

DOCKETED

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| Filer: | Liza Lopez |
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STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF:

Steve Uhler Petition for Rulemaking

**ORDER DENYING PETITION FOR
RULEMAKING**

I. INTRODUCTION AND PROCEDURAL HISTORY

On January 29, 2023, Steve Uhler filed a letter requesting that the California Energy Commission (CEC) initiate a rulemaking. The letter stated that a petition to initiate rulemaking was attached to the letter. As a result of the CEC's Docket System not detecting an attachment embedded in the letter, the Executive Director determined that Mr. Uhler's petition was incomplete, and the determination was emailed to Mr. Uhler on February 6, 2023.

On February 6, 2023, Mr. Uhler responded that he had filed the petition (TN 248592) with the CEC and noted that the attached "Rulemaking Petition to amend 20 CCR section 1104.pdf" file was overlooked. Chief Counsel's Office staff identified the hidden attachment by using a different version of Adobe Acrobat to access the petition, and confirmed that Mr. Uhler had in fact filed a petition requesting that the CEC initiate rulemaking pursuant to California Code of Regulations (CCR), title 20, section 1221.

Mr. Uhler's petition requests that the CEC initiate a rulemaking to amend CCR, title 20, section 1104, subsection (e) in two separate regards. First, Mr. Uhler's petition requests that section 1104(e) be amended to require CEC staff to file documents submitted in proceedings for commission business meetings in time to allow members of the public to file written comments regarding such documents in compliance with section 1104, subsection (e)'s requirement that, unless otherwise directed by the presiding member, they be filed at least three days before the commission meeting. Second, Mr. Uhler's petition requests that section 1104(e) be amended to require the CEC to provide an opportunity for members of the public to directly address the state body on each agenda item before or during the CEC's discussion or consideration of the item.

On February 14, 2023, the Executive Director determined that Mr. Uhler's petition met the requirements of CCR, title 20, section 1221 and certified that the petition was complete. The Executive Director's determination and certification was sent to Mr. Uhler via email.

On February 17, 2023, the CEC published the Business Meeting Agenda for its business meeting scheduled on February 28, 2023. The agenda included consideration of Mr. Uhler's petition for a rulemaking hearing.

On February 28, 2023, the CEC held a hearing to consider Mr. Uhler's petition for a rulemaking.

II. CEC FINDINGS

Based on the entirety of the record, the CEC finds that:

- 1) CCR, title 20, section 1104, subsection (e) provides that: any person may file comments in writing on any agenda item. Unless otherwise directed by the presiding member, all written comments shall be filed at least three days before the commission meeting. Any person present shall be given an opportunity to make oral comments on any agenda item; provided however, that the presiding members may limit or preclude such comments as necessary for the orderly conduct of business.
- 2) Public Resources Code sections 25213 and 25218(e) mandate and authorize the CEC to adopt rules and regulations, as necessary, to carry out its statutory duty. Thus, the CEC has the authority to initiate a rulemaking to amend CCR, title 20, section 1104, subsection (e), as requested in the Mr. Uhler's petition.
- 3) Mr. Uhler's petition for a rulemaking meets the requirements of CCR, title 20, section 1221.
- 4) The Chief Counsel's Office evaluated Mr. Uhler's petition and found that the CEC is following existing law.
- 5) CEC staff makes documents available to the public before business meeting as required by law.
- 6) CEC has already made changes to the conduct of its business meeting to provide the public opportunity to comment before discussion of information items (non-voting items) and continues to provide the public opportunity to comment during discussion of voting items.
- 7) Thus, the requested rulemaking is not necessary and does not warrant the expenditure of resources.
- 8) CCR, title 20, section 1221(c), requires that, within 30 days of the filing of the petition, the CEC shall deny the petition, stating the reason for the denial in writing, or grant the petition, directing staff to prepare an order instituting a rulemaking.

III. CONCLUSIONS AND ORDER

- 1) For the reasons stated above, the CEC hereby DENIES Mr. Uhler's petition for a rulemaking to amend CCR, title 20, section 1104, subsection (e).
- 2) CEC staff is directed to file this Order and supporting documentation with the Office of Administrative Law in accordance with Government Code section 11340.7(d).

IT IS SO ORDERED.

CERTIFICATION

The undersigned Secretariat to the CEC does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the CEC held on February 28, 2023.

AYE: Hochschild, Gallardo, Gunda, McAllister, Monahan

NAY: NONE

ABSENT: NONE

ABSTAIN: NONE

Dated: February 28, 2023

SIGNED BY:

Liza Lopez
Secretariat

Memorandum

To: Chair, Vice Chair, and Commissioners
California Energy Commission

From: Linda Barrera, Chief Counsel
Chief Counsel's Office
California Energy Commission

Date: February 22, 2023

Subject: Recommendation Regarding Steve Uhler's Petition to Initiate Rulemaking to Amend California Code of Regulations, title 20, section 1104, subsection (e).

I. Procedural and Factual Background

On January 29, 2023, Steve Uhler filed a letter requesting that the California Energy Commission (CEC) initiate a rulemaking. The letter stated that a petition to initiate rulemaking was attached to the letter. As a result of the CEC's Docket System not detecting an attachment embedded in the letter, the Executive Director determined that Mr. Uhler's petition was incomplete, and the determination was emailed to Mr. Uhler on February 6, 2023.

On February 6, 2023, Mr. Uhler responded that he had filed the petition (TN 248592) with the CEC and noted that the attached "Rulemaking Petition to amend 20 CCR section 1104.pdf" file was overlooked. Chief Counsel's Office staff identified the hidden attachment by using a different version of Adobe Acrobat to access the petition, and confirmed that Mr. Uhler had in fact filed a petition requesting that the CEC initiate rulemaking pursuant to California Code of Regulations (CCR), title 20, section 1221. Specifically, Mr. Uhler's petition requests that the CEC initiate a rulemaking to amend CCR, title 20, section 1104, subsection (e).

On February 14, 2023, the Executive Director determined that Mr. Uhler's petition met the requirements of CCR, title 20, section 1221 and certified that the petition was complete. The Executive Director also noted that his determination and certification does not constitute an approval of his petition for the CEC to initiate a rulemaking hearing. The Executive Director's determination and certification was sent to Mr. Uhler via email.

On February 17, 2023, the CEC published the Business Meeting Agenda for its business meeting scheduled on February 28, 2023. The agenda includes consideration of Mr. Uhler's petition for a rulemaking hearing and describes the agenda item as follows: "Consideration of an action on a petition that requests the CEC initiate a rulemaking hearing pursuant to CCR, title 20, section 1221." The CEC posted the agenda on its website and Business Meeting Docket 10 days prior to the February 28 business meeting. The agenda includes information on how to participate in the meeting.

II. Legal Authority

Government Code section 11340.6 provides that any interested person may petition an agency to initiate a proceeding for the adoption, amendment, or repeal of a regulation. The CEC has established regulations that set the requirements and procedures to file a petition for rulemaking. Specifically, CCR, title 20, section 1221(a)-(b), requires a petition to include the following information: (1) the name, address, and phone number of the petitioner; (2) the

substance or nature of the regulation, amendment, or repeal requested; (3) the reasons for the request; and (4) reference to the authority of the CEC to take the action requested.

Pursuant to CCR, title 20, section 1221(b), a petition to request a rulemaking hearing shall be filed with the executive director who shall within seven days after its filing determine whether the petition is complete. CCR, title 20, section 1221(c) provides that, if the executive director certifies that the petition is complete, the CEC shall, within 30 days from the filing of the petition, deny the petition, stating the reason for the denial in writing, or grant the petition, directing the staff to prepare an appropriate order.

III. Mr. Uhler's Request and Assertions

Mr. Uhler requests that the CEC amend CCR, title 20, section 1104, subsection (e). In his petition, Mr. Uhler requests an amendment to require CEC staff to file documents submitted in proceedings for CEC business meetings in a timely manner so the public may file written comments in a timely manner. Mr. Uhler states that "a timely manner for commission staff would be the same as required for notice of the meeting" and that "timely filing for commission staff is to be done pursuant to 20 CCR section 1208, the same method required for the public." Further, Mr. Uhler asserts that the amendment is necessary because "there appears to be no requirement for commission staff to file documents in a timely manner so as to ensure it is not impossible for the public to file written comments in a timely manner."

Additionally, Mr. Uhler requests amendment to CCR, title 20, section 1104, subsection (e) to require that the CEC provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item. To support this request, Mr. Uhler references Government Code section 11125.7(a). Mr. Uhler states that the CEC's business meeting agendas have prohibited the public from speaking on some agenda items before or during the state body's discussion or consideration of the item, and asserts that this is inconsistent "with the state's meeting laws and the Administrative Procedure Act."

IV. Analysis and Recommendation

The Chief Counsel's Office recommends denying the petition for rulemaking because amendments to CCR, title 20, section 1104, subsection (e) are not necessary to address Mr. Uhler's assertions and concerns. While Mr. Uhler's statements have been carefully evaluated and are appreciated, the Chief Counsel's Office has determined that the CEC is following existing law. As explained below, CEC staff makes documents available to the public before business meeting as required by law, and the CEC has already made changes to the conduct of its business meeting to provide the public opportunity to comment before discussion of information items (non-voting items) and continues to provide the public opportunity to comment during discussion of voting items. The CEC can make this change without adopting amendments to its regulations; thus, the requested rulemaking is not necessary and does not warrant the expenditure of resources that such a rulemaking would require.

CCR, title 20, section 1104, subsection (e) states:

Public Comments. Any person may file comments in writing on any agenda item. Unless otherwise directed by the presiding member, all written comments shall be filed at least three days before the commission meeting. Any person present shall be given an opportunity to

make oral comments on any agenda item; provided however, that the presiding member may limit or preclude such comments as necessary for the orderly conduct of business.

The CEC follows the relevant requirements of CCR, title 20, and the Bagley-Keene Open Meeting Act (Government Code sections 11120-11132) when noticing the agenda and making materials available to the public before consideration by the CEC at a business meeting. To achieve and exceed these requirements, and based on the electronic systems in place, the CEC utilizes a combination of dockets and webpages to maximize public engagement. Dockets act as the repository for documents related to a specific rulemaking, informational, or other proceeding, and the Business Meeting Docket and Business Meetings webpage provides a quick and centralized forum for those interested to learn more about agenda items up for consideration.

Mr. Uhler claims that CEC staff do not file documents submitted in proceedings for CEC business meetings in a timely manner and suggests this prevents the public from filing written comments in a timely manner. He then specifies what he considers to be “a timely manner” for CEC staff, which he defines as the same amount of time as required for publishing the notice of the meeting (e.g., 10 days before the meeting).

However, Mr. Uhler’s statements ignore the fact that the CEC’s already ensures that documents related to business meetings are filed in a timely manner, as required by law.

First, consistent with the requirements of the Bagley-Keene Open Meeting Act (Government Code section 11125(a)-(b)), the CEC has always provided notice of a business meeting at least 10 days in advance of the meeting, and the notice of the meeting includes a specific agenda containing a legally sufficient description of the items to be discussed and considered during the meeting. Nothing prevents Mr. Uhler (or any other member of the public) from filing written comments on specific agenda items within 3 business days before the meeting and/or orally (in person or virtually) during the business meeting, in accordance with CCR, title 20, section 1104, subsection (e). Furthermore, as required by the Bagley-Keene Open Meeting Act (Government Code section 11125.1(b)), prior to or during the business meeting, the CEC consistently makes available to the public all public records distributed to CEC commissioners pertaining to any item to be considered during the meeting. The law does not require that all supporting documentation be filed at the same time as the notice of the meeting. Given that Mr. Uhler and all members of the public are always given adequate notice of the specific items to be considered before the business meeting, and that the CEC does provide the public with access to the documents distributed to the CEC commissioners before or during the business meeting, the CEC’s process is consistent with the Bagley-Keene Open Meeting Act and there is no legal requirement or need to amend CCR, title 20, section 1104, subsection (e).

Second, pursuant to the California Administrative Procedure Act (APA), CEC staff files rulemaking documents, including the proposed regulatory language, notice of proposed action, initial statement of reasons and other relevant documents in the corresponding rulemaking proceeding docket for at least a 45-day public comment period before the CEC considers adoption of a rulemaking at a business meeting. Moreover, consistent with the APA, prior to considering approval of a rulemaking, the CEC files a Notice of Adoption in the rulemaking docket to inform the public when such rulemaking will be considered at a CEC business meeting or a separate public hearing. This process ensures both compliance with the legal requirements of the APA and sufficient time within which the public can submit comments.

Last, the CEC posts backup materials to the “Business Meetings” website so that those who are not following a specific docket will be aware of the items being considered at the business meeting. In the case of a rulemaking, the proposed regulatory language would always be filed in the specific rulemaking docket, along with notice of when the docketed proposed regulatory language will be considered at a business meeting. This means that prior to when the CEC considers a rulemaking for a vote, the public has had at least 45 days of notice and opportunity to comment, as required by the APA.

Beyond the specific legal requirements, CEC staff is also doubling its efforts to make documents available in multiple locations on its electronic systems by ensuring that documents filed in dockets for specific rulemaking proceedings and informational proceedings are also available to the public through the backup materials posted on the CEC’s Business Meeting webpage. The Chief Counsel’s Office notes that proposed resolutions and proposed orders considered for adoption at the CEC business meetings are posted as backup material to the Business Meeting website prior to the meeting, to inform the public of the document that will be considered by the CEC commissioners. After the CEC adopts the resolutions and orders, they are posted to the Business Meeting docket and the specific rulemaking dockets to complete the rulemaking record pursuant to CCR, title 20, section 1208.

Mr. Uhler also requests that the CEC amend CCR, title 20, section 1104, subsection (e) to remove language on the meeting agenda that prohibited the public from speaking on some agenda items before or during the CEC commissioner discussion or consideration of the item. After careful consideration of Mr. Uhler’s concern, the Chair of the CEC, on the advice of the Chief Counsel’s Office, has adjusted CEC business meeting agendas to hold public comments on all information items (non-voting items) before the CEC hears and discusses these items rather than during a general public comment portion of the meeting. Furthermore, as required by the Bagley-Keene Open Meeting Act (Government Code section 11125.7(a)), the CEC will continue to provide the public opportunity to comment during discussion of voting items. While we appreciate Mr. Uhler’s comments on this topic, there is no legal requirement or need to amend CCR, title 20, section 1104, subsection (e) to adopt this change.

Based on the foregoing, the Chief Counsel’s Office recommends that the CEC deny Mr. Uhler’s petition requesting a rulemaking.