



# Public Utilities Commission's Public Participation Processes

2020  
EVALUATION REPORT

Program Evaluation Division  
**OFFICE OF THE LEGISLATIVE AUDITOR**  
STATE OF MINNESOTA

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## OFFICE OF THE LEGISLATIVE AUDITOR

STATE OF MINNESOTA • James Nobles, Legislative Auditor

July 2020

Members of the Legislative Audit Commission:

The Public Utilities Commission (PUC) regulates telecommunications and gas and electric utilities in Minnesota. It also permits energy facilities, such as power plants and pipelines.

PUC's public participation processes are complex, varied, and have been implemented inconsistently. Further, PUC has not done a good job helping the public understand how to participate in those processes. We make a number of recommendations for improvements.

PUC cooperated fully with our evaluation, and we thank the agency for its assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jim Nobles'.

James Nobles  
Legislative Auditor

A handwritten signature in black ink, appearing to read 'Judy Randall'.

Judy Randall  
Deputy Legislative Auditor



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# Summary

## Public Utilities Commission's Public Participation Processes

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### Key Facts and Findings:

- PUC regulates telecommunications, electric and natural gas utilities, and energy facility permitting. It makes most of its decisions using quasi-judicial procedures. (pp. 3-4, 10-12)
- A key role of public participation in PUC cases is to help develop the official record on which the commission must base its decisions. (pp. 12-13)
- PUC's public participation processes vary significantly from case to case and are administered by multiple state agencies, which makes those processes complex and challenging for the public to navigate. (pp. 14-15, 18-22)
- The law does not require notification of tribal governments about PUC cases that may affect them, even when it requires such notification for other governments. (p. 26)
- PUC has done a poor job educating the public about the roles of its partner agencies and the complex processes that these agencies administer. (p. 21)
- PUC has done a poor job educating the public about PUC's unique role and processes, and has not provided adequate resources to help the public participate. (pp. 31-38)
- PUC has established "attendee protocols" to maintain order in its meetings, but these protocols have varied and staff have enforced them inconsistently. (p. 48)
- PUC was not adequately prepared to administer meetings regarding a controversial pipeline. PUC did not provide its staff with adequate guidance, support, or oversight, which resulted in inconsistent practices and frustration among attendees and staff. (pp. 68-78)

### Key Recommendations:

- PUC should provide more and better resources to help the public understand PUC's unique role and the role of the public in PUC's proceedings. (pp. 32, 36-37, 43)
- PUC should provide better guidance to its staff and partner agencies to ensure consistency and fairness across public participation processes. (pp. 22, 39)
- The Legislature should require notification of affected tribal governments whenever notification of other affected governments is required. (p. 27)
- PUC leadership should provide more oversight of the agency's public participation processes and better prepare for cases with significant public interest. (p. 78)

**PUC  
proceedings are  
complex; the  
commission  
should do more  
to facilitate  
participation.**

## Report Summary

The Public Utilities Commission (PUC) regulates telecommunications and electric and natural gas utilities in Minnesota; it also permits energy facilities, including power plants, transmission lines, wind-energy systems, and pipelines. In this evaluation, we focused on public participation in PUC's energy facility cases.

PUC is composed of five commissioners who are appointed by the Governor and approved by the Senate. PUC makes most of its regulatory decisions using quasi-judicial procedures that resemble those of courts. PUC's work is largely driven by petitions from utilities and other entities, such as requests to build power plants, rather than its own policy initiatives.

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**State law requires PUC to provide the public with opportunities to participate in its cases, but these opportunities vary significantly across different types of cases.**

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PUC must base its regulatory decisions on: (1) criteria in law, such as the impact a proposed project may have on humans or the environment; and (2) the information in the official record for the case, which may include evidence about the need for the proposed project or its potential impacts. The key role of the public in PUC cases is to help develop the official record by providing evidence or testimony related to the criteria in law.

State law requires PUC to “adopt broad spectrum participation as a principal of operation” with respect to energy facilities in particular.<sup>1</sup> State law also identifies specific opportunities in which PUC must allow the public to provide input on a given case. For example, at various points in a case, the public may submit written comments, provide comments or ask questions at public meetings or hearings, propose alternatives to the project, or formally “intervene” as a party to a case. But, the complex set of laws that govern energy facility cases guarantee varying

participation opportunities across different types of cases. The complexity of these processes can be challenging for the public to navigate.

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**By law, other state agencies administer some public participation processes for PUC, which increases the complexity of those processes.**

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The Department of Commerce conducts the environmental reviews of proposed energy facilities for PUC. As such, it administers the public participation opportunities that accompany environmental reviews. Administrative law judges from the Office of Administrative Hearings hold public hearings in certain PUC cases to establish the facts in the case. These two agencies administer many of the public participation processes associated with PUC's cases, often alongside PUC staff.

The fact that PUC's public participation processes are administered by multiple state agencies makes those processes complex for participants. PUC has not provided the public with sufficient information to help it understand these complex processes or the roles that its partner agencies play. We recommend that PUC provide more information to the public.

Further, PUC has not provided adequate guidance to its staff or partner agencies about the administration or coordination of public participation processes. As such, the processes have involved unnecessary variation and have been confusing for some. We recommend that PUC more formally coordinate among its staff and agency partners.

PUC and the Department of Commerce have at times delegated some of the logistical duties associated with these participation processes—such as reserving and renting venues for public meetings or hearings—to the applicants whose proposed projects are under review. PUC should direct its staff and partner agencies not to delegate these responsibilities, as it provides applicants

State law requires PUC to provide opportunities for the public to provide input.

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<sup>1</sup> *Minnesota Statutes* 2019, 216E.08, subd. 2.



with too much actual or perceived control over the state's processes.

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**Until recently, PUC had not formally consulted with American Indian tribes, and state law does not always require notification of affected tribes.**

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In recent years, several tribes have intervened in PUC cases. PUC did not have a formal policy of consulting with tribes until 2019.

State law requires PUC, its partner agencies, and applicants to notify affected units of government (such as municipalities and counties) at various stages throughout a case; but, it does not always require them to notify affected tribal governments. The Legislature should require PUC, its partner agencies, and applicants to notify tribal governments whenever notification of other affected governments is required.

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**PUC has not provided adequate guidance to effectively facilitate public participation.**

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A number of institutions, including various state agencies and nonprofit organizations, advocate on behalf of the public in PUC utility cases. However, fewer institutions advocate for the public in energy facility cases. As a result, affected members of the public may need to advocate for themselves, such as by intervening as parties to a case.

However, PUC has not provided sufficient resources to help the public participate in its processes. For example, PUC's website provides no information about how members of the public may intervene in a case. Further, the website provides little information to help the public understand PUC's unique role as a quasi-judicial body, its complex processes, or the criteria that PUC must use to make its decisions. PUC should provide more and better information on its website to facilitate participation.

PUC has not done a good job helping the public understand both how PUC staff can support public participation and the limits of the support they can give. Moreover, PUC has not done a good job helping its staff

understand the scope of their responsibilities to aid public participation. Further, until early 2020, PUC had not provided staff with sufficient agency-wide guidance on issues such as how to handle public comments or complaints, which has resulted in inconsistent practices. PUC should provide the public and its staff with more guidance.

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**PUC's meetings are not easily accessible to the public.**

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PUC's five commissioners regularly meet in two types of meetings: (1) agenda meetings, where they make regulatory decisions; and (2) planning meetings, where they make internal operations decisions and discuss broader policy issues with stakeholders.

PUC has sent mixed messages to the public about whether or when they may address the commissioners during agenda meetings. PUC has also not done a good job educating the public about the purpose of its planning meetings. As a result, the opportunity to engage with commissioners directly on policy or other issues has likely been limited to those stakeholders who are most familiar with PUC, such as utilities. PUC should provide clearer guidance about the purpose of its meetings and the role of the public in them.

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**PUC and its partner agencies offered the public numerous opportunities to participate in the Line 3 case.**

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In 2015, Enbridge, a Canadian corporation, submitted an application to PUC to replace its Line 3 pipeline, which runs across northern Minnesota, with a larger pipeline along a partly new corridor, also in northern Minnesota.

From 2015 through 2017, Department of Commerce and PUC staff held dozens of public meetings as part of the review process for Line 3. In 2017, an administrative law judge held numerous public hearings to develop the record for the case. In these public meetings or hearings, members of the public could submit project alternatives, testimony, or documents about how the project could impact them, their communities, or the environment. In

**PUC has not provided adequate resources to support public participation.**

**PUC did not use consistent practices when interacting with the public during its Line 3 meetings.**

addition, numerous individuals or groups formally intervened as parties to the case.

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**PUC staff were not adequately prepared to administer some Line 3 meetings.**

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From mid-2018 through early 2020, PUC met in a series of agenda meetings to make final decisions about the Line 3 case.

Despite the large amount of public interest in the case, PUC chose not to hold most of the Line 3 agenda meetings in a larger venue. Instead, it used its normal meeting space for most of the meetings and used tickets to manage admission. PUC's ticket procedures caused a number of problems. Staff did not offer equal numbers of reserved tickets to each party in the case, made decisions about which party representatives could have access to the reserved tickets, and made inconsistent exceptions to its ticketing procedures. Staff barred several individuals—including

representatives of intervening parties—from the meetings for allegedly violating ticket procedures.

PUC also imposed special rules on attendees during the Line 3 meetings. These special rules varied from meeting to meeting, were not all posted publicly, and were enforced inconsistently. Staff were not adequately trained or prepared to enforce the rules, and were expected to perform tasks that fell outside of their normal job duties, such as searching bags. Finally, PUC did not have adequate processes in place to resolve complaints from the public during the meetings.

In future cases, PUC leadership should conduct more advanced planning. It should provide more oversight of staff and training for staff; establish clear, written procedures for staff; and establish, publicly post, and consistently enforce clear, written protocols for the public.

## Summary of Agency Response

*In a letter dated July 22, 2020, the five commissioners of the Public Utilities Commission stated that, "Over the past year, the Commission has been working diligently to make changes aimed at improving public engagement, some of which are identified in this report." Specifically, the commissioners explained that PUC has adopted a Tribal Engagement and Consultation Policy, is working to rebuild its website to provide more and better information for the public, is working with the Department of Commerce to improve the eDockets system, and has added new positions to support public outreach. Regarding the Line 3 pipeline proceedings, the commissioners noted that PUC provided numerous opportunities for public participation. They noted that PUC made improvements over the course of the Line 3 proceedings as lessons were learned. The commissioners also stated that PUC leadership "has committed to providing more oversight of public participation in general, and particularly for cases that have a significant level of public interest." They went on to say that, "Improved public engagement is a priority for the new leadership team, and this report provides some important recommendations to incorporate into our ongoing efforts."*

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The full evaluation report, *Public Utilities Commission's Public Participation Processes*, is available at 651-296-4708 or: [www.auditor.leg.state.mn.us/ped/2020/puc2020.htm](http://www.auditor.leg.state.mn.us/ped/2020/puc2020.htm)



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# Introduction

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Minnesota's Public Utilities Commission (PUC) regulates certain public utilities in the state, including telecommunications and electric and gas utilities. It also permits energy facilities, such as pipelines. Minnesota law provides a variety of opportunities for the public to participate in PUC's regulatory proceedings, depending on the type and nature of the case.

In 2018, PUC approved a request by Enbridge, a Canadian corporation, to replace and relocate the "Line 3" crude oil pipeline. This pipeline currently crosses the reservations of two sovereign American Indian tribes and 13 counties in northern Minnesota. The Line 3 case generated significant controversy and led to concerns about how PUC handles public participation.

In April 2019, the Legislative Audit Commission directed the Office of the Legislative Auditor to evaluate PUC's public participation processes. The Legislative Audit Commission selected this topic largely in response to concerns about how PUC handled public participation in the Line 3 case. Our primary research questions were:

- **What are PUC's processes and rules for public participation?**
- **To what extent do PUC's structure, processes, and rules facilitate public participation?**
- **To what extent does PUC enforce its rules for public participation appropriately and consistently?**

In this evaluation, we reviewed PUC's public participation processes in general. We also looked more closely at public participation in the Line 3 case. It is important to note, however, that we did *not* evaluate PUC's decision to approve the Line 3 pipeline, or evaluate PUC's regulatory decisions in any other cases.

In this evaluation, we defined "the public" broadly to include anyone who may be interested in PUC's regulatory work, as well as anyone directly affected by a proposed project, such as landowners, area residents, local municipalities, local businesses, and advocacy groups. We did not, however, review the participation opportunities afforded to regulated entities. Also, given the interest in the Line 3 case, we focused on public participation processes in PUC's energy facility cases more so than in its utility or telecommunications cases.

We used a variety of research methods to conduct this evaluation. Among other things, we reviewed the statutes and rules that govern PUC's work, PUC's policies and procedures, other PUC documents and data, PUC's website, and other resources that PUC makes available for the public. We also reviewed public participation opportunities in four energy facility cases that were pending before PUC during the

evaluation.<sup>1</sup> In addition, we attended numerous PUC proceedings, both in St. Paul and outstate.

We also solicited input from a wide range of stakeholders. We held a public meeting to gather input on the scope and focus of the evaluation, and we accepted written comments throughout the evaluation. We reached out to:

- Various energy, environmental, and community organizations.
- Anyone who was included on the official contact list for the four energy facility cases that we reviewed.
- Participants that we encountered at PUC proceedings.
- The 11 American Indian tribes located within Minnesota's borders.
- The state, regional, and federal agencies whose work may be affected by PUC's decisions.<sup>2</sup>
- All of PUC's current staff.
- All of the entities that submitted energy facility applications to PUC in the last two years, as well as the telecommunications companies and electric and/or gas utilities that PUC regulates.

Although we did not receive responses from all of those listed above, we received a large number of responses from stakeholders. We also accepted written input from anyone who reached out to us over the course of the evaluation and reviewed all of their comments.

Additionally, we interviewed key stakeholders, many on the condition of anonymity. We interviewed representatives from a number of stakeholder organizations, tribal officials, and other participants. We individually interviewed the five commissioners who compose the Public Utilities Commission, as well as some past commissioners and several of the commission's current and former staff. Finally, because the Department of Commerce and the Office of Administrative Hearings manage certain aspects of the commission's public participation processes, we interviewed officials from both of those agencies.

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<sup>1</sup> We reviewed the public participation opportunities of the following energy facility cases that took place at least in part during our research period: (1) "Huntley-Wilmarth," an application for a 40-mile, high-voltage transmission line near Mankato; (2) "Dodge County Wind," an application for a large wind-energy system and accompanying 23-mile, high-voltage transmission line in Dodge, Steele, and Olmstead counties; (3) "Line 3," an application to replace and relocate Enbridge's Line 3 petroleum pipeline; and (4) "Line 4," an application to replace and relocate a 10-mile segment of Enbridge's Line 4 petroleum pipeline.

<sup>2</sup> The government agencies we reached out to included: the Metropolitan Council; the Minnesota Board of Water and Soil Resources; the Minnesota Environmental Quality Board; the Minnesota Indian Affairs Council; the Minnesota Office of Pipeline Safety; the Minnesota Pollution Control Agency; the Minnesota State Archaeologist; the Minnesota State Historic Preservation Office; the Southwest Regional Development Commission; and the Minnesota departments of Agriculture, Commerce, Employment and Economic Development, Health, Labor and Industry, Natural Resources, and Transportation, as well as the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service.

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# Chapter 1: Background

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The Public Utilities Commission (PUC) regulates several industries that affect the lives of Minnesotans. In this chapter, we provide background information about PUC and the role of public participation in the agency’s work. We begin with an overview of PUC’s regulatory authority. Then, we describe its structure and processes. Finally, we discuss who can participate in PUC’s proceedings and how they can participate.<sup>1</sup>

## Regulatory Authority

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The state agency now known as the Public Utilities Commission is Minnesota’s oldest regulatory body. Over time, it has regulated numerous industries in Minnesota, including railroads. Today, it regulates (1) telecommunications, (2) electric and natural gas utilities, and (3) energy facility permitting.

PUC’s authority over telecommunications includes regulating the rates and/or services of certain types of local and long-distance landline telephone companies, as well as other telecommunications matters.<sup>2</sup> It does not regulate cell phone or internet providers. In 2019, PUC had regulatory authority over more than 200 telephone companies, according to PUC estimates.

PUC’s regulatory authority over electric and natural gas utilities includes setting utility standards and rates, approving utilities’ long-term plans, and ensuring service quality, among other things.<sup>3</sup> PUC’s authority over utilities is primarily limited to for-profit companies that are owned by investors.<sup>4</sup> PUC does not regulate most aspects of municipal utilities or electric cooperative associations, but it can mediate or investigate complaints about them and advise on their long-term plans. Municipal utilities and electric cooperative associations, however, may *elect* to be regulated by PUC.<sup>5</sup> In 2019, PUC regulated one



### The Public Utilities Commission Regulates:

1. Telecommunications
2. Electric and Gas Utilities
3. Energy Facility Permitting

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<sup>1</sup> We use the term “proceeding” generically throughout the report to refer to PUC’s meetings and broader processes.

<sup>2</sup> See *Minnesota Statutes* 2019, Chapter 237, for PUC’s regulatory authority over telecommunications.

<sup>3</sup> See *Minnesota Statutes* 2019, Chapter 216B, for PUC’s regulatory authority over electric and gas utilities.

<sup>4</sup> *Minnesota Statutes* 2019, 216B.01; and 216B.02, subd. 4.

<sup>5</sup> *Minnesota Statutes* 2019, 216B.025; and 216B.026, subd. 1.

cooperative electric association in addition to eight investor-owned electric and/or natural gas utilities.<sup>6</sup>

PUC also permits “energy facilities,” which encompass various types of energy infrastructure.<sup>7</sup> For example, from January 2016 through mid-2019, PUC received permit applications for 13 wind-energy projects, 5 pipeline projects, 4 transmission-line projects, 3 solar-energy projects, and 1 natural gas power plant project.<sup>8</sup> Various types of entities, including utilities, municipalities, pipeline or transmission companies, and wind- or solar-energy developers, submit energy facility applications to PUC.

In this evaluation, we focused our attention on public participation in PUC’s energy facility proceedings. Large energy facility projects typically require two types of PUC approval.<sup>9</sup> First, PUC must determine whether the state needs the proposed facility; if needed, PUC issues a “certificate of need.”<sup>10</sup> Then, PUC must approve a “site” or “route” permit, which determines where the applicant may construct the proposed facility.<sup>11</sup>



#### Energy Facility Projects Often Require:

- ✓ Certificate of Need
- ✓ Site or Route Permit

Before PUC can approve either a certificate of need or a site or route permit, it must consider the environmental impacts associated with granting that approval.<sup>12</sup> The Department of Commerce studies these potential impacts for PUC through environmental reviews.<sup>13</sup> In addition, before making decisions about certain types of energy facility permits, PUC must ask an administrative law judge from the Office of Administrative Hearings to establish the facts of the case through a public hearing.<sup>14</sup>

<sup>6</sup> In 2019, PUC regulated the following *electric* utilities: Dakota Electric Cooperative Association (an electric cooperative association), Minnesota Power (owned by Allete, Inc.), Northwestern Wisconsin Electric, Otter Tail Power Company, and Xcel Energy (owned by Northern States Power Company). In 2019, PUC regulated the following *natural gas* utilities: CenterPoint Energy, Great Plains Natural Gas Company (owned by Montana-Dakota Utilities Company), Greater Minnesota Gas, Minnesota Energy Resources (owned by WEC Energy Group), and Xcel Energy (owned by Northern States Power Company). In 2019, 124 municipal electric utilities, 33 municipal gas utilities, and 44 electric cooperative associations served energy customers in Minnesota.

<sup>7</sup> See *Minnesota Statutes* 2019, 216B.2421 and 216B.243; and chapters 216E, 216F, and 216G, for PUC’s authority to regulate energy facilities.

<sup>8</sup> Four of the wind-energy projects involved applications for accompanying transmission lines.

<sup>9</sup> *Minnesota Statutes* 2019, 216B.2421, subd. 2, defines “large” energy facilities.

<sup>10</sup> *Minnesota Statutes* 2019, 216B.243, subd. 2.

<sup>11</sup> *Minnesota Statutes* 2019, 216E.03, subds. 1-2; 216F.04 (a); and 216G.02, subd. 2.

<sup>12</sup> Minnesota Environmental Policy Act, *Minnesota Statutes* 2019, 116D.04, subd. 2a(a)-(b); and *Minnesota Rules*, 4410.4400, subps. 1, 3, 6, and 24, published electronically November 30, 2009.

<sup>13</sup> In this report, we use the term “environmental review” generically to refer to various types of reviews, including environmental impact statements.

<sup>14</sup> We discuss the roles of the Department of Commerce and the Office of Administrative Hearings further in Chapter 2.



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**The issues that the Public Utilities Commission regulates have the potential to affect Minnesotans deeply and in a wide range of ways.**

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PUC's regulatory decisions can affect the lives of individual Minnesotans in various ways. For example, the quality of service provided by regulated telephone companies could affect the ability of its customers to call emergency services. In utility rate cases, the prices proposed by state-sanctioned monopolies could affect all ratepayers. In energy facility cases, Minnesotans could lose property through eminent domain if the commission chooses to site or route a project through their properties.<sup>15</sup> In the energy facility cases that we reviewed, individuals notified PUC about various other ways in which the proposed energy facility projects could affect them. For example, they said proposed projects could lower their property values, affect their health or quality of life, disrupt their businesses, affect their sacred cultural practices (such as tribal members' ability to gather wild rice), or violate tribal sovereignty, among other things. Others said proposed projects could benefit them positively, such as through the creation of construction jobs, income from easements, increased electricity reliability, or added renewable energy into the region's energy grid.<sup>16</sup>



High-voltage transmission lines can be large.

Photo courtesy of the Department of Commerce.

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## Structure and Processes

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In this section, we outline PUC's structure and processes at a high level. First, we outline its organizational structure, functions, and meetings. Then, we describe the procedures that PUC uses to make its decisions.

### Organizational Structure

PUC's organizational structure is largely dictated by law, but the agency has some discretion over how its staff are organized.

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**The Public Utilities Commission is composed of five commissioners.**

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Statutes vest the power of the agency in five commissioners who are appointed by the Governor and approved by the Senate.<sup>17</sup> When appointing commissioners, the Governor must consider applicants from various fields, including law, accounting,

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<sup>15</sup> "Eminent domain" is the right to seize private property; it typically involves compensation for the property owner.

<sup>16</sup> An "easement" is a contract that gives an entity the right to use part of a property, usually in exchange for a fee.

<sup>17</sup> *Minnesota Statutes* 2019, 216A.03, subd. 1, defines PUC's composition.

agriculture, engineering, natural resources, and other sciences. Statutes stipulate that not more than three commissioners may be of the same political party and that at least one reside outside of the seven-county metropolitan area at the time of appointment. Commissioners serve staggered, six-year terms and may be reappointed.

Statutes give the Governor authority to select the commission's chair, whose term is concurrent with that of the Governor.<sup>18</sup> The chair functions as the "principal executive officer" of the agency and has statutory authority to preside over the commission's meetings and (upon commission approval) give direction to staff through the executive secretary, whose role we discuss below.<sup>19</sup>

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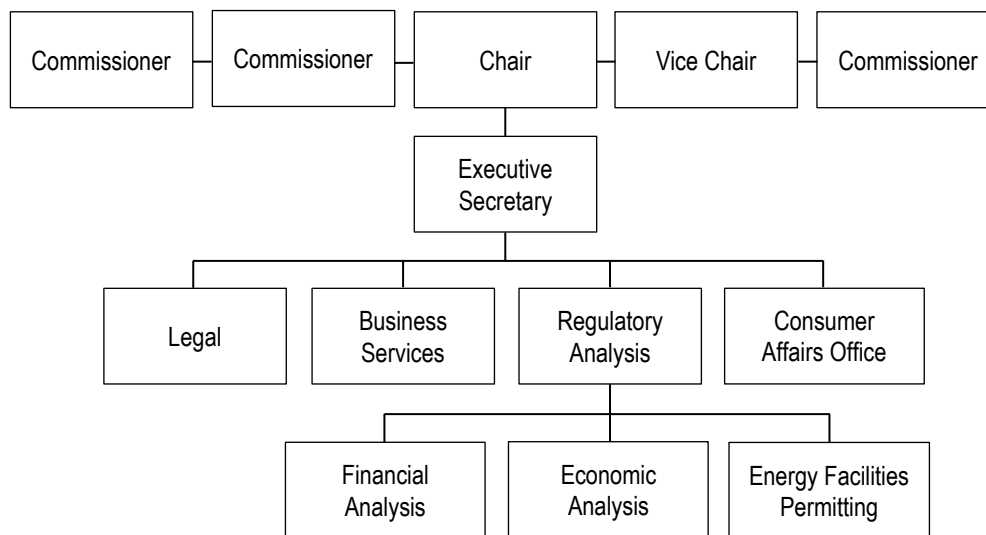
**The Public Utilities Commission has about 50 staff led by an executive secretary.**

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Statutes give administrative authority over the agency to an executive secretary who is responsible for hiring, directing, and supervising the agency's personnel; developing the agency's budget; and making recommendations to achieve the agency's objectives, among other things.<sup>20</sup> Exhibit 1.1 illustrates PUC's organizational structure in 2019.

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**Exhibit 1.1: Public Utilities Commission's Organizational Structure**



SOURCE: Office of the Legislative Auditor.

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<sup>18</sup> *Minnesota Statutes* 2019, 216A.03, subd. 3.

<sup>19</sup> *Minnesota Statutes* 2019, 216A.03, subd. 3a.

<sup>20</sup> *Minnesota Statutes* 2019, 216A.04, subd. 1a.

In 2019, more than half of PUC's staff (28) worked in the Regulatory Analysis unit. Regulatory analysts from that unit are responsible for analyzing and interpreting the issues that go before the commission to help the commissioners make decisions. The Regulatory Analysis unit contains three subunits: (1) Financial Analysis, which handles utility rate cases, among other things; (2) Economic Analysis, which handles telecommunications, utility long-term planning and service quality, and other emerging energy issues; and (3) Energy Facilities Permitting, which handles energy facility applications. The Energy Facilities Permitting unit also contains a "public advisor," whose position is established in law.<sup>21</sup> The role of the public advisor is to assist members of the public in participating in energy facility proceedings.

The agency has three other units: (1) Legal, (2) Business Services, and (3) Consumer Affairs. The Legal unit provides legal analysis of cases and drafts the commission's orders. The Business Services unit handles the agency's finances and provides general administrative support. Finally, the Consumer Affairs Office mediates complaints about utilities from utility customers, among other things.

## Functions

The Public Utilities Commission has an unusual combination of functions.

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### **The Public Utilities Commission has quasi-judicial, legislative, and executive functions.**

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First, statutes explicitly grant the commission quasi-judicial functions.<sup>22</sup> Its quasi-judicial functions typically involve making decisions with *particular applicability*, such as approving the construction of a particular energy facility using criteria outlined in law.<sup>23</sup> The commission also adjudicates allegations of misconduct by particular regulated entities, such as a utility accused of overcharging its customers or a wind developer accused of violating the conditions of its site permit.

Second, statutes explicitly grant the commission legislative functions.<sup>24</sup> For example, the commission acts in its legislative capacity when it promulgates rules or balances competing criteria when setting utility rates. The commission's legislative functions may have *general applicability*.<sup>25</sup> For example, in 2004, the commission issued an order establishing fees and standards related to how small electricity generators (such as homeowners with solar panels) may connect to the electrical grid.<sup>26</sup> The order did not relate to one particular entity, but rather to small electricity generators generally.

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<sup>21</sup> *Minnesota Statutes* 2019, 216B.243, subd. 4; 216E.08, subd. 3; and 216F.02 (a); and *Minnesota Rules*, 7850.2200, published electronically September 18, 2009; 7852.1200, published electronically August 21, 2007; and 7854.0700, published electronically September 18, 2009.

<sup>22</sup> *Minnesota Statutes* 2019, 216A.05, subd. 1.

<sup>23</sup> *Minnesota Statutes* 2019, 216A.02, subd. 4.

<sup>24</sup> *Minnesota Statutes* 2019, 216A.05, subd. 1.

<sup>25</sup> *Minnesota Statutes* 2019, 216A.02, subd. 2.

<sup>26</sup> Minnesota Public Utilities Commission, "In the Matter Establishing Generic Standards for Utility Tariffs for Interconnection and Operation of Distributed Generation Facilities under *Minnesota Laws* 2001, Chapter 212: Order Establishing Standards," Docket No. CI-01-1023, September 28, 2004.

Alternatively, the commission's legislative functions may have particular applicability, such as when the commission balances competing factors when establishing rates for a particular utility.

Finally, although not explicitly stated, statutes give the commission functions that are inherently executive in nature.<sup>27</sup> For example, the commission administers discount telephone programs and enforces Minnesota's "Cold Weather Rule."<sup>28</sup>

The relationships between PUC's three functions are complex. For example, when PUC approves the rates set by a utility, it exercises both its quasi-judicial and its legislative functions. PUC's complicated functions and responsibilities were created over time through a patchwork of legislation and case law. Such complexity poses real challenges for members of the public as they try to participate in PUC's processes.

## Meetings

The Public Utilities Commission is subject to Minnesota's Open Meeting Law, which requires public bodies to conduct their business in meetings that are open to the public.<sup>29</sup>

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### The commissioners of the Public Utilities Commission hold two different types of meetings.

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PUC's five commissioners meet regularly in "agenda meetings" and "planning meetings."<sup>30</sup> In agenda meetings, the commission makes decisions about specific cases, which are organized into "dockets." A docket is essentially any pending matter before the commission, such as a request by a utility to raise its rates. Energy facility cases often involve more than one docket. For example, a transmission line case might involve one docket related to the certificate of need application and another docket related to the route permit application.



#### Docket

A "docket" is a matter pending before the commission that is assigned a unique number.

The commission often makes decisions about specific cases over the course of multiple agenda meetings. For example, in one meeting, it might determine whether the application materials for a transmission line contain the required information. In a subsequent meeting, it might approve the certificate of need for that transmission line. And, in yet another meeting, it might approve the route permit.

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<sup>27</sup> *Minnesota Statutes* 2019, 216A.02, subd. 3.

<sup>28</sup> Minnesota's Cold Weather Rule requires utilities to provide notice before disconnecting heat to low-income households between October 15 and April 15 when those households fail to pay their bills. The rule also prohibits utilities from shutting off power if those households set up and adhere to a payment plan. *Minnesota Statutes* 2019, 216B.096-216B.097.

<sup>29</sup> Open Meeting Law, *Minnesota Statutes* 2019, 13D.01, subd. 1(a)(3).

<sup>30</sup> PUC's staff and partner agencies also administer other types of public meetings and hearings to inform the public about pending projects and to solicit public input. We discuss those opportunities in more detail at the end of this chapter and in Chapter 2.



The five commissioners of the Public Utilities Commission in 2019 during a PUC meeting.

In planning meetings, the commissioners make decisions about administrative issues, such as scheduling and personnel matters, and discuss broader policy issues that are not pending as dockets before the commission. (We discuss the commission's agenda and planning meetings further in Chapter 4.)

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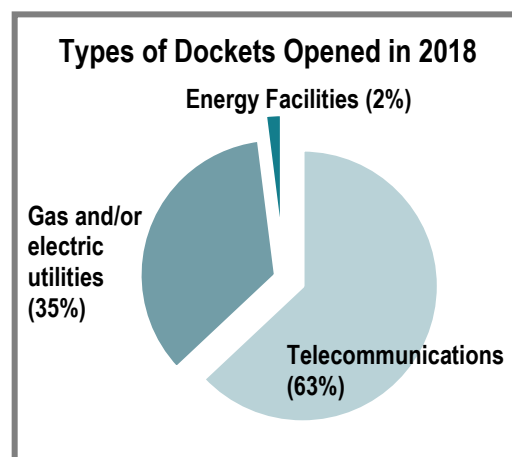
### **The Public Utilities Commission handles a large volume of work each year.**

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In calendar year 2019, the commission held 49 agenda meetings, during which it issued 313 orders. That year, it also held 50 planning meetings.

The commission's workload can vary widely according to the complexity and scope of the issues that it handles. Some dockets may be closed relatively quickly, while others may remain open for long periods of time, such as if a regulated entity has ongoing compliance requirements.

As the box at right shows, of the nearly 800 dockets that the commission opened in calendar year 2018, the majority (63 percent) related to telecommunications; only 35 percent related to gas and/or electric utilities and only 2 percent related to energy facilities. However, according to PUC, telecommunications dockets are often routine and resolved quickly, while utility and energy facility dockets typically take up the majority of the commission's time.



## Procedures

In this section, we describe the formal procedures that the commission uses in its agenda meetings.

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### The Public Utilities Commission makes most of its decisions through quasi-judicial procedures.

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When making both legislative and quasi-judicial decisions in its agenda meetings, the commission typically uses formal procedures that more closely resemble those found in courts than in legislative committees or city council meetings. For example, legislators or city council members may make decisions based on the sentiments of their constituents. The commission, however, like a court, must base its decisions on legal criteria and the information in the official record for a given case.<sup>31</sup> According to state rules, “Commissioners shall not be swayed by partisan interests, public clamor, or fear of criticism.”<sup>32</sup> However, at specific stages in a case, members of the public may submit information into the official record. When they do so, the commission may use that information to inform its decision, consistent with state law.



#### The Record

The commission must base its decisions on criteria outlined in law and the information in the official record for the case.

Also similar to courts, the commission's proceedings involve “parties.” A party is a person or entity who files a petition with the commission or who is the subject of a petition.<sup>33</sup> For example, if a company submitted an application to construct a transmission line, it would be a party to that case. Or, if a person filed a formal complaint against a utility, both the complainant and the utility would be parties to the case. As we discuss at the end of the chapter, members of the public who are not parties to a case may still be able to participate in that case at certain stages and in certain ways.

Individuals or entities who are not, by definition, already parties to a case may petition to become parties through a process called “intervention.”<sup>34</sup> In a transmission line case, for example, landowners might petition to intervene if a route were proposed to pass through their properties. To successfully intervene, petitioners must meet specific legal

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<sup>31</sup> For example, see *Minnesota Rules*, 7849.0100, 7849.0110, and 7849.0120, published electronically October 13, 2009.

<sup>32</sup> *Minnesota Rules*, 7845.0500, subp. 1, published electronically January 5, 2010.

<sup>33</sup> *Minnesota Rules*, 7829.0100, subp. 14, published electronically June 14, 2016. A “petition” is a request for the commission’s permission, authorization, or approval, or other type of action.

<sup>34</sup> For example, see Minnesota Environmental Rights Act, *Minnesota Statutes* 2019, 116B.09; and *Minnesota Rules*, 7829.0800, published electronically June 14, 2016; 1400.6200, published electronically August 6, 2013; and 1405.0900, published electronically August 21, 2007. Under certain circumstances, the commission rules on petitions to intervene; in other circumstances, administrative law judges rule on them, as we discuss in Chapter 2.



criteria, listed in the box at right.<sup>35</sup> Party status provides intervenors with additional opportunities to make their case to the commission.<sup>36</sup> For example, typically only parties may file motions or address the commission directly during agenda meetings.<sup>37</sup>

Also like a court, the commission is subject to rules about *ex parte* communication.<sup>38</sup> *Ex parte* communication is any oral or written communication: (1) between certain PUC officials and certain interested parties or participants, (2) that takes place without notice to all parties, and (3) that pertains to the merits or outcome of a pending case. *Ex parte* communication between a commissioner and a party or participant is prohibited in certain types of pending cases.<sup>39</sup> For example, in an open transmission line case, a commissioner may not have a private discussion with the applicant about issues in that case.



#### Grounds for Intervention

- The person's interests are not adequately represented by another party
- The outcome of the proceeding will affect a person's specific interests, as opposed to the interests of the general public
- Certain other reasons allowed by law

— **Minnesota Rules, 7829.0800**



#### Prohibited *Ex Parte* Communication

*Ex parte* communication is prohibited when it occurs in certain types of pending cases between a commissioner and a party or other participant and pertains to the merits or outcome of the case.

— **Minnesota Rules, 7845.7200**

The commission's proceedings are often dictated by rules of procedure that resemble those found in courts, such as the ability of parties to make motions.<sup>40</sup> Many of the commission's procedures are dictated by statutes or rules that vary based on the type of case at hand. For example, rules require the commission to give parties an opportunity to make oral arguments only in certain types of cases or situations. In general, however, the PUC chair has discretion over whether and when parties may address the commission. When considering an issue in an agenda meeting, the chair typically allows commissioners to ask questions of parties as needed.

When commissioners have finished hearing parties' oral arguments and asking them questions, they enter into deliberations. During deliberations, the commissioners discuss their options publicly with one another. The commission then makes a decision through majority votes of a quorum of its members.<sup>41</sup>

<sup>35</sup> For example, see *Minnesota Rules*, 7829.0800, subp. 2, published electronically June 14, 2016; 1400.6200, subp. 1, published electronically August 6, 2013; and 1405.0900, subp. 1, published electronically August 21, 2007.

<sup>36</sup> For example, see *Minnesota Rules*, 7829.0410, subp. 1; and 7829.2700, published electronically June 14, 2016.

<sup>37</sup> A "motion" is a formal request to the commission, such as a request by an intervening party that an energy facility applicant provide certain information about the proposed project.

<sup>38</sup> *Minnesota Statutes* 2019, 216A.037; and *Minnesota Rules*, 7845.7000-7845.7900, published electronically January 5, 2010.

<sup>39</sup> *Ex parte* communication is prohibited in rulemaking proceedings, contested case proceedings, and disputed formal petitions. *Minnesota Rules*, 7845.7200, subp. 1, published electronically January 5, 2010.

<sup>40</sup> For example, see *Minnesota Rules*, Chapter 7829.

<sup>41</sup> *Minnesota Statutes* 2019, 216A.03, subd. 5.

Also like a court, the commission's decisions are translated into orders, which have the effect of law.<sup>42</sup> Parties or other participants may petition the commission to reconsider its orders.<sup>43</sup> They may also appeal the commission's orders to the Minnesota Court of Appeals.<sup>44</sup>

Finally, like a court, the commission's schedule is driven in large part by petitions from the regulated entities, not by the commission's own policy initiatives. Of the roughly 800 dockets that the commission opened in 2018, fewer than 2 percent represented commission initiatives, such as investigations into utilities' practices.

## Public Participation

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In this final section, we discuss what "public participation" means in the context of PUC's cases, particularly its energy facility cases.

### Role of Public Participation

Across Minnesota state government, public participation plays a variety of roles; in PUC's work, it plays a specific role.

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**The key role of public participation in the Public Utilities Commission's cases is to help develop the official record upon which the commission must base its decisions.**

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As we discussed earlier, the commission must base its decisions on criteria outlined in law and on the information in the official record for a given case.<sup>45</sup> In the box on the next page, we list some of the many criteria that the commission must consider in energy facility cases.

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<sup>42</sup> *Minnesota Statutes* 2019, 216A.02, subds. 2 and 4; and 216A.05, subd. 1.

<sup>43</sup> *Minnesota Rules*, 7829.3000, published electronically June 14, 2016.

<sup>44</sup> *Minnesota Statutes* 2019, 14.63, 216.25, and 216B.52.

<sup>45</sup> For some of the legal criteria related to certificates of need, see *Minnesota Statutes* 2019, 216B.243 and 216C.05-216C.30; *Minnesota Rules*, 7849.0100-7849.0120, published electronically October 13, 2009; and *Minnesota Rules*, 7853.0100-7853.0130, published electronically November 14, 2003. For some of the criteria related to power plant siting and transmission line routing, see *Minnesota Statutes* 2019, 216E.03, subd. 7; and *Minnesota Rules*, 7850.4000-7850.4200, published electronically September 18, 2009. For some of the criteria related to pipeline routing, see *Minnesota Statutes* 2019, 216G.02, subd. 3(b)(4); and *Minnesota Rules* 7852.0200, subps. 3-4; 7852.0700; 7852.0800; and 7852.1900, published electronically August 21, 2007. For some of the criteria related to wind-energy siting, see *Minnesota Statutes* 2019, 216F.05, (1) and (5); and *Minnesota Rules*, 7854.1000, published electronically September 18, 2009. The criteria for power plant projects also apply to large wind projects, per *Minnesota Statutes* 2019, 216E.03, subd. 7; and 216F.02(a). For criteria related to the state's greenhouse gas emissions-reduction goal, see *Minnesota Statutes* 2019, Chapter 216H.03. For criteria related to the state's energy conservation and renewable energy goals, see *Minnesota Statutes* 2019, 216C.05, subd. 2.

The key role of the public in PUC cases is to provide information related to the criteria that the commission must use in a given case. For example, when considering where to route a transmission line, the commission must consider what effects the proposed routes could have on “human settlement, including, but not limited to, displacement, noise, aesthetics, cultural values, recreation, and public services” (among other things).<sup>46</sup> Individuals who live along a proposed route could provide information to the commission about how selecting that route would affect them. The commission uses the information that the public has provided (along with other information in the record) to choose among the proposed routes.



#### Examples of Decision Criteria in Energy Facility Cases

- Socioeconomic effects on humans, including health, displacement, noise, aesthetics, cultural values, recreation, and public services
- Effects on archaeological and historic resources
- Economic effects, including loss of agricultural land, forestry, tourism, and mining
- Effects on the natural environment
- Energy reliability and demand forecasts
- The state's renewable energy and greenhouse gas emissions-reduction goals
- Efforts to reduce energy consumption
- Use of existing corridors and rights-of-way



At the end of the day, when we're deciding whether to...site a power plant at one place or another...what really comes to the fore are the views of the people in the vicinity of that plant...that's really what drives our decision—environmental impact—but also impact on people.

— A PUC Commissioner

Current and former commissioners that we spoke with described public participation as vital to developing a full case record. For example, one said, “The role of the public is central and foundational.” Another said, “It is critically important for the commission to have robust public involvement.” Commissioners told us that participants in PUC proceedings help them determine how to balance the many criteria in law.

State law also recognizes the importance of public participation in energy facility cases and guarantees specific opportunities in which the public may help develop the record. State law also directs PUC to facilitate participation in energy facility cases, stating: “The commission shall adopt broad spectrum citizen

participation as a principal of operation. The form of public participation shall not be limited to public hearings and advisory task forces....”<sup>47</sup>

## Who Is the “Public”?

In this evaluation, we reviewed the opportunities available to members of the general public to participate in PUC’s proceedings—with an emphasis on energy facility proceedings. We also considered the opportunities available to the public to engage with the commission on broader regulatory issues.

We defined “the public” to include those who may be directly affected by a proposed project, such as landowners, area residents, local municipalities, local businesses, and

<sup>46</sup> *Minnesota Rules*, 7850.4100 A, published electronically September 18, 2009.

<sup>47</sup> *Minnesota Statutes* 2019, 216E.08, subd. 2.

advocacy groups (such as community, labor, energy, or environmental groups), as well as those who may not be directly affected by a proposed project. Anyone may participate in PUC's proceedings, whether or not they may be directly affected by a given case.

## What Is "Participation"?

Public participation can take a variety of forms. In PUC's energy facility cases, some public participation opportunities are defined in law.

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**State law provides opportunities for the public to participate in certain energy facility proceedings, but these opportunities vary across different types of cases.**

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### How to Participate in an Energy Facility Case

- During a public comment period, submit written comments or other information into the record about potential impacts of the proposed project
- During a public meeting, ask questions of state officials or the applicant, or submit oral or written comments into the record
- During a public hearing before an administrative law judge, submit evidence or testimony into the official case record; cross-examine the applicant's testimony or evidence
- Submit proposed alternatives to the project into the record
- Participate in a citizen advisory task force to help identify potential impacts of the project, alternatives, and mitigation measures
- Formally intervene as a party to the case to participate more actively
- Observe an agenda meeting

Energy facility permitting is governed by a complex set of state laws that are intertwined in a complicated way. (Appendix A at the back of this report outlines these laws.) The law guarantees varying participation opportunities across different types of energy facility cases.

For example, the law explicitly requires PUC to order formal, "contested case" hearings for cases involving certain types of large energy facility projects, such as large power plants.<sup>48</sup> For other types of energy facility projects, however, the law allows PUC to order less formal public hearings, or none at all.

Further, energy facility cases are subject to varying procedures, which also affects participation. For example, public hearings related to pipeline *route permit* cases must follow one set of rules, while public hearings related to pipeline *certificate of need* cases must follow another. Under the former set of rules, members of the public must be allowed to cross-examine the applicant during the hearing; under the latter set of rules, the public is not guaranteed this right.<sup>49</sup>

The box above lists various participation opportunities outlined in law across different types of energy facility cases.

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<sup>48</sup> "Contested case" hearings are a specific type of proceeding in which an administrative law judge develops the record for a case. As defined in *Minnesota Statutes* 2019, 14.02, subd. 3, "'contested case' means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."

<sup>49</sup> *Minnesota Rules*, 1400.7150, published electronically August 6, 2013; 1405.0800 and 7852.1700, published electronically August 21, 2007; and 7853.0200, subp. 5, published electronically November 14, 2003.

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# Chapter 2: Partner Agencies and Other Participants

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The Public Utilities Commission’s (PUC’s) proceedings are incredibly complex—in no small part because many entities are involved in them. In this chapter, we discuss the roles of some of those entities and how they relate to public participation.

We begin the chapter by discussing the roles of two state agencies that administer key components of PUC’s public participation processes. Then, we discuss some of the entities charged with advocating for the public in PUC proceedings. Finally, we discuss the participation of tribal governments in PUC’s proceedings.

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## Partner Agencies

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Although PUC is the final decision-making authority for matters under its jurisdiction, other state agencies are heavily involved in PUC’s proceedings.

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**The Public Utilities Commission’s public participation processes are administered by multiple state agencies, which makes those processes complex and challenging for the public to navigate.**

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The Department of Commerce and the Office of Administrative Hearings administer many of PUC’s public participation processes, often in partnership with PUC staff. Over the life of a single energy facility case, an interested member of the public may encounter public participation opportunities administered by each of these three agencies, each with its own rules and procedures.<sup>1</sup> It can be difficult for members of the public to figure out whose rules and procedures apply or which agency is in charge of a given event.

In the sections below, we describe the roles of the Department of Commerce and the Office of Administrative Hearings in PUC energy facility proceedings. Then, we discuss some of the challenges that result from having multiple state agencies administer these public participation processes.

## Department of Commerce

The Minnesota Environmental Policy Act requires all state agencies to consider any potential significant environmental impacts of large projects before approving those projects.<sup>2</sup> State agencies evaluate these impacts by conducting “environmental reviews.”<sup>3</sup>

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<sup>1</sup> As we discussed in Chapter 1, “energy facilities” encompass various types of infrastructure, such as power plants, transmission lines, wind-energy systems, and pipelines. To construct a large energy facility, applicants typically must obtain from PUC (1) a certificate of need and (2) a route or site permit.

<sup>2</sup> Minnesota Environmental Policy Act, *Minnesota Statutes* 2019, 116D.04, subd. 2a(a).

<sup>3</sup> In this chapter, we use the term “environmental review” generically to refer to various types of reviews, including environmental impact statements.

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**The Department of Commerce conducts environmental reviews of energy facilities for the Public Utilities Commission and administers the associated public participation processes.**

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**In General, Environmental Reviews Analyze:**

- ✓ Environmental impacts
- ✓ Economic impacts
- ✓ Employment impacts
- ✓ Sociological impacts
- ✓ Methods for mitigating impacts
- ✓ Alternatives

The Department of Commerce's Energy Environmental Review and Analysis (EERA) unit conducts the environmental reviews of proposed energy facility projects for PUC.

PUC, however, is the "responsible government unit" in charge of the reviews, and determines whether the reviews conducted by EERA are adequate. For certain kinds of energy facility cases, the two agencies' roles are set in law.<sup>4</sup>

The Minnesota Environmental Policy Act requires state agencies to provide public participation opportunities during the environmental review process. EERA administers these public participation opportunities for PUC, often in coordination with PUC staff.

Although requirements under the Minnesota Environmental Policy Act prescribe standard public participation procedures during environmental reviews, state law provides for alternative environmental review processes for several types of energy facilities. As a result, the public participation opportunities that EERA administers for PUC vary across different types of energy facility projects. This variation creates complexity and can cause confusion for participants.

Generally speaking, the public may participate in environmental reviews by asking questions of applicants or state officials or by providing comments during public comment periods or at "public meetings."<sup>5</sup> The public may alert EERA to potential environmental, economic, employment, or sociological impacts of proposed projects. Members of the public may also suggest alternatives to proposed projects, as described in the box at right.



**Alternatives**

**System Alternatives:** In relation to a certificate of need application, members of the public may propose alternatives to the project itself. For example, they could suggest conservation strategies to eliminate the need for a new high-capacity transmission line.

**Site or Route Alternatives:** In relation to a site or route permit application, members of the public may propose alternative sites or routes that differ from those that the applicant has proposed. For example, a farmer could suggest a route for a transmission line that would not interfere with the farmer's field practices.

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<sup>4</sup> The Minnesota Environmental Policy Act establishes PUC as the responsible government unit in charge of environmental reviews for energy facilities; see *Minnesota Statutes* 2019, 116D.04, 2a(b) and (j); and *Minnesota Rules*, 4410.2800, subp. 1; and 4410.4400, subps. 1, 3, 6, and 24, published electronically November 30, 2009. The Power Plant Siting Act charges the Department of Commerce with conducting for PUC the environmental reviews of power plants and transmission lines; see *Minnesota Statutes* 2019, 216E.03, subd. 5; and 216E.04, subd. 5. Under an interagency agreement, the Department of Commerce also conducts the environmental reviews of wind-energy systems and pipelines for PUC. See Public Utilities Commission and Department of Commerce, "Memorandum of Understanding Between the Minnesota Public Utilities Commission and the Minnesota Department of Commerce," January 10, 2017.

<sup>5</sup> Throughout this chapter, we use the term "public meeting" generically to refer to various types of meetings that PUC or the Department of Commerce hold to provide information to the public or to receive information from the public as part of the review process for energy facility applications.



Because of EERA's role in the environmental review process, its staff are among the most public faces of state government in PUC's energy facility proceedings. During public meetings, EERA staff give presentations to the public, often alongside PUC staff, about the review process, answer questions from members of the public, and help members of the public submit alternatives. In addition, if PUC orders the formation of a "citizen advisory task force" to supplement the environmental review process, EERA officials organize and facilitate those task forces.<sup>6</sup>

## Office of Administrative Hearings

The Office of Administrative Hearings also administers some of the public participation processes involved in PUC's proceedings.

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### **Administrative law judges hold hearings to establish the official record used by the Public Utilities Commission to make its decisions.**

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PUC refers certain types of cases to administrative law judges within the Office of Administrative Hearings. Administrative law judges develop the official record for those cases by holding hearings.

The procedures that administrative law judges use to administer hearings vary across different types of PUC cases.<sup>7</sup> Under the law, PUC must refer certain large energy facility cases for a specific type of hearing, called a "contested case" hearing.<sup>8</sup> In contested case hearings, administrative law judges must use procedures prescribed in state law. However, procedures vary somewhat according to the type of energy facility project under review. Sometimes, PUC also refers other types of cases to the Office of Administrative Hearings, such as smaller energy facility projects that do not require contested case hearings. In those cases, administrative law judges may use other, less formal procedures.



State law requires the Office of Administrative Hearings to establish rules that "attempt to maximize citizen participation."

— **Minnesota Statutes, 216E.16**

Generally, in large energy facility cases, contested case hearings involve several stages. First, the judge assigned to the case makes decisions about how the hearings will be conducted. The judge may, for example, hold prehearing conferences and issue orders that set deadlines; grant or deny petitions to intervene; or

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<sup>6</sup> For more on "citizen advisory task forces," see *Minnesota Statutes* 2019, 216E.08, subd. 1; 216F.02, (a); and *Minnesota Rules*, 7850.2400, published electronically September 18, 2009; and 7852.1000, published electronically August 21, 2007.

<sup>7</sup> Administrative law judges administer public hearings using the procedures outlined in *Minnesota Rules*, chapters 1400, 1405, 7829, 7849, 7850, 7852, 7853, and 7854.

<sup>8</sup> "Contested case" hearings are a specific type of proceeding in which an administrative law judge develops the record for a case. As defined in *Minnesota Statutes* 2019, 14.02, subd. 3, "'contested case' means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." *Minnesota Statutes* 2019, 216E.03, subd. 6; 216F.05, (3); and 216B.243, subd. 4; and *Minnesota Rules*, 7829.1000, published electronically August 21, 2007; 7829.2500, subp. 9, published electronically June 14, 2016; 7852.1700, published electronically August 21, 2007; 7853.0200, subp. 5, published electronically November 14, 2003; and 7854.0900, subp. 5, published electronically September 18, 2009.

establish the format, locations, and dates of the hearings.<sup>9</sup> Next, parties to the case prefile testimony and documents into the record.

Then, in *public* hearings, any person may provide oral or written testimony, exhibits, or evidence. Persons who may be directly affected by the project, or any other member of the general public, may submit information about the need for the project or lack thereof, the project's potential positive or negative impacts, or why the commission should select one site or route over another. In certain types of energy facility cases, rules also grant members of the public the right to testify under oath and to question testifiers and cross-examine witnesses, to be a witness, and to provide witnesses.<sup>10</sup>

Finally, in *evidentiary* hearings, parties to the case cross-examine each other's witnesses. Members of the general public may attend evidentiary hearings.<sup>11</sup>

At the conclusion of a contested case hearing, the judge assigned to the case reviews the information in the record and writes a report for PUC with findings of fact, conclusions, and recommendations.<sup>12</sup> PUC must then make the final decisions in the case based on criteria in law and the official record developed by the judge.<sup>13</sup>

## Interagency Administration

For members of the general public, trying to navigate the various processes administered by PUC and its partner agencies can be daunting and confusing. The box below lists the various types of meetings and hearings that PUC or its partner agencies may hold over the course of a single case.

Types of Meetings and Hearings	
Type	Description
Public Meeting	A type of public meeting conducted by EERA or PUC staff or administrative law judges to provide information to the public or solicit input, often for the environmental review; various types of public meetings go by various names, such as "public information meetings"
Contested Case Hearing	A type of hearing in which an administrative law judge develops the record for a case using procedures prescribed in law, and which may involve both a "public hearing" in which members of the public may provide input into the record and an "evidentiary hearing" in which parties submit testimony and documents into the record and cross-examine each other's witnesses
Informal Public Hearing	A type of hearing typically held by an administrative law judge to solicit input from the public that may use less formal procedures than those established for contested cases
Agenda Meeting	A type of public meeting in which PUC commissioners make decisions about specific cases
Planning Meeting	A type of public meeting in which PUC commissioners make administrative and policy decisions and hear from stakeholders; rarely, the commission also hears issues pertaining to specific dockets

<sup>9</sup> As we discussed in Chapter 1, "intervention" is the process by which a person or entity petitions to become a party to a case.

<sup>10</sup> *Minnesota Rules*, 1400.7150, published electronically August 6, 2013; and 1405.0800 and 1405.1700, published electronically August 21, 2007.

<sup>11</sup> *Minnesota Rules*, 1400.7800, published electronically August 6, 2013.

<sup>12</sup> *Minnesota Rules*, 1400.5500 and 1400.8100, published electronically August 6, 2013; and 1405.0400, subp. 3; and 1405.2400, published electronically August 21, 2007.

<sup>13</sup> *Minnesota Rules*, 1400.8200, published electronically August 6, 2013; and 1405.2500, published electronically August 21, 2007.

The three agencies may combine or jointly administer these meetings or hearings, or administer them on behalf of one another. For example, under the law, PUC and EERA are both required to hold public meetings as part of certain energy facility review processes; to avoid duplication, the agencies often combine the meetings. In addition to public *hearings*, PUC sometimes asks the Office of Administrative Hearings to appoint an administrative law judge to administer a public *meeting* on its behalf.

In some cases, the law requires PUC to combine the processes associated with the individual components of a single case—unless it would be more efficient not to. For example, in an energy facility case involving two applications—one for a certificate of need and another for a route permit—PUC may combine the environmental reviews required for each, or the public hearings required for each. While combining these component processes may create efficiencies that benefit the public, it may also add confusion to an already complex process. For example, the individual components of a combined process may be subject to different timelines and procedures.

It also can be challenging for the public to understand the differences between the roles of PUC and its partner agencies within these complex processes. For example, when a case is before an administrative law judge, the judge has authority to make certain decisions, such as whether or not to grant a petition to intervene.<sup>14</sup> But, when a case is before the commission, the commission has that authority. The three agencies also may each follow different procedures established in law or by their agencies.

Further complicating matters, a second unit within the Department of Commerce plays an important role in PUC energy facility cases that is completely different from EERA's role. The department's Energy Regulation and Planning unit analyzes whether PUC should grant certificates of need; the unit intervenes in certificate of need cases to advocate on behalf of ratepayers and the public at large.<sup>15</sup> This means that, in a single energy facility case, the Department of Commerce's Energy Regulation and Planning unit could be advocating against a project, while its EERA unit is defending the adequacy of the environmental review that it produced for that project. This can be confusing for participants.

When members of the public do not understand what rules apply or who is in charge of a given process, they may struggle to figure out who can resolve their problems or answer their questions. One agency's staff may technically be in charge of only one component of a joint meeting or hearing, yet its staff may be present and interacting with the public in official capacities. Or, while one agency's staff may appear to the public to be administering a process, another agency may technically be responsible for that process under the law. Such complex processes can even be challenging for state officials to understand, which can make it difficult for them to accurately guide the public through them.



...there is no clear indication of who to contact when problems arise.

— A Member of the Public

<sup>14</sup> *Minnesota Rules*, 7829.0800, subps. 5-6, published electronically June 14, 2016.

<sup>15</sup> *Minnesota Statutes* 2019, 216A.01, 216A.07, and chapters 216B and 216C.

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**The Public Utilities Commission has not provided adequate guidance to its staff or partner agencies about the administration or coordination of its public participation processes, which has affected the consistency of these processes.**

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Although PUC and its partner agencies must follow various procedures established in law, they also have significant discretion over the processes that they administer. PUC and EERA developed a memorandum of understanding to “clarify and formalize” their roles and responsibilities.<sup>16</sup> But, this document describes the agencies’ roles at a high level; it does not provide detailed guidance to standardize how their staff administer or coordinate public participation processes. And, this document does not provide guidance about how PUC should coordinate with the Office of Administrative Hearings in the administration of public hearings. Absent further standardized guidance, PUC and its partner agencies coordinate their efforts informally and on an as-needed basis, and individual staff members use their discretion.

This level of informal coordination and discretion has led to variation in practices and quality, as well as logistical missteps. For example, one state official told us about a recent public meeting in which PUC and EERA staff were confused about which agency’s staff was supposed to secure a court reporter to create a transcript of public comments; each thought the other agency had already made arrangements for one. At some public meetings that we attended, we observed two different sets of sign-up sheets and flow charts describing the permitting process for a single project. When we asked individual PUC or EERA staff questions about public participation processes, they sometimes gave us conflicting answers. Some members of the public told us that variations in rules or procedures have confused them or made them feel like they are being treated unfairly.

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**State officials have delegated some of their responsibilities related to public participation to the companies whose proposals are under review.**

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PUC and EERA staff have sometimes delegated certain responsibilities for public meetings or hearings, such as reserving and renting the venues, to the applicants whose proposed energy facility projects have been under review. State officials told us they have delegated these responsibilities to the applicant to make accounting practices easier, because state procurement practices take too long, or because they do not have enough resources to handle these logistics internally. Various stakeholders, including state officials, told us this arrangement can create the perception that the state is working on behalf of the applicant, or can give the applicant too much real or perceived control over the event.

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<sup>16</sup> Public Utilities Commission and Department of Commerce, “Memorandum of Understanding Between the Minnesota Public Utilities Commission and the Minnesota Department of Commerce,” February 7, 2014. The two agencies updated the agreement in 2017.

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**The Public Utilities Commission has done a poor job educating the public about the roles of its partner agencies and the complex processes that they administer.**

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PUC's website and other educational materials contain little information about the complex roles that PUC's partner agencies play. The information PUC's website does provide about its partner agencies is hard to find and not contextualized to help the public understand the agencies' roles, their processes, or the scopes of their authority. The website does not, for example, publish the memorandum of understanding between PUC and EERA or contain any description about the role of the Department of Commerce's Energy Regulation and Planning unit. PUC's website does contain a link to EERA's website, which provides more useful information, including flow charts that illustrate the regulatory process for energy facility cases. But, understandably, the information on EERA's website is generally limited to the parts of the process that involve EERA.

Additionally, the notices for some public meetings or hearings that we reviewed did not contain adequate information about PUC's partner agencies. For example, one of the hearing notices that we reviewed did not explain that members of the public could cross-examine the applicant during the hearing. Another did not explain how the public would or would not be able to participate in a public hearing versus an evidentiary hearing.

PUC does, however, provide educational information to the public about the roles of its partner agencies during the public meetings and hearings that it holds with them. For example, PUC (and its partner agencies) may give slide show presentations with high-level overviews of their respective roles and review processes. But, members of the public must be present at these meetings or hearings or search through PUC's eDockets system to receive this information.<sup>17</sup> As we describe in Chapter 3, eDockets can be difficult to use. We discuss PUC's efforts to educate the public further in Chapter 3.

In 2015, Minnesota Management and Budget's Management Analysis and Development Division recommended that PUC and the Department of Commerce develop information for the public to help the public better understand the two agencies' roles.<sup>18</sup> Notably, it suggested that the agencies develop a one-stop website and a plain-language version of the agencies' memorandum of understanding. We think these recommendations stand true today.

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<sup>17</sup> "eDockets" is an electronic system that houses the commission's case records and is available to the public through the Department of Commerce's website.

<sup>18</sup> Minnesota Management and Budget, Management Analysis and Development Division, *Public Utilities Commission and Department of Commerce Function Transfer Study* (St. Paul, 2015), 10 and 73.

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## RECOMMENDATIONS

- **The Public Utilities Commission should formalize its coordination efforts with partner agencies to reduce variation across its public participation processes.**
  - **The Public Utilities Commission should not delegate logistical responsibilities related to its public participation processes to applicants.**
  - **The Public Utilities Commission should do more to help the public understand the roles of its partner agencies in energy facility proceedings.**
- 

PUC's public participation processes are extremely complex. Given this complexity, PUC should more formally coordinate with its agency partners. For example, it could update its memorandum of understanding with the Department of Commerce to include more detailed guidance for staff, and create a similar agreement with the Office of Administrative Hearings. Such guidance should aim to reduce unnecessary variation across public participation processes, such as establishing which agency arranges for a court reporter or assesses the need for security. Such guidance could also serve as a reference to help orient the rotating set of administrative law judges who are assigned to PUC cases at any given time.

PUC should also direct its staff and encourage its partner agencies not to delegate the logistics for public participation processes to the applicants seeking the commission's approval. We think this arrangement gives regulated entities too much actual or perceived control over the state's processes.

Finally, PUC should better educate the public about its processes and about the roles of its partner agencies in those processes. Notably, it should provide more and clearer information on its website, and it should publish a plain-language version of its memorandum of understanding with the Department of Commerce's EERA unit, as Minnesota Management and Budget's Management Analysis and Development Division suggested in 2015.

## Institutional Advocates

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In addition to the Department of Commerce and the Office of Administrative Hearings, a number of other institutions also participate in PUC's proceedings. In this section, we discuss the institutions that advocate on behalf of the public interest in PUC's proceedings.

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**A number of government agencies and other organizations advocate on behalf of the public interest in the Public Utilities Commission's proceedings.**

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Many of the entities that PUC regulates, such as investor-owned utilities, are for-profit enterprises whose actions—by nature—are driven by the interests of shareholders. The Legislature has chosen to regulate these entities and/or their activities precisely for the

purpose of protecting the public interest.<sup>19</sup> Petitions that these or other entities submit to PUC for approval may or may not be in the public interest.

The Legislature has charged a number of state agencies with advocating on behalf of the public interest in PUC's proceedings. For example, the Minnesota Office of the Attorney General's Residential Utilities and Antitrust Division is responsible for advocating before PUC on behalf of residential and small business ratepayers.<sup>20</sup> Under state law, the Attorney General has the right to intervene in any PUC proceeding.<sup>21</sup> The Department of Commerce's Energy Regulation and Planning unit (which we discussed earlier in the chapter) advocates on behalf of ratepayers and the public at large. The unit analyzes whether proposed energy facilities are needed and whether rate increases and long-term plans proposed by utilities are reasonable and consistent with state policies. Like the Attorney General, the Department of Commerce has the right to intervene in any PUC proceeding.<sup>22</sup>

Numerous other government agencies also have responsibilities to protect the public interest in PUC's proceedings. In some cases, applicants proposing energy facility projects must obtain permits from other state agencies in addition to those issued by PUC. For example, if a transmission line is proposed to cross a river, the applicant may need to obtain a permit from the Department of Natural Resources.



#### Numerous Government Agencies May Participate in PUC Proceedings

1. Metropolitan Council
2. MN Board of Water and Soil Resources
3. MN Department of Agriculture
4. MN Department of Commerce
5. MN Department of Employment and Economic Development
6. MN Department of Health
7. MN Department of Labor and Industry
8. MN Department of Natural Resources
9. MN Department of Transportation
10. MN Environmental Quality Board
11. MN Indian Affairs Council
12. MN Office of Pipeline Safety
13. MN Pollution Control Agency
14. MN State Archaeologist
15. MN State Historic Preservation Office
16. Southwest Regional Development Commission
17. U.S. Army Corps of Engineers
18. U.S. Environmental Protection Agency
19. U.S. Fish and Wildlife Service

By law, PUC's decisions are binding on other state agencies.<sup>23</sup> As a result, state agencies participate in PUC's proceedings to ensure that their responsibilities to protect

<sup>19</sup> *Minnesota Statutes* 2019, 216B.01.

<sup>20</sup> *Minnesota Statutes* 2019, 8.33. The Attorney General plays several other roles in PUC proceedings. It represents the Department of Commerce's Energy Regulation and Planning unit and its EERA unit. It also represents PUC when PUC's decisions are appealed to the Minnesota Court of Appeals. And, it investigates and enforces noncompliance of entities regulated by PUC.

<sup>21</sup> *Minnesota Statutes* 2019, 8.33, subd. 3; and *Minnesota Rules*, 7829.0800, subp. 3, published electronically June 14, 2016.

<sup>22</sup> *Minnesota Statutes* 2019, 216A.07, subd. 3; and 216C.10 (a)(9); and *Minnesota Rules*, 7829.0800, subp. 3, published electronically June 14, 2016.

<sup>23</sup> *Minnesota Statutes* 2019, 216E.10.



the public interest are exercised. The Department of Natural Resources, for example, might recommend during a comment period that PUC select one proposed route over another, or that PUC impose conditions in a permit that would help protect the state's waters. PUC maintains a list of 19 state, federal, and regional agencies (shown in the box on the previous page) that it uses to notify those agencies when a pending case could affect the agencies' work.

In addition, a number of nonprofit organizations, such as the Citizens Utility Board of Minnesota and the Energy CENTS Coalition, have missions to advocate before PUC on behalf of Minnesota's utility customers or other segments of the state's population. Several PUC commissioners that we spoke with told us that advocates such as these are critical in helping them understand the public interest.

We spoke with a number of organizations that routinely advocate in the commission's utility proceedings. In general, representatives from these organizations spoke favorably about the commission's efforts to work with them. For example, a representative from one organization commented that the commission offers a "comfortable" and "accommodating" environment for smaller organizations. Another suggested that the commission is a much more welcoming environment now compared to years past, stating, "It has evolved to the point where [commissioners] expect us to be in the room, they ask for our perspective and suggestions."



Many of our issues are heard because we have been in the room for 27 years—usually as the only non-governmental consumer organization. I don't know how the commission would hear about low-income consumer concerns...without some form of institutionalization....

— A Stakeholder Organization

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### **The public generally has fewer institutional advocates in energy facility cases than in other types of cases.**

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The institutions that we discussed above typically advocate in matters that affect *classes* of the public—such as ratepayers in utility cases. They typically do not advocate in energy facility cases, which often involve balancing the interests of *individual* members of the public.

For example, the Office of the Attorney General's Residential Utilities and Antitrust Division does not advocate on behalf of an individual resident, landowner, or small business that might be affected by a proposed transmission line. As a result, the division does not typically intervene in energy facility cases, which require the balancing of those interests.

Similarly, even if the Department of Commerce's Energy Regulation and Planning unit were to recommend that PUC approve a certificate of need for a transmission line, it would



If we don't have experts and well-trained effective advocates appearing in front of us on behalf of the public...the public is in trouble.

— A PUC Commissioner

not advocate for or against a specific route for that transmission line.<sup>24</sup> Likewise, the nonprofit advocacy organizations with whom we spoke typically only participate in cases that affect classes of people, such as ratepayers in general or low-income ratepayers.

Therefore, in energy facility cases, the individual interests of landowners, residents, small business owners, or other individuals may not be represented by any institutional advocate. Rather, these individuals must advocate for themselves. In Chapter 3, we discuss some challenges that participants in energy facility cases face when advocating for themselves.

## Tribal Governments

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Like any other entity, American Indian tribes may intervene or otherwise participate in PUC proceedings.<sup>25</sup> American Indian tribes, however, are not like most other entities. They are sovereign nations whose relationships with the United States are governed by a series of treaties. Under the U.S. Constitution, treaties are the “supreme law of the land.”<sup>26</sup> The potential impacts of the proposed projects that go before PUC become more complicated when they involve the lands or rights of another sovereign nation or its citizens. In recent years, a number of tribes whose reservations lie within Minnesota’s borders have intervened in PUC’s cases.

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**Until recently, the Public Utilities Commission had not established formal protocols for interacting with tribal governments.**

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In 2013, Governor Dayton issued an executive order directing certain executive branch agencies to develop and implement tribal consultation policies and to consult annually with each tribe.<sup>27</sup> However, neither PUC nor the Department of Commerce nor the Office of Administrative Hearings was named in the order.<sup>28</sup> In April 2019, Governor Walz issued a new executive order on tribal consultation.<sup>29</sup> Unlike the previous one, this order included the Department of Commerce. But, like the previous one, it did not include PUC or the Office of Administrative Hearings.

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<sup>24</sup> As we explained in Chapter 1, large energy facility cases often involve multiple “dockets” or components of the case. For example, they may involve one docket related to the certificate of need and another related to the site or route permit.

<sup>25</sup> In this report, we use the term “tribe” when referring to the six bands that compose the Minnesota Chippewa Tribe, as well as the other federally recognized American Indian tribes whose reservations are located within Minnesota’s borders.

<sup>26</sup> *U.S. Constitution*, art. VI.

<sup>27</sup> State of Minnesota Executive Order 13-10, “Affirming the Government to Government Relationship between the State of Minnesota and the Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation; Rescinding Executive Order 03-05,” August 8, 2013.

<sup>28</sup> We did not evaluate the efforts of the Department of Commerce or the Office of Administrative Hearings to consult with tribal governments.

<sup>29</sup> State of Minnesota Executive Order 19-24, “Affirming the Government to Government Relationship between the State of Minnesota and the Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation,” April 4, 2019.

It is important to note that PUC's unique role as a quasi-judicial body limits its ability to interact with parties to a given case, including tribal governments. *Ex parte* communication rules prohibit PUC commissioners from communicating with one party without providing proper notice to the other parties. But, *ex parte* communication restrictions apply only on material matters in certain types of pending cases. Commissioners can and do interact with entities that are parties to PUC cases (such as utilities) in other settings about other issues. *Ex parte* communication rules do not prevent PUC from consulting with tribes about matters that are not pending before it.<sup>30</sup>



**Federally Recognized  
American Indian Tribes  
Located within Minnesota's Borders**

- Lower Sioux Community
- Minnesota Chippewa Tribe
  - Bois Forte Band
  - Fond du Lac Band
  - Grand Portage Band
  - Leech Lake Band
  - Mille Lacs Band
  - White Earth Band
- Prairie Island Mdewakanton Dakota Community
- Red Lake Nation
- Shakopee Mdewakanton Sioux Community
- Upper Sioux Community

We asked PUC officials about the agency's efforts to consult with tribes. Officials told us that PUC historically has not conducted formal consultation with tribal governments or adopted special protocols for working with them. However, in a letter to Governor Walz in June 2019, PUC's chair stated the commission's "intent to recognize and implement to the extent possible" the Governor's executive order.<sup>31</sup> And, in December 2019, PUC approved a tribal consultation plan.

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**State law does not always require state agencies and regulated entities to notify tribal governments when it requires notification of other governments about pending PUC cases.**

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State law requires state agencies and regulated entities to notify—at various stages during a case—stakeholders that may be affected by a proposed project, including regional and local units of government. In some cases, the law also requires state agencies and regulated entities to notify tribal governments; but, in other cases, it does not. For example, when applicants submit a site or route permit application for an energy facility, they must notify any county, city, or town that would be affected. But, they are not required to notify any tribal governments that may be affected.

Further, as we noted earlier, PUC maintains a list of 19 government agencies that it uses to notify those agencies about proposed projects that may overlap their respective jurisdictions. Although this list includes the Minnesota Indian Affairs Council, it does not include tribal governments. The Minnesota Indian Affairs Council is not a

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<sup>30</sup> PUC commissioners also must adhere to a code of conduct outlined in *Minnesota Rules*, Chapter 7845.

<sup>31</sup> Katie Sieben, Chair, Public Utilities Commission, letter to Tim Walz, Governor, *Executive Order 19-24 and Tribal Liaison*, June 27, 2019.

representative of any tribe; rather, it is a state agency that liaises with tribes, among other things.<sup>32</sup>

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## RECOMMENDATIONS

- **The Public Utilities Commission should regularly consult with each tribe.**
  - **The Legislature should require tribal notification whenever notification of affected units of government is required.**
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Over the course of this evaluation, PUC took a number of steps to improve its work with tribes, such as the development of a tribal consultation plan. In mid-to-late 2019, several key PUC officials also attended training on tribal-state relations, and the commission designated its public advisor to serve as a tribal liaison.<sup>33</sup>

PUC should continue and expand on these recent efforts. For example, it should regularly consult with each tribe to ensure a shared understanding of the rights imparted by treaties and to engage with tribes on other matters of interest or concern. PUC should also add each of the tribes to its contact list of government agencies to ensure tribes are notified of projects that could affect them.

In addition, the Legislature should modify state law to ensure that tribal governments are provided the same notification as other governments that may be affected by pending PUC cases. Tribal governments and members cannot effectively participate in the commission's processes if they are not informed about them.

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<sup>32</sup> *Minnesota Statutes* 2019, 3.922, subd. 6(7).

<sup>33</sup> PUC's public advisor attended training on tribal-state relations in mid-2018.



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# Chapter 3: Participation Resources

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The Public Utilities Commission's (PUC's) public participation processes are incredibly complex for a number of reasons. They are complex because a complicated set of laws establish different participation opportunities for different types of projects, as we discussed in Chapter 1. They are complex because they are administered by multiple state agencies and involve numerous entities with numerous roles, as we discussed in Chapter 2. And, they are complex because they involve highly technical subject matter, legalistic proceedings, and issues that may impact individuals deeply, such as the threat of property loss.

Because PUC's processes are so complex, it is important that PUC provide resources to help members of the public navigate them. In fact, state law directs PUC to facilitate public participation in energy facility cases. It states: "The commission shall adopt broad spectrum citizen participation as a principal of operation. The form of public participation shall not be limited to public hearings and advisory task forces..."<sup>1</sup>



The commission shall adopt broad spectrum citizen participation as a principal of operation.

— *Minnesota Statutes*,  
216E.08, subd. 2

In this chapter, we explore the resources that PUC has provided to facilitate public participation. First, we review the "eDockets" system, which houses PUC's case records. Then, we review the educational materials posted on PUC's website, followed by resources that PUC has provided to enable the public to submit comments. Next, we discuss the resources that PUC has provided to help members of the public intervene in its cases. Finally, we discuss the extent to which PUC staff function as a resource to the public.

## eDockets

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Since the mid-2000s, PUC has used "eDockets" to house its case records. eDockets is an electronic record system that is accessible to the public through the Department of Commerce's website. The Department of Commerce maintains the system on behalf of PUC. State agencies, parties to cases, and others upload case records directly into the eDockets system, including: meeting notices, application materials, environmental reports, public comments, administrative law judges' reports, and PUC decisions.

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**The eDockets system provides valuable public access to case records, but it is difficult to use.**

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The eDockets system facilitates public participation in several ways. It provides users with remote access to information in the official case record. It allows users to directly

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<sup>1</sup> *Minnesota Statutes* 2019, 216E.08, subd. 2.

upload public comments and other documents. And, it allows users to subscribe to e-mail alerts, which notify them whenever someone uploads a relevant document or sends out a notice.

But, the eDockets system is antiquated and difficult to use. Both state officials and members of the public expressed frustration to us about it. One official described it as a tool “for insiders.” In a 2015 report, Minnesota Management and Budget’s Management Analysis and Development Division also reported stakeholder frustration with the eDockets system.<sup>2</sup>



eDockets is such a horrible system.

— A PUC Official

One of the system’s key limitations is that it does not link related dockets.<sup>3</sup> For example, one pipeline case that we reviewed involved two dockets—one for the certificate of need application and one for the route permit application. In that case, notices for some PUC meetings were issued through one docket, but not the other. This means that if users were subscribed to only one of the two dockets, they may have missed notifications for some meetings.

On the other hand, because related dockets are not linked, users often—but not always—post the same information in each docket. For example, one pipeline case we reviewed involved around 6,300 documents; many of those documents were duplicated across the case’s two dockets. When dockets are so voluminous, it can be challenging for PUC commissioners, PUC staff, and the public to carefully review the full record.

Another key limitation of the system is that users typically must know the unique docket number(s) associated with a case. For example, we searched eDockets for one case using the abbreviated title for the case, “Dodge County Wind.” The search returned 1,000 documents (the maximum possible) under 135 different docket numbers. Because PUC’s website does not contain a comprehensive list of pending energy facility cases, it was difficult to identify the relevant docket numbers associated with that case.

The eDockets system can be difficult to use for other reasons, too. Notably, its search features are limited; users cannot search by certain criteria simultaneously or by case status. Transcripts of public comments are often not available through the system, and the system does not provide clear instructions on how to access the transcripts by other means. Further, users must download one document at a time, which is impractical for large dockets. And, although the system’s subscription function can help users stay apprised of actions in a given case, the function cannot be tailored, which means subscribers’ inboxes may be bombarded daily by irrelevant notifications.

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<sup>2</sup> Minnesota Management and Budget, Management Analysis and Development Division, *Public Utilities Commission and Department of Commerce Function Transfer Study* (St. Paul, 2015), 73.

<sup>3</sup> A “docket” is a matter pending before the commission that is assigned a unique number.



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## RECOMMENDATION

### **The Public Utilities Commission should work with the Department of Commerce to improve the usability of the eDockets system.**

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First, PUC should adjust its practices to make eDockets more useful. For example, PUC should post meeting notices in all related dockets and direct agency partners (the Department of Commerce and the Office of Administrative Hearings) to do the same for notices that they issue. PUC should also post a list of pending energy facility dockets on its website so members of the public can refer to the list when using eDockets.<sup>4</sup>

Second, PUC should work with the Department of Commerce to make eDockets more user friendly. They should, for example:

- Explore whether they can expand the system's search functions.
- Explore ways to link related cases.
- Explore the system's ability to automatically "stamp" the first page of a document with pertinent information, such as a unique identifier for the document, the date it was uploaded, and who uploaded it. Alternatively, PUC could require certain users (such as parties and state agencies) to upload accompanying cover sheets with this information. PUC could also require users to provide tables of contents for large, multi-part uploads.

In April 2020, PUC officials told us the agency had begun working with the Department of Commerce and the Office of Minnesota Information Technology Services (MNIT) to improve the eDockets system.

## Website

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Websites are often the first resource that members of the public turn to when trying to learn about an agency's work or processes.

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### **The Public Utilities Commission's website does a poor job educating the public about the commission's unique role and processes.**

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PUC's website does a poor job helping the public understand PUC's unique role as a quasi-judicial body. For example, the website contains little information about the legal criteria that PUC must apply to the record when making its decisions. As we discussed in Chapter 1, a key role of the public in PUC's proceedings is to help develop the record for a given case. But, members of the public cannot effectively develop the record if they do not know what criteria are relevant. In one public meeting that we attended, we observed a PUC staff person struggle to find the criteria relevant to the project when

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<sup>4</sup> As we discuss below, the Department of Commerce maintains a list of energy facility cases on its website, but it does not include certificate of need dockets.

asked about them by a member of the public. This crucial information should be readily available at public meetings and on PUC's website.

Additionally, the website does not explain which types of entities have the power of eminent domain.<sup>5</sup> Eminent domain is an important issue in PUC's energy facility proceedings; many of the companies seeking PUC's regulatory approval have this power.<sup>6</sup> Members of the public cannot make a fully informed decision about whether or how they should participate in a proceeding if they do not understand whether they may lose property through eminent domain.

Further, with some exceptions, PUC's website does not provide information about important PUC orders. As we discussed in Chapter 1, the commission issues orders with "general applicability."<sup>7</sup> These orders are not accessible on PUC's website. In most cases, members of the public must comb through eDockets to learn that these orders exist. PUC's website also does not explain how precedent that the commission has set through orders in past cases could influence future cases, nor does it point the public to key PUC decisions that might guide the commission in future cases, such as in wind-energy cases.

Finally, PUC's website contains little information to help the public understand what cases are currently before the commission. The website does contain a link to eDockets; but, eDockets does not allow users to search cases by status, which means they cannot identify a comprehensive list of open dockets. PUC's website also contains a link to the Department of Commerce's website, which has a list of PUC's open energy facility dockets, but this list is incomplete.<sup>8</sup>

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## RECOMMENDATION

**The Public Utilities Commission should include more and better information on its website to facilitate public participation.**

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Numerous stakeholders that we spoke with, including PUC staff, recommended improvements to PUC's website. We agree that improvements are warranted. In particular, PUC should provide more information about its quasi-judicial processes.

PUC's website could serve as a powerful tool to help the public understand how and when to participate in cases. In Chapter 2, we explained that members of the public may have access to fewer resources when participating in PUC cases as compared to regulated entities. PUC could help level the playing field by providing the public with

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<sup>5</sup> "Eminent domain" is the right to seize private property; it typically involves compensation for the property owner.

<sup>6</sup> *Minnesota Statutes* 2019, 117.025, subds. 10-11; and 117.48.

<sup>7</sup> These orders apply generally, rather than to a particular case, such as to a particular energy facility application. For example, as we discussed in Chapter 1, in 2004, the commission issued an order with general applicability that established fees and standards for how small electricity generators, such as homeowners with solar panels, may connect to the electrical grid. See *Minnesota Statutes* 2019, 216A.02, subd. 2.

<sup>8</sup> The Department of Commerce's Energy Environmental Review and Analysis unit's website does not include all certificate of need dockets.

more educational resources. Such resources could help develop a shared understanding between PUC commissioners, staff, partner agencies, and other stakeholders about the role of the public, the participation opportunities afforded to them by law or PUC discretion, and the limits of public participation.

Throughout this report, we discuss other information that PUC should provide on its website. PUC should also reach out to stakeholders to find out what additional information they would find useful on the website.

## Public Comments

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PUC has provided various resources to enable members of the public to submit into the record information related to open cases. PUC generally refers to this sort of information as “public comments.”

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### **The resources that the Public Utilities Commission has provided for the public to submit comments have been difficult to use or unreliable.**

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Through late 2019, PUC used an application on its website to collect public comments. We heard numerous complaints about this application. For example, people reportedly had problems uploading attachments or finding the relevant docket within the application. In addition, officials told us that because the application used a discussion-based format, users could submit disparaging replies to other users’ comments, which could be intimidating for some.

In late 2019, PUC replaced the application with an electronic form on its website. This new form alleviates many of the problems users faced with the old system. However, in early 2020, we observed that the form was down during a public comment period for a highly controversial pipeline project.

PUC allows members of the public to submit comments in other ways, too. For example, members of the public can directly upload comments into eDockets. But, as we described earlier, the eDockets system can be difficult to use, especially for those who are not technologically savvy.

Members of the public can also submit public comments to PUC by mail or e-mail, or orally or in writing during a public meeting or hearing. When they submit comments this way, PUC staff upload the comments to eDockets for them. But, as we discuss later in this chapter, until early 2020, PUC did not have agency-wide policies about how staff should handle comments, which resulted in some staff not uploading comments that did not meet their personal criteria. Later in this chapter, we recommend that PUC provide better guidance about issues such as this to its staff.

## Intervention

As we discussed in Chapter 1, members of the public can participate in a PUC case in a variety of ways; one way is by petitioning to intervene as a party.<sup>9</sup> As a party to a case, members of the public have more guaranteed opportunities to advocate than they do by participating in other ways.

**Intervening as a party to a case can be difficult, time consuming, and expensive for a member of the general public; the Public Utilities Commission has provided few resources to help the public participate in this way.**

Intervening in a case is not easy. Members of the public first must be aware of their right to petition to intervene. PUC's website does not inform the public of this right.

In certain types of cases, state law requires PUC to post information about the right to intervene and the responsibilities of intervenors when it orders a hearing to take place.<sup>10</sup> While PUC's orders for some of the cases that we reviewed contained information about intervening, they did not contain sufficient information to guide someone through the process. Further, this information was presented only in PUC orders that were housed in eDockets, not posted in plain language on PUC's website or in press releases.



...just getting through the process of submitting our very first petition to intervene was really daunting. We wouldn't have made it that far if it wasn't for a volunteer who went through and wrote up all of the statutes relevant to citizen intervenors and the intervenor process for us. ...We then took that information, spent hours parsing through all of it and writing guides that could help us and other people intervene.

— An Intervenor Organization

In addition, aside from the limited information posted in these orders, we found no evidence that PUC has provided resources to educate the public on how to exercise their right to intervene. As a result, members of the public must turn directly to state law, which is voluminous, confusing, and does not provide instructions about the mechanics of petitioning to intervene.

Individuals and entities may intervene without legal counsel, but this can be challenging.<sup>11</sup> For example, intervenors would have to read the law very carefully to understand that they may ask an administrative law judge to have PUC review the

<sup>9</sup> *Minnesota Rules*, 7829.0800, published electronically June 14, 2016.

<sup>10</sup> *Minnesota Rules*, 1405.0500, subp. 1I, published electronically August 21, 2007, requires PUC to provide information in hearing orders and notices regarding: the right to intervene, the rights and responsibilities of intervenors and how they differ from the rights of other participants, and the procedures for intervening. This requirement applies in only certain types of PUC energy facility cases.

<sup>11</sup> *Minnesota Statutes* 2019, 216.16; and *Minnesota Rules*, 1400.5800; and 1400.7100, subp. 5, published electronically August 6, 2013; and 1405.0600, published electronically August 21, 2007.

matter if the judge makes a decision with which they disagree.<sup>12</sup> In one case that we observed, a judge ruled that an intervenor group could not represent itself without legal counsel. Fortunately for that group, it was familiar enough with state rules to ask the judge to refer the matter to PUC for review. In that case, PUC clarified its position that legal representation by intervenors is not required in PUC proceedings.<sup>13</sup>



If you're not an advocate, if you're not a lawyer...it's going to be hard. It's hard for members of the public generally, I think, to participate at the same level...with someone who actually does it for a living.

— A PUC Commissioner

Intervening can be time consuming and challenging in other ways, too. Intervenors may have to defend their petitions to intervene from legal objections by the regulated entities that they oppose. Intervenors may need to make motions; respond to motions; and adhere to numerous deadlines, which may be scattered throughout state law. They may have to travel to St. Paul from outstate Minnesota during their work days to appear at numerous hearings or meetings, which may be spread across months or years and scheduled with little advanced notice. They may need to prepare documents in a specific format. They may need to present expert

witnesses, submit to cross-examination by attorneys, and cross-examine the regulated entity's witnesses. Intervenors may also have to pay for, make, and deliver numerous paper copies of their materials.

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**Generally speaking, intervenors and other participants in energy facility cases face greater challenges in advocating for themselves than participants in other types of cases.**

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In Chapter 2, we explained that the public generally has fewer institutional advocates in energy facility cases than in other types of PUC cases. As a result, members of the public affected by proposed energy facility projects must advocate for themselves.

Additionally, intervenors and other participants in energy facility cases face challenges that participants in other types of cases do not. For example, utility cases typically involve the same sets of stakeholders over and over again (the ratepayers of the nine utilities). Energy facility cases, on the other hand, generally affect new stakeholders each time (such as local landowners, businesses, and municipal governments). As a result, intervenors and participants in energy facility cases may acquire less institutional knowledge over time and across cases, which can limit their effectiveness. And, because they may not have a need to participate in other PUC cases, they may be less likely to seek changes to problematic processes.



We would learn just how hard [intervening] was as time progressed and our involvement deepened...in its complexity and expense [the process] was neither designed for nor friendly to access by a small group of citizens.

— An Intervenor Organization

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<sup>12</sup> *Minnesota Rules*, 1400.7600, published electronically August 6, 2013; and 1405.2200, published electronically August 21, 2007.

<sup>13</sup> Minnesota Public Utilities Commission, “Order Allowing Withdrawal of Route Permit Application, Suspending Certificate of Need and Site Permit Proceedings, and Allowing Refiling,” Docket Nos. 17-306, 17-307, and 17-308, December 5, 2019.

A handful of institutions, including some counties and labor and environmental groups, do routinely intervene in energy facility cases, which allows them to sharpen their skills over time. But, the interests of those groups may not necessarily align with those of other stakeholders in a given case. Individual American Indian tribes, area residents, landowners, lake associations or other environmental organizations, labor organizations, and local governments may each have different goals for the same energy facility project.

Further, state law allows intervenors to request reimbursement for their costs in utility and telecommunications rate cases, but not in energy facility cases.<sup>14</sup> In energy facility cases, local residents or small businesses that choose to intervene may face significant financial, time, and information resource imbalances compared to the regulated entities that they challenge. Although they may hire an attorney, they may not be able to afford one. Meanwhile, the regulated entities that they face may be able to afford skilled, full-time legal counsel specializing in utility regulation. Without legal counsel, it may be challenging for members of the general public to craft arguments that are relevant to the legal guidelines that the commission must follow.



...one of the commissioners ...said, 'Why aren't there more landowners up here being intervenors?' ...He had no clue that they've tried...you have to get a lawyer. You have to have money.

— A Member of the Public

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## RECOMMENDATION

**The Public Utilities Commission should provide educational resources about intervening to members of the general public.**

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As we explained earlier, statutes require PUC to “adopt broad spectrum citizen participation as a principal of operation” in energy facility cases.<sup>15</sup> One way the commission could better facilitate citizen participation and help to level the playing field is by educating the public about opportunities to participate in PUC cases, which includes the right to intervene. PUC should inform the public about the grounds under which the public may intervene, the rights and responsibilities of intervenors, and the procedures that intervenors must follow.

PUC should not only provide better information about intervening in orders for hearings, as required by law, but also provide it in plain language on its website and in other forms. For example, the public advisor could create and make available educational materials about intervening, such as webinars or downloadable guides. After all, state law requires PUC’s public advisor to “assis[t] and advis[e] those affected and interested citizens on how to effectively participate” in PUC proceedings.<sup>16</sup> As such, the public advisor should inform members of the public about the benefits and challenges of intervening.

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<sup>14</sup> *Minnesota Statutes* 2019, 216B.16, subd. 10; and 237.075, subd. 10.

<sup>15</sup> *Minnesota Statutes* 2019, 216E.08, subd. 2.

<sup>16</sup> *Minnesota Statutes* 2019, 216E.08, subd. 3.

## Commission Staff

Various PUC staff, including the public advisor, staff in the Consumer Affairs Office, and regulatory analysts, serve as resources to the public. For example, the public advisor must assist members of the public and advise them on how to participate in energy facility cases.<sup>17</sup> PUC's Consumer Affairs Office mediates complaints about utilities from utility customers and responds to inquiries from PUC's general phone line and e-mail account, among other duties. And, PUC's regulatory analysts answer questions from the public about specific dockets.

## Guidance for the Public

In order for the public to use PUC's staff as a resource, the public must know that PUC's staff can serve in that capacity.

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**The Public Utilities Commission has not provided adequate information to the public about how to use its staff as a resource.**

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Although PUC's website provides contact information for all of its staff, it does not clearly explain the roles of those staff or explain how most staff can help the public participate in PUC's processes. For example, the website posts the name and contact information for the individual who works as the public advisor, but does not identify that person as the public advisor. Additionally, the website does not provide sufficient guidance about what kind of support the public advisor may or may not give.

Similarly, although a page on the website posts the names and contact information for PUC's regulatory analysts, it does not clearly explain what the regulatory analysts do, how they can help the public, or the limits of their ability to work with the public, if any. For example, we encountered some confusion over whether conversations about pending cases between PUC staff and parties or members of the public are considered prohibited *ex parte* communication. But, such communication is not prohibited by law.<sup>18</sup>



Significant differences of opinion exist on what counts as prohibited *ex parte* communication.

— Minnesota Management and Budget, 2015 Report

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## RECOMMENDATION

**The Public Utilities Commission should provide better information to the public about how its staff can support public participation.**

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PUC should post more information on its website about the roles of its staff and provide clear guidance about the kinds of support staff can and cannot give. Clear guidance

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<sup>17</sup> *Minnesota Statutes* 2019, 216B.243, subd. 4; 216E.08, subd. 3; and 216F.02(a); and *Minnesota Rules*, 7850.2200 and 7854.0700, published electronically September 18, 2009; and 7852.1200, published electronically August 21, 2007.

<sup>18</sup> *Minnesota Rules*, 7845.7200, subp. 2, published electronically January 5, 2010.



could, for example, not only help reduce accidental *ex parte* communications, but also create a better and shared understanding between staff, intervening parties, and members of the public about the kind of communication and support that *is* permissible.



The public have little idea of who the Commission is, what the Commission does, and the role of staff.

— A PUC Staff Member

## Guidance for Staff

In order for PUC's staff to serve as a resource to the public, those staff also must understand how they are supposed to serve the public.

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**The Public Utilities Commission has not provided adequate guidance to its staff about working with the public, which has led to inconsistent treatment of the public.**

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PUC has not provided its staff—particularly the public advisor and staff in the Consumer Affairs Office—with adequate guidance about the scope of their responsibilities or their authority when working with the public. Notably, the agency has not provided position descriptions to some key staff. Our conversations with PUC staff revealed that they did not have a clear or common understanding of the scope of their—or their colleagues'—responsibilities in working with the public.

PUC officials also told us they were unsure about the extent to which either the public advisor or the Consumer Affairs Office should proactively facilitate public participation, such as by developing educational materials or conducting outreach. To date, their efforts to facilitate public participation have been largely passive, such as responding to questions when asked, staffing public meetings and hearings, and filing comments from the public when requested.



For the most part, public participation at PUC runs on autopilot.... There should be more thoughtful internal discussion about public participation, and the staffing to support it.

— A PUC Staff Member

In addition, PUC has not developed sufficient policies on how staff should work with the public. Notably, until early 2020, PUC had not established clear, agency-wide policies about how staff should process public comments or certain kinds of complaints. As a result, staff have used inconsistent practices. For example, staff used varying definitions for what constituted a “complaint” or a “public comment” and did not always file in the docket or maintain submissions that did not meet their personal definitions. In the absence of agency-wide guidance, staff have relied on their own judgment to make some important decisions. For example, staff have barred attendees from proceedings for breaking rules imposed by the individual staff person, rather than enforcing only those that were officially established and publicly posted.

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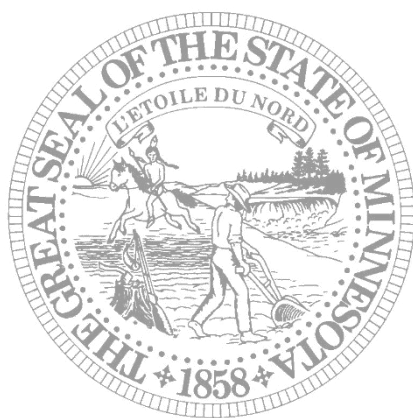
## RECOMMENDATION

**The Public Utilities Commission should provide clearer guidance to staff about their responsibilities to ensure consistent treatment of the public.**

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PUC should ensure that staff across the agency understand the scope of their respective roles. To this end, PUC should require that all staff review, sign, and maintain copies of their own position descriptions. In early 2020, PUC officials told us that they had instituted a new policy of maintaining copies of position descriptions and having staff sign them, and that they planned to review position descriptions across the agency. We commend the commission on this plan. We think it is a good first step in providing staff with clearer guidance on their responsibilities—including those related to working with the public.

In early 2020, PUC also established an agency-wide policy about how staff should handle complaints and public comments. Again, we commend the commission on taking steps to help staff understand how they should work with the public. Ensuring that staff have a common understanding of their responsibility to work with the public is a good first step toward more equitable and consistent treatment of those who engage with the commission.



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# Chapter 4: Commission Meetings

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Minnesota’s Open Meeting Law requires the Public Utilities Commission (PUC) to conduct its business in meetings that are open to the public.<sup>1</sup> PUC’s five commissioners conduct their business in two types of meetings—agenda meetings and planning meetings. In this chapter, we discuss public participation in those two types of meetings.<sup>2</sup>

We begin the chapter by discussing the role of the public in PUC’s meetings. Then, we review how PUC notifies the public about its meetings and the meeting records that PUC makes available to the public. Next, we discuss the rules that PUC has imposed on the members of the public who attend its meetings. Finally, we discuss other issues that affect public participation in PUC’s meetings.

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## Role of the Public in Meetings

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In this section, we first discuss the role of the public in agenda meetings, then we discuss the public’s role in planning meetings.

In agenda meetings, the commission makes decisions about specific dockets, as we discussed in Chapter 1.<sup>3</sup> For example, in an agenda meeting, the commission may vote on whether to approve a permit for a specific energy facility. Generally speaking, the commission must base its decisions on the information in the record for that docket and on applicable law. As we discussed in Chapter 1, a key role of the public in the commission’s proceedings is to help develop that record for a given case.

Generally speaking, the record for a given case is closed by the time the case goes before the commission for a final vote in an agenda meeting. The general public usually does not have an opportunity to further develop the record at late-stage agenda meetings. Parties, however, may be able to supplement the record through oral arguments, or when asked a question by a commissioner. Therefore, the role of the public in late-stage agenda meetings is typically to observe the commission—a public body—as it makes its decisions based on the record. But, this is not exclusively the case.



### Purpose of PUC Meetings

Agenda Meetings	Planning Meetings
To make decisions about specific dockets	To make internal operational decisions and discuss broader policy issues with external stakeholders

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<sup>1</sup> Open Meeting Law, *Minnesota Statutes* 2019, 13D.01, subd. 1.

<sup>2</sup> In Chapter 2, we discussed other types of PUC meetings, including “public meetings” and “public hearings,” which are held specifically to solicit public input.

<sup>3</sup> A “docket” is essentially any pending matter before PUC, such as a request by a utility to raise its rates. A case may involve more than one docket.

The commission may allow members of the public to supplement the record during an agenda meeting. In fact, Minnesota rules explicitly allow the commission to grant members of the public an opportunity to address it during an agenda meeting, although they do not guarantee this as a right.<sup>4</sup> PUC's internal "Meeting Procedures" also acknowledge the possibility, as the box at right shows.<sup>5</sup>



Occasionally it will be useful to the commission to accept public comments at the time of the agenda meeting to aid its deliberations, or because matters are raised that are of public interest and there was no formal public comment process.

— PUC Meeting Procedures

Whether or not the commission allows the public to address it during an agenda meeting can depend on the type and stage of the case, as well as commission discretion. The commission typically does not make a single summary judgment at the end of each case; rather, it typically makes a series of decisions throughout the life of a case and over multiple agenda meetings. The commission may let individual members of the public speak at an earlier stage in a case, but not at a later one. At a later stage, the commission may need to take extra care not to give one person an opportunity to supplement the record when others do not have an opportunity to provide contrary arguments or evidence.

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### **The Public Utilities Commission has done a poor job educating the public about the public's role in its meetings.**

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PUC has sent mixed messages about the public's ability to address the commission during agenda meetings. For example, through 2019, the page on PUC's website that discussed agenda meetings stated simply, "No 'open mike' [*sic*] time." Yet, some attendees have witnessed PUC grant this opportunity to members of the public. PUC's website does not explain why a member of the public might be able to supplement the record at one point in a case but not another, or why parties might be able to supplement the record during an agenda meeting when members of the public might not.

PUC's internal meeting procedures (shown in the box at right) explain what members of the public should do if they would like to address the commission during an agenda meeting. But, these instructions are not posted publicly on PUC's website, or anywhere else.<sup>6</sup>



Members of the public who wish to address the commission are encouraged to notify commission staff in advance of the meeting so that the commission is aware of the request.

— PUC Meeting Procedures

PUC has also done a poor job educating the public about the role of the public in its planning meetings. In many planning meetings, the commission handles internal or operational matters that may be of little interest to the public, such as scheduling which dockets will be heard at upcoming agenda

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<sup>4</sup> *Minnesota Rules*, 7829.0100, subp. 13, published electronically June 14, 2016; and 7829.0900, published electronically August 21, 2007.

<sup>5</sup> Minnesota Public Utilities Commission, *Operating Procedures and Policy*, "Meeting Procedures," (St. Paul, adopted September 18, 2014).

<sup>6</sup> *Ibid.*

meetings, approving the agency's budget, or handling personnel issues. But in other planning meetings, the commission engages with stakeholders and considers policy issues that are more likely to be of interest to the public. For example, in 2019 planning meetings, the commission heard presentations from utilities, renewable energy advocates, and others; it also discussed policy proposals, renewable energy goals, how severe winter weather impacted utilities' operations, and various other issues.

At least in theory, compared to agenda meetings, the public has a greater opportunity to interact with the commission in planning meetings. Planning meetings are less formal than agenda meetings, which—given their quasi-judicial format—are adversarial by nature. And, because the commission is not usually dealing with specific dockets in planning meetings, it is typically not restricted by *ex parte* communication rules.

Although planning meetings offer interested members of the public a valuable opportunity to engage with the commission, PUC's website provides little information about this opportunity. PUC's web calendar lists the dates of upcoming planning meetings, but it provides no description of the general purpose of planning meetings and rarely contains agendas for upcoming ones. As a result, likely only experienced stakeholders, such as utilities or some advocacy groups, know that they may give presentations to or otherwise engage with the commission on policy or other issues in planning meetings.

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## RECOMMENDATION

**The Public Utilities Commission should do a better job educating the public about the role of the public in its agenda and planning meetings.**

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First, PUC should provide clear information on its website about whether and when the public may address the commission during agenda meetings. PUC should also provide information that explains when the record is truly closed, and why that may affect the public's ability to address the commission during agenda meetings.

Second, PUC should provide information on its website about the purpose of its planning meetings. The opportunity to engage with the commission during planning meetings should not be limited to only those experienced stakeholders with inside knowledge of the commission's processes. Numerous stakeholders expressed frustration to us about their inability to address the commission directly. PUC could better leverage its planning meetings to engage with the public on non-docketed issues, such as how to continuously improve its public participation processes.



...informal planning meetings are essential...the commission [should] hold more regular ones....

— A Stakeholder Organization

## Meeting Notification

State law dictates whether and when PUC must notify the public about its meetings. The box below lists the requirements that apply to agenda and planning meetings.

According to state rules, before PUC may hear a given docket, it must provide the parties to the docket (and certain other participants) at least ten days' notice.<sup>7</sup> PUC typically hears dockets in agenda (not planning) meetings. When PUC decides to hear a docket, it notifies the parties (and certain other participants) about the meeting through the eDockets system.<sup>8</sup> PUC also posts the agendas for upcoming agenda meetings on its web calendar.<sup>9</sup>



### Notification Requirements

Agenda Meetings	Planning Meetings
At least ten days to parties and certain other participants	At least three days when a meeting is held at a special time or location
— <b>Minnesota Rules, 7829.2800</b>	— <b>Minnesota Statutes, 13D.04</b>

PUC uses its web calendar to notify the public about upcoming planning meetings as well. But, planning meetings typically do not involve dockets or parties to those dockets; therefore, PUC does not usually have to provide ten days' notice for them. By law, PUC only has to provide advanced notice of *special* planning meetings.<sup>10</sup> The Open Meeting Law requires PUC to keep a copy of its regular meeting schedule at its office. If PUC holds a planning meeting outside of its normal time or place, it must post a notice for that meeting on its "principal bulletin board" at least three days before the meeting will take place.

### The Public Utilities Commission's meetings—especially planning meetings—can be difficult to track and attend.

It can be difficult to track and attend PUC's meetings, given the relatively short notice requirements. The short notice requirements can be especially challenging for intervenors or other stakeholders who must travel from outstate Minnesota to PUC's office in St. Paul. We had to check PUC's website multiple times per week to stay apprised of the schedule, sometimes without success.

<sup>7</sup> *Minnesota Rules*, 7829.0300; 7829.1200, subp. 3; and 7829.2800, published electronically August 21, 2007.

<sup>8</sup> "eDockets" is an electronic system that houses the commission's case records and is available to the public through the Department of Commerce's website. It also provides alerts to subscribers, such as when a document has been filed for a specific docket.

<sup>9</sup> PUC's web calendar is located at: <https://mn.gov/puc/newsroom/calendar>.

<sup>10</sup> Open Meeting Law, *Minnesota Statutes* 2019, 13D.04, subds. 1 and 2(a)-(b), requires public bodies to post "written notice of the date, time, place, and purpose of the meeting on the principal bulletin board of the public body" when a regular meeting is held at a special time or place. We considered the commission's web calendar to be its "principal bulletin board." PUC also posts meeting notices on a bulletin board located outside one of its hearing rooms.



### Regular Meeting Schedule

Agenda Meetings	Planning Meetings
Thursdays at 9:30 a.m.	Every other Tuesday at 9:30 a.m., and every Thursday at 11:00 a.m. or after the agenda meeting ends

For agenda meetings, individuals can subscribe to eDockets to receive meeting notices by e-mail. However, eDocket's subscription options are limited. For example, individuals may subscribe to receive notifications for all agenda meetings, *or* for any activity on a specific docket. Subscribers cannot limit alert subscriptions to agenda meeting notices for a specific case, which means they may be inundated with unwanted notifications if they subscribe to either of the available options.

For planning meetings, the three-day notice requirement can be especially challenging. For example, one Friday in 2019, PUC provided notice for a planning meeting that would take place the following Monday in the city of Cloquet. Although PUC met the three-day requirement, the short amount of notice may have made it difficult for some interested persons to learn about and attend the meeting.

Further, while PUC typically livestreams agenda meetings and makes audio and video archives of them available to the public, it does neither for planning meetings. Planning meetings are also much less predictable. For Thursday planning meetings, PUC holds them either at 11:00 a.m. or after the agenda meeting adjourns. This means that if members of the public want to observe a Thursday planning meeting, they need to arrive in person at 11:00 a.m. and may need to wait all afternoon until the end of the agenda meeting, at which point it may be too late to hold the planning meeting. PUC also frequently cancels planning meetings with little notice.

Moreover, PUC rarely posts agendas for planning meetings, which makes it difficult for a prospective attendee to know whether it would be worthwhile to try to attend one. According to PUC officials, the agency tries to post agendas of planning meetings whenever they include presentations from external stakeholders. The Open Meeting Law does not require PUC to post agendas for planning meetings, but it does require PUC to post the "purpose" for an upcoming meeting when that meeting will be held at a special time or location.<sup>11</sup> PUC did not post the purpose for several planning meetings that it held or planned to hold at special times or locations in 2019. In addition, PUC failed to post on its website that several special planning meetings were canceled. As a result, members of the public could have unnecessarily traveled to PUC to attend them.

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## RECOMMENDATION

**The Public Utilities Commission should make its planning meetings more accessible and transparent to the public. It should also ensure that its meeting notices comply with state law.**

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We understand that PUC often deals with issues in planning meetings that may not be of great concern to the public but that are important to PUC's continuing operations. However, it is difficult for members of the public to make this determination for

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<sup>11</sup> Open Meeting Law, *Minnesota Statutes* 2019, 13D.04, subds. 1-2.



themselves, given how little information PUC currently provides about the purpose of upcoming planning meetings.

PUC should make its planning meetings more accessible and transparent to the public. First, PUC should post the purpose of planning meetings that are to be held at special times or locations, as required by law. PUC could also livestream planning meetings like it does for agenda meetings and/or make audio and video archives of them available to the public. It could also regularly post the purpose of upcoming planning meetings, if not agendas for them. And, when possible, it could provide more than the minimum amount of notice required by law for special planning meetings.

In early 2020, PUC adopted a new practice that we think has helped. It began issuing notifications from its web calendar that notify subscribers whenever it makes changes to or cancels a meeting. We think this is a good first step.

## Meeting Records

We reviewed the extent to which PUC makes meeting records and other meeting materials available to the public.

In general, PUC maintains good records for its *agenda* meetings. State law requires PUC to make audio recordings of all of its proceedings.<sup>12</sup> As previously stated, PUC typically makes audio and video recordings of its agenda meetings and posts them on its website. In addition, PUC quickly posts decisions made during agenda meetings on its website—although full minutes are not usually posted until several months later.

**The Public Utilities Commission has not made planning meeting records available to the public, including some required by law.**



### Record Requirements

Agenda Meetings	Planning Meetings
An audio recording must be made of all PUC proceedings	PUC votes must be recorded and maintained at PUC's office for public inspection during business hours
— <i>Minnesota Statutes</i> , 216A.03, subd. 6	— <i>Minnesota Statutes</i> , 13D.01, subds. 4-5

In contrast to agenda meetings, PUC does not create records, such as audio or video archives or minutes, for most planning meetings. The Open Meeting Law does not require PUC to keep minutes. But, it does require PUC to keep a record of any votes taken at its meetings.<sup>13</sup> Records of these votes must be maintained at PUC's office for public inspection during business hours. We inspected PUC's records for planning meetings and found that PUC had not recorded at least one vote taken in 2019.<sup>14</sup>

<sup>12</sup> *Minnesota Statutes* 2019, 216A.03, subd. 6.

<sup>13</sup> Open Meeting Law, *Minnesota Statutes* 2019, 13D.01, subds. 4-5.

<sup>14</sup> Because PUC maintains neither meeting minutes nor audio or video archives of its planning meetings, we could not verify whether or not it maintained records of all other votes taken in 2019.

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## RECOMMENDATION

**The Public Utilities Commission should record all votes taken at planning meetings, as required by law. It should also consider making planning meeting records more accessible to the public.**

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In addition to recording votes as required by law, PUC should consider taking minutes at its planning meetings and uploading them to its website, as it does for agenda meetings. If PUC does not implement our earlier recommendations (regarding posting agendas for upcoming planning meetings, livestreaming them, or making audio and/or video archives of them available to the public), then providing minutes would be one way to make the business that PUC conducts at planning meetings more transparent. If nothing else, PUC could at least post records of the votes taken at planning meetings on its website. Given PUC's current practices, most members of the public have no way of knowing what occurs at most planning meetings.

## Meeting Rules

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We also reviewed the rules that PUC has imposed on members of the general public who attend its meetings.

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**State law protects the rights of citizens to protest; it also requires the Public Utilities Commission to maintain order to ensure that its business can be conducted.**

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Some inherent tension exists in the law with regard to the role of the public in PUC's meetings. On one hand, state law protects the rights of citizens to protest the commission and its actions; it "acknowledges and reaffirms the right of its citizens to petition, peacefully and in an orderly manner, all levels and units of government for the redress of grievances of whatever nature...."<sup>15</sup>

On the other hand, PUC has a statutory responsibility to ensure that its business can be conducted. Participants' rights are affected when PUC's proceedings are disrupted. State law requires that the business of state agencies be able to proceed in an orderly manner.<sup>16</sup>



...functions and proceedings of governmental bodies and agencies must remain free from organized or calculated confusion, disturbance or delay....

— *Minnesota Statutes*, 624.72, subd. 1

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<sup>15</sup> *Minnesota Statutes* 2019, 624.72, subd. 1.

<sup>16</sup> *Ibid.*

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**The Public Utilities Commission has established formal rules as well as “attendee protocols” to maintain order in its meetings; however, these protocols have varied, and staff have enforced them inconsistently.**

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State law authorizes government bodies to promulgate rules “for the purpose of protecting the conduct of public business therein or thereon, free from interference, or disruption or the threat thereof.”<sup>17</sup> As such, PUC has promulgated rules about maintaining order in its meetings. One of the provisions in rules states that PUC’s commissioners, as well as persons who appear before the commissioners, be “patient, dignified, and courteous,” as the box below shows.<sup>18</sup>

Another provision states: “Commissioners shall not be swayed by partisan influences, public clamor, or fear of criticism.”<sup>19</sup>

Several commissioners we spoke with cited this provision when discussing their role as decision makers. Commissioners emphasized that they must base their decisions on criteria in law and information in the case record—not on so-called “public clamor.” However, this is not always an easy distinction since members of the public may contribute to the case record.

In addition to formally promulgated rules, PUC has also established “attendee protocols” to maintain decorum among attendees at its meetings. We found a number of issues with these rules. For example, rules posted simultaneously in various locations have differed from one another. Rules posted on PUC’s hearing room doors prohibited attendees from bringing in briefcases, backpacks, or other bags; while rules posted on PUC’s website did not. This means someone could check the website ahead of a meeting and—seeing no rule against it—bring a briefcase to a meeting, then be turned away because of it. Additionally, the rules have changed from meeting to meeting, and agency officials told us they have not been good about consistently enforcing them.

Numerous meeting attendees expressed frustration to us about the inconsistencies in PUC’s meeting rules. For example, one person told us: “There needs to be one thing: consistency with the rules. [W]e’ve always had water, then all of a sudden [we] can’t...we used to be able to bring our purses in, [then we] can’t.... There were different rules every meeting.” We discuss these inconsistencies more in Chapter 5.



Commissioners shall not be swayed by partisan interests, public clamor, or fear of criticism.

Commissioners shall maintain order and decorum in proceedings before the commission. In their official capacity, commissioners must be patient, dignified, and courteous to litigants, witnesses, lawyers, commission staff, and others appearing before them.

Commissioners shall require similar conduct from persons appearing before them.

— **Minnesota Rules, 7845.0500**

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<sup>17</sup> *Minnesota Statutes* 2019, 624.72, subd. 3.

<sup>18</sup> *Minnesota Rules*, 7845.0500, subp. 2, published electronically January 5, 2010.

<sup>19</sup> *Minnesota Rules*, 7845.0500, subp. 1, published electronically January 5, 2010.



### Attendee Protocols

- The commission asks that you are respectful of the Commissioners, staff and others attending the hearing.
- Signs displayed outside of the hearing room should not be larger than 8.5 x 11 inches and must not have handles such as wood or metal poles.
- Signs or banners must be put away inside of the hearing room; stickers, flyers or other materials must be handed out before entering the hearing room.
- Do not block the hearing room doors.
- Every person watching the hearing must be seated in a chair.
- Rooms cannot be over capacity.
- No unnecessary talking, loud whispering, or other distracting activity is allowed inside of the hearing room. Conversations in the hallway should not be disruptive.
- Pictures without flash cameras may be taken and video recording is allowed if not disruptive or unless prohibited by the Commission Chair.
- Demonstrations of any kind are not allowed in the hearing room.
- Pagers and cell phones must be turned off before entering the hearing room.
- Distracting activity may result in you being asked to leave the hearing room.

*This version of attendee protocols was posted on PUC's website throughout 2019.*

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## Protesters have disrupted some of the Public Utilities Commission's agenda meetings.

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Even though PUC has established rules to maintain decorum in its meetings, protestors have disrupted some agenda meetings. For example, in September 2018, the PUC chair had to adjourn an agenda meeting before the commission voted because it was continuously disrupted by protestors. The protestors performed a call-and-response chant during the meeting, spoke over a megaphone, and played music over a wireless speaker. In November 2018, protestors attached signs to the backs of their shirts and kneeled backwards on their chairs to symbolize that the commission had turned its back on them; however, the commission was able to continue its business during this largely silent protest. In February 2020, protestors disrupted another agenda meeting, interrupting and yelling at the commissioners.



### Threats

At times, PUC commissioners, PUC staff, and other state employees have been threatened. For example, after approving the Line 3 pipeline, which we discuss in Chapter 5, protestors showed up at each of the commissioners' houses, sometimes with a coffin. Other state officials told us they were physically pushed or verbally threatened by attendees during that case. During one agenda meeting, a protestor announced the cities in which some of the commissioners and staff members lived; their addresses were also posted online.

Commissioners told us they have little recourse to act when their meetings are disrupted. This is because, in 2017, the Minnesota Supreme Court held that the statute that authorized law enforcement to charge individuals with disorderly conduct for disrupting a public meeting was overly broad and unconstitutional.<sup>20</sup> In fact, in the three meetings mentioned previously, law enforcement was present to ensure public safety but did not step in to stop the protests (at least to the extent that law enforcement actions were captured in official videos of the meetings). Rather, the PUC chair either regained control or adjourned those meetings.

## Other Meeting Issues

Finally, we reviewed other aspects of PUC's meetings and considered the extent to which they facilitate public participation.

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### The Public Utilities Commission's meetings are not easily accessible to the general public.

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...we need to have regulatory agencies that invite that public discourse, even with folks that aren't familiar.

— A Stakeholder Organization

For members of the public to be able to effectively participate in PUC's meetings, they must have a reasonable understanding of what goes on during them. But, this can be challenging because PUC's meetings are often highly technical and legalistic. One former PUC official that we spoke with described them as “intellectually lethal,” given the number of acronyms used throughout them and their long and cumbersome processes.

PUC meetings can be challenging to follow for other reasons. For example, in some of the meetings that we attended, the commissioners or their staff provided little introduction to the matters at hand, did not define acronyms or technical terms being discussed, or offered little or no instructions to the public about the rules or flow of the meetings. In at least one planning meeting that we attended, the commissioners and other participants did not use the hearing room's microphones, which made it difficult to hear them.

We also found that PUC rarely made paper copies of agendas, staff briefing papers, or other key materials available to the public at the meetings. Links to these materials are available on the PUC website or on eDockets for agenda meetings, but not most planning meetings. The Open Meeting Law requires PUC to make at least one copy of any printed meeting materials being discussed by the commission available for the public to review during that meeting.<sup>21</sup> In at least one planning meeting that we attended, PUC did not make some printed meeting materials available to the



The lack of use of everyday language in the process can prevent those without a strong high school or college-level education from comprehending the proceedings. This makes it difficult for the public to not only participate in the process but to even understand what the process is about.

— A Member of the Public

<sup>20</sup> State v. Hensel, 901 N.W.2d 166 (Minn. 2017).

<sup>21</sup> Open Meeting Law, *Minnesota Statutes* 2019, 13D.01, subd. 6.

public. Further, in at least one planning meeting that we attended in which PUC did make printed materials available to the public, those materials were not located at the entrance to the hearing room, but rather at the front table where the commissioners sit and where the public may not see them.

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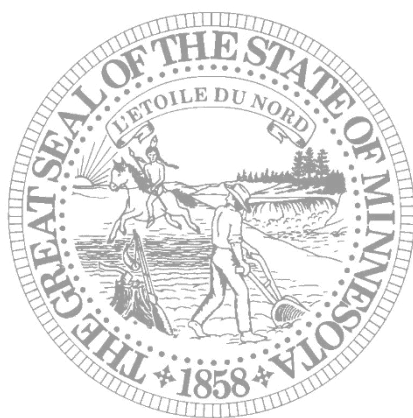
## **RECOMMENDATION**

**The Public Utilities Commission should adopt practices to make its meetings more accessible to the general public.**

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PUC should adopt practices that would make it easier for members of the public to observe, follow, and otherwise participate in its meetings. For example, PUC could provide brief, plain-language introductions to agenda items, define acronyms and key terms in briefing papers, or provide a glossary of key terms or a “frequently asked questions” page on its website. PUC could also provide a few paper copies of agendas, briefing papers, or other important handouts at the entrance to the hearing rooms. It could also use microphones at planning meetings to make it easier for the public to hear.

Finally, PUC could consider reserving the first portion of Tuesday planning meetings for public comments about non-pending matters. As one stakeholder said, “We find it necessary to resort to protests and other outside activities because PUC, while ostensibly offering a forum, does not listen to us....”



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# Chapter 5: Line 3 Pipeline Project

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The Legislative Audit Commission selected this topic for evaluation, in large part, because of concerns about how the Public Utilities Commission (PUC) handled public participation in the Line 3 pipeline case. As a result, in this chapter, we look more closely at that case.

We begin the chapter with a brief description of the Line 3 pipeline project. In the remainder of the chapter, we describe the chronology of the major public participation opportunities offered during the case, from the early public meetings and hearings that PUC’s partner agencies led, to the agenda meetings where the PUC commissioners voted to approve the project. We also discuss participation issues that we identified and offer recommendations for changes.<sup>1</sup>

## Project Background

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Enbridge, a Canadian corporation, owns a set of pipelines that deliver crude oil through Minnesota. These pipelines mostly run parallel to one another from the North Dakota border, through a number of northern Minnesota cities and counties, between the White Earth and Red Lake American Indian reservations, through the Leech Lake and Fond du Lac American Indian reservations, to Superior, Wisconsin.<sup>2</sup>

In 2013, Enbridge submitted an application to PUC to construct a new pipeline, called Sandpiper.<sup>3</sup> Unlike its other pipelines in Minnesota, the company proposed to have the Sandpiper pipeline travel through a largely new corridor.<sup>4</sup> In 2015, while the Sandpiper application was pending before PUC, Enbridge submitted another application, this time to replace one of its existing pipelines, called Line 3. Enbridge proposed to replace its Line 3 pipeline with a larger one and locate it—not in the existing corridor—but in the same one proposed to hold the Sandpiper line.

Among other things, the route that Enbridge proposed for the Line 3 pipeline crossed 12 counties and the watersheds containing the headwaters to the Mississippi River and

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<sup>1</sup> The purpose of this chapter is to discuss PUC’s public participation processes in the Line 3 case. In this chapter, we do not evaluate the merits of arguments made by parties to the case nor do we evaluate PUC’s regulatory decisions in this case. We also do not provide a comprehensive chronology of events in the case, such as the various lawsuits related to the case.

<sup>2</sup> The pipeline corridor also crosses territory ceded by tribes in treaties with the U.S. Government, on which certain tribes assert “usufructuary” rights to hunt, fish, and gather. In this report, we use the term “tribe” when referring to any of the six bands that compose the Minnesota Chippewa Tribe or any of the other federally recognized American Indian tribes whose reservations are located within Minnesota’s borders. For more about usufructuary rights, see *Minnesota et al. v. Mille Lacs Band of Chippewa Indians et al.*, 526 U.S. 172 (1999).

<sup>3</sup> Williston Basin Pipeline LLC, a wholly owned subsidiary of Marathon Petroleum Corporation, was a partner with Enbridge in the Sandpiper project and application.

<sup>4</sup> The portion of the pipeline proposed to be built in a new corridor ran between the cities of Clearbrook and Carlton.



Lake Superior.<sup>5</sup> Although it avoided any tribal reservations, it crossed land ceded by American Indian tribes in treaties with the U.S. Government, on which some tribes maintain certain rights. Exhibit 5.1 shows Enbridge's existing pipeline corridor, the new Line 3 route proposed by Enbridge, and the new Line 3 route that PUC ultimately approved.

Because the Sandpiper and Line 3 pipeline cases were pending at the same time and involved the same corridor, PUC combined certain aspects of the two cases. When Enbridge later withdrew the Sandpiper application, the Line 3 application moved forward on its own. Because the cases were connected for a period of time, we discuss how some public participation issues in the Sandpiper case affected participation in the Line 3 case.



### Approval Needed

Enbridge needed the following approval from PUC before it could construct the Line 3 pipeline.

- **Certificate of Need:** PUC would need to certify whether the pipeline was needed.
- **Route Permit:** If the commission determined the pipeline was needed, then it had to approve a route for the pipeline.

To build the Line 3 pipeline, Enbridge needed PUC to approve two applications: (1) an application for a “certificate of need,” which would affirm that the pipeline was needed, and (2) an application for a “route permit,” which would determine where the pipeline could be located.<sup>6</sup> PUC was required to grant the certificate of need if the application met a variety of criteria enumerated in law.<sup>7</sup> Before PUC could approve either the certificate of need or route permit, it had to approve whether an environmental review

conducted by the Department of Commerce adequately summarized the potential impacts associated with each application.<sup>8</sup> In addition, PUC was required by law to refer the case to an administrative law judge within the Office of Administrative Hearings.<sup>9</sup> The administrative law judge held “contested case” hearings to develop the record for the case.<sup>10</sup>

<sup>5</sup> The route proposed by Enbridge crossed Aitkin, Carlton, Cass, Clearwater, Crow Wing, Hubbard, Kittson, Marshall, Pennington, Polk, Red Lake, and Wadena counties. The existing Line 3 pipeline also crosses Beltrami, Itasca, and St. Louis counties, but not Wadena or Crow Wing counties.

<sup>6</sup> *Minnesota Statutes* 2019, 216B.243, subd. 2; 216B.2421, subd. 2(4); and 216G.02, subd. 2.

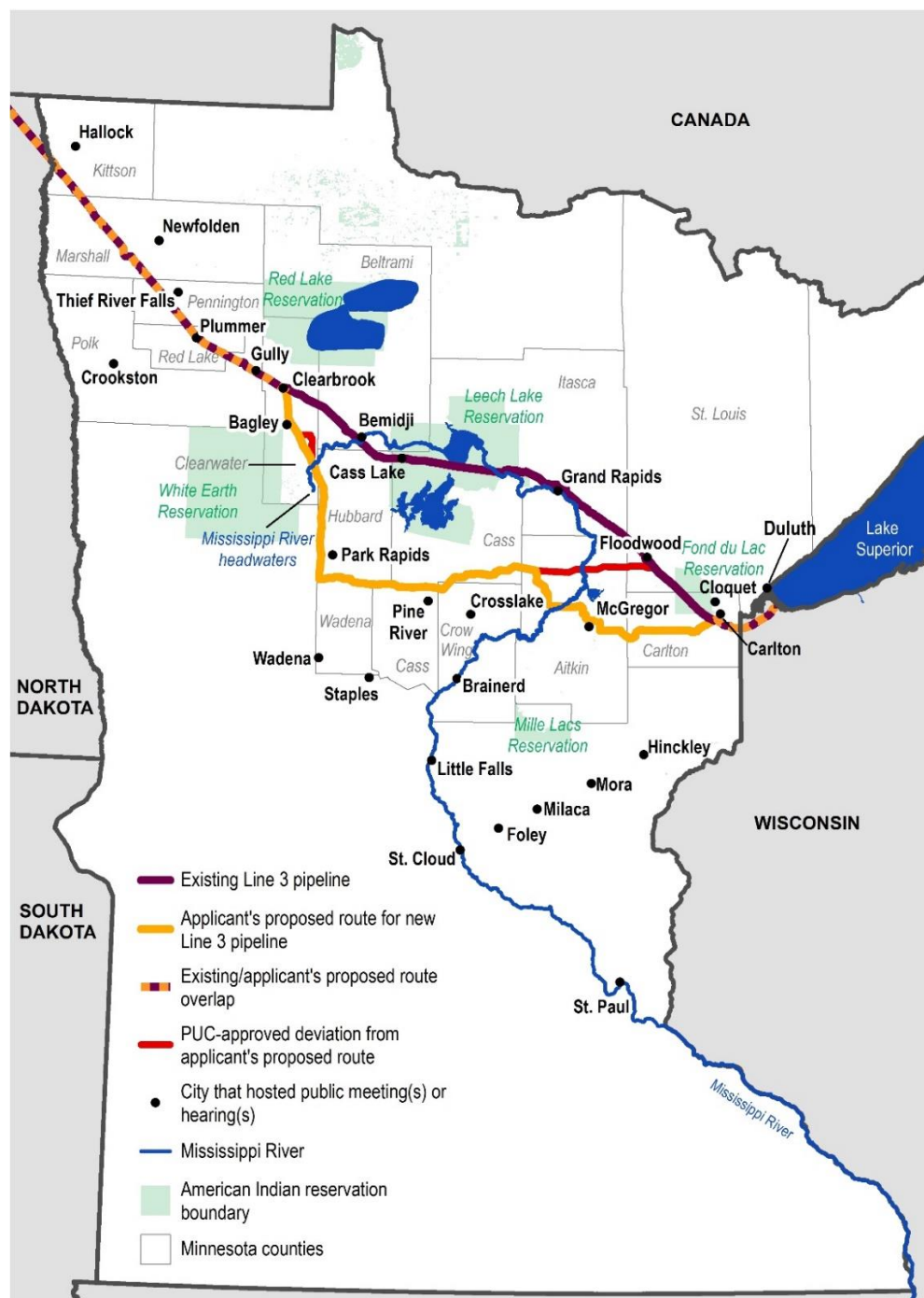
<sup>7</sup> To obtain a certificate of need, the project needed to meet various criteria in law, including those listed in *Minnesota Statutes* 2019, 216B.243; *Minnesota Rules*, 7853.0130, published electronically November 13, 2003; and others. To obtain a route permit, the project needed to meet criteria in *Minnesota Statutes* 2019, 216G.02, subds. 2 and 3(4); *Minnesota Rules*, 7852.1900, published electronically August 21, 2007; and others.

<sup>8</sup> We use the term “environmental review” generically to refer to a number of different types of environmental reviews. Environmental reviews consider potential impacts to the natural environment, as well as potential economic, employment, and sociological impacts. In the Line 3 case, PUC combined the environmental reviews for the certificate of need and route permit applications into a single review, which resulted in an “environmental impact statement.” We use the term “environmental report” to refer generically to the written environmental impact statement. *Minnesota Environmental Policy Act*, *Minnesota Statutes* 2019, 116D.04, subds. 2a-2b; and *Minnesota Rules*, 4410.4400, subps. 1 and 24, published electronically November 30, 2009; and 7852.1500, published electronically August 21, 2007.

<sup>9</sup> *Minnesota Statutes* 2019, 216B.243, subd. 4; and 216G.02, subd. 3(b)(3); and *Minnesota Rules*, 7852.1700, published electronically August 21, 2007; and 7853.0200, subp. 5, published electronically November 14, 2003.

<sup>10</sup> “Contested case” hearings are a specific type of proceeding in which an administrative law judge develops the record for a case. As defined in *Minnesota Statutes* 2019, 14.02, subd. 3, “‘contested case’ means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.”

## Exhibit 5.1: The existing Line 3 pipeline and the proposed new route both traverse northern Minnesota.



NOTES: This map shows the cities that hosted at least one public meeting and/or hearing as part of the Public Utilities Commission's (PUC's) Line 3 proceedings. Most of these cities are located along the applicant's proposed route (shown on the map) or along a proposed alternative route (not shown on the map). Some of the cities shown on this map also hosted a public meeting and/or hearing during PUC's Sandpiper proceedings. The city of McIntosh (not shown) hosted a public meeting as part of the Sandpiper proceedings, but not as part of the Line 3 proceedings. The city of St. Cloud was scheduled to host a Line 3 hearing, but that hearing was canceled; the city hosted a Sandpiper hearing. This map does not show all of the American Indian reservations in Minnesota; it shows only the reservations of the tribes that were parties to the Line 3 case.

SOURCE: Office of the Legislative Auditor.

## Proceedings with Partner Agencies

Many of the public participation opportunities in the Sandpiper and Line 3 cases were administered by or with PUC's partner agencies—the Department of Commerce and the Office of Administrative Hearings.<sup>11</sup> We describe those opportunities in this section.

### Public Meetings

The Department of Commerce's Energy Environmental Review and Analysis (EERA) unit was responsible for conducting the environmental reviews for the Sandpiper and Line 3 projects on behalf of PUC.<sup>12</sup> As part of those reviews, the unit was required to solicit input from the public for PUC about the potential impacts of the projects.<sup>13</sup>

**Between 2014 and 2017, the Department of Commerce held dozens of public meetings related to the environmental reviews of Sandpiper and Line 3.**



#### Public Meetings

The public meetings for Line 3 involved:

1. An open house
2. An open-mic portion

During both parts, members of the public could ask questions and provide comments regarding the environmental review.

The Department of Commerce held 56 public meetings in 26 municipalities to gather input during the environmental reviews of Sandpiper and Line 3; 49 of those public meetings related to Line 3.<sup>14</sup> Some of the meetings officially were led both by Department of Commerce *and* PUC staff, while others were officially led only by Department of Commerce staff.<sup>15</sup> For those held jointly with PUC, a purpose of the meetings was for PUC to provide information to the public about the review process and the proposed project and to answer questions from the public.<sup>16</sup>

Each of the public meetings involved (1) an open house and (2) an “open-mic” portion. During the open house, attendees could view information displayed by the applicant and state agencies about the proposed projects and the state's approval processes. Attendees could also ask questions of the applicant and of state officials. In addition, attendees could provide written comments about how the projects could impact them, their communities, or the environment.<sup>17</sup> Department of Commerce officials told us the open

<sup>11</sup> See Chapter 2 for more about PUC's relationship with its partner agencies.

<sup>12</sup> Under the law, PUC is technically the “responsible government unit” in charge of the environmental reviews of pipeline projects.

<sup>13</sup> *Minnesota Rules*, 4410.2100, subp. 3B, published electronically August 20, 2018; 4410.2600, subp. 2; 4410.2800, subp. 2; and 4410.4400, subp. 24, published electronically November 30, 2009.

<sup>14</sup> Throughout this report, we use the term “public meeting” generically to refer to various types of meetings that PUC or the Department of Commerce hold to provide information to the public or to receive information from the public as part of the process for reviewing energy facility applications.

<sup>15</sup> PUC's commissioners typically do not attend public meetings such as these.

<sup>16</sup> *Minnesota Rules*, 7852.1300, published electronically August 21, 2007.

<sup>17</sup> Members of the public could also submit written comments outside of the public meetings during a “public comment period.”

houses provided an important opportunity for attendees to learn about the proposed project and ask questions without having to speak in front of a large crowd.

At the start of the open-mic portion of the meetings, officials announced some “ground rules,” which we show in the box at right. The applicant and state officials also gave presentations about the project and the state’s review processes. Then, attendees could stand up and ask questions or provide comments.<sup>18</sup> Department of Commerce officials told us that attendees were usually allotted about five minutes to speak and, in general, could speak in the order in which they signed up. But, officials said they asked attendees who had spoken at previous

meetings to wait to speak again until all new attendees had a chance to do so. Officials said, if there was still time available, they allowed attendees a second opportunity to speak at a given meeting.

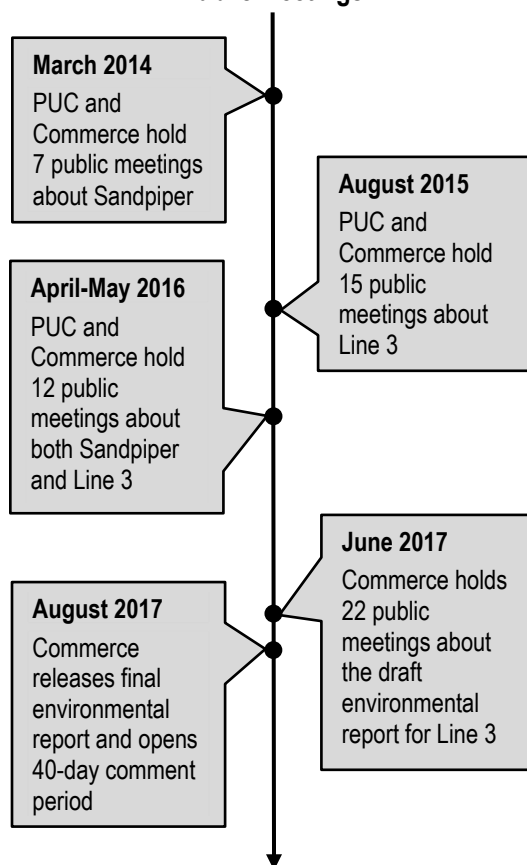


#### “Ground Rules”

At the early meetings, Commerce representatives announced “ground rules” for attendees, which included:

- Not obstructing attendees’ views
- Not carrying signs on sticks
- Turning cell phones to vibrate
- Being respectful
- Not addressing the audience
- Not interrupting the speaker
- Being quiet so the court reporter making the transcript and others could hear

#### Case Timeline: Public Meetings



Department of Commerce officials said they did not impose security checks (such as metal detectors, pat-downs, or bag searches) at these meetings, with the exception of one in Bemidji.<sup>19</sup> Officials told us no attendees were turned away from the meetings due to room-capacity constraints. They also said, with the exception of one meeting, there was sufficient time for all who wanted to speak to do so. (We were not, however, able to independently verify officials’ recollections about these meetings.)

The public meetings occurred in four stages, as the timeline at left shows. In the following sections, we discuss each of those stages and some of the issues that occurred over the course of them. Exhibit 5.1 shows the cities that hosted the public meetings.

### Sandpiper Public Meetings, 2014

The first set of seven public meetings occurred in March 2014.<sup>20</sup> The purpose of these meetings was to provide information about the proposed Sandpiper project and

<sup>18</sup> As we discuss later, at the last set of meetings, all of the available time was dedicated to receiving comments; time was not reserved for answering questions.

<sup>19</sup> Department of Commerce officials told us the venue in Bemidji required the use of metal detectors.

<sup>20</sup> Officially, Department of Commerce and PUC staff were jointly in charge of these meetings.

the state's review process, answer questions, and gather input about the scope of the environmental review. The meetings took place in cities across northern Minnesota along the applicant's proposed route for the Sandpiper pipeline.<sup>21</sup>

We heard a number of concerns about these meetings. For example, officials told us some attendees were confused about why the Department of Commerce was responsible for handling the environmental review, as opposed to the Minnesota Pollution Control Agency or the Department of Natural Resources. Some people were upset that none of the meetings were held on tribal lands, given the project's likelihood to impact several tribes. And, some people were frustrated that the state had not formally consulted with the tribes.

Other critiques we heard stemmed from the fact that both the Department of Commerce and PUC delegated certain logistical responsibilities to applicants (which we discussed in Chapter 2). For example, among other things, Enbridge reserved and rented the venues for the public meetings. State officials and stakeholders told us this caused a number of issues and frustration among stakeholders. Notably, some stakeholders told us they were not allowed to set up display materials in the open houses alongside the applicant's and state agencies' display materials. In Chapter 2, we recommended that PUC stop delegating logistical responsibilities for public meetings to the applicant because it gives the applicant too much actual or perceived control over the state's processes.

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### **Members of the public could submit project alternatives, but this was not an easy task.**

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In the public meetings, attendees could submit alternatives for the Department of Commerce to study in the environmental review. For example, they could suggest alternatives to the project, such as using alternative shipping methods, using existing pipelines instead of building a new one, or using alternative routes. Participants submitted a variety of alternatives. For example, one group submitted a route alternative that paralleled existing highway corridors to avoid the headwaters to the Mississippi River.

But, it can be challenging for members of the public to submit viable alternatives. PUC may only consider route alternatives that meet specific criteria in law.<sup>22</sup> For example, when members of the public submit route alternatives, they must submit aerial photographs or maps and data and analysis of the potential impacts to the proposed alternative. These requirements, which are in law, can be both technically challenging and resource intensive.

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<sup>21</sup> These seven meetings took place in Carlton, Clearbrook, Crookston, McGregor, McIntosh, Park Rapids, and Pine River. Later, in January 2015, an administrative law judge from the Office of Administrative Hearings held five public hearings as part of PUC's review process for the Sandpiper project. Those hearings took place in Bemidji, Crookston, Duluth, St. Cloud, and St. Paul. We discuss the role of administrative law judges later in this chapter.

<sup>22</sup> *Minnesota Rules*, 7852.1400 and 7852.2600-7852.2700, published electronically August 21, 2007.

### Line 3 Public Meetings, 2015

The second set of public meetings occurred in August 2015.<sup>23</sup> The purpose of these 15 meetings was the same as for the previous set, except that they related to the Line 3 project, not Sandpiper.<sup>24</sup>

Department of Commerce officials told us that, in response to issues they encountered at the first set of Sandpiper meetings, they made adjustments to their practices for this set of Line 3 meetings. For example, they more than doubled the number of meetings that they held (15 compared to 7) and held two of the meetings on tribal reservations. They allowed stakeholder groups (not just the applicant and state officials) to set up display materials during the open houses. They also provided better information to the public about how to participate in the process by organizing folders with handouts that contained information about how to submit a route alternative, comment forms, and maps of the applicant's proposed route and the route alternatives suggested during the Sandpiper public meetings, among other things.

Despite these changes, officials said tensions continued to run high during the public meetings. Stakeholders on various sides of the issue told us they felt intimidated by stakeholders on opposing sides. Some stakeholders told us they felt that their technical comments were lost in the “for” or “against” dichotomy that emerged in the case. And, some stakeholders told us they felt that the comments they submitted were ignored by PUC.

### Sandpiper and Line 3 Public Meetings, 2016

The third set of public meetings, which took place in April and May of 2016, related to *both* Sandpiper and Line 3. The Department of Commerce and PUC held an additional 12 public meetings after PUC combined the environmental reviews for the two projects. The purpose of these meetings was the same as for the previous two sets.<sup>25</sup>

Department of Commerce officials told us that, given the feedback they received and the issues they encountered, they continued to make adjustments for this third set of meetings. For example, this time they hired a facilitator. They also asked staff from the Minnesota Pollution Control Agency and the Department of Natural Resources to attend the meetings and explain their roles, which they did. And, officials said they asked the applicant, which they said typically brought numerous representatives to the meetings, to bring fewer. Some stakeholders said they found these large contingents of representatives intimidating.

As the public meetings progressed, Department of Commerce officials also began conducting formal consultation and outreach to several tribes that were directly affected

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<sup>23</sup> These 15 meetings took place in Bagley, Carlton, Clearbrook, Gully, Hallock, McGregor, Newfolden, Park Rapids, Pine River, Plummer, and Thief River Falls. Some cities hosted more than one meeting.

<sup>24</sup> Officially, Department of Commerce and PUC staff were jointly in charge of the meetings.

<sup>25</sup> These 12 meetings took place in Bagley, Bemidji, Carlton, Crookston, Hinckley, Little Falls, McGregor, Park Rapids, St. Paul, and Thief River Falls. Some cities hosted more than one meeting. Officially, Department of Commerce and PUC staff were jointly in charge of the meetings.

by the projects.<sup>26</sup> We did not evaluate the Department of Commerce's efforts to consult with affected tribes.

Although Enbridge eventually withdrew its Sandpiper application, the Department of Commerce used the information that it collected during the 2014, 2015, and 2016 public meetings to define the scope of the environmental reviews for Line 3. As part of the scoping process, Department of Commerce officials summarized and presented to PUC some of the alternatives that members of the public had submitted during the public meetings. PUC's commissioners directed department staff to study a subset of these alternatives in the environmental review.

In May 2017, the Department of Commerce released to PUC and the public a draft report of its environmental review for Line 3.

### **Line 3 Public Meetings, 2017**

In June 2017, following the release of the draft environmental report, the Department of Commerce held a final set of 22 public meetings to solicit input about that draft report.<sup>27</sup> This time, it held some of the public meetings along the route alternatives proposed by the public and approved for review by PUC, in addition to along the route proposed by Enbridge.

The Department of Commerce made even more changes to its practices for this last set of public meetings. Notably, it contracted with technical consultants with specific experience handling public engagement in controversial energy projects. The consultants facilitated the public meetings and handled the logistics, such as choosing and renting the venues and coordinating with local law enforcement to provide security.

Also, instead of using some of the open-mic portion of the meetings to respond to questions, the Department of Commerce dedicated all of the available time to receiving public comments. Department of Commerce officials told us they had mixed feelings about this decision. On one hand, they said this format did not allow the meetings to function as an exchange of information. As a result, they thought some attendees left the meetings misinformed about the pipeline project or the state's process. On the other hand, this format allowed more time for public comments.

In addition, the Department of Commerce provided a second court reporter who sat outside of the meeting room to take oral comments from members of the public. One official told us this provided a valuable opportunity for individuals to submit comments into the record without having to speak in front of a large, tense crowd.

In August 2017, the Department of Commerce released the final draft of the environmental report.<sup>28</sup> The lengthy report included attachments with the written

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<sup>26</sup> Department of Commerce officials reached out to the Fond du Lac, Mille Lacs, Leech Lake, Red Lake, and White Earth tribes. In Chapter 2, we discuss PUC's work with tribal governments.

<sup>27</sup> These 22 meetings took place in Bagley, Bemidji, Brainerd, Cass Lake, Cloquet, Floodwood, Foley, Grand Rapids, Gully, Hallock, Hinckley, Little Falls, McGregor, Milaca, Mora, Newfolden, Thief River Falls, Park Rapids, Plummer, St. Paul, Staples, and Wadena. Officially, only Department of Commerce staff led these meetings, but PUC staff attended them and provided support.

<sup>28</sup> The Department of Commerce later revised the final environmental report.

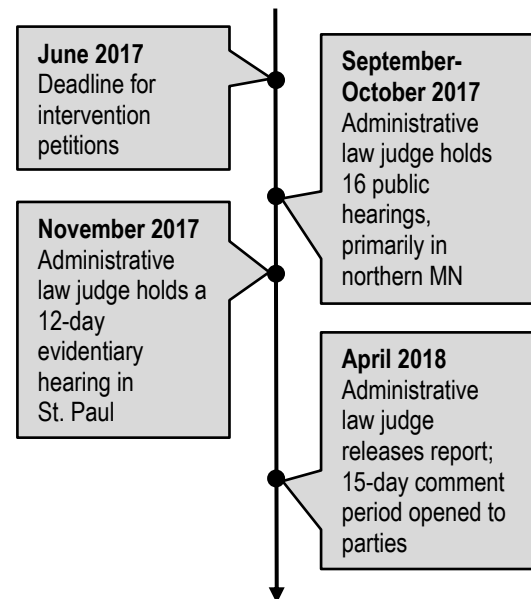


comments and transcripts of oral comments that the public had provided during the last set of public meetings and the associated public comment period. That month, PUC opened a 40-day comment period for the public to submit comments about the adequacy of the final draft of the environmental report.

## Contested Case Hearings

The Office of Administrative Hearings oversaw the next major opportunity for the public to actively participate in the Line 3 case. This opportunity came in the form of contested case hearings. Contested case hearings are a specific type of proceeding that involve disputed facts and some government action that has the ability to affect individuals' rights.<sup>29</sup> An administrative law judge from the Office of Administrative Hearings presides over contested case hearings. During the hearings, parties and other members of the public may help develop the record for a case. PUC then must base its decision on that record. In this section, we describe the three stages of the Line 3 contested case hearings: (1) prehearing activities, (2) public hearings, and (3) evidentiary hearings.

### Case Timeline: Contested Case Hearings



## Prehearing Activities

Before the public and evidentiary hearings began, the administrative law judge assigned to the Line 3 case made a series of decisions about how they would be conducted. During prehearing conferences or through written comments to the judge, stakeholders could and did provide input about various issues, such as the format and location of the upcoming hearings.

At this stage, the judge also ruled on petitions to intervene in the case.<sup>30</sup> The judge granted numerous petitions to intervene and denied several others, ruling that petitioners' interests were already represented by others, or that their petitions did not meet legal or procedural requirements. Five tribes, a pair of landowners, two labor organizations, and several environmental groups (including three that formed in response to the Sandpiper and/or Line 3 cases) successfully intervened in the case,

<sup>29</sup> "Contested case" hearings are a specific type of proceeding in which an administrative law judge develops the record for a case. As defined in *Minnesota Statutes* 2019, 14.02, subd. 3, "'contested case' means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."

<sup>30</sup> As we discussed in Chapter 1, "intervention" is the process by which a person or entity may petition to become a party to a case.



among some others. Many of these intervenors also intervened in the Sandpiper case. Several intervenors represented themselves without the aid of legal counsel.

In addition to these intervenors, two units within the Department of Commerce with very different roles also participated in the contested case hearings. The department's Energy Environmental Review and Analysis unit participated because it produced the environmental report of the project. The department's Energy Regulation and Planning unit intervened as a party to the case, which is its right in law.<sup>31</sup> As we discussed in Chapter 2, this second unit analyzes whether proposed energy facility projects are needed and in the public interest.

In advance of the hearings, the judge asked all of the parties to prefile testimony and documents into the record. Enbridge submitted testimony about why it needed to replace the existing Line 3 pipeline. Intervenors submitted testimony and documents about various issues. For example, among other things, the Fond du Lac Band of Lake Superior Chippewa submitted testimony about how the proposed project could affect the band's cultural practices with wild rice and rights guaranteed by treaties with the U.S. Government. The organization, Friends of the Headwaters, submitted testimony about how the new pipeline corridor could affect the sensitive lakes that form the headwaters to the Mississippi River. Two labor organizations submitted testimony about how the proposed project could affect the state's construction industry.

The Department of Commerce's Energy Regulation and Planning unit submitted testimony that Enbridge did not meet the burden of proof to show that the pipeline was needed or in the public interest; the unit concluded that the potential costs to the public outweighed the benefits. The Department of Commerce's Energy Environmental Review and Analysis unit submitted the environmental report.

## Public Hearings

After the parties submitted prefiled testimony and documents into the record, the administrative law judge held a series of public hearings.

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### **In 2017, an administrative law judge held 16 public hearings for the Line 3 case.**

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In September and October of 2017, the administrative law judge held public hearings in northern Minnesota along the applicant's proposed route and some of the proposed route alternatives.<sup>32</sup> At the hearings, members of the public could submit oral or written testimony into the record. For example, they could testify about why they thought the pipeline was needed or not needed, why PUC

An estimated  
**5,500**  
people attended the public  
hearings for Line 3.

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<sup>31</sup> *Minnesota Statutes* 2019, 216A.07, subd. 3, gives the Department of Commerce the right to intervene in any PUC case.

<sup>32</sup> The hearings were scheduled to take place in northern Minnesota, in the cities of Bemidji, Crosslake, Duluth, Grand Rapids, Hinckley, McGregor, Thief River Falls, and St. Cloud, as well as in St. Paul. Exhibit 5.1 shows the locations of these cities. Each city was scheduled to host two public hearings.

should choose one route over another, or why the environmental review was adequate or inadequate.<sup>33</sup>

The judge used a lottery system to determine the speaking order of attendees at the public hearings, which prevented the need for attendees to show up early to stand in line. The judge also asked attendees who had spoken at previous hearings to wait to speak until new speakers had an opportunity to do so. According to the judge's report, an estimated 5,500 people attended the hearings and 724 people spoke at them, resulting in around 2,600 pages of transcripts.<sup>34</sup> PUC's commissioners typically do not attend public hearings, although some told us they did attend some of these hearings.

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**The notices for the Line 3 public hearings were not easily accessible and did a poor job explaining how the public could be involved in the process.**

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State law requires PUC to issue a notice when it orders a contested case hearing.<sup>35</sup> As required by law, PUC issued two sets of notices for the Line 3 hearings—one in 2015 that pertained to the certificate of need portion of the hearings and another in 2016 that pertained to the route permit portion of the hearings.<sup>36</sup> The law required PUC to include certain information in the 2016 notice about how the public could participate in the

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<sup>33</sup> Although the public was able to testify about the adequacy of the environmental report during the public hearings, the scope of the issues under the judge's purview was limited to whether or not PUC should grant a certificate of need and a route permit. PUC had asked a second administrative law judge to review and write a report about whether or not PUC should find the environmental review that the Department of Commerce produced in August 2017 as adequate. This second administrative law judge did not hold public or evidentiary hearings in association with that report, which was released in early November 2017. However, parties were able to submit written briefs to the second administrative law judge about the adequacy of the environmental review; they could also submit written exceptions to the judge's report. Then, when PUC considered whether or not to find the environmental review adequate, parties were able to make oral arguments to PUC in an agenda meeting in December 2017. See State of Minnesota, Office of Administrative Hearings, "In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border: Report of the Administrative Law Judge," Docket Nos. 14-916 and 15-137, November 1, 2017.

<sup>34</sup> State of Minnesota, Office of Administrative Hearings, "In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Line 3 Project in Minnesota from the North Dakota Border to the Wisconsin Border: Findings of Fact, Conclusions of Law, and Recommendation," Docket Nos. CN-14-916, CN-15-340, and PPL-15-137, April 23, 2018, p. 59.

<sup>35</sup> *Minnesota Rules*, 1400.5600, published electronically August 6, 2013, enumerates the information that PUC must provide in hearing notices for pipeline certificate of need cases, while *Minnesota Rules*, 1405.0500, published electronically August 21, 2007, enumerates the information that PUC must provide in notices for hearings in pipeline route permit cases. These two sets of rules contain different requirements. The latter requires PUC to provide more information about how the general public may participate in the hearings. See also *Minnesota Rules*, 7852.1700, published electronically August 21, 2007; and 7853.0200, subp. 5, published electronically November 14, 2003.

<sup>36</sup> Minnesota Public Utilities Commission, "In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border: Order Finding Application Substantially Complete and Varying Timelines; Notice of and Order for Hearing," Docket No. 14-916, August 12, 2015. Minnesota Public Utilities Commission, "In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border: Notice of Hearing," Docket No. 15-137, February 1, 2016.

hearings, as the box at right shows.<sup>37</sup> In 2017, a few weeks before the hearings began, PUC issued a subsequent notice that pertained to both parts of the case.<sup>38</sup>

Although the notices for the hearings contained most information required by law, they did a poor job educating the public about how to effectively participate in the hearings. First, the initial 2015 and 2016 hearing notices that PUC issued were published within larger PUC orders that were posted in eDockets, not in plain language on PUC's web calendar or in a press release.<sup>39</sup> As required, the 2016 notice contained important information about how the public could participate in the hearings, such as about the right to intervene. But, as we discussed in Chapter 3, it can be challenging for the general public to find information in eDockets. As a result, this information was not as accessible, and thus not as helpful, as it could have been in facilitating participation in the hearings.

Second, although PUC published the 2017 notice in a location that was likely more accessible to the general public (PUC's web calendar), this notice poorly described how the public could effectively participate in the hearings. For example, the notice stated: "The purpose of the public hearing is to compile a full record for the Commission to consider in making a final decision on the Line 3 Project certificate of need and route permit applications." This statement does not identify the criteria that the commission must use to make its decisions, which should be the basis for public testimony. It also does not identify what kind of testimony or evidence would be within or outside of the scope of the hearings. When we asked state officials from PUC and the Department of Commerce about the



**Among other things, the law requires public hearing notices for certain types of cases to contain:**

- ✓ A description of the proposed project
- ✓ A list of the existing parties with their contact information
- ✓ The date, time, and place for each prehearing conference and hearing, including when members of the public and parties may testify and question testifiers
- ✓ Information about the right to intervene, a description of the responsibilities of intervenors, the procedures with which intervenors must comply, and how the rights of intervenors differ from those of other participants
- ✓ A statement advising all persons, not just parties, that they may be represented by legal counsel
- ✓ The place where persons may review materials, including prefiled testimony, and the date when it will be available
- ✓ The name, contact information, and function of the public advisor
- ✓ The name and contact information for the administrative law judge assigned to the case
- ✓ The name and contact information of the PUC regulatory analyst assigned to the case
- ✓ The name and contact information for the staff person at the Attorney General's office who may be contacted for advice on PUC's procedures

— **Minnesota Rules, 1405.0500**

<sup>37</sup> *Minnesota Rules*, 1405.0500 and 7852.1700, published electronically August 21, 2007.

<sup>38</sup> Minnesota Public Utilities Commission, "Notice of Public and Evidentiary Hearings for the Proposed Line 3 Replacement Project," Dockets No. CN-14-916 and PPL-15-137.

<sup>39</sup> "eDockets" is an electronic system that houses the commission's case records and is available to the public through the Department of Commerce's website.

scope of the testimony or evidence that the public could provide, they gave us conflicting responses.

The 2017 notice also did not contain some relevant information that was provided in the 2016 notice, such as the name and contact information for PUC's public advisor (which had changed since the initial notice went out) or for a staff person at the Attorney General's office who could provide advice on PUC's procedures. State rules do not explicitly require PUC to include in amended notices all of the information required in prior notices. But, expecting the public to be aware of and seek out earlier notices in eDockets in order to learn how to participate in the process does not facilitate informed participation.

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### **One of the Line 3 public hearings was disrupted by protestors.**

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When the Line 3 public hearings took place in 2017, tensions were extremely high among the various participants. One of the last scheduled hearings took place during the evening at a convention center in Duluth. Local law enforcement was present at that hearing, although neither PUC nor the administrative law judge assigned to the case arranged for law enforcement to provide security at the public hearings.

The judge's report to PUC stated that some attendees protested during that Duluth hearing and acted in a "loud, threatening, and boisterous manner." About two hours into the hearing, some attendees approached the tables where the judge, court reporter, Department of Commerce staff, and Enbridge representatives sat, and one attendee confiscated a microphone. Having lost control of the hearing, the judge adjourned it early.

After this incident in Duluth, the judge held two more hearings in the city of Crosslake. According to PUC, city officials canceled the last two hearings that were scheduled to occur in St. Cloud due to security concerns.

### **Evidentiary Hearings**

In November 2017, after the public hearings concluded, the judge held a 12-day evidentiary hearing over the course of three weeks in a PUC hearing room in St. Paul. During the evidentiary hearing, the parties made oral arguments and cross-examined each other's witnesses. The evidentiary hearing was open for the public to attend.

After the conclusion of the evidentiary hearing, the parties submitted briefs to summarize their positions. Then, the judge issued a 368-page report.<sup>40</sup> The report summarized for PUC the public comments provided during the hearings and provided findings of facts, conclusions, and a recommendation. PUC then opened a 15-day

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<sup>40</sup> State of Minnesota, Office of Administrative Hearings, "In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Line 3 Project in Minnesota from the North Dakota Border to the Wisconsin Border: Findings of Fact, Conclusions of Law, and Recommendation," Docket Nos. CN-14-916, CN-15-340, and PPL-15-137, April 23, 2018.

comment period, as required by law, in which parties could submit exceptions to the judge's report.<sup>41</sup>

## Agenda Meetings

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The next stage of the Line 3 proceedings was a series of agenda meetings. As we discussed in Chapter 4, in agenda meetings, PUC's five commissioners publicly deliberate and make decisions about the cases before them.

In this section, we describe the timeline of the final Line 3 agenda meetings. Then, we discuss various participation issues that we identified in those agenda meetings. We conclude with some recommendations for PUC.

### Timeline

By the time the contested case hearings for Line 3 concluded and the administrative law judge's report was released, PUC's commissioners had already discussed the Line 3 case in 16 different agenda meetings. In those agenda meetings, which started in 2015, PUC made various procedural or substantive decisions about the case.

From late 2017 through early 2018, PUC made a series of key decisions that prepared it to make final decisions about the case. In December 2017, PUC met and found the environmental review that the Department of Commerce had released in August to be inadequate. Then, in February 2018, the Department of Commerce released a revised environmental report and PUC opened a 15-day period for the public to comment on it. The following month, PUC met again and found the revised environmental report to be adequate. Then, in May 2018, the Department of Commerce released a sample route permit; PUC opened a ten-day period in which parties could provide comments on the sample permit. Next, PUC was ready to decide (1) whether to grant the certificate of need, and (2) which route to approve in the route permit. PUC considered these remaining issues in June 2018 over the course of five days, spanning a two-week period.

During the June 2018 agenda meetings, the parties made oral arguments to the commissioners (an opportunity required by rule) and the commissioners asked the parties questions.<sup>42</sup> Members of the general public did not have an opportunity to address the commissioners during these agenda meetings.<sup>43</sup> On the last day of the June 2018 agenda meetings, PUC granted both the certificate of need and the route permit.

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<sup>41</sup> *Minnesota Statutes* 2019, 14.61, subd. 1, requires PUC to provide parties to a contested case an opportunity to file exceptions to an administrative law judge's report before PUC makes its final decision in the case. *Minnesota Rules*, 7829.2700, subp. 1, published electronically June 14, 2016, requires parties to file those exceptions within 15 or 20 days after the administrative law judge's report is released, depending on the type of case.

<sup>42</sup> *Minnesota Rules*, 7829.2700, subp. 3, published electronically June 14, 2016.

<sup>43</sup> As we discussed in Chapter 4, members of the public typically do not have an opportunity to address the commission during agenda meetings.

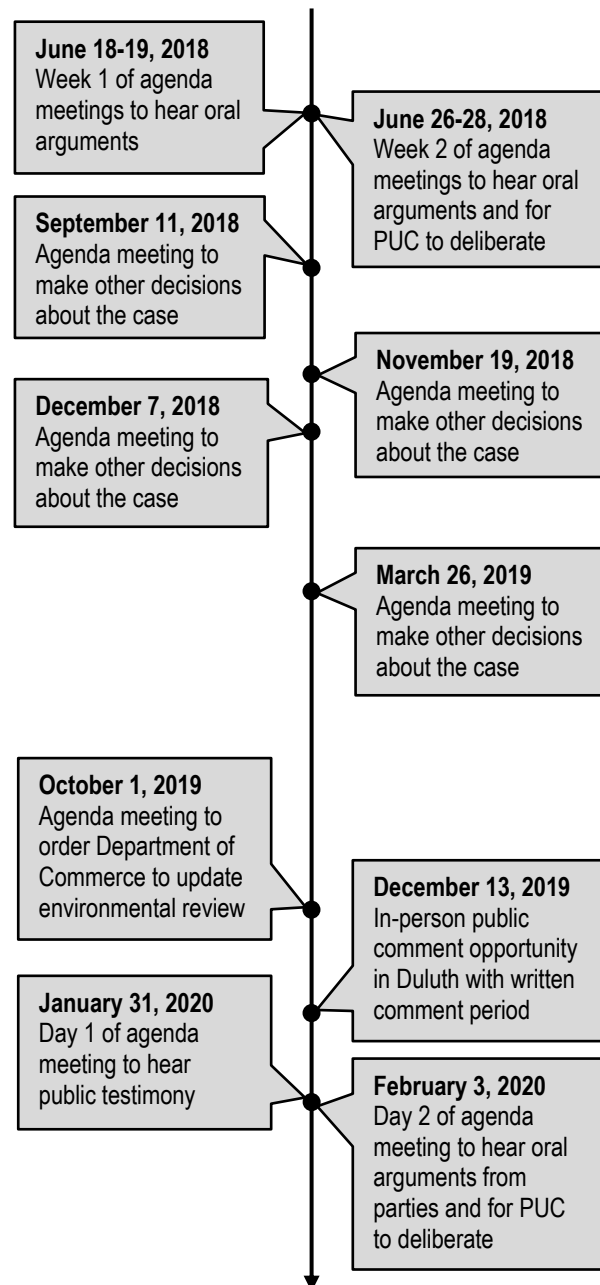
Over the next several months, PUC held four more agenda meetings to make other decisions in the case. For example, the commissioners discussed permit conditions and petitions from intervenors to reconsider the commission's decisions in the case.

In early 2019, several intervenors appealed PUC's decisions to the Minnesota Court of Appeals. In June 2019, the court ruled that the environmental report that the Department of Commerce had conducted and that PUC had approved was inadequate, overturning PUC's decision. As a result, in October 2019, PUC met in another agenda meeting to direct the Department of Commerce to supplement the parts of the environmental report that the court had found inadequate.

Then, in early December 2019, the Department of Commerce released an updated environmental report. Later that month, PUC held what it called a "public comment opportunity," in which members of the public could provide input about the revised environmental report at a public meeting in Duluth. An administrative law judge presided over the event for the commission.

In early 2020, PUC held another agenda meeting over the course of two days to make final decisions about the case. Contrary to its normal practice, PUC set aside the first day of the agenda meeting to hear public comments. On the second day of the agenda meeting, PUC once again heard oral arguments from the parties. PUC then voted to approve the revised environmental report and again grant the certificate of need and route permit.

### Case Timeline: Agenda Meetings



## Participation Issues

Many of the concerns we received from stakeholders throughout this evaluation related to PUC's practices during the Line 3 agenda meetings that took place from mid-2018 through early 2020. In particular, stakeholders expressed frustration about the venue that PUC used for the meetings, PUC's security practices, its admission-ticket procedures, and various other procedures or rules that PUC staff imposed. We discuss these concerns below; we also discuss the extent to which PUC's leadership provided adequate planning and oversight of the meetings.

### Venue and Security

PUC typically holds its agenda meetings on the third floor of the Metro Square Building in downtown St. Paul. The Metro Square building, which is owned by Ramsey County, houses several state or county agencies, including PUC's office space and two PUC hearing rooms. PUC's "Large Hearing Room" seats a total of 173; its "Small Hearing Room" seats a total of 71.

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### **Despite the large amount of public interest in the case, the Public Utilities Commission chose not to use a larger venue for most of the Line 3 agenda meetings.**

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Given the large number of parties and the significant public interest in the case, we asked PUC officials if they considered using a larger venue for the Line 3 agenda meetings. PUC officials told us they considered using an alternative venue for the June 2018 agenda meetings, but ultimately chose not to. They told us they chose to use PUC's Large Hearing Room because (among other reasons) it provided PUC commissioners and staff with easy access to documents related to the case.

An estimated 60 percent of the seats in the Large Hearing Room were reserved for the many parties to the case, PUC staff, members of the press, or others; only around 70 seats were available for members of the general public. PUC used its Small Hearing Room and an auditorium on the building's lower level (which seats 240) for overflow seating. The overflow rooms each contained a screen that livestreamed the agenda meetings for attendees seated there. Members of the public could also livestream the meetings remotely on PUC's website.



In part, some of this could have been alleviated if the commission had chosen a larger venue. But, even having seen the problems at the first meeting, the commission chose to continue using the same venue throughout. This was not lost on the public.

— A PUC Staff Member

Because of the limited seating, PUC used no-cost tickets to manage general admission to the June 2018 agenda meetings (and most of the subsequent Line 3 meetings).<sup>44</sup> Numerous stakeholders, including agency staff, indicated that they thought PUC could have avoided many of the problems it experienced—including issues with the tickets—if it had used a larger venue.



...for the vast majority of these meetings we all had to wait outside. On the sidewalk. In the cold. In the rain. For hours and hours and hours. Folks on both side[s] were willing to do all that to be a witness to a 'public' process.

By limiting access to this process, the PUC pitted us against each other and made many of us question why they were limiting access. The entire experience was competitive, stressful and inaccessible.

It was a tinderbox that could have essentially been avoided by PUC staff getting a large venue and making the public welcome.

— A Member of the Public

PUC officials told us they asked the Minnesota Department of Public Safety to provide security for the June 2018 agenda meetings but the department declined to do so because PUC is not located within the capitol complex. As a result, PUC officials contracted with the St. Paul Police Department to provide security.

After PUC approved the certificate of need and route permit in June 2018, PUC met again in September 2018 to discuss other issues in the case. Protestors disrupted the September 2018 meeting, and the chair had to adjourn it before the commission could vote. As a result, PUC moved the subsequent Line 3 meeting (in November 2018) to a hearing room in the Minnesota Senate Building. Because that meeting was held within

the capitol complex, the Minnesota State Patrol and Capitol Security were able to provide security, in coordination with the Senate Sergeant at Arms. The Senate hearing room not only provided greater security, but also slightly greater capacity than PUC's Large Hearing Room, at 190 seats. We estimate that roughly half of that capacity was available for the general public; the remainder was reserved for parties to the case, PUC staff, members of the press, or others.

PUC returned to its own space for the December 2018 and March 2019 Line 3 agenda meetings, but used the Minnesota Senate Building again for the October 2019 and January/February 2020 meeting.

## General Admission Tickets

As we noted earlier, because limited seating was available in PUC's Large Hearing Room, PUC used tickets to manage admission to most of the Line 3 agenda meetings, starting with the meetings that took place in June 2018. Officials told us the Line 3 case was the first and only case to-date in which it has used admission tickets.

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### The ticketing procedures that the Public Utilities Commission used during the Line 3 agenda meetings caused a number of problems.

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Because the limited tickets were available on a first-come, first-served basis, attendees lined up outside of the Metro Square Building early each morning to get them. For at least one of the meetings, once let into the building, attendees queued in the building's

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<sup>44</sup> PUC used tickets to manage admission for all of the Line 3 agenda meetings that occurred from June 2018 through February 2020, except for the September 2018 meeting.



third-floor foyer and down the back stairwell as they waited for the meetings to begin at 9:30 a.m. PUC staff told us this disrupted some of the building's other tenants, and a few attendees reported feeling unsafe waiting in the stairwell.

PUC officials told us that attendees on “both sides” of the case began “gaming” the ticket procedures. For example, PUC officials (as well as attendees) told us that they observed pipeline proponents arrive early in the morning to stand in line, obtain tickets, enter the hearing room, and then promptly exit with their tickets—leaving their seats empty for the rest of the day. PUC officials also told us they observed both pipeline opponents and proponents controlling or “brokering” stacks of tickets.

PUC initially encouraged attendees to swap tickets with one another to ensure that the hearing room was full. The PUC notice describing the ticket procedures for the June 2018 meetings clearly allowed this practice. It stated:

A particular public ticket is transferable—if the holder wishes to pass the ticket to another member of the public, then that recipient may use the ticket.<sup>45</sup>

But, PUC officials told us they became frustrated when attendees held more than one ticket at a time. The ticket procedures for the June 2018 meetings, however, did not explicitly prohibit this. The procedures stated only, “There will be only one ticket *granted* per person present” [emphasis added].<sup>46</sup> Some pipeline opponents told us they passed tickets off to an organizer when they left for the day. Others said they stood in line for those who could not arrive early enough to get a ticket, such as those driving down from northern Minnesota each morning.



Sometimes people were allowed to leave temporarily to use the restroom, other times doing so meant forfeiting your seat for the day.... The bottom line here is that the process for attending the hearings, and the rules at the hearings themselves, were blatantly unfair and only increased tension between the two sides and with the PUC staff. And most of that could have been avoided if the staff had been more transparent, and chosen a more consistent, fair structure.

— A Member of the Public



Sometimes there was a ticketing process, other times [it was] purely first-come-first-serve. This created an unnecessary competition to see who could get there earlier—to the point that people were lining up outside (in the winter) before sunrise—hours before the hearings began.

— A Member of the Public

We also heard concerns about and observed problems with how PUC handled the tickets. Attendees told us that PUC staff used inconsistent practices regarding the tickets. For example, they said some PUC staff would allow them to leave the room for a break and then reenter using their tickets, while other staff would not. At a Line 3 agenda meeting that we attended in early 2020, we observed numerous reserved seats go unfilled. We also observed that PUC did not have clear plans in place for how staff would handle certain ticket procedures, such as how they would readmit attendees after the commission took a lunch break. In the January 2020 meeting, the chair asked attendees in the main hearing room to consider leaving after they spoke to allow those seated in

<sup>45</sup> Minnesota Public Utilities Commission, “Notice of Oral Argument and Deliberation Procedures for Proposed Line 3 Replacement Project Certificate of Need and Route Permit Decisions,” June 8, 2018, 5.

<sup>46</sup> *Ibid.*, 4.

the overflow room to move to the main hearing room; yet, PUC staff did not have a plan in place to seat them. PUC did, however, provide staff with some written guidance for these later meetings, and some stakeholders told us they thought the meetings in early 2020 went better.

**Reserved Party Tickets**

PUC also used tickets to manage admission into the Line 3 agenda meetings for the many parties to the case.

**Each party in the Line 3 case did not have access to the same number of tickets.**

Ahead of the June 2018 meetings, PUC sent out individualized notices to each of the parties in the case. The notices described the ticket procedures for parties generally and specified the number of reserved party tickets that the recipient of the notice would receive.

PUC allotted five reserved party tickets to most, but not all, parties. As the box at right shows, Enbridge received ten tickets. A PUC official told us the agency gave the applicant more tickets because it was likely to receive more questions from PUC commissioners than any of the other parties. The White Earth and Red Lake bands, which were two separate parties, received only five tickets total—not each. PUC officials told us they combined the bands’ ticket allowances because, at that point in time, the bands were represented by the same attorney. Similarly, the Dyrdals, a pair of intervening landowners, were offered only two tickets total. Although the Department of Commerce has the right to intervene in PUC proceedings, two different units within it have important and distinct roles in the proceedings. This has the effect of the department acting as two parties. According to PUC, the Department of Commerce pressed PUC to provide it with more tickets; ultimately it received nine total for its two units.

PUC offered parties to the case an unequal number of tickets to the June 2018 agenda meetings.	
Party	Number of Tickets Offered
Enbridge	10 total
Dyrdals	2 total
Red Lake and White Earth bands	5 total
Department of Commerce's two separate units	9 total
Other parties	5 each

Like with the general admission tickets, PUC staff told us they observed a number of problems with the reserved party tickets during the first week of the June 2018 meetings. For example, they said many of the seats reserved for parties went unoccupied. Some PUC staff told us they thought certain parties abused their reserved tickets by distributing them to individuals that staff did not consider to be party representatives, such as children. But, during the June 2018 Line 3 meetings, PUC did not have an agency-wide policy that defined who should be considered a representative of a party. Rules state only that “parties” include parties’ “attorneys, agents, or representatives.”<sup>47</sup>

<sup>47</sup> *Minnesota Rules*, 7845.7000, subp. 8, published electronically January 5, 2010.

In response to problems that they observed or perceived, PUC staff changed the party ticket procedures midway through the June 2018 meetings. Ahead of the second week of June 2018 meetings, PUC staff e-mailed new ticket procedures to each party. The new procedures indicated that parties would receive the same number of tickets as in the previous week (five for most parties). But, this time, the parties had to submit in advance the names of the individuals who would be using the parties' reserved tickets on each day of the meetings. The notice described who should have access to the party tickets:

Tickets for official parties are intended to be provided to individuals who will address the Commission and to experts needed to answer questions posed by the Commissioners. This may include, but is not limited to, subject matter experts, additional legal counsel, environmental experts, economists, and others with expertise that could be needed to address questions from the Commissioners.<sup>48</sup>

The notice for the second week of the June 2018 meetings also indicated that, if a party did not need all five tickets, the remainder would be redistributed for general admission. Officials said they made this change after seeing numerous seats for reserved party seats go unused during the first week of meetings.

In addition to reserved party tickets, PUC officials distributed badges and wrist bands for party representatives to prevent them from passing their tickets on to individuals that staff considered to be members of the general public. The procedures that PUC used during the second week meant that parties were not allowed to swap tickets among their representatives throughout the day.

In theory, these ticketing procedures could affect the ability of parties to make their case in oral arguments or to defend their case when questioned by commissioners. One of the parties, the Youth Climate Intervenors, was an unaffiliated group of 13 persons under the age of 25. The group was not represented by an attorney and had no paid staff. Rather, members of the group divvied up the responsibilities of intervening amongst themselves, with each becoming an expert on specific topics. They also recruited ten expert witnesses to volunteer their time. Because the group of 23 was allotted only five tickets, one of its leaders told us the group had to guess which issues the commissioners might discuss on a given day, and allot their tickets accordingly. The rest of the group's members and experts had to try to obtain general admission tickets.

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### **In later meetings, Public Utilities Commission staff controlled which specific party representatives had access to reserved party tickets.**

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For the November 2018, December 2018, and March 2019 agenda meetings, PUC changed the party ticket procedures yet again.<sup>49</sup> In individualized letters sent to parties in advance of those meetings, PUC named the specific party representatives who could

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<sup>48</sup> Public Utilities Commission, e-mail attachment to individual parties, "Revised Procedures for Official Parties for Hearings on Proposed Line 3 Replacement Pipeline Project," June 21, 2018.

<sup>49</sup> PUC did not use tickets at the September 2018 Line 3 agenda meeting.

have access to the reserved party tickets. PUC staff told us they allotted the tickets only to the individuals who had represented the party during the contested case proceedings. But, by the November 2018 agenda meeting, the contested case proceedings had occurred a year earlier.

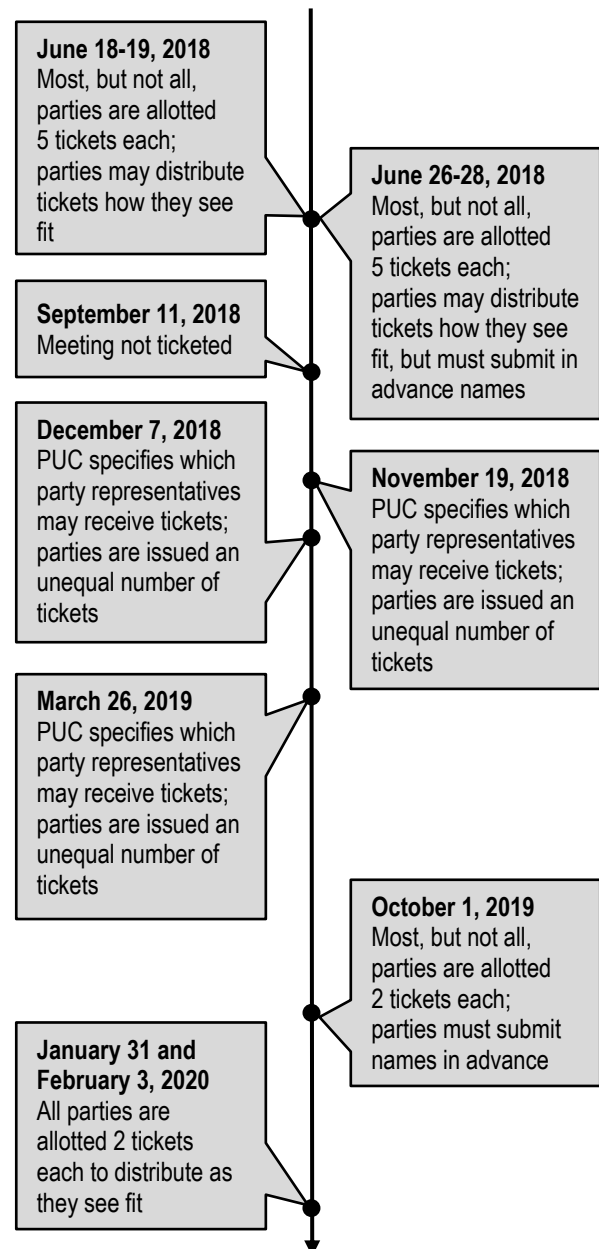
Some of the parties' representatives had changed by the time these three meetings took place. For example, the Department of Commerce—whose job was to advocate on behalf of the public interest—had to request a party ticket for one of its representatives who was not named in the letter. The Sierra Club, an intervenor that had hired outside counsel, was not able to obtain a party ticket for its attorney's main organizational contact, who was not named in the letter. Our review of PUC records shows that staff were inconsistent about whether or how they allowed parties to obtain party tickets for other representatives who were not named in the letters.

In addition, because some parties had more representatives during the contested case proceedings than others, those parties were allotted more tickets than others. For example, Enbridge had access to three reserved tickets, while the intervenor, Northern Water Alliance of Minnesota, had access to only one.

For the October 2019 Line 3 agenda meeting, PUC changed the party ticket procedures once again. For this meeting, PUC said it allotted the reserved tickets to the individuals who had represented the parties before the Minnesota Court of Appeals. Further, according to PUC officials, all parties had access only to two tickets each. However, we found that two intervening parties that shared attorneys with other parties at the time received only one ticket each. (We were not able to confirm how many tickets all other parties received.)

For the January/February 2020 Line 3 agenda meeting, PUC offered each party two tickets. According to PUC, the agency did not restrict to whom the parties could distribute the tickets, and parties did not have to send the names of the representatives who would be using them in advance.

#### Case Timeline: Agenda Meeting Party Tickets



## Other Attendee Rules

In addition to the ticket rules, PUC imposed other special rules on attendees during the Line 3 agenda meetings.

### The rules that the Public Utilities Commission imposed during the Line 3 agenda meetings changed over time and staff enforced them inconsistently.

In Chapter 4, we explained that PUC has traditionally imposed rules—called “attendee protocols”—on attendees at agenda meetings to maintain decorum and ensure that its business can be conducted. During the Line 3 agenda meetings, PUC imposed special rules on attendees. We found a number of issues with these special rules.



Arbitrary rules about liquids, clothing, tickets, in-out privileges, and more were imposed and were constantly being changed.

— A Member of the Public

#### The Public Utilities Commission inconsistently notified the public about the special rules it used during Line 3 agenda meetings.

Agenda Meeting	Posted to Web Calendar	Posted to eDockets
<b>June 18-28, 2018</b>		
Special attendee protocols	✓	✓
Special ticket procedures	✓	✓
<b>September 11, 2018</b>		
Special attendee protocols	✗	✗
Special ticket procedures	Not ticketed	Not ticketed
<b>November 19, 2018</b>		
Special attendee protocols	✓	✗
Special ticket procedures	✗	✗
<b>December 13, 2018</b>		
Special attendee protocols	✓	✗
Special ticket procedures	✗	✗
<b>March 26, 2019</b>		
Special attendee protocols	✓	✗
Special ticket procedures	✗	✗
<b>October 1, 2019</b>		
Special attendee protocols	✓	✓
Special ticket procedures	✗	✓
<b>January 31/February 3, 2020</b>		
Special attendee protocols	✓	✓
Special ticket procedures	✓	✓

First, the rules that PUC imposed during the Line 3 agenda meetings changed from meeting to meeting. For example, in some meetings, coats or briefcases were allowed; in others, they were not.<sup>50</sup>

Second, PUC did a poor job notifying the public about the special rules that it imposed, including the ticket procedures. For some meetings, PUC posted the special rules on its web calendar and in eDockets; for others, it posted them in one location but not the other; and for others, it posted them in neither location.<sup>51</sup> The box at left shows how PUC notified the public about the various iterations of the special rules that it imposed.

Even when PUC did notify the public about the special rules, those rules were not readily apparent. For example, the special rules imposed on the public during the June 2018 meetings were published on page three of a document titled, “Notice of Oral Argument and Deliberation Procedures.” PUC labeled subsequent notices more clearly, with titles such as, “IMPORTANT! ATTENDEE MEETING PROTOCOLS.” However, these special rules conflicted with the rules posted on PUC’s website.

Further, PUC did not always notify the public when it changed the rules that were posted. For example, when PUC stopped allowing attendees to

<sup>50</sup> In agenda meetings in which briefcases were not allowed, exceptions were made for party representatives.

<sup>51</sup> We discuss the eDockets system in Chapter 3 and PUC’s web calendar in Chapter 4.

swap tickets with one another during the June 2018 meetings, it did not issue a notice about this change. Rather, the only notice that described the ticket procedures explicitly stated that PUC *allowed* ticket swapping.

Numerous attendees told us they were frustrated by the rules imposed at the Line 3 agenda meetings, particularly their ever-changing nature, the inconsistent enforcement of posted rules, and the enforcement of rules that were not posted. For example, according to internal documents, staff were instructed to prohibit umbrellas, even though umbrellas were not prohibited in posted notices. The fact that PUC prohibited members of the general public from bringing water into some meetings—including some that lasted all day—was particularly frustrating for some attendees. Some attendees said they felt that PUC staff unfairly enforced rules for certain attendees but not others.



...every day that I showed up it seemed like the rules were different. Sometimes we could switch out the people in line, sometimes we couldn't. Sometimes we could bring water bottles in, the next we day we couldn't. It was impossible to keep up and it felt like these rules were being made on the fly....

— A Member of the Public



At times, staff volunteers did not understand [or] know [how] to enforce the changing informal procedures.

— A PUC Staff Member

PUC staff acknowledged that they did not always enforce the rules consistently. They told us they made changes to the rules in response to problems they encountered in a dynamic environment; they said they were trying to continuously improve the process. We discuss these issues further in the following section.

## Planning and Oversight

We also reviewed the extent to which PUC planned for and facilitated public participation in the Line 3 agenda meetings.

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**The Public Utilities Commission was not adequately prepared to administer the Line 3 agenda meetings. It did not provide its staff with adequate guidance, support, or oversight, which resulted in inconsistent practices and frustration among attendees—and staff.**

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To understand how PUC planned for and oversaw the Line 3 agenda meetings, we individually interviewed each of the PUC commissioners, the executive secretary, and other PUC employees who staffed the Line 3 agenda meetings; we also surveyed all PUC staff.<sup>52</sup> In our communication with PUC officials, we had a hard time determining the extent to which PUC leadership was involved in the administration of the Line 3 agenda meetings or which staff were in charge of what. We heard differing accounts from different officials.

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<sup>52</sup> Some staff did not respond to our survey. We surveyed 49 staff and received an 82 percent response rate.

A number of PUC staff told us they did not receive adequate training to administer the Line 3 agenda meetings. Although St. Paul Police provided PUC staff training on de-escalation ahead of the June 2018 meetings, some staff told us this training alone was not sufficient to prepare them for the Line 3 agenda meetings. Staff from across the agency were asked to volunteer to perform tasks that fell well outside of their normal job duties, such as managing



In hindsight, it was unfair to put staff in that position.

— A PUC Commissioner



I do not appreciate being put in a position where I do not have the training nor the background to deal with safety and security measures for meetings such as these.

— A PUC Staff Member

crowds or inspecting attendees' bags. Various PUC staff told us they were uncomfortable being put in such positions. Staff told us they needed better training on a variety topics, including their roles in the meetings and protocols for working with tribal officials or members. They also said they were doing their best under trying circumstances, but were overwhelmed.

In the absence of clear guidance, staff used their discretion to handle issues that arose during the meetings. In some cases, staff made questionable decisions. For example, records show that staff attempted to restrict representatives from certain parties from being near the general admission line in the public Metro Square building; party representatives said this would have affected their ability as employees of community organizations to organize volunteers.



Overall, PUC staff were unequipped to be crowd control at the hearings. Staff should not have been put in a position to make these types of determinations or deal with members of the public. We are not crowd control experts.

— A PUC Staff Member

For the November 2018 meeting, PUC imposed a new rule prohibiting attendees from wearing coats in the hearing room. Staff told us they created this rule out of a concern that attendees would hide objects in their coats that could be used to disturb the meetings. PUC imposed the no-coats rule again for the December 2018 meeting. That day, one attendee wore snow pants to stay warm as she waited in line outside of the building to get a ticket. When she was let into the building, a PUC official told her she would not be allowed into the hearing room while wearing her snow pants because they were considered a "coat." Although the attendee told the official that she was only wearing long underwear under her snow pants, the official would not admit her unless she removed them, which she ultimately did.

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### **Several individuals—including party representatives—were removed or banned from the meetings for non-safety-related issues.**

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One area of significant confusion involved PUC's authority to remove disruptive attendees. The commission—namely the chair—was in charge of what was going on *inside* the hearing room. But, most of the issues we heard about occurred *outside* of the hearing room—in the lines and overflow rooms—as people were trying to get into the meeting. PUC staff were in charge of these areas.



PUC’s executive secretary at the time of the June 2018 meetings told us he directed staff to inform law enforcement if they observed safety-related concerns. He said staff did not receive direction about whether they could remove attendees. But, PUC staff told us—and records show—that staff barred attendees from the meetings for violating what the staff perceived to be the ticket rules, not for safety reasons.

We also found that police removed two individuals from the Metro Square building for non-safety-related reasons upon the request of PUC staff. Both of these individuals were removed when they were waiting outside of the hearing room. One of the removed individuals had been listed in PUC files as a party representative for the intervenor, Northern Water Alliance of Minnesota, and had been granted a party badge. The other was also a party representative—the primary organizational contact for the outside counsel hired by the Sierra Club, another intervenor.<sup>53</sup>



We are deeply concerned about the intimidation and eviction of intervening parties and restrictions that have been arbitrarily placed on their participation....

...the rules have been consistently inconsistent...these “rules” are being enforced arbitrarily and without any proper notice or explanation of how and when alleged violations have taken place.... ...[I]ntervening parties are left confused, frightened, and paralyzed about where they are allowed to be and what they are allowed to do.

We want clear rules in writing, direction to PUC staff that violation of rules be put in writing, and that police be used as a last line of enforcement.

**Sierra Club, Letter to PUC, June 2018**

Staff alleged that the party representatives who were removed violated PUC’s ticket procedures because they were holding more than one ticket at a time. The individuals dispute this claim; they also say they were not told why they were removed. Regardless, as we noted earlier, the rule that staff allege was violated was not stated in any notice and did not relate to safety.

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### **The Public Utilities Commission did not have a standardized process in place to handle complaints during the Line 3 agenda meetings, which made it difficult for attendees to resolve their concerns.**

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PUC has formal processes for handling certain types of complaints, such as complaints about utilities from utility customers or allegations of *ex parte* communication violations. But, during the Line 3 agenda meetings (and throughout our evaluation), PUC did not have standardized processes in place to ensure that complaints from members of the general public about PUC staff or processes were centrally documented, elevated to PUC leadership, or resolved appropriately.

Several attendees told us they tried to file complaints about various issues that occurred during the Line 3 agenda meetings but could not figure out who to contact. Even Sierra Club and Northern Water Alliance of Minnesota (parties to the case) struggled to complain after their representatives were removed from the building (and initially barred from reentry). The parties first tried to complain to commission staff, and then

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<sup>53</sup> According to rules, a party includes an intervenor’s “attorneys, agents, or representatives.” *Minnesota Rules*, 7845.7000, subp. 8, published electronically January 5, 2010.



filed a written letter in eDockets. When the commission chair chose not to address the concerns raised in the letter, Sierra Club's outside counsel made an irregular oral objection during an agenda meeting to alert the commission to the fact that her client's representative had been denied access to the proceedings as a party representative.

## Recommendation

PUC officials told us the Line 3 case was an anomaly and that the agency's practices, which they believe generally work well, should not be judged on this one case alone. However, the uniqueness of the Line 3 case does not negate the problems that the participants experienced in the case. We have no reason to doubt that there will be significant public interest in future PUC cases, and we believe the agency should be prepared for such occasions. In this last section, we recommend how PUC can improve its public participation processes in future agenda meetings.

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### RECOMMENDATION

**The Public Utilities Commission's leadership should provide more oversight of the agency's public participation processes and better prepare for cases with significant public interest.**

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First and foremost, PUC's leadership should take a more active role in overseeing the public participation processes associated with agenda meetings, particularly in cases with significant interest like Line 3. For example, senior leadership, not individual staff, should make decisions and set agency-wide policies about important issues, such as who should be considered a party representative and how many reserved tickets each party should get (if tickets are necessary). PUC leadership should provide clear, written guidance to staff about the scope of their responsibilities, such as whether or not they may have someone removed from a meeting. PUC leadership should also establish a consistent set of written attendee protocols so staff and attendees alike clearly understand the rules that are sanctioned by the agency.

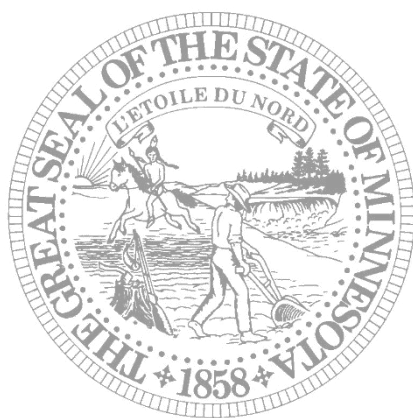


[T]he Commission could more clearly communicate, preferably in advance, what rules will be in place in the hearing rooms. For example, members of the public were taken by surprise that they were not allowed to bring water into the hearing room for the day-long meetings. It's not clear whether reasons for banning water were communicated to the public.

— A State Official

PUC leadership should also conduct more planning in advance of high-interest cases like Line 3. For example, leadership should establish a plan for using a larger venue when needed. Many of the issues that we heard about could have been avoided if the agency had used a larger venue instead of a ticketing system. PUC also could have avoided some of the problems that it experienced with the tickets if it had developed clear procedures ahead of time and ensured that staff were trained to consistently use those procedures. Additionally, PUC should either hire and properly train staff who can perform security and crowd-control functions, contract for those services, or ensure that whatever venues it uses can perform them.

We recognize that PUC staff will always need some flexibility to handle new issues that arise at agenda meetings. We also recognize that they may struggle to maintain order in highly controversial cases. However, the variation in rules and enforcement that occurred during the Line 3 meetings left many attendees confused and frustrated. Some of these issues could have been avoided through additional planning and clear, consistent, and well-publicized policies.



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# List of Recommendations

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- The Public Utilities Commission should formalize its coordination efforts with partner agencies to reduce variation across its public participation processes. (p. 22)
- The Public Utilities Commission should not delegate logistical responsibilities related to its public participation processes to applicants. (p. 22)
- The Public Utilities Commission should do more to help the public understand the roles of its partner agencies in energy facility proceedings. (p. 22)
- The Public Utilities Commission should regularly consult with each tribe. (p. 27)
- The Legislature should require tribal notification whenever notification of affected units of government is required. (p. 27)
- The Public Utilities Commission should work with the Department of Commerce to improve the usability of the eDockets system. (p. 31)
- The Public Utilities Commission should include more and better information on its website to facilitate public participation. (p. 32)
- The Public Utilities Commission should provide educational resources about intervening to members of the general public. (p. 36)
- The Public Utilities Commission should provide better information to the public about how its staff can support public participation. (p. 37)
- The Public Utilities Commission should provide clearer guidance to staff about their responsibilities to ensure consistent treatment of the public. (p. 39)
- The Public Utilities Commission should do a better job educating the public about the role of the public in its agenda and planning meetings. (p. 43)
- The Public Utilities Commission should make its planning meetings more accessible and transparent to the public. It should also ensure that its meeting notices comply with state law. (p. 45)
- The Public Utilities Commission should record all votes taken at planning meetings, as required by law. It should also consider making planning meeting records more accessible to the public. (p. 47)
- The Public Utilities Commission should adopt practices to make its meetings more accessible to the general public. (p. 51)
- The Public Utilities Commission's leadership should provide more oversight of the agency's public participation processes and better prepare for cases with significant public interest. (p. 78)



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# Laws Governing Energy Facility Permitting in Minnesota

## APPENDIX A

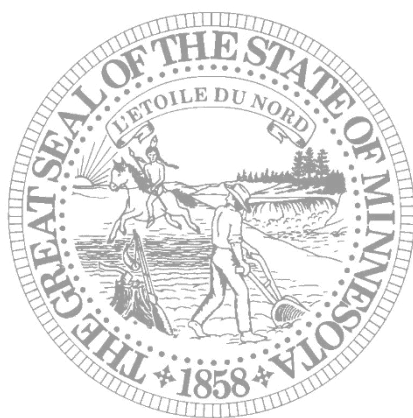
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Minnesota Statute	Relevant Regulatory Purview
Administrative Procedure Act, Chapter 14	<ul style="list-style-type: none"><li>• Governs how administrative law judges conduct public hearings</li><li>• Rules establish special procedures for hearings on energy facilities</li></ul>
Minnesota Environmental Rights Act, Chapter 116B	<ul style="list-style-type: none"><li>• Establishes that “each person” is entitled to and responsible for environmental protection</li><li>• Provides each person the right to intervene in a state proceeding to protect the environment</li></ul>
Minnesota Environmental Policy Act, Chapter 116D	<ul style="list-style-type: none"><li>• Requires environmental reviews “where there is potential for significant environmental effects resulting from any major governmental action”</li><li>• Rules outline public participation processes for environmental reviews</li><li>• Rules explicitly mandate environmental reviews for large power plants, transmission lines, and pipelines</li></ul>
Minnesota Public Utilities Act, Chapter 216B	<ul style="list-style-type: none"><li>• Requires a certificate of need in order to construct a large energy facility</li><li>• Requires gas and electric utilities to develop long-term plans outlining the resources they will use to meet the needs of customers, which must include conservation methods and renewable energy</li></ul>
Energy Planning and Conservation, Chapter 216C	<ul style="list-style-type: none"><li>• Establishes statewide policies on energy conservation, renewable energy development, and energy security</li></ul>
Power Plant Siting Act, Chapter 216E	<ul style="list-style-type: none"><li>• Governs the siting of power plants and the routing of transmission lines</li><li>• Establishes environmental review procedures that override those required by the Minnesota Environmental Policy Act</li></ul>
Wind Energy Conversion Systems, Chapter 216F	<ul style="list-style-type: none"><li>• Governs the siting of wind-energy projects</li><li>• Rules exempt wind-energy site permits from some of the environmental review requirements in the Minnesota Environmental Policy Act and the Power Plant Siting Act</li></ul>
Pipelines, Chapter 216G	<ul style="list-style-type: none"><li>• Governs the routing of pipelines</li><li>• Rules require PUC to conduct an alternative type of environmental review for pipeline route permits, called a comparative environmental analysis</li></ul>
Greenhouse Gas Emissions, Chapter 216H	<ul style="list-style-type: none"><li>• Sets statewide greenhouse gas emission-reduction goals</li><li>• Prohibits PUC from approving large energy facilities that would contribute to carbon dioxide emissions unless: the emissions are offset, the facility is essential for the long-term reliability of Minnesota’s electric system, or the facility’s absence would cause a substantial burden on ratepayers</li></ul>

NOTES: “PUC” refers to the Public Utilities Commission. We use the term “environmental review” generically here.

SOURCES: *Minnesota Statutes* 2019, chapters 14, 116B, 116D, 216B, 216C, 216E, 216F, 216G, 216H; and *Minnesota Rules*, chapters 1400, 1405, 4410, and 7848 through 7855.

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July 22, 2020

Judy Randall  
Deputy Legislative Auditor  
Room 140 Centennial Building  
658 Cedar Street  
St. Paul, MN 55155

Dear Ms. Randall:

Thank you for the opportunity to comment on the Office of the Legislative Auditor's (OLA) report and recommendations on the Public Utilities Commission's (Commission) public engagement processes. In particular, the Commission appreciates the dedicated work of OLA staff to understand the complex work of the agency. As the agency manages through the COVID-19 pandemic and is using different tools to interact with the public in a remote environment, the OLA report is well-timed.

The Commission regulates electric, natural gas, and telecommunications service, and reviews applications for siting and routing permits of large energy facilities. In practice, this means considering over 700 unique decisions (or dockets) on an annual basis, on a range of issues from locating large energy facilities, to approving utility investments, to setting electricity rates. Public engagement is a critical part of this work, and it can be hard for the public to participate given the inherently complex nature of the issues, Minnesota's regulatory laws, and the wide range of dockets that come before the Commission. Moreover, the Commission is a quasi-judicial agency that must make its decisions by applying the evidence in the record to the law. The Commission is also bound by ethics rules that limit when, how, and who can engage with the public. This already-complicated process can be confusing because other state agencies often interact with the public on behalf of the Commission. The Commission believes that its existing process has provided an opportunity for the public to engage, but recognizes that it can be confusing for the public and appreciates that the OLA has helped identify some areas for further improvement.

Before identifying many of the improvements already underway, we wanted to provide some additional context. The Line 3 proceeding, which was a driver of this program evaluation, has generated a level of interest and controversy that has not been seen at the Commission for decades. There were 67 public meetings, 12 days of evidentiary hearings, and more than 20 Commission agenda meetings for Line 3. The agency opened more than 10 comment periods covering more than 400 days over the span of 5 years. Thousands of Minnesotans attended these meetings, and the Commission received thousands of comments that were included in the record of the case. The OLA accurately concluded that there were many opportunities for the public to



participate in the Line 3 case. That said, this proceeding presents a good opportunity to identify strategies for improvement. Many improvements were made during the course of the Line 3 proceeding as lessons were learned.

Over the past year, the Commission has been working diligently to make changes aimed at improving public engagement, some of which are identified in this report. Specifically:

- In early 2020, the Commission adopted a Tribal Engagement and Consultation Policy and appointed a tribal liaison to improve communication with tribal governments. The Commission looks forward to strengthening these relationships in the years ahead.
- The Commission is currently engaged in an effort to rebuild its website to provide more and better information, including, as noted in this report, information about how the public can participate in its proceedings, and about the role of partner agencies like the Department of Commerce and the Office of Administrative Hearings.
- The Commission is working with the Department of Commerce to update the eDockets program to make it easier to navigate and search for relevant documents.
- The Commission has recently added a position of Public Engagement Regulatory Analyst to expand the agency's outreach, and is in the process of filling an Assistant Executive Secretary position that will have oversight over the agency's public affairs work.
- Specific to Line 3, additional public comment opportunities were provided in December 2019 and January 2020, using the Senate Office Building that could better accommodate large crowds.

More importantly, the Commission's leadership has committed to providing more oversight of public participation in general, and particularly for cases that have a significant level of public interest. Leadership at the agency has changed significantly in recent years, including a new Commission Chair, a new Executive Secretary, a new General Counsel, a new Business Unit Manager, and, as noted above, shortly a new Assistant Executive Secretary. Improved public engagement is a priority for the new leadership team, and this report provides some important recommendations to incorporate into our ongoing efforts.

Thank you again for the opportunity to comment on the report.


Sincerely,



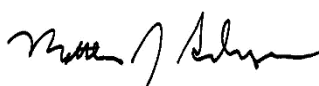
Katie Sieben  
Commission Chair



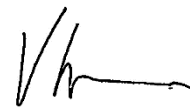
Joseph K. Sullivan  
Commission Vice Chair



John Tuma  
Commissioner



Matthew Schuerger  
Commissioner



Valerie Means  
Commissioner

## Recent OLA Evaluations

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*Pesticide Regulation*, March 2020  
*Agricultural Utilization Research Institute (AURI)*,  
May 2016  
*Agricultural Commodity Councils*, March 2014  
*“Green Acres” and Agricultural Land Preservation  
Programs*, February 2008

### Criminal Justice

*Safety in State Correctional Facilities*, February 2020  
*Guardian ad Litem Program*, March 2018  
*Mental Health Services in County Jails*, March 2016  
*Health Services in State Correctional Facilities*,  
February 2014  
*Law Enforcement’s Use of State Databases*, February  
2013

### Economic Development

*Minnesota Investment Fund*, February 2018  
*Minnesota Research Tax Credit*, February 2017  
*Iron Range Resources and Rehabilitation Board (IRRRB)*,  
March 2016

### Education, K-12 and Preschool

*Compensatory Education Revenue*, March 2020  
*Debt Service Equalization for School Facilities*,  
March 2019  
*Early Childhood Programs*, April 2018  
*Minnesota State High School League*, April 2017  
*Standardized Student Testing*, March 2017  
*Perpich Center for Arts Education*, January 2017  
*Minnesota Teacher Licensure*, March 2016

### Education, Postsecondary

*Preventive Maintenance for University of Minnesota  
Buildings*, June 2012  
*MnSCU System Office*, February 2010  
*MnSCU Occupational Programs*, March 2009

### Energy

*Public Utilities Commission’s Public Participation  
Processes*, July 2020  
*Renewable Energy Development Fund*, October 2010  
*Biofuel Policies and Programs*, April 2009  
*Energy Conservation Improvement Program*,  
January 2005

### Environment and Natural Resources

*Public Facilities Authority: Wastewater Infrastructure  
Programs*, January 2019  
*Clean Water Fund Outcomes*, March 2017  
*Department of Natural Resources: Deer Population  
Management*, May 2016  
*Recycling and Waste Reduction*, February 2015

### Government Operations

*Office of Minnesota Information Technology Services  
(MNIT)*, February 2019  
*Mineral Taxation*, April 2015

### Government Operations (continued)

*Councils on Asian-Pacific Minnesotans, Black  
Minnesotans, Chicano/Latino People, and Indian  
Affairs*, March 2014  
*Helping Communities Recover from Natural Disasters*,  
March 2012

### Health

*Office of Health Facility Complaints*, March 2018  
*Minnesota Department of Health Oversight of HMO  
Complaint Resolution*, February 2016  
*Minnesota Board of Nursing: Complaint Resolution  
Process*, March 2015  
*Minnesota Health Insurance Exchange (MNsure)*,  
February 2015

### Human Services

*DHS Oversight of Personal Care Assistance*, March 2020  
*Home- and Community-Based Services: Financial  
Oversight*, February 2017  
*Managed Care Organizations’ Administrative Expenses*,  
March 2015  
*Medical Assistance Payment Rates for Dental Services*,  
March 2013  
*State-Operated Human Services*, February 2013  
*Child Protection Screening*, February 2012  
*Civil Commitment of Sex Offenders*, March 2011

### Housing and Local Government

*Economic Development and Housing Challenge Program*,  
February 2019  
*Consolidation of Local Governments*, April 2012

### Jobs, Training, and Labor

*State Protections for Meatpacking Workers*, 2015  
*State Employee Union Fair Share Fee Calculations*,  
July 2013  
*Workforce Programs*, February 2010

### Miscellaneous

*Minnesota Department of Human Rights: Complaint  
Resolution Process*, February 2020  
*Minnesota State Arts Board Grant Administration*,  
February 2019  
*Board of Animal Health’s Oversight of Deer and  
Elk Farms*, April 2018  
*Voter Registration*, March 2018  
*Minnesota Film and TV Board*, April 2015  
*The Legacy Amendment*, November 2011

### Transportation

*MnDOT Measures of Financial Effectiveness*,  
March 2019  
*MnDOT Highway Project Selection*, March 2016  
*MnDOT Selection of Pavement Surface for Road  
Preservation*, March 2014  
*MnDOT Noise Barriers*, October 2013  
*Governance of Transit in the Twin Cities Region*,  
January 2011



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