

**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

R.12-03-014
(Filed March 22, 2012)

**APPLICATION BY SIERRA CLUB CALIFORNIA FOR REHEARING OF DECISION
MODIFYING LONG-TERM PROCUREMENT PLANNING RULES
("TRACK III" DECISION)**

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Pursuant to Public Utilities Code § 1731 and Rule 16.1 of the California Public Utilities Commission's ("Commission" or "CPUC") Rules of Practice and Procedure, Sierra Club California ("Sierra Club") files this Application for Rehearing of the Decision Modifying Long-Term Procurement Planning Rules ("Track III Decision" or "Decision") by Administrative Law Judge David M. Gamson, issued on March 4, 2014.

I. INTRODUCTION

This Application for Rehearing seeks reconsideration of a single issue: the failure of the Track III Decision to ensure that Procurement Review Group ("PRG") meetings comply with the Commission's transparency mandates under the Bagley Keene Open Meeting Act ("Bagley Keene Act" or "Act").¹ Currently, the exclusive and non-public nature, content and results of PRG meetings violate the Act, which requires that "state body" meetings be open to the public.² Because the Commission created PRGs,³ maintains authority over PRG activity protocols⁴ and is itself obligated to comply with Bagley Keene Act mandates,⁵ the Commission must ensure that PRG activities comply with the Act. PRGs are governed by Bagley Keene Act transparency standards because they constitute "state bodies" under the Act.

A number of Commission rulings, including the Track III Decision, have underscored the importance of public access to and transparency in PRG procurement information and review. In D.07-12-052, for example, the Commission noted that a "PRG Transparency Working Group" was formed under the Commission's direction with the express goal of making the PRG "black

¹ Gov. Code §§ 11120 *et seq.*

² Gov. Code § 11123(a) (requiring that "[a]ll meetings of a state body" be "open and public and all persons ... be permitted to attend any meeting..." unless the agency is specifically authorized to meet in closed session).

³ D.07-12-052 at p. 119; *see also* D.02-08-071.

⁴ *See, e.g.*, D.07-12-052 at p.119 ("Current Commission orders require IOUs to meet with the PRG (1) quarterly to review their portfolio position and transactions and (2) as needed to review all transactions with terms greater than three months."); *Id.* at p. 123 ("we direct the IOUs to provide PRG members with meeting agendas and materials a minimum of 48 hours in advance of the PRG meeting...").

⁵ Pub. Util. Code § 306(b).

box” less opaque.⁶ The scope of the 2012 LTPP Track III proceeding explicitly included consideration of potential rules to address the “impacts of transparency on forward procurement.”⁷ In the Track III Decision, the Commission acknowledges the importance of transparency in the procurement review process and concludes that “[i]t is in the public interest to promote greater reporting of the information ... regarding procurement activities....”⁸

Despite the Commission’s purported interest in increasing procurement review process transparency, however, the Track III Decision fails to apply Bagley Keene Act transparency requirements to an all-important procurement information review process: PRG meetings. Indeed, the Track III Decision fails to even acknowledge the Bagley Keene Act requirements, despite Sierra Club raising the issue in a half dozen Track III briefs and comments over the course of both the 2010 and 2012 LTPP proceedings,⁹ and despite the Commission’s jurisdiction over PRG activities.

By ignoring a statutory mandate that requires public access to PRG activities, the Track III Decision fails to proceed in a manner required by law. Sierra Club thus respectfully applies herein for rehearing of the Commission’s Decision Modifying Long-Term Procurement Planning Rules.

II. THE TRACK III DECISION MUST ENSURE THAT PRG MEETINGS COMPLY WITH BAGLEY KEENE ACT

Sierra Club has made the case in both this proceeding and the 2010 LTPP proceeding that the current form and operation of the PRGs – an exclusive group of non-market participants that holds confidential meetings under non-disclosure agreements – is inconsistent with California

⁶ D.07-12-052 at p. 125.

⁷ See Administrative Law Judge’s Ruling Seeking Comment on Track III Rules Issues at p. 2 (March 21, 2013).

⁸ Track III Decision at p. 73.

⁹ Sierra Club has raised the PRG Bagley Keene Act compliance issue in multiple proceedings including in 2010 LTPP Track I and III papers (Opening Brief of Sierra Club California on Track I and Track III Issues at pp. 19-22 (Sept. 16, 2011); Reply Brief of Sierra Club California on Track I and Track III Issues at p. 5 (Oct. 3, 2011)) and in 2012 LTPP Track III papers (Comments of Sierra Club California on Track III Rules at pp. 3-5 (Nov. 12, 2012); Reply Comments of Sierra Club California and CEJA on Track III Rule at p. 6 (Nov. 30, 2012); Opening Comments of Sierra Club California on Track III Rules Issues at p. 5-11 (April 26, 2013); CEJA and SC California’s Comments on the Track III Proposed Decision at pp. 4-6 (Feb. 18, 2014)). The Commission has not acknowledged Sierra Club’s position in any ruling.

law.¹⁰ PRGs are a state body under the Bagley Keene Act and can only conduct closed sessions in a method similar to the Commission,¹¹ yet all three IOUs prohibit public participation in PRG meetings.¹² The Commission, which created PRGs, maintains jurisdiction over PRG meeting protocols and is itself obligated to comply with Bagley Keene Act mandates, has failed to pass rules to ensure compliance despite Sierra Club’s repeated urging.

Each PRG fits the definition of a “state body” pursuant to Gov. Code Section 11121 subsections (b), (c) and (d), which define “state body” to mean, respectively:

(b) a “board, commission, committee or similar multimember body that exercise any authority of a state body delegated to it by that state body”;

(c) an “advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons”;

(d) a “board, commission, committee, or similar multimember body on which a member of a body that is a state body pursuant to this section serves in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation.”¹³

PRGs are state bodies under each of these subsections. Further, the total balance of PRG characteristics, such as the Commission’s creation of the PRG, the Commission’s authority over PRG meeting protocols,¹⁴ the presence of Commission staff in PRG membership ranks, the delegation of review authority from the Commission under PUC 454.5 and the advisory role the PRG plays to the Commission, demonstrates that PRGs function as state bodies as contemplated

¹⁰ Cf. Gov. Code §§ 11123, 11126, 11132; *see also* FN 9, *supra*.

¹¹ A state body, such as the PRG, may conduct closed sessions on “any matter that properly could be considered in a closed session by the state body whose authority it exercises” or matters properly “considered in a closed session by the state body whose authority it exercises.” Gov. Code §§ 11126(f)(4) and (6). The Commission must generally open all meetings to the public pursuant to the Bagley-Keene Act, but it may meet in closed session “to deliberate on the institution of proceedings, or disciplinary actions against any person or entity,” or to discuss pending legal action with legal counsel. Gov. Code § 11126(d)(2). Since the Commission is not expressly authorized to conduct closed sessions for reviewing IOU procurement activities, neither may a PRG.

¹² *See, e.g.*, Cross-Examination of Mr. Dagli, SCE, Trans. at pp. 547, 549, 554; Cross-Examination of Mr. Eekhout, SDG&E, Trans. at pp. 710-711; Cross-Examination of Ms. Everidge, PG&E, Trans. at p. 768 (2010 LTPP Tracks I and III).

¹³ Gov. Code § 11121 subsections (b)-(d).

¹⁴ *See, e.g.*, FN 4, *supra*.

by the Act. As the Bagley Keene Act itself states: “The people insist on remaining informed so that they may retain control over the instruments they have created.”¹⁵

First, the Commission defines the role that the multimember PRGs play in the procurement process, and delegates its authority in so doing. Section 11121(b) defines a “state body” to include any multimember body that “exercises any authority of a state body delegated to it by that state body” (emphasis added).¹⁶ Consistent with subsection (b), the Commission has entrusted the PRGs with review and assessment authority otherwise belonging to the Commission under Public Utilities Code § 454.5 (AB 57), which requires that the Commission review each IOU’s procurement activities and procurement plans. This entrustment is expressed in numerous Commission decisions. In 2002, when the Commission created the PRGs, the purpose of the PRGs was described in D.02-10-062 as “an interim one-year measure while the Commission augments its staff and hires an independent consultant or advisory service, pursuant to the contracting authority and \$600,000 appropriated to the Commission for the purposes of implementing AB 57.” (emphasis added).¹⁷ That is, PRGs were explicitly created by the Commission to oversee and review IOU procurement processes in order to meet AB 57 requirements, a responsibility assigned solely to the Commission.

In its 2007 LTTP decision, the Commission explained the PRGs’ review function in greater detail:

Procurement Review Groups (PRGs) were initially established in D.02-08-071 as an advisory group to review and assess the details of the IOUs’ overall procurement strategy, RFOs, specific proposed procurement contracts and other procurement processes prior to submitting filings to the Commission as an interim mechanism for procurement review.¹⁸

¹⁵ Gov. Code § 11120.

¹⁶ Gov. Code § 11121(b).

¹⁷ D.02-10-062 at p. 72 ; *see also* D.02-08-071 at p. 24-25 (PRGs were created by the Commission “[i]n order to ensure that interim procurement contracts entered into by the utilities are subject to sufficient and expedited review and pre-approval”); D.07-12-052 at p. 103 (PRGs are tasked by the Commission with providing “close oversight of IOU procurement activities to ensure that reduction [to procurement of EE, DR, renewables or QF resources] does not materialize”); R.04.04-003 at p. 129 (PRGs are used to as “appropriate safeguards for the solicitations for long-term transactions”); D.07-12-052 at p. 119 (PRGs are an “advisory group to review and assess the details of IOUs overall procurement strategy, RFOs, specific proposed procurement contracts and other procurement processes prior to submitting filings to the Commission as an interim mechanism for procurement review.”).

¹⁸ D.07-12-052 at p. 119.

The Commission has reiterated in subsequent decisions that the PRG’s role is to “to ensure that interim procurement contracts entered into by the utilities are subject to sufficient and expedited review and pre-approval”; to “review and assess the details of IOUs overall procurement strategy, RFOs, specific proposed procurement contracts and other procurement processes prior to submitting filings to the Commission as an interim mechanism for procurement review”; and to provide “close oversight of IOU procurement activities to ensure that reduction [to procurement of EE, DR, renewables or QF resources] does not materialize.”¹⁹ The Commission has also assigned PRGs review of certain greenhouse gas compliance mechanisms.²⁰ The fact that PRGs may not have authority to approve or reject any procurement transaction²¹ is not relevant here to determining whether PRGs have delegated authority from the Commission under § 11121 subsection (b), because the Commission *has* delegated review and assessment authority to PRGs.

The PRG also meets the definition of a “state body” under subsection (c) because it is a “multimember advisory body of the state body” similar to an advisory committee that was “created by formal action of the state body” and has more than three members under subsection (c).²² IOUs and other parties have argued that the Act does not apply to the PRGs because the PRGs are advisory bodies to the IOUs, not the Commission,²³ but this ignores the plain language of the statute and Commission rulings. Contrary to the claims of the IOUs, the PRGs provide more than just advice to the IOUs. Relevant Energy Division staff is informed about procurement activity.²⁴ The Commission has stated explicitly, for example, that the PRGs are tasked with offering assessments and recommendations both to the utilities and to the PUC. In D.02-08-071, the Commission wrote that “[e]ach ‘Procurement Review Group’ would assess the

¹⁹ *Id.* at pp. 119, 103; *see also* D.04-04-003 at p. 129 (PRGs are used to as “appropriate safeguards for the solicitations for long-term transactions.”).

²⁰ D.12-04-046 at pp. 53, 55, 57.

²¹ *See, e.g.*, PG&E Track I and III Reply Brief (2010 Proceeding) at pp. 22-23.

²² Gov. Code § 11121(c); *see also* 85 Ops. Cal. Atty. Gen. 145 (2002) at *3 (“Even advisory committees created by state bodies, rather than by statutes, are subject to open meeting requirements.”).

²³ *See, e.g.*, Reply Comments of PG&E (U 39 E) Regarding Track III Issues at pp. 16-17; Reply Comments of SCE (U 338-E) to Parties’ Comments on Proposed Track III Procurement Rules at pp. 17-19.

²⁴ D.03-12-062 at p. 46.

procurement contracts and reasonableness criteria with each utility and offer assessments and recommendations to each utility and then to the PUC when the contracts and/or reasonableness criteria are submitted for expedited PUC review.”²⁵ (emphasis added). In D.03-12-062, the Commission emphasized the importance of PRG feedback provided to Commission staff: “Though it only has consultative and informal advisory functions, the Commission finds the PRG to be an effective vehicle for IOU dialogue with Commission staff familiar with the nuances of their energy portfolios and the necessary policies/strategies needed to mitigate portfolio risks.”²⁶ Additionally, the PRGs play a formal role in the procurement process, which is demonstrated by the Commission delineating the types of procurement activity reviewed and setting specific requirements related to the agenda and summary of the meetings.²⁷

Finally, PRGs are state bodies under the Act under § 11121 subsection (d), which provides that multimember bodies are state bodies for purposes of the Act when they include members who represent and/or are funded by state bodies. Both staff of the Energy Division and Office of Ratepayers Advocates participate in each PRG.²⁸ Their activity within the PRGs is supported by public funds. Further, other PRG members receive intervenor compensation for participation in the PRGs. The fact that an IOU organizes and operates its PRG is irrelevant to whether the PRG meets the definition of state body pursuant to subsection (d).

In sum, PRG meetings must comport with Bagley Keene Act requirements because PRGs are state bodies under the Act. Arguments that PRGs are not state bodies disregard the multiple characteristics of these groups that render them “state bodies” under the Act, from advisory role, to membership make-up, to delegated review and assessment authority. Significantly, the opening provision of the Bagley-Keene Act emphasizes:

It is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority,

²⁵ D.02-08-071 at pp. 24-25.

²⁶ D.03-12-062 at p. 46.

²⁷ D.12-04-046 at pp. 65-66.

²⁸ See, e.g., D-07-12-052 at p. 120 (listing PRG membership). Although the current membership may be slightly different than that outlined in D-07-052, Energy Division and ORA have been constant members.

do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”²⁹

Consistent with this explicit policy of the Bagley Keene Act, any uncertainty as to whether the PRG is a “state body” under the Act must be resolved liberally in favor of transparency.

The Commission has acknowledged the “black box” character of ongoing PRG activities and the value of providing access to significant information about mid-term and other procurement contracts to agencies with regulatory obligations with respect to IOUs, as well as the public.³⁰ Thus, not only is PRG Bagley Keene compliance required under the law, it is also the correct policy choice. Dialogue between the PRG and IOUs behind closed doors, in combination with the expedited review process, removes important decision-making components of the IOUs’ procurement activities from the public realm.

The Public Utilities Code incorporates the requirements of the Bagley-Keene Act and reinforces the Commission’s duty to provide public meetings and public notice.³¹ For this reason, and because PRGs are creations of the Commission, which possesses sole authority to dictate the protocols of PRG meetings, the Track III Decision should affirmatively prevent PRG violations of the Bagley Keene Act in future meetings.³²

III. CONCLUSION

For the foregoing reasons, the CPUC should grant rehearing of the Track III Decision to address the Bagley Keene Act issue and to ensure that future PRG activities comply with the

²⁹ Gov. Code § 11120; *see also Funeral Sec. Plans, Inc. v. State Bd. of Funeral Directors & Embalmers* (1994) 35 Cal. Rptr. 2d 36, 49 (“The open meeting requirements follow state body delegation, funding, and advisory groups. Moreover, the comprehensiveness of the definitions of state bodies effectuates the expressed legislative preference for openness.”).

³⁰ *See, e.g.*, D.03-12-062 at p. 47 (under current procedures for procurement activity review, the public is “denied the opportunity to learn about ongoing activities and challenges in real-time and instead [is] forced to review materials underlying the Advice Letter filings for the first time after the decisions ha[ve] been made and submitted for approval.”) (quotation omitted); D.07-12-052 at p. 125 (noting that a PRG Transparency Working Group was formed with the goal of making this “black box” less opaque).

³¹ Pub. Util. Code § 306(b).

³² *See Regents of Univ. of California v. Superior Court* (2009) 20 Cal. 4th 509, 522-23 (the Open Meeting Act is designed to “prevent[] threatened violations of the act by members of a state body”; any interested person may bring an action “to determine the act’s applicability to *threatened future* actions.... In this regard, it covers violations and actions *that are yet to occur*”) (internal quotations omitted) (emphases in original).

Act. Specifically, as recommended in California Environmental Justice Alliance's and Sierra Club California's Comments on the Track III Proposed Decision (Feb. 18, 2014), Sierra Club requests that the Track III Decision be revised to include the following new conclusion of law: "The Bagley-Keene Open Meeting Act, Cal. Gov't. Code §§ 11120 *et seq.*, applies to Procurement Review Group meetings" and the following new ordering paragraph: "The Commission shall require that the Procurement Review Group meetings comply with Bagley-Keene Open Meeting Act requirements, while also comporting with procedures delineated in D.06-06-066 for identifying and protecting confidential information."

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Respectfully submitted,

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