

**WORKSHOP ON GOVERNMENT DECISION-MAKING AND OPEN MEETINGS
BEFORE THE GOVERNOR’S OFFICE OF PLANNING AND RESEARCH**

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Comments of the California Energy Commission by Its Chief Counsel, Kourtney Vaccaro

Thank you for welcoming the Energy Commission’s perspective on ways in which the Bagley-Keene Act might be modestly modified to allow state agencies to more efficiently and effectively conduct their business, while staying true to the Act’s goals of ensuring open, transparent government decision making.

In our view, modifications are warranted to address unintended adverse impacts of the 2009 amendments. The 2009 amendments prohibit “serial meetings,” which are essentially indirect communications between quorums of decision makers, on an item of agency business, whether those communications occur directly among decision makers, through intermediaries, or through written communications. This requirement has led the Energy Commission to restrict general policy and administrative discussions, both among Commissioners and between Commissioners and staff. Commissioners and staff are concerned that these discussions may be unlawful serial meetings, because no one knows with whom the others have been speaking and if a quorum has directly or indirectly been established.

This well-founded concern impedes our full-time Commissioners’ ability to hold general discussions about policy and program matters and approaches to fulfilling the Commission’s responsibilities. This is at odds with some of the Commission’s enabling statutes. For example, the Warren-Alquist Act requires each of the Commissioners to possess a distinct set of skills and experience to ensure a comprehensive perspective on energy issues and policy matters within each Commission’s purview. The five appointed full-time Commissioners represent specific areas of expertise: law, environment, economics, science/engineering, and the public at large. The Bagley-Keene Act’s effective limitations on the Commissioners’ ability to share these perspectives on broad policy issues undermines this intent.

Similarly, members of a full-time state body such as the Energy Commission need the ability to communicate with one another in order to direct staff activities in a way that does not require staff to essentially choose between Commissioners when there is conflicting direction.

More specifically, adherence to the 2009 amendments impairs the ability of Commissioners to fulfill at least two of the Commission’s core duties: (1) certifying (licensing) large thermal power plants and (2) preparing an integrated energy policy report, commonly referred to as the IEPR, which provides electricity and natural gas demand forecasts to assist in the development of energy infrastructure planning and state energy policy. The Commission’s work in both of these areas has been adversely affected by the 2009 amendments.

Power Plant Certification. The Warren-Alquist Act, which embodies the Energy Commission’s enabling laws, requires the Commission to establish a committee of at least two Commissioners to preside

over quasi-adjudicatory power plant certification cases. The committees are comprised of a presiding member and an associate member. Under the amendments, these committee members may not – *for any purpose* – discuss a pending certification case unless the discussion is preceded by 10 days public notice and occurs in a public setting or allowed closed session. This means, for instance, that if two committee members travel to the desert for days of hearings they generally avoid traveling together or carpooling from the airport to the hearing site because, under the Act, they may not discuss the pending matter *in any way*. This makes no sense when, on the heels of a hearing, where evidence and issues are at the forefront of their thoughts, they can't readily benefit from the other's expertise to make sense of the policy and factual issues presented or otherwise touch base on how to proceed in the matter. They can't even discuss scheduling.

This isn't a hypothetical. About a year ago, a two-Commissioner committee conducted a multi-day power plant certification hearing in a desert area hours from the airport. The Commissioners carpooled to and from the airport, together with some of their respective staff, but in an abundance of caution to comply with Bagley-Keene, none of the individuals in the car discussed the case at all. In circumstances like this, it would make better to sense to allow the discussions to occur as long as the committee subsequently entered an oral or written record of the conversation into the case docket.

As a point of clarification, power plant certification committees are allowed by Bagley-Keene and the Administrative Procedure Act to deliberate in closed session after giving appropriate public notice, but the car pool example doesn't readily lend itself to the Bagley-Keene mandatory noticing and procedural requirements for holding a closed session.

This problem isn't limited to the circumstances when powerplant certification Committees travel offsite to hearings. It occurs within the Energy Commission's headquarters as well. The Committee members do not speak unless at a publicly- noticed meeting. The practical effect of this is to reduce the value of having a committee overall and to render the statutorily required two-member committee a one-member committee when swift action must be taken, because the presiding Committee member must act alone.

Given the practical challenges of avoiding serial meetings, the Energy Commission no longer creates Commissioner committees – with the exception of the statutorily required powerplant certification committee.

IEPR. Adherence to the 2009 amendments while preparing the IEPR presents a different problem for the Commissioners. The IEPR and its updates present information about California's energy trends and issues and, includes policy recommendations.

The IEPR is developed under the leadership of a designated Lead Commissioner. The Lead Commissioner identifies high-priority topics as well as topics mandated by the Legislature. The Lead Commissioner isn't, however, expert in all of the IEPR's topical areas as some of the areas fall within the expertise of our other Commissioners. As potential IEPR topics are considered, workshops are organized to obtain stakeholder and public comments, sections are drafted and reviewed by staff and Commissioners, and everyone takes great pains to ensure that serial meetings aren't occurring. The orchestration involved in setting and implementing the rules on who may speak with whom on any given topic is both time consuming and counterproductive. The Commissioners would benefit from more

opportunities to use their broad expertise to scope and prepare workshops, discuss takeaways from the workshops (including written comments and review sections), and prepare sections for public discussion.

Proposed Solutions. To address the concerns presented and related concerns, the Energy Commission proposes that the Bagley–Keene Act be modified to (1) allow decisionmakers to discuss, with one another and staff, policy, program, and procedural matters, and (2) allow designated committees to also engage in discussions of substance and procedure without those discussions being deemed “meetings” subject to noticing and public discussion requirements, as long as the discussions do not involve consensus building or votes.