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UTILITY OVERSIGHT IN THE SUNSHINE: WHO BENEFITS?

Douglas N. Jones

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Open meeting and open record laws are now more than two decades old. All states and the District of Columbia have them.² Despite resistance from powerful quarters and legitimate doubts about the wisdom of their universal application, the laws have experienced few changes since their inception—and changes that have been made have resulted in stricter legislation.³

"Government-in-the-sunshine" deservedly has great appeal, especially in a democracy that cherishes an independent citizenry and informed press. The problem is that openness also has its drawbacks.

In the small but steady stream of literature on the subject, academics and practitioners often have criticized the universal application of open-meeting and open-record laws. For example, college administrators have pointed out that the laws often conflict with academic privacy, freedom, and governance.⁴ School-board members have complained of the obstacles the laws present in disciplinary cases. Lawyers and government officials have contended that the laws sometimes undermine traditional attorney/client privileges, especially when officials seek legal advice in conducting public business.⁵ And some federal regulatory commissioners have written of the harmful effects that full openness has on achieving agency-mandated public policy goals.⁶

What one can surmise from all this attention is that: (1) open-meeting and open-record laws enjoy broad public support and are a permanent part of the political landscape; the laws are especially valued by the media and legislators; (2) arguments against their strict application remain similar to those when the laws were first adopted; (3) the emotionalism that surrounds the subject makes reasoned discussion of narrowing or relaxing the laws’ provisions difficult to debate; and (4) potential limits to total public scrutiny can best be accomplished by (a) exempting an agency (for example, when an agency’s tasks are primarily judicial in character), or (b) permitting open meetings for decision-making forums but not for deliberative discussions.
Public policy is dynamic, not static. Therefore, laws and regulations, including open meeting ones, should be reviewed periodically. How, for example, may open-meeting laws affect the behavior of state public utility commissions (PUCs)? Have open meeting laws:

- Inhibited collegial discussion among commissioners?
- Increased operating costs?
- Encouraged circumvention?
- Discouraged substantive discourse?
- Emphasized process at the expense of outcome?
- Become more useful to special interest groups than to the public?

THE ARGUMENTS AND THEIR APPLICATION

Public utility commissions carry quasi-judicial, quasi-legislative, and quasi-administrative functions. PUCs display a judicial function when they hear disputes and adjudicate contested cases; they have a legislative function when they set policy for public utilities; and they have an administrative function when they carry out the statutes that underpin public utility regulation. Cases and issues typically involve tens of millions of dollars (sometimes hundreds of millions). They are economically and legally technical and complex, and they must be decided on the basis of an evidentiary record. There is considerable difference between a state PUC and, for example, the fish and game or liquor control departments.

Only three agencies—the Kentucky Public Service Commission, the Maryland Public Service Commission, and the Texas Water Commission—report that state sunshine laws do not apply to them. Thirty-one commissions conduct all (or nearly all) of their proceedings in public, and 24 open all (or nearly all) of their documents to the public.

The most serious charge leveled against open-meeting laws is that they inhibit collegial discussion among public utility commissioners. Candid exchanges, critical analyses, the winnowing and sifting of relevant considerations, and the offering of divergent (and perhaps tentative) views may all be impeded by openness. Substantive discourse also may be victimized, and posturing, according to some observers, becomes more prevalent in the public spotlight.

In a public utility case, a commissioner must learn the facts, hear the positions of competing parties, become acquainted with the technical aspects of an issue, and come to a decision on the merits of an argument. This is judge-like behavior and, as with judicial panels, may work better when there is opportunity to communicate one’s views candidly—with neither the press nor the opposing parties present. Open-meeting laws foreclose this opportunity.

The following description of PUC procedures by a former Pennsylvania commissioner exemplifies the difficulty presented by the current process:8

At the end of the week, the cases to be decided the next week are distributed to the commissioners and their staffs for review and study.

On the Tuesday or Wednesday before public session...the commission meets in executive session to discuss ministerial matters. None of the items on the public session agenda is discussed. A temporary agenda for public session is available and is used only for...
the purpose of requesting postponements. That is the extent of the "discussion" of that week's cases (which number 100 to 150).

No later than 4 p.m. on the day preceding public session, all motions to be made in the public session must be distributed in writing. No discussion between or among commissioners occurs on the motions prior to public session.

My problem with this procedure is that there has been no collective discussion of the cases prior to the individual votes.

Occasionally there is some discussion of the issue at hand, but most often there is no frank, free-flowing discussion of all the options. Most often there is a complete lack of a candid and open exchange of ideas. No one tries to persuade a fellow commissioner to his or her point of view. Instead, prepared texts are read, and public posturing occurs. I am as guilty as anyone else.

Why don't we just let it all hang out in public session? Because, human nature being what it is, I hesitate to appear dumb or silly, or to float ideas that may prove unwise. I also know that by that time my fellow commissioners have worked out their positions with their personal staffs....To put it more vulgarly, expecting public officials to negotiate candidly in public is like expecting them to bare their souls in public. It just isn't going to happen.9

Lack of candor also tends to oversimplify and trivialize discussions. Depreciation accounting, discounted future earnings streams, and multiterritory tariff design—all complex subjects—may be side-stepped or misrepresented in the quest to "boil the matter down to its two sides." Open discussion often focuses on simpler topics that are more susceptible to solution. Commissioners may prefer to discuss a utility's real estate transactions or charitable contributions rather than ratemaking issues—although the latter have a far greater impact on a utility's financial condition and, in the long run, upon the public. Thus, small issues are allowed to take up significant amounts of time, and important issues may never be discussed at all.

Open discussions with PUC technical staff, where divergent views are aired, can be particularly difficult to arrange. The law's chilling effect on PUC decision-making could be minimized if deliberative aspects of the process (not the fact-finding or decision-making aspects) were held in private.

Critics also contend that "government in a fishbowl" encourages public officials to circumvent the intent if not the letter of the law, especially if they believe that total openness prevents them from doing their job. "Ways around the law" include private teleconferencing, notation voting (decision making through commenting on a circulated written memo), and delegating authority to staff. Writing about this circumvention in the case of higher education, one author states:

many top administrators are not concerned about sunshine laws because they have incorporated subversion of those procedures in their operating methods....Thus a real cost of openness is its cost to the legal system—it creates an atmosphere in which the law itself is brought into disrepute. Wherever the bounds of openness are drawn, some discussion will occur beyond the pale.10

PUC commissioners operating under open-meetings laws are prohibited from privately conferring. A commissioner generally cannot speak with other commissioners about a case in the presence of a majority of the commissioners—two out of three, three out of five, four out of seven. A majority-gathering constitutes a "meeting," which in all states requires public access. To build a
coalition, each commissioner must "make the rounds" several times and, at the same time, make sure not to meet too many colleagues at once. Coalition-building under open-meeting constraints makes commissioners behave like door-to-door salespersons. Attorneys observing the process spend a great deal of time trying to determine when a "gathering" becomes a meeting, whether teleconferencing constitutes a meeting, and when social conversation becomes illicit communication.

Although a talented commissioner can perform well in all circumstances, the art and effectiveness of persuasion often depends on whether discussions are held one-on-one in private or in an open meeting with many participants and observers. Commissioners spend much energy seeking necessary compromises. Coalition-building is essential to a commission's effective operations and effective compromise is more likely to be accomplished in a closed meeting. To circumvent the strictest application of open-meeting laws, commissioners may use their staff and special assistants as conduits to relay information among each other. As one commissioner stated, "we allow...office-hopping surrogates to do our bidding and negotiating."

Deal-making by proxy delegates decision-making responsibility to people who are not accountable to the public and who may not even hold the same views as the principals. Moreover, this practice vitiates the concept of shared policy making through face-to-face exchange. It also increases the commission's inefficiency because staff meetings become trial runs for the formal meetings that largely replicate them.

Open-meeting laws also generate administrative costs. (The counter argument is that the incremental costs are small and are part of the price we pay for "good government.") PUC operating costs increase due to special requirements for notice, recordings and transcriptions, and structuring safeguards to prevent commissioners from conferring elsewhere. In a field where speedy action is not common (a problem known as "regulatory lag"), notice requirements may force regulators to move even more slowly as they wait for a prescribed time to elapse before taking the next procedural step. Openness also has opportunity costs. As one author has written:

In all states, the imposition of additional administrative procedures upon decisionmakers means that people who are hired to do one thing wind up doing another, lesser, thing. Time that could be spent moving forward is spent treading water in one place, reducing activity (which would be) more directly in the public interest.

The monetary costs of openness are not negligible, but the nonmonetary costs of unrestricted open-meeting laws may be even greater.

Open-meeting laws often emphasize process at the expense of outcome. While the laws are instituted for the benefit of the public, they are of far greater use to special interests that do business with government agencies. Commission hearing rooms are not usually filled with average citizens intently watching the drama of a lengthy and technical utility case. Those invariably present are immediate parties to the proceeding: lawyers for various sides and representatives of the regulated utilities. While neither surprising nor improper, the important point is that these observers gain tactical and strategic advantages if commissioners cannot deliberate in private.
In another regulatory forum, the head of the U.S. Consumer Product Safety Commission has written:

At deliberations open to the public, staff urged a particular regulatory approach and various commissioners challenged its wisdom. This put the manufacturer on notice that the commission itself was not completely persuaded by the merits of the case, and the firm learned what elements of the proposed corrective action plan the commission questioned. As any skilled negotiator can attest, telegraphing which elements of a position are firm and which are not is tantamount to conceding the latter.\textsuperscript{15}

A state public utility commissioner offered a similar view:

There is no question that the utilities and other parties...take advantage of the open meeting law for their particular use....One of the problems is that commission meetings are held during the day and at commission headquarters which makes attending meetings difficult for the ordinary citizen.\textsuperscript{16}

Total openness encourages excessive reliance upon procedure; innovation is stifled, conservative solutions are favored, and brainstorming is discouraged.\textsuperscript{17} These and other costs led one public utility commissioner to say:

The 1974 Sunshine Law is an excellent law which ought to remain on the books. As it applies to the deliberative and decisional functions of the PUC, however, it is counterproductive to the public good....the current state of the law compromises our ability to be fair, just, and reasonable to all who come before us or have an interest in what we do....I am distressed and dismayed that none of the parties before us, including the rate-paying public, is receiving truly reasoned decisions from us....Allowing us to deliberate and discuss cases in executive session would produce better public decisions. Each commissioner would continue to vote publicly on every case, and often on every contested issue. Our practice of written decisions giving reasons would continue, except those decisions would be better reasoned and written.\textsuperscript{18}

OPEN RECORD LAWS

Intertwined with open-meeting laws are open-record laws; in fact, the two are sometimes bundled into the same statute.\textsuperscript{19} However, some states and the federal government separate the issues into "government in the sunshine" and "freedom of information" acts. Open-records laws are designed to provide access to what went on in a closed meeting. Thus, it is argued that they could safeguard the public's right to know if open-meeting laws have been relaxed. In short, open-record laws could largely substitute for open-meeting laws. A well-crafted open-record law could allow the commission to conduct its deliberative actions out of the sunshine without keeping the public in the dark.

Not all open-record laws are the same. Requirements differ in the degree of detail that must be "recorded" and when such records can be released. The range is substantial—from keeping minutes to taking verbatim transcripts. Private deliberations may be complemented by rigorous record-keeping comparable to what the public expects in court records. Regardless of the form of the written record, delaying their release (for example, until the PUC order is issued) may reduce the chilling effects on discussion that takes place in fully open deliberations.\textsuperscript{20} As one commissioner observed:

I can say that our process ("unopen" meetings) encouraged and usually resulted in frank and honest discussion, candid exchange of views, and a willingness to be persuaded by an opposite opinion that would probably be stifled if every meeting were on the record.\textsuperscript{21}
Even with open-meeting law exemptions, confidential discussions may be accessible by court-supported open-record provisions. Under an administrative procedures act or due process claim, those involved in the proceedings may have rights to information during PUC deliberations. Also, where commission decisions can be reviewed by courts, the record could become a crucial part of the appeal and thus forced into the public arena.

Thus open-meeting and open-record laws can complement each other by covering the same legislative and regulatory terrain. If that is the case, open-meeting laws could be relaxed to improve the efficiency of the PUC process, while open-record laws could be maintained in their present form to protect the public's right-to-know.

Finally, it is possible that events have eclipsed the need for open-meeting laws. The public's distrust of government—and its unfairness and inefficiency—is episodic. Concerted outcry against public officials springs from dramatic abuses such as Watergate or agency or congressional misbehavior. When government "lives down" its bad reputation, trust is restored and the need for vigilance may lessen. With a prevailing sense of trust, institutions could function with less openness—if the benefits outweigh costs.

The Iran-Contra affair, the savings and loan scandal, and the 1991 budget fiasco, however, have rekindled the public's cynicism toward government. If the public's distrust is deep, broad, and permanent, then any changes in open-meeting laws would seem cynical and remote. However, if trust can be restored and distrust becomes selective, then well-functioning government may convince the public that PUCs deserve to have closed deliberations where frankness can be expressed without fear of adverse ramifications.

Indeed, the demand for total openness indicates a lack of trust, not only in today's government, but more fundamentally in representative democracy. Public officials are chosen to act on the public's behalf and in the public's interest—even when the public and press are not watching them. Unless the concept of "public office as a public trust" has lost all credibility, it seems reasonable to allow some public officials to conduct some of the public's business in private. In fact, such initiatives could be interpreted as a reaffirmation of representative government.

The benefits of open meetings as applied to state public utility regulators carry significant costs. However, the need to revisit the open-meeting issue depends in part on whether general criticisms can be corroborated by policy makers who have experienced the process first-hand. On the one hand, if public utility regulators are satisfied with the open-meeting concept, concerns may be more theoretical than practical. On the other hand, if many regulators say that they share these concerns, administrative reform may be worth consideration.

The questionnaire was sent to 161 former state public utility commissioners and consisted of 10 statements. Respondents were asked to "strongly agree," "agree," "disagree," or "strongly disagree" with each statement. To force a choice, respondents were not given a "neutral" option. Respondents also were invited to provide additional comments.22
Eighty-two respondents (51 percent of those surveyed) completed the questionnaire.23 Following is the wording of each survey question and the nature of the overall response:

Q. Open-meeting laws inhibit collegial discussion among commissioners, i.e., critical analysis, the weighing of relevant facts and considerations, and the offering of divergent views.

A. Seventy-four percent of those surveyed strongly agreed or agreed with this statement. Inhibition appears linked to the "public setting" and the inexperience or limited technical expertise of the commissioners and fear of being embarrassed or quoted out of context.

Q. Open-meeting laws increase the cost of commission operations through, for example, special requirements for notice, provisions for materials and meeting facilities, length of proceedings, safeguards against commissioners conferring elsewhere, etc.

A. Seventy percent agreed that openness is costly. However, some former commissioners contended that the added administrative cost was trivial, particularly in light of the long-term social and economic benefits of an open process.

Q. Open-meeting laws create an unintended incentive for commissioners to circumvent the intent of the law through teleconferencing, notation voting, staff delegations, and other methods that make open meetings largely a forum for ratification.

A. About two-thirds of those responding—68 percent—agreed that open-meeting provisions may encourage circumvention. At the least, they agreed that the laws tempt commissioners to work outside the laws’ constraints.

Q. It is common practice to circumvent state open-meeting laws.

A. The commissioners were divided equally on this question, with slightly more than half—53 percent—agreeing that circumvention is commonly practiced. Circumvention may be intentional (e.g., using "creative scheduling" to make it less likely that participants and the public will be present at every session) or unintentional (using teleconferencing without speaker phones when commissioners are not at the same location.)

Q. Open-meeting laws discourage candid exchanges and encourage tentative conclusions and posturing rather than substantive discourse.

A. Seventy-seven percent agreed that open proceedings can lead to posturing, playing to the audience or press, or even manipulating the process.

Q. Open-meeting laws emphasize process at the expense of outcome, i.e., that while the public’s right to know is enhanced, the quality of the policy produced is lessened or not improved.

A. Seventy percent agreed that openness may emphasize process over outcome. However, some contended that the process validates (and thus is inseparable) from the outcome, and others clearly placed more emphasis on the public’s right to know than on the quality of the policy decisions.

Q. Open-meeting laws are of greater use to interested parties (e.g., lawyers for utilities and consumer counsels) than to the public. The parties, in fact, may gain tactical and strategic advantages by observing open-meeting laws.
A. Seventy-four percent agreed that openness may provide a tactical advantage to parties in cases heard by regulatory commissions. Respondents felt that openness does not necessarily favor a particular party, although utilities may have some advantage in gleaning information for appeals.

Q. If open-meeting laws were to be relaxed, open-records laws that provided access to what went on in a meeting can adequately safeguard the public's right to know.

A. Fifty-eight percent of those surveyed disagreed or strongly disagreed that open-records provisions are a sufficient safeguard. Open-records laws are important but cannot be viewed as a substitute for open-meeting provisions.

Q. The initial occasion for open-meeting laws—a distrust of government institutions—is no longer compelling.

A. Seventy-five percent disagreed that distrust of government may no longer represent a rationale for openness.

Q. Open meeting laws should be relaxed.

A. A majority—59 percent—agreed that open-meeting laws, as applied to public utility commissions, should be relaxed. Relaxation would depend on the fortitude of governors, legislatures, and commissioners. Modification would depend on stringency of rules now in place.

A majority of the former commissioners responding "agreed" or "strongly agreed" that the criticisms in the literature corresponded to their hands-on experiences and said that the open-meeting laws should be relaxed. However, the majority "disagreed" or "strongly disagreed" with two other propositions: (1) that open-records laws would be an adequate safeguard if open-meetings laws were relaxed and (2) that the public distrust of government is now lessened, making open-meeting laws less critical.

Three basic conclusions can be drawn about the issue: (1) sustained and substantive dialogue is crucial to good policy; (2) the requirement of total openness hampers dialogue; and (3) open-meeting laws are desirable but ill-suited to the quasi-judicial task of public utility regulation. The survey also reveals that a majority of former public utility commissioners share the prevailing criticisms of open-meeting laws.

Open-meeting laws are and should be here to stay. That is not to say that they should never be re-examined or altered. Nor should those who call for modification be described as anti-democratic or ideological foes of "the right to know." As with other public policy questions, relative merits and tradeoffs are key issues. Exempting particular types of agencies or relaxing particular aspects of agency business from public scrutiny may be appropriate for reaching efficient and equitable policy.

If much of the regulatory work by state public utility commissions is judicial in character, the enhancement of the deliberative phase of the process may be crucial to effective decision making. Thus, a selective easing of the application of open-meeting laws could improve the policy outcome.
NOTES
1. The author gratefully acknowledges the assistance of Janice A. Beecher, senior research specialist at the National Regulatory Research Institute, who participated in the design and presentation of this article.
2. Except for deliberations about personnel, litigation, and certain financial matters, all government business in all jurisdictions, according to the law, must be conducted in the open.
3. Except when quoting, the term "sunshine" is not used in this article; rather, the somewhat more neutral term "open meeting" is used. For a comprehensive listing of "sunshine law" state statutes, see Harlan Cleveland, The Costs and Benefits of Openness: Sunshine Laws and Higher Education, Special Report of the Association of Governing Boards of Universities and Colleges (Washington, DC: 1985), appendices A and C.
7. To help answer these questions, the authors conducted a survey of 161 former state public utility commissioners. The survey sought to explore the commissioners' experience with open-meeting laws and their analysis of criticisms. The 161 former regulators represent about one-third of the state public utility commissioners who served from the late 1970s through the 1980s. These former regulators now serve as university professors, lawyers, consultants, industry executives, and public officials in state and federal government. The sample includes elected and appointed commissioners of different party affiliations, ages, and levels of experience.
8. Pennsylvania has one of the nation's most lenient open-meeting laws. A major report on the ranking of states in degrees of openness listed Pennsylvania last. See Cleveland, The Costs and Benefits of Openness.
12. Examples include cases in which a particular change in utility rates would favor the business customer at the expense of residential customers or where the risk is shifted from ratepayers to shareholders.
13. Cawley, "The PUC and the Sunshine Law."
15. Statler, "Let the Sunshine In?," p. 574.
16. Written comment returned with the survey question number 7.
18. Cawley, "The PUC and the Sunshine Law."
19. Open-meeting laws and open-record laws often, but not always, work in tandem.
20. The Illinois Commerce Commission, for example, uses court reporters for certain closed meetings, then reviews and releases the transcripts (or minutes) semi-annually to determine if continued confidentiality is required.
21. Written comment returned with the survey.
22. For each question, as many as 12 respondents added written comments. Most written comments (but not all) defended open-meeting statutes.
23. The survey did not address characteristics of the respondents (e.g., elected vs. appointed commissioners, party affiliation, age, geographic distribution) because explaining variations among respondents was not envisioned as part of this research. The approach also helped assure anonymity.