

Goodin, MacBride, Squeri & Day, LLP

505 Sansome Street, Suite 900

San Francisco, CA 94111

415-392-7900

mday@goodinmacbride.com

August, 24, 2015

Commissioner Liane Randolph
Commissioner Michel Florio
505 Van Ness Ave.
San Francisco, CA 94102

**Re: CPUC Policy and Governance Committee: August 26, 2015 Agenda
Discussion re Ex Parte Communication Pilot Program**

Dear Commissioners Randolph and Florio:

The undersigned, as a former Acting General Counsel of the California Public Utilities Commission and a long time practitioner before the Commission, representing a variety of non-utility stakeholders, hereby submits this letter to offer my comments and recommendations with respect to the Pilot Program under consideration by your Committee regarding regulation of ex parte communications in ratesetting proceedings. In this letter, I am speaking as an individual, and not on behalf of my clients. However, over decades, I have represented the interests of a wide variety of community groups, cities, counties, special districts, large and small business interests, and energy project developers before the CPUC.

Specifically, I firmly believe that the proposed legislative and regulatory bans on individual ex parte communications in ratesetting cases will not have the effect of diminishing the influence of the large utilities that have committed violations of the existing ex parte rules in the Commission's Rules of Practice and Procedure. To the contrary, I and many other practitioners, believe that such a ban will primarily harm smaller stakeholders, while actually reinforcing the advantage that large utilities hold because of their tremendous advantage in resources and in their control of virtually all the relevant financial data in ratesetting cases.

To the extent the Commission wishes to consider the use of a Pilot Project to test alternative means of obtaining input from parties in ratesetting cases, I have one specific recommendation for modifying the Pilot Program discussed at your last committee meeting. As Section III A. of the Pilot Program states, the intent of the program is to "focus on post-PD Commission decision-making." My recommendation is that this focus should be built into the basic structure of the program, and that *individual ex parte communications in ratesetting cases continued to be allowed subject to the existing requirements for notice and reporting, up until the issuance of a Proposed Decision in a ratesetting proceeding.*

In this fashion, the Commission can test the efficacy of the alternate procedures that it wishes to examine during the time from issuance of the PD until the case is decided.

However, parties, particularly smaller stakeholders, would still be able to contact Commissioners and advisors to educate them about their particular issues, and to urge that such issues be carefully reviewed in the Proposed Decision when it is released. This process will be critical to balance the influence that the larger utilities possess in the hearing room environment. At the same time, limiting ex parte communications following the issuance of the PD to written communications or all-party and en banc proceedings will diminish concerns that the key decision-making processes are occurring outside of a public process.

Many CPUC practitioners, including myself, as well as the Little Hoover Commission¹, believe that such ex parte communications are a useful and valuable part of the ratemaking process. And it is very important to note that both the U.S. and California Supreme Courts have made it clear that *ratesetting proceedings are essentially a legislative act*, not an adjudicative process.² In quasi-legislative proceedings, restrictions on any form of public input are difficult to justify. Indeed, the result of the proposed Pilot Program under consideration may be to prove that the prohibition of individual ex parte communications in ratesetting cases results in less informed and less effective decision-making on the part of the Commission. However, given that reforms barring individual ex parte contacts to some extent appear likely to be tried in one form or another, I offer my recommendation so that the Commission can test its new

¹ The recent report of the Little Hoover Commission offered support for retention of ex parte communications in ratesetting and quasi-legislative proceedings. In the Executive Summary of its Report entitled “Conversations for Workable Government”, Report #227, June 2015, the Little Hoover Commission stated, “The Commission concluded that these private [ex parte] conversations are, in most cases, a necessary and effective tool of information gathering and governing – and recommends that current rules stay in place, while giving consideration to additional transparency and accountability that could provide Californians optimum insight into state government decision-making.”

² “Ratemaking is an essentially legislative act . . .” *New Orleans Public Service Inc. v. Council of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506; (1989 U.S. LEXIS 3043); “The fixing of a rate and the reducing of that rate are prospective in application and quasi-legislative in character.” *Southern Pacific Co. v. Railroad Com.*, 194 Cal. 734, 739; “In adopting rules governing service and in fixing rates, [the] commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions”, *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292, 93 Cal.Rptr. 455, 481 P.2d 823; “The rules of practice and procedure promulgated by the commission are liberal in allowing public participation in ratemaking proceedings. (E.g., Cal. Admin. Code, tit. 20, rule 54.) Hence there may be a number of interveners in such matters, representing a wide variety of public positions. The commission's primary task is to assimilate those views into a composite “public interest,” a give-and-take process often producing a result that cannot be deemed a clear-cut victory for any party”, *Consumers Lobby Against Monopolies v. Public Utilities Com.*, 25 Cal. 3d 891 (1979); 603 P 2d 41.

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parameters for *post-PD* decision-making without completely denying small stakeholders the opportunity to explain their important issues to the Commission at an early stage of the decision-making process.

I want to express my appreciation for the opportunity to offer my views on these important public policy matters to the Committee and to the rest of the Commission. While I will not be able to attend your August 26, 2015 meeting, I hope to be able to converse with you about these subjects in the future, and I would be pleased to provide any additional information that would be of use to you or the Committee staff. Please feel free to let me know if you have any questions about my recommendation.

Very truly yours,

/s/ Michael B. Day

Cc: President Michael Picker
Commissioner Catherine Sandoval
Commissioner Carla Peterman
Arocles Aguilar, General Counsel CPUC
Timothy Sullivan, Exec. Director, CPUC
Ed O'Neill, CPUC

Background Information on the Authors

Please note: In submitting these comments, the authors are offering their collective personal recommendations, and do not purport to represent the views of any of their respective clients, employers, or organizations.

Michael B. Day is a partner in the firm of Goodin, MacBride, Squeri & Day, LLC, which specializes in California regulatory law. Mr. Day represents a wide variety of clients before the CPUC, in cases addressing electric transmission, natural gas, telecommunications, rail safety, and water matters. From 1980-91, he held several positions in the Legal Division at the CPUC, including Deputy General Counsel, where his responsibilities included supervising all decisions issued by the Commission, and Acting General Counsel. In 1999-2000 Mr. Day served as President of the Conference of California Public Utility Counsel, a regulatory bar association with public, private and utility attorney members.

Ralph Cavanagh is Energy Program Co-Director for the Natural Resources Defense Council, which he joined in 1979; he has worked frequently in subsequent years with all of California's major energy regulatory agencies, with a particular focus on the California Public Utilities Commission and the California Energy Commission. He has held appointments as a visiting professor of law at Berkeley and Stanford. He is a recipient of the state's Flex Your Power award for lifetime achievement in energy efficiency, and a member of the boards of the Center for Energy Efficiency and Renewable Technologies and the California Clean Energy Fund.

Dr. Barbara O'Connor, Ph.D. is a nationally recognized expert in the fields of political communication and telecommunications policy and applications. She has served as chair of the California Educational Technology Committee and the California Public Broadcasting Commission, and served on many other boards and commissions dealing with the media and technology. Dr. O'Connor has served as an expert consultant to the California Legislature, the Congress of the United States, The Federal Communications Commission, The Office of Technology Assessment, The U.S. Department of Commerce, and National Public Radio, as well as a large number of Fortune 500 media, energy and telecommunications companies. Dr. O'Connor is an Emeritus Professor of Communications, and Director of the Institute for the Study of Politics and Media at the California State University. She was elected as a member of the AARP National Board in 2010, and was appointed to serve as a Director of the California Emerging Technology Fund by the California Public Utilities Commission.

William Kissinger is a partner in the firm Morgan, Lewis & Bockius and regularly appears before the CPUC, among other California and federal energy agencies, representing a wide range of clients including California state agencies, natural gas and renewable energy generation developers, storage developers, municipal utilities and transmission developers. During the 2000-2001 California energy crisis, Mr. Kissinger served in the Office of Governor Gray Davis as Senior Deputy Legal Affairs Secretary and a member of the Governor's Energy Task Force. Mr. Kissinger also served as a board member of the California Electricity Oversight Board.

Dr. Barbara R. Barkovich, Ph.D. worked for the California Public Utilities Commission from 1975 to 1983, in positions ranging from Commissioner's advisor to Director of Policy and Planning. She also represented the Commission at the Legislature, the Governor's Office, and Congress. After two years working in the finance industry, in 1985 Dr. Barkovich began a consulting practice that has primarily focused on electric industry matters before the California Public Utilities Commission. She has developed a large body of expert witness testimony on many matters and has also submitted numerous comments in CPUC proceedings and participated in many settlements. Dr. Barkovich is currently Chairperson of the Board of the restructured California Power Exchange, a position she has held since 2003. She has also served on the California Independent System Operator Governing Board, on the Trust Advisory Committees that set up the reorganized California electricity structure and markets, as well as the Energy Engineering Board of the National Research Council.

William Schulte worked for over 28 years with the California Public Utilities Commission. Subsequent to his retirement as Director of the CPUC's Consumer Protection Division, he has been engaged by a number of telecommunications companies and associations, transportation companies, and real estate developers assisting in resolving regulatory issues. He has served as a consultant to state regulatory commissions throughout the country on a variety of issues, including consumer protection. Mr. Schulte has also been engaged by the US Agency for International Development and the World Bank in assisting developing countries in Western and Southern Africa and Southeast Asia. He is also on the Board of Directors of Sustainable San Mateo County and Self Help for the Elderly.

The authors may be contacted through:

Michael B. Day
Goodin, MacBride, Squeri & Day, LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111
direct line 415.765.8408
fax 415.398.4321
mday@goodinmacbride.com