

4/27/98

Decision 98-04-067 April 23, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.

Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's electric services industry and reforming regulation.

R.94-04-031
(Filed April 20, 1994)

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1.94-04-032
(Filed April 20, 1994)

ORDER ALLOWING WITHDRAWAL OF APPLICATION FOR REHEARING AND MODIFYING DECISION 97-09-117

In Decision (D.) 97-02-014, issued in our electric restructuring proceeding, this Commission established two advisory boards: the Low Income Governing Board (LIGB) and the California Board for Energy Efficiency (CBEE), to make recommendations about low-income assistance and energy efficiency programs in the restructured electric industry. Subsequent decisions and assigned ALJ rulings established the tasks and milestones necessary to move from present utility administration of these programs to the new, independent administrative structure. D.97-09-117, at issue here, addressed initial start-up issues for the two Boards.

These two Boards are advisory boards to the Commission and as such, are state bodies subject to the provisions of the Bagley-Keene Open Meeting Act, Govt. Code §§ 11120 et seq. (Bagley-Keene). (See Decision 97-04-044, p. 7, and D.97-09-117, p. 47.) Advisory boards are specifically made subject to Bagley-

Keene in Govt. Code § 11121.8. D.97-09-117 addresses the application to the Boards of several sections of Bagley-Keene. The provision relevant to today's order is section 11123(b), which delineates the use of teleconferencing by state bodies. D.97-09-117 notes that section 11123(b) allows teleconferencing when necessary to assemble a quorum. However, this decision also determines that teleconferencing may be used when a quorum is present, and specifically prohibits the use of teleconferencing to convene a quorum. D.97-09-117 also notes that section 11123(b) currently is effective only until January 1, 1998, and thus authority for teleconferencing will be short-lived.

On October 27, 1997, the LIGB filed an application for rehearing, alleging that the above interpretation and application of section 11123(b) misconstrue the statute, as evidenced by its plain meaning as well as pertinent legislative history. While the LIGB "strongly agreed with the Commission that allowing teleconferencing irrespective of the physical presence of a quorum at one location is a wise idea and would forward the general goals of the Act" (App/Rhg at p. 3), the LIGB argued not only that Bagley-Keene permits teleconferencing to convene a quorum as long as certain prerequisites to its use are met, but also that Bagley-Keene does not authorize teleconferencing when a quorum is physically present. The LIGB urged the Commission to correctly construe the statute so that it could get on with its work in the most expeditious way possible, and so that its decisions do not run the risk of being found invalid because Bagley-Keene was not complied with. The LIGB also requested that its application for rehearing be considered a request to intervene, if there is a question as to whether the LIGB has standing to appeal the decision.

At its meeting of February 10, 1998, the LIGB voted to withdraw its application for rehearing. On February 17, it filed a short withdrawal notice, stating only that the Board had voted for such withdrawal. No party responded to either the application for rehearing or the withdrawal notice.

We will accept the LIGB's withdrawal of its application for rehearing. Thus we do not need to address the question of the LIGB's possible intervention in this case. However, after further consideration of the issues presented by this application, we have decided on our own motion to modify D.97-09-117 concerning the teleconferencing option. First, we reverse ourselves on allowing teleconferencing when a physical quorum is present. Second, we reaffirm our policy preference that advisory bodies such as the LIGB not teleconference to convene a quorum, but open this up to comment by any and all of our advisory bodies in furtherance of developing a generic teleconferencing rule applicable to all of them. Third, we delete the reference to the sunset provision, since that provision has been deleted from the statute. We explain our reasoning below.

Section 11123(b)(1) of Bagley-Keene provides:

"Nothing in this article shall be construed to prohibit a state body from holding an open or closed meeting by teleconference if the convening at one location of a quorum of the state body is difficult or impossible, subject to all of the following:"

After further review of the language of the statute itself and of related legislative history, it is our opinion that this provision only allows teleconferencing for the limited but important purpose of convening a quorum when a physical quorum cannot be achieved, and conversely, does not allow teleconferencing if a physical quorum is present.

Both the origins of this section and the 1997 amendments to the Bagley-Keene Act support this interpretation of the statute. The teleconferencing provision came about in 1994. Committee reports from that legislative session state that the provision, which was intended to be limited in scope, was enacted as a result of the Northridge earthquake, which made it impossible for the California State University Board of Trustees to conduct its business because of the impossibility of convening a physical quorum. Clearly, the Legislature wanted to

provide a way for state bodies to meet in emergency situations or when a disaster has prevented the gathering together of a physical quorum. At the time the provision was created, and, apparently as recently as last session, any accommodation to members not necessary for a quorum was not a concern.

Much more recently, the Committee Report for AB 1097 (Stats. 1997, Ch. 52) reiterated the Northridge earthquake origins of allowing teleconferencing for purposes of convening a quorum, as well as the intent that teleconferencing was to be limited in scope. AB 1097 eliminated the January 1, 1998 sunset provision in the teleconferencing section but did not change the actual language of the section.

In addition, during this same session, the Legislature rejected provisions of SB 95 (Stats. 1997, Ch. 949, which made a number of changes to the Bagley-Keene Act) which would have authorized state bodies "to use teleconferencing to conduct any meeting or other proceeding authorized by law." (Emphasis added.) The bill as enacted left intact the language permitting teleconferencing "if the convening at one location of a quorum of the state body is difficult or impossible . . ."¹ There is case law holding that the Legislature's deletion of a proposed provision is strong evidence that the statute as adopted should not be construed to incorporate that deleted provision. See, e.g., *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 634. A logical extension of this is that if the pre-existing version of the statute reads exactly the same way as the ultimately adopted version on a particular

¹ The Brown Act, the local agency counterpart of Bagley-Keene, is also instructive here. The teleconferencing provision of that Act has had a checkered history, beginning with its being specifically open-ended, then being amended to be rather tightly restricted, and recently coming full circle to be open-ended again. A recent article in one of the Palo Alto area newspapers made reference to that city's Council members being able as of 1-1-98 to attend meetings and be counted towards a quorum by teleconferencing. Each incarnation has been specifically delineated by the Legislature. As we note in the discussion above, while the Legislature had an opportunity to change the Bagley Keene Act to contain an open-ended teleconferencing option, it chose not to do so.

point, the pre-existing version should not be construed to contain the deleted provision either.

Unfortunately, most of the provisions of Bagley-Keene make no distinction between advisory boards and actual decisionmaking boards; and we do not believe we have the authority to make that distinction to permit teleconferencing when a physical quorum is able to be present. While we remain of the view that the basic purposes of Bagley-Keene are not thwarted if such occurs, we do not wish to put any of the LIGB's actions in jeopardy of being invalidated on this basis. We will, therefore, modify D.97-09-117 to provide that if a quorum is physically present, no teleconferencing by other Board members may occur until the Legislature expressly allows it.

We do stress that members not necessary for a quorum who cannot be in attendance can listen in from other locations if they wish to do so, but cannot deliberate or vote. Moreover, certainly the boards can decide that members of the public can be present at the location where a board member is listening in.

Finally, we affirm that the Bagley-Keene Act does permit teleconferencing for purposes of convening a quorum. However, we also believe that as the creator of advisory bodies like LIGB and CBEE, we have the authority to impose more stringent requirements on those bodies in certain circumstances and still be within the boundaries of Bagley-Keene. We remain of the view that the advisory boards we have created will function more efficiently and effectively with a physically present quorum, and it is our policy preference to continue this requirement. However, we recognize that the LIGB did argue persuasively in its application for rehearing that its efficiency and effectiveness might very well be handicapped by such a requirement. We will, therefore, seek advice in the form of comments from not only the LIGB but the other advisory boards we have created concerning the crafting of this requirement, with the ultimate goal in mind of adopting a generic approach which will work for all of these boards, and which

will serve as guidance for appropriate modification of their bylaws. It may be that allowing advisory boards to include a stringent definition of "difficult or impossible" in their bylaws would be a satisfactory solution. This would allow members to teleconference to convene a quorum, should their inability to attend a meeting fit within the definition. Another possible solution might be to give the boards a certain number of meetings in a given year for which they may opt to convene a quorum by means of teleconferencing. There may be yet other solutions which the boards can offer through comments on today's decision. We look forward to their consideration.

Therefore, **IT IS ORDERED** that the Low Income Governing Board's withdrawal of its application for rehearing of Decision 97-09-117 is accepted.

IT IS FURTHER ORDERED that Decision 97-09-117 is modified as follows:

1. The discussion beginning after the quoted statutory language on page 53 and continuing to subsection E on page 55 is modified to read:

"An issue has arisen as to whether teleconferencing would be permitted even if there is a quorum assembled in one location. As noted above, the Proposed Bylaws of both CBEE and LIGB and CBEE's Operating Rules would allow for this possibility.

"Government Code § 11123 appears to prohibit teleconferencing when there is a quorum present. Both the language of the section itself and relevant legislative history support this interpretation. Unfortunately, most of the provisions of Bagley-Keene make no distinction between advisory boards and actual decisionmaking boards; and we do not believe we have the authority to make that distinction to permit teleconferencing when a physical quorum is able to be

present. While we remain of the view that the basic purposes of Bagley-Keene are not thwarted if such occurs, we do not wish to put any of the LIGB's actions in jeopardy of being invalidated on this basis. We will, therefore, require that if a quorum is physically present, no teleconferencing by other Board members may occur until the Legislature expressly allows it. This does not, of course, prevent board members from listening in to a meeting from a remote location as long as they do not deliberate or vote, nor does it prevent members of the public from attending and listening to meetings at these same locations, if such accommodation is possible.

"Finally, we strongly encourage the CBEE and LIGB to attempt to have all participating members in one place for every meeting. To this end, we express our policy preference that the Boards have at least a majority of members physically present in one location at all Board meetings. Thus, we are precluding the Boards from teleconferencing if there is no quorum physically present, despite what is permitted by Government Code § 11123."

2. Finding of Fact 54 is deleted.
3. Conclusion of Law 46 is modified to read:

"Despite our view expressed in Conclusion of Law 44 above, Government Code § 11123 appears to prohibit teleconferencing where there is a quorum present."

4. Ordering Paragraph 36 is deleted.

IT IS FURTHER ORDERED that the Executive Director shall serve a copy of this order on the advisory boards listed in Attachment A of this order.

IT IS FURTHER ORDERED that any or all of the advisory boards listed in Attachment A may provide us with advice in the form of comments concerning the crafting of a rule prohibiting or substantially limiting the use of teleconferencing to convene a quorum. Such comments should include whether or not a particular board now uses teleconferencing for this purpose, what the

practical effects of prohibiting or greatly restricting such use would be on the board's functioning, and possible solutions the board would suggest, keeping in mind our policy preference as expressed in our discussion above. While this matter is under active consideration by the Commission, the LIGB and CBEE shall operate within the terms set forth in this order.

IT IS FURTHER ORDERED that any board wishing to submit such comments shall file an original and four copies with the Commission's Docket Office within 60 days from the effective date of this order. Such comments shall be served on all of the advisory boards listed in Attachment A, as well as the General Counsel and Chief ALJ, but need not be served on the lengthy service list for this proceeding. Any party to this proceeding who wishes a copy of advisory board comments may contact the advisory board directly, and that board shall provide the requesting party with its comments.

This order is effective today.

Dated April 23, 1998, at Sacramento, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

ATTACHMENT A

LIST OF COMMISSION ADVISORY BOARDS

Deaf & Disabled Telecommunications Program Administrative Committee

Universal Lifeline Telephone Service Administrative Committee

Universal Lifeline Telephone Service Marketing Board

California Teleconnect Fund Administrative Committee

California High Cost Fund-A Administrative Committee

California High Cost Fund-B Administrative Committee

Payphone Service Providers Committee

General Order 133-B Committee

Low Income Governing Board

California Board for Energy Efficiency

Electric Education Trust Administrative Committee

California DSM Measurement Advisory Committee

EMF Stakeholder Advisory Committee