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**Comments of Joe Como to the CPUC Commissioner Committee
on Policy & Governance addressing
Reports on CPUC Ex Parte Rules issued by Michael Strumwasser and Edward W. O'Neill
and Draft Commissioner Code of Conduct**

ORA offers these comments to assist the Commission in its laudable efforts to improve its ex parte rules to ensure that its decision-making process is fair and transparent. These comments do not address all issues discussed in the above reports. Silence on an issue does not indicate ORA's support. The following areas are major issues of concern for ORA.

Ex parte communications overall have deleterious effects on the decision-making process at the California Public Utilities Commission (CPUC). As Mr. Strumwasser points out in his investigative report, ex parte communications at the CPUC have come to “fundamentally undermine record-based decision-making.”¹

It is understandable that commissioners may view private meetings with parties to a proceeding as an effective way to quickly and directly communicate with parties in order to better comprehend complex policy and technical issues. There are other reasons for continuing the ex parte practice, such as helping commissioners gain clarity on a party's position or to ensure that those parties with fewer resources have access to decision-makers. However, ex parte communications, by law, are not part of the record in any proceeding before the CPUC. Accordingly commissioners don't have a compelling reason, as fact gatherers or decision-makers, to entertain ex parte meetings for the purpose of fulfilling their statutory responsibilities. The possible harm that comes from holding ex parte meetings greatly outweighs the salutary reasons that are given for otherwise holding them. Overall, the practice clouds the decision-making process with public mistrust and suspicion, which were recently validated by revelations of ex parte abuse by some of the regulated utilities.

CPUC proceedings are almost always complicated endeavors that sometimes take years to complete. As Mr. Strumwasser points out, the CPUC has the “worst of both worlds: a long, expensive process

¹ Report to the California Public Utilities Commission Regarding Ex Parte Communications and Related Practices, Strumwasser & Woocher, p. 4, June 22, 2015.

producing enormous evidentiary records” followed by decisions being influenced (or changed) by “unverified, untested oral representations” in ex parte meetings.²

There is no doubt that commissioners have to be efficient in understanding the information in order to render decisions, but there are better tools than ex parte meetings to accomplish that. The Commission should first prioritize better utilization of its extensive and technically sophisticated staff members of the CPUC. The first line of knowledge on any case is the Administrative Law Judge (ALJ) who is assigned to develop the record. The ALJs are in the best position to know all the issues and facts, and can advise commissioners from an impartial perspective. There are also over 800 staff members that work in an advisory capacity within the CPUC. These staff are available to brief commissioners and provide summary information, or to simply answer questions as they arise. CPUC commissioners have, at their disposal, the largest and one of the most educated, experienced group of advice-givers of any public utility commission in the country.

The Commission should also utilize oral arguments and all-party meetings, to a greater extent, as an expedient method to better develop their understanding of the record. All-party meetings are especially well-suited to allow all interested persons an opportunity to be heard directly by a commissioner without the problems that ex parte communications present. The Commission should also make liberal use of the Ratesetting Deliberative Meeting exception to Bagley-Keene.

Strumwasser’s findings and recommendations are sound, based on the law, and practiced in other similar agencies. Ed O’Neill’s recommendations are similar. They both recommend, and ORA supports, a ban on ex parte communications in ratesetting cases, similar to the current ban for adjudicatory cases.

Strumwasser also finds no legal loophole for the common practice at the CPUC whereby a commissioner can communicate in private to a party and NOT have that communication event reported to other parties. Quoting Strumwasser, “The fact that only the decision-maker spoke *does* mean that there was no ‘reportable communication,’ ... but it *does not* mean there was no ‘ex parte communication.’ ... A monologue delivered by a commissioner to a party is still a communication and under the circumstances, an ex parte communication.”³ A notice from the party of the time, place, and

² Report to the California Public Utilities Commission Regarding Ex Parte Communications and Related Practices, Strumwasser & Woocher, p. 140, June 22, 2015.

³ Report to the California Public Utilities Commission Regarding Ex Parte Communications and Related Practices, Strumwasser & Woocher, p. 138, June 22, 2015.

identification of the participants must still be filed, just not what the decision-maker said. That reporting result would trigger the equal time requirement of Public Utilities Code Section 1701.1. It may not be the decision-maker's desire to trigger equal time, but there is no loophole in the law that justifies the CPUC condoning of a one-way conversation.

The practice of not reporting one-way ex parte communications should stop immediately, and the CPUC should articulate expressly that it will stop it. This issue is so germane to the public perception of the impartiality of commissioners in their decision-making role that if the CPUC disagrees with this point, it should articulate its disagreement and the legal rationale. Silence is not acceptable on this issue.

The Commission should also clarify the difference between procedural and substantive communications with decision-makers. There is ample room for mischief when a party poses what it characterizes as "procedural" to a commissioner in order to transmit a substantive message. One solution may be to require all procedural questions be directed exclusively to the assigned ALJ. The ALJs are the gatekeepers to ensuring due process, so it is reasonable that they respond to all procedural inquiries. Additionally, parties who pose procedural questions should be required to simultaneously copy the service list of the proceeding. After all, if the question is procedural in nature then all parties should be privy to the inquiry and the response.

A related issue was addressed by Mr. O'Neill - communication is poor between staff and management, characterized by information siloing, and often leading to dissonance between the assumptions, understandings, and expectations of senior management and those of employees on the front line. Communication can be improved, and less siloing would occur, if leadership from the top of the organization would do more to gather information and advice from the CPUC advisory staff. There should be no silos of information between staff and commissioners. Commissioners can both solve their need for efficient information-gathering and the need to integrate staff resources for the common purpose of providing commissioners with quality advice.

In summary, ORA recommends that, at minimum, Mr. O'Neill's recommendations should be adopted by the CPUC. Accordingly, ORA recommends:

1. Have a two-part categorization scheme for cases - the approach taken by other states and federal agencies: adjudicatory and quasi-legislative proceedings. Ratesetting proceedings requiring hearings should be characterized as adjudicatory.
2. Adopt a ban on ex parte communications in adjudicatory proceedings.

ORA Comments on Strumwasser/O'Neill Reports (cont'd)

3. Permit ex parte communications, without restriction, in “quasi-legislative proceedings” (as provided for under current law). However, require parties and decision-makers to report those communications.
4. Establish a duty on CPUC decision-makers, as well as parties, to promptly disclose improper ex parte communications.
5. Establish meaningful sanctions for any violation of the ex parte rules, including sanctions on CPUC decision-makers for any failure to promptly disclose an improper ex parte communication.
6. Have final, on-the-record en banc hearings for adjudicatory proceedings.

Additionally, as Mr. Strumwasser recommends, the personal advisors to commissioners should be subject to the same ex parte communication requirements and restrictions as the commissioners, given that they act as surrogates for the commissioner. ORA would support revisions to the Bagley-Keene Act to allow increased communications between commissioners so long as there is concurrent tightening of the ex parte rules to restrict private, off-the-record conversations.

On the issue of the Commissioner Code of Conduct:

ORA supports the commissioners' efforts to articulate a standard for commissioners. These standards should be articulated as *minimum* standards of conduct. The Code of Conduct should encourage commissioners to be exemplary individuals. Trust takes a long time to establish, but only a moment to destroy. Public trust in CPUC commissioners is an essential element of the successful functioning of the CPUC as a whole.