

## **PROTOCOL FOR MAKING FILINGS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION (FCC)**

The vast majority of FCC proceedings are rulemakings or “inquiries” which lead to rulemakings. Occasionally, the CPUC will comment on a petition for relief submitted on behalf of a single entity. Over the past twenty years, the FCC and/or Congress have pre-empted much of the states’ original jurisdiction over communications services and entities. Accordingly, the CPUC has become significantly more active at the FCC in representing the interests of California.

The protocol for developing positions and filing comments is as follows.

1. Communications Division (CD) staff monitors the FCC website and news releases for matters of interest to the CPUC. When CD staff identifies a matter of interest, it flags the item. Matters of interest include Notices of Proposed Rulemaking (NPRMs), Notices of Inquiry (NOIs), and Petitions.
2. CD and the Legal Division conduct an initial review of items the FCC has issued to decide if staff may want to recommend filing comments on behalf of the CPUC. If staff recommends filing comments on an item then they proceed to the next step.
3. Items of interest are placed on the agenda for a meeting of the interdivisional Federal Team (Fed Team). The Fed Team is comprised of representatives from CD, Legal, ALJ, and ORA, as well as Commissioners’ advisors.
4. Staff discuss the items of interest at the Fed Team meeting. Consistent with Bagley-Keene restrictions, advisors do not express opinions on these items, but do ask questions of a technical, historical, or contextual nature. Often, it is decided at the Fed Team meeting whether to recommend to the Commission that comments be filed.
5. Sometimes a matter is held over for further CD staff review, either to the next Fed Team meeting or pending notification to advisors via an e-mail of staff’s recommendation that comments be filed. CD staff seeks input from other divisions when the subject of the comments would affect that other division’s work or when input from that other division would enhance the comments.
6. The supervising attorney in Legal Division assigns the matter to an attorney who in turn places the item on the next Commission agenda. CD management assigns one or more CD staff members to the project.
7. The assigned attorney and CD staff person then work together to prepare a Memo of Recommendation (MOR), which is circulated a week before the Commission meeting. Often, the assigned staff receive questions from Commissioners’ advisors about the MOR, and respond to those. Occasionally they modify the MOR based on input from the advisors, but since the MOR is a staff recommendation, this rarely occurs.
8. The Commission votes on the staff recommendation, contained in the MOR, at its meeting. Often, if the matter is not controversial, staff recommends that the matter be taken up on the Consent Agenda. If one or more Commissioners ask that the matter be moved to the Regular Agenda, the assigned attorney makes a presentation at the Commission meeting on the item.

9. The Commission votes on the item. If the Commission approves the recommendation, CD and Legal Division staff prepare the comments based on the MOR. Management in both CD and Legal Division review the comments.
10. Because the CPUC General Counsel is mandated by statute to represent the CPUC in any action or proceeding, the assigned attorney oversees document processing by Legal Division support staff. (Public Utilities Code § 307(b).)<sup>1</sup> Legal Division then circulates the draft comments to all five Commissioners' offices for review.
11. Commissioners' offices provide feedback on the draft; final edits are made.
12. The comments are filed electronically with the FCC.

On occasion, the FCC issues a notice for public comment with a very short time frame for responses. In those instances, CD and Legal Division staff confer on whether to submit comments, and if so, what position to take. Staff generally limits comments in these instances to positions the CPUC has advocated previously. Staff develops a proposed position, and pursuant to section 307(b), sends it to the President's office for review and approval. Staff circulates the resulting draft comments to all five offices for review, and then submits the comments.

---

<sup>1</sup> Section 307(b) reads follows:

The attorney shall represent and appear for the people of the State of California and the commission in all actions and proceedings involving any question under this part or under any order or act of the commission. If directed to do so by the president, except as otherwise directed by vote of the commission, the attorney shall intervene if possible in any action or proceeding in which any such question is involved.

## **PROTOCOL FOR FILINGS BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION (FERC)**

The protocol for FERC filings differs from the protocol for FCC filings in two ways. First, unlike rulemaking proceedings, which are decided in the public session of the CPUC's meetings (whether comments are filed before the FCC or FERC), the rate cases at the FERC involve litigation in hearings and settlement negotiations, which require confidential, attorney-client privileged communications. Therefore, these matters must be discussed with CPUC Commissioners in closed sessions. Second, when utilities file rate cases at FERC, interested parties have much shorter time periods to intervene and protest than they do in rulemaking proceedings. More specifically, they have 12 days pursuant to FERC rules to intervene or protest the filing in natural gas rate case filings, because under the Natural Gas Act, 15 U.S.C. § 717c(d), the FERC must issue its initial order, also known as its "hearing order" within 30 days of the rate case filing. Similarly, the FERC gives interested parties 20 days to intervene and protest electric utility rate or tariff filings, because under the Federal Power Act, 16 U.S.C. § 824d(d), the FERC must issue its hearing order within 60 days.

For rulemaking proceedings, the protocol for FERC filings has fewer steps than the process for FCC filings.

1. Energy Division and Legal Division staff monitor the FERC website and news releases for matters of interest to the CPUC. When staff identifies a matter of interest, they flag the item. Matters of interest include Notices of Proposed Rulemaking (NPRMs) and Notices of Inquiry (NOIs).
2. Energy Division and the Legal Division staff (including management) decide whether to recommend filing comments on behalf of the CPUC.
3. If they decide to recommend filing comments, the matter is noticed on the agenda for the public session of the Commission meeting. A public memorandum containing the staff's recommendation or options is prepared and circulated at least one week in advance of the public meeting. The Commission votes on the item either as part of the consent agenda or after public deliberations as a regular item on the agenda.
4. Energy Division and Legal Division staff draft comments, which are consistent with Commission's vote, with subsequent management in Energy Division and Legal Division review. If a Commissioner requests the opportunity to see the comments in advance of the CPUC filing them with the FERC, the Commissioner is provided a copy. The final comments are sent to each of the CPUC Commissioners.
5. The CPUC attorney files comments electronically with the FERC. Thereafter, the CPUC staff may make further comments in the rulemaking proceeding, so long as they are consistent with the original authorization granted to them by the CPUC Commissioners.

For the 90% or more interventions or protests the CPUC files in rate or tariff proceedings at FERC, which the CPUC staff has to quickly prepare due to the short time allowed by the FERC (i.e., 12 days or 20 days), the protocol is necessarily different.

6. With certain exceptions, the staff usually does not have time to get the initial authorization from the full Commission for filing a protest. This is because the agenda

must be distributed at least 10 days in advance of the CPUC's meeting, and additional internal deadlines make the 10-day distribution possible. Therefore, most of the time, the Legal Division and the Energy Division staff draft a notice of intervention and protest, get management approval and then, pursuant to California Public Utilities Code § 307(b), staff obtains authorization from the CPUC's President.

7. In the other instances, when there is sufficient time to get initial authorization for the protest from the full Commission in closed session, staff meets the internal deadlines for putting the item on the closed session agenda, including the confidential portion of the closed session agenda. Thereafter, the Legal Division and Energy Division staff prepare a confidential memorandum with recommendations, which is reviewed by management, and then distributed at least one week in advance for the full Commission to vote upon this item in the closed session.
8. In FERC cases that are resolved by settlement, during the negotiations, CPUC staff makes clear to all parties that they must receive authorization from the Commission before they can actually agree to a settlement. The CPUC Legal Division and Energy Division staff put the item on the next possible Commission agenda as a closed session item, then, prepare a confidential memorandum with recommendations, which is reviewed by management, and then distributed at least one week in advance for a Commission. The Commission's vote authorizes staff to take a position at FERC on behalf of the CPUC.
9. In cases where the CPUC staff litigates against the FERC-regulated entity or other parties, the staff's positions are consistent with the original authorization to protest the utility's filing or are based on a CPUC-authorized position taken elsewhere. Moreover, before the CPUC Legal Division can appeal a FERC decision by filing a petition for review, it must put the item on a closed session agenda, prepare a confidential memorandum and get authorization from the full Commission at a closed session.
10. For any proceeding in which CPUC staff wants to intervene without taking a position, the CPUC President may delegate authority to the assigned Assistant General Counsel to perform this ministerial task. However, if, at some point in time in that proceeding, CPUC staff wanted to take a position, then they would have to get the authorization from the CPUC in a closed session to do so.

#### **PROTOCOL FOR FILINGS BEFORE OTHER FEDERAL AGENCIES**

The CPUC on occasion has the opportunity to submit comments before other Federal agencies. For example, the CPUC responds to requests for comment from various divisions in the U.S. Department of Transportation, among them, the Federal Railroad Administration (FRA) and the Federal Transit Administration (FTA). Safety and Enforcement Division (SED) staff follow the protocol outlined above for comments to the FCC, except that, similar to how Energy Division prepares comments to FERC, SED has no equivalent of the "Federal Team." SED and Legal Division staff review requests for comment from US DOT, identify proceedings warranting comment from the CPUC, place an item on the CPUC public agenda (as the requests for comment are rulemakings), and then prepare a Memo of Recommendation for public and internal distribution. The process for filings before other Federal agencies not specifically named here should track the protocols set forth in this document.