

Chairman Jackson's Comments on COMNJD-98-007 and 98-007A - Commission Decision Making Regarding the Effects of Legal Advice and Litigative Risk on High-Priority Policy Matters

In this intense period of staff development of recommendations and options on high priority policy matters relative to the tasking memorandum and of concern to stakeholders, I generally agree that the staff should present a full array of policy options, including those that involve litigative risks, to the Commission for informed decision making.

Currently, I am unaware of much evidence indicating that the staff has not presented the Commission with options involving litigative risk. In fact, I recall some technical staff papers where litigative risk of certain options was analyzed.

In order to address your concern, however, I recommend the following approach. The EDO, after coordinating with OGC, should ensure that the staff presents viable options, even those involving litigative risk, in papers it submits to the Commission. As for options that the staff considers, that OGC advises are not feasible (or are difficult to implement) because of litigative risk, the staff could at a minimum mention in papers it submits to the Commission that these options were considered, but not fully developed and presented, due to litigative risk. This approach would allow the staff to keep the Commission informed of the existence of other options considered, permit the staff and OGC to conserve resources by not addressing these other options in the paper in detail, and thus, allow the Commission to request further information or analysis from the staff and/or OGC separately, on these undeveloped options, on an as needed basis, if it so desires for the particular issue. OGC however, should always have the option of submitting a paper to the Commission, separate from the staff's paper, that analyzes the litigative risk in detail or explains why it advised the staff that certain other options were not feasible under current law, in appropriate circumstances.

Further, as staff (and OGC) resources and time are at a premium during this period of transition, unless there is an extraordinary circumstance, I am disinclined to require our already inundated staff to inform the Commission of its independent approaches it considered, prior to submission of a paper to the Commission, or outside of the briefings we have been holding on the response to the tasking memorandum and stakeholder concerns.