Modernization Committee Notes – July 22, 2015

Welcome: introducing the "Proceeding Input Matrix:" note the goal to gain a common understanding about how information gets into the record and the various practices involved in getting information onto the record.

Opening Discussion:

- Getting information into proceedings is challenging: ALJs in PPHs may become subject to hearings, technical expertise in working groups might not understand 'process' generally and there have been challenges getting technical contributions into proceedings. (Example: Distribution Resources Planning Process Proceeding, "More than Smart" Working Group & Smart Inverter Working Group (SWIG) smart inverter documents)

Questions:

How do we give technical people a voice in a proceeding if they don't want to become a party?
Or/ How to get technical voices as parties into the proceeding?
How do we incorporate new types of people into our proceedings?
How do we change our processes to make public participation easier!?
What is the weight of opinion/ facts/ expert opinion & expertise in various parts of the record:
Remember: there are factors that weigh into decision to be a party: sovereignty, internet access, resources, proximity to San Francisco, etc

Helen M.'s presentation of the Proceeding Input Matrix:

- PPHs – transcripts created sometimes, not others
- Workshops – discuss policy, sometimes ALJ there, other times not there, staff prepares an agenda, if no lawyers then better discussion (of technical issues), not on record, only sometimes a workshop report is created but they are helpful for procedural movements that incorporate workshop discussions, not transcribed (unless transcript production is requested), parties participate
- All Party Meetings – came into existence 15 yr ago, Commissioner s/ ALJs/ participants vary (depending on many factors) not transcribed, no court reporter (usually), though they are sometimes video recorded
    - "on the record in the sense that:" the information can be referenced in a decision. "Assigned Commissioner held an all-party meeting…" contents of the all party meeting are not on the record [*will likely need clarification*]
    - The piece that was involved in creating the record goes into the decision.
    - The fact that all party meeting occurred exists, but the content of the all party is not automatically party of formal record… If the judge references a specific quote then that specific piece of the all-party becomes part of the record
        - All parties can happen before record is closed and after the record is closed
        - Judge may/may not include content of all party meeting b/c "it's not on the record"
    - **Identify:** rules for All Parties, no rules regarding how they're run, only rules for how they're noticed. Area to modernize?

- Sometimes: Closing oral arguments [formal mechanism] lawyers get up and give canned presentations, gets in the record, structured – hard to create a finding of fact on this type of information.
    - Example: earlier phase of Monterey Desal case
- All Parties vs Closing Arguments/ Final Arguments (Quorum of commission must be present): in the early days, this included 20 minute statements by parties, changed by the injection of questions with time limits and NOSTOESO vs structured closing statements by lawyers. No such thing as all party reports.
    - All parties were created for everyone to give Commissioner input without needing the Ex Parte meeting. Not much experience in the world of 'process,' today maybe we should structure them and figure out what to do with the information produced in them.
    - All parties are still considered "ex parte" so information are not subject to hearing and cross
    - By name, about the parties and are observed by the public, sometimes broadcast.
    - Oxymoron: Commissioner not there doesn't have access to what was said. Because of BK, one Commissioner can not ask another Commissioner what happened.
- En Banc Meetings – "rare"
- Workshop Report: hard to come by b/c of staffing problems
    - Other options – court reporter comes for last half hour/ 45 minutes so that parties can summarize their point s and that can be incorporated on the record
        - Happening in Verizon Frontier proceeding – return after tour of facilities, tell court reporter
    - Must ask for workshop report to be created, can have comments/ replies
    - Is this the best structure?
- Other Meetings between stakeholders, parties and staff (aka "work") – excludes Decisionmakers, ALJs, advisors.
    - Parties sometimes don't want to be party – if staff agrees with parties, easy to move forward, if expertise isn't agreed upon, harder to get information into the record.
    - The interagency context is really interesting: can't provide information about how information will be used if information between two agencies are shared. Including issues about contracting. [*Could use some clarification.*]
    - Example: Low Income Oversight Board (LIOB)
- Add a box to the matrix: Other Agencies
    - Hard to be authentic when someone says "going to use this information on the record," agencies get really conservative when this topic comes up. Similarly with access to data.
    - How to weigh information from experts, other agencies – big dilemma. Should be explored.
- Distinction for on/ off the record – we created! – FCC doesn't have record delineation; in regards to weight of information. FCC does informal rule making, backwards to the CPUC, similarly to Air Agencies. NOI, NOPR (notice of inquiry/ notice of proposed rulemaking), then designate facts for hearings if there is no agreement, then formal process. We have a formal process with mixed in informal options.
    - We give more weight to the formal process, we have an "evidentiary record," lots of alternatives.
    - How do these contexts interact with quasi legislative, adjudicatory, ratesetting categories of proceedings?

- **The Ask: Discussion showing that we might need a consideration / reconsideration of how we consider the record and examining that or having a different animal besides the formal record.**
    - There could be reasons to do things differently but that might be more complicated for people coming to PPHs
        - The beauty of Modernization: be informed by what we have been doing and take a fresh look at if this serves us and the public or if there's a way to make it serve everyone better.
            - Refer back to Stromwasser report: reasons why people felt that ex parte was necessary was b/c the rigidity of the process. Not persuasive to the authors but was included. Parties not feeling heard enough during the formal process and ex parte enables parties to highlight the record.
- Individual ex parte meetings – info not on the record, required to file notice in ratesetting case, none in adjudicatory, for parties, summaries attached to the notice, existence is a part of the record but the content is not and summaries are inadequate.
- Written ex parte - off the record, require filed notice, public advisor may keep them. Sometimes, lots of mail/email comes into public advisor and this gets circulated to the commissioner offices.
    - End of presentation

- **We give greatest weight in the record to hearings but unless you're the assigned Commissioner, no copy of the transcript.** Transcript accessible to staff working on it but not sent automatically, also, transcript not put on the docket card. Therefore, unable to get a copy of the most important part of what's in the record. [*It's difficult to get the transcript.*]
    - Option that challenges the status quo: AT&T/ T-Mobile – Commissioner Sandoval's office made those transcripts available online.
        - Really important for people throughout the nation. FCC, there, never held public hearings or informal comment workshops. We were the only agency outside of congressional testimony to hold hearings on this topic.
            - Our court reporters, their union clause states that they get extra money for different parties buying the transcripts. If free handout of transcripts, contrary to their union contract.
            - If someone buys copy of the transcript, intervenors eligible for IComp get free copy to the transcript. This is an issue all over the country.
            - Pre-filed written testimony used to be filed with docket office but a few years ago the rules changed and now it's served but no longer filed. You move it into the record in the hearing room. But it's not on the docket card b/c it's part of the evidentiary record.
- **Conclusion: Most relied upon stuff (transcript), it's not accessible. Hard to reconcile that with the financial needs of the court reporters.**

- Where do we go from here to distill the issue down and consider possible rule changes?
    - Say: imagine we keep existing construct w/ formal ruling making, ratesetting/ QL/ adjudicatory // also big in between area
    - There's a **range of fact gathering techniques that are more appropriate in different proceedings.**

- Rate case – formal testimony, cross examination – but many things we do don't require that.
- Not until SB 960 rules in mid 90s that we got the 3 categories of proceedings and different rules fell out of that when legislature designs a process for the PUC. Categories might not be correct or may be too rigid, maybe we over design them.
- Look at energy commission: IPER and other reports have workshops and staff presents + involved parties present + public comment at every meeting. No swearing in, no testimony. Siting case is more formal. CAISO has stakeholder process where there's a well understood sequence of events and it's all informal and is a means of getting input. They talk to stakeholders and have no ex parte, no BK, no equal time

- **Next steps:** look at Stanford university report discussion, Stramwasser report, Ed O'Neil report, variety of steps to take:
  - **Guidance on evidence rules and public comment would produce more consistency on how agency treats these things and what's in our authority and what's not**
    - Longer term – OIR/ legislation
      - Categories are talked about by Ed O'neil
  - **Look into: What requires statutory changes, what requires changes to practice and procedure, what requires guidance etc**
  - May be different need to recognize that different proceedings require different types of actions. We might need more flexibility than what we have now
    - Verizon frontier – "field workshop" = ambulatory parts of the workshop by walking around and look at facilities (field ethnography)

Requests:

- **Staff (of some variety) should help us by comparing a report about procedures to weigh and consider public input into proceedings (state/fed/local/tribal bodies we might compare ourselves to). State agencies would be another good place to look into.**
    - Stramwasser looked at ex parte rules in different agencies.
    - FCC has figured out a way to take public comment w/o diminishing public comment and doesn't give public less weight
  - Areas where we'd like to come to decision: re PPHs (clarity on footnote #1 of Matrix) – not part of evidentiary record. How can decision refer to PPH? As long as you're not relying on it for the truth of the matter asserted. They're not sworn testimony. Can refer to it b/c it's transcribed but it's not testimony and is effectively hearsay.

Topic shift – We have created barriers to participation in our own proceedings:

- For decision makers to attend workshops, ruling must be issued enabling Commissioner to attend or else scoping memo allows Commissioner to always attend
  - Some ALJs only issue these rulings if the decision maker requests in advance that the ruling be issued
  - What if you're assigned Commissioner or not assigned Commissioner doesn't ask to put out the notice
- Resolution was daily calendar note, scoping memo note, and a ruling: daily calendar + scoping memo. Scoping memo does not suffice (especially if a workshop occurs before the publishing of the scoping memo). This system is burdensome.
- Do we need to advance the date to calendar & prehearing conference? Why can't calendar be enough.

- Provision in rule 8.1 – public meeting if meeting is notice by ruling in a proceeding.
- Rule says, if noticed by ruling or order in the proceeding,
- Potential change "A public meeting is any meeting that appears in the daily calendar" -- stay within the context of Bagley keen.
- Lawyer asks – will these ideas stand up on appeal? Let's ask the appellate lawyers on their ideas about whether or not we're depriving anyone of due process
    - [*Memo to be drafted by Helen Yee. Discussion topic Aug 26,2015.*]
- As long as we comply w/ BK, how we define what COMMISSIONER s can do/not do/say/not say is up to the Commissioners. Categorization & stuff we're talking about here, not part of statute, they're just rules that commission and predecessors have adopted.
    - If there's a ruling in proceeding: workshop on Day X, does it have to say Commissioner may be here? Interpretation by ALJ.
- SFI – to close non-controversial rules and solicit some feedback
- Rule changes go through OAL office of administrative law; an interpretation can be reinterpreted
- Work w office and legal and alj division to draft an interpretation on that individual rule to reduce work and reduce impediment to participation – Commissioner s and advisors want to participate
    - Need to be adopted interpretation by resolution or decision
- If any ideas about rule changes that will be helpful for PPHs, to make public comfortable and honored, workshops/ all party meetings – there are questions if rule changes may be helpful
    - Ask Ed O'neil to look into as well
- Learn more about "PFI" process
- Use website to request for comments