

California Statewide LNG Environmental Stakeholder Working Group

Little Hoover Commission
925 L Street, Suite 805
Sacramento, California 95814

RE: Comments on the Governor's Energy Agency Reorganization Plan

The California Statewide LNG Environmental Stakeholder Working Group would like to express the following concerns regarding the proposed reorganization and creation of the CA Department of Energy as these changes relate to the potential approval of Liquefied Natural Gas (LNG) terminals in California. The potential introduction of LNG terminals to CA represents a major change in energy policy and the need for public involvement and transparency is paramount.

A. Transfer of Authority and Limitation of Judicial Review to the Supreme Court Removes the Public's Existing Right to Challenge these Decisions in Superior Court.

1. The proposed reorganization appears to transfer authority of certain natural gas and electricity transmission decisions, including those affecting LNG terminals, from the CPUC to the newly created Department of Energy. While the decision to concentrate decisions under one Department may sound like an improvement, it is essential that regulatory oversight and the public's right to participate in decisionmaking be preserved and, where possible, enhanced.
2. The transfer of certain decisions over LNG to the Department of Energy and the parallel call to confine judicial review of these decisions to the Supreme Court only by writ of review removes the public's existing right to challenge these decisions in both the Court of Appeal and the Supreme Court. This right was re-affirmed by the Legislature as recently as 2000 when it recognized the public's need for expanded access to the courts in the wake of deregulation in the energy markets.
3. Limiting judicial review to the Supreme Court replicates an already dysfunctional process for reviewing power plant certification decisions in this state that has effectively locked the public out of the decisionmaking process and curbed its ability to effectively challenge these decisions. Of the approximately 30 petitions that have been filed to the Supreme Court over these power plant certifications in the last 25 years, only ONE such petition has ever been heard and that was in 1985, 20 years ago.
4. There is also substantial case law suggesting that the limitation of judicial review to the Supreme Court in these siting decisions is, in fact, unconstitutional. The constitutionality of this provision is currently being challenged in a petition pending with the California Supreme Court. And, it appears that the legislature,

itself, anticipated that the provision might be unconstitutional when it directed that, if found to be invalid, the judicial review should then be directed to Superior Court.

Recommendation:

Limiting judicial review for these decisions as they relate to LNG to the Supreme Court will make CA government less accountable, not more. As such, the Little Hoover Commission should advise that this provision be rejected outright.

Instead of limiting judicial review, the Commission should recommend that judicial review be given to the Superior Court to hear challenges to Department of Energy decisions wherein the proceedings and subsequent appeals are granted priority in the Court's calendar.

B. Weakening of Ex Parte and Conflict of Interest Rules for the Secretary of Energy, the Designated Chair of the Energy Commission, Compromises Transparency and Accountability.

1. A change to the ex parte communication rules appears to set a different and lesser standard for the Secretary of Energy, who would also serve as the designated Chair of the Energy Commission. The public members, in contrast, would be held to the more stringent standard for ex parte rules.

2. A similar provision appears to set a different and lesser standard for conflict of interest rules for the Secretary of Energy, who again, would also serve as the designated Chair of the Energy Commission. The public members, in contrast, would be held to the higher standard when it comes to conflict of interest rules, and would be precluded from appointment if they had received a substantial proportion of their income from an electric or natural gas utility with the previous two years.

3. We believe that all members of the Energy Commission should be held to the higher standards that would be applied to the four public members and can see no justification for lessening those standards as they apply to the member of the Commission who functions as the Secretary of the new Department of Energy and the designated Chair of the Commission. If anything, the standard should be higher for the Secretary, as she or he would chair the Commission.

Recommendation:

At a minimum, the Little Hoover Commission should recommend that the Secretary of Energy, who also serves as the designated Chair of the Energy Commission, be held to the higher standards on ex parte and conflict of interest rules that apply to the other four public members of the Energy Commission.

The applicable code citations can be found in Attachment A that accompanies our written comments.

Attachment A

The main subject of this testimony is proposed Public Utilities Code section 1001(b), which states with emphasis added:

(b) Notwithstanding subdivision (a) or any other provision of law, ***all responsibilities of the commission with respect to the certification of a natural gas line, storage facility, plant or system, or any extension thereof, and with respect to an electric transmission line, plant or system, or any extension thereof, carrying electricity to the interconnected grid or that is part of the interconnected grid, but not including electric distribution facilities, are hereby transferred to the exclusive jurisdiction of the Department of Energy.*** All applications for the certification regarding any line, facility, plant or system described in this subdivision shall be heard and decided by the California Energy Commission with the Department of Energy. A decision of the Department of Energy or the California Energy Commission with respect to matters transferred pursuant to this subdivision shall be conclusive as to all matters determined thereby, ***and judicial review of any such decisions shall be governed by section 25531 of the Public Resources Code.*** For purposes of this section, an electric line, plant or system, or extension thereof, shall be considered “electric transmission” when either (1) it has a maximum rated voltage of 200 kV or greater or, (2) it has a maximum rated voltage of 100 kV or greater and certification is sought following inclusion of that facility as an element of a final transmission expansion plan for the California Independent System Operator.

Transferred Public Utilities Commission Functions

- A proposed addition to the Public Utilities Code, subdivision 1001(b), would transfer certain natural gas and electric transmission decisions from the Public Utilities Commission (PUC) to the new Department of Energy.
- The Little Hoover Commission should carefully consider whether this part of the reorganization plan comports with Government Code section 12080.4(e). That section prohibits any reorganization plan from transferring jurisdiction over any constitutionally-mandated functions of a constitutionally-created agency to any other agency.
- Because the PUC is a constitutionally created agency with constitutionally mandated functions, certain functions may not be transferred to the new Department of Energy by the reorganization plan.

Judicial Review of Transferred PUC Functions

- In addition to transferring certain PUC functions, the proposed subdivision attempts to confine judicial review of decisions to the Supreme Court regarding these transferred responsibilities. The subdivision does this by reference to the judicial review procedure applicable to power plant certification decisions in Public Resources Code section 25531.
- Currently, PUC decisions regarding natural gas and electricity transmission are subject to judicial review in both the Court of Appeal and Supreme Court under Public Utilities Code section 1756(a).
- While such decisions were subject to review only in the Supreme Court prior to 2000, the Legislature rejected this arrangement because of the need for expanded access to courts due to deregulation in the energy markets, and to promote uniformity of evolving decisional law and judicial economy. (See Stats.2000, c. 953 (A.B.1398))
- Confining judicial review to the Supreme Court of these transferred decisions is simply bad policy, and may also violate the Government Code and the Constitution.

Confining Judicial Review to the Supreme Court is Bad Policy

- While the goal of confining judicial review to the Supreme Court might be characterized as simply attempting to make the work of the executive branch “more efficient,” so would eliminating all judicial review. This type of improved efficiency was not contemplated in the formation of the Little Hoover Commission process.
- The very real effect of this provision would be to effectively eliminate the judiciary’s check on the legislative and executive branches when it comes to interpretation and enforcement of the law in this field. The provision would essentially deprive the public of the ability to have applicable laws enforced.
- An example from the power plant certification process is illuminating. Public Resources Code section 25531 confines judicial review of power plant certification decisions to the Supreme Court. Over the past 25 years, there have been approximately 30 petitions requesting review of such decisions.
- *However, only one petition has ever been heard by the Supreme Court (in the 1985 case of County of Sonoma v. California Energy Commission).*
- This record of one in about 30 cannot possibly be characterized as truly providing a check on the executive branch, nor can it be deemed to be providing the public a genuine avenue of recourse for bad decisions.
- This experiment in confining jurisdiction to our state’s highest and *most overburdened court* has thus been a colossal failure in the context of power plant certification decisions, and there is no sign it would be any different for review of natural gas and electric transmission decisions.
- The judicial review provision is also bad policy because it does nothing to improve the type of executive branch efficiencies typically overseen by the Little Hoover Commission. This provision is about stripping the judicial branch of power rather than improving the executive function of government.
- *Rather than making government more accountable, as is the stated goal of practically every document recently produced by the Little Hoover Commission, the judicial review provision has precisely the opposite effect.*

The Judicial Review Provision May Violate the Government Code

- Government Code sections 12080 to 12081.2 detail the Governor’s authority to perform executive branch reorganizations.
- Section 12080.1 describes the purposes intended by the Legislature in allowing the Governor this limited power to reorganize the executive branch.
 - These purposes entirely focus on improving the management of the executive branch and “state government,” but do not speak to the role of the judiciary nor the separation of powers. Rather, it is clear that the Legislature has carefully limited the Governor’s power in this process.
- In section 12080, the Government Code defines “reorganization” with respect to the executive branch, and this section similarly does not speak to the role of any reconfigured executive branch with respect to the judiciary.
- Without such statutory support, it is not reasonable to conclude that reorganizations should take in broad governmental changes that would shift the distribution of power between the branches.
- However, the judicial review component in §1001(b) attempts to shift this balance.

The Judicial Review Provision Is Likely to Be Unconstitutional

- In addition to these policy and statutory problems, an unbroken line of California case law suggests that the proposed judicial review provision is unconstitutional.
- Article VI of the Constitution empowers all three levels of the state courts to hear extraordinary writ proceedings. However, proposed §1001(b) would prevent the superior courts and courts of appeal from hearing challenges by way of writ of mandate to Department of Energy decisions regarding natural gas and electricity transmission.
- When there has been such a conflict between a statute and the Constitution, California courts have required the statute to be supported by a superseding constitutional authority allowing the Legislature to strip court jurisdiction. This line of doctrine started with *Pacific Telephone etc. Co. v. Eshleman* in 1913 and was last affirmed in *County of Sonoma v. State Energy Resources Conservation and Development Commission* in 1985.¹
- However, because there is no constitutional authorization for proposed §1001(b) (or the proposed Department of Energy for that matter), such legislative jurisdiction stripping is not permissible, and the judiciary's Article VI power is supreme.
- This Commission should note the following. First, the constitutionality of Public Resources Code section 25531 is the subject of a petition currently pending with the Supreme Court. (Case S132199) Second, that the Legislature itself foresaw that section 25531's potential invalidity in crafting Pub. Res. Code §25903, which states:

If any provision of subdivision (a) of Section 25531, with respect to judicial review of the decision on certification of a site and related facility, is held invalid, judicial review of such decisions shall be conducted in the superior court subject to the conditions of subdivision (b) of Section 25531. The superior court shall grant priority in setting such matters for review, and the appeals from any such review shall be given preference in hearings in the Supreme Court and courts of appeal.

- Because of the policy, statutory, and constitutional problems of the judicial review provision in proposed section 1001(b), the LNG stakeholder group requests that this Commission not endorse the provision in its recommendations concerning the Department of Energy reorganization plan.
- Instead, we recommend language similar to that included in Public Resources Code section 25903, which would give the superior court jurisdiction to hear challenges to such Department of Energy decisions wherein the proceeding and subsequent appeals are granted priority in the courts' schedules.

Ex Parte Communication and Conflict of Interest Standards

- Proposed Public Resource Code sections 25204 and 25205 govern ex parte communications and conflict of interest standards for the California Energy Commission members.
- As currently formulated, these sections would apply different and lower standards for the Secretary of Energy than for the four public members of the Energy Commission without

¹ *Pacific Telephone etc. Co. v. Eshleman* (1913) 166 Cal. 640; *Great Western Power Co. v. Pillsbury* (1915) 170 Cal. 180; *Loustalot v. Superior Court* (1947) 30 Cal.2d 905; *Department of ABC v. Superior Court* (1968) 268 Cal.App.2d 67; *County of Sonoma v. State Energy Resources Conservation and Development Comm'n* (1985) 40 Cal.3d. 361.

any justification. If anything, the standard should be higher for the Secretary, as she or he would chair the Commission.