

Date of Hearing: April 27, 2022

ASSEMBLY COMMITTEE ON UTILITIES AND ENERGY

Eduardo Garcia, Chair

AB 2911 (Muratsuchi) – As Amended April 18, 2022

**SUBJECT:** Public Utilities Commission: public advisor: Independent System Operator: confidentiality

**SUMMARY:** Require various public disclosures of information related to the operations of the California Independent System Operator (CAISO) and the California Public Utilities Commission (CPUC). Specifically permits actions brought against the CPUC for Bagley-Keene Open Meetings Act or California Public Records Act (CPRA) enforcements to be brought in superior court, rather than appellate court. Additionally removes the presumption of confidentiality for utility information shared with the CPUC.

**EXISTING LAW:**

- 1) Establishes the public has a right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. (California Constitution, Article I Section 3 (b) (1))
- 2) Requires every public utility to provide information to the CPUC including specific answers to all questions posed by the CPUC. (Public Utilities Code § 581)
- 3) Requires every public utility to deliver copies of any or all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers, and records in its possession or in any way relating to its property or affecting its business, and also a complete inventory of all its property. (Public Utilities Code § 582)
- 4) Provides that no information provided to the CPUC by a public utility or its subsidiary or affiliate shall be open to the public except on the order of the CPUC or a commissioner in the course of a hearing or proceeding. Also provides that any present or former officer or employee of the CPUC who divulges information is guilty of a misdemeanor. (Public Utilities Code § 583)
- 5) Requires the CPUC to adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in a procurement plan. (Public Utilities Code § 454.5(g))
- 6) Requires public utilities to furnish reports periodically, special, or both concerning any matter about which the CPUC is authorized to inquire to keep itself informed or which it is required to enforce. (Public Utilities Code § Section 584)
- 7) Requires the public utilities to provide access to all computer models used by the public utility, in any rate proceeding or a proceeding that may influence a rate, to the CPUC. (Public Utilities Code § 585)

- 8) Requires the CPUC to release, in an aggregated form, to the Legislature the costs of all electricity procurement contracts for eligible renewable energy resources and costs for all utility-owned generation approved by the CPUC. Permits the CPUC to aggregate data to the extent required to ensure confidentiality of individual contract costs. (Public Utilities Code § 913.3)
- 9) Finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state and establishes the CPRA. Specifically lists the CPUC as a state body subject to the CPRA and mandated to establish written guidelines for accessibility of records. (Government Code § 6250, et seq.)
- 10) Provides that agencies shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of the CPRA or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by the disclosure of the record. (Government Code § 6255)
- 11) Establishes the CPUC with jurisdiction over all public utilities and grants the CPUC certain general powers over all public utilities and common carriers, subject to control by the Legislature. (California Constitution, Article 12)
- 12) Requires the CPUC to regulate utilities, establish just and reasonable rates for service, and establishes a division of the CPUC responsible for consumer protection and safety. (Public Utilities Code § 451 and § 309.7)
- 13) Establishes the CAISO as a nonprofit, public benefit corporation and charges it with ensuring efficient use and reliable operation of the transmission grid. Mandates the CAISO maintain open meeting standards and notice requirements consistent with the general policies of the Bagley-Keene Open Meeting Act, and provide public access to records consistent with the general policies of the California Public Records Act. (Public Utilities Code §§ 345-352.7)
- 14) Provides that CPUC orders and decisions can only be appealed at the California Supreme Court and the courts of appeal. (Public Utilities Code § 1759)
- 15) Provides that the venue for review of an agency's decision under the CPRA lies with the superior court. (Government Code § 6259)

**FISCAL EFFECT:** Unknown. This bill is keyed fiscal and will be referred to the Committee on Appropriations for its review.

**BACKGROUND:**

*CPUC Reform: Legislative Response to the San Bruno Disaster* – In September 2010, eight people were killed when a natural gas pipeline exploded in San Bruno, California. This tragedy focused the public's attention on gas utilities, and the regulators tasked with overseeing them. With this increased public focus came increased legislative action, primarily as a package of reform bills aimed at the CPUC.

SB 48 (Hill, 2015) contained a number of reforms to the governance and operations of the CPUC, including language present in this bill, allowing certain actions to be heard in superior court. The Governor vetoed SB 48 in October 2015. In his signing message for his veto, the Governor stated his support of the intent of the bill but felt additional work was needed.<sup>1</sup>

In response to the Governor's veto message, a package of bills enacting major CPUC reforms was introduced in 2016.<sup>2</sup> Two bills in that package, AB 2903 (Gatto) and SB 1017 (Hill), stalled in the Legislature. Some of the provisions in those bills – namely bringing action against the CPUC in superior, rather than appellate, court and the confidentiality of documents furnished to the CPUC – reappear in this current bill. In his signing message for the 2016 package of bills, the Governor mentioned AB 2903 and SB 1017 as “important reforms [that] cannot wait another year.”<sup>3</sup> He then went on to direct his staff to work with the CPUC to develop a plan and to work with the Legislature to enact the remaining measures.

*California Public Records Act and the CPUC.* The California Constitution and the CPRA require that most government records be available to the public and, as such, allow agencies, including the CPUC, wide latitude to establish policies for public access to their records. However, unique among other agencies, the CPUC is also governed by statute nearly as old as the agency itself, Section 583 of the Public Utilities Code, which states that no information furnished to the CPUC by a public utility “*except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the CPUC, or by the CPUC or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the CPUC who divulges any such information is guilty of a misdemeanor.*” As a result, the CPUC rules provide that regulated entities can stamp their documents and information as confidential (which they routinely do) and place the burden on the CPUC to determine whether the claims of confidentiality are justified.

*Confidentiality Treatment at the Commission* – Since the burden rests with the CPUC to determine whether utility data are confidential or not, the CPUC must carefully consider the appropriate balance between open access and market confidentiality. The CPUC has a long history of protecting market-sensitive energy data from public disclosure, and especially its disclosure to entities participating in wholesale power markets. The purpose of these protections is to avoid market manipulation risk that was a contributing factor during the 2000-01 electricity crisis.

In 2006, the CPUC adopted an electric utility confidentiality matrix to support this balance between open access and market confidentiality.<sup>4</sup> These matrices provide detailed and

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<sup>1</sup> Brown, Edmund G., Jr. *Governor's Veto Message for SB 18, SB 48 and AB 825*; Oct. 9<sup>th</sup> 2015.

<sup>2</sup> AB 2168 (Williams), AB 2903 (Gatto), SB 62 (Hill), SB 215 (Leno), SB 512 (Hill), SB 661 (Hill), and SB 1017 (Hill)

<sup>3</sup> Brown, Edmund G. Jr. *Governor's Signing Message for AB 2168, SB 62, SB 215, SB 512, and SB 661*; Sept. 29<sup>th</sup> 2016.

<sup>4</sup> D. 06-06-006 to implement SB 1488 (Bowen, Chapter 690, Statutes of 2004)

standardized guidance to stakeholders concerning the confidentiality of data at the CPUC. The standardized treatment outlined in each of these matrices attempts to offer a consistent approach to public disclosure of data provided to the CPUC by load-serving entities (LSEs = investor-owned utilities (IOUs), community choice aggregators (CCAs), and electric service providers). The CPUC defined market sensitive data, for the purposes of these matrices, as information with the potential to materially affect an energy buyer's market price for electricity. That definition has been modified eight times over the last decade.<sup>5</sup> For example, in 2020, the CPUC modified their confidentiality matrices to allow that the market-sensitive information of CCAs is eligible for confidential treatment.<sup>6</sup>

Currently, LSEs share market-sensitive information with the CPUC for the purpose of electric system reliability and energy resource procurement planning. The LSEs may claim confidentiality for data because of the data's ability to adversely impact the market if disclosed publicly. If the information does not allow market participants to raise the price of electricity a retail seller procures, then that information is not considered market-sensitive. For example, electric generators may choose to raise their prices if they are aware of a project delay that causes an LSE to be tight on supply. This market manipulation could be to the detriment of ratepayers by making ratepayers pay higher prices than necessary for electricity.

In addition to the Decisions governing the handling and access to market-sensitive data, the CPUC's General Order 66-D (GO 66-D), effective January 1, 2018, implements the CPRA and Public Utilities Code Section 583. GO 66-D sets forth the process an LSE must follow when submitting information that it claims is confidential, as well as the process by which the CPUC may deem the information to be non-confidential upon CPUC order. The presumption remains with the CPUC, not the LSE, to show the data should not be confidential. It is through this process where the CPUC conducts a "balancing test" of public interest; that is, whether the disclosure of such information is in the public's interest. GO 66-D also states that the CPUC may adopt confidential matrices, which preemptively designate certain information as confidential or public.<sup>7</sup>

The most recent CPUC action on confidentiality clarified and improved rules for renewable energy procurement under the Renewables Portfolio Standard (RPS) program.<sup>8</sup> The Decision adopts a two year window of confidentiality for renewable energy and capacity data considered market sensitive. The data are protected in the year it is submitted to the CPUC plus two years into the future. After this period of time, the data may be publicly disclosed.<sup>9</sup>

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<sup>5</sup> in Decisions, 08-04-023, 16-08-024, 17-09-023, 19-01-028, 20-07-032, 20-08-031, and 21-11-029

<sup>6</sup> D. 20-07-005

<sup>7</sup> Various CPUC Decisions, namely D. 06-06-066, 08-04-023, 20-07-005, and 21-11-029, have preemptively designated as confidential certain energy procurement information, such as market-sensitive information.

<sup>8</sup> D. 21-11-029

<sup>9</sup> LSE contracts are considered public, and LSEs cannot request confidential treatment of the contracts. Anyone seeking to access public RPS contracts can submit a PRA request to the CPUC or submit a request to the LSE itself.

**COMMENTS:**

- 1) *Author's Statement.* According to the author, "Transparency in decision making is a main component to the government's ability to garner the public's trust in those decisions. The California Public Utilities Commission (CPUC) has not made the necessary improvements to their policies to remedy the suspicions against them from the public in their practices as evidenced by the numerous complaints levied against them. AB 2911 increases transparency and protects consumer interests at the CPUC relating to public records act requests, litigation, and rate setting. Increased transparency and consumer protections builds public trust in the operations of the CPUC, an agency that ultimately works for the people of California."
- 2) *Judicial Review of Challenges under the CPRA.* One of the reforms proposed in this bill includes a change to the manner in which a person may bring a challenge against the CPUC under the CPRA. Statute sets forth a process for obtaining a hearing and review of a CPUC decision.<sup>10</sup> Before any review is sought in a court, a party that wishes to challenge a CPUC decision must first ask the CPUC for a rehearing. If, after the rehearing process is exhausted, the CPUC has not reversed or modified its decision, the challenging party may file a petition in either a California Court of Appeal or the California Supreme Court. Existing law expressly prohibits any court *other than* the Supreme Court or a Court of Appeal – that is, a superior court – from reviewing, reversing, correcting, or annulling any order or decision of the CPUC or otherwise interfering with the performance of its official duties.<sup>11</sup>

While this topic is in the expertise of the Assembly Committee on Judiciary, past analyses from that Committee on this matter have highlighted that the rationale for precluding superior court review of CPUC decisions is not entirely clear. Some have suggested the preclusion reflects a view that the CPUC administrative review and rehearing process is the functional equivalent of a trial court proceeding, so that any challenge to a final CPUC decision after review and rehearing should go to an appellate court. Whether or not this is accurate, existing law only precludes superior court review or interference with the CPUC in its "official duties." Just what are the "official duties" of the CPUC and what are the "decisions" that can only be reviewed by the Supreme Court or a Court of Appeal? Those who advocate allowing the superior court to hear CPRA challenges contend that the denial of a public records request is not an "official duty" of the CPUC. While the CPUC, like any other agency, has a duty to respond to CPRA requests, it is certainly not a duty unique to them.

Past supporters of this change believed it unreasonable to force a person who simply wants a disclosable public record from the CPUC to have to file an action with the

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<sup>10</sup> Public Utilities Code §§ 1731-1768

<sup>11</sup> Public Utilities Code §§ 1756-1759

California Supreme Court or one of the few Courts of Appeal should the CPUC deny the public record request. While it may be true that superior courts do not have experience handling CPUC matters, according to the Assembly Committee on Judiciary, they have ample experience handling actions brought under the CPRA. As noted in their past analysis on this matter,<sup>12</sup> *“The questions before the superior court, after all, will not be questions about CPUC policies and regulations, but about whether or not the requested documents must be disclosed under the CPRA and whether the documents are subject to a recognized exemption. To the extent that any request would implicate concerns that are somehow unique or specific to the CPUC, an intelligent lawyer could explain those implications and an intelligent judge will understand them. Many CPRA requests, after all, may involve documents submitted to an agency by a business that uses complex marketing strategies or sophisticated technologies, such that the average judge will have little to no familiarity with those issues.”* These complexities have not, to date, greatly affected the court's capacity to determine whether or not a record falls under a CPRA exemption.

- 3) *Balancing Transparency and Confidentiality* – This bill proposes amendments to the CPUC's and CAISO's confidentiality processes as they relate to the releasing of utility procurement contract information. As stated earlier, the CPUC, in its disclosure policies, seeks to balance the desire to allow public access to this information with the reality of the market-sensitive and potentially security-compromising nature of the data. Following the suite of legislative reforms levied at the CPUC, they updated the tools used to assess the confidentiality of utility data and created standard protocols for the data's release. Most recently, the CPUC updated its rules around RPS contract information allowing RPS data to be considered confidential for three years. Individual contract data for all LSEs is considered public 30-days after the project's commercial operation date or 18-months after the CPUC approves the contract, whichever is first. The sponsors of this bill cite rising electric rates, and the nebulous data and approvals that lead to the rate increases, as evidence for releasing utility contract information. While the process of utility ratemaking is often murky; it is unclear that disclosure of utility contract information would provide much clarity on rates. What's more, the confidential treatment of utility contract information is a ratepayer protection measure, as market manipulation could lead to ratepayers paying much higher prices than necessary for electricity.

This bill also calls for the “timely disclosure” of contracts, yet it is unclear how the current time windows for utility contract disclosure hinder public access. Finally, the bill calls for the CPUC to timely disclose only electrical corporation contracts, potentially advantaging CCAs and ESPs who not only are not subject to this disclosure but now may view the IOUs' contract terms in a highly competitive energy market. *Given this delicate balance, the committee may wish to consider amending this bill to strike provisions*

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<sup>12</sup> Assembly Committee on Judiciary analysis for SB 19 (Hill, Chapter 421, Statutes of 2017), July 9, 2017.

*relating to the disclosure of market sensitive information, specifically parts of Section 3 (Section 345.9 (b)(3)-(6) and 345.9(c)), and all of Section 4 and Section 5.*

4) *Previous Legislation.*

SB 19 (Hill) provides a suite of reforms of the operations of CPUC. An earlier version allowed legal actions against the CPUC arising from the CPRA to be brought before superior court. Status: Chapter 421, Statutes of 2017.

AB 2903 (Gatto, 2016) would have provided a suite of reforms of the operations of the CPUC, including clarifying the responsibilities and oversight of various positions; improvements to ethics practices; reports related to telecommunications services and CPUC staffing; stating the intent of the Legislature to transfer most non-rail, for-hire transportation services to the STA; and others. Status: Held in the Senate Energy, Utilities, and Communications Committee.

SB 1017 (Hill, 2016) would have modified the confidentiality of documents furnished to the CPUC by public utilities and would have stated the jurisdiction of judicial review of CPUC CPRA decisions to be with the superior court. Status: Held on the Assembly Floor.

ACA 11 (Gatto, 2016) would have proposed a measure on the ballot to authorize the Legislature to reallocate or reassign all or a portion of the functions of the CPUC to other state agencies, departments, boards, or other entities, consistent with specified purposes and proposed to repeal the provisions of the California Constitution pertaining to the CPUC effective January 1, 2019. Status: Held in the Senate Energy, Utilities, and Communications Committee.

SB 215 (Leno/Hueso) Proposed a suite of reforms of the rules, operations and procedures of the CPUC pertaining to the laws and rules related to ex parte communications and criteria and process for disqualification of commissioners to a proceeding. Status: Chapter 807, Statutes of 2016

SB 512 (Hill) Proposed a suite of reforms of the operations and governance of the CPUC, including allowing intervenor compensation for certain local governments, requiring specified information is available to the public, requiring specified reporting of the CPUC regarding the timeliness of proceedings, applying the Code of Ethics from the Administrative Procedures Act (APA) to ALJs, and others. Status: Chapter 808, Statutes of 2016.

AB 825 (Rendon, 2015) would have proposed a package of reforms of the CPUC largely directed at increased transparency of the activities of the agency, including requiring the California State Auditor's Office to appoint an Inspector General within its office for the CPUC, expanding the roles and responsibilities of the CPUC public advisor, specifying additional requirements of commissioners, and increased transparency of electric utilities' procurement, among others. Status: Vetoed.

SB 48 (Hill, 2015) would have proposed a suite of reforms of the governance and operations of the CPUC, including, among others, requiring sessions in

Sacramento, applying the Code of Ethics from the APA to ALJ, clarifying and augmenting the information the CPUC must provide the Legislature in its annual report, and others. Status: Vetoed.

SB 660 (Leno/Hueso, 2015) would have proposed a suite of reforms of the governance, rules, operations and procedures of the CPUC, including reforming laws and rules related to ex parte communications, criteria and process for disqualification of commissions to a proceeding, and authorizing the CPUC to appoint the chief administrative law judge. Status: Vetoed.

SB 1488 (Bowen) required the CPUC to open a proceeding to review and update its public disclosure practices. Status: Chapter 690, Statutes of 2004.

**REGISTERED SUPPORT / OPPOSITION:****Support**

Environmental Working Group

**Opposition**

Advanced Energy Economy

American Clean Power Association

Environmental Defense Action Fund

Environmental Defense Fund

Independent Energy Producers Association

Pacific Gas and Electric Company

Sempra Energy and Its Affiliates: San Diego Gas & Electric Company and Southern California Gas Company

Sempra Energy Utilities

Solar Energy Industries Association

Southern California Edison

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