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BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Integrate
And Refine Procurement Policies and Consider Long
Term Procurement Plans

Rulemaking 12-03-014
(Filed March 22, 2012)

RESPONSE OF THE UTILITY REFORM NETWORK TO THE APPLICATION FOR
REHEARING OF DECISION 14-02-040 BY THE SIERRA CLUB CALIFORNIA



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**RESPONSE OF THE UTILITY REFORM NETWORK TO THE APPLICATION FOR
REHEARING OF DECISION 14-02-040 BY THE SIERRA CLUB CALIFORNIA**

Pursuant to Rule 16.1(d) of the Commission Rules of Practice and Procedure, The Utility Reform Network (TURN) hereby submits this response to the application for rehearing of Decision 14-02-040 filed by Sierra Club California (“Sierra Club”). In its application, Sierra Club seeks rehearing on the grounds that the Decision fails to conclude that meetings of the Procurement Review Groups (PRGs) of all three Investor-Owned Utilities (IOUs) are subject to the requirements of the Bagley Keene Open Meeting Act (“Bagley Keene”). TURN disagrees and urges the Commission to deny the application for rehearing.

The Commission originally established the Procurement Review Groups (PRGs) in D.02-08-071 based on joint principles proposed by TURN, Pacific Gas & Electric, Southern California Edison and Consumers Union. The Commission created the PRGs in light of the fact that the enactment of Public Utilities Code §454.5 established a new framework for utility power procurement that included the objective of eliminating “the need for after-the-fact reasonableness reviews” for transactions executed consistent with an approved procurement plan.¹ Under the statutory framework, the Commission is required to “provide for expedited review and either approve or reject the individual contracts submitted by the electrical corporation to ensure compliance with its procurement plan.”²

Due to the need for expedited up-front review and approval, the PRGs were established to ensure that utilities engage in advance consultation with both Commission staff and

¹ Cal. Pub. Util. Code §454.4(d)(2).

² Cal. Pub. Util. Code §454.4(c)(3).

non-market participants. This advance consultation is intended to provide more time for staff and non-market participants to review information on proposed contracts and provide informal and non-binding feedback to each utility prior to formal submission of any specific procurement transaction.³ The process allows PRG members to be informed about ongoing confidential procurement activities and assists these individuals in more expeditiously determining which proposed transactions, if any, they wish to publicly support or oppose when submitted by the utility for formal Commission review and approval.

Sierra Club argues that the open meeting requirements of Bagley Keene apply to the PRGs based on the notion that they satisfy the definition of a “state body” under Government Code §11121(b), (c) and (d).⁴ Specifically, Sierra asserts that the PRGs have been delegated “review and assessment authority otherwise belonging to the Commission”, that the PRGs are “similar to an advisory committee” as defined by §11121(c), and that PRGs represent an official “multimember body” that includes “a member” of a state body. Contrary to the claims made by Sierra Club, the PRG does not function as a “state body” pursuant to §11121. The PRGs are merely forums for non-market participants, utilities and Commission staff to receive advance notice of ongoing procurement activities.

The Commission should recognize that the PRG does not operate as a “state body” because they do not result in any “actions taken” which are subject to legal challenge. In enacting Bagley-Keene, the Legislature clarified that “it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted

³ The PRG meetings do not involve providing any advice or feedback to the Commission itself.

⁴ Sierra Club AFR, page 3.

openly.”⁵ For purposes of applying the requirements of Bagley-Keene, the Legislature defined “actions taken” as

a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action.⁶

Since the PRG itself does not engage in a “collective decision”, make a “collective commitment or promise”, issue a “positive or negative decision”, or take an “actual vote”, there is no basis for concluding that the requirements of Bagley-Keene apply to any PRG meeting. The PRGs have no leadership, no governance structure and no formal organization. The PRGs do not take votes of its members, issue reports or offer any recommendations as a joint body. As a result, there is no decision ever made by the PRGs, no formal findings reached, and no PRG-endorsed proposals or reports. Moreover, the remedy for a violation of Bagley-Keene is a judicial determination that “any action taken by a state body” is “null and void”.⁷ Since there are no “actions” taken by the PRG, there is nothing for the courts to invalidate.

Finally, there has been no delegation of authority to the PRGs with respect to determining the reasonableness of procurement transactions or other utility practices. While the Commission does seek to ensure that PRG members have an opportunity to review proposed procurement transactions, transactions discussed in PRG meetings are subsequently submitted for formal Commission review. As part of that formal review process, both PRG members and any member of the public has a right to review and file comments on the reasonableness of utility transactions.

⁵ Cal. Government Code §11120 [emphasis added]

⁶ Cal. Government Code §11122.

⁷ Cal. Government Code §11130.3.

There are no comments filed by the PRGs as a single entity. Although individual members of the PRGs can, and often do, file comments on proposed transactions, the Commission has no obligation to accept the recommendations of PRG members or give greater weight to their comments based on the fact that the organization is a member of the PRG. The Commission subsequently considers all comments and renders decisions in an open, public meeting based solely on the materials submitted as part of the formal review process. This Commission decision represents the only “action taken” subject to Bagley-Keene.

Because the PRGs do not perform any of the functions of a “state body”, do not operate as a unified entity, and fail to take any actions that constitute a collective decision, there is no basis for concluding that the requirements of Bagley-Keene are applicable. TURN therefore respectfully asks that the Commission deny the Application for Rehearing.

Respectfully submitted,

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