

CALIFORNIA LAW REVISION COMMISSION

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8/30/96

<i>Date:</i> September 12, 1996	<i>Place:</i> Sacramento
Sept. 12 (Thursday) 9:00 am – 5:00 pm	State Capitol, Room 2040
<p>Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the "California Law Revision Commission".</p>	
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FINAL AGENDA*for meeting of the***CALIFORNIA LAW REVISION COMMISSION**

1. **MINUTES OF JULY 11, 1996, MEETING (sent 7/22/96) (\$5.50)**
2. **ADMINISTRATIVE MATTERS**
 - Schedule for Future Meetings**
Memorandum 96-54 (NS) (sent 8/8/96) (\$5.50)
 - Conflict of Interest Code**
Memorandum 96-55 (SU) (to be sent)
 - Materials Distribution Policy**
Memorandum 96-56 (NS) (sent 8/15/96) (\$5.50)
 - Report of Executive Secretary**
3. **1996 LEGISLATIVE PROGRAM**
 - Memorandum 96-57 (NS) (to be sent)
4. **NEW TOPICS AND PRIORITIES**
 - Memorandum 96-58 (NS) (sent 8/30/96) (\$8.50)
5. **TRIAL COURT UNIFICATION BY COUNTY (STUDY J-1300)**
 - Memorandum 96-61 (NS) (to be sent)

6. BEST EVIDENCE RULE (STUDY K-501)

Draft of Recommendation

Memorandum 96-60 (BG) (to be sent)

7. OBSOLETE RESTRICTIONS (STUDY H-407)

Draft of Recommendation

Memorandum 96-47 (NS) (sent 6/24/96) (\$8.50)

First Supplement to Memorandum 96-47 (sent 8/8/96) (\$5.50)

Special
Order of
Business
10:30 am

8. BUSINESS JUDGMENT RULE (STUDY B-601)

Revised Draft

Memorandum 96-62 (NS) (sent 8/29/96) (\$8.50)

9. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)

Comments on Revised Tentative Recommendation

Memorandum 96-63 (RM) (to be sent)

Staff Draft of Recommendation (to be sent)

Special
Order of
Business
1:00 pm

10. ETHICAL STANDARDS FOR ADMINISTRATIVE LAW JUDGES (STUDY N-111)

Draft of Recommendation

Memorandum 96-64 (NS) (sent 8/23/96) (\$8.50)

First Supplement to Memorandum 96-64 (sent 8/29/96) (\$5.50)

11. QUASI-PUBLIC ENTITY HEARINGS (STUDY N-112)

Draft of Recommendation

Memorandum 96-50 (NS) (sent 6/21/96) (\$8.50)

First Supplement to Memorandum 96-50 (sent 8/23/96) (\$5.50)

12. ADMINISTRATIVE RULEMAKING (STUDY N-300)

Revision of Rulemaking Procedure: Miscellaneous Issues

Memorandum 96-65 (NS) (sent 8/8/95) (\$8.50)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 12, 1996
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on September 12, 1996.

Commission:

Present: Allan L. Fink, Chairperson
Dick Ackerman, Assembly Member
Robert E. Cooper
Colin Wied

Absent: Christine W.S. Byrd, Vice Chairperson
Bion M. Gregory, Legislative Counsel
Quentin L. Kopp, Senate Member
Arthur K. Marshall
Edwin K. Marzec
Sanford Skaggs

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Robert J. Murphy, Staff Counsel

Consultants: Michael Asimow, Administrative Law
Melvin A. Eisenberg, Business Judgment & Derivative
Actions
Gregory S. Weber, Administrative Law

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento
Larry De Fehr, California Correctional Peace Officers Association, Sacramento
Karl Engeman, Office of Administrative Hearings, Sacramento
Dugald Gillies, Sacramento Nexus, Fair Oaks
Louis Green, County Counsels' Association of California, Placerville
Bill Heath, California School Employees Association, San Jose
Clark Kelso, Judicial Council, Sacramento
Catherine Kennedy, California State Employees Association, Sacramento
Charlene Mathias, Office of Administrative Law, Sacramento

Julie Miller, Southern California Edison, Rosemead
Joel Perlstein, California Public Utilities Commission, San Francisco
Steven R. Pingel, Lemaire, Faunce, Pingel & Singer, Consumer Attorneys of
California, California Employment Lawyers Association, Los Angeles Police
Protective League, Orange County Employees Association, and Association of
Los Angeles Deputy Sheriffs, Los Angeles
Dick Ratliff, California Energy Commission, Sacramento
Daniel L. Siegel, Attorney General's Office, Sacramento
John Sikora, Association of California State Attorneys and Administrative Law
Judges, Sacramento
Ruth Sorensen, County Counsels' Association of California, Sacramento
Elizabeth Stein, State Personnel Board, Sacramento
Kathleen Yates, Legal Services, Department of General Services, Sacramento

A quorum of the Commission not being present at the meeting, decisions reported in these Minutes are subject to ratification at a subsequent meeting.

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MINUTES OF JULY 11, 1996, MEETING

The Minutes of the July 11, 1996, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Recognition of Service of Colin W. Wied as Chairperson

Allan L. Fink, incoming Commission Chairperson, expressed the appreciation of the Commission and staff for the outstanding service of Colin W. Wied as

Commission Chairperson during 1995 and 1996, and on behalf of the Commission presented him a plaque in recognition of his service.

Schedule for Future Meetings

The Commission considered Memorandum 96-54, relating to the schedule for future meetings. The Commission added Friday, November 15, to the November 1996 meeting, making it a two-day meeting; the Friday portion is subject to cancellation, depending on the amount of material on the agenda for the meeting.

The Commission adopted the following meeting schedule. Some of the scheduled one-day meetings may be turned into two-day meetings by the addition of Friday if the Commission's agenda demands it.

October 1996	Long Beach
Oct. 10 (Thu.)	9:00 am – 5:00 pm
November 1996	Sacramento
Nov. 14 (Thu.)	9:00 am – 5:00 pm
Nov. 15 (Fri.)	8:30 am – 3:00 pm
December 1996	Sacramento
Dec. 12 (Thu.)	9:00 am – 5:00 pm
January 1997	Sacramento
Jan. 23 (Thu.)	9:00 am – 5:00 pm
February 1997	Sacramento
Feb. 27 (Thu.)	9:00 am – 5:00 pm
April 1997	Sacramento
Apr. 10 (Thu.)	9:00 am – 5:00 pm
May 1997	Sacramento
May 8 (Thu.)	9:00 am – 5:00 pm
June 1997	Sacramento
June 12 (Thu.)	9:00 am – 5:00 pm
July 1997	Sacramento
July 10 (Thu.)	9:00 am – 5:00 pm

September 1997	San Diego
Sept. 11 (Thu.)	9:00 am – 5:00 pm
October 1997	Sacramento
Oct. 9 (Thu.)	9:00 am – 5:00 pm
November 1997	Sacramento
Nov. 13 (Thu.)	9:00 am – 5:00 pm
December 1997	Sacramento
Dec. 11 (Thu.)	9:00 am – 5:00 pm

Conflict of Interest Code

The Commission considered Memorandum 96-55, relating to the Commission's Conflict of Interest Code. The Commission concluded that the code does not need to be amended in light of the new studies added to the Commission's agenda. The Executive Secretary will identify affected interests in the code after the Commission has set its priorities for study during the coming year.

Materials Distribution Policy

The Commission considered Memorandum 96-56, relating to the Commission's policy on distribution of its materials. The Commission adopted the following policy, as set out in the memorandum.

(1) All materials will continue to be available electronically, and that availability will be suggested as a first option to persons wishing to obtain copies of Commission materials.

(2) Printed reports will be available on request, the first copy free and additional copies charged at cost.

(3) Tentative recommendations will be available free of charge, including multiple copies (e.g., for bar committees), to persons wishing to review and comment on them.

(4) Meeting materials will be available free of charge to persons who attend meetings or comment on the materials, and will be available at cost to other persons.

(5) Bound compilations of previously printed reports will continue to be available at cost.

(6) The staff will have discretion to vary these rules in appropriate circumstances (e.g., provide discount for bulk purchase or educational use).

New Topics and Priorities

The Commission considered the First Supplement to Memorandum 96-58, relating to revision of the Public Utilities Code, but did not otherwise consider issues relating to new topics and priorities.

In response to the statutory requirement that the Public Utilities Commission report to the Legislature in consultation with the Law Revision Commission on needed code revisions that result from electric, gas, transportation, and telecommunications industry restructuring, the Commission decided to review materials prepared by PUC, focusing on procedural and substantive problem areas identified by PUC or by other interested persons, and make recommendations to the Legislature on the problem areas.

Report of Executive Secretary

The Executive Secretary reported on progress toward filling our new attorney and administrative assistant positions.

The Executive Secretary reported that the Department of Finance has directed state managers to use their surplus accrued vacation time by the end of 1998. This could impact the Commission's productivity, since both the Executive Secretary and Assistant Executive Secretary have large accrued balances.

The Executive Secretary reported favorable results in enlisting local bar associations for involvement in Commission projects. The Commission suggested that involvement with the State Bar Conference of Delegates might also be fruitful. The Commission might also develop a speakers program for local bar associations. A law reform newsletter might be helpful.

1996 LEGISLATIVE PROGRAM

The Commission considered Memorandum 96-57 and the attached chart showing the status of the Commission's 1996 legislative program. No Commission action was taken.

STUDY B-601 – BUSINESS JUDGMENT RULE

The Commission considered Memorandum 96-62 and its First Supplement, relating to codification of the business judgment rule. The Commission made the

decisions described below concerning the draft. The Commission also directed the staff to meet with the State Bar Corporations Committee and Professor Eisenberg and other interested persons to see whether we can resolve the State Bar concerns and come up with consensus language on the unresolved issues for Commission consideration at a future meeting. When the proposal is eventually circulated for comment, comment should be solicited on the ultimate question of whether codification is desirable, as well as on the specifics of the Commission's draft.

Setting Aside or Enjoining Corporate Action

The Commission decided not to attempt to codify application of the business judgment rule to questions involving the validity of — as opposed to personal liability of directors for — corporate actions. The commentary to the statute should note that a court may apply the business judgment rule to determine the validity of a corporate action in an appropriate case. Language along these lines may be found in the commentary to the ALI Principles of Corporate Governance.

Business Judgment Rule as Presumption or as Substantive Rule

The Commission decided to preserve the current draft formulation of the business judgment rule as a substantive rule. The staff should investigate the possibility of addressing the concern about the rule superseding the duty of care by such techniques as (1) incorporating the rule in Section 309, (2) adding explanatory language to the Comment, (3) adding explanatory language to the statute, or (4) recasting the statutory language in some way to make more clear the interrelation of the two provisions.

Interested Director Definition

The Commission approved simplification of the “interested director” definition as suggested by the State Bar Committee, in the form set out in the memorandum. In addition, the reference to a “familial” or similar relationship should be deleted from the draft:

A person with respect to whom a director has a familial, business, or financial, ~~or similar~~ relationship that other than a person described in paragraph (1) or (2), but if and only if the ~~familial, business, financial or similar~~ relationship would reasonably be expected to affect the director's judgment with respect to the transaction or conduct in question in a manner adverse to the corporation or its shareholders.

In its place, the definition of “associate” should be broadened somewhat to include specified immediate family members, along the lines provided in the corporate securities rules. Professor Eisenberg will provide suggested language to the staff.

Interested Director Liability

Rather than a statute section, the issue of liability of an interested director should be elaborated in a Comment.

STUDY H-407 – OBSOLETE RESTRICTIONS

The Commission considered Memorandum 96-47 and its First Supplement, relating to obsolete land use restrictions. The Commission approved the recommendation with the addition of the provisions set out in the memorandum to deal with recordation of a notice of intent to preserve a restriction as to multiple parcels. The Commission also added the language set out in the supplemental memorandum on recordation of a notice of intent to preserve the restriction as constructive notice to the owner of the burdened property.

STUDY J-1300 – TRIAL COURT UNIFICATION BY COUNTY

The Commission considered Memorandum 96-61, relating to statutory implementation of SCA 4 (Lockyer) — trial court unification by county. The Commission determined to make this a priority study, with the objective of legislation for the 1998 legislative session.

The Commission approved a research contract with Professor Clark Kelso and the Institute for Legislative Practice at McGeorge Law School. The contract would pay for travel expenses and a \$100 per diem honorarium for Professor Kelso to attend Commission meetings and hearings at the Commission’s request for advice on trial court unification.

STUDY N-111 – ETHICAL STANDARDS FOR ADMINISTRATIVE LAW JUDGES

The Commission considered Memorandum 96-64 and its First Supplement, relating to ethical standards for administrative law judges. The Commission approved the recommendation with the addition of the statute and Comment language set out in the memorandum prohibiting political activities by administrative law judges and referring to the enforcement mechanism before

the State Personnel Board. The Commission also adopted the language set out in the supplemental memorandum making clear that the code of ethics is not intended to impair collective bargaining rights guaranteed state employees under the Ralph C. Dills Act.

STUDY N-112 – QUASI-PUBLIC ENTITY HEARINGS

The Commission considered Memorandum 96-50 and its First Supplement, relating to hearings by quasi-public entities. The Commission revised the recommendation so it is limited to entities “created by ~~or pursuant to~~ statute.” An explanatory Comment on this point should be added as set out in the supplemental memorandum. The Comment should also note that the State Bar Court is exempt from the general Administrative Procedure Act.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission began consideration of Memorandum 96-63 and First Supplement with comments on the Revised Tentative Recommendation. The Commission made the following decisions:

§ 1120. Application of title

The Commission approved the staff recommendation to revise subdivision (a)(1) of Section 1120 as follows:

1120. (a) Except as provided in this section, this title governs judicial review of agency action of any of the following entities:

(1) The state, including any agency or instrumentality of the state, whether ~~in the~~ exercising executive department powers or otherwise.

Nongovernmental entities. The Commission approved the concept of allowing some room for courts to apply the judicial review statute to nongovernmental entities where it appears appropriate to do so. Professor Asimow had reservations about applying it, for example, to a routine dispute between a private company and its employees under a collective bargaining agreement as in *Wallin v. Vienna Sausage Mfg. Co.*, 156 Cal. App. 3d 1051, 203 Cal Rptr. 375 (1984). The three elements of Code of Civil Procedure Section 1094.5 should be present — hearing required, evidence required to be taken, and discretion to determine facts vested in the inferior tribunal or officer. The

Commission thought these elements should be required by “statutory or decisional” law, not merely by private contract. The staff should bring back a revised draft.

Public Utilities Commission. The Commission decided to exempt the PUC from the draft statute for the following reasons: Senate Bill 1322 keeps judicial review of nonadjudicative PUC matters exclusively in the Supreme Court. For adjudicative matters of the PUC, SB 1322 has procedures that are sufficiently different from the draft statute that many exceptions would be required, concerning, for example, additional evidence, limitations period, type of relief, standard of review for application of law to fact, and venue. Regulation of most highway property carriers will be transferred to the Department of Motor Vehicles and California Highway Patrol by Assembly Bill 1683, leaving with the PUC only charter party carriers, passenger stage corporations, and household goods carriers. SB 1322 applies to disciplinary proceedings for passenger carriers and household goods carriers. All that would be left for possible inclusion under the draft statute would be initial licensing of passenger carriers and household goods carriers. This is such a limited class of cases and would generate so little litigation that it was thought not to justify separate procedures for judicial review under the draft statute. The staff should consider whether highway carrier licensing proceedings should be reviewed in the court of appeal, possibly a single court of appeal, by revising provisions enacted by SB 1322.

Energy Commission. The Commission decided to exempt power plant siting decisions of the Energy Commission from the draft statute. Under Public Resources Code Section 25531, these decisions are reviewed in the same manner as decisions of the PUC. Exclusive Supreme Court review of power plant siting decisions of the Energy Commission appears to be unaffected by SB 1322, because the bill expands review jurisdiction only for PUC “adjudicatory proceedings,” defined as enforcement proceedings and complaint cases. This definition appears not to apply to power plant siting decisions of the Energy Commission.

§ 1121.150. Operative date

Uncodified. Operative date

The Commission approved the staff recommendation to replace the two operative date provisions in the draft statute with the following:

1121.150. (a) This title applies to a proceeding commenced on or after January 1, 1998, for judicial review of agency action .

(b) The applicable law in effect before January 1, 1998, continues to apply to pending proceedings.

SEC. ____ (a) This act applies to a proceeding commenced on or after January 1, 1998, for judicial review of agency action.

(b) The applicable law in effect before January 1, 1998, continues to apply to pending proceedings.

§ 1121.290. Rule

The Commission approved the staff recommendation to consolidate subdivisions (a) and (b) as follows:

1121.290. "Rule" means all both of the following:

(a) ~~"Regulation" as defined in Section 11342 of the Government Code.~~

(b) The whole or a part of an agency regulation, including "regulation" as defined in Section 11342 of the Government Code, order, or standard of general applicability that implements, interprets, makes specific, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency, except one that relates only to the internal management of the agency. The term includes the amendment, supplement, repeal, or suspension of an existing rule.

(c) (b) A local agency ordinance.

Professor Asimow thought adoption of an ordinance by a local agency should not be subject to judicial review under the draft statute. The staff should give more thought to whether a local agency ordinance should be included within the definition of "rule."

§ 1123.230. Public interest standing

The Commission approved the staff recommendation not to change Section 1123.230. The Commission thought the problem is not with public interest standing per se, but rather is with the attorneys' fee provision, Code of Civil Procedure Section 1021.5.

§ 1123.240. Standing for review of decision in adjudicative proceeding

The Commission was inclined to prefer alternative 2 in the Memorandum. The Commission was concerned about excluding land use and environmental matters from the restrictive standing rules for review of adjudication, such as in

zoning variance cases. The Commission asked the staff to discuss this with Commissioner Skaggs and with local agency representatives, and to bring back a revised draft.

§ 1123.310. Exhaustion required

The Commission approved the staff recommendation not to change the elimination of immediate judicial review of a denial of a request for a continuance.

The Commission approved adding the following to the Comment:

This chapter does not require a person seeking judicial review of a rule to have participated in the rulemaking proceeding on which the rule is based. Section 1123.330. However, this chapter does prohibit judicial review of proposed regulations (see Section 1123.130), regulations that have been preliminarily adopted but are not yet final (Section 1123.120), and adopted regulations that have not yet been applied (Section 1123.130).

§ 1123.330. Judicial review of rulemaking

The Commission approved the staff recommendation to revise Section 1123.330(a) as follows:

1123.330. (a) A person may obtain judicial review of rulemaking notwithstanding the person's failure either to participate in the rulemaking proceeding on which the rule is based, or to petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.

§ 1123.420. Review of agency interpretation or application of law

The Commission approved the staff recommendation not to exempt the State Personnel Board, Department of Alcoholic Beverage Control, or ABC Appeals Board from the standard of review of questions of law in Section 1123.420. The Commission approved the staff recommendation to add to the Comment citations to the following two cases:

— Agricultural Labor Relations Bd. v. Superior Court, 96 Daily Journal D.A.R. 10512, 10518 (Aug. 29, 1996) (standard of review of ALRB legal determinations).

— Grier v. Kizer, 219 Cal. App. 3d 422, 434, 268 Cal. Rptr. 244 (1990) (determination by Office of Administrative Law that agency rule is subject to rulemaking portion of Administrative Procedure Act is entitled to great weight,

since OAL is charged with enforcing and interpreting that act). In the administrative rulemaking study, the Commission will revisit the policy question presented by *Grier*.

§ 1123.430. Review of agency fact finding

The Commission approved the staff recommendation not to provide independent judgment review of fact-finding in drivers' license hearings of the Department of Motor Vehicles.

The Commission did not reach the other issues in the Memorandum under Section 1123.430, and will address these at the next meeting.

§ 1123.640. Time for filing petition for review in adjudication of state agency and formal adjudication of local agency

§ 1123.650. Time for filing petition for review in other adjudicative proceedings

The Commission decided that running of the limitations period should be tolled while the record is being prepared, if the request for the record is timely. Enough formality should be required in requesting the record to provide a clear basis for determining when tolling begins.

The Commission approved the staff recommendation to make the 90-day limit for review of a denial by the Unemployment Insurance Appeals Board of an employer's protest of a statement of charges or credits to the employer's account subject to the general limitations rule of the draft statute. This should be done by revising Unemployment Insurance Code Section 1243 as follows:

Unemp. Ins. Code § 1243 (amended). Judicial review

1243. A decision of the appeals board on an appeal from a denial of a protest under Section 1034 or on an appeal from a denial or granting of an application for transfer of reserve account under Article 5 (commencing with Section 1051) shall be subject to judicial review if an appropriate proceeding is filed by the employer within 90 days of the service of notice of the decision under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The director may, in writing, extend for a period of not exceeding two years the time provided in Section 1123.640 of the Code of Civil Procedure within which such proceeding may be instituted if written request for such extension is filed with the director within the 90-day period time prescribed by that section.

Comment. Section 1243 is amended to make clear that judicial review under the section shall be under Code of Civil Procedure Sections 1120-1123.950. The

former 90-day time limit for a proceeding under this section is superseded by the time limit provided in Code of Civil Procedure Section 1123.640 (30 days from effective date of decision or giving of notice, whichever is later).

The Commission approved the staff recommendation to preserve the following special limitation periods for particular state agencies:

— Ninety days to review an administratively-issued withholding order for taxes. Code Civ. Proc. § 706.075.

— Thirty days from notice of filing with the court of a notice of deficiency of an assessment due from a producer under a commodity marketing program. Food & Agric. Code §§ 59234.5, 60016. The Director has four years after the administrative determination to file it with the court.

The staff should consider whether the one-year limitations period of Government Code Section 19815.8 should be preserved. This section is similar to Section 19630 which the Commission has decided to preserve.

The Commission approved the staff recommendation to preserve the following special limitation periods for particular local agencies:

— The 180-day limit for administrative mandamus to challenge cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act. Gov't Code § 51286.

— The 30-day limit to review a cease and desist order of the Bay Conservation and Development Commission, Gov't Code § 66639, and to review a complaint by BCDC for administrative civil liability, Gov't Code § 66641.7.

— The 90-day limit for commencing an action or proceeding to challenge a decision of a local legislative body adopting or amending a zoning ordinance, regulation attached to a specific plan, or development agreement. Gov't Code § 65009.

STUDY N-300 – ADMINISTRATIVE RULEMAKING

The Commission considered Memorandum 96-65 and its First Supplement, relating to revision of the rulemaking procedure. The Commission approved the revisions set out in the memorandum, with the exceptions noted below.

Gov't Code § 11346.8 (amended). Public hearing and comment

The language proposed in subdivision (a) was revised to read, "The agency may impose reasonable limitations on oral testimony presentations."

Gov't Code § 11347.1 (added). Documents added to rulemaking file

Dugald Gillies raised several issues in connection with this section, including the suggestion that it be expanded to refer to any material the agency relies on, allowing more time for public comment, and dealing with ex parte communications. The Commission deferred decision on these issues in order to give Mr. Gillies an opportunity to develop them in writing and in order to allow the Office of Administrative Law an opportunity to consider and comment on them.

Gov't Code § 11347.3 (amended). Rulemaking file

The staff will examine the public records act to see whether there may be some useful guidance on accessibility of records to the public.

APPROVED AS SUBMITTED

Date

APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Chairperson

Executive Secretary