while retaining the prohibition on reaching a collective consensus or voting outside public business meetings, could provide a means to significantly improve agency governance while potentially also improving public access to the CPUC's deliberative process and better serving the original intent of the Bagley-Keene Act.
2. Expanding Proceeding-Specific Exemptions - The existing proceeding-specific exemptions permitting CPUC Commissioners to discuss proposed decisions in certain ratesetting and adjudication proceedings have facilitated more effective collaboration among Commissioners but only in the small minority of proceedings to which the existing limited exemptions apply. Expanding these existing exemptions could provide a means for broader collaboration among Commissioners and better informed decision-making in formal proceedings before the agency.

Ex Parte Reform

Broader revisions to existing ex parte rules applicable to the CPUC should also be considered. CPUC ex parte rules are extraordinarily complex and full of ambiguities ripe for abuse. They have also come under severe criticism as a result of recent disclosures of numerous improper private off-the-record communications between utilities and CPUC decision-makers concerning disputed issues in formal proceedings pending before the CPUC. Many of the recent disclosures concern ex parte communications that were not properly disclosed, but were otherwise permissible under existing CPUC rules.

Academics have criticized existing CPUC ex parte rules on grounds that they are inconsistent with the rules applicable to most other state and federal agencies and undermine the transparency, integrity and fairness of the CPUC's decision-making process.⁴⁵

Under the circumstances, it has become abundantly clear that public confidence in the CPUC and its decision-making process cannot be restored without significant revisions to existing ex parte rules applicable to the agency.

Some of the proposals for reform of CPUC ex parte rules made to date are rather simplistic, however, and fail to adequately address the root causes of the broader communications and information flow deficiencies at the CPUC. They also could inadvertently increase existing barriers to constructive communication within the agency and the inherent advantages large utilities already enjoy in proceedings before the Commission. As a result, more thorough and nuanced remedies should be considered. A number of considerations should be taken into account in fashioning such ex parte reform.

Formal proceedings before the CPUC are often extraordinarily time-consuming, technically complex, and expensive to participate in.⁴⁶ They often include dozens of different parties with different interests and issues, thousands of pages of pleadings, extensive written testimony generally prepared by experts in their fields, and take years to complete. Few parties other than the large utilities have the resources to keep track of all of these proceedings and where issues of importance to them are being addressed, much less fully participate in all that may affect their interests.

Large utilities have distinct and significant advantages in formal proceedings before the CPUC as a result of the fact that they are often the only party in possession of information regarding their systems critical to CPUC proceedings, and they almost always have superior access to the funds, technical experts, attorneys and support staff necessary for effective participation in such lengthy and complex proceedings. Less experienced, less well capitalized, and less frequent CPUC intervenors are at a significant disadvantage in such formal proceedings. Many of these smaller parties rely on ex parte communications to gain a measure of visibility among CPUC decision-makers for their concerns and consider the CPUC's existing ex parte rules as providing a means of neutralizing, to some degree, the advantages large utilities enjoy in the formal hearing process before the CPUC. As a result, if existing ex parte rules are tightened, some alternative and effective means must be provided for parties who do

⁴⁵ See, for example, Behles, Deborah and Weissman, Steven, *Ex Parte Requirements at the California Public Utilities Commission: A Comparative Analysis and Recommended Changes* (January, 2015).

⁴⁶ The time, expense and difficulty of participating in formal proceedings before the CPUC impacts the CPUC staff as well as outside parties. It was cited in the CPUC's Independent Panel report as a factor contributing to SED's reluctance in bring more formal enforcement investigations against utilities and other regulated entities for violations of applicable regulatory requirements. The report states, "(T)he Staff observed and we agree the levels of graduation (in the CPUC's graduated enforcement policy) may not be well calibrated. In particular, the OII process has rarely been invoked in pipeline safety cases. Because the OII is a formal adjudicatory process that may involve administrative law judges, hearings, and pleadings, it is unwieldy for any but the most severe violations." *CPUC Independent Panel Report re San Bruno* (June 24, 2011 revision), at p. 21.

not have the resources of the larger utilities to ensure that CPUC Commissioners hear and give thoughtful consideration to their concerns.

CPUC Commissioners over the years, without exception, have found it extremely challenging to keep up with the CPUC's workload of formal proceedings. And almost without exception, they have addressed this challenge, in part, by entertaining and, to differing degrees, relying upon private off-the-record ex parte communications with utilities, consumer groups, and other interested parties to obtain a better understanding of their issues and concerns. Any reform to existing CPUC ex parte rules must take into account and address through some effective alternative means, the reasons for CPUC Commissioners historic and almost universal reliance on ex parte communications as an integral part of the CPUC's decision-making process.

Finally, the current ex parte rules applicable to the CPUC are extremely complex, ambiguous in certain respects, and difficult to fully comply with. Different rules apply depending upon the "category" of the proceeding.⁴⁷ In general, ex parte communications are prohibited in proceedings categorized as "adjudication;"⁴⁸ permitted subject to certain advance notice, equal time, and disclosure requirements in proceedings categorized as "ratesetting;"⁴⁹ and permitted without limitation or restriction in proceedings categorized as "quasi-legislative."⁵⁰ Under the CPUC's rules implementing statutory ex parte requirements, it has reserved the authority to change the ex parte rules applicable to particular proceedings and to adopt different rules. CPUC Administrative Law Judges have exercised this authority in a number of different proceedings, in some instances imposing unique rules and requirements for a particular proceeding and in others applying new rules and restrictions more broadly to multiple proceedings or to an entire utility. This has resulted in such complexity that few utilities or CPUC practitioners can say with complete confidence that they are fully conversant with all of the CPUC's currently applicable ex parte rules.⁵¹

One way to address these concerns would be to simplify and tighten the existing ex parte rules in contested quasi-judicial proceedings and accompany the tighter restrictions with changes in CPUC process and procedure to increase reliance in these proceedings on-the-record final en banc hearings before a majority of CPUC Commissioners. This combination of reforms could provide a means for Commissioners to obtain information directly from interested parties at the conclusion of formal quasi-judicial proceedings in a more efficient, transparent and accountable manner and could serve to promote better and more constructive lines of communication and information flow within the agency.

Ex parte reforms of this nature could be implemented in the following manner.

⁴⁷ Pub. Util. Code sec. 1701.1.

⁴⁸ Pub. Util. Code sec. 1701.2(c).

⁴⁹ Pub. Util. Code sec. 1701.3(c).

⁵⁰ Pub. Util. Code sec. 1701.4(b).

⁵¹ In several instances, parties involved in inappropriate ex parte communications that were not properly or timely disclosed, including CPUC Commissioners and utilities that should be as well informed as anyone regarding applicable requirements, claimed not to know that the communications were inappropriate or required disclosure.

1. Revise the Public Utilities Code to repeal the existing three-part categorization scheme (adopted in SB 960) and substitute, in lieu thereof, a new two-part scheme, conforming more closely to the approach taken by other state and federal agencies, and also for defining the standard for judicial review of CPUC decisions, consisting of: “adjudication proceedings” and “quasi-legislative proceedings”;
2. Define “adjudication proceeding” as including enforcement, complaint, rate, licensing, and other proceedings involving the rights and obligations of an individual utility, other regulated entity, customer, or other stakeholder; and define “quasi-legislative proceedings” as including rulemaking, investigation, and other proceedings involving broad policy and political issues affecting an entire class of utilities, other regulated entities, customer class, or other group of stakeholders with common interests;
3. Adopt a clear, unambiguous and unconditional ban on ex parte communications in contested “adjudication proceedings” (as is provided for under current law);
4. Permit ex parte communications, without restriction, in “quasi-legislative proceedings” (as provided for under current law);
5. Establish a clear and unambiguous duty on CPUC decisionmakers, as well as interested parties, to promptly disclose any improper ex parte communications that may occur;
6. Establish meaningful sanctions for any violation of the ex parte rules, including sanctions on CPUC decisionmakers for any failure to promptly disclose an improper ex parte communication; and
7. Establish a new requirement for a final on-the-record en banc hearing before a majority of Commissioners, after the Proposed Decision has been issued but before it is considered at a public business meeting, in formal quasi-judicial “adjudication proceedings” before the CPUC that are contested.

CONCLUSION

Reforms of this type are critical to improve internal lines of communication, instill constructive dialogue, improve enterprise management, and increase the CPUC’s efficiency, effectiveness and accountability. These reforms would not only facilitate more vigorous discussion and debate of substantive and management issues within the Commission, but would also likely do so among Commissioners in public hearings and business meetings. Such reforms may therefore provide an opportunity to not only improve the efficiency and effectiveness of the CPUC, but also better achieve the intent of the Bagley-Keene Act.