Energy Justice Intervenor 2024

Session 4: Regulatory Proceedings 101

Three Different Visions for Utility Systems

I wanted to start off by sharing these three visions for utility systems that come from The People's Utility Commons curriculum. They define the 3 visions as follows:

1) **Public power:** where the system is owned by a municipality, the federal government, or some combination of government-chartered partnerships and managed under a democratic mandate to meet goals besides profitability. In the 1930s, significant investment to support this would be made under the New Deal.
2) **"Utility consensus":** where monopolists design and control their own regulation through propaganda, political corruption, and lobbying, meant to protect the corporation's ability to survive. At the end of the 1920s, this had the most power and would steadily consolidate power through the 1970s.
3) **Free market ideology:** where "competition" and belief in price-setting market forces with as little government oversight as possible are substituted for the utility consensus. This was defeated in the early 1900s by the private monopolists but would reappear in a significant way in the 1970s.

Now, each of these visions emerged as the energy system developed and is carried forward through both private and public interest interventions in the system; they are all still present today in some way.
According to the creators of this curriculum, "Recognizing these three competing visions can help sharpen analysis of regulatory actions and interventions. The reality is that after the swift takeover of many publicly-owned utility systems in the United States in the first 50 years of the industry and a brief intervention for wholesale power supply during the New Deal, there has not been a significant resurgence of expanded public ownership.
This means that during discussions about "utility regulation," we are often not even discussing possibilities for governance under municipal ownership but are navigating tensions between two private models – "utility consensus" and "free market ideology" – for what the utility system looks like."
This put things in perspective for me in many ways and opened my eyes to the ways in which focusing solely on regulatory outcomes can limit the public's imagination of what is possible but also what some of the limits or bounds exist in terms of what is possible in energy regulation conversations and proceedings.
Again, as a refresher, we will be focused on Public Service Commissions/Public Utility Commissions/ Commerce Commissions that are charged with regulating investor-owned utilities because of what is known as the regulatory compact. These commissions may have some oversight over rural electric coops and municipal utilities, but their focus is largely on IOUs.
Let's keep these 3 visions in mind as we go through the presentation and think about what vision is being put forward at different points in the conversation and how we might stretch the limits of regulatory work to build toward greater public power.
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Typical PSC/PUC Responsibilities

Okay, here is a look at what state PUCs are responsible for. They are charged with implementing state energy legislation in addition to setting the direction for utility action through rules, guidance, evaluation metrics, opinions, and more on issues related to:

- Setting just and reasonable utility rates and ensuring adequate and reliable service to customers

- Authorizing and overseeing investments in energy resources such as power plants
- Reviewing and approving a utility's energy resource plans
- Regulating private, investor-owned natural gas, electric, telephone, water and private sewer companies
- Approving new developments/facilities

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State of PUCs Today
PUCs vary greatly from state to state in terms of

- the size of the commission by budget and number of commissioners, though 92% of commissions have between 3 and 5 commissioners
- whether commissioners are appointed or elected
- the political affiliation of commissioners
- the length of their terms, though the most common term length is 6 years.

Among the 50 PUCs in the US today, 40 have appointed commissioners, and 10 have elected commissioners. South Carolina and Virginia have commissioners that are appointed by state legislators. Of the 40 appointed PUCs, 39 are officially nonpartisan, while all 10 of the elected PUCs are partisan positions.
The Illinois Commerce Commission is the only PUC with appointed, partisan commissioners.
The other 10 PUCs—including those of Alabama, Arizona, Georgia, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, and South Dakota—consist of elected, partisan commissioners, with 8 of these 10 PUCs holding elections in states that are considered red states and the other 2 are purple/swing states,--Arizona and Georgia.
Only Arizona, Louisiana, Montana, New Mexico, and Oklahoma have set a term limit of 2 terms.
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Regulatory Commission Demographics
This demographic information comes from the 2022 report Who Holds the Power: Demystifying and Democratizing Public Utilities Commissions from the Chisholm Legacy Project.
They covered all 50 commissions in the US today, and their topline findings were:

- A **significant majority** — 65% — of Public Utility Commissioners identify as men
- Six states have **all-male** PUCs, though that number has since gone down to 5, I believe because a woman was appointed to Maine's commission in early 2023.
- Nearly **half** of all states have PUCs with **no commissioners of color**.
- A mere **8** states have PUCs with more than one commissioner of color
- Commissioners from several states have ties to **fossil fuels – wielding significant influence within one of the very industries they regulate.**

37% of commissioners have legal backgrounds, and 25% have served in an elected official capacity, primarily in their respective state legislatures.
With more recent commissioners, there has been greater diversity across gender, race, background, and party, but there is still more work to be done to ensure diverse representation that reflects the makeup of the US population as a whole.
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Obstacles to Engaging at PUCs
So those representational challenges stack on top and really do lead to some of the obstacles related to engaging at PUCs. Some of these include:

- Lack of accessible notice and outreach to impacted customers and communities
- Lack of translation of materials both for complexity and language
- Costs associated with formal participation
- Limited opportunities to offer feedback
- Time investment required alongside other responsibilities
- Arcane websites that are difficult to navigate
- Little to no technical assistance offerings
- Lack of trust in a commission (regulatory capture), the system, and that outcomes will benefit ratepayers

And I'm providing all of this context so that we can have this big picture perspective on commissions before we dive in because when we live in or work in states where commissions are slow to act or are making what we deem the wrong decisions, it can feel really discouraging and I think sometimes we as a movement can internalize losses as a reflection of some kind of failing on our part, on our analysis, on our organizing.
And I want us to remember that in a lot of ways old ideas about the energy system and who should be in charge of shaping it as well as a lot of money and influence are all at play here.
But there are solutions and recommendations out there, including a really robust list in the Who Holds the Power report I referenced. It's also full of great case studies, so please do check it out. It's a great resource.
I'm hoping that this session and the next, when we continue to discuss regulatory cases, can help shed some light on tips and strategies that can demystify some things. Please do bring your experience and your questions into our conversation so that we can all learn from each other.
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Understanding the Regulatory Process
Okay let's get into what a typical contested case process looks like.
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Typical Case Procedure pt.1
Depending on the type of case, the process might have tweaks, so consider this a basic outline to orient yourself. Most regulatory cases are adjudicatory or litigation proceedings, meaning there's a legal process where a judge or decision-maker listens to evidence and arguments from both sides to make a decision about a case and that's what is described here.
First, there is a **filing** where a utility company, consumer group, or other interested party files an application or proposal with the Public Utilities Commission. This could be a request for a rate increase, approval of a new power plant, changes to services, etc.
The commission then provides **public notice** of the filed case, allowing interested parties to intervene or provide comments within a specified period.
The parties engage in a **discovery** process where they exchange relevant data, documents, and information through data requests and responses.
The commission then holds **public hearings**, during which the parties present evidence, expert testimony, and arguments. Consumers also have an opportunity to provide comments.
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Typical Case Procedure pt.2
After hearings, the parties file legal **briefs** summarizing their positions and arguments.
Commission staff or an administrative law judge issues a **proposed decision** or recommended ruling on the case.
Comments on Proposed Decision: Parties then have a chance to file comments and exceptions to the proposed decision.
Final Decision: The commissioners review the entire record and issue a final decision, either accepting, modifying, or rejecting the proposed decision.
Potential Appeals: Parties may have the option to request a rehearing or appeal the final decision to a state court if they disagree with the outcome.
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Process Flowchart
This flowchart here might help with visualizing some of this. The process depicted here is everything that may happen when a utility proposes and requests approval for a hypothetical new EV program.
You can see that the commission evaluates the utility's proposal through a legal process that includes public hearings and comments, briefs, discoveries, workpapers, expert testimony, rebuttal testimony, and more.
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Regulatory Terminology
Okay, so that is a high level of what the process is, let’s define some other terms.
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Procedural Terms
Advanced Submission: any requirement for an applicant to notify designated people and entities before a filing is submitted to the Commission. Advance submission requirements vary depending on the type of case.
Investigation: typically initiated by the Commission to review an issue (or complaint or allegation) that involves one or more utilities.
Inquiry: a less formal proceeding initiated by the Commission typically to gather information. The formal rules of adjudicatory proceedings do not apply. If, after gathering information, the Commission wishes to take action, it may open an adjudicatory proceeding or rulemaking.

- Inquiries may involve public workshops, stakeholder meetings, or requests for written comments, but they generally do not involve formal evidentiary proceedings or cross-examination of witnesses.

Rulemaking: The Commission seeks comment on a proposed rule or rulemaking amendments that have general applicability to more than one utility or entity. Rulemakings are less formal than adjudicatory proceedings.

- A rulemaking is distinct from an investigation or inquiry in that it is a formal process specifically aimed at creating or modifying binding rules and regulations rather than examining specific allegations or gathering general information.
- Rulemakings are an important tool for commissions to update regulatory frameworks, implement new policies or legislative mandates, and respond to changing industry conditions.

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Procedural Terms
Docket: A commission organizes all its actions into dockets. Each docket is identified by a unique series of numbers and letters, making it easier to communicate about and track records and actions associated with each docket.
Administrative Law Judge: The role of ALJs varies based on the specific procedures and regulations of each state, but generally their responsibilities include:

1. Presiding over evidentiary hearings: ALJs preside over formal evidentiary hearings, during which the utility, consumer advocates, and other intervening parties present testimony, exhibits, and evidence supporting their positions.
2. Managing the procedural schedule: ALJs issue procedural orders, set filing deadlines, rule on motions and objections from parties and ensure the cases adhere to established procedures and rules.
3. Developing the evidentiary record: ALJs ensure that all relevant evidence is properly entered into the record and available for consideration by the commissioners.
4. Issuing a recommended decision: After the hearings conclude, the ALJ reviews the entire evidentiary record and issues a recommended decision or proposal for decision. This document analyzes the evidence and testimony, makes findings of fact, and recommends a final decision to the commission.

Intervenor: Full party to the case with the right to submit testimony, participate in discovery, cross-examine witnesses at hearings, and make arguments to the Commission. To gain intervenor status, one must file a Petition to Intervene that demonstrates that the party's rights, duties, privileges, immunities, or other substantial interests may be affected by the case.

- Intervention requirements and rules will vary depending on the state you are working in

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Procedural Terms
Comment: A statement of your opinion about any issue that the Commission is deciding on. A comment could include a recommendation about what the Commission should do or answers to questions asked in a public notice.
Comments can help shape regulatory decisions, but they are not the only information considered when the PUC makes a decision. All public comments are filed as part of the "official record," which is reviewed by PUC staff and Commissioners.
The official record may include comments from the public, issue advocates, state agencies, expert testimony, utility information filings, and more. The Commissioners review all information in the official record, consider state laws, and then decide on an issue.
Public Hearings: meetings that allow utility customers and other interested parties to share their comments on a pending case. The Commission typically schedules public hearings in the utility's service territory.

- Prior to the hearing, the Commission will publish a public notice of hearing and will also provide information about the hearing to local organizations for distribution

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What is Testimony?

Please review the slides and recording to hear Khadeya explain testimony and the distinction between expert and lay witnesses

Types of Cases
Okay, let's cover some of the types of cases you might engage in when it comes to energy issues
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Rate Case
Rate cases tend to get the most coverage and attention because in a lot of ways they are the most simple to understand. A utility wants to charge more, customers don't want to pay more; it can be easier to organize around rate cases because the impacts are so tangible. You can see here what the process looks like in the Minnesota PUC.
It all begins with a utility submitting a filing to demonstrate the need for a rate increase. The rate filing includes estimates of expenses, including operating expenses (labor, pension costs, materials, fuel), depreciation costs, taxes, a return on investor capital, and recognition of utility plant additions and capital expenditures.
Commission staff and other intervenors have the ability to scrutinize requests through a contested case proceeding. An Administrative Law Judge (ALJ) presides over rate case proceedings – setting the schedule, hearing motions from parties to the case, and overseeing cross-examination of witnesses during the evidentiary hearing.
Intervenors in the case are able to submit testimony and exhibits, cross examine witnesses, and file legal briefs on issues in the case.
The ALJ reviews the evidentiary record and makes findings and recommendations regarding the action the commission should take on the application—which will involve rates, terms and conditions of service, and other matters relevant to the rates—in the form of a report, known as an ALJ Report.
The Commission takes the ALJ Report under consideration and generally has several months from the date the utility filed the application to issue a final decision through an order.
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Integrated Resource Plans
Most regulated, investor-owned utilities have processes for planning how to meet future energy demand, with many utilizing some form of an IRP.
The main goal is to create a long-term vision for resource development, addressing how the utility will meet future demand. IRPs are particularly important for vertically integrated utilities, as they help determine the resource mix for procurement.
IRPs are constantly evolving. This graphic comes from an RMI report called Reimagining Resource Planning where they identify three core qualities IRPs must maintain to help utilities and regulators evaluate resource decisions even in the context of significant change: they must be **trusted**, **comprehensive**, and **aligned**.
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Integrated Resource Plans (IRP) Process
IRPs typically address questions about the trade-offs between different resource options such as building new generation assets, purchasing energy from other generators, integrating distributed energy resources (DERs), investing in energy efficiency programs, and/or investing in demand response programs. These resource considerations are used to evaluate and communicate potential strategies for delivering safe, reliable supply at the lowest system-wide cost over ~10 to 20 years. Many utilities are now adding environmental performance, resilience, and consumer empowerment to their list of basic considerations—either voluntarily, or because they are required by regulation.

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Certification of Public Convenience and Necessity (CPCN)

Developers, utilities, and transmission companies that want to build new construction projects must apply for approval, with the goal being that projects that are necessary and have reasonable costs and environmental impacts will be approved.

A Certificate of Public Convenience and Necessity (CPCN) proceeding is used to review and approve major utility infrastructure projects or service expansions proposed by regulated utilities.

The key aspects of a CPCN proceeding include:

1. Application: A utility company files an application with the public utilities commission seeking a CPCN for a proposed project, such as building a new power plant, transmission line, pipeline, or expanding service into a new geographic area.
2. Need demonstration: The utility must demonstrate to the commission that the proposed project is needed for public convenience and necessity. This typically involves providing evidence of future demand projections, system reliability needs, or other justifications for the investment.
3. Impact assessments: The utility may be required to submit environmental impact studies, cost-benefit analyses, and assessments of the project's potential impacts on rates, local communities, and other stakeholders.
4. Public input: The commission seeks public input through written comments and public hearings, allowing interested parties to intervene and present evidence for or against the project.
5. Evidentiary hearings: Formal evidentiary hearings are held, where parties can cross-examine witnesses, submit testimony and exhibits, and make legal arguments.
6. CPCN decision: After reviewing the entire record, the commission decides whether to grant or deny the CPCN for the proposed project, potentially with conditions or modifications.

Something to note is that with these types of cases, a utility is likely going to have to submit permits applications in other offices in order to move a project forward. For instance, construction permits, water permits, etc so there’s an opportunity to tackle this type of development in multiple arenas at once, not just in front of a utility commission but also potentially in front of a department of environment for instance.

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Tools to Make Your Case

Let’s go over some resources at your disposal when it comes to participating in a regulatory case.

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Existing Data Sources

Here are some datasets and reference points that may be helpful in building your evidence

- The US Census Bureau Household Pulse Survey is a multi-year survey that includes maps and datasets on energy insecurity, housing insecurity, and food insecurity
- The US Energy Information Administration has its Residential Energy Consumption Survey (RECS) which is distributed every 5 years and includes household energy usage data sets of detailed energy insecurity measures
- US Department of Energy has the Low-Income Energy Affordability Data (LEAD) Tool which uses American Community Survey data from the U.S. Census Bureau to create maps and datasets of income-sensitive analysis of energy insecurity and housing type and tenure
- On the Ballotpedia state executive offices list, you can find a list of commissioners with their political party affiliation and when they assumed office
- When it comes to state energy offices, state environmental agencies, and PUC sites, the data shared will vary from state to state but they can be a helpful starting point.

    - Commission Sites are helpful if you want to reference workshop materials, meeting notes, and special working group reports. You might also want to refer back to previous case decisions to get a sense of commissioner arguments and legal precedence in a state.
    - State environmental agencies will also host a lot of information about permitting procedures for new energy infrastructure and related environmental impact assessments.
- Similarly, utilities vary in terms of how much information they display on their sites but some do host outage maps and some general customer information as well as program overviews and updates on workshops they may have hosted
- Local nonprofits and ratepayer advocates will often host a number of reports and resources on the site ranging from emissions breakdowns of facilities to testimony from community members impacted by utility and commission decisions.
- US Federal Energy Regulatory Commission: Online library includes case records for cases in front of the Commission
- The US Environmental Protection Agency has the EJScreen tool that evaluates 13 EJ indexes to create a percentile score for each index, which is then compared to the nationa and state averages. Percentiles higher than 50 for any of these indexes mean that the communities in the area have a greater than average burden in that index compared to the state or national average. EJ Indexes over 80 in any of these categories may suggest that the surrounding community is overburdened.
- The Federal Emergency Management Agency hosts The National Risk Index which is a dataset and online tool to help illustrate the U.S communities most at risk for natural hazards. The Index leverages available source data for 18 natural hazards, social vulnerability, and community resilience to develop a baseline relative risk measurement for each U.S county and Census tract.

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Existing Data Sources Cont.

- Independent research reports, feasibility studies, and cost-benefit analyses from academic institutions, think tanks, or consultancies may also be a resource, as many of these papers analyses and papers are released to support cases and can be commissioned by nonprofits
- Public comments and stakeholder input are a treasure trove of insight into what community members think about an issue. Of course there are limits and challenges to participation so comments may not always be representative but still, something to review when possible.
- Energy modeling and forecasting tools like those from the National Renewable Energy Laboratory NREL or private companies can be used to analyze and forecast energy demand, supply, and pricing scenarios.

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Generating Data

Generating data yourself can understandably be a more time-intensive endeavor, but it also has the potential to activate more people to support your cause.
Advocates have generated their own data by:

- Conducting their own research for forecast modeling, their own cost benefit analysis, etc. Some groups may also conduct field studies or site visits to gather data on the operation practices, environmental impacts, or community impacts of energy facilities or projects relevant to a case.

This can involve collecting air, water, or soil samples for analysis, as well as observational data and stakeholder interviews.

- Commission studies on the topics we already discussed but also on economic impacts to quantify the potential economic impacts, costs, or benefits associated with different energy policies, projects, or regulatory decisions including data on job creation, consumer costs, tax revenues, or other economic factors.
- You may also want to tackle the public health angle so environmental impact assessments or health impact studies to quantify the potential effects of energy projects or policies on air quality, water, public health, or environmental justice concerns may also be an avenue to explore.
- And just as a note, there are quite a number of technical assistance providers out there that can support some of this, and that includes local universities, think tanks, legal groups and others, so developing those robust partnerships is important.
- Hosting community listening forums or stakeholder meetings to gather in-depth qualitative data from different groups like consumers, environmental organizations, industry representatives, or community leaders.
- Conducting community surveys and public opinion research to gather data on public sentiment, concerns, and preferences regarding energy issues relevant to the case.
- Encouraging and driving turnout at public comment opportunities
- Access campaign finance and lobbying disclosures to bring relationships between utilities and regulators to light (more typically used for outside game strategy)
- And similarly, used social media and traditional media to bolster public support and educate more of the public