4-9-1991

Reform of Public Utilities Commission Procedures - Senate Bill 1041 & Senate Bill 1042

Senate Committee on Energy and Public Utilities

Senate Judiciary Committee

CALIFORNIA LEGISLATURE

SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES
SENATOR HERSCHEL ROSENTHAL, CHAIRMAN

SENATE JUDICIARY COMMITTEE
SENATOR BILL LOCKYER, CHAIRMAN

Joint Informational Hearing

REFORM OF PUBLIC UTILITIES COMMISSION PROCEDURES
Senate Bill 1041 & Senate Bill 1042

April 9, 1991
Room 112, State Capitol
Sacramento, California

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Schmidt

Committee Consultants
Paul Fadelli
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HERSCHEL ROSENTHAL
CHAIRMAN

JOINT INFORMATIONAL HEARING OF THE

SENATE JUDICIARY COMMITTEE AND
SENATE ENERGY & PUBLIC UTILITIES COMMITTEE

REFORM OF PUBLIC UTILITIES COMMISSION PROCEDURES
SB 1041 AND SB 1042, ROBERTI

Tuesday, April 9, 1991
To begin approximately 3 to 3:30pm Room 112, State Capitol

AGENDA

PANEL I

Audrie Krause, Executive Director
Toward Utility Rate Normalization

Joel Anderson
Assistant to the Vice President
California Trucking Association

Phillip DiVirgilio
Chairman, Board of Directors
Independent Energy Producers Assn

Dennis Mangers, Vice President
California Cable Television Assn

Thomas J. MacBride, Jr.
Regulatory Counsel
California Assn of Long Distance Telephone Companies (CALTEL)

John P. McDonald, Vice President and General Counsel
Donnelley Information Publishing

PANEL II

Patricia Eckert
President
Public Utilities Commission

Michael B. Day
Acting General Counsel
Public Utilities Commission

PANEL III

Roger Peters
Chief Counsel
Pacific Gas & Electric Co

Ken Okel
Assistant General Counsel
GTE California

Bruce Jamison
Executive Director, Regulatory
Pacific Bell

James Lehrer
Senior Counsel
Southern California Edison Co

OPEN MICROPHONE For brief identification and short summary of positions not already reflected by witnesses on the above panels.

California Legislature

SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES

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MEMORANDUM

TO: MEMBERS, SENATE ENERGY AND PUBLIC UTILITIES AND SENATE JUDICIARY COMMITTEES

FROM: COMMITTEE STAFF

SUBJECT: PUC PROCESS AND PROBLEMS -- SB 1041 and SB 1042 (ROBERTI)

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II. Concerns Raised about the PUC Process
III. Legislative Efforts to Improve PUC Administrative & Judicial Review Procedures
IV. Roberti Preprint 8 Process/New Legislation

I. BACKGROUND:

Introduction

The decision-making processes of the legislature and judiciary are more easily understood, and usually more visible to the public, than those of the scores of regulatory agencies whose critical decisions impact our daily lives. The Public Utilities Commission (PUC), for example, has a tremendous workload and agenda which annually involves thousands of decisions impacting not only transportation and water utilities, but the critical concerns involving the cost and quality of telephone, gas and electric service to all Californians. With the large number of significant proceedings handled by this commission, and the recent commission decisions made to abandon traditional ways of regulating utilities and instead promote "deregulation," the manner in which the PUC conducts business has become a controversial issue.

How PUC decisions are made, and the fairness of the process, has been an ongoing issue at the PUC for many years. Depending upon the make-up of the commission and the decisions made, various interests have either thought the process has worked well--or has been in need of dramatic overhaul and clearer procedural guidelines.

Recent Senate actions to address some of these concerns have included bills by Senator Rosenthal to require ex parte disclosure rules, and to better separate the roles of Administrative Law Judges (ALJ's) and the PUC commissioners. Last session, Senator Roberti undertook a comprehensive process of investigating complaints about the PUC process using Preprint SB 8 as a vehicle for discussion. Based on the Preprint SB 8 review, this year Senator Roberti introduced SB 1042 to respond to concerns about internal PUC procedures, and SB 1041 to reform the process for judicial review of PUC decisions.

Inside the commission, debate has continued concerning procedural reforms. For example, several attempts have been made in the past to establish general ex parte rules, only to fail. Last month, the PUC once again issued "proposed" rules which would regulate the review of ex parte communications--this proposal relies on a system of public disclosure.

Make-up of PUC

Originally established in 1911 as the Railroad Commission, the PUC is authorized by the state constitution to regulate utilities. The Governor appoints and the Senate approves the five commissioners who serve staggered six-year terms.

Commissioners approve all regulatory decisions by a majority vote, usually after a lengthy process which involves both quasi-legislative/judicial responsibilities. The PUC code requires the commission to determine how utility service can best be delivered in a safe and reliable manner and what amount is appropriate for ratepayers to pay for the service. The commissioners must also determine a fair rate of return for the utilities and their stockholders.

In the past, the most important proceedings at the PUC have been traditional rate cases--when utilities request a change in the rates they charge or the services they provide. But most of this has changed since this commission dramatically altered utility regulation to favor market based decisions. Recently, the PUC has initiated its own investigatory proceedings as an intial step to significant restructuring of the utility industry.

PUC Process

The process of determining the outcome of investigations or changes requested by utilities results in the "hearing process", which generally includes the following steps:

o a prehearing conference may be held to identify the parties involved and the major issues which need to be addressed;

o an assigned Commissioner, as well as an Administrative Law Judge (ALJ), are selected to preside over the actual hearing where the parties, their lawyers, economists and other expert witnesses present testimony. Testimony is either given in support of the utility's request or against it. Written legal briefs are also presented and reviewed by the ALJ;

o the ALJ, upon completion of the hearing, issues a draft decision which is usually reviewed and approved by the assigned commissioner which is circulated for comments among the parties;

o after review of the comments, the commissioner assigned to the specific case, issues a decision which is presented to the full commission for approval.

o the commissioners vote on the decision; dissatisfied parties can petition for a modification of the decision;

o the last avenue for critics of the commission's final decision is to request that the state Supreme Court (the only appellate court allowed to review PUC decisions) reverse the PUC action. The Supreme Court rarely agrees to such review requests.

II. CONCERNS RAISED ABOUT PUC PROCESS

Increasingly, concerns have been raised at legislative hearings and in other forums about maintaining a fair PUC process. It is obviously very difficult for a party to various PUC proceedings to criticize the commission which regulates it. However, as the speed and scope of several recent PUC proceedings have pitted various distinct competitive groups against each other, and as this commission has moved in regulatory directions that some contend favor the general deregulatory goals of large utility interests, criticisms about the process have surfaced. Among the concerns raised about PUC process are:

Appellate Court Review -- Some have complained that because the decisions made by the PUC can only be reviewed by the California Supreme Court, which rarely accepts review of PUC cases, there is in actuality no effective judicial accountability of PUC decisions. Few statutory changes have been made since the Supreme Court was first established as the sole reviewer of commission decisions.

When the Supreme Court does grant a petition for review of a PUC decision, it will receive a record, hear arguments and render an opinion with an explanation of its reasoning. However, judicial review of PUC decisions is an exceptional event, as noted in a 1988 article published in the Hasting Law Journal:

> In some ninety percent of the cases coming up from the CPUC, however, the court denies the petition for a writ of review. In such cases, the court does not have the record before it, does not hear oral argument, and issues its denial without opinion or explanation.

Even in cases where the Supreme Court has agreed to review a PUC decision, some have argued that the statutory standard of judicial review is so narrow, that fair and just decisions are not always forthcoming.

A variety of divergent parties have promoted the establishment of an additional lower appellate court review, where PUC decisions are more likely to be considered. These parties believe that the greater likelihood of lower court review will provide an incentive for the PUC to adhere to fairer procedures and make careful decisions clearly based on the case record in the case and applicable law.

In addition to the above recommendation from parties who practice before the PUC, the Select Committee on Internal Procedures of the Supreme Court has recommended that legislation be introduced to eliminate the Supreme Court's original review jurisdiction over PUC decisions in order to relieve the Supreme Court of its burdensome case load.

In response to this report, in 1989 Assemblyman Floyd introduced AB 338 to permit the Supreme Court to transfer the judicial review of PUC decisions to a court of appeal. The PUC and major utilities opposed the bill, and it was defeated.

Ex Parte Communication -- The PUC does not have administrative regulations to monitor ex parte (private, off-the-record) communications or to trigger a prohibition of such communications in certain controversial, contested cases. In recent years, the staff has prepared recommendations for dealing with such sensitive discussions--but the commission has decided not to adopt administrative procedures for a comprehensive ex parte rule. Instead, the PUC has testified that because of its quasi-legislative/judicial roles, it prefers to make ex parte rules on a case-by-case basis "in particular cases of great importance and widespread public interest." Presently, the commissioners, ALJ's and staff not only meet privately with parties to significant hearings, but also have no restrictions on discussions involving complaint cases--which are adjudicatory in nature.

Critics contend that the present laissez faire system with respect to communications between parties and PUC policy makers is not in the public interest--because so many important regulatory decisions can be made behind closed doors without regard to the public record. They also point out that the PUC has only recently moved to initiate ex parte restrictions when the Attorney General raised the concern as a party to controversial cases. Other parties have defended the system stating that access to commissioners is an important part of doing business at the PUC.

Several other federal and state agencies presently have either administrative or statutorily-mandated procedures for conducting ex parte discussions. For example, the Air Resources Board and the California Energy Commission have administrative ex parte rules in place. The Federal Communications Commission (FCC) has strict rules for dealing with telecommunication companies, including a disclosure rule for less significant proceedings.

The California legislature also recently approved, and Governor Deukmejian signed into law, the establishment of a "California Integrated Waste Management and Recycling Board" with strict ex parte communication restrictions. On the other hand, the Senate defeated legislation by Assemblyman Friedman to established an ex parte disclosure rule for the California Coastal Commission.

Administrative Law Judge Reform -- There are two major schools of thought with respect to what the role of the ALJ's should be in the PUC. Some argue that they should be independent and make decisions based on the record, which the commissioners can either agree with, change or disagree with in their final decision. Certain parties and several ALJ's have stated that the ALJ draft decision should be a separate document from the commissioner's final decision, and that an effort should be made to more clearly define the separate roles of the ALJ's and the commissioners. For example, critics of the current system state that because an ALJ's decision presently has to be approved by the assigned commissioner before it can be released, great pressure is put upon the judge by the assigned commissioner to make the proposed decision reflect the commissioner's view, thus undermining the independence of the ALJ.

The other school of thought argues that historically the ALJ's are there to assist the assigned commissioners. Some commission members believe that besides the ALJ's statutory responsibilities to hear cases, the primary function of the ALJ's should be to assist the assigned commissioner or commission on specific cases. Rather than being an independent and public draft recommendation, they believe the ALJ decision, which reflects the assigned commissioner's views, should be more a preview of what the commission will likely decide.

Section 311 of the Public Utilities Code specifies what the roles of the ALJ's are. The two most important parts of the code are the following:

(1) "(b)...The commission, upon scheduling hearings and specifying the scope of issues to be heard in any proceeding...shall assign an administrative law judge to preside over the hearings, either sitting alone or assisting the commissioner or commissioners who will hear the case." and,

(2) "(d) The administrative law judge shall prepare and file an opinion setting forth recommendations, findings and conclusions. The opinion of the (ALJ) is the proposed decision and a part of the public record in the proceeding. The decision of the (ALJ) shall be filed with the commission and served upon all parties to the action or proceeding...(t)he commission shall issue its decision not sooner than 30 days following filing and service of the proposed decision by the (ALJ)."

Thus either view concerning the role ALJ's--one of independence or one of assisting the assigned commissioner--can be supported by existing law.

Discovery Rules -- Some parties have been concerned that the PUC does not have rules for "discovery" of information held by parties to a case or hearing. They contend that some parties, especially the smaller ones, are left at a disadvantage when it comes to confronting other parties in PUC proceedings. The PUC has testified that it does not believe it necessary to establish formal discovery rules. AB 2252 (Friedman) of 1989, was introduced to require the PUC to adopt such a rule, but failed passage.

Complaint Procedures -- Some parties have raised concerns about the difficulty in conducting complaint proceedings at the PUC and have questioned if the new market based regulatory programs adopted by the commission will make the complaint process even more difficult to undertake. For example, with new telecommunication issues involving lucrative competitive services increasingly becoming the topic for complaints at the PUC, the timing and length of the complaint process will determine how successful competitors can be in their efforts to compete with large utilities.

Workshops -- Informal "workshops" as a PUC procedure have increased in the past few years. They are primarily used to reconcile or work out the various details (often significant) of major regulatory reform cases initiatied by the PUC. Some critics have complained that there have been no standard rules for these workshops, no recorded proceedings, and that their ad hoc nature has assisted the large utilities at the expense of the smaller competitive parties.

III. Legislative Efforts to Improve PUC Administrative and Judicial Review Procedures

The "Bagley-Keene Act" (Sect. 11125 of the Government Code) requires that the public be notified of meetings of state agencies and be supplied with an agenda to be covered at the meeting. Also, present law requires that copies of public documents to be discussed be made available and that reports of executive sessions be made public.

AB 3991 (Moore) enacted in 1984, requires the PUC to compile and report to the legislature on its rules of procedure on an annual basis.

AB 4237 (Hauser-1988) and AB 338 (Floyd-1989) would have authorized a court of appeals, instead of the Supreme Court, to review PUC decisions. These bills were defeated.

In 1989 the Senate Energy and Public Utilities Committee held an interim hearing on two bills introduced by Chairman Rosenthal:

SB 1125 (Rosenthal) would have established the "Public Utilities Commission Ex Parte Disclosure Act" by requiring the PUC to adopt rules governing ex parte communications. Based on FCC rules of disclosure, which most telecommunication corporations must follow at the federal level, SB 1125 made a legislative finding that the flow of information in PUC proceedings was important and "should only be curtailed where absolutely necessary, but that disclosure of those contacts should be public information and made part of the record." SB 1125 did not prohibit ex parte communication--but rather required the PUC to issue public notices of these contacts.

SB 1126 (Rosenthal) initially would have required that a separate "Division of Public Utilities Commission Administrative Law Judges" be created in the Office of Administrative Hearings of the Department of General Services. The bill was later amended to only prohibit the approval by a commissioner of an ALJ proposed decision before it was made public, in order to enhance the independence of ALJ decisions.

Both these bills died in policy committee due, in part, to intense opposition lobbying by the PUC and major utilities.

IV. Roberti Preprint SB 8 process/New Legislation

In April 1990, in response to a variety of parties who believed that the PUC process was unfair, Senator Roberti introduced Preprint SB 8 which involved both reforming the complaint process at the PUC and modifying the judicial review process. The preprint was used by the Senator's staff as a vehicle for discussion on a variety of problems involving the PUC process--including many issues mentioned above.

Staff conducted several meetings with parties involved in the PUC process, and undertook individual meetings with any utility or party which specifically asked to share their viewpoints on Preprint 8. The following two bills are the results of those discussions and meetings and generally address the most significant topics which the author believes will improve the PUC by implementing basic procedural changes:

SB 1041 (Roberti)

Existing law provides that judicial review of PUC decisions resides exclusively with the California Supreme Court. SB 1041 would provide that judicial review of PUC decisions could be considered in the Court of Appeal for the First Appellate District, and then, if necessary, by the Supreme Court.

SB 1042 (Roberti)

SB 1042 would revise PUC procedures by requiring the commission to establish ex parte communication rules involving communications with members of the Commission and ALJ's.

This bill would also require the findings and decision of an ALJ to be based on the record of the proceeding, and would further require the commission to be bound by the factual findings of the ALJ, and to explain, with reference to the record, any substantive changes made by the commission that deviate from the proposed ALJ decision.

SENATOR HERSCHEL ROSENTHAL, CHAIRMAN: We're going to wait about five minutes, and then we'll start. I want to thank Senator Lockyer in absentia for his cooperation in putting together this joint committee informational hearing today between the Energy and Public Utilities and the Judiciary Committees.

The Senate Judiciary Committee thought that they might be finished by now, but it appears that they're going a little bit longer. And we agreed that we would begin this informational hearing, and Senator Lockyer and Senator Roberti will be joining us, along with other Judiciary members and other members of our committee. The reason that both of the Chairmen agreed to such a hearing at this time was because Senator Roberti introduced two bills -- SB 1041 and SB 1042 -- which would do some significant things to the way the State's Public Utilities Commission conducts its business.

The bills would make three simple changes to the PUC: First, create a new level of judicial review for PUC decisions; second, create a consistent ex parte procedure; and third, make PUC administrative law judges more independent from decisions made by the PUC Commissioners.

This hearing is needed because although these changes may seem simple, their impact into the complicated world of the PUC will be significant. Therefore it is important for these two committees to understand these bills and what they will do before votes are taken.

As Chairman of this committee for the past eight years I'm all too aware of some of the concerns that may be expressed here today. The theme, I believe, will be fairness -- fairness of the PUC process -- in this active time of utility deregulation and redefinition. I can attest to the significant changes which have occurred to telecommunications and energy utilities over the past five to six years, with most regulatory changes occurring to enhance competition. I've not agreed with all of these changes, but I've understood the nature of appointed commissioners and their agendas.

However, it's when I continue to hear criticism of the process undertaken to achieve regulatory decisions that I get upset. And ironically, it seems to be the competitive groups which we've heard the most -- raise the most concerns. So while we're supposed to be doing deregulation in order to create competition, the problems that we've heard have come from the competition.

Some members may be familiar with other attempts to change the PUC process. Last session I offered legislation to deal with a few of the topics that the Roberti bills also address. Senator Roberti's staff has worked for over a year to review the concerns raised by various parties which must participate with the PUC. The Preprint 8

process, as it was known, brought all interested parties, utilities, consumer and ratepayer groups to the Capitol to discuss the fairness of the PUC process and how to improve it. I want to commend Senator Roberti and his staff for the hard work they've done to bring an important issue to the Legislature.

With the time constraints today we have selected witnesses to give a broad overview of the issues involved, and I'm hopeful that they'll speak -- only speak generally about the bills. I don't want necessarily to get into the finite details, because those can be worked out if in fact there is some sort of agreement in the direction the bills should go. But now is the time to speak about the process at the PUC and the problems or lack of them that some may have encountered.

Now, how the concepts of the Legislature would impact it -- there'll be other times to talk about more specific aspects of the bills. We've asked all interested parties not testifying today to use the open microphone at the end of the hearing to make one short statement if they wish, or to submit written testimony for a transcript which will be made available. And we are transcribing this hearing.

We have three short panels today, and I want to keep the testimony to approximately five minutes each if we can, and I hope that you'll please identify yourselves. And let me call the first panel: Audrie Krause; Joel Anderson; Phillip DiVirgilio; Dennis Mangers; Thomas MacBride; and John McDonald.

Okay, I'm just informed that Mr. MacBride has a time constraint in terms of catching a plane or something, and so I'll ask him to lead off. Now, identify your name and who you represent so that for the record we'll have it there.

MR. THOMAS J. MACBRIDE, JR: Thank you, Mr. Chairman and members of the committee. My name is Thomas MacBride, and I'm testifying today on behalf of a number of entities that regularly participate in PUC proceeding. For the record, those groups are the California Association of Long Distance Telephone Companies, known as CALTEL which is an association of about 25 long distance companies here in California; the Telephone Answering Services of California, a statewide association of answering services and voice mail and voice messaging providers; and US Sprint. I believe that at least, also two of the members of CALTEL -- MCI Communications and Bay Area Teleport -- have already indicated their support for Senate Bills 1041 and 1042 to the committee. The hour is late and the witnesses are many, so I'll be brief.

First, the groups that I represent want to congratulate you, Mr. Chairman, and the Senate leadership for addressing the Commission's processes as a priority item this session. But I think that it would be shortsighted to simply regard this endeavor that the Senate is undertaking as a criticism of the agency. I view it rather as a recognition by the Senate that the California Public Utilities Commission is the single most powerful state regulatory body in the United States. It's decisions have a daily

impact on consumers and business enterprises throughout the state.

Now while it's a body created by the Constitution, it derives virtually all of its authority from the Legislature. And the Constitution expressly provides that the Legislature will determine the fashion in which PUC decision are reviewed by the courts. And it's the view of those who are supporting these bills that judicial review is absolutely essential to the operation of an agency with that level of influence. It's got to be more than just cursory judicial review, which is the case today.

A number of proposals are before the committee today, and some are in the proposed legislation. You'll probably hear some others from the witnesses. It's my view, however, that the single most important provision before the committee today is the judicial review provisions provided for in Senate Bill 1041, which would establish judicial review as a matter of right in the Court of Appeal. Meaningful judicial review will promote PUC decisions predicated on the record of the proceeding and in conformance with procedural and substantive provisions of existing law. In the absence of meaningful judicial review, enactment of the other proposals may well prove to be an exercise in futility. The judicial review provisions, in my view, contained in SB 1041 are the predicate to other procedural reforms.

Now, I'd like to put one myth to rest. It is simply not the case that judicial review as provided for in Senate Bill 1041 would result in a flood of litigation, tying up the Commission's proceedings indefinitely. Last year in response when there were some proposals before the Senate last year, I performed a study of the Commission agendas for the 1989 fiscal year -- 1989-90 fiscal year -- which confirmed what most of us already know. The vast majority of Commission decisions are on contested matters that could not result in an appeal. Of the about 1,100 decisions that the Commission issued during that period, about a fifth could have been regarded as remotely contested.

And if even half of the non-prevailing parties in those matters were willing to bear the significant legal expenses and other expenses of proceeding through an application for rehearing process and then go to a -- take an appeal to the civil courts, the number of appellate decisions resulting would be less than the decisional caseload of a single appellate justice. And if one of these parties seeks a stay of the underlying Commissioner orders, the party will bear the heavy burden provided for under existing law of demonstrating some type of irreparable harm, and will probably be required to post some sort of bond or could under the rules that would be retained even if SB 1041 is enacted.

The crucial thing is that today neither the Commission nor those that are affected by its decisions receive any guidance from the court regarding the state of law governing the Commission's most important activities. There've been decisions on

attorneys' fees; there've been decisions on attorney-client privilege and whether the Commission can take -- make rulings on property matters, but nothing -- we haven't had anything in the last few years on are they -- on what they're doing in telecommunications, energy, and transportation.

Now, a number of us, for example -- a number of us think that the Commission's phased deregulation of AT&T violates the statute that happens to exist that requires hearings when the Commission wants to modify its past decisions. We've raised the issue with the Commission without success. We've raised the issue with the California Supreme Court, but only one justice has ever voted to hear the case. Now, we could be dead wrong on this point. But the fact is, there's a 1977 unanimous decision of the Supreme Court that states otherwise. So we continue to raise the point.

Now, if SB 1041 were enacted, we would have a court at some point issue a written decision, either reaffirming that old Supreme Court case and telling the Commission to conform its practice to the requirements of the statute, or telling us we're dead wrong, so that we can go on to more productive activities. Either result is perfectly fine with me, but the present result is simply intolerable.

Now we -- and when I say "we" here I mean those of who participate before the Commission as well as the Commission itself who are affected -- receive nothing in the way of meaningful judicial review. Even if the first -- I think this is an important point -- even if the first year of judicial review under SB 1041 resulted in the Commission batting 1000 in the civil courts, SB 1041 will have achieved a great deal. The decisions upheld will bear a mark of legitimacy resulting from the fact that a court heard and considered the arguments of the appellants and rendered a decision explaining why the Commission was correct in all respects. That same level of legitimacy simply cannot result from a one sentence Supreme Court denial of a petition for a review.

Last year the Court voted four to three not to hear TURN's appeal of a landmark telecommunications decision. And one of the commissioner's interpreted that vote as a quote, "clear indication that we're on the right track in telecommunications regulation." Now, the level of clarity from that vote wasn't apparent to me, but under the present law the commissioner is entitled to reach that conclusion. That's the inference he's allowed to draw from the fact that three Supreme Court justices weren't able to find a fourth vote to even hear the case. Had SB 1041 been in effect, some court would have rendered a written decision either providing some basis for the commissioner's statement in that regard, or reaching a contrary conclusion.

Again, I'd like to thank the Senate for addressing these issues this year, and I'd be happy to answer any questions that you might have.

CHAIRMAN ROSENTHAL: Can you identify some of the problems that the groups that you

represent have been experiencing at the PUC?

MR. MACBRIDE: I'd say the principal problem that we have experienced is the Commission's use of an advice letter procedure to, in essence, deregulate AT&T without conducting further hearings on the fashion in which it is to be deregulated. At the end of 1988 the Commission issued a decision establishing a procedure and a process, and it was our view that the Commission violated that by simply allowing AT&T to further deregulate itself with advice letter filings.

Again, we took the issue to the court. We said, Section 728 of the Public Utility Code requires that you have a hearing. We pointed out to the Commission that they ignored our last filing, didn't do anything. We filed an application for rehearing. They dismissed it and said it was improvidently filed. We filed with the Supreme Court and got one vote.

CHAIRMAN ROSENTHAL: Okay. Thank you very much.

MR. MACBRIDE: Thank you.

CHAIRMAN ROSENTHAL: Okay, Audrie Krause.

MS. AUDRIE KRAUSE: Thank you, and I appreciate the opportunity to speak on this issue.

CHAIRMAN ROSENTHAL: Identify yourself and...

MS. KRAUSE: Yes, I'm Audrie Krause, Executive Director of TURN. We strongly endorse the basic thrust of Senate Bills 1041 and 1042 and essentially support SB 1041 as is, and would support SB 1042 with some amendments which I have provided, a list of our concerns in writing that I'll pass out later.

We think the need for reform at the Public Utilities Commission has never been greater than it is at this point. There are severe process related problems that we're aware of in the telecommunications and transportation industries. And there are increasingly frequent examples of similar concerns coming up with the energy industries. The absence of any effective judicial review makes these problems even more serious, so we believe that review by the Court of Appeal is essential at this time. The mere presence of the review possibility, we believe, will help to curb some of the worst of the abuses that we've seen. And I'd like to give you a few examples of some recent Public Utilities Commission decisions that have had broad public impact which the Supreme Court has not reviewed.

The Diablo Canyon case in which there was a contested settlement, the staff had recommended a $3.4 billion disallowance on a $5.6 billion, I believe it is, construction cost. A settlement was reached. It was contested, and the Court chose not to hear our request for a review.

P.G.& E.'s residential electric customers are now paying over nine cents a kilowatt hour for the power they obtain from Diablo Canyon. It is the highest cost power in

P.G.& E.'s mix of power that's available, even higher than the much maligned Q.F.'s (?) contracts that are considered to be the highest in many cases. The Diablo Canyon power is actually more costly now, and P.G.& E. has been earning record profits. This is a serious impact on the public on millions of customers, and there -- without an effective way to get review this contested settlement stood.

In regard to the alternative regulatory framework which Mr. MacBride just mentioned earlier, the Public Utilities Commission essentially disregarded nearly 100 years of ratemaking precedent to approve the alternative regulatory framework. It relies on arbitrary formulas which could result in rate increases at a time when there are declining costs in the industry. And since it was approved, we've seen increasing evidence of monopoly abuse, such as the 18 million in identified cross-subsidizations of Pacific Bell's non-regulated services which are being paid for by ratepayers, and the recent revelations regarding late charges and Pacific Bell's problems in handling the processing of payments on time.

With regard to AT&T the Commission has allowed a rate increase without a hearing, despite the fact that that company earned a 39 percent profit in the first quarter of 1990, which was three times its authorized rate of return. We believe that Senate Bill 1041 would provide the opportunity for interested parties like TURN and other public interest groups to have their arguments considered on the merits of the arguments by a court.

And I just want to add also that our support for appellate court review represents a change in position for TURN. We didn't always believe this was the best idea because we don't have the same kind of deep pockets that the utilities and some of the other special interests have. But we now feel that it's essential that there be this kind of review because of the problems that have been coming up with increasing frequency.

And I'll answer any questions you have, and would like to hand out written comments with more detailed listing of some of our concerns.

CHAIRMAN ROSENTHAL: Why do you think these conditions exist today, and perhaps didn't exist in earlier years?

MS. KRAUSE: Well...

CHAIRMAN ROSENTHAL: I mean, what's changed?

MS. KRAUSE: Well, the Commission, of course changes leadership all the time.

CHAIRMAN ROSENTHAL: I know. The Commission always changes its membership, so I don't want to put it on that basis.

MS. KRAUSE: Other than that, it would be hard to speculate. Perhaps the fact that there hasn't been any effective review in many years has created a climate in which the Commission doesn't believe it needs to be reviewed. But we see increasing evidence that they disregard the factual record in deciding cases, knowing full well that

effectively there is no review. They can get away with that.

CHAIRMAN ROSENTHAL: You spoke about the ability to go to court. Do you have any comments about the ex parte procedure at the Commission?

MS. KRAUSE: Yes, I do. In general, we would support the need for putting into code some form of ex parte rule. We do have some specific problems with the bill as proposed, which I've included detailed comments on. We think that while the Commission has recently reintroduced a proposed rule, they have done so in the past and not followed through, and we would have concerns about their follow-through in this case also, particularly since they moved on this after it was clear that there was interest by the Legislature in doing something about this problem.

CHAIRMAN ROSENTHAL: Thank you very much. Joel Anderson.

MR. JOEL ANDERSON: Thank you, Senator Rosenthal. My name is Joel Anderson. I'm Vice President and Chief of Staff of the California Trucking Association. Our organization is a trade association representing about 2,500 trucking companies in the State of California. Their average size is 10 to 15 drivers, maybe 15 to 20 employees, revenue of about $1 million a year, small business type people.

And we probably have the singular distinction, along with the railroads, of being the first regulated utilities in California, unlike the rest who are regulated by statute. We're regulated by Constitution as part of a transportation company, which gives us a unique set of problems, but the impact of which has been the same as spoken by Mr. MacBride and Ms. Krause. I'd like to address both aspects of the bill -- the judicial review and the ex parte rule.

Regarding judicial review, Tom spoke about a 1977 case. That was a case that CTA litigated against the Commission and won, and it was a case that said that every party is entitled to a fair hearing and an opportunity to be heard before the Commission. Since the Supreme Court made that landmark decision on an advice letter type procedure which we took the court and won, there's been a steady retreat from that -- not in terms of the active voice of the justices, but in terms of the leeway that justices give the Commission in their actions.

You may recall that we approached you when the Commission first set upon to redo its 1986 transportation decision. And it compounded one day of hearing after another and put such a compressed hearing schedule that for anyone outside of government to participate in a meaningful fashion was impossible in terms of financial strain, logistic strain, and getting your witnesses there. Fortunately, through intervention the schedule became more reasonable, but at the first hearing or just before the first hearing we had Commissioner Wilk tell us when the decision would be issued by the Commission before the first shred of evidence was submitted to the Commission for adjudication. We find that intolerable behavior, and we're glad that it backed down a

bit.

We don't think that behavior could occur if there were meaningful review by the court. We later took the Commission up to the Court, and like Mr. MacBride, we got two votes out of seven, four being needed for review. We think in a prior era we'd of got the review, but now there's automatic appeal death sentences, all other kinds of things going to the court, and so their attention is directed away from commercial cases which it was more active in the '70's.

We strongly support SB 1041 on the level of review and an opportunity to be heard at the Court on the merits of the case. We don't want to retry the case, but we want to make sure that it's heard and the Commission acted in accordance with law.

The second issue, SB 1042 dealing with the ex parte rule, we're about 50 percent in support of the bill. Our problem with the bill is we think we should have a right to approach the commissioners on the quasi legislative cases. We think you have an absolute right to address the decision makers there at all times. But in terms of enforcement cases, in terms of cases dealing with the issuance of a certificate of an adjudicatory proceeding which we think could be more narrowly defined than present in the bill, we would strongly support it. We think there is no appropriate means or no business of an ex parte contact in those type cases so...

CHAIRMAN ROSENTHAL: Do you have any problem with the disclosure of subject matter?

MR. ANDERSON: Not at all. We would fully expect that any time we meet a commissioner the commissioner would note it down and report it. We don't have any problem being noticed.

In summary, we think these bills are long overdue. We applaud you for moving forward with them. We will testify in support. In those areas where we have opposition we'll let you know, like on the ex parte rule. We think one of the impacts on the Legislature of the lack of judicial review and fairness at the Commission has been you've been forced to be involved much more than you ever have in the past. When the Commission played by fairer rules in our opinion, they handled the matters. The Legislature gave the Commission policy. Now you're being forced to go back and correct things on a micro level. It's bad public policy, but you're required to do it because of what is occurring over there.

We thank you.

CHAIRMAN ROSENTHAL: Why do you think there's been this increasing concern over the past few years with respect to the fairness of the process?

MR. ANDERSON: Well, we've litigated before the Commission since 1934, and never in our history did we have a commissioner tell us the first day of hearing when the decision would be out and what days we'd have to brief and what could be expected. Now, that's an extraordinary statement. Unfortunately -- actually, the commissioner

didn't say it. The assigned law judge said it after he had -- said been in consultation with the commissioner, and he made sure he said it off the record, but there were many ears to hear it. We've never experienced that before.

CHAIRMAN ROSENTHAL: Would you comment upon the concept of the ALJs in the bill.

MR. ANDERSON: Well, you know, last year we came with a suggestion that the ALJs actually be separated from the Commission and assigned to a different office in the State of California -- I believe the Office of Administrative Law. That's what we'd prefer to see happen. This legislation moves a step in that direction, and we would support it.

CHAIRMAN ROSENTHAL: Okay, thank you very much. Mr. DiVirgilio.

MR. PHILLIP DIVIRGILIO: Chairman Rosenthal, distinguished members of the committee, my name is Phillip DiVirgilio. I'm Manager of Government Affairs for DESTEC Energy. I'm pleased to appear today before you on behalf of both the California Cogeneration Council and the California Independent Energy Producers. I serve as Chair of electric issues for the California Cogeneration Council, an ad hoc group of industrial companies who have installed gas-fired cogeneration facilities. Also I'm Chairman of Independent Energy Producers, an umbrella organization representing all forms of alternative energy production in California.

Our groups have strong interest in fairness and integrity of the proceedings at the Public Utilities Commission. Our companies spend considerable amounts of time and money participating in a multitude of PUC proceedings. Generally, we find ourselves as adversaries of the regulated utility companies. We're forced to hire attorneys and expert witnesses to counter the massive efforts of the utilities to lower the payments of our energy and in general to make us less of a competitive threat. We'd like to commend Senator Roberti for introducing these two important pieces of legislation which we believe will improve the procedural due process of the PUC.

Looking at each bill individually -- first, Senate Bill 1041 -- we generally support the concept of effective judicial review of PUC decisions. We believe that all regulatory agencies should be subject to judicial review. The present system of direct appeal to the State Supreme Court makes it virtually impossible for any party to question Commission decisions. The Supreme Court is just too busy; very unlikely that they will hear most cases, and therefore they're not a true oversight of Commission actions. This is of particular concern to our group, since our industry relies heavily on the statutory direction given by the Legislature to the PUC.

And as an example, Senator Rosenthal, you carried legislation in 1984 that directed the PUC on how to set prices for natural gas for cogenerators. The PUC has virtually ignored major elements of that law in recent years. And unfortunately, it's not practical for us to appeal these very technical PUC decisions to the State Supreme

Court, and as a consequence we've been forced to ask you to carry new legislation making this law more explicit so that the will of the Legislature can be carried out.

At the same time that we see benefits in an appellate court review of PUC decisions, we do have a major concern. Our industry bears its own cost for appearing before the PUC and for appealing to any courts. The utilities, on the other hand, have all their costs borne by the ratepayers. This includes their staff, lawyers, and any consultants in supporting their cases. And making court review easier may prompt the utility companies to challenge every adverse PUC ruling. Simply, they down have a down-side risk. We would like to ask you to consider amending the bill so that if a utility appeals and loses, their shareholders will bear the cost of that appeal.

Now, our fears here are not a matter of conjecture, but actually a matter of fact. We were victims of a campaign by P.G.& E. to disadvantage our industry. They once appealed a very minor and very technical PUC decision that went against them all the way up to the U.S. Supreme Court. They lost at every level, and ratepayers had to pay all the legal fees. Our industry, unfortunately, was forced to respond and respond at our own costs, so we feel this bill should safeguard against utilities launching frivolous appeals.

Turning to Senate Bill 1042, we support the major provisions of this bill. We support the time periods for assigning ALJs, but also ask you to look at including time periods for scheduling hearings and scheduling -- and rendering decisions.

Many times we've protested utility actions, only to find the Commission has simply refused to deal with our protests. They do not schedule hearings or even workshops; in some cases, never rendered a decision. We feel no party should have to wonder whether it will be able to receive a hearing on a legitimate issue.

Regarding the ex parte rule, we can support a stronger rule, although we feel that the rule as written is perhaps a little too sweeping. We're content to win or lose based on the facts that we present in the record. However, sometimes we find it helpful to clarify our issues in direct conversation. The bill as drafted makes ex parte contact a misdemeanor, which we believe is a bit onerous, and some form of reporting requirements is probably more appropriate.

The bill also limits the commissioners to the facts or determinations made by the ALJ, and we feel this goes too far. This makes the ALJ the single decision maker, and we feel it's wrong. However, if the commissioners depart from the factual findings of the ALJ we do feel they should identify those facts in the record that justify their conclusions. We don't feel this is a large burden and we feel it will contribute to a reasoned decision making process.

We appreciate the leadership that you've shown on these important issues, and we look forward to working with you and members of both committees as this legislation

comes forward.

CHAIRMAN ROSENTHAL: Thank you very much. Dennis Mangers.

MR. DENNIS MANGERS: Mr. Chairman and members, Dennis Mangers; Senior Vice President, California Cable Television Association. I have some printed support testimony I'd like to make available if I may.

And I'd like to just share with you a couple of thoughts about these bills. I can't say that as a member, Mr. Chairman and Senator Alquist, I ever paid much attention to the PUC. It seems to me -- it seemed to be at the time that we created this entity for a specific purpose. It seemed to me to be pursuing that purpose, and it was dealing in a very complex area of public policy that I for one was very glad to have them pursuing it, and so that I didn't have to spend a great deal of time looking at it.

I have to also admit that in the early days of this job representing the cable television industry I didn't pay much attention either, because the only purview that the PUC had that affected my industry had to do with public safety issues, and so we had a few engineers and a few technical people watching over the whole issue for us, that whole arena.

It then came, however, as the cable industry became more and more successful, that the telephone companies made it abundantly clear they intended to get into the cable business. And they made it abundantly clear they were going to work the congressional level, they were going to work with the FCC, and they were going to work with the various state PUCs to facilitate their getting into that business.

We, obviously, became nervous because they had exhibited behaviors in the past that led to the breakup of AT&T, and we knew that if they could they'd cross-subsidize their way into our business and we could be gone. So I want emphasize from the beginning, it doesn't get very complicated to us. It's simple. Life and death matters as they affect the cable television industry are being decided over there in that legislative-created body all the time. And we're here today to tell you that we support these bills. We believe something -- and this is the rule we have around here -- we believe something is broke and it does need fixing, and these bills would go a long way to doing precisely that.

Now let me be specific in this regard. With regard to the three issues involved in these bills, what could be the harm in this agency having some level of appellate review of its decisions? Can you imagine how sobering it is when your industry is under the threat mine is from the telco incursion to know that once the PUC makes a decision that could be life and death for your industry, that's where it stops, friends. It doesn't go anywhere else, and you don't have much additional latitude. If the Supreme Court, as Tom MacBride just suggested, doesn't take these cases and that's

the only thing set up in our law, what do you do? Well for us, some provision for appellate review is absolutely essential, and we strongly support the concept.

What could be wrong with the independence of the ALJ? Do you know how that works? I just came to discover this. You go over and you watch these administrative law judges that are assigned to these hearings. They listen carefully to all the evidence. They're there every day and they see every nuance. They see the interplay of the people. Then they write up a report. You know what happens to the report? The public doesn't see this thing. This goes to an assigned commissioner that in many cases has been out giving speeches, writing articles, and expressing a philosophical viewpoint. And guess what? Sometimes that report of the ALJ comes out and it reflects very accurately the philosophy of the assigned commissioner to the case. Big surprise.

And you know what? It doesn't become public until that assigned commissioner gets to revise it anyway he or she wants to. So what the public gets to see is not what the ALJ reported after hearing this case as a law judge. We get to hear what the assigned commissioner, who didn't even come to the hearing, thinks. Well boy, I'll tell you, it sounds to me like some reform is necessary in that category.

Now, with regard to ex parte contact, what's the harm in having some rules that require contact with commissioners on issues of this magnitude to be recorded -- who was there and what they had to say -- so that the press and all of the competitors can take a look at the record and decide what was the magnitude of the impact, or the impact on the commissioners before they made some of these controversial decisions so that the public and all of us -- and I think especially you legislators -- can begin to get a flavor for is that a fair and equitable process?

As I said, I didn't used to get very concerned. Now, the level or magnitude of threat to the industry is so great, our fate is so much in the hands of the PUC commissioners, we need to guarantee that the Legislature is watching, that they don't just abdicate entirely the authority to that body, and that they are aware that all is not totally fair and equitable. So while I can't list a whole litany of problems to date, I can tell you, knowing what's coming ahead for my industry, I want to proactively come over here and support these two bills and ask you to make sure that that process through which my industry is probably going to go for the next decade, with life-or-death consequences, is fair and is equitable. And these two bills, simply stated, do it, and I urge your support.

CHAIRMAN ROSENTHAL: What do you think of the PUC's recently proposed rules on ex parte communications?

MR. MANGERS: Personally, we have recommended some amendments to SB 1042 that I think would work better because they apply to the workshop process that's been developed in this deregulatory environment since last fall, so we'd like to discuss

further with the Senator both what the PUC has recommended and what we think would be more equitable for everyone. So we're not entirely satisfied with the status of the bill, but I don't want to nit-pick it to death in this informational hearing.

CHAIRMAN ROSENTHAL: Thank you very much. Mr. McDonald.

MR. JOHN P. McDONALD: Thank you. My name is John P. McDonald. I'm Vice President and General Counsel of Donnelley Information Publishing. Donnelley Information Publishing publishes 18 directories -- telephone directories -- in Southern California.

For the most part we did not expect to have any involvement with the Public Utilities Commission when we opened our operations here in California. We thought we had a fairly simple matter. Telephone directories need telephone listings, and while I won't go into the actual merits of what did or didn't go on in terms of what we asked for, the process that we went through was just fascinating.

It began almost six years ago. We asked for access to listings and were told that we could not have them because the PUC said we couldn't. We went to the PUC and said, why can't we have this? And they said, because it's not in the tariff. When we asked how to go about addressing getting something into the tariff, we were told first to intervene in an OII -- order initiating investigation -- that was dealing with rate reform. We intervened in that proceeding, and shortly after intervening were told, no, you're in the wrong proceeding. The issue you seek to raise here cannot be raised in this proceeding. You have to go someplace else.

Our alternative was to take and file a complaint case, so we went and filed a complaint case before the Commission and were proceeding along that avenue. We also took and filed a request with the Commission to expand the OII to include the issues that we thought were important. They clearly dealt with regulation and reform.

After we were well into the complaint case, the administrative law judge in that case informed us that in fact we could not raise a major portion of our case in the complaint case either. It appeared that we as a customer of the utility didn't have standing to raise issues that may relate to the reasonableness of the tariffs. It was the tariffs that we were trying to change. Having had the complaint case largely gutted by this ruling, we were surprised to find the OII directing others interested in our issues to participate in our complaint case. We thought we had a nice, simple dispute.

This proceeded along until the OII or regulatory reform came out. We were absolutely stunned to find a bunch of factual findings about the extensive record on directory needs and on listings issues. We hadn't been allowed to put those issues into the case.

The complaint case concluded and we sat for nearly a year waiting for an order from the Commission. We finally took and filed a motion with the Commission simply asking

them to rule. Rather than ruling they started yet another OII, this one directed to listings. After that proceeding had started they did take and come and rule on our initial complaint. They ruled that we should wait until the OII to find final resolution. It seemed to me we were back to where we started.

The changes to the Commission's procedure that are set forth in SB 1041 and SB 1042 we think will go a long way to solving those sorts of problems. We have experienced in the course of our travels through the assorted regulatory processes of the PUC many of the problems that are addressed in these bills. We're particularly concerned about decisions that are rendered citing facts that are nowhere to be found in the record. When our complaint case was finally decided, nearly 60 percent of the material in that case related to things that never appeared in that record. They were nowhere to be found. They represented things that we had had no opportunity to confront. Indeed, there were factual findings about proceedings that had not even been noticed for hearing yet. There needs to be a change in the way the PUC does its business.

I think that probably in the past its method of operating, where you were dealing with utilities that were simply in the business that they were in, may have been appropriate. In today's world where the utilities are in a variety of businesses -- some of them regulated, some of them unregulated -- the need for the Commission to sit meaningfully as an arbiter of disputes to provide dispute resolution is very important. Having proceedings on the record, having them noticed, having a right of appeal; knowing that the real proceeding is there in the hearing room and not out in the hallway someplace are all things that are very, very important to this process.

We support the bills. We urge the Legislature to continue their oversight. We don't think that the bills by themselves will do enough to change the practices that evolved over such a long period of time.

Thank you.

CHAIRMAN ROSENTHAL: Thank you very much. I want to thank the panel participants for this number one. We'll know call forth the Panel II: The PUC; the President, Ms. Eckert and the Acting General Counsel, Michael Day. At your convenience you may start.

MS. PATRICIA ECKERT: Good afternoon.

CHAIRMAN ROSENTHAL: Good afternoon.

MS. ECKERT: I'd like to thank you, Chairman Rosenthal, and the committees for their invitation to address SB 1041 and SB 1042 today.

My fellow commissioners and I consider these two to be two of the most important bills on the Legislature's agenda because of their potential impact on the workings of the Commission. I would like to address SB 1041, the appellate review bill, first.

As we have in the past, the Commission continues to feel very strongly that modifying the original scheme for expedited review of CPUC decisions directly to the

California Supreme Court is a mistake. Such modification will degrade the ratemaking process in California. The possibility of benefits from additional court review will not outweight the harm.

Let me briefly explain our major reasons for opposing SB 1041. Number one: There will be no reduction of court workload. It is not true that the bill will reduce the workload of the Supreme Court. In fact, there will be a significant increase in the workload of both the Court of Appeals and the Supreme Court. A reduction in court workload has been the major justification for the bill. However, both sides of the issue now concede that the additional appeals expected in the lower courts will likely increase the number of petitions ultimately reaching the Supreme Court. And of course, there will be a substantial increase in the workload of the First Appellate District, which is already a very busy court in its own right.

Number Two: The existing appellate procedures were crafted for a reason -- a good reason. There's a reason the Public Utilities Act provided for expedited direct review to the Supreme Court. That reason is still valid today. The appellate review provisions of the Public Utilities Act of 1911 were drafted by Commissioner and General Counsel Max Thelen after an extensive survey of procedures in other states. As Thelen's report stated, "It is hoped that the procedure thus provided will tend to prevent the long drawn-out court proceedings and the reliance on technicalities to which the public utilities have largely resorted in other states to tie the hands of the states acting through their railroad or public service commissions."

As the Commission's own report in 1912 stated, quote, the provisions of the Public Utilities Act with reference to procedure have been drawn with considerable care so as to ensure swiftness and certainty in the proceedings, both before the Commission and the courts. In this way it is possible to secure speedily a decision of the highest court of the state.

Number three: SB 1041 would eliminate the most important elements of the original appellate procedure. It proposes to eliminate direct discretionary appeal to the Supreme Court, no right of automatic appeal, court deference to the Commission on factual determinations, and a limitation on the action may take to either affirm or set aside the order of the Commission. These elements are all important if utilities and their customers are to have any real regulatory certainty in this day and age, just as they were important when the progressive reformers were battling the railroads.

Now, however, the Commission's main litigation opponents are far more numerous, and many are just as well funded and well equipped, with as many able lawyers as the railroads at the turn of the century. In addition, utility regulation has become more complex and its economic impact affects millions more of the state's citizens and businesses. Today it's easier than ever to choose a Commission decision at random,

find several willing litigants who would seek to overturn that decision. There are simply more winners and losers, and we were hearing many of those stories in the panel that just proceeded us.

In addition, the competitive forces unleashed in the regulatory field today give parties an incentive to use litigation as a weapon to frustrate their competititors. This has progressed to the point where the Commission has admonished parties from the bench for filing rehearings or appeals solely to delay their competitor's rate approvals. SB 1041 would give these parties powerful new weapons for further delay. And I'd like Mr. Day at the end of my comments to comment and reply to a couple of the comments that were incorrect in Panel I. We would like to clarify a couple of those.

What harmful impacts would result from SB 1041? Well to begin, the added layer of appeal would add 12 to 18 months to each appellate case, which already takes from three to 18 months, assuming the losing party at the court of appeals takes it to the Supreme Court. Thus we could face three years of delay before a Commission decision is final.

Further, this regulatory uncertainty costs time, money, effort, and can ruinously frustrate a well thought through regulatory program. Many federal agencies such as FERC are subject to a right of automatic appeal to intermediate federal courts, and their major policy decisions are routinely tied up in lengthy court battles.

For example, the FERC began to order open access to natural gas in 1984. Here we are in 1991 and they're still grappling with elementary questions, such as how can parties trade capacity rights. This is because every one of their orders has been subject to appeal. Each appeal lasts over two years, and frequently the Court has overturned a portion of a key decision after it's been partially implemented. We can only urge you not to place California's economy in that type of purgatory.

In addition, the current CPUC appellate procedure provides tangible dollar benefits by providing a speedy final decision. A rate case increase or reduction in rates, if held up for an additional 12 to 18 months, could result in the accrual of vast sums of interest which would have to be paid once a final order has been reached, either by shareholders or ratepayers. Even if the order of the Commission is not stayed and the refund or increase in rate takes effect, parties will have to encumber the money which they have collected, or which may have to be paid until the Court's decision is final.

For example, in 1987 General Telephone challenged approximately $33 million of a Commission rate reduction order, and in 1988 Pacific Bell challenged over $100 million of a rate reduction order. If the Commission orders had been stayed and then reversed, the resulting interest cost would have run into tens of millions of dollars, and such uncertainty is a severe burden on both businessmen and individual ratepayers. Do you as legislators want the responsibility in this example for loading tens of millions of dollars of interest payments onto the backs of ratepayers?

Further, granting an appeal of right in every case, instead of the current discretionary appeal, would very likely increase the number of appeals enormously, further clogging the civil appeals process and our decision making. The CPUC issues an average of 400 to 450 decisions a year which are not on the consent calendar. Even if half of the losing parties avail themselves of the automatic appeal right, the number of appeals to the CPUC decisions will increase from 15 per year to 200 to 225, an increase of up to 1,500 percent.

What's worse is that SB 1041 allows the Court to ignore the factual findings and conclusions of the Commission -- it was these types of complaints we were just listening to in Panel I -- and to take new evidence which has never been addressed in the Commission's proceedings. And as you know, this is very complex material.

We strongly oppose this provision for two reasons. It will require the court to consider technical evidence without the benefit of full cross-examination by all parties to our cases. It will deprive the Commission of its primary function of weighing such evidence. If the courts were equipped to take all the evidence and make policy decisions in regulatory cases, no Public Utilities Commission would ever have been created. Instead, our Constitution calls for a Commission which specializes in utility regulation vested with great discretion. In addition, the Public Utilities Act for the reasons I mentioned above provides for expedited court review on limited grounds. It specifically prohibits a trial de novo, which SB 1041 would essentially allow.

Even if the bill were passed, it could never be effectively implemented as written. Everyone speculates that the bill will generate vastly more appellate work for the Commission, yet the bill provides none of the resources needed by the Commission in terms of additional lawyers to defend our decisions.

And finally, the bill provides that if the Commission grants rehearing, a party may appeal to the Court if the Commission does not act within 90 days. This deadline is simply impossible to meet. The Commission must grant rehearing, assign an ALJ, take testimony, permit briefs to be filed, prepare a proposed decision, allow the parties 30 days to comment on the decision before we can issue a final order. This simply cannot be done in 90 days, and it cannot be reasonably be done in less than three to six months in certain complex cases. Such a deadline is effectively useless. If the Commission grants rehearing the party will have to wait for a Commission decision on rehearing before applying to the court.

The current system does not provide an effective means of review of CPUC decisions. The number of the parties here today have expressed the notion that there is no effective review of the Commission's decisions at this time. We respectfully disagree. Our own study of other state agencies whose orders are subject to discretionary appeal

to the Courts of Appeal report that one out of every eight or 10 appeals is accepted. At the Commission over the last three years one out of every 14 appeals has been accepted by the Court. If you eliminate the appeals which were clearly frivolous or non-meritorious, the ratio was one case accepted out of every eight -- well within the range of the other agencies.

We are wholly unpersuaded that parties have a less effective right of appeal from CPUC cases, and we attribute the low number of cases accepted to our rehearing process. The Commission's process allows us to correct many minor and some major flaws in our decisions before they are appealed to the court.

In summary, this procedural proposal has been strongly opposed by the Commission for the last three years. We see SB 1041 as defective in the same manner as the other proposals, and we urge you to reject the bill and retain the carefully crafted appellate process, which was designed specifically to meet the needs of utility regulation in California.

Just as a final note on SB 1041, I noted with interest a recent LA Times article in which the attorney for the Legislature expressed his pleasure that the Supreme Court had agreed to hear the lawsuit over Prop. 140 immediately rather than waiting for a lower court review, because this was a case of "statewide importance." The attorney specifically referred to the fact that the expedited appeal would allow a decision to be rendered before the next fiscal year begins when the mandate and costs would occur.

We rely on precisely the same reasoning to urge you that our cases be heard expeditiously. Many of our decisions have statewide economic ramifications that total hundreds of millions of dollars. So long as the parties have a fair opportunity to appeal our decisions and our cases do not unduly burden the court, no case can be made for lengthy delays in the appellate process for the CPUC.

And Mr. Day, would you like to just set the record straight on a couple of the items of testimony in Panel I.

MR. MICHAEL DAY: The three things I would just briefly mention is with regard to the ALJ-commissioner relationship. It is a mischaracterization to say that the ALJ's independent judgment in evaluating the record is not made part of the proposed decision. Section 311, specifically including the statute amendments from a few years ago which this committee participated in, do provide that the ALJ's proposed decision is submitted to public comment. The public does see and comment on that decision.

CHAIRMAN ROSENTHAL: Let me break in here. Can you comment on the concept which said that the decision was made on the basis of testimony or information that was never presented.

MR. DAY: Well, I'm not going to comment on the specifics of one particular case that's mentioned, but to the extent any party can determine that that was the case,

that's legal error. But we reject the notion generally that that occurs in PUC decisions.

CHAIRMAN ROSENTHAL: Okay. I see a little smirking around the audience behind you. So, you know, one of the things that comes through to me is that -- I'm not suggesting that the legislation solves in the best way, but I do suggest to you that there's a lot of smoke around, and where there's smoke there's some fire. And there's an indication that something has changed from what existed previously.

And I think maybe one of the reasons we see the changes is that we went from a monopoly situation, okay, to a breakup of those monopolies, which changes everything and suggests to me that something which was in effect in 1909 because of a monopoly railroad and which existed until the deregulation came into effect a number of years, that it needs to be reviewed in terms of how one appeals.

MR. DAY: If I could comment, Senator, I think that you're quite correct that the source of the additional complaints about the process is the fact that there are many more winners and losers when we have a competitive industry. But that does not mean that the procedure itself is broken. Many of the people you heard here complained not really because of the procedure, but because they lost on the policy issues. And the thing that everybody has to realize is that even if every single Commission decision were appealed to the Supreme Court, and somehow the Supreme Court could be compelled to issue a decision in every case, they wouldn't necessarily win any more of the policy decisions, because regulatory agencies are granted such extreme latitude. The Supreme Court of the U.S. has made that very clear.

CHAIRMAN ROSENTHAL: And I have never raised the question about the results, the policy. What I've raised for the last eight years that I've been on this committee is the process. And the process hasn't improved, in my opinion, because on every issue we get involved in some part of the process; somebody is saying, well, 'it was speeded up.' Somebody made a decision before it was going to be happening. You know, I couldn't get -- I couldn't hear because I couldn't compete with the utilities number of attorneys that were involved -- on and on and on so that my concern throughout this whole process, and I think -- Senator Roberti, I'm glad you're here too -- has been the process, not whether somebody wins or loses.

MS. ECKERT: Well, as you know, I've just issued an assigned commissioner's ruling with respect to the ex parte rule, and I would if I could like to address that in my comments with respect to SB 1042.

We urged the rejection of the provision of this bill as well. The most controversial aspect of the bill is the mandated ex parte rule, which would certainly have a very chilling effect on the Commission's decision making process. And as I mentioned, on March 22 of this year I issued an assigned commissioner's ruling in our

ongoing procedural docket which distributed for comment a proposed ex parte rule. Our proposed rule is a sunshine rule which will clearly inhibit -- and that's something you and I have talked about for the two years I've been on the Commission. And the rule is out there and I think that -- and we're very aware of the comments that are coming in on it, and we intend to put this rule into place.

And our proposed rule will clearly inhibit the majority of ex parte contacts, but yet it will ensure that communications between the commissioners and the parties on important policy issues are not cut off completely. And I think you've heard some sentiment for that in Panel I as well. Furthermore, it provides parties with the right to rebuttal if these so choose whenever a contact is made. The rule would apply from the submission of the case -- that is, after the hearings and briefings are concluded -- until a final decision.

It's our firmly held belief that a Commission -- as a Commission that no ex parte rule should be imposed on the Commission by the Legislature, certainly not one with the inflexibility of SB 1042. The Commission can and will control its own procedures to maintain the integrity of our proceedings and to make certain that every appearance of fairness is maintained in its proceedings. And as you know, you and I have spent a lot of time talking about the process, and I am deeply dedicated to putting that into place. I think you know my dedication to that.

CHAIRMAN ROSENTHAL: I think that that may be so about this Commission. One of my concerns is that if it's good, it ought to be a law -- if it's good. Now, because I don't want the next Commission, whoever that happens to be, to make some other determination which is different.

The other thing I'd like to make comment about: I'm not sure that this would have happened if there wasn't a bill around here saying, hey, there's something wrong. And so maybe what you're doing is correct. But what would be wrong with putting it into law?

MS. ECKERT: Well, one of the major problems is that it's terribly over-broad as it's drafted right now. It applies strict courtroom-like ex parte rules to contacts very similar to those the Legislature has with constituents. And by that I mean, the Commission is frequently engaged in policy making, which is far more legislative in character than a judicial determination of an individual's property rights or fitness for licensing.

In fact, there's an excellent article written by an Ohio commissioner in the ABA Natural Resources Journal. It's entitled, "The Over-Judicialization of the Regulatory Process." And the point he makes is a really good one, and that is we want to bring information in so we can create the best policies, but we want to do it fairly. We want to have the right amount of access. In other words, not a closed door but fair

access, getting back to the process concerns. It's neither practical nor prudent for commissioners to avoid all ex parte contacts. We simply cannot schedule an en banc argument in every case, nor are there enough hearing rooms or commissioners to do so. But we need to make inquires of the parties, and I think under the sunshine -- the proposed assigned commissioner's ruling under the sunshine rule -- we can create such a rule.

And I think that the key flaw in the bill, though, is the misperception that all our proceedings are like licensing hearings. We need to get this input. We need to do this in our kind of unusual situation where we're somewhat legislative in nature, somewhat judicial, and appointed by the executive branch.

For example, in the recent Camp Meeker Water case, the Supreme Court reaffirmed that utility ratemaking by our Commission is fundamentally legislative in character and not adjudicative. Thus we have a legitimate need for communication with the parties on policy determinations. And I think you heard in Panel I an interest to have that type of communication. But what's important -- what's more important than denying access...

MR. DAY: ...came up with that _____ California Supreme Court.

SENATOR DAVID ROBERTI: The Supreme Court?

MR. DAY: Yes.

MS. ECKERT: A recent one. What's more important than denying access is to ensure fair access, and our proposed rule would do that. And that gets -- it returns once again, Senator Rosenthal, to the process issues that we've talked about. We thought about this a lot. We've given this a lot of thought, and it's a good-faith setting forth of the rule that we intend to put into place. So also we feel that the flexibility to craft our own rules for specific cases -- as you know, we've created a strict ex parte rule in the Edison merger case. This is working. It prohibits the parties from communication with decision makers. In certain cases of this type of -- or of this importance where less policy and more adjudication is at stake, such rules may be preferable, but we would certainly like the -- be allowed to make that judgment rather than suffering from these very restrictive rules.

Let me just comment for a moment on the role of the ALJs, if I may. We also strongly oppose the provisions of SB 1042 with respect to the ALJs. By making ALJ findings of fact binding on the Commission, this bill would take the ultimate authority for decision making and policy making out of the hands of the commissioner and place it in the hands of the ALJs. They are not constitutional officers. They're not entrusted with the authority to regulate utilities, but the commissioners are. There's no system of government that we're aware of that would grant the authority to civil servants unaccountable to either the electorate or the executive branch, yet our cases are so complex that the legal standards for reasonable of rates so strict that the power to

make binding findings of fact equals the power to determine the outcome of the case.

CHAIRMAN ROSENTHAL: Now let me just break in, okay. And I have told commissioners this forever. They have to make the final decision, but if in fact ALJs are in fact directed as to the results that should be obtained, which has been said on and over and over again, okay. See, I don't have a problem with an ALJ listening to the testimony, making some recommendation. That ought to be available at that point for comment.

If the commissioners want to disregard it completely and make another decision, that's fine as far as I'm concerned. That's their responsibility.

MS. ECKERT: (Inaudible)

CHAIRMAN ROSENTHAL: Okay. But if in fact something has changed -- so now the ALJ's decision does not get exposed to the light, goes to the commissioner first, gets modified and then is exposed to the light, I'm not sure that we're getting what we ought to be getting.

MS. ECKERT: Mr. Day indicated he'd like to respond to that.

MR. DAY: I would just like to respond, Senator, that as your own committee's background report for this hearing indicated, there's statutory evidence to the fact that the ALJs were never intended to have an independent decision they created all on there own, but were in fact assigned to assist the commissioner in hearing the cases. That's Section 310 and 311. Your own people have mentioned that it can be interpreted both ways.

The historical practice of the Commission is very obviously that the assigned ALJs are there to assist the commissioners in preparing a decision. Now the fact that the ALJ's proposed decision is now published for comment is a fine procedural reform, but we would say that does not necessarily mean that there can be no communication between the ALJ and the commissioner.

CHAIRMAN ROSENTHAL: No, no. Tell me what's changed in the last two years or three years.

MR. DAY: Nothing. The procedure is exactly the same as it's been.

CHAIRMAN ROSENTHAL: Not exactly the same. Not the same. We've heard from ALJ's that it's not the same. We've heard from people who had testimony before ALJs in which something else happened. It's not the same. I don't know what took place that changed.

MR. DAY: If people have communicated that they're unhappy with the relationship -- the working relationship -- between an assigned ALJ and the assigned commissioner, and that that's somehow new, they're simply not aware with how the Commission's been practicing since 1912, because that is a long-standing practice.

CHAIRMAN ROSENTHAL: And no ALJ's decision was public before it went to a commissioner previous to the last three or four years?

MR. DAY: Well, before Section 311 was amended to include the publishing of an ALJ's decision, that's correct. There were no proposed decisions published either by the Commission or by the ALJs. That is new. That is a new statutory change, and of course, we're complying with that.

MS. ECKERT: With Section 311 it is working. As a commissioner and with two years of experience, I have -- in none of the cases where I've been assigned commissioner have I ever had a problem with an ALJ. We'll sit down. They'll say, here's my game plan. I say, you hear the evidence. Let's take a look at the record. Write your decision, and we team play it. And I have not had any of those problems. I don't know where those complaints are coming from.

CHAIRMAN ROSENTHAL: Madam President, you may not be the problem.

MS. ECKERT: Well, I'd sure like to be part of a solution where we get to keep some ability to...

CHAIRMAN ROSENTHAL: And I'm trying to get you to be part of the solution.

MR. DAY: Well, the thing I would say about SB 1042 that you do have to realize is that it goes so far in that direction that if you do allow ALJ findings of fact to be binding on the Commission, you have...

CHAIRMAN ROSENTHAL: I don't want it to be binding. I don't want them to be binding.

MR. DAY: Then if all you're looking for is an advisory opinion as to what the ALJ thinks should be in the findings, in fact we're at that situation now. The commissioners do not dictate findings of fact and conclusions of law in proposed decisions. The vast majority of them are prepared by the ALJs in the course of the hearing. Commissioners are looking at policy perspectives at that stage of the proceeding. And to characterize it as the assigned commissioners dictating every little individual _____.

CHAIRMAN ROSENTHAL: Not every little...

MR. DAY: That's not the case.

CHAIRMAN ROSENTHAL: Come on. You're really begging the issue here. It is not that they outline every little bitty part that comes out. But commissioners have -- ALJs have said to us, and it's no secret -- some of them may not be there anymore because they were forceful enough to make their opinions known. But something has changed in the process, and I'm concerned about the process. I'm not concerned about the decision, either the ALJ's decision or the commissioner's decision. That's the commissioner's responsibility.

MR. DAY: Well, then I would think the key issue would be whether or not the initial findings were drafted by the ALJ or the assigned commissioner when the Commission issues its final decision. If there is evidence in the record to support

the findings adopted by the full Commission, as far as the Supreme Court is concerned there will be no review of findings of fact. The Commission's discretion will be upheld. And that has not changed.

MS. ECKERT: And just one other thing, Senator, and I hope you'll be sympathetic with this. But the imposition of criminal penalties to me is so unduly harsh. I mean, I'm really taking my public service job seriously. I'm -- you know, and it's a high honor and a privilege. But it is really harsh to be thinking that, you know, you're facing a criminal penalty for -- that's written into this. It has a very chilling effect on communications, and I just don't think that in the legislative aspect of what we do that it's fair to us to do that, so...

SENATOR ROBERTI: We'll look into that.

MR. DAY: The last thing I might add if I could is with regard to the calculation of how many appeals there would be. I think it is an important point. Mr. MacBride noted his calculation, but he never totaled it up. And our calculation of his total would be over 100 appeals heard by the Court every year versus the four or five currently heard. Our estimate is if there were an automatic right of appeal, that at least half the aggrieved litigants would take them up, and we'd be looking at 200 to 300 appeals heard all the way through each year, which is, you know, a vast, vast increase in litigation.

CHAIRMAN ROSENTHAL: There's no question that would be out of -- I, you know, something -- the Legislature -- I deal with the Air Resources Board, the California Energy Commission, the Department of Health Services, other state agencies and commissions that make billion-dollar decisions affecting California industry, including utilities. And their decisions are received at a lower court, not the Supreme Court. And there have not been that many cases.

MR. DAY: They're discretionary reviews, I believe. Are they not? The vast majority of the other agencies that we surveyed are all discretionary review, not mandatory.

MS. ECKERT: This is different.

MR. DAY: This is a big, big change...

MS. ECKERT: Very different.

MR. DAY: ...and it's the same thing that's put FERC in the waste basket for six years.

CHAIRMAN ROSENTHAL: Well, you would support discretionary review by a court?

MR. DAY: I would not support any change in the present procedure, but the automatic appeal is much, much worse, which is how it's written now.

CHAIRMAN ROSENTHAL: You're talking bills and not issues, and that's different. How does one get an issue looked at if the court won't take it?

MR. DAY: Our position is...

CHAIRMAN ROSENTHAL: I'm not talking about the winners and losers, I'm talking about policy.

MR. DAY: I understand that. We think you're getting the same amount of opportunity for review as other state agencies at the present. And if the statutory scheme is balanced in favor of quick decisions by the court, one way or another, to provide certainty in the regulatory process, and that overweighs the concept that everybody should get a chance to go to the court in every single case.

CHAIRMAN ROSENTHAL: How many states have another system that goes only to the supreme court in their state? Can you tell me?

MR. DAY: I believe there are several. There were several back when Thelen did his study, but I do not know the numbers. We can provide that information to you.

MS. ECKERT: (Inaudible)

CHAIRMAN ROSENTHAL: Yeah, I wish you would...

MR. DAY: Sure.

CHAIRMAN ROSENTHAL: ...because it's my opinion that there aren't very many, and there aren't very many for a reason. The supreme courts are not the court that ought to be deciding those particular kinds of issues. And I'm not talking about the winners and losers. I'm talking about policy which changes as a result of going from monopoly system to a deregulatory system in which we are supposed to be creating competition. But it's kind of interesting that the kind of -- that the people that we have created to create the competition are the ones who are saying, it might just as well have been a monopoly.

MR. DAY: Well, you aren't hearing from all the competitors, and I think that's an important concept to remember as well.

CHAIRMAN ROSENTHAL: Okay. I'm prepared to have another hearing, and you name the people who ought to be that we didn't select and I'll be willing to listen to them. It just seems to me that what may have been -- and I'm not suggesting that certain things are not good for long periods of time, but going from a monopoly system to a different kind of a system in the last eight or 10 years, basically, means that something needs to be changed in order to release the pressure that begins to build up in these various kinds of decisions.

And so anything further that you would like to...?

MS. ECKERT: No, sir.

CHAIRMAN ROSENTHAL: Any comment _____?

SENATOR ROBERTI: No, except on the SB 1041. Just to reiterate the point that Senator Rosenthal is making, is that the Supreme Court is so inundated with court cases, death penalty cases occupying the Court's time to an inordinate degree. There's

just no judicial review without...

MR. DAY: The one thing I might...

SENATOR ROBERTI: ...without appellate. That's why I was persuaded to put the bill in.

MR. DAY: I understand your concern, but I would say if you look at the records over a number of years -- and we can provide them -- the Court isn't taking any less cases than it did before there were the mandatory death penalty appeals.

MS. ECKERT: Also...

MR. DAY: It's not a significant, to our view and our discussions with the Judicial Council's people. They're not relying on the workload issue anymore.

MS. ECKERT: No. In fact they basically unburdened themself of the biggest problem. Those were lawyers that were being disbarred. And there's now been a whole new appeal court, State Bar court set up to handle those. And the PUC issue got put in with the number of lawyers case, disbarment cases that they were having to hear. And now that that's out of the way we're not hearing any of those kinds of complaints from the Court any more. And I think they do a really fine job on the ones that they do review.

CHAIRMAN ROSENTHAL: Did I hear a witness -- maybe I misunderstood -- indicate that there was a case that the Court decided, but you haven't been following it? In 19...

MR. DAY: No, that was a representation about the CTA case and the definition of -- or rather, the interpretation of Section 1708 on petitions for modifications. And we would strenuously object to the notion that we do not comply with that statute. We do. They have a different interpretation about what procedures that statute requires, but we believe we're following the Court's decision.

MS. ECKERT: And also, with respect to Mr. DiVirgilio's comment about the pricing of gas, I think that that is -- again, it's an interpretation, and if they don't get the price that they want then they figure, well, there's something, you know, there's something wrong. We'll go around and we'll show them how it's done and we'll take that tack if they don't get what they want. So again, you've got more of that winners and losers. And the losers now have more money than they used to have, apparently, because they really -- you know, they put as many lawyers behind this as the winners do.

CHAIRMAN ROSENTHAL: Okay. Thank you very much.

MR. DAY: Thank you.

MS. ECKERT: Thank you for the chance to testify.

CHAIRMAN ROSENTHAL: Panel III: Pacific Gas and Electric, GTE, Pacific Bell, and Southern Cal Edison. Okay, I didn't have the names of the people who were going to represent -- oh, I'm sorry. Okay. Roger Peters; Chief Counsel for Pacific Gas and Electric Company.

MR. ROGER PETERS: Thank you. My comments will be reasonably brief. I guess responding to your request for a conceptual approach, I'm struck by the fact that the reference today has been to the fact that the utility industry is moving towards less regulation, deregulation, affecting competition. And yet the three proposals for a new review process, for an ex parte rule and ALJ independence, seems to be to translate into greater judicial review, limiting the flow of information to decision makers at the Commission who are making the decisions on the direction, and putting control of the decisions -- at least certain decisions -- in the ALJs. Seems to me that there is a wide mismatch between the direction in which the Utility Commission needs to go and where these particular three components are going.

That raises, I think to me, the question of what the process here. Is it a judicial process or is it a legislative process? Commissioner Eckert mentioned the Camp Meeker case in which the Court clearly said, this is a legislative model.

What's a legislative model? Many of the cases that the Commission deals with are cases which are not adjudicating past rights. They are adjudicating or they are discussing the future. They are forecasting where the price of energy is going to go, where rates should go. That is clearly a legislative process. That is not a process in which you want to use a judicial model which puts the blinders on, looks at the facts as stated historically, and adjudicates the rights of individuals based on those facts. That's the wrong model for where this industry is going. This industry needs to open up its blinders, look at the future, try to project what's happening, and have a Commission with full information make decisions on what is in the best interest of the ratepayers and the utilities in this state.

CHAIRMAN ROSENTHAL: How does FERC affect you in that respect?

MR. PETERS: The same situation; that is, there is an ex parte rule at FERC, but I believe FERC is having some problems with that ex parte rule in terms of legislative -- or in terms of judicial review...

CHAIRMAN ROSENTHAL: What are the problems that they're having?

MR. PETERS: Well, as I understand it, on the next decision conference FERC is considering modifications to its ex parte rule in part because the fact that the administration -- particularly the President, President Bush -- is concerned about his ability to communicate to FERC on matters of importance to FERC. So we're dealing again with a situation...

CHAIRMAN ROSENTHAL: Wait, wait. They're going to change their rules because they want the President to influence their decisions on something? Is that what you're talking about?

MR. PETERS: I can't presume what they're doing. I understand that that is an agenda item. And there is a question as to whether or not the legislator (?) or the

executive branch should have the ability to communicate with decision makes on matters of policy. I believe the courts generally have felt that there should be that ability to communicate. So I think to the extent that FERC is looking at those models, maybe they're facing some of the problems that we're trying to avoid which might be created if these bills were enacted.

CHAIRMAN ROSENTHAL: Utilities have to deal with ex parte all over this country in their PUC's or their energy commissions or -- I'm trying to figure out why we are something special in California in this respect. If all the other states have some sort of an ex parte in law, what -- how do they deal with it?

MR. PETERS: Well, I don't believe all the states have ex parte rules in law. And to the extent that they have ex parte rules, at least I suspect that they are more broadly the sunshine rule that Commissioner Eckert referred to. That is, they allow communication to occur, but they allow equal access to communication.

CHAIRMAN ROSENTHAL: Yeah.

MR. PETERS: This particular bill does not allow communication to occur. It closes communication down entirely. It shuts it off.

CHAIRMAN ROSENTHAL: I don't want to talk to these bills. I want to talk about a concept of what makes sense. If you're saying, for example, we need sunshine, and I heard the President indicate the concept, what's wrong with putting that into law?

MR. PETERS: Well, I think this bill doesn't put sunshine in law.

CHAIRMAN ROSENTHAL: How do you utilities deal in Florida where they just have a very strict ex parte just put in?

MR. PETERS: I don't know.

CHAIRMAN ROSENTHAL: Think they're going out of business?

MR. PETERS: I hope they're not.

CHAIRMAN ROSENTHAL: So do I.

MR. PETERS: All I can say -- I mean, getting back to the approach, if their ex parte rules operate in the way this legislation would, I suspect that they're going to have problems; not only the utilities, but other parties who wish to change the structure, who believe that something else ought to happen that's not happening. I mean, ex parte does open access for both individuals.

In terms of the scope of review, I guess I would just like to comment. There's been some reference that there aren't major cases considered by the California Supreme Court. I beg to differ. P.G.& E. has a very large nuclear power plant that the Supreme Court heard a case and issued a decision on the interim ratemaking that was authorized. That was a billion or multi-billion dollar case to us.

CHAIRMAN ROSENTHAL: When was that?

MR. PETERS: That was in, I believe 1987 or 1988. That was on the interim

ratemaking. That case was heard by the Commission.

Similarly, the Commission did issue its decision on the settlement, Diablo Canyon. We believe that was a good settlement. It puts us at risk if that plant doesn't operate. And that particular settlement, parties briefed that to the California Supreme Court, that they felt that the procedures there were appropriate. It's not that the Court ignored it. The Court looked at the briefs of both parties and they decided that there wasn't an issue that was meritorious for consideration. I don't believe it's fair to make the leap in judgment that that was no review. So I think the standard review is different than it has been represented here.

In terms of what happens if you change it, there's nothing to lose. You appeal everything. Appeal as a matter of right. That's not a situation that I think enhances the policy of this state. The references as to the number of cases -- I suspect 200, 300 -- that's probably a good estimate. Certainly there's nothing to lose if you do it.

Just make a couple of other comments. In terms of ex parte, as I said, I believe that you need to open communication. Most of the rules, at least a concern that we would have as to any rule or any statute, would be that it applies to all parties either way in all directions.

Finally, as to ALJs: Again, I guess I close on a note of irony. It seems to me that in a discussion as to whether or not there should be greater judicial review, to enact legislation that says absolutely whatever the finding of fact of an ALJ is shall not be reviewed by the Commission, if it's not reviewed by the Commission it's hard to believe it would be reviewed by the Court. That seems to me to go in the opposite direction.

Thank you.

CHAIRMAN ROSENTHAL: Let me just ask you something, because...

MR. PETERS: Excuse me.

CHAIRMAN ROSENTHAL: I'm sorry.

MR. PETERS: There is one other point I wanted to make. You referenced the California Energy Commission. I would just draw your attention to the fact that Public Resources Code Section 25531 provides that judicial review of a licensing matter or certification of a utility power plant is directly to the California Supreme Court, the exact same rules as the Public Utilities Commission appeal.

CHAIRMAN ROSENTHAL: One of the things that we hear about, and it's kind of an interesting expression, and I'd like to know if somebody has some comment. There's the concept of the fifth-floor decision, or the fifth-floor approach. Tell me what that's about. Have you heard that? Has anybody heard that?

MR. PETERS: Well, all decisions are made on the fifth floor.

CHAIRMAN ROSENTHAL: Oh, okay. Okay. Not on one-on-one basis?

MR. PETERS: Pardon me?

CHAIRMAN ROSENTHAL: Is that where somebody can walk up to the...

MR. PETERS: I believe decisions made on the fifth floor and announced in the Commission -- in the open Commission's decision conference based on any discussion at that point.

CHAIRMAN ROSENTHAL: Okay, thank you very much. Let's see: Bruce Jamison.

MR. BRUCE JAMISON: Senator, I have some prepared remarks.

CHAIRMAN ROSENTHAL: Fine.

MR. JAMISON: Senator Rosenthal, Senator Roberti, my name is Bruce Jamison, representing Pacific Bell. Many of the parties who have spoken so far have taken positions which are similar to Pacific's, and I won't repeat what they have said in a very eloquent way.

CHAIRMAN ROSENTHAL: This will make part of -- so if you'll just kind of tell us.

MR. JAMISON: With the exception of ex parte, Pacific is opposed to the positions that are outlined in the bills as they are written. And in the case of ex parte we oppose it as well, but we are certainly in favor of ex parte rules. We have been on record publicly to that regard in the past in hearings before your committee -- December of 1989, I believe.

But I concur with President Eckert and with the preceding speaker that the ex parte rules as described in your bill are draconian in nature and would close off communication rather than provide sunshine, particularly when we deal with a quasi-legislative type process at the PUC. Disclosure is certainly a welcome item, but cutting off communication is not welcome.

As to the issue of appeal, the issue of trial de novo as spoken to earlier is of grave concern to Pacific, and I would second the comments that have been made by previous speakers to that regard.

And finally on the ALJ issue, the issue of whether or not ALJ decisions have an opportunity to be commented on by the public seems to have been overlooked, although Mr. Day pointed that out very clearly. There are very specific comment cycles outlined in the Commission's own rules in which -- under which if a party feels that there has been an error in the proposed decision, that is the opportunity to bring it to the attention to the Commission. And the Commission does not vote on the decision until after those comments are in.

With those in mind, noting the hour, I think that it's been said well by others.

CHAIRMAN ROSENTHAL: Thank you very much. Ken Okel.

MR. KEN OKEL: Yes, Mr. Chairman, my name is Ken Okel and I'm...

CHAIRMAN ROSENTHAL: I'm sorry about the pronunciation.

MR. OKEL: It's common. I'm Associate General Counsel for GTE California.

A lot of our concerns, I think, were very well summarized by Commissioner Eckert in her presentation. I would like to perhaps -- you were asking for some information about perhaps ex parte laws in other states, and I can speak only of one state in which other than California in which I've been involved in a case, and that's the State of Washington which has a rule which says basically that all the commissioners must attend. They have an ex parte contact rule, but offsetting that is a rule which requires all the commissioners to attend every hearing in every case that's before it; or if they don't attend a hearing they are required by statute to read the transcript of that hearing each day. Given the incredible number of matters that are before this Commission, I think that type of rule would be unfeasible in California.

And I think, given the length of the proceedings, the complexity of the proceedings, there is a need to have some communication between the utilities and the commissioners and other people to talk to commissioners. And I think the -- we support some sort of ex parte rule, and I think what's going to take place before the Commission is a good idea.

You are suggesting that these type of rules properly belong in statutes so some later Commission doesn't change the rule. I would suggest that type of rigidity is not really particularly useful in the long-term situation. I think you need some flexibility to allow rules to adapt; as new information comes to the Commission's attention, it can be incorporated in the rules. If there is a rule in effect, obviously, that rule would be available for inspection by the Legislature. You would have some -- as part of perhaps your oversight role to just see what's going on, and you would know and could ask questions should they -- concerns arise.

Getting back to the appellate review bill, we are -- like the other parties who have been opposing this legislation, are quite concerned with the impact this might have on getting cases decided which are quasi-legislative in nature. And that's really the application proceedings, the investigations, and this type of proceeding. From our own experience, we have cases that go -- and our last, when we were in the rate case mode, we have 95 days of hearings in a 1988 rate case which still hasn't been finished. We had 61 days of hearings in this new regulatory framework investigation.

So I think one thing you should keep in mind in this legislation is to realize that California in many ways is very different from other states. I don't think there's any state in this country that has so much up-front openness in its PUC-type proceedings in terms of receiving and developing a very extensive and exhaustive evidentiary record. From talking to my counterparts who work in other states, a rate case can be decided in two weeks in other states. In California that's -- that would be unheard of. There's just a lot of input that the Commission receives in carrying out its quasi-legislative

functions. So when you get down to the time a decision is made, you have a very, very full and complete record.

So our concern is if you go through this lengthy process, you have a year of hearings, and then you go ahead and have additional years of appellate review of an automatic right of appeal, and then people challenging that and going to the Supreme Court, you'll never get things resolved. You're going to have cases that are pending for years and years and years, and I think that is not in the public interest. You got to close -- get closure at some earliest possible point. I think Commission Eckert stated the process going directly to the Court is an excellent way to -- Supreme Court -- is the excellent way to do that.

We were concerned about one provision of the bill concerning the standards for judicial review and quasi-legislative proceedings. It seems to me the way the bill is currently written that you have a substantial evidence test to justify any action made by the Commission. That is far different from the standard that the courts have used in California consistently regarding review of quasi-administrative type decisions. The standard there has always been whether the courts -- the decision of the agency is arbitrary, capricious, or entirely lacking in evidentiary support.

And I just cite you the case of Pitts vs. Perless at 58 Cal 2nd, Page A-24. And that's discussed at page A-33. And this doctrine has been around for many years. There's no -- for quasi-legislative decisions you don't have a substantial evidence test.

And think it was interesting, just going back to Panel I's comments: It's from the comments that were made there, the concerns that were expressed by some groups (?), and I'll use TURN in particular about certain Commission action, in that in effect what they're asking that they want the courts to do is to be a quasi -- or super Commission to review the policy decisions adopted by the Commission. She used examples of the new regulatory framework case, the rate of return earned by AT&T, and some other proceedings; the P.G.& E. settlement agreement.

They're asking for the -- what they're looking for the courts to do is becoming a body to challenge the policy determinations made by the Commission and to second guess the Commission, if you will, not necessarily from a legal point of view to decide if those policies are good for the State of California. And I submit the California Commission as a constitutional agency is the body who should be making those decisions. The courts should be looking at decisions if at all from the point of view of a leg(al) -- whether they've followed, they've met the legal requirements that apply.

In the case of -- there's standards where they look at the evidence independently, if constitutional rights are involved. And if they're not constitutional rights, then you have to look at the arbitrary, capricious nature of decisions, a very limited type

of review in those type of quasi-legislative type decisions.

Again, I think those really are the substance of our comments. Again, I think we generally -- are in general agreement with, I thought, the very carefully thought out comments of Commission Eckert and Mr. Day and the views expressed by some of the other panelists on this Panel III. Thank you.

MR. JAMES LEHRER: Thank you, Chairman Rosenthal. In view of the time I will try and trim my prepared marks down as much as I can, as well. There are a few remarks that were made earlier that I would like to respond to if I may.

CHAIRMAN ROSENTHAL: Fine. Okay. If you have written testimony we'll accept that as part of the record.

MR. LEHRER: Well, I would like to work into it...

CHAIRMAN ROSENTHAL: Fine. Okay.

MR. LEHRER: ...my response to some of the earlier comments I heard, if I may.

Edison appreciates the opportunity to comment on Senate Bills 1041 and 1042. We oppose both of those bills because we believe they would impair the Commission's ability to render timely and informed decisions. We see no benefits to the regulatory process that would offset the detriments that the bill would cause.

Let me first note a few comments with respect to SB 1041. It would not -- and it's been said before, but it bears reiterating -- relieve the Supreme Court's workload. Quite the contrary, it would increase the workload of the state's appellate system in general, including that of the Supreme Court, because once a party has filed a petition with a lower court of appeal it's a simple matter if they get a decision that's unsatisfactory to slap a new cover on it and try it before the Supreme Court. It doesn't cost that much more in terms of dollars and lawyer input. But it certainly would cost that much more in terms of time to the parties who are looking for finality to the decision.

In the meantime, the final resolution of ratemaking decision involving hundreds of millions of dollars and major policy determinations of the Commission would be delayed. And the state's statistics indicate that just on appeal to the Court of Appeal, those delays would be on average 18 months. Major utilities have general rate cases every three years; cost of capital adjustment every year; fuel clause proceedings in the case of energy utilities every year. And appeals of right to the Court of Appeal causing delays on the order of 18 months each could cause three of these cases, for example, to stack up so that you could have an amount in jeopardy of, in Edison's case, an amount equal to Edison's total annual earnings -- $700 million. You stack up a general rate case, a fuel clause proceeding, and a cost of capital proceeding, you could easily get that much money in jeopardy.

Now, just to put that in perspective, you and I would be hard pressed to plan for

the future if we new that our whole annual income was going to be suspended or put in jeopardy. Similarly, utilities' ability to plan is going to be severely hampered by the imposition of that kind of delay and uncertainty. And this Legislature recognized that in 1911, and the need for prompt and effective regulation is no less important today than it was back in 1911.

I'd like to turn to SB 1042 for a moment. It seems to be that the thought behind that bill loses sight of the fact that the Commission, not the ALJ, has the duty and authority to set policy and to make decisions and findings of fact and conclusions of law. It would make the ALJs a driving force in setting policy, and it would substantially diminish the Commission's role in establishing policy.

As far as the ex parte communications between commissioners and the ALJ until the draft decision has been issued, that bill again confuses ALJs with civil judges. The ALJs are not members of the judiciary. They're merely hearing officers. They are accountable to the Commission. The public interest would not be served by barring communication between the ALJs who must implement the Commission's policy, and the commissioners who must set that policy.

The ex parte rule that's proposed in SB 1042 would make members of the Commission less accessible. The intent of the ex parte rule may be to improve the regulatory process, but we don't believe it would accomplish that objective. Openness and accessibility are essential for effective regulation. I'm sure that the legislators recognize the importance of talking directly with their constituents and finding out what's on their minds without the filter of an institutionalized, legalized process.

Of equal importance to the Commission is a direct understanding of the concerns of their constituents and of the many complex issues which they must consider in establishing the state's energy policies. The Commission is not and should not be a court. Just as legislators here reach out in an effort to understand the issues before them and to craft informed solutions, the Commission should be allowed the same flexibility in the conduct of their legislative -- quasi-legislative functions.

In addition, we see the institution of an ex parte rule as a step in the direction of increased formality and heightened barriers to communication at a time when the Commission is working very hard to be a more open, accessible forum for the average person to participate in. We think they've been successful in the past two years in doing that, and we think that Section 1042, particularly with its criminal sanctions, sends the wrong signal.

In conclusion, we think that these bills would detract from rather than contribute to the effectiveness of utility regulation. And finally I would note that of the six concerns that are identified in the package that was distributed prior to this informational hearing, three are not even addressed. We met with members of the

legislative staff to discuss those, and I participated in the sort of the kick-off meeting, if you will, where we heard some of the original concerns expressed by the new competitive players. And the concerns that they seem to have, including the conduct of workshops and the timing of Commission proceedings, are things that perhaps could be more fruitfully explored in Commission rule makings than the imposition of these rules, which we don't believe would really address the kinds of concerns that the parties have expressed.

In addition...

CHAIRMAN ROSENTHAL: Would you sum up, because you're repeating some of the same things that have already been _____.

MR. LEHRER: Yes sir. I'm almost done. I'd like to point out that Mr. MacBride called for, to quote, decisions of the Commission explaining why the Commission was correct in all respects, unquote -- if my notes captured his words correctly. And I think that it's very clear that what he is representing here is a judicial model of regulation, and I agree completely with Mr. Peters' comments that that is quite inappropriate to the task the Commission has before it. And it's not surprising to me that a private attorney would be more interested in a judicial model and take their chances with the courts than relying on the expertise of the Commission.

Similarly, I would note that Ms. Krause also clearly, explicitly stated that she wanted the courts to review the merits of CPUC decisions. So if you're talking about reviewing the Commission process, I think you're not in sync with what some of the other parties here are suggesting. They want the Commission decisions reviewed on their merits. So let's make no mistake about it. The number of appeals and the extent of the appeals would be very, very great.

CHAIRMAN ROSENTHAL: My concern is not the winners and losers. I've expressed that many times. I'm concerned about the process. And I must say that it would be difficult, in my opinion, for a utility to take the PUC to task for anything they did in terms of the process. And I understand that.

At the same time, hearing from all of the others, those who were here and those who were not here, indicate that there is some kind of a problem. And maybe -- it kind of disturbs me that because there's a bill we now have sunshine, whatever that means. And I have no problem with sunshine. But if the bill goes away, does the sunshine go away? See, I don't know the answers, really. And because of the number of groups that have been concerned about the process is the reason that I'm even interested in the subject matter at all.

I have to tell you that there are no secrets around Sacramento, okay. And when something happens, it spreads pretty quickly. And we hear about them, and what I'm trying to get to at some point is how we put out the smoke that's all over the place in

terms of the process. When somebody says, you know, you've got -- I need a decision by this date, and that may be difficult for anybody, then I wonder, you know, why that's done. And I'm not suggesting that there isn't enough -- that you shouldn't have enough time to make your case or whatever it happens to be. But almost no one can compete with a utility that doesn't want to give up something, if you understand what I'm saying.

MR. LEHRER: I do, Senator, but maybe I've been in the trenches too much these past 10 years, but I've got the scars all over me to show me...

CHAIRMAN ROSENTHAL: I understand.

MR. LEHRER: ...that there's a great deal of -- a great deal of advocacy and give and take. The utilities are not always the winners by any stretch. And we're as committed to having an effective PUC process as anyone.

CHAIRMAN ROSENTHAL: I am too. And if in fact these hearings -- and we'll probably have some more -- if they push us in the direction of the process being cleaned up so that people feel they've gotten a fair shake, then I'm really not concerned about somebody who lost something. But if somebody lost something because they didn't have enough time to present their case or because their attorney had to work on Saturday and somebody else's had more attorneys that could fill in for somebody who didn't want to work Saturdays, then those are the things I become concerned about.

Anyway, I thank you very much.

MR. LEHRER: Thank you.

CHAIRMAN ROSENTHAL: We now have...

MR. JAMISON: Senator, I'd like to add one comment here. In my discussion of the issues here I talked about ex parte. I think we've seen a display on the part of the Commission of a willingness to undertake a review of those rules, and we ought to let that process work; let them work out those ex parte rules. The issue may have been raised here in the past, but certainly this Commission is moving in that direction. And again, Pacific supports that move.

CHAIRMAN ROSENTHAL: I am pleased that they are moving in that direction, and I want to thank the President for that movement. It seems to me that once she or they decide what it ought to be, then we ought to have some law which says, that's what you've got to do.

MR. JAMISON: Well, I think...

CHAIRMAN ROSENTHAL: I'll tell you something. Otherwise, it changes. It will change every time there's a new Commission or a new president, and that's not what ought to happen. If it's good then it's good. And if it's not good it's not good. If it doesn't work we'll change the law. We do that all the time.

Anyway, I want to thank the participants. We now have an open microphone available

for short comments. Nobody's going to read a long statement. If anybody in the audience would like to come up and make a one-minute comment about anything, you have the ability now to do that. Just identify yourself and in one brief statement tell us what you think.

MR. DAN BAKER: My name is Dan Baker, and I represent the Ad Hoc Carriers Committee. And I probably...

CHAIRMAN ROSENTHAL: The Ad Hoc what?

MR. D. BAKER: Ad Hoc Carriers Committee.

CHAIRMAN ROSENTHAL: Carriers Committee. Okay.

MR. D. BAKER: And we participated in all the major PUC general freight rate cases. In fact the Commission in 1986 adopted our program for the regulation of all general freight rates in California. I have experience before all courts in the United States, appealing from regulatory commission decisions. I have had no trouble whatsoever going to the U.S. District Court, three judge court; I've gone to the Circuit Court of Appeals, United States Supreme Court. We do not have any problems. But we do have problems with the procedure of the California PUC.

You asked for a specific example. We had 58 days of hearings in the last general freight case. You could look at that decision and you'll find -- very pressed to find any reference to the factual information that's presented in that proceeding. However, eight months after the case was closed you'll find the key element: the variable cost price floor, or minute rate. It was not mentioned. It was not discussed. It was not introduced in that proceeding, but that most important element of the whole decision came up eight months after the case was submitted.

Not only that, but you had -- under the Commissions' regulations you're supposed to have findings of facts and conclusion. On this important element there were no findings of facts and conclusion because there was no discussion of the matter. The statutory provision ...(TAPE TURNED OVER)... to the public and to the Commission with regarding to filing common carrier rates and tariffs. The Commission changed that to 10 days. And there're other elements to that decision. I appealed a case, and I've -- people say they got one. I got three votes, but close is only good in horse racing, nothing else.

CHAIRMAN ROSENTHAL: Horse shoes.

MR. D. BAKER: Now, with regard to the fear of these rate cases, I was going to bring an article that was in the paper about six months ago when the Commission bragged that there were no major rate cases considered in 1990. And the reason for that is they set up formulas that are voiding their duties to set rates. The rates are not set by the Commission any more. They're set by the utilities, by the carriers.

CHAIRMAN ROSENTHAL: Thank you very much.

MR. D. BAKER: One last statement. With regard to the Commission's proposed rules of ex parte: Look at them. They are not ex parte rules that are going to curb anything because it eliminates the rules case. It eliminates the investigation cases, the most important cases that the Commission considers.

Furthermore, the ex parte rule is only triggered after the case is submitted. It can go on for a year or six months, and all during that time the matter is wide open for ex parte communications. And only when it's submitted does it become effective. If there's going to be an ex parte rule it's going to have to come from the Legislature, not the Commission.

CHAIRMAN ROSENTHAL: Okay. I think that that's one of the things we ought to look into and question. As a matter of fact, I'd like to get an answer form the President. I wish they had stayed around so the PUC could have heard these comments.

Be interesting to take a look at what that ex parte -- what it doesn't do.

MR. D. BAKER: Your honor, it's rather simple. Look in the first paragraph, about four lines, and you'll come to the same conclusion.

CHAIRMAN ROSENTHAL: Okay. I thank you very much for that comment. Yes sir.

MR. STEVE BAKER: Mr. Chairman, Steve Baker with Aaron Read and Associates representing the Association of California State Attorneys and Administrative Law Judges. We represent the administrative law judges that work at the PUC, and would like to indicate our support for both SB 1041 and 1042. We also appreciate your ongoing efforts to provide some reform at the PUC, and we look forward to working with both you and Senator Roberti on the successful passage of these measures.

Thanks again.

CHAIRMAN ROSENTHAL: Thank you very much. Anybody else? Quickly -- one minute?

Thank you very much for coming, and we'll be continuing with the hearings at some point.

--ooOoo--

COMMENTS OF TOWARD UTILITY RATE NORMALIZATION

ON SENATE BILLS 1041 AND 1042

April 9, 1991

Toward Utility Rate Normalization (TURN), the only statewide residential consumer group that regularly participates in proceedings before the California Public Utilities Commission (CPUC), strongly endorses the basic thrust of Senate Bills (SB) 1041 and 1042. We support SB 1041 essentially as is, and could support SB 1042 if it were amended to address certain concerns noted in our written comments, which we are submitting today.

The need for comprehensive procedural reform at the CPUC has never been greater. While process-related problems have been most severe in the telecommunications and transportation industries, similar concerns are arising with increasing frequency in the energy area as well. The seriousness of the situation is compounded by the virtual absence of any real judicial review.

In TURN's view, the single most important aspect of the bills before you is the provision for Court of Appeal review of PUC decisions. This element is crucial, because the existence of an effective review mechanism will go a long way toward restoring the Commission's own sense of self-discipline. With virtually no significant court review over the last decade, the Commission has been able to "get away with" poorly reasoned and procedurally defective decisions.

The mere presence of an effective review mechanism will deter this disturbing trend toward arbitrary, and sometimes even sloppy, decisionmaking. Of all the potential changes that the Legislature could enact, this one clearly offers the greatest "bang for the buck."

The Supreme Court's reluctance to review more than a handful of CPUC decisions over the last decade, while perhaps understandable in light of the Court's workload, has nonetheless been extremely frustrating to parties such as TURN who have sought to appeal major Commission decisions with broad public impact. Some of our unsuccessful attempts to obtain Supreme Court review have included challenges to CPUC decisions that:

1) Approved a contested settlement of the Diablo Canyon nuclear powerplant reasonableness review and adopted a price formula for Diablo generation that has resulted in substantial rate increases for customers and record profits for the utility;

2) Discarded almost a century of ratemaking precedent by approving a "new regulatory framework" for local telephone companies that relies on arbitrary formulas rather than detailed review of utility costs to set rates;

3) Approved a contested settlement of the Palo Verde nuclear plant prudency review, which tied Edison's cost recovery for that plant to the CPUC's decision on the

reasonableness of the costs of a different nuclear plant in a different state; and

4) Granted AT&T the right to increase its long-distance telephone rates without a hearing, despite the fact that company is still the clear price leader in the only partially competitive residential long-distance market.

Under SB 1041, TURN would gain at least the opportunity to have its arguments on such major issues considered on their merits by the Court of Appeal. Today, parties who take the gamble of seeking judicial review can only wait to receive the seemingly inevitable postcard denial in the mail from the Supreme Court.

I should point out here that TURN has only recently come to the conclusion that intermediate appellate review is necessary. While proposals such as this one have surfaced from time to time over the years, TURN previously withheld its support out of concern that the review process would be dominated by the utilities and others with the "deep pockets" needed to hire an additional staff of appellate lawyers. Obviously, small non-profits such as TURN do not enjoy that luxury. Nonetheless, we have now become convinced that the problems at the CPUC are so severe that effective judicial review is the only workable solution.

SB 1041 would also establish a requirement that CPUC decisions be supported by substantial evidence in the record

of the proceeding. Under the current "any shred of evidence" rule, TURN's lawyers have frequently concluded that even poorly reasoned or arbitrary Commission decisions are not worth appealing, because the standard of court review is so narrow. Effectively, Commission decisions can now be challenged only if they violate a specific statute or result from procedural errors. Given the general nature of most provisions in the current Public Utilities Code, even the most illogical or capricious decision may therefore escape judicial review altogether. A "substantial evidence" test would go a long way toward insuring that the Commission is more careful and thoughtful in its decisionmaking.

By way of comparison, it is not at all uncommon today for the federal appellate courts to remand orders issued by administrative agencies such as the Federal Energy Regulatory Commission (FERC) on the grounds that the agency's reasoning does not support the ordered result. Such decisions often do not overturn the agency's conclusions at all-- they simply require an understandable logical explanation of the thought process by which those conclusions were reached. As minimal as this degree of court oversight may seem, it would be nothing short of revolutionary if a CPUC decision were overturned on this basis. Today's appellate review process in California does not require that the Commission use logical reasoning based on record evidence, but TURN believes that it should.

TURN therefore applauds Senator Roberti for introducing SB 1041 and strongly urges all members of the committee to approve this "good government" legislation.

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PROPOSED LANGUAGE CHANGES

SB 1041

Section 1756: At page 4, line 7, the word "agreeing" should read "aggrieved."

Subsection (c), lines 22-28. This subsection is supposed to establish that the "date of issuance" is the date when the Commission actually mails its decision, which is often several days after the date of the Commission meeting. The proposed new language is confusing and unclear however. TURN prefers the existing language that is already included as the last sentence of Section 1756.

Section 1756.1: This new section is superflous, because the same provision is included in Section 1758(a).

SB 1042

Section 3 (page 3). This section of the bill would split the current Section 1705 into five subsections and make certain changes. We will address each of the new subsections in turn.

Subsection (a) simply carries over what are now the first two sentences of Section 1705, with only minor editorial changes. TURN suggests a further modification, to remove any implication that the requirements of this section apply only in complaint cases. There is no apparent reason for such a limitation, and no such distinction exists in current PUC practice.

> (a) At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, [the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene] all parties to the proceeding, [shall be] are entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses.

By changing the language from complainant, etc. to all parties, it becomes clear that the section applies to all hearings before the Commission, not just hearings in complaint cases.

Subsection (b) would require that the ALJ's decision be based on the record of the proceeding. TURN agrees.

Subsection (c) would state that the Commission is bound by the factual findings of the ALJ and would further require the Commission to explain, with reference to the record, the reasons for any substantial changes it makes to the ALJ's proposed decision. TURN sees no good reason why the Commission should be bound by the ALJ's factual findings. On the other hand, the Commission should be required to

explain the reasons for any changes it makes. This represents a very minimal burden and will help to assure reasoned decisionmaking. TURN therefore recommends that the sentence that begins on line 5 and ends on line 6 of page 4 be stricken from the bill.

Subsection (d) simply adds a requirement that the Commission serve its decision on all parties. This reflects current practice. It also corresponds with TURN's comments regarding subsection (a) to the extent that it clearly makes the language applicable to cases other than complaints. Subsection (e) makes no substantive changes to existing law.

Section 4 (pages 4-7). This section of the bill would establish ex parte contact restrictions. TURN would favor a disclosure-type ex parte rule, but does not favor an outright ban. We also strongly oppose criminal penalties [Section 1705.5(d)].

TURN agrees that the burden of reporting any contacts should be on the Commissioner, because the important thing is what the decisionmaker thought he heard, not what the communicator thought he said. If the burden is nonetheless placed on the outside party, then the notice of ex parte contact should be served on all parties, not just hidden away in the Commission's files.

TURN agrees with the proposed Section 1705.5(a)(3), regarding the treatment of commissioners' advisors. Restrictions on staff personnel should go no farther than

this. TURN opposes Section 1705.5(b), which would extend the ex parte rule to ALJs. There is no real or perceived problem with the ALJs and ex parte contacts. Further, the penalties are actually more severe than for contacts with commissioners, for no apparent reason. Given the fine line between prohibited substantive contacts and procedural ones (which are often necessary with ALJs) TURN particularly opposes the sanctions provision.

Subsection (c), which defines "adjudicatory proceeding," is critical and yet unduly vague, because of the reference to "other similar formal action." Specifically, the definition would appear to cover most commission-initiated investigations (OIIs), which often incorporate evidentiary hearings before an ALJ. TURN agrees that such investigations should be covered, but the language needs to be clear. One reasonable option would be to apply the ex parte rule in any proceeding in which an ALJ proposed decision will be issued pursuant to Section 311 of the Code (basically, all cases that go to hearing). This would also then cover the more unusual, but not unheard of, situation where hearings are held in a rulemaking proceeding. TURN would favor such coverage.

If the concerns set forth above can be accommodated, TURN would support SB 1042, along with 1041.

In general, however, TURN supports the need for codifying rules regarding ex parte contacts at the Commission. As you know, the Commission has proposed its own ex parte rule, and TURN has concerns with that propsal as well. Furthermore, while TURN would like to believe that the Commission will follow through on establishing an ex parte rule, past experience leads us to believe that the Commission may not follow through. Consequently, we believe a legislative remedy is in order.

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ALAN J. GARDNER
Vice President/Regulatory Affairs

December 19, 1990

DEC 21 1990

Mr. Paul Fadelli
Senate Energy & Public Utilities Committee
State Capitol, Room 2035
Sacramento, California 95814

RE: CPUC REFORM BILL

Dear Paul:

Enclosed is a copy of the opinion in Camp Meeker Water System Inc. vs. PUC decided by the California Supreme Court on November 15, 1990.

On pages 12976-7, you will see the court has decided and discussed the scope of review on the factual basis of a Commission decision. This discussion clearly indicates that the standard of review now existing in California is not what is generally provided in the other 49 states. Rather, the standard here is "whether the Commission has regularly pursued its authority."

This means that even if the Legislature's reform bill grants appellate review, such review would effectively be precluded. The present standard of review means a Commision factual finding would be insulated from review even if it was contrary to overwhelming factual evidence in the record that would make the finding "erroneous" in most of the jurisdictions.

We are not talking about a situation when there is real substantive evidence introduced that is conflicting and upon which the Commission then has the full right and duty to make a choice or to meld its choice. What we are talking about is where testimony is presented without any support or backup: for instance in the recent depreciation proceedings, DRA candidly admitted it had no studies or backup for its position, and it had picked the mid-point between the two disputed figures with no other justification. Under that circumstance, other states' standards of appellate review would suggest a Commission decision based on such "evidence" is "erroneous" and an unsupported factual finding. This does not mean the Commission could not have chosen between the two principal parties' positions, but it

does mean that in other states there would have had to be a substantive basis for how the factual decision was made, and supporting conclusions, if on cross-examination, the direct testimony of one of the two parties had been impeached or reasonably called into question.

Therefore, I suggest that as part of the appellate review section of the reform bill that the standards for review of factual evidence and conclusions be listed. While there are several standards the Legislature might want to consider, we suggest the "preponderance of the evidence" test is fair to both the Commission and any parties who are disappointed in a factual finding.

If I can answer any questions, please give me a call.

Very truly yours,

Alan J. Gardner

Enclosure

cc: Spencer R. Kaitz
Dennis Mangers

AJG:tmc

ployees had no legal right to retain Chandler's keys (**Knighten v. Sam's Parking Valet, supra**, 206 Cal.App.3d at pp. 75-76), we do agree that this case does not involve a negligent entrustment. The vehicle driven by Chandler belonged to him, not to Saga or one of its employees. However, plaintiff's lack of a cause of action based on negligent entrustment cannot justify Saga's summary judgment, given the Restatement Second of Torts section 324 A issue presented by plaintiff's opposition to the motion for summary judgment. Thus, Mettelka is also of no value to Saga.

CONCLUSION

The plaintiff has submitted evidence to raise a triable issue of material fact regarding whether Saga's restaurant and its patron, Chandler, had an arrangement or agreement on the night of the accident to the effect that the restaurant employees would not give Chandler's keys back to him if he were under the influence of alcohol. If such an arrangement existed, Saga may have liability to plaintiff based upon the principles expressed in section 324 A of the Restatement Second of Torts. Therefore, the trial court erred in awarding Saga a summary judgment.

DISPOSITION

The judgment appealed from is reversed and the cause is remanded to the trial court with directions to vacate its order granting Saga's motion for summary judgment and conduct further proceedings in accordance with the views expressed herein. Costs on appeal to plaintiff.

CROSKEY, J.

We concur:
KLEIN, P.J.
DANIELSON, J.

1. The 1978 amendment to section 1714 designated the original text of that section as subdivision (a) and added the following provisions.

"(b) It is the intent of the Legislature to abrogate the holdings in cases such as **Vesely v. Sager** (5 Cal.3d 153), **Bernhard v. Harrah's Club** (16 Cal.3d 313), and **Coulter v. Superior Court** ([21] Cal.3d [144]) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

"(c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages."

The 1978 amendment to section 25602 designated the original text of that section as subdivision (a) and added the following provisions.

"(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

"(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as **Vesely v. Sager** (5 Cal.3d 153), **Bernhard v. Harrah's Club** (16 Cal.3d 313) and **Coulter v. Superior Court** (21 Cal.3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person."

2. The record does not reflect whether the trial court ruled on the objections. However, that is of no consequence; we must determine the validity of those objections ourselves since our standard of review is a de novo examination of the order which granted the motion for summary judgment. (**Price v. Wells Fargo Bank** (1989) 213 Cal.App.3d 465, 474.)

3. Such testimony could not be received in this case over a hearsay objection on the ground that it is admissible under the "former testimony" exception. Under Evidence Code section 1292, subdivision (a), it is required that the declarant (i.e., Mr. Nolan) be unavailable as a witness. No such showing is made here. However, inasmuch as the recorded testimony was offered in support of the opposition to a summary judgment motion and serves effectively as declaration by Mr. Nolan, we treat it here as such.

4. It is of no consequence whether the arrangement which plaintiff contends Chandler had with the employees at the restaurant viewed as one made gratuitously by the restaurant or one in which the consideration given by Chandler was his continued business there.

5. The duty of a volunteer ends once he had performed his voluntary act. (**Andrews v. Wells** (1988) 204 Cal.App.3d 533, 541.) Thus although, according to Nolan, Saga's employees had previously held Chandler's keys for him, it is not those past acts that bring the case with Restatement Second section 324 A. Rather, it is plaintiff's assertion that on the night of the accident, the restaurant employees took, apparently in accordance with an understanding or agreement made with Chandler, and then returned his keys to him.

6. The court in **Knighten** explained that although the valet service could have refused to give the keys back to the driver since "A citizens in California have the right to interfere with an attempt t commit a crime, and drunk driving obviously is that [citation]," the valet service did not have a to do so. (**Knighten v. Sam's Parking Valet, supra**, 206 Cal.App.3d at pp. 75-76.) Quoting from another case the court said: " 'As a general rule, one owes no duty to control the conduct of another. . . .' (**Davidson v. City of Westminster** (1982) 32 Cal.3d 197, 203. . . .) Only a special relationship between the two parties, or between the one party and the potential victims of the other creates such a duty. (Ibid.)" The **Knighten** court found no such special relationship in the case before it. (**Id.** at pp. 73-74.)

REAL PROPERTY

Regulated Utility Has Easement For Water Resource Development

Cite as 90 Daily Journal D.A.R. 12972

CAMP MEEKER WATER SYSTEM, INC.,
Petitioner,
v.
PUBLIC UTILITIES COMMISSION,
Respondent;
CAMP MEEKER RECREATION AND PARK DISTRICT,
Real Party in Interest.

No. S012916
California Supreme Court
Filed November 15, 1990

We are asked to determine whether, pursuant to article XII of the California Constitution or legislative enactment, the Public Utilities Commission (commission) has jurisdiction to adjudicate interests in real property, and, if so, the effect of such adjudication on the interests of persons who are not regulated utilities in that property. Petitioner Camp Meeker Water System, Inc. (CMWSI), a regulated utility, also challenges, as unsupported by the evidence, the finding and conclusion of the commission that CMWSI is the holder of an extensive easement for water resource development and exploitation in lands in which it does not claim an interest and to which it does not hold title.

On examination of the record it appears that, in the exercise of its ratemaking authority, the commission has done no more than construe deeds conveying real property and easements to petitioner and its predecessor. It has done so in the same manner that a court or agency construes any written instrument (see Civ. Code, § 1066 et seq.;

Code Civ. Proc., §§ 1857, 2077) for the purpose of ascertaining facts relevant to the merits of the application for increased rates, not for the purpose of resolving disputes between parties claiming rights under the deed or to enforce rights conveyed by those deeds. The commission acknowledges that it does not have jurisdiction equivalent to that of a court, to adjudicate incidents of title, and that it would be bound by a judicial ruling in a quiet title action brought by any person claiming an interest in the subject property who believes the commission ruling clouds his title. (Code Civ. Proc., § 760.010 et seq.)

The only issues properly before us in this proceeding, therefore, are whether the evidence supports the commission's construction of the deeds in issue, and its decision, based on that construction, to deny in part petitioner's application for a rate increase. In undertaking that review this court is limited to determining if the commission has regularly pursued its authority. Factual findings of the commission are not reviewable unless a petitioner asserts that the petitioner's constitutional rights have been violated. (Pub. Util. Code, §§ 1757, 1760.)[1] Since CMWSI makes no such claim, and there is evidence to support the commission decision, we shall affirm.

I

This dispute arises in major part because wells located on a 16-acre parcel of land owned by CMWSI no longer supply water to the system which serves approximately 350 customers in or near the Sonoma County community of Camp Meeker. Wells on an adjacent parcel, the "Chenoweth parcel," which is a watershed for the CMWSI land, currently supply approximately half of the water needed by the utility. CMWSI is wholly owned by members of the Chenoweth family, who are also the record title owners of the Chenoweth parcel. The CMWSI and Chenoweth parcels were conveyed to the Chenoweths in 1951 by members of the Meeker family who then owned and operated the Camp Meeker Water System (CMWS). The Chenoweths incorporated the utility in 1959.

In November 1983, CMWSI sought a rate increase based on a claim that in order to meet the needs of its customers for water CMWSI would have to lease additional wells on the Chenoweth parcel. After extended hearings, and rehearing, in decision No. 89-10-033, the commission concluded that CMWSI owns an easement that permits it to obtain water from the entire 600-acre Chenoweth watershed, and therefore is not obligated to compensate the Chenoweths for its exercise of that easement, or to pass on the cost of future well site use to the ratepayers.

This proceeding arises on the petition of CMWSI for review of that decision. As we have noted, and will explain in greater detail below, the commission decision construed two 1951 deeds, the first of which conveyed CMWS, the sixteen-acre parcel of land on which the water system is located, and the easements in issue here to the Chenoweths. The second conveyed the lands making up the 600-acre parcel to the Chenoweths and again conveyed to them property owned by CMWS. The commission found that the first of these deeds conveyed an easement for water rights on the adjacent 600-acre Chenoweth parcel which the grantors had not yet transferred to the Chenoweths. Based on that construction it ordered:

1. CMWSI to enforce those water rights against the record titleholders;

2. CMWSI to record a notice of intent to preserve its easements pursuant to Civil Code section 877.060;[2]

3. The commission's Advisory and Compliance Division to intervene in proceedings before the State Water Resources Control Board to prevent the record titleholders of the Chenoweth parcel from obtaining rights inconsistent with those held by CMWSI under its easement;

4. The Advisory and Compliance Division to forward copies of the decision to title insurance companies and take other steps to ensure that any future purchaser of the burdened 600-acre property would have actual notice of the easement.

The commission, relying on cases decided under Code of Civil Procedure section 902, opposed issuance of the writ of review on the ground that CMWSI was not a party aggrieved by its decision. The right to petition this court for review of a decision of the commission is governed by section 1756, however. That section expressly authorizes a petition by an applicant for rehearing before the commission. Nonetheless, because CMWSI benefits from the commission ruling that it holds easements in the Chenoweth parcel, its standing to complain that the factual findings underlying the decision are erroneous extends only to the impact of that decision on its application for a rate increase. The jurisdictional claim, and the related assertion that by determining CMWSI's interests in the Chenoweth parcel the commission denied due process to members of the Chenoweth family who are record titleholders, will not be considered.[3]

Because the commission regularly pursued its authority in reaching its decision, the only issue to be addressed is CMWSI's claim that the commission's finding that CMWSI owns rights to substantially all, if not all, wells, stored surface water, and surface runoff of the Chenoweth parcel, is not supported by the evidence.

II

PROCEDURAL/EVIDENTIARY HISTORY

CMWSI filed its application for authority to increase revenues from $34,200 to $53,800 (a 57.3 percent increase) on November 13, 1983. A 12.74 percent offset increase was authorized by resolution on November 22, 1983, after which hearings were held addressed to the balance of the requested increase, an end to an existing moratorium on new connections, and a 6.5 percent attrition increase. On September 19, 1984, the commission granted an increase of 19.46 percent, continued the ban on new connections, granted attrition increases, and found:

"11. Members of the Meeker family, original owners of the water system at Camp Meeker, executed a deed conveying all but approximately 16 acres of the land on which the water system was located to members of the Chenoweth family on November 29, 1951, without commission authorization.

"12. The question of fact as to whether the property described in the Meeker deed of November 29, 1951 contained only private nonutility property and no public utility water resources has not been presented to the Commission for its determination."

The commission then concluded:

"The deed from the Sonoma County Land Title Company to Hardin T. Chenoweth, William C. Chenoweth, and L. C. Chenoweth dated November 29, 1951 is void for want of authorization by the Commission."[4]

Rehearing was granted on February 6, 1985, limited to treatment of the Chenoweth parcel. Two years of unsuccessful negotiations between the owners of that parcel and the commission's Division of Ratepayers' Advocates (DRA), ensued. Resumption of evidentiary hearings before the administrative law judge (ALJ) were delayed until January 1988, by the death of William Chenoweth, president of CMWSI.

At the hearings a representative of DRA testified. DRA recommended that the commission declare the Chenoweth parcel, on which the several wells sought to be leased by CMWSI were located, to be public utility property used and useful in the public utility water service of CMWSI. That recommendation became the central issue in the hearings. The DRA representative testified that he believed CMWSI was entitled to water from the Chenoweth parcel, but conceded that he had not found recorded evidence to support his conclusion that the well sites on the Chenoweth parcel had been dedicated to public utility use. CMWSI offered documentary evidence dating back to 1932

to support its claim that the Meeker family had segregated the family and utility properties.

Among those documents was a summary of evidence made by the commission staff in 1932 in conjunction with a CMWS rate increase request. That summary included a cost estimate of the value of lands reserved for springs and water tank sites, apparently referring to sites on the Chenoweth parcel. Reference was also made to an expense item for taxes, part of which was determined to be chargeable to the applicants' private realty holdings.

Other documents from the 1932 rate proceedings included a land and right-of-way appraisal exhibit prepared by the commission staff which reflected an inventory of 11 parcels or lots owned by CMWS, the total acreage of which was 15.75 acres. No properties other than those parcels which contained springs, diversions, or tanks actually used or proposed for utility service were identified in that inventory.

A ledger sheet from the 1935 records of the Sonoma County Tax Collector identified 21 properties as associated with CMWS, but those parcels did not conform in all respects to the commission's 1932 inventory. An inventory of the estate of Effie M. Meeker, who died intestate in 1940, was filed in 1941. That inventory listed her interest in "Camp Meeker Water System lots" whose descriptions, with a single exception, corresponded to the lots listed as associated with CMWS in the 1935 records of the tax collector. A handwritten annotation in the margin recited: "Appraised as part of water system." Other lots in the estate's inventory did not appear on the tax collector's list and were not among CMWS properties. The appraisal of the estate's real property valued the properties of CMWS separately.

In 1951 the estate of Effie Meeker agreed to sell to Hardin T. Chenoweth, and his sons, William C. and L. C. Chenoweth, 14 of the 17 distributive interests in the estate.[5] The estate contracted to sell those interests in:

"[1] all of the property owned by said Meeker Estate located in the County of Sonoma . . . , [2] together with the Camp Meeker Water System, and all other property both real and personal appurtenant to said system and used therefor, [3] together with all moneys in bank in the name of said Camp Meeker Water System, and all outstanding receivables of the said Camp Meeker Water System."

The agreement provided that "[t]he property herein referred to and described as the Camp Meeker property generally consists of [1] approximately 800 acres of land more or less located as aforesaid, [2] the Camp Meeker Water System, and [3] the inventory of personal properties, together with the cash in bank in the name of said Camp Meeker Water System, and the accounts receivable."

The agreement also provided that the administratrices would cooperate in obtaining the approval of the commission for the transfer of CMWS, on which the agreement was conditioned, and, that: "It is fully understood and agreed by and between the parties hereto that the [administratrices] have not joined in or been a party to the dedication of any of said property herein referred to for the purpose of the operation of the Camp Meeker Water System other than the acreage consisting of 14 acres more or less immediately surrounding the various springs now used in the operation of the Camp Meeker Water System."

On October 10, 1951, the administratrices, the Chenoweths, and Paul R. Edwards, who held a one-third interest in the estate, sought, and on November 6, 1951, the commission granted, authority for the transfer of CMWS to the Chenoweths. The commission opinion acknowledged that the estate was transferring properties other than its interest in CMWS, and noted that of the $24,880.28 purchase price, $8,500 had been assigned to CMWS, and the balance to "certain nonoperative lands." The opinion also noted that the purchasers intended to acquire the remaining interests in the estate "to the end that they will have entire ownership of the water system properties."

Of particular importance in the proceedings were the November 26, 1951, and November 29, 1951, deeds by which the properties were conveyed to the Chenoweths.

The first deed, executed on November 26, 1951, conveyed [italics added]:

". . . all of the right, title, and interest of the said grantors in that certain property situated in the County of Sonoma, State of California, and generally known as the Camp Meeker Water System, including all pipes, whether covered or on the surface, used and employed in conveying water to customers of said System, and all connections and facilities of every kind and character used and useful in the operation of said System, **and also all rights, and privileges, and easements had, used, and enjoyed in the operation of said System and also all water and water rights appurtenant to said system and used and useful in its operation** and also all tanks, reservoirs, springs, spring traps, pipes and ditches leading thereto or therefrom;

"All real property . . . used in connection with the Camp Meeker Water System, a public utility, including the following parcels of real property . . . [description of 8 parcels totalling just over fifteen acres, ten lots, and one block].

"Together with any and all other real property . . . now or heretofore used as springs, reservoirs, or tank sites in connection with said Camp Meeker Water System, a public utility." (Italics added.)

The concluding paragraphs of the deed provided that in conjunction with the sale of the utility the Meeker family sellers were conveying all water rights and easements appurtenant to the property used by the utility:

"Together with all water and water rights appurtenant to and belonging to the above described land, and all ditches, pipes, and improvements, and all rights, privileges, and easements belonging thereto or commonly had, used, or enjoyed therewith, together with all of the personal property used in the conduct and operation of said Camp Meeker Water System and owned in common by the said grantors herein.

It is the intent and purpose of this Deed and instrument of transfer to convey not only the properties particularly described herein, but also all rights, easements, and privileges and facilities appurtenant to said Camp Meeker Water System and commonly used, had, and enjoyed in the maintenance and operation thereof, whether expressly described herein or not, and this deed shall be so construed as to accomplish such purpose." (Italics added.)

The second deed, executed on November 29, 1951, conveyed to the Chenoweths five specifically described "Highland Farms" parcels comprising 48.4 acres; four parcels subtitled "Timberland and acreage," among which was the north one-half of the southwest one-quarter of section 27 "except portions heretofore conveyed, but including Camp Meeker Water System lots"; lots in five subdivisions of the Camp Meeker area subtitled "Subdivision lands"; and under the subtitle "Camp Meeker Water System," two categories of property:

1. "All parcels of land standing in the name of Camp Meeker Water System, a Public utility.

2. "Church, Camp Meeker Store, Post Office, school building, library and water building sites."

This deed also conveyed all of the interest of the estate in the personal property of the CMWS.

The November 29, 1951, deed, executed, as was the earlier deed, by a title company, was recorded at the request of L. G. Hitchcock, the attorney who had represented the Chenoweths in negotiating the purchase of CMWS and in arranging separate conveyance to the Chenoweths of the estate's interest in that 600-acre parcel.[6] In his declaration, Hitchcock, who had supplied the information used for preparation of the deeds, stated that the reference to CMWS property in the omnibus clause of the November 29, 1951, deed conveying that property was included as a precautionary measure to ensure that any CMWS property not

specifically described in the earlier deed would be conveyed.

Hitchcock also stated that CMWS had been recognized as a public utility by the California Railroad Commission, the predecessor to the present commission, and was such at the time of its acquisition by the Chenoweths. The term "used and useful" in the November 26, 1951, deed was intended by both the grantees and grantors to include pipes, connections and facilities; the term "water and water rights" appurtenant to the system and useful in its operation was intended to include only the water, water rights, privileges, and easements on property owned by CMWS as described in that deed.

Hitchcock had inquired, prior to the purchase of the system by the Chenoweths, if any watershed other than those in the acreage expressly owned by CMWS had been dedicated for water supply purposes to the utility. At an ensuing meeting with commission staff member Coleman, Hitchcock was told by Coleman that he had no knowledge of any watersheds or lands encumbered, encroached upon, or dedicated to serve CMWS for the purpose of securing a cater supply other than the acreage expressly owned by CMWS. Coleman represented that if there were such rights he would be aware of them. The November 26, 1951, deed was prepared for the grantors and grantees with this understanding and with the intent that it be interpreted consistently with Coleman's representations.

Finally, Hitchcock declared that CMWS and the property it owned at all times had been treated by the grantors as distinct and separate from that other property which they owned and conveyed to the Chenoweths. The deed of November 26, 1951, pertained only to properties owned by CMWS and those properties were described in that deed. No other properties owned by the grantors were intended to be impressed with a watershed easement for the benefit of CMWS.

Based on this evidence, the ALJ concluded that CMWSI had no easement rights over the Chenoweth parcel. He reasoned that the language of the November 26, 1951, deed was not ambiguous and could not be interpreted to convey rights in the surrounding lands, and was consistent with the intentions of the parties as expressed in the 1951 agreement.

Thus, the surrounding lands, including the well sites developed by the Chenoweths and leased to CMWSI were not dedicated to public utility water service.

The commission reached a contrary conclusion in its October 12, 1989, decision.[7] That decision, like the proposed decision of the ALJ, concluded that the 1951 conveyances to the Chenoweths were proper since they represented a commonly understood segregation of the Meeker property between public utility and private property for tax and ratemaking purposes.[8] The commission also concluded that the November 26, 1951, deed conveyed the CMWS real estate and all water rights, easements and privileges appurtenant thereto. The November 29, 1951, deed conveyed the remaining Meeker land.

Unlike the ALJ, however, the commission concluded that while the property conveyed by the November 29, 1951, deed was the private real estate of the Chenoweths, it was: "subject to the public utility water rights, easements and privileges granted by the November 26, 1951 deed.

"The rights given to CMWS by the November 26, 1951 deed (and subsequently given to Camp Meeker Water System, Incorporated (CMWSI) by the August 7, 1959 deed)[9] allow the utility to explore for and develop public utility water sources on the Chenoweth land, and to take such actions as may be necessary to ensure that the Chenoweths do not jeopardize the ability of the water system to meet its public utility obligations. The Chenoweths are free, however, to use their land as they see fit so long as that use is consistent with the utility's rights and easements."

The commission reasoned that the Meekers as owners of CMWS did not have a formal easement over the nonoperative portion of their land. Such was not needed because as owners they already possessed the right to explore for and develop new water sources thereon. The public utility thus had a quasi-easement which ripened into a formal easement when the Meekers conveyed the CMWS land to the Chenoweths by the November 26, 1951, deed. The commission also concluded that even if the November 26, 1951, deed had not expressly mentioned easements, an implied easement would have been created by operation of law pursuant to Civil Code section 1104.[10]

In reaching its decision, the commission applied Civil Code sections 806[11] and 1069,[12] as well as case law requiring consideration of the types of rights conveyed, the relationship of the easement to other property owned by the recipient of the easement, the reasonable contemplation of the parties, and an assumption that future needs were to be accommodated. (See **Faus** v. **City of Los Angeles** (1967) 67 Cal.2d 350, 355; **Fristoe** v. **Drapeau** (1950) 35 Cal.2d 5, 10; **Moylan** v. **Dykes** (1986) 181 Cal.App.3d 561, 569; and **George** v. **Goshgarian** (1983) 139 Cal.App.3d 856, 861-862.) Based thereon, the commission reasoned that it could interpret any ambiguity in the deed to provide the water company with more, rather than less, property rights. The language of the November 26, 1951, deed, the commission concluded, conveyed to CMWSI "broad rights to water from the land subject to the easements."

These rights were not limited to use of the wells or water sources from which CMWSI drew water in 1951 when the conveyance was made, since those wells and diversions would not permit CMWSI to develop new water sources on the Chenoweth parcel, and many of the sources in use in 1951 had deteriorated or been taken out of service. Therefore, considering the water rights and easements conveyed in the November 26, 1951, deed in light of the relationship of those rights to the public utility land, the commission concluded that they should be interpreted to enable CMWSI to continue to meet its obligations as a public utility. That could not have been done if CMWSI were limited to easements in springs in existence in 1951.[13]

The commission also found in a June 13, 1950, commission decision a basis for a reasonable inference that the parties to the 1951 deeds did intend that the Chenoweth parcel be subject to water rights beyond those being utilized at the time of the conveyances, and that those rights were to be expanded to serve an increased customer base. That decision, issued three months prior to the date on which the parties executed the sale agreement, found that CMWS had inadequate water sources to serve existing and future customers, and ordered that numerous improvements in the water supply be made.[14]

Based on this reasoning the commission found:

"[T]he Meeker family operators of CMWS enjoyed quasi-easement rights to use the non-utility portion of their Camp Meeker property for public utility purposes by virtue of their common ownership of the utility and non-utility portions of their property. These rights included the right 1) to take all water flowing over or located under the land; 2) to enter upon the land to explore for, develop, and maintain water sources thereon; 3) to construct dams and reservoirs on the land for water storage and supply purposes; 4) to enter upon the land to maintain such dams and reservoirs; 5) to construct and maintain pipelines and rights of way necessary for the taking of water from the land; 6) to drill wells and develop springs necessary to supply water from the land; 7) to expand their use of the land as necessary to replace deteriorating or obsolete water sources and to develop new sources of water to meet the growing needs of an increased customer base; 8) to insist that no one interfere with any of these rights; 9) to rely on the maintenance of the land in a manner that would not adversely affect the utility's water supply operations; and 10) to do anything else necessary to utilize the non-utility portion of their land for public utility water services purposes."

III
COMMISSION JURISDICTION

Petitioner assumes that the commission has undertaken to adjudicate incidents of title, and has adjudicated the rights of third parties against the public utility. It argues on that basis that the commission has exceeded its authority and has taken, on behalf of the utility, property owned by the third parties without compensation.

As noted earlier, however, the commission makes no claim to have such jurisdiction. Rather, it purports only to have construed the existing legal rights of CMWSI, and disclaims any power to create new rights. The commission expressly recognizes that its functions do not include determining the validity of contracts, whether claims may be asserted under a contract, or interests in or title to property, those being questions for the courts. (**Hanlon v. Eshleman** (1915) 169 Cal. 200. See also **C.B. Lee** (1939) 42 C.R.C. 41.) It claims only the power to construe, for purposes of exercising its regulatory and ratemaking authority, the existing rights of a regulated utility.

In construing the 1951 deeds for that purpose, the commission acted within its constitutional and statutory jurisdiction.

"Private corporations and persons that own, operate, control, or manage a . . . system for the . . . furnishing of . . . water . . . are public utilities subject to control by the Legislature." (Cal. Const., art. XII, § 3.) The commission may, pursuant to the grant of authority found in article XII, section 2 of the California Constitution "[s]ubject to statute and due process . . . establish its own procedures." And, pursuant to article XII, section 5, "[t]he Legislature has plenary power, unlimited by the other provisions of this constitution, but consistent with this article, to confer additional authority and jurisdiction upon the commission, . . ."

In the exercise of its plenary power the Legislature has provided that all charges by a public utility for commodities or services rendered shall be just and reasonable (§ 451) and has given the commission the power and obligation to determine not only that any rate or increase in a rate is just and reasonable (§§ 454, 728), but also authority to "supervise and regulate every public utility in the State and [to] do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (§ 701.)

In regulating a public utility the commission may determine the facilities, service, and method of service in order to ensure that the service provided is adequate (§ 761), and in aid thereof may order that the utility extend or improve its physical facilities or properties. (§ 762.)

Further, a public utility may not dispose of any property necessary and useful in the performance of its duties without authorization by the commission. (§ 851.) While this section is most often applied to outright transfers of property, read together with the above sections which authorize the commission to require that a utility ensure its ability to provide adequate service, it unquestionably permits the commission to prevent disposal of such property by indirection, as by failure to exercise or safeguard rights possessed by the utility. (Civ. Code, § 811, subds. 3 & 4. See also. **Crum v. Mt. Shasta Power Corp.** (1934) 220 Cal. 295, 309-310.)

Therefore, construction of the November 26, 1951, deed in reference to the transfer of the appurtenant Chenoweth parcel in order to determine CMWSI's rights to sources of water on the Chenoweth parcel was a necessary incident to the commission's consideration of CMWSI's application for an increase in its charges. The commission was obligated to determine if the claimed expense for leasing wells on the Chenoweth parcel was justified, and to ensure that CMWSI did not abandon or otherwise dispose of property in the form of easement rights necessary and useful to meet the present and future needs of its customers.

Similarly, the action taken by the commission in an attempt to ensure that a purchaser of the Chenoweth parcel would not be entitled to assert the conclusive presumption of the second paragraph of section 851 is a reasonable exercise of its power and obligation to ensure that the property of CMWSI is not transferred without its authorization. Since the easement rights of CMWSI over the Chenoweth parcel are not described in the November 29, 1951, deed and thus may not be subject to the constructive notice provision of Civil Code section 1213, the commission could reasonably conclude that an attempt to give actual notice that CMWSI may have such rights is necessary.

IV
SUFFICIENCY OF THE EVIDENCE

Petitioner claims that there are neither facts nor law to support the commission's conclusion that CMWSI holds an easement over the Chenoweth parcel. That claim is largely based on evidence other than that on which the commission relied in reaching its decision,[15] however, and fails to acknowledge the limited scope of review permitted this court in commission matters.

A. Scope of Review.

Section 1757 limits our consideration of CMWSI's claim that the decision lacks factual support. The question is not whether the evidence is sufficient under traditional criteria for appellate review because section 1757 provides: "No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

"The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination." (Emphasis added.)

This legislative limitation is expressly authorized by section 5 of article XII of the California Constitution, which vests the Legislature with "plenary power, unlimited by the other provisions of this constitution, but consistent with this article, to . . . establish the manner and scope of review of commission action in a court of record. . . ."

As a result our review of commission decisions "is generally limited to a determination whether the commission has regularly pursued its authority." (**Toward Utility Rate Normalization v. Public Utilities Com.** (1988) 44 Cal.3d 870, 880.) A decision that affects the rights of a party, but has no factual support, would not be one made in the regular pursuit of commission authority and could deny due process. If there is evidence to support the commission's findings, however, the findings are final and unreviewable unless the evidence is undisputed and subject to only one reasonable inference.

"[T]he provision of section 1757, that the findings and conclusions of the commission on questions of fact shall be final, refers to findings and conclusions 'arrived at from the consideration of conflicting evidence and undisputed evidence from which conflicting inferences may reasonably be drawn. Findings and conclusions drawn from undisputed evidence and from which conflicting inferences may not reasonably be drawn, present questions of law.' (**Southern Pac. Co. v. Public Utilities Com., supra,** 41 Cal.2d 354, 362.)" (**Pacific Tel. & Tel. Co. v. Public Util. Com.** (1965) 62 Cal.2d 634, 647.)

Therefore, if there is evidence to support the commission's factual findings and conclusions, and those findings and conclusions are the basis for the commission's order or decision, further review by this court is foreclosed. (South-

ern Pac. Co. v. Public Utilities Com. (1953) 41 Cal.2d 354, 362.) We may not substitute our judgment as to the weight to be accorded the evidence [illegible] findings of the commission. (Cal[illegible] Pa[illegible] Commission (1979) 23 Cal.3d 638.)

While section 1760 gives the court the power to exercise its independent judgment on the law and the facts if an order or decision of the commission is challenged on grounds that it violates the federal constitutional rights of the petitioner, no claim to which section 1760 applies is properly before us.

CMWSI does argue that the commission lacks jurisdiction to determine the rights of third parties, a due process-based claim, or to take private property without compensation, a claim presumably founded in the Fifth and Fourteenth Amendments to the United States Constitution. We have concluded above, however, that the commission has not purported to affect title or create interests in CMWSI and has done nothing more than construe the 1951 deeds for purposes of ratemaking only.

More importantly, however, the decision that CMWSI holds an easement over the Chenoweth parcel is one favorable to CMWSI, which does not claim that the decision violates rights it has as the petitioner. The sole question, therefore, is whether there is an evidentiary basis in the record for the commission's conclusion that the November 26, 1951, deed conveyed an easement for water developments on the Chenoweth parcel to CMSWI. There is.

B. Evidence Supporting the Decision.

1. The Deed.

The November 26, 1951, deed expressly conveyed to CMWSI all of the grantor's interest in CMWS and all "easements had, used, and enjoyed in the operation of said System, and also all water and water rights appurtenant to said System and used or useful in its operation."

It is axiomatic, as the commission recognized, that an easement conveys rights in or over the land of another. "An easement involves primarily the privilege of doing a certain act on, or to the detriment of, another's property. To the creation of an appurtenant easement, two tenements are necessary, a dominant one in favor of which the obligation exists, and a servient one upon which the obligation rests." (Wright v. Best (1942) 19 Cal.2d 368, 381. See also, Los Angeles etc. Co. v. S.P.R.R. Co. (1902) 136 Cal. 36, 48.)

The 16-acre parcel and the Chenoweth parcel had, until the November 26, 1951, conveyance, been in the same ownership, notwithstanding the Meekers' separate treatment of the parcels for tax and other recordkeeping purposes. That being so, the deed cannot reasonably be construed as either creating or conveying a then-existing easement burdening the 16-acre parcel. The only theory on which such a conveyance might be premised, revival of an easement existing prior to merger of the dominant and servient estates (see Civ. Code, § 811, subd. 1; Dixon v. Schermeier (1895) 110 Cal. 582, 585; 28 Cal.Jur.3d (rev.) Easements, § 52, p. 188), is unsupported by any evidence that such ease lent existed prior to the acquisition of title to the properties by the Meeker family. The deed therefore created an easement under which the CMWS-property became the dominant tenement, holding an easement appurtenant to that land over property in the possession of another.[16]

The language of the November 26, 1951, deed therefore supports the commission finding that the deed conveyed an easement over lands appurtenent to CMWS and its 16-acre parcel.

2. The Burdened Property.

There is also a basis in the evidence for the findings and conclusion of the commission that the easement conveyed was, by implication, a burden on the Chenoweth parcel. It is not necessary to its validity that the conveyance of an express easement identify the servient tenement. The law implies that a conveyance of real property creates in favor of that property "an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." (Civ. Code, § 1104.) "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." (Civ. Code, § 806.) It may reasonably be inferred, therefore, that the easement expressly granted in the November 26, 1951, deed burdened the retained property of the grantor, the 600-acre parcel retained by the Meeker estate.[17] When the 600-acre parcel was conveyed by the November 29, 1951, deed, it continued to be the servient tenement.

3 The Extent of the Easement.

Because the November 26, 1951, deed expressly granted an easement over the Chenoweth property it is not necessary to find an easement by implication, and the easement is not limited by Civil Code section 1104 to uses in existence at the time of the agreement and/or conveyance. The well-established law governing easements by implication is instructive, however, when the deed does not describe the extent of the easement it conveys.

In Fristoe v. Drapeau, supra, 35 Cal.2d 5, 9-10, we accepted the rule as set forth in the Restatement of Property: "'The extent of an easement created by implication is to be inferred from the circumstances which exist at the time of the conveyance and give rise to the implication. Among these circumstances is the use which is being made of the dominant tenement at that time. Yet it does not follow that the use authorized is to be limited to such use as was required by the dominant tenement at that time. It is to be measured rather by such uses as the parties might reasonably have expected from the future uses of the dominant tenement. What the parties might reasonably have expected is to be ascertained from the circumstances existing at the time of the conveyance. It is to be assumed that they anticipated such uses as might reasonably be required by a normal development of the dominant tenement. . . .' (Rest., Property, § 484, comment b.) [Para] Accordingly, in determining the intent of the parties as to the extent of the grantee's rights consideration must be given not only to the actual uses being made at the time of the severance, but also to such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance."

This rule necessarily applies to express easements when the extent of the easement is in question. "The effect of section 806 of the Civil Code is to establish intent as the criterion for determining the 'extent of a servitude,' and this is in accord with the rationale of the rules governing easements by implication. (Fristoe v. Drapeau, 35 Cal.2d 5, 9.)" (Mosier v. Mead (1955) 45 Cal.2d 629, 633.) The rule is tempered, of course, by the limitation that if an "easement is founded upon a grant . . . only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee. The general rule is clearly established that, despite the granting of an easement, the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement." (Pasadena v. California-Michigan etc. Co., supra, 17 Cal.2d 576, 579.)

There is evidence in the record to support the finding of the commission that the easement granted by the November 26, 1951, deed permits CMWSI to exploit any and all sources of water on the Chenoweth parcel. The deed did not restrict CMWS to use of the wells or springs existing at the time of the conveyance. Rather, the grant included "all water rights appurtenant to said System and used or useful in its operation" and "whether expressly described . . . or not." (Italics added.) The commission could reasonably infer from this language and the circumstances in which the conveyance was made that the easement permits CMWSI to use any water sources necessary to replace springs that

are no longer adequate and to develop water sources needed to meet the demands created by "normal development of the dominant tenement." (**Fristoe v. Drapeau, supra**, 35 Cal.2d 5, 9.)

The commissions construction of the easement is consistent with and supported by the assumption that an express easement is intended to accommodate future needs. (**Faus v. City of Los Angeles**, supra, 67 Cal.2d 350, 355.)

4. Relevance of Separate Transfer of Chenoweth Parcel.

Petitioner claims alternatively that the two deeds in question conclusively establish that the Chenoweth parcel is not useful or necessary.

Petitioner's argument is based on the stipulation in section 851 that: "any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee, or encumbrancer dealing with such property in good faith for value; . . ." Petitioner reasons that the commission's approval of the sale of the 16-acre parcel separately from the Chenoweth parcel established that the latter was not useful or necessary for public benefit.

Our conclusion, that there is an evidentiary basis in the record for the commission's conclusion that the November 26, 1951, deed conveyed to CMWSI an easement for the development and exploitation of such water rights as are needed to adequately service CMWSI's customers, answers that contention.

Inasmuch as the November 26, 1951, conveyance included an easement for water rights in the Chenoweth parcel, the commission cannot be deemed to have determined that this parcel was not useful to CMWS. To the contrary, the manner in which the sale was structured preserved for the utility a "useful" interest in that property, an easement that is "necessary in the performance of [CMWSI's] duties to the public."[18]

The decision is therefore supported by evidence in the record. The inferences drawn from that evidence are reasonable. The findings and conclusions are not subject to further review. The commission did not err in determining the legal significance of its findings in construing the November 26, 1951, deed.

V

Commission decision No. 89-10-033 is affirmed.

EAGLESON J.

We concur:
LUCAS, C.J.
MOSK, J.
BROUSSARD, J.
PANELLI, J.
KENNARD, J.
ARABIAN, J.

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1. All further references to code sections herein are to the Public Utilities Code unless otherwise indicated.

2. Civil Code section 877.060, subdivision (a): "The owner of an easement may at any time record a notice of intent to preserve the easement."

3. Those claims, which attempt to assert the rights of other parties, assume that the commission decision has res judicata effect and may be binding in future ratemaking or judicial proceedings.

Pursuant to section 1709, the commission decision -- that CMWSI is not presently entitled to a rate increase -- is binding as, "[i]n all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." The Public Utilities Code does not give the ruling any greater effect. This court has recognized that when the commission exercises its judicial power, its orders or decisions have "the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between the same parties." (**People v. Western Air Lines, Inc.** (1954) 42 Cal.2d 621, 630.) However, the commission exercises its legislative power, not its judicial power, when it fixes rates. (**People v. Western Airlines, Inc.**, 42 Cal.2d 621, 630; **Southern Pacific Co. v. Railroad Com.** (1924) 194 Cal. 734, 739.) Therefore, its determination of the property rights is subject to relitigation in any court of law which is asked to determine these interests.

4. Section 851 provides, inter alia: "No public utility . . . shall sell . . . the whole or any part of its . . . plant, system, or other property necessary or useful in the performance of its duties to the public . . . without first having secured from the commission an order authorizing it so to do. . . .'

"Nothing in this section shall prevent the sale or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser . . . dealing with such property in good faith for value; . . ."

5. The acting administratrices had at that time obtained agreement only from the holders of those interests.

6. The remaining eight fifty-firsts interest was subsequently acquired from other heirs and conveyed by deeds recorded in 1952.

7. The findings of the commission commence with the 1951 deed transferring the Meeker properties to CMWSI and the Chenoweths. The evidence regarding events relevant to the properties dates back only to 1932, although the record does reflect that Effie M. Meeker and Julia E. Meeker, her sister, constructed the water system now known as the Camp Meeker Water System, Inc., around 1910 to serve a summer camping and residential community in Sonoma County. Real party in interest, Camp Meeker Recreation and Park District, is both a user of water supplied by CMWSI, and, as a county service district elected by the residents of Camp Meeker, represents their interests in these proceedings.

8. Accordingly, the commission set aside its earlier ruling that the November 29, 1951, deed was void for want of authorization by the Commission for the transfer.

9. The August 7, 1959, deed to which the commission referred transferred the CBS properties to CMWSI, and was identical to the November 26, 1951, deed, with the exception of the grantors and grantees.

10. Civil Code section 1104: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

11. Civil Code section 806: "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired."

12. Civil Code section 1069: "A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor."

13. The commission found the deeds to be sufficiently ambiguous to warrant consideration of some, but not all, of the extrinsic evidence admitted and considered by the ALJ. It considered the September 1951 agreement between the administratrices and the Chenoweths for the sale of the properties as being relevant to the intent of the parties, but found the deeds themselves to be the best evidence of that intent, and refused to consider an interpretation of the agreement that was inconsistent with the language of the deeds.

The commission considered, but rejected, the declaration of L. G. Hitchcock regarding the parties' understanding of terms in the deeds, reasoning that the November 26, 1951, deed could not have intended to convey only water rights on the CMWS property. The conveyance of the fee necessarily granted those rights to the grantees, and the conveyance of an easement is necessarily conveyance of an interest in the land of another. (Civ. Code, §§ 801, 805.)

14. The commission cited no evidence that the Chenoweths were aware of this order when they entered into the agreement, or knew of findings in earlier proceedings that further development of spring sources and supplies was necessary to provide adequate service. The only such earlier proceeding to which reference was made by the commission took place in 1932. The commission decision does not further explain the relevance of the findings made in that year or of its conclusion that the Meekers were aware of the necessity that resources on the segregated private real estate holdings of the Meekers be developed.

15. Petitioner's argument is based in part on the reasoning of the ALJ and evidence he considered. Evidence in any commission

hearing is taken by an ALJ (§ 311, subd. (c)), but the commission need not accept any findings made by the ALJ, and "may, in issuing its decision, adopt, modify, or set aside the proposed decision or any part of the decision." (§ 311, subd. (e).)

16. Civil Code section 803: "The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement."

17. There is no evidence in the record, and no party has suggested, that CMWS or the Meeker family held utility easements over land owned by customers of the utility. (See, e.g., Pasadena v. California-Michigan etc. Co. (1941) 17 Cal.2d 576.) A reasonable inference, therefore, is that the grantors intended to convey an easement over the 600-acre parcel they retained.

18. Based in part on its assumption that the commission decision was intended to adjudicate the incidents of title to the Chenoweth parcel, rather than construe the deed to the 16 acre parcel now owned by CMWSI, petitioner asserts the commission procedures were irregular because the issue of ownership of Chenoweth parcel was not properly before it and the record owners of that parcel were not given notice. They also seek to support this challenge to the procedure with a claim that the 1951 proceeding in which the commission authorized the sale of the utility was conclusive. Our conclusion that the commission properly construed the November 28, 1951, deed, and purported to do nothing more, makes it unnecessary to address this claim further.

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CRIMINAL LAW AND PROCEDURE

Lack of Fine Advisement Merits Remand for Plea Withdrawal

Cite as 90 Daily Journal D.A.R. 12979

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Respondent,
v.
JOHN THOMAS GLENNON,
Defendant-Appellant.

No. A047950
Super. Ct. No. 131918

California Court of Appeal
First Appellate District
Division One
Filed November 16, 1990

The sole issue raised by this appeal is whether a restitution fine of $10,000 should be stricken because the trial court failed to advise appellant of the fine prior to accepting his plea of no contest. We conclude that although appellant has failed to show that he was prejudiced by the court's failure to so advise, he must be given the opportunity to withdraw his plea.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was the purchasing manager for the biochemistry and biophysics departments of the University of California at San Francisco. Utilizing his own outside company, appellant engaged in a number of fraudulent sales to the university which were accomplished by means of appellant's position as purchasing manager.

Prior to the preliminary hearing, appellant pleaded no contest to the charge that he misappropriated over $300,000 in state funds over a period of 10 years while employed by the university. (Pen. Code, § 424, subd. (1).) He also admitted the special allegation that the amount taken was over $100,000 thereby exposing himself to an additional two-year term. (Pen. Code, § 12022.6, subd. (b).)

Prior to entering this plea, appellant was advised of and waived his constitutional rights.[1] After he was advised of the range of punishment for the offense, of the applicable parole period, and the consequences of a revocation of parole, appellant entered a plea of no contest to all charges. This plea was "open to the court" and was not the result of negotiations with the prosecutor; however, the sentencing judge had indicated that a two-year prison term appeared to be an appropriate disposition. The requirement of a restitution fine was not mentioned.

Even though this was not a negotiated plea, appellant was advised that his plea was not binding on the court and, if the sentencing judge withdrew his approval of the indicated disposition, he would be allowed to withdraw his plea.

Appellant was thereafter sentenced to the mitigated term of two years in prison for the reason that he acknowledged his guilt at an early stage in the proceedings. A two-year term for the special allegation was imposed but stayed because of appellant's lack of a prior criminal record. The court also imposed a restitution fine of $10,000, as required by Government Code section 13967, subdivision (c). Appellant did not object to the fine at the time of sentencing.

DISCUSSION

This appeal is taken only from the sentence. Appellant does not challenge the validity of his plea of no contest. Since the restitution fine was a direct consequence of the plea, appellant should have been informed of the possibility of a fine prior to entry of his plea. Appellant, having served a substantial portion of his sentence, asks that the fine be stricken.[2]

The improper imposition of a restitution fine can result from two distinct situations. Thus, a fine may exceed the permissible punishment allowed by the terms of a negotiated disposition, or it may have been imposed after a failure to advise the defendant that the fine was a consequence of a guilty plea. (**People v. Davis** (1988) 205 Cal.App.3d 1305, 1308-1310.) In cases involving breach of the terms of a plea bargain, constitutional issues of due process are raised, and the bargain may be enforced or the plea may be withdrawn depending on the facts of the case. (**People v. Mancheno** (1982) 32 Cal.3d 855, 860-861.) In such situations, waiver is not presumed from a failure to object at the time of sentencing. (**Id.** at p. 864; but see **People v. Davis, supra,** 205 Cal.App.3d 1305; **People v. Melton** (1990) 218 Cal.App.3d 1406.) Also, the harmless error test of **People v. Watson** (1956) 46 Cal.2d 818, 836, is inapplicable. (**Peo-**

TESTIMONY OF BRUCE F. JAMISON

BEFORE A JOINT INFORMATIONAL HEARING OF

THE SENATE JUDICIARY COMMITTEE

AND

THE SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES

ON

REFORM OF PUBLIC UTILITIES COMMISSION PROCEDURES

SB 1041 AND SB 1042

Bruce F. Jamison, Assistant

Vice President

Regulatory Proceedings

Pacific Bell

Chairman Rosenthal, Chairman Lockyer and members of the Committees:

My name is Bruce Jamison. I am Assistant Vice President for Regulatory Proceedings at Pacific Bell. I am pleased to join you this afternoon to discuss the need for reform of California Public Utilities Commission (CPUC) procedures. Pacific Bell has thoroughly reviewed the two pieces of legislation, SB 1041 and SB 1042, resulting from Senator Roberti's investigation of complaints about CPUC processes that was initiated with Preprint SB 8 last year. My written testimony addresses specifically the changes in law that would be made by the two bills Senator Roberti has introduced this session and the problems Pacific Bell sees with these changes.

Analysis of Issues in SB 1041

1) Change in Appellate Jurisdiction

The major change in the law that would be made by SB 1041 is the elimination of the grant of exclusive jurisdiction to the Supreme Court for appeal of CPUC decisions. This change is made in Section 4 of the bill by amending Section 1756(a) of the Pub. Util. Code to provide for review of CPUC actions by the Court of Appeal for the First Appellate District.

The reason that has been cited previously for proposing this change is the ever increasing workload of the Supreme Court. Pacific firmly believes that changing the appellate jurisdiction for Commission decisions to the Court of Appeal would not decrease the Supreme Court's workload. Rather, it would only result in unnecessary delays in the implementation of Commission decisions by adding another layer of appellate review, since it is highly likely the majority of Appellate Court decisions would be appealed to the Supreme Court.

Intermediate review by the Court of Appeal would also significantly increase utilities' costs. Not only will utilitie's be financially impacted by delays in the implementation of decisions and collection of new rates, but utilities' costs will also be increased by the additional time it will take to bring a case to conclusion.

2) Right to Review of CPUC Decisions

Another change that SB 1041 makes in Section 1756(a) of the Pub. Util. Code would provide for review of CPUC decisions as a matter of right, as opposed to the discretionary review currently exercised by the Supreme Court. In the corporation's review of Preprint SB 8, authored by Senator Roberti last year, Pacific Bell opposed the change from discretionary review to an automatic right to review. The reasons for this opposition are that discretionary review discourages frivolous appeals and reinforces the finality of Commission decisions.

More appeals, including those without merit, occur when there is an automatic right to review. Appeals without merit are of particular concern due to the unnecessary expenditure of resources they require and the unfair advantage they provide to competitors wishing to delay utility actions approved by the Commission. Finality is very important for decisions involving telephone corporations because of the transitional nature of the telecommunications industry at this time.

3) Expansion of the Scope of Review

Amendments to Section 1757 of the Pub. Util. Code in Section 6 of SB 1041 raise only one issue. The added language in this code section would expand the scope of review on appeal from the current rule limiting review to a determination of whether the CPUC has pursued its authority to also requiring that the appellate court determine whether any CPUC action under review is "supported by substantial evidence in the record of the proceeding." This expansion would make reviews of CPUC cases much more burdensome for both the court and the parties involved by requiring the appellate court to examine in detail the substance of CPUC decisions.

A change in the current standard would open the door to judicial regulation and second-guessing by the judiciary. The fact that the CPUC is a constitutionally created body indicates the high value that should be accorded to the expertise of the Commission. The courts' responsibility in reviewing the orders of regulatory bodies, at both the state and federal level, has always been exclusively to determine the validity of such orders. To allow the courts to do other than decide questions of law, interpret constitutional and statutory provisions, and ascertain whether there is evidence to support the decision would subvert the judgment of the Commission. As the appointed experts and decision-makers on utility policy matters, the Commissioners are in the best position to evaluate the merits of different arguments and to make consistent policy decisions based upon their expertise.

4) Expansion of the Scope of Redress Available to the Courts

Amendments to Section 1758 of the Pub. Util. Code in Section 7 of SB 1041 also raise only one issue. The new language in this section would expand the redress available to the courts by directing the Court of Appeal or the Supreme Court not only to affirm or set aside a CPUC decision, but also to "afford other relief to effectuate its judgment." This expansion, along with the expansion of the scope of review, would severely undercut the authority of the Commission and even further intensify the negative impacts, discussed above, that would be caused by the expansion of the scope of review in Section 1757 of the Pub. Util. Code. Pacific strongly opposes any expansion in either the scope of review or redress that can be granted by a court reviewing CPUC decisions.

Analysis of Issues in SB 1042

1) Who May Bring a Complaint to the Commission

Amendments to Section 1702 of the Pub. Util. Code in Section 1 of SB 1042 raise one issue. Language deleted from Section 1702(a) would make a significant change in the complaint process at the CPUC by removing the current limitations (including the requirement that not less than 25 consumers sign a complaint) on who may bring a complaint at the CPUC about the reasonableness of rates. Pacific is very much opposed to this proposed change. Pacific believes the requirement for 25 signatures, in particular, has prevented the filing of many frivolous complaints.

Utility rates are set by the Commission after lengthy proceedings. It is patently unfair to permit those rates to be later challenged by one individual after the numerous hours spent by many parties to determine what is a reasonable rate. Rates should only be permitted to be challenged when there are new and materially changed circumstances and when the complaint is signed by 25 or more consumers or one of the other parties now designated in Section 1702 of the Public Utilities Code.

2) Change in the Role of ALJs

Amendments to Section 1705 of the Pub. Util. Code in Section 3 of SB 1042 raise one issue. Language added to Section 1705(c) would give ALJs more authority to make decisions independently of the Commissioners. This would be done by requiring the Commissioners to follow the factual findings of the ALJs and to explain their reasons for any substantive deviations from ALJs' decisions, thus giving ALJs the same responsibility as the Commissioners for decisions. This change confuses the roles of the ALJs and the Commissioners, conflicts with the constitutional authority granted to the Commissioners (e.g., to fix rates or establish rules for public utilities), and injects inconsistency into CPUC decisions.

Commissioners are appointed by the Governor, with the approval of the legislature, and have ultimate responsibility for all decisions of the CPUC. ALJs are civil servants whose role is to gather information and compile the record upon which the Commissioners' decisions will be based. It is the Commissioners who must answer to the public. To give ALJs separate decision-making authority would essentially create two commissions, thereby usurping the constitutional authority of the CPUC and replacing it with one not accountable to the public.

Granting ALJs separate decision-making authority would place the Commissioners in the position of an appellate body with regard to ALJs' decisions, contrary to the state's constitutional provisions establishing the Commission as the primary decision-maker with regard to the implementation of public utility policy. Furthermore, this dual decision-making authority raises issues of consistency, arguing for a single point for setting regulations and making decisions governing the range of different cases arising at the CPUC.

3) Rules for Ex Parte Contacts

Section 4 of SB 1042 would adopt an Ex Parte Rule for the CPUC by adding Section 1705.5 to the Pub. Util. Code. This new law would, to a great extent, prohibit ex parte contacts. Specifically, the Ex Parte Rule proposed by this legislation does the following:

(1) Commissioners would be prohibited from communicating orally or in writing with any "party" or ALJ in a pending "adjudicatory proceeding." Commissioners would be permitted to confer with the ALJ after a proposed decision has been issued. (See Section 1705.5(a)(1).)

(2) If a prohibited communication occurs, the Commissioner would be required to file a notice of the communication and a summary of any oral communication or a copy of any written communication. An opportunity for rebuttal on the record would also have to be provided. (See Section 1705.5(a)(2).)

(3) Communication with an Advisor to a Commissioner or any member of the Commission staff would be very limited since communication with these parties is prohibited to the extent it would circumvent the purpose of the Ex Parte Rule. (See Section 1705.5(a)(3).)

(4) Parties to an adjudicatory proceeding would be prohibited from communicating with the ALJ "except upon notice to all parties providing an opportunity to be heard." Upon receipt of such communication the ALJ would be required to file a notice of the communication and determine whether sanctions should be imposed. A party who violates this requirement may be required to show why their claim should not be "dismissed, denied, disregarded or otherwise adversely affected." (See Section 1705.5(b).)

The draconian measures that would be imposed by this legislation would severely hinder the ability of the CPUC to function as a regulatory body. Good regulation of an industry is dependent on the free flow of information between the regulators and the regulated entities. The Ex Parte Rule proposed by SB 1042 emphasizes the prohibition of communications. A rule that instead emphasized disclosure and the obligation to report ex parte contacts on the record would be much more valuable and supportive of the regulatory process.

Regulatory bodies like the CPUC perform quasi-legislative as well as quasi-judicial functions. Almost all cases before the CPUC are in some way legislative in nature, that is, they involve public policy issues. It is imperative that the CPUC's "constituency" be permitted to communicate with it for the Commission to be made aware of all the areas of concern and range of proposed solutions available. Pacific Bell believes the constraints on communication that would be imposed by the Ex Parte Rule in SB 1042 are so restrictive they would prevent the Commission from rendering decisions that are in the best interest of the public it serves.

An Ex Parte Rule should be simple, effective and as non-burdensome as possible for those subject to it. The rule set out in this legislation is ambiguous and confusing. There is no definition of who is a party. The definition of what constitutes an adjudicatory proceeding is very broad and vague. It is unclear in the section prohibiting parties from communicating with ALJs, Section 1705.5(b), exactly what is allowed and when sanctions will be imposed.

The CPUC has recently determined (3/22/91) that it is time to revisit the question of adopting a generic rule governing ex parte contacts in Commission proceedings. Comments on the Ex Parte Rule proposed by the Commission are due April 22, 1991. The Commission has gained some experience with ex parte rules that it has adopted on a case-by-case basis. The Commission is in the best position, based on this experience and that of the parties who will comment in the Commission's proceeding, to determine the kind of Ex Parte Rule that will facilitate its decision-making process while maintaining the due process and fair access that are necessary for all parties appearing before it.

Thank you for considering the concerns about the changes that SB 1041 and SB 1042 would make in the CPUC's regulatory processes that I have identified. Pacific Bell looks forward to working with the legislature to assure any procedural reforms at the CPUC are fair to all parties involved.

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TESTIMONY OF BAY AREA TELEPORT

Informational Hearing on SB 1041 and SB 1042

April 9, 1991

Bay Area Teleport very much appreciates this opportunity to discuss our views on the subject of process and procedure at the California Public Utilities Commission. We strongly support the fundamental due process concepts addressed by SB 1041 and SB 1042: access to justice provided by appellate judicial review, effective controls on ex parte contacts with the Commissioners and staff, and more definite rules applicable to the conduct of proceedings by the CPUC's Administrative Law Judges.

Bay Area Teleport - Who We Are

Bay Area Teleport ("BAT") is an Alameda-based telecommunications common carrier, providing high quality, high speed digital voice and data services via dedicated circuits, to long distance interexchange carriers and to business and governmental users. Our network serves locations in eleven Northern California counties, including the cities of San Francisco, Oakland, San Jose, Sacramento, Santa Rosa, Santa Cruz, and surrounding communities. BAT was founded in 1984 and began offering service in 1986.

BAT is an entrepreneurial venture, and our network was constructed and operates entirely on private capital. Our operations are regulated by both the California Public Utilities Commission and the Federal Communications Commission.

Since our inception, we have been a frequent participant in telecommunications matters which come before the CPUC, for two reasons. First, BAT considers its chief competitor to be Pacific Bell. Since Pacific Bell is regulated by the CPUC, BAT must appear before the CPUC to argue for rules, regulations, and results that control Pacific

Bell's ability and incentive to use its monopoly and market power in an anticompetitive fashion against BAT. Second, we are a ratepaying customer of Pacific Bell. BAT must involve itself at the CPUC to attempt to ensure that we are charged fair rates for the monopoly services we must purchase from Pacific Bell.

The CPUC's Processes and Procedures

As many public policy makers are aware, the CPUC is in the midst of a significant restructuring of its regulatory oversight of telecommunications utilities under its jurisdiction. The CPUC has been quite cautious in allowing the benefits of increased competition to be realized by California telecommunications consumers, and has proceeded at a slower pace than have other major states. Meanwhile, technological change and innovation have proceeded rapidly, and have brought competition, although in a de facto manner in some cases, for some services in California.

As competition begins and spreads, the CPUC's regulatory role changes by necessity. When the provision of telecommunications services was a 100% monopoly enterprise by Pacific Bell, GTE California, and the other Local Exchange Carriers ("LECs") in California, the CPUC's primary role was the protection of monopoly ratepayers from monopoly abuses, such as overcharges and undue rate discrimination. With the entry of competitors, all of whom are both competitors and customers of the LECs, the CPUC must oversee more players, must watch for and prevent any anticompetitive activities of the LECs, and must also allow the LECs to compete fairly.

There are, of course, a number of different regulatory models available, based on the experiences of numerous other states who have turned the trail the CPUC now walks into a well-worn path. The Commission has chosen to modify its telecommunications regulatory regime in a number of important aspects, most of which have been implemented in a long-running docket entitled Investigation 87-11-033.

In Phase I of this docket, the Commission allowed competition for a handful of services previously reserved to Pacific Bell and the other LECs, and granted the LECs pricing flexibility for those services. In Phase II, the Commission acceded to the wishes of Pacific Bell and GTE California, and substantially changed its regulatory approach for those companies in the fall of 1989. The principal outcome of Phase II was the adoption of a new pricing structure for LEC telecommunications services, with an emphasis on so-called "price caps" and ranges of rates, and a departure from hearing-based rate-setting in the traditional rate case context.

From BAT's perspective, the Commission has incorrectly presumed that the emergence of some competition for Pacific Bell and the other LECs should be the occasion not only for the abandonment of effective regulatory controls over the LECs, in the name

of "freeing" the LECs to "compete", but also for the abandonment of the due process rights of interested parties before the CPUC. The Commission is departing from traditional processes, in which the fundamental decisions involving rates, service, and competition are made based on evidence established and tested in the hearing room. As it emphasizes more informal methods of policy making, such as "rulemakings", off-the-record "workshops", and advice letters, the Commission has, both practically speaking and as a matter of stated policy, de-emphasized the discipline which accompanies the hearing room: the fairness and regularity of procedure, the opportunity to cross-examine witnesses under oath, and the creation of a full and complete evidentiary record.

Moreover, as it departs from traditional decision making, it appears the Commission has adopted a new method of making policy and resolving disputes: prejudgment. Our experience, and we believe the experience of most of the companies attempting to make a go of it in the telecommunications marketplace in California, has been that no amount of facts or evidence presented before an Administrative Law Judge will alter the Commission's predetermined course. Traditional hearing processes are not gradually being left behind, they are being abandoned so rapidly as to be considered a waste of time by those making the Commission's ultimate decisions. Exacerbating this problem is the appearance that such predetermined outcomes are arrived at as the direct result of ex parte contacts and information provided off-the-record by ratepayer-supported lobbyists of large utility companies.

The I. 87-11-033 Phase III Experience

We raise I. 87-11-033 because the Commission's conduct of Phase III of that docket provides a telling object lesson on the need for statutory reform of the Public Utilities Code.

Phase III was established to deal with issues of fundamental importance: the nature, pace, and scope of competition for LEC services which the Commission would allow; the rules applicable to that competition; the responsive rate changes by LECs which the Commission would allow; and the impact of the Commission's decisions on ratepayers at all levels. It is difficult to imagine a more important set of decisions for the Commission to make in the field of contemporary telecommunications regulation. Moreover, these decisions clearly require the development of the best possible record to serve as the basis for decision, since many of the necessary decisions are one-time in nature. Unfortunately, the Commission attempted ill-advised procedural shortcuts, as the following discussion demonstrates. We believe the events of the last year illustrate dramatically the flaws of the CPUC's current procedures and the need for intervention by the Legislature.

In November, 1989, the Assigned Commissioner issued a Ruling that announced a new procedural approach for Phase III of I. 87-11-033. "[W]e will use a variety of procedural means to build the Phase III record," he stated. "We will rely on

notice-and-comment rulemaking to determine policy issues where appropriate. We will hold hearings as appropriate on questions of fact where the parties differ. Workshops may be used to resolve questions that follow narrowly from policies or even formulas the Commission may adopt..." This Ruling also identified specific issues to be addressed in what was referred to as "Prepared Testimony."

A number of parties, including Pacific Bell, GTE California and the Commission staff, filed opening and reply testimony on the specified issues in January and February, 1990. Because BAT's prior experience in Phases I and II had shown that the cost of retaining an expert witness to prepare such testimony would range from $70,000 to $100,000, BAT decided to wait for the promised Phase III hearings, where it expected it would be able to cross-examine witnesses, submit briefs, and file comments on the Proposed Decision, focusing only on the points where its interests were affected or where it could make a direct contribution. Like other parties, BAT waited for the scheduling of a prehearing conference to identify hearing dates. No such conference was scheduled, and rumors began to multiply that the Commission was going to try to dispense with hearings altogether. (Ironically, the Commission had conducted Phase II pursuant to its longstanding practice of full evidentiary hearings and briefs). BAT became concerned that it would have no opportunity to cross-examine witnesses under oath or otherwise intervene in a meaningful way.

In July, 1990, the assigned Administrative Law Judge issued a proposed decision. BAT strenuously objected to the denial of due process inherent in the attempt to dispense with hearings. Pointing to the Assigned Commissioner's Ruling, BAT stated that it had relied on the statement that hearings would be held on questions of disputed fact; not only did BAT show that there were numerous areas with disputed factual claims, but BAT also demonstrated that hearings were legally required under Section 1708 of the Public Utilities Code because the proposed decision would alter several important prior Commission decisions. Despite strong pressures to the contrary from certain other parties, BAT held fast to its position that hearings were legally required. TURN joined BAT in that effort. Ultimately, however, the Commission agreed with BAT and chose not to issue a Phase III decision.

BAT is proud of the role that it played in confronting, and then stopping, what many parties believed was a fait accompli, namely, the issuance of a Phase III decision without the benefit of evidentiary hearings. Looking back on the matter, BAT believes the Commission was saved from issuing a decision with numerous factual and, worse, significant policy errors that, belatedly, even Pacific and GTE California recognized would have brought major adverse consequences for their companies.

Largely in response to BAT's intervention, the Commission reissued its proposed decision as a new "Proposed Decision" and asked the parties for further comment on whether hearings were required to resolve disputed facts. After receipt of extensive comments from BAT and other parties, the Commission then scheduled the prehearing conference that, under its usual custom and practice, should have been held a year before.

With no small amount of effort, the originally sprawling set of issues was pared down to a manageable scope, new testimony was filed, and 16 days of hearings were finally held. Those hearings were recently completed, and briefs are due in the near future. Matters that the Commission may have believed were capable of easy resolution are now seen as considerably more complex and stubborn. BAT submits that evidence, not ex parte contacts, is what brought that recognition about.

Why We Support SB 1041 and SB 1042

BAT is convinced that whatever delay occurred between late 1989 and early 1991 was caused almost entirely by the Commission's attempt to dispense with due process and with its customary, tried-and-true hearing procedures that permit cross-examination of witnesses under oath. Rather than hastening decision, the attempt to avoid hearings caused many parties, including BAT, to believe that the Commission, in effect, intended to act on the basis of information received outside the hearing room from only those parties with sufficient influence to make their voices heard and their wishes known, and without the benefit of information from other parties. In other words, what was generated was a distrust of the Commission's process; this distrust was finally alleviated only when the Commission acknowledged that hearings were not only legally required, but also the best means for resolving the complex factual and policy issues awaiting decision.

Realizing that it was forced to do so regardless of the financial burden, BAT fully participated in the Phase III hearings once they were finally held, including actively cross-examining other parties' witnesses. Having done so, and having gone to such extraordinary lengths to force the Commission to held hearings in Phase III in accordance with the promise in the Assigned Commissioner's Ruling, BAT believes more strongly than ever that the Phase III decision should now be made only on the basis of substantial evidence in the record, not on the basis of ex parte contacts, and that meaningful judicial review should be available in case the Commission makes an error of law or abuses its discretion in determining matters of fact.

Typically, ex parte contacts involve representations made at the last minute on matters that were never even addressed in the hearing room. Typically they are made by persons who have no knowledge of, or interest in, what happened in the hearing room. Typically the information is inaccurate or, if not inaccurate, subtly biased in favor of the fortunate party that has gained the decisionmaker's attention. Not only are other parties prevented from rebutting (or even learning about) such information, but worse, the Commission may reach a decision on the basis of factors antithetical to the welfare of the state as a whole.

Moreover, limits on ex parte contacts go hand-in-hand with meaningful judicial review. Meaningful judicial review helps insure that a Commission decision will be reached

on the basis of substantial evidence in the record. Having a court with time to review the record increases the chances that a decision will be made in the first instance on the basis of a fair and impartial assessment of all the evidence in the record, not simply the evidence argued in ex parte contacts. BAT's experience in I. 87-11-033 and, in particular, in Phase III thereof, convinces BAT that these are necessary regulatory reforms, and that they should be made part of the Public Utilities Code so that other parties will not be forced in the future, as BAT was, to undertake such extensive efforts simply to insure that a hearing is held.

A long list of parties will, by the time this legislative hearing is concluded, bring to the Committee's attention the current realities of the CPUC judicial appeal process: for all intents and purposes, this process is almost nonexistent. The first line of appeal -- to the Commission itself for a reversal of a previous decision -- is seldom effective. The next, and only other line of appeal is to the California Supreme Court, via a writ of review process. The Committee is no doubt well aware that California is the only major state which does not provide for judicial review as a matter of right of its utilities commission's decisions. This, combined with the crush of death penalty and criminal appeals before the Supreme Court, has created an appeal "gridlock" which denies any meaningful review to disaffected or injured parties as the result of CPUC decisions.

Thus, the environment within the Commission, wherein procedures and rules are essentially being written as the agency goes along (and often to support predetermined outcomes), is not merely allowed to exist because of an absence of any real oversight -- it is encouraged. The CPUC is free to act as it chooses with the full knowledge that aggrieved parties have no judicial body available to them to ask for a review of factual or evidentiary integrity of Commission decisions, and no meaningful review of conformity to statutory or Constitutional law as a deterrent against future unfair action.

For the past five years, BAT has joined with other competitive companies, the California Manufacturers Association, the California Judicial Council, and a diverse grouping of interests in seeking to introduce a measure of meaningful judicial review into the decision making of the CPUC. We supported AB 4237 (Hauser) in 1987, and AB 338 (Floyd) in 1989. Since 1989, we have sought to build support for the introduction of a new appellate review bill by contacting dozens of companies, associations, and agencies who believe, as we do, that the CPUC was becoming increasingly unaccountable for increasingly questionable decision making. They believe, as we do, that CPUC decisions are simply too important and costly to be made without appropriate judicial review when necessary.

Our concerns also led us to support Senator Rosenthal's attempt last year to introduce a fair reporting mechanism for off-the-record contacts at the CPUC, SB 1125. BAT believes that access to decision-makers at all levels of the Commission can be a useful way of communicating general information. However, we feel it is equally important that a record of such exchanges be kept. In this way, all concerned parties can know at least which decision makers have been contacted and when.

We also strongly support the provision of SB 1042 which requires the CPUC to make its decisions based on the record of proceedings of a particular case. We attempted to amend AB 338 with a similar provision two years ago.

Conclusion

Bay Area Teleport has rarely believed it appropriate for the Legislature to involve itself in determining specific outcomes of CPUC decision making. We do believe that individuals can make mistakes and that the process for arriving at certain outcomes can be flawed. Ultimately, this is why we believe there is a compelling need for SB 1041 and SB 1042. We know of no reason why the CPUC should be alone among state agencies (and indeed alone among major states' public utilities commissions) in avoiding judicial review. Likewise, we believe it is time the Legislature took a hard look at the role of off-the-record discussions in Commission decisions. The Commission, unlike the Legislature, does not face the threat of electoral scrutiny. It should be compelled to base its decisions on record facts and evidence.

We respectfully urge passage of SB 1041 and SB 1042, and stand ready to assist the Members and their staffs as they consider any modifications which may be appropriate to these long-overdue pieces of legislation.

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April 8, 1991

Senator David Roberti
President Pro Tempore
State of California Senate
State Capitol
Sacramento, CA 95814

Dear Senator Roberti:

Thank you for your letter of March 26, 1991 regarding Senate Bills 1041 and 1042.

This office represents the Western Burglar & Fire Alarm Association which is a trade association of security companies doing business in the State of California. They are large users of telecommunications services and have been interested parties in telephone company proceedings dating back to the 1960's. The Western Burglar & Fire Alarm Association supports both of your proposed bills.

The limitation of judicial review of Public Utility Commission decisions to the California Supreme Court has created a de facto immunity for the Commission from judicial review. Over its history, the Supreme Court has reviewed very few Public Utility Commission cases and it is quite appropriate to amend the review process to permit easier access to a judicial forum. This is particularly relevant in light of the fact that in recent proceedings the Commission has attempted to or in fact has dispensed with evidentiary hearings before making decisions on key issues. This occurred in the alternative regulatory framework proceedings (I.87-11-033) and the Commission's review into the cellular radiotelephone utilities (I.88-11-040).

The WBFAA also supports Senate Bill 1042. The interested parties do not enjoy the same access to the Commissioners and their staff as are enjoyed by the utilities. Therefore, unrestricted ex parte contacts have generally worked to the disservice and disfavor of interested parties and consumers in general. However, there is a modification that should be made to SB 1042 with regard to notice.

It would be appropriate to amend Sections 1705.5(a)(2) and 1705.5(b) to provide that a copy of the notice and description of the communication be served on all parties of record rather than merely being placed in the public file. If it is only placed in the public file, it is unlikely that the interested parties will become aware of the communication in a timely manner.

We appreciate your concern regarding these important issues, and if we may be of further service or assistance, please do not hesitate to contact us.

Yours truly,

GOLD, MARKS, RING & PEPPER

By Alan L. Pepper
Alan L. Pepper

ALP:clr
cc: Roger Westphal, President,
Western Burglar & Fire Alarm Assn.
Senator Bill Lockyer, Chairman,
Senate Judiciary Committee
✓Senator Herschel Rosenthal, Chairman,
Senate Committee on Energy and Public Utilities

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Ann Gressani
Government Relations
Pacific Division

April 8, 1991

Senator David Roberti
Senate President ProTem
State Capitol
Sacramento, CA 95814

Re: SB 1041 -- SUPPORT
Hearing April 9th, Joint Meeting of Senate Committees on Judiciary and Energy & Public Utilities

Dear Senator Roberti:

MCI strongly supports SB 1041, which will provide parties in proceedings before the Public Utilities Commission (PUC) the right to appeal PUC decisions to the Court of Appeal. This measure would provide a realistic opportunity for relief under a regulatory system increasingly characterized by a lack of due process resulting from the informal and ad hoc decision making employed by the PUC as it attempts to move away from traditional regulation. In addition to being afforded the opportunity to appeal unjust decisions, MCI believes that the increased possibility of judicial review proposed by this bill would serve to encourage the PUC to more scrupulously enforce due process procedures as part of its decision making, and lead to a more fair and equitable regulatory process.

Decisions of the PUC have imposed upon MCI new and unreasonable requirements which were never the subject of evidentiary proceedings, or subject to challenge through cross-examination or other processes. Furthermore, our efforts to demand due process have been circumvented by the Commission's apparent ability to ignore altogether legitimate protests. In order to strengthen SB 1041, the bill should be amended to address a new informal method of decision-making at the PUC which leaves MCI and other parties with regulatory "decisions" that are never even put into writing, which render us unable even to use the appellate process intended to be provided by your bill.

For example, a utility may request an expedited rate change through the device of an "advice letter" filing to the PUC. This procedure delegates almost all decision-making responsibility to PUC staff, rather than to appointed officials. Although time is allowed for parties with concerns to file protests against the proposed change, the PUC staff may choose to ignore the protests completely and allow the rate change automatically to go into effect without even issuing an order that addresses and adequately responds to the concerns of the protesting parties. The protesting party has no way of knowing whether the Commissioners themselves were even aware that a protest had been filed. Furthermore, the rate change goes into effect without the creation of an appealable PUC decision establishing the legal or factual basis for ignoring the legal challenges contained in the protests.

Therefore, we suggest including the following amendment which would simply require the PUC to either grant or deny properly-filed protests and complaints, by issuing an order that adequately responds to any legitimate issues that have been raised. Such an amendment would assure that the Commissioners are aware of the protest and provide interested parties with a full explanation of the basis for the PUC's decision. If concerns still remain, this written decision will enable parties to seek judicial review of the Commission's action, and enable the Court to comprehend the nature of the dispute and rationale by which the commission reached its decision, thereby facilitating the appellate review process.

Proposed Amendment

Add third paragraph to existing Public Utilities Code Section 728:

> If a customer or competitor of a utility or other interested person files a timely-filed protest or complaint, alleging that the rates or classifications that any utility demands, deserves, charges or collects, or proposes to demand, deserve, charge or collect, for or in connection with any service, product or commodity, or that the existing or proposed rules, practices or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory or preferential, the Commission shall, in a timely manner, issue an order that either grants, in whole or in part, the protest or complaint, or denies, in whole or in part, the protest or

complaint, and which sets forth the reasons for the Commission's decision, including the factual and legal bases upon which it disposed of the protest or complaint.

MCI greatly appreciates your interest in addressing the important issues of PUC regulation, issues with a profound economic impact on consumers and businesses in California. We are eager to work closely with you and your staff to help this important proposal become law.

Sincerely,

Ann Gressani
Manager, Government Relations

cc: Senator Herschel Rosenthal
Chairman, Senate Committee on Energy and Public Utilities

Senator Bill Lockyer
Chairman, Senate Judiciary Committee

April 9, 1991

JOINT INFORMATIONAL HEARING

SENATE JUDICIARY COMMITTEE

AND

SENATE ENERGY AND PUBLIC UTILITIES COMMITTEE

REFORM OF PUBLIC UTILITIES COMMISSION PROCEDURES

SB 1041 AND SB 1042, ROBERTI

My name is Daniel Baker, and I am counsel for the Ad Hoc Carriers Committee which is an association of small and medium size PUC regulated motor carriers. Its primary function is to participate in PUC general freight investigations proceedings, to assist in the development of an adequate record upon which the Commission can base a rational and proper decision. In the past two general freight investigation proceedings, the Ad Hoc Carriers provided more expert witnesses than any other participant. The basic regulatory program adopted by the Commission in its 1986 Decision was proposed by the Ad Hoc Carriers.

I have practiced before the Commission and the California Supreme

Court for over 30 years. I have testified before the Judiciary Committee of the Senate on behalf of the State Bar on the same issue, an appeal from PUC decisions, about 20 years ago. The argument was the same - there is no actual appeal to the state Supreme Court from capricious, arbitrary, and even unlawful Commission decisions. The PUC under the present system is accountable to no one.

The recent Commission general freight decision issued February 1990, is a clear example of what is wrong with this appeal system. The most important element of the rate regulatory program adopted by that decision, a variable cost price floor or a minimum rate floor, was not introduced in the case until eight months after the proceeding record was closed. An obvious violation of due process. PUC Code 1705 requires findings of fact and conclusions of law to be based upon the case record for all material issues. There could be no findings or conclusions based upon the case record for the variable cost price floor for the matter was not introduced, argued, or considered in the proceeding. Section 491 of the Code requires that all common carrier rates and tariffs to be filed on 30 days notice to the Commission and the public. The Commission by its decision reduced the

statutory notice to 10 days. Section 3662 states that the PUC "shall" establish or approve rates for permitted carriers. By its decision, the PUC changed the word "shall" to "shall not" establish or approve rates for these carriers. There are additional findings and conclusions in the decision equally repugnant to fairness and the law of this state, but I believe the few mentioned clearly demonstrate the problem that exists.

Three petitions for writs of review were filed with the state Supreme Court asking for an appeal of the February, 1990 decision, all of which were denied. The Ad Hoc Carriers petition received the most votes to grant an appeal, however, it obtained only three of the four votes that were required and "close is only good in horse races."

Another deficiency in the present system is that "reconsideration" by the Supreme Court of a denial of a petition for a writ of review is not permitted. However, such a right is available from all other state and federal courts including the U.S. Supreme Court.

The California system with regard to appeals from PUC decisions is defective, unfair, and practically nonexistent. A change in these appellate procedures is long overdue.

With respect to SB 1402, the 1990 California PUC in the recent past regulated through ex parte communications and by a marketplace philosophy. The investigation which resulted in the 1990 general freight regulatory program involved 58 days of oral hearings but the decision is almost bare of any discussion of the factual evidence introduced. Generally, it was a waste of time and effort by the over 100 witnesses and literally thousands of participants which appeared in the case directly or through their associations. Ex parte communication is not for the little people which are disadvantaged from this unfair and improper practice. And the marketplace philosophy and policies are not designed to protect the vast majority of the people of this state which the PUC was created to protect.

Ask the question why these ex parte communications cannot be offered in the formal oral hearings which are held for the specific purpose of gathering pertinent information. At these hearings the information to be offered is submitted under oath and its creditability and reliability is tested through cross-examination. The Commissioners of the PUC are not competent to test or challenge the ex parte statements. None of the Commissioners have been employed by or associated with utilities they

control nor a shipper or a carrier. Hearings are conducted to protect Commissioners against prejudiced, distorted, incredible, and/or untrue statements. Receiving and encouraging ex parte back-door communications bypasses the safeguards established for the Commissioners and for the protection of the people of this state.

The ex parte communication should not be tolerated and should be declared unlawful. The decisionmakers of our courts are forbidden by law from receiving ex parte communications. PUC's Commissioners' decisions on important issues are of far greater significance and consequence than an order of any judge and ex parte communication should be subjected to the same restraints.

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BY FACSIMILE

April 9, 1991

Hon. David Roberti
President Pro Tempore
California Senate
California Legislature
State Capitol
Sacramento, CA 94248

Hon. Herschel Rosenthal
Chairman
Senate Committee on Energy
and Public Utilities
California Legislature
State Capitol
Sacramento, CA 94248

Dear Senator Roberti and Senator Rosenthal:

Please be so kind as to add this letter to the hearing record in support of enactment of Senate Bill 1041 and Senate Bill 1042. I understand that these bills will be the subject of a joint informational hearing on April 9 before the Senate Energy and Public Utilities Committee and the Senate Judiciary Committee. I urge the Committees to approve these bills for consideration by the full Senate..

SB 1041 would accomplish two important reforms in judicial review of decisions made by the California Public Utilities Commission ("CPUC" or "Commission"). First, it provides for direct review of Commission decisions by the Court of Appeal rather than the California Supreme Court. Second, it would authorize the Court of Appeal to review whether Commission decisions are supported by substantial evidence in the Commission's record (and not simply whether the Commission has regularly pursued its authority). These reforms are long overdue. This bill would result in meaningful judicial review of CPUC decisions for the first time in a long time. The current workload of the California Supreme Court effectively precludes judicial review. The Supreme Court's workload is so heavily burdened with death penalty cases and other criminal matters that the Court appears to be strongly disinclined to grant review of CPUC decisions, as evidenced by the relative handful of CPUC decisions actually accepted for

review by the Court in the last seven years. Indeed, except when a decision involves a matter of general law outside the CPUC's specific jurisdiction, the Court almost never reviews the Commission's decisions. This situation has left the Commission virtually a law onto itself, with little real oversight. Such a situation should not be allowed to continue. I do not believe that there is any regulatory commission in the United States that enjoys as much unreviewable discretion as the CPUC; given the enormous influence that the CPUC has on both the state and national economies, it is vital that it be subjected to meaningful judicial review.

SB 1042 would effect an equally important reform in the Commission's procedures. Principally, it would enact a ban on ex parte contacts with CPUC Commissioners in any "adjudicatory proceeding" pending before the CPUC concerning any issue of law or fact involved in the proceeding. This reform also is long overdue. Unfortunately, to an extent that the public and perhaps even the Legislature scarcely imagines, much of the CPUC's current business is heavily influenced by ex parte contact. I regret having felt obliged, on behalf of my clients, to engage in such contact, and I would like to see the whole system ended. The result of such contacts is not only a loss of confidence in the impartiality and integrity of the Commission's decision-making processes, but also, in the long run, a loss of quality in the CPUC's decisions as well. Typically, ex parte presentations involve information that was not tested in the hearing room; such information is either wholly inaccurate or biased or both, and should never be the basis for decision. Yet, when other parties are unable to rebut (and, worse, often do not even know about) such presentations, ex parte information frequently does become part of the ground for decision. Again, this situation should not be allowed to continue.

I believe I am well positioned to offer these observations. First, I served as a research attorney for the California Supreme Court in 1978 and 1979, so that I have more than a passing acquaintance with some of the pressures on that Court's caseload. Second, after leaving the Court, I joined the Commission's Legal Division and then served as the Legal Advisor to (the late) Commissioner (later Judge) Richard D. Gravelle between 1980 and 1982. In that position, I frequently attended meetings involving ex parte presentations; thus, I have had the opportunity to know and understand quite intimately the advantages and disadvantages of such contacts. Finally, since 1983, I have frequently appeared before the Commission as an attorney in private practice on behalf of numerous clients. As stated above, at times I have felt obliged to make ex parte presentations myself, and I have always personally regretted their necessity. Suffice it to say, I am quite familiar with both the Commission's processes and its decisions over a time period extending more than 10 years. After long thought on the subject, I have come to the point where I strongly support the reforms proposed in SB 1041 and 1042. I urge the Legislature to pass these bills.

I believe that SB 1041 and SB 1042 represent an historic opportunity for the legislature to ensure that the Commission remains faithful to the purposes for which it was established

almost 80 years ago, namely, to protect all Californians from the power and influence of large economic interests providing monopoly services essential to their welfare. If these reforms are not adopted, the Commission will likely conclude that the future should involve less, rather than more, due process and less, rather than more, opportunity for the voices of ordinary Californians to be heard. Please let me know if there is anything that I can do to assist in seeing these bills enacted.

Very truly yours,

Earl Nicholas Selby

ENS/lmj