

DRAFT COMMISSION POLICY	
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The five-member Commission, acting as a body, may direct the California Public Utilities Commission (CPUC) to make official comments during a state or federal administrative agency rulemaking process. Each individual Commissioner may separately decide to make such comments on an individual basis. This policy sets out the protocol for either approach, with emphasis on the CPUC’s activity before the Federal Communications Commission (FCC), and the Federal Energy Regulatory Commission (FERC).

ACTIVITY BEFORE THE FCC

The CPUC has been active in proceedings before the FCC since at least the 1970’s, and has challenged FCC actions in the courts when the Commission has deemed it important or necessary to do so. It is important to note that 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 following is the protocol for filing comments at the FCC.

1. Communications Division (CD) staff monitor 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. CD and the Legal Division will review the items at the staff level and prepare a memorandum making a recommendation. The memorandum must be approved by the CD Director, the General Counsel and the Executive Director. The memorandum shall also be circulated to all Division chiefs except ORA, prior to being scheduled on a Commission agenda.
2. After receiving the necessary approvals and subsequent to staff review, the memorandum may be placed on the agenda and the Commission votes on the staff

recommendation, at its meeting, either on the consent calendar or after public deliberation on the regular agenda.

3. If the Commission approves the recommendation, CD and Legal Division staff prepares the comments based on the memorandum. Management in both CD and Legal Division review the comments.
4. 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).) Legal Division then circulates the draft comments to the Commission offices. The Commission offices are requested to return any feedback within five days of receipt of the draft.
5. Final edits are made and the General Counsel and CD Director shall ensure that any final edits are consistent with the direction provided by the Commission in approving the staff recommendation.
6. The comments are filed electronically with the FCC.

ACTIVITY BEFORE FERC

The protocol for FERC filings is different from the protocol for FCC filings. The CPUC has a long history of representing the CPUC before the FERC, and its predecessor, the Federal Power Commission (FPC), because the State of California is primarily an importer of natural gas. Therefore, for more than 50 years, the CPUC has been an active participant in interstate pipeline rate cases, and matters involving the wholesale prices of natural gas.

When electric restructuring occurred under Assembly Bill (AB) 1890, the CPUC efforts at the FERC increased significantly. As a result of AB 1890, for the first time, the CPUC had to represent the California ratepayers in the California electric utilities' Transmission Owner (TO) rate cases at the FERC, instead of deciding the utilities' bundled rates as a vertically integrated monopoly in CPUC general rate cases. A few years after implementation of AB 1890 we had the California Energy Crisis (i.e., from June 1, 2000 to June 1, 2001), which involved the manipulation of wholesale electric and natural gas prices. Therefore, more than 90% of the CPUC's participation in FERC proceedings has been in natural gas or electric rate cases, tariff cases or complaint cases (hereinafter "rate cases") with much less of the CPUC's work in rulemaking proceedings.

This difference is significant 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. Secondly, when the utilities file rate cases, 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 is similar to the protocols for FCC filings but with fewer steps due to the lack of a Federal Team as described in number 3, above.

1. Energy Division and Legal Division staff monitor the FERC website and news releases for matters of interest to the CPUC. When staff identify 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 and provide the comments to the Commission offices for review. The Commission offices are requested to provide any comments within five days of receipt of the draft.
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 its protest. This is because the agenda must be distributed at least 10 days in advance of the CPUC’s meeting, and there are additional internal deadlines which must be met to 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. In these circumstances, after the approval of the President and the filing, the staff should share all the related documents, e.g., notice of intervention and protest, with other Commissioners.
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, it 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. Most of the FERC rate cases settle. During the negotiations between the CPUC Legal Division and Energy Division staff, the FERC-regulated entity (e.g., the Transmission Owner) and other parties in which a compromise may be reached, the CPUC staff make clear to all parties that they must receive authorization from the Commission before they can actually be a settling party. The CPUC Legal Division and Energy Division staff put the item on the next possible Commission agenda (i.e., which meets the internal deadlines before the 10-days required for distribution) as a closed session item. Thereafter, the Legal Division and Energy Division staff prepare a confidential memorandum with recommendations, it 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. Based upon the Commission's vote, the CPUC staff are then authorized to take a position at FERC on behalf of the CPUC.
9. In cases where the CPUC staff litigate against the FERC-regulated entity or other parties, it is consistent with the original authorization for staff to protest the utility's filing or based upon a CPUC-authorized position in another memorandum. 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 that the CPUC staff wanted to intervene without taking a position, the CPUC President has delegated authority to the CPUC's Assistant General Counsels 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.

INDIVIDUAL COMMISSIONER COMMENTS TO FEDERAL AGENCIES

If individual Commissioners choose to file comments with federal agencies that have not been voted on or approved by the Commission, those Commissioners should adhere to the following protocol. The comments should be reviewed by the General Counsel to ensure that they will not adversely impact the Commission in litigation or any adversarial proceeding. The comments must indicate that they are the views of the individual Commissioner and have not been approved by the full Commission. If the Commission has also submitted comments on the same topic, the individual Commissioners' comments should disclose the existence of the Commission comments with sufficient detail to enable the reader to locate the comments. The comments should be copied on all of the other Commission offices.