BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U 902 M) for Authority, Among Other Things, to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 2016.	A.14-11-003 (Filed November 14, 2014)
And related matters,	A.14-11-004

MOTION REQUESTING RULING ON VIDEO RECORDING AND WEBCASTS

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OVERVIEW

Recently, the public has been restricted from using recording devices in prehearing conferences and evidentiary hearings conducted by the California Public Utilities Commission (CPUC) through rulings and actions. It is our assertion that these restrictions are illegal and must cease. We therefore request a ruling on the topic in proceeding A.14-11-003/004, the San Diego Gas & Electric (SDG&E) General Rate Case (GRC), such that we may initiate legal action if our rights continue to be violated.

We hereby notify the Commission that we intend to video record all meetings of these proceedings by placing our video camera in the back of the room in an inconspicuous location. Our recordings will be "C-SPAN" style, and will not be interrupted or muted during "off the record" periods. These recordings may be hosted on the Internet on a permanent basis. Also, our First Amendment rights allow us and other members of the public to create derivative works based on these recordings. We also assert that other members of the public may also make their own recordings.

In addition, we request that the Commission webcast the proceedings to make it possible for members of the public to more easily observe the proceedings without traveling to the CPUC offices in San Francisco.

Furthermore, we believe it is appropriate to hold some or all of these proceeding in the service area of SDG&E so members of the public can participate in person.

BACKGROUND

Citizens Oversight (AKA "Citizens Oversight Projects" – COPS) is a 501(c)3 nonprofit organization with corporate offices in Delaware and primary offices in California. Over the past seven years, COPS has recorded hundreds of public meetings. The public's ability to review and promulgate the content of the entirety of these meetings helps the public to understand and participate in their government and discourage waste, fraud, and abuse. COPS has also operated through the fictitious name "Coalition to Decommission San Onofre" (CDSO) as a party to the investigation into the outages at SONGS (I.12-10-013) and the Nuclear Decommissioning Cost Triennial Proceeding (NDCTP) A.12-12-012/013, which were recently in process at the CPUC. COPS has become a party under the COPS banner in this proceeding, A.14-12-003/004, and intends to participate as a party in other proceedings. Although COPS operates as a party in the instant proceeding, the issues in question are with regard to the rights of the general public, and not just those who have gained party status in the proceedings.

COPS has recorded hundreds of other meetings of similar bodies, and even evidentiary hearings of the CPUC. Generally, we have no difficulty making these recordings. In some cases, the bodies we record are unfamiliar with our right to make such recordings, but in time, we have always prevailed. Now we have recently encountering rules and rulings[1] on this subject that are limiting our ability to participate as allowed by law, and thus this motion for a ruling so we may put this to bed.

The CPUC is a state agency, originally formed in 1911 by Constitutional Amendment as the Railroad Commission. In 1912, the Legislature passed the Public Utilities Act, expanding the Commission's regulatory authority to include natural gas, electric, telephone, and water companies as well as railroads and marine transportation companies. In 1946, the Commission was renamed the California Public Utilities Commission. The Governor appoints the five Commissioners, who must be confirmed by the Senate, for six year staggered terms. The Governor appoints one of the five to serve as Commission President.

DISCUSSION

1. The "Bagley-Keene Open Meetings Act" applies

The Public Utilities Code explicitly states that the commission shall be open and public in accordance with the Bagley-Keene Open Meeting Act, which applies to state agencies and related advisory bodies.

> PUBLIC UTILITIES CODE
> 306. (b) The meetings of the commission shall be open and public in accordance with the provisions of Article 9 (commencing with Section]11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code. [AKA the Bagley-Keene Open Meeting Act]

The Bagley-Keene Act is similar to the "Brown Act" which applies to local governmental bodies,

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1 ALJ Melanie Darling told Ray Lutz that he could not video record the I.12-10-013 SONGS OII Phase 1 evidentiary hearing on May 13, 2013. She said this was because of the interruption caused in the prior meeting from a banner held by activists, although the banner was unfurled after the end of the meeting, and the unfurling of the banner has nothing to do with the rights of citizens to record events at public meetings. This video is available here: http://www.copswiki.org/Common/M1358. At least Darling agreed to webcast the rest of the week of hearings, and all but the first day can be viewed here: http://www.copswiki.org/Common/M1360. However, we were prohibited from making our own recordings, but audio and video. We protested this action but did not dilute the focus of the proceedings by taking additional legal action at that time.

In the I.12-10-013 Phase 2 prehearing conference held on July 12, 2013, a member of the public was physically escorted out of the meeting when he refused to stop recording the meeting. An audio recording of this confrontation and some still photos are available here: http://www.copswiki.org/Common/M1370. This action was taken by Commissioner Florio.

such as boards, councils and commissions. The intent of both the Bagley-Keene Act and the Brown Act is to make these governmental bodies and agencies more open to the public, acknowledging that public scrutiny and oversight can reduce waste, fraud, and abuse. The provisions of these laws deal with two major subjects: 1) public notification, agendas, and restrictions on closed meetings, and 2) the rights of the public to attend and record these meetings, and be provided with the documents under consideration. In some circumstances, the public is also provided with the opportunity to make public comments and to comment on agenda items before the body.

In the case of the CPUC, the entirety of the workload is far beyond what one five-member body could possibly hope to accomplish without delegating a vast quantity of that work to employees. Public Utilities Code explicitly provides for such delegation.

> 309. The executive director may employ such officers, administrative law judges, experts, engineers, statisticians, accountants, inspectors, clerks, and employees as the executive director deems necessary to carry out the provisions of this part or to perform the duties and exercise the powers conferred upon the commission by law. All officers and employees shall receive such compensation as is fixed by the commission.

It is important to note, however, that acts performed by these employees are still acts by the Commission, and in essence is equivalent to the commission itself acting. In fact, in the Bagley-Keene Open meeting act, from Govt Code 11121(c) we learn that the act applies equally to advisory boards, and similar bodies that are created by a formal action of the state body and which consist of three or more persons. See below.

> FROM THE BAGLEY-KEENE OPEN MEETING ACT.
> 11121. As used in this article, "state body" means each of the following:
> (a) Every state board, or commission, or similar multimember body of the state that is created by statute or required by law to conduct official meetings and every commission created by executive order.
> (b) A board, commission, committee, or similar multimember body that exercises any authority of a state body delegated to it by that state body.
> (c) An advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons.
> (d) A board, commission, committee, or similar multimember body on which a member of a body that is a state body pursuant to this section serves in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation.

Legal analysts point out that the Act applies to advisory bodies if they consist of "three or more *persons*." Please note that they do not have to be attended by "two or more commissioners" as has been asserted by CPUC ALJs in the past. The word "persons" implies that these can be anyone, including parties to a formal proceeding, ALJ's, and of course actual Commissioners.

Delegated committees and commissions also have to follow the law. We have recorded appointed advisory bodies who had no ability to make decisions on their own, and who did not have any member of the body in attendance which formed the delegated body. For example, when a blue-ribbon commission is formed by a city council, they are subject to the provisions of the Brown Act, even though no member of the City Council sits as a member of the blue ribbon commission.

Another example is regarding Community Planning Groups in San Diego County. They are elected bodies, but are wholly advisory, as their position on any issue is treated only as advice by the Board of Supervisors. Nevertheless, they are also subject to the provisions of the Brown Act.

Similarly, when an investigation is created by the CPUC, the Commission has delegated powers to this body, and similarly, responsibilities to be open.

We have recorded CPUC evidentiary hearings in the past. We were involved as a member of the public in the CPUC proceedings regarding the Sunrise Powerlink in San Diego County. We recorded these hearings without any consternation by the ALJs.

2. Cameras and recording devices are NOT inappropriate in administrative law hearings

We assert that cameras and recording devices are appropriate for administrative law hearings. City councils and similar bodies frequently and routinely have hearings where testimony is provided under oath, and we have encountered no difficultly recording those hearings.

The Bagley-Keene Open Meeting Act states:

> 11124.1. (a) Any person attending an open and public meeting of the state body shall have the right to record the proceedings with an audio or video recorder or a still or motion picture camera in the absence of a reasonable finding by the state body that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.
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> (b) Any audio or video recording of an open and public meeting made for whatever purpose by or at the direction of the state body shall be subject to inspection pursuant to the California Public

Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), but may be erased or destroyed 30 days after the recording. Any inspection of an audio or video recording shall be provided without charge on equipment made available by the state body.

(c) No state body shall prohibit or otherwise restrict the broadcast of its open and public meetings in the absence of a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the proceedings.

There has been no assertion by ALJ Darling that our camera in the rear of the room or held by a member of the public in the audience creates undo noise, illumination, or obstruction of any view. In this article, there is no provision that such a recording is not allowed if someone officially involved in the hearing does not want to be recorded. On the contrary, all the events which occur during the meeting, including before and after the meeting, are available for the public to record as they see fit.

To successfully assert that recordings are inappropriate is particularly difficult if the meeting is being recorded in any other manner, such as a webcast. The only difference would be in the ease of the public to use the video recordings for their own purposes, such as preparing reviews of the meeting, promulgating it on YouTube, etc. (This is a separate issue, which is protected under the First Amendment rights of the public.)

Although not required by law to do so, COPS would be happy to edit out any content that would violate someone's need for anonymity, such as a person in a witness protection program. We have done this in the past in local planning group meetings where residents are involved. However, we have yet to find such a case in meetings of governmental bodies at this level where the discussion is about official matters.

3. "Off the record" periods are also recordable

There is no exemption for what can be recorded in a public meeting. The public has the right to record ALL events in the meetings, and use those recordings as they see fit. This includes periods when the meeting is taken "off the record" and an official transcript is not produced. In recent meetings, the audio track of the official webcast is muted during these periods. However, if you are a member in attendance at the meeting, you can hear these conversations. If you are unable to make it to the meeting, you are unable to hear these discussions, and therefore, to mute the webcast during these periods is inappropriate, and any restriction on the public in terms of recording discussions that are "off the record" are illegal.

From a practical standpoint, the reality is that the discussions that are held "off the record" are generally less significant than the discussions and testimony that is on the record, but is taken off the record to give the hearing reporters a break, and to exempt them from attempting to record every word of a conversation if many people are engaged and perhaps talking at the same time.

With that said, we also find that some of the conversations held in the meeting but "off the record" are significant enough to allow the right to record these intervals just like every other time.

4. Even without the Bagley-Keene Open Meeting Act, the public has a right to record such meetings based on First Amendment rights

We point to a case from 1991 that very closely parallels the situation here at the CPUC.

In the case "Thompson v. City of Clio, 765 F. Supp. 1066 - Dist. Court, MD Alabama 1991" a member of the city council, Thompson, (who was previously the mayor) was recording the meetings using an audio recorder. The Mayor (Cox) told Thompson he could not record the meetings and he confiscated his tape recorder in one instance and ejected him from the meeting in another instance.

They ruled in favor of Thompson, with the following paragraph being the most clearly explanatory:

> Because the recorder ban is content-based as well as viewpoint based, the state's burden of justifying the policy is far more severe than in the case of a legitimate time, place, or manner regulation. "[C]ontent-based restriction[s] on political speech ... must be subjected to the most exacting scrutiny," and are constitutionally permissible only where "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988). The defendants in this case have not argued that their desire to avoid the misinformation or angry responses that they believed Thompson's tape recordings engendered qualifies as a "compelling state interest." Indeed, such a purpose is not even a legitimate one, for the Supreme Court has frequently recognized that the disruptive or disturbing effects of expression are integrally bound up with the very political value of free speech that the first amendment was designed to safeguard and nurture.
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> Furthermore, although the state may legitimately forbid speech intended and likely to incite "imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969) (per curiam), Thompson's recording of council meetings and replaying of these tapes cannot be made to fit within this narrow category based simply on evidence of a single hostile citizen. *See* *Texas v. Johnson*, 491 U.S. 397, 408-09, 109 S.Ct. 2533, 2541-42, 105 L.Ed.2d 342 (1989); *Monroe v. State Court of Fulton County*, 739 F.2d 568, 575 (11th Cir.1984).

Thus, we may conclude from this case that it is improper to restrict the recording of a meeting by a member of the public if the meeting is recorded in any other fashion, such as a webcast, based on First Amendment rights supporting freedom of speech.

CONCLUSION

Therefore, we file this motion requesting a ruling on the use of video and audio recording devices, and to provide a webcast of any public meetings related to the proceeding, including Prehearing Conference, Evidentiary Hearing, Public Participation Hearings, etc. We request this ruling so that we may file legal action to compel the Commission to allow us to record should your ruling be adverse to our intentions.

Although we are requesting this ruling to clarify the matter, we do not agree that such a ruling is required, as our right to record under the Bagley-Keene Act exists as a matter of law regardless of any action by the Commission. Similarly, there is no requirement that we provide any 24-hours courtesy notice of video recording these meetings.

Respectfully Submitted

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