

Putting the Public in Public Utilities Commissions

After losing his home in California's Tubbs Fire in 2017, which was sparked by faulty electrical equipment, William Abrams became a regular participant in proceedings before the California Public Utilities Commission (CPUC). When Pacific Gas & Electric paid a \$13.5 billion settlement to the fire's victims, the CPUC oversaw the utility's bankruptcy reorganization plan, and Abrams was often one of a few nonlawyers in the room. Abrams's singular status speaks to how the intimidating bureaucratic structures of energy regulatory agencies can discourage public participation and prevent widespread engagement from nonexperts.

Public utility commissions are an essential and often overlooked avenue for influencing the policymaking process. Despite their daunting bureaucratic structures, they present concrete opportunities for individuals to be heard—in contrast to the ill-defined advocacy process in state legislatures and other local governing bodies. Abrams, a former restaurant owner, has become something of an expert in this bureaucracy. In addition to his role as a formal intervenor in several proceedings, a time-consuming task that requires familiarity with commission processes, Abrams has participated in a range of engagement opportunities, including attending public participation hearings and delivering written and oral public comments at CPUC meetings.

Although the CPUC is ahead of many other regulatory bodies in offering such opportunities to the public, the lack of substantive engagement and outreach frustrates Abrams and other advocates. What is needed, they say, are broader gauges of public sentiment and more accessible, straightforward mechanisms for public participation. In addition, they add, public comments rarely seem to change commission decisions.

While similar barriers to participation are common across public utility commissions, nowhere is the need to increase citizen engagement more urgent—and more challenging—than at the Federal Energy Regulatory Commission (FERC). Congress first instructed FERC to establish an Office of Public Participation through the Public Utility Regulatory Policies Act of 1978. However, this order remained dormant for four decades until Congress again directed FERC to take action as part of the 2021 Consolidated Appropriations Act (H.R. 133), under the assumption that the office will begin operating in fiscal year 2022.

Enhancing public input could broaden energy regulators' understanding of the complexities of the energy landscape, help find more equitable pathways for infrastructure change, and assist the transition to lower carbon energy sources. However, such public engagement requires clear, measurable, and actionable pathways. As energy infrastructure, power generation, and energy consumption are remodeled in the coming decades, the effects of regulatory decisionmaking will be felt by more and more people. There is a need, both at state and federal levels, to understand the value of public input and to apply successful state models to encourage greater participation.

Public participation is crucial for equitable representation

Evidence indicates that public participation in the utility regulatory process changes the way regulators consider issues that are important to consumers, such as safety and rates. For example, an analysis of public comments before federal regulatory bodies found that approximately half the arguments raised by commenters led to regulatory changes. However, substantial modifications were

more likely to result when commenters demonstrated “sophisticated” legal knowledge and presented empirical evidence.

Since the 1980s, representation of low-income clients by advocacy groups in utility regulatory proceedings has significantly changed aspects of regulation and service, leading to the creation of income payment programs, customer service regulations, targeted conservation funding for low-income customers, and increased service access and training centers. Despite these results, the groups that most frequently appear before the CPUC note that there are too few community-based organizations representing the specific needs of low-income and minority communities in commission proceedings.

An important distinction must also be made between the interests of ratepayers and the interests of other groups involved in utility deliberations, particularly environmental groups. Ratepayer advocates, for example, can find themselves at odds with environmental advocacy groups over carbon reduction strategies that lead to increased energy prices for consumers. This is especially important in the context of energy planning and decisionmaking in which the impacts of carbon emissions are widely distributed, often inequitably, across a diverse range of communities.

Inviting more groups into the regulatory process can be an effective route to creating more equitable policies. In California, the 2006 Global Warming Solutions Act (AB 32) was initially passed with a single regulatory framework to address both climate change and local air pollution. However, it faced significant critiques from community stakeholders who argued that the market-based mechanisms for carbon reductions (i.e., cap-and-trade) failed to address local air quality; they also pointed out that efforts to include “fenceline” communities in decisionmaking processes were inadequate.

As a result, lawmakers passed new legislation (AB 617) in 2017 to establish a framework for communities to work with regulators to create legally binding roadmaps addressing local emissions reductions. The California Air Resources Board (CARB) is tasked with implementing and updating the program every five years with public consultation. As of 2020, CARB had distributed \$211 million to over 1,600 projects, with 92% of funds targeted toward disadvantaged and low-income communities.

Models for increasing public participation

One model for increasing the diversity of interests and people involved in utility rulemaking is to compensate citizens who regularly engage with public utilities commissions. So-called intervenor compensation has been proposed or implemented in at least 12 states since the 1980s. In California, which operates one of the country’s largest intervenor compensation programs, the commission has

distributed about \$10 million per year to public interest intervenors over the past five years. A 2013 audit of the CPUC found that participating organizations represented a broad array of interests, including environmental groups, low-income and minority ratepayers, and ratepayers from diverse geographic groups. Such compensation is only available when organizations can show that they are intervening on behalf of constituents who would be unlikely to participate on their own.

However, this program is not without its shortcomings. The requirement for an intervenor to make a “substantial contribution” to the outcome of the proceeding can deter participation by consumer groups that are financially constrained and cannot afford to risk participating with no guarantee of compensation. In addition, the process can appear challenging and inaccessible for individual ratepayers, particularly if they lack financial resources or technical expertise.

Furthermore, even when participants qualify for intervenor compensation, the CPUC has failed to award this compensation in a timely manner. From 2011 to 2020, there were 141 more claims filed for intervenor compensation than funding decisions issued, representing the highest number of outstanding claims over a 10-year period since the program’s initiation in 1981. This process disproportionately burdens individual and low-income intervenors who rely solely on the compensation to fund their participation—instead favoring larger organizations with significant financial reserves.

Other states have also implemented intervenor compensation models that empower different bodies of representatives before their regulatory commissions. The Massachusetts Attorney General’s Office of Ratepayer Advocacy provides funding to hire expert witnesses and consultants in regulatory proceedings. Michigan’s Utility Consumer Participation Board provides upfront grants to qualified representatives before the commission, with funding generated from regulated utility companies. In Rhode Island, regulatory commissions have statutory authority to hire experts, with funding from both the legislature and utility companies participating in commission proceedings. Wisconsin’s intervenor compensation program, which, like California’s, has been around since the 1980s, sets aside specific funding for low-income advocates.

Another model for involving a broader range of citizens in the regulatory process can be found in Hawaii, which has piloted mechanisms for long-term stakeholder engagement. These structured deliberations demonstrated their potential when they were used to realign utility incentives after Hawaii passed the Ratepayer Protection Act (SB 2939) in 2018. The act set a 2020 deadline for Hawaii’s Public Utilities Commission (PUC) to establish

a performance-based ratemaking process. This will shift the PUC from traditional models that allow utilities to set customer rates based on capital investments, to a model that ties rates to performance in areas such as customer service or emission reductions.

To meet this deadline, the Hawaii PUC created a multiyear, two-phase process of public deliberations, with hundreds of hours of public meetings and discussions involving PUC staff, Hawaiian Electric (the state's primary utility), and other stakeholders. This approach differed significantly from traditional PUC processes, which are largely driven by esoteric, back-and-forth document filing and written comments that limit participation to experts and frequently result in contested decisionmaking. One workshop participant even described the sessions as "open, equitable, inclusive, and relaxed," words that are rarely used to describe utility regulatory proceedings.

These deliberations contributed to a set of performance incentive mechanisms (PIMs) to create the financial structures to accomplish the legislature's clean energy goals. One of these PIMs, proposed by the Hawaii nonprofit Ulupono Initiative, provides a monetary reward for the utility to meet state-mandated renewable portfolio standards ahead of schedule.

In late 2020, Hawaii's PUC issued a decision establishing the new performance-based ratemaking standards. While not everything proposed during the workshops was included, the new process was largely praised for its ability to produce innovative outcomes.

Among states, there are numerous other models for broadening participation in energy regulatory proceedings, particularly focusing on public education and outreach. The Oregon Energy Facility Siting Council (part of the state's Department of Energy) provides a written guide outlining the process for the siting of energy facilities and mechanisms for public engagement. Similarly, to provide the public with tools for meaningful participation in proceedings before ISO New England (a regional transmission organization), the Massachusetts Attorney General's Office has developed a series of multilingual educational videos and hosted a virtual "teach-in" last year. Massachusetts also partnered with other states across New England to host a joint public forum, providing a free, virtual platform to engage participants in discussions of equity and environmental justice related to regional grid planning.

Lessons for a FERC Office of Public Participation

As FERC establishes its Office of Public Participation, the office can draw from lessons learned at the local level, particularly from California and Hawaii.

Currently, citizens interact with FERC either by participating in the commission's rulemaking decisions or by formally intervening to petition for a reconsideration

of a prior decision and the right to seek judicial review.

Although it is also possible to participate by protesting or filing a complaint, these routes do not make the protestant a party to the proceeding. And if a party's position is not included in the formal case record, FERC cannot rule on it. In general, these processes are so challenging to navigate that participants often come from industry or a few large organizations such as the Sierra Club and the Natural Resources Defense Council. In 2018, FERC issued a ruling that made it even more difficult for environmental groups to have standing in pipeline cases.

To remedy this legacy, FERC should proactively seek public participation in its regulatory processes. To provide clarity, the commission could develop public participation plans unique to each case type or, when needed, on a case-by-case basis. In addition, FERC should more broadly expand the work of its Office of External Affairs to provide comprehensive public education and outreach. And building on the commission's recent experience during the COVID-19 pandemic, virtual sessions should be continued and enhanced so that more people, from further away, can be involved.

In particular, FERC should consider creating liaisons to state-level consumer advocates who offer valuable insight into local stakeholders and regional expertise. These advocates, particularly at the grassroots level, are often underfunded and would benefit significantly from FERC's support to participate in national as well as regional proceedings.

The newly formed Office of Public Participation could implement programs to offer intervenor compensation and expert assistance, with the goal of ensuring fairer representation. Since utilities are able to recover the costs of their participation in FERC proceedings through rates, intervenor compensation fees in all proceedings initiated by a utility should be the responsibility of that utility. For other proceedings (e.g., rulemaking), funds should be drawn from FERC's administrative budget. Funding mechanisms should also be implemented to identify the most in-need intervenors and administer a public interest attorney referral program for them, in addition to securing any expert assistance they might require.

The FERC Office of Public Participation represents a unique opportunity to democratize the commission's regulatory process and enhance stakeholder engagement. By proactively centering communication, clear guidelines for participation, and fair access to resources, FERC, as well as other state and local regulatory agencies, can take the first steps towards significantly improving public participation in the energy regulatory process.

Christopher Tonnu Jackson is a PhD candidate in chemistry at the University of California, Berkeley.