

# Memorandum

To: Commissioners and Advisors

Date : November 3, 2010  
via e-mail

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From: **California Energy Commission**  
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Subject: **Backup Material for November 8, 2010 Business Meeting:  
“Ratification” or Reconsideration of Contract 400-10-404:  
LGC, \$33 Million in ARRA SEP Funds**

## Introduction and Summary

This memo describes the events leading up to, and the rationale for, Items 1, 2, and 3 on the November 8, 2010 Business Meeting Agenda. Item 1 is the possible “ratification” or reconsideration of Contract 400-10-404 with the Local Government Commission for approximately \$33 million in American Recovery and Reinvestment Act (“ARRA”) State Energy Program (“SEP”) funds (“Contract 404”), and Items 2 and 3 are related matters. The Commission has already approved Contract 404, at the October 21, 2010 continuation of the October 20, 2010 Business Meeting. However, the Western Riverside Council of Governments (“WRCOG”) (a) asserts that the Commission’s October 21st action violates the Bagley-Keene Open Meeting Act (“OMA”), (b) “demands” that the Commission “correct or cure” that action, and (c) threatens to file a lawsuit seeking to void Contract 404.

We believe the Commission’s October 21st action complied with the OMA. However, in order to (i) provide an opportunity for any additional comments on the Contract that any member of the public may have, and (ii) “correct or cure” any alleged OMA violation in case a court were to find that such a violation occurred, the Commission has placed “ratification” of the Contract on the November 8 Business Meeting Agenda.

## The Facts

In 2009 the Commission approved Program Opportunity Notice (“PON”) 400-10-401 (“401”), which allocated approximately \$33 million in ARRA SEP funds to establish a number of districts across California to implement the federal government’s Property Assessed Clean Energy (“PACE”) program. WRCOG, which had unsuccessfully bid on the contract, filed a protest of the awards, which the Department of General Services (DGS) determined was untimely. WRCOG then filed a lawsuit challenging DGS’s determination ruling, which ultimately resulted in a writ of mandate

from the Superior Court of Riverside County, directing DGS to hear the protest, and barring the Commission from performing under the Contracts awarded under PON 401 until the protest hearing had occurred.

Shortly after the Superior Court issued its injunction, the Federal Housing Finance Agency (“FHFA”) essentially obliterated the PACE program by ruling that PACE financing violates the terms of uniform security instrument prohibitions against senior liens in federally backed mortgages. While PACE had offered much promise nationwide as a tool to break through market barriers to reducing energy consumption on existing properties, now only a handful of local banks — those with the resources and inclination to not sell their PACE loans to secondary markets — are presently offering PACE financing.

In response to the FHFA ruling and related federal actions, on July 28, 2010 the Commission cancelled PON 401 and all contracts awarded under it, and, on August 6, 2010, in light of the impending federal deadline of October 21, 2010 to encumber ARRA funds, revised the SEP regulations to allow the money to be awarded without a public solicitation. WRCOG received notice of both business meetings and the proposed actions, and objected to neither.

At the September 22, 2010 Business Meeting the Commission approved Contract 400-10-403 (“Contract 403”). That contract was awarded to the California Statewide Communities Development Authority (“CSCDA”) to administer the Energy Upgrade California program, through which the \$33 million would be expended. (WRCOG also received notice of that meeting, but did not object to the contract.) However, on October 13, 2010, at CSCDA’s regularly-scheduled business meeting, CSCDA delayed approving the contract – until its next meeting of October 27, 2010 – in light of concerns about opposition from WRCOG. (Notably, 16 jurisdictions in the Western Riverside Council of Governments are also members of CSCDA.) Because CSCDA’s approval of Contract 403 would not occur, if at all, until after the October 21, 2010 federal deadline, on October 13, 2010 the Commission issued a public notice that it would consider adding Contract 404 (and two related items) to the agenda for the Commission’s own October 20, 2010 Business Meeting. The October 13th notice was provided to WRCOG.

Because the October 20th Business Meeting agenda had already been published on October 8th, and the October 13th notice regarding Contract 404 was less than 10 days before the scheduled October 20th meeting, the OMA required the Commission, before approving Contract 404, to make a determination “that there exists a need to take immediate action and that the need for action came to the attention of the [Commission] subsequent to the agenda being posted [on October 8th].” (Gov’t Code, § 11125.3, subd. (a)(2).) As the Commission determined, it was clear that both elements existed: (i) the need to take action (the necessity of encumbering the funds before the October 21st federal deadline) and (ii) that the need for action came to the attention of the Commission after the original posting of the October 8th notice for the October 20th meeting (it was not until October 13th that CSCDA failed to approve Contract 403 and thereby necessitated consideration of an alternative such as Contract 404).

On October 14, 2010, WRCOG obtained a temporary restraining order (“TRO”) blocking the Commission from taking action on Contract 403. The judge orally indicated that the TRO should be interpreted to apply to any action encumbering the \$33 million. Therefore, at the October 20th Business Meeting, the Commission continued Items 17 - 19 (which were Contract 404 and related matters, to which, the judge had indicated, the TRO appeared to apply) and adjourned the meeting to October 21, 2010, at 10:00 a.m. (Such continuation is proper under the OMA and appropriate notice thereof was provided.)

Because of the TRO, the Commission would have been unable to act on Contract 404 on October 21st. However, shortly after 10:00 a.m. on that day, the Commission learned that the California Court of Appeal had temporarily stayed operation of the TRO, which thus allowed the Commission to take action on Contract 404. Under the authority established by section 1203, subdivision (c) of the Commission’s regulations, at approximately 11:00 a.m. the Chairman changed the starting time of the October 21st continuation of the October 20th meeting to 2:00 p.m. on October 21st, to allow additional public notice of the Commission’s potential action. Appropriate notice of that change was posted at the Commission and on the Commission’s website, and notice was also provided by e-mail to all known interested parties, including but not limited to WRCOG. (There appears to have been no person present at the Commission at 10:00 a.m. or on the phone to the Business Meeting at 10:00 a.m. Moreover, to date the Commission has received no indication that anyone who wanted to participate at the October 21st (or October 20th) Business Meeting was unable to do so, for any reason including but not limited to the change of the October 21st start time from 10:00 a.m. to 2:00 p.m.)

At the 2:00 p.m. Business Meeting on October 21st, the Commission first determined, as required by the OMA, “that there exists a need to take immediate action and that the need for action came to the attention of the [Commission] subsequent to the agenda being posted [on October 8th].” (Gov’t Code, § 11125.3, subd. (a)(2).) No one challenged that determination, which was made unanimously by all four Commissioners present. In so doing, the Commission noted the October 21st deadline imposed in the SEP award by the United States Department of Energy (“DOE”). The Commission also noted that while the Chairman received an oral representation by DOE staff members on October 19th that DOE was not then planning to exercise its right to deobligate the funds on the passage of the October 21st deadline, there was substantial uncertainty about how long such forbearance might continue and about the circumstances under which DOE would proceed, and it was necessary to act in light of the Court of Appeal’s temporary stay, which facilitated the Commission’s ability to act expeditiously. The Commission thereafter considered and approved Contract 404 (again, there were no objections).

### Legal Analysis

There were three components of the noticing of the October 21st approval of Contract 404, and all three were proper under the OMA.

1. Adding Items 17 - 19 to the October 20th Business Meeting agenda with less than 10 days notice (i.e., on October 13th) was proper under the OMA, because

the Commission determined that providing less than 10 days notice was necessary, as required by Government Code section 11125.3, subdivision (a)(2), and there is compelling evidence that the factors listed in that provision – a need to take immediate action, and the Commission’s obtaining knowledge of the need to take action less than 10 days in advance – were present.

2. Recessing the business meeting and continuing (“adjourning,” in the language of the statute) Items 17 - 19 from October 20th to October 21st was also proper under the OMA. Sections 11128.5 and 11129 of the OMA expressly authorize such actions, and proper notice of the date and time that the meeting would be reconvened was provided by announcing it at the October 20th meeting and by posting a written notice on the door of Hearing Room A, as provided by the OMA.

3. Changing the start time of the October 21st continuation meeting from 10:00 a.m. to 2:00 p.m. was proper, because the Chairman has the power to make such changes. (Cal. Code Regs., tit. 20, § 1203.) In addition, the change is also authorized as an OMA “recess” or “adjournment” of the meeting from 10:00 until 2:00, and the proper notice of such a continuation was provided as required by the OMA.

In sum, approval of Contract 404 on October 21st was in strict compliance with the OMA. Moreover, strict compliance is not required to fend off a legal challenge. Actions taken at agency meetings cannot be overturned on the ground of an OMA violation if “[t]he action taken was in *substantial compliance* with [the OMA]” (Gov’t Code, § 11130.3, subd. (b)(3) [italics added]) and there has been no prejudice to the complaining party (see *North Pacifica LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416). It would be surprising if a court found that the Commission’s actions were not in at least “substantial compliance”, especially given that WRCOG suffered no prejudice, because WRCOG had actual notice of the October 21 meeting and an opportunity to speak at that time. (See *id.* [agency’s good faith efforts to provide notice, and the provisions of six days’ actual notice, constituted substantial compliance and avoided prejudice to plaintiff].)

Nevertheless, the Chief Counsel’s Office has recommended that at the Business Meeting of November 8 – for which the ordinary 10-day notice has been provided – the Commission should consider “ratifying” (or otherwise reconsidering) the October 21st approval of Contract 404. (The backup material for the November 8th Meeting includes the transcript of the October 21st Meeting and the backup material for Item 17 on the October 20th agenda.) We make this recommendation so that WRCOG and anyone else will have one more opportunity to be heard on this matter, and in recognition that the OMA allows an agency to “cur[e] or correct[] an action challenged pursuant to the OMA.” (Gov’t Code, § 11130.3, subd. (a).) We believe such “curing or correcting” is unnecessary legally, but it could provide additional assurance to stakeholders that Contract 404 continues to be valid and was based upon a full consideration of any factors that anyone views as relevant for the Commission’s consideration. Indeed, while the agenda styles the November 8th action as a possible “ratification” of Contract 404, the Commission has the discretion to rescind, cancel, or take other appropriate action on Contract 404, based upon this memo, the other backup material for the Meeting, and anything else relevant that is appropriately presented at or before the meeting.

## Conclusion

The Commission's October 21st action complied with the Open Meeting Act. Nevertheless, "ratifying" or reconsidering that action on November 8th, which we believe is legally unnecessary, will give interested persons an opportunity to express additional useful views on Contract 400-10-004 that were not previously considered and would "correct" or "cure" any alleged OMA violation.

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