

**September 2002**

**The Minnesota Public  
Utilities Commission and  
Related Agencies:  
Structure and Function**

The Minnesota Public Utilities Commission regulates certain energy and telecommunications services and providers in Minnesota. This report describes the history, structure, and function of the commission, and of the two state entities most closely associated with it, the telecommunications and energy divisions of the Department of Commerce and the Residential and Small Business Utility Division of the Office of the Attorney General.

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## Introduction

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The Minnesota Public Utilities Commission (PUC) impacts the lives and pocketbooks of each Minnesota homeowner and business daily. However, the purpose, jurisdiction, and operations of this agency are not generally well understood outside of the relatively small number of interests that regularly interact with the commission. Likewise, there is much confusion surrounding the roles and functions of the state entities that are most closely associated with the PUC, such as the Department of Commerce's Telecommunications and Energy Divisions (Commerce), and the Attorney General's Residential and Small Business Utilities Division (RUD).

Chapters one and two detail the history, structure and function of the PUC, Commerce, and RUD. Chapter three briefly discusses a number of current issues involving those agencies.

# Chapter 1: The Public Utilities Commission

## The Mission of the Commission

As stated in its 2001 annual report, the mission of the Minnesota Public Utilities Commission (PUC) is to protect and promote the public's interest in safe, adequate, and reliable utility services (electricity, natural gas and telecommunications) at fair, reasonable rates. It does so by providing independent, consistent, professional, and comprehensive oversight and regulation of utility service providers.<sup>1</sup> One of the key functions of the commission in performing this mission is to balance the private and public interests affected in each docket, and to make decisions that appropriately balance these interests in a manner that is "consistent with the public interest."<sup>2</sup>

### Agency Snapshot

**Description:** Independent regulatory agency with authority over telecommunication and energy utilities

**Budget:** \$3.99 million for fiscal year 2002; \$4.16 million for fiscal year 2003 (funded through utility assessments)

**Personnel:** Five commissioners, 42 staff (21 analysts – 11 energy, 10 telecommunications)

**Primary functions:** Establish utility rates and standards; adjudicate disputes; issue industry-wide utility policies

The commission:

- Sets rates for those utility service providers that are comprehensively regulated;
- Establishes service standards for a broader class of utility service providers;
- Resolves consumer and provider complaints; and
- At the direction of the legislature, establishes utility policy for the state.

**Early regulation.** Policymakers determined that certain industries provide goods and services that are so vital to the well-being of citizens that there must be some government intervention to

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<sup>1</sup> Note that not all entities providing utility services in the state are comprehensively regulated. As a general rule, the PUC has regulatory authority over for-profit utilities providing services directly to retail customers in the state, as well as not-for-profit entities that have opted for comprehensive regulation by the PUC. Comprehensive regulation of municipal and cooperative utilities is statutorily deemed unnecessary, in that the legislature has determined that these not-for-profit utilities are "effectively regulated" by other entities. For municipal utilities, that regulation is conducted through oversight by the municipal government. Boards made up of members of each cooperative regulate cooperative utilities. [Minn. Stat. § 216B.01](#). PUC jurisdiction over these types of utilities is limited.

<sup>2</sup> One example of this requirement to balance these various interests can be found in [Minnesota Statutes, section 216B.16](#), subdivision 5, which states, "The commission, in the exercise of the powers under this chapter to determine just and reasonable rates for public utilities, shall give due consideration to the public need for adequate, efficient and reasonable service and to the need of the public utility for revenue sufficient to enable it to meet the cost of furnishing the service . . ." Obviously, in this instance, the utility's need for sufficient revenue is the "private interest" which the statute requires the commission to balance against the "public need for adequate, efficient and reasonable service." Other examples of public interests the PUC considers include protecting the environment, ensuring universal access to utility services, reliability of utility services, promotion of competitive markets where the legislature has directed them to do so, and other public policy goals imposed by lawmakers.

ensure their safe, adequate, and nondiscriminatory delivery.<sup>3</sup> As described by the U.S. Supreme Court in 1877:

When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *Munn v. Illinois*, 94 U.S. 113, 126 (1877).

Prior to the creation of utility commissions, regulation of these industries and services had been conducted by courts, state legislatures, municipalities, and a single administrative decision-maker. However, regulation by these bodies was determined to be impractical, ineffective, or inflexible.<sup>4</sup>

Judicial oversight of regulatory practices was “discontinuous, expensive, and often slow.”<sup>5</sup> Regulation of utility industry practices necessitates an expertise in accounting, economics, engineering, rate design, and a host of other disciplines, which judicial decision makers lacked. In addition, courts generally look at remedying past actions, not guiding future behavior.<sup>6</sup>

Neither legislative regulation nor local franchise regulation by municipal government fared much better, failing due to inflexibility, lack of enforcement, lack of expertise, and lack of continuity.<sup>7</sup> The comprehensive scope of authority was generally deemed too broad and deep for a single administrative decision maker, whose policy direction, thus the fates and future of regulated entities, might change with a general election.<sup>8</sup>

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<sup>3</sup> The concern was that, in the absence of regulation, competitive market forces would be insufficient to provide adequate discipline to a market for a particular essential service, due to a number of factors including the difficulty of other competitors to enter the market. A provider of such a service may then be able to impose an exorbitant price for the service, pricing it out of reach for many consumers. Regulation of providers of these services was intended to substitute for a competitive market. Regulation has been said to offer these providers a “regulatory compact,” in which a service provider agrees to provide utility service under rates and conditions set by the government, in exchange for which the government offers the provider the opportunity to recover their costs of providing service, plus a reasonable profit. In recent years, policymakers have determined that certain aspects of these regulated industries could be subject to sufficient competition that those aspects of the industries could be deregulated (e.g., local telephone service).

<sup>4</sup> Charles F. Philips, “The Regulation of Public Utilities” *Public Utilities Reports*, Third Edition (1993): 129, 130.

<sup>5</sup> “[E]ven when the courts found a business practice unreasonable, only negative action could be taken. The problem of deciding new rates and regulation for a future period is a legislative, not a judicial function. The courts moreover could decide only the cases brought before them; they could not take the initiative. And the court system was unable to handle the required volume of cases that arose from regulatory adjudication.” *Ibid*, 129.

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

<sup>7</sup> *Id.*, 129, 130.

<sup>8</sup> The scope of government authority over regulated utilities is indeed vast. The PUC can and does determine the rates a utility can charge customers, the services it can offer, the conditions under which those services are to be offered and provided, the customers who may receive those services, the amount of money the utility can make on service investments, total utility earnings, and the utility’s capital structure, among a host of other key financial, service, and operational issues.

**An independent regulatory commission.** In the wake of these failures, policymakers in Minnesota and around the nation, created “independent regulatory commissions,” generally modeled after the federal Interstate Commerce Commission, in order to provide comprehensive, fair, adequate, expert economic regulation of those industries deemed to be “affected with the public interest.” These agencies are multimember boards, replete with numerous structural and procedural protections to insulate the government’s decision making from political manipulations or other undue influence. In addition, to ensure that no single branch of government dominated their actions and decisions, these regulatory commissions are “hybrid institutions,” administrative agencies housed in the executive branch, vested with both judicial and legislative authorities and responsibilities. As described by the PUC:

The commission is somewhat unique in that its statutory responsibilities involve elements of all three branches of government. In resolving specific disputes, the commission acts like a court. In setting broad industry policies through investigations or rulemaking, the commission is a policymaking, or legislative, body. In enforcing statutes and rules, the commission is an administrative body.<sup>9</sup>

The PUC is the sole example of a true “independent regulatory commission” in Minnesota.<sup>10</sup> Its structure will be discussed in detail below.

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<sup>9</sup> Minnesota Public Utilities Commission, *2001 Annual Report*, 2.

<sup>10</sup> Minnesota has a number of multimember agencies, such as the Arts Board, the Amateur Sports Commission, and the Campaign Finance Board, which share many of the structural and procedural attributes of the PUC. However, none of those agencies share the full panoply of attributes that safeguard the PUC’s independence. The federal government, however, has many examples of independent regulatory commissions, including the Federal Communications Commission, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the Food and Drug Administration, the Security and Exchange Commission, the Federal Reserve Board, and the Consumer Product Safety Commission, among others.

## The History of the Commission

The PUC is Minnesota's oldest regulatory agency, tracing its roots back to 1871 in the early days of railroad regulation. The Railroad and Warehouse Commission was created in 1874. In 1915, it was given regulatory authority over telephone service. Its descendant agency, the Public Service Commission, was granted jurisdiction over energy utilities in 1974.<sup>11</sup> The commission's history is described in detail below.

### The History of the Public Utilities Commission

- 1871** The legislature created the Office of Railroad Commissioner to report to the legislature annually on the operations of Minnesota railroad companies (*Laws 1871, ch. 24*).
- 1874** The legislature replaced the Railroad Commissioner with the three-member Board of Railroad Commissioners to oversee the operations of state railroads (*Laws 1874, ch. 26*).
- 1885** The board was granted authority over warehousing in the state and renamed the Railroad and Warehouse Commission (*Laws 1885, ch. 188*).
- 1915** The Railroad and Warehouse Commission was granted jurisdiction over the provision of telephone service in 1915 (*Laws 1915, ch. 152*).
- 1967** The legislature transformed the Railroad and Warehouse Commission into the Department of Public Service, which consisted of a Public Service Commission and an Administrative Division (*Laws 1967, ch. 864*). The legislature divided the responsibilities of the Railroad and Warehouse Commission into these two entities, in order to avoid a perceived constitutional conflict. (See page 9.)
- 1974** Minnesota became the 48th state to regulate the rates of natural gas and electric utilities (*Laws 1974, ch. 429*). Regulatory authority over these industries was vested in the commission.
- 1980** A 1979 report by the Legislative Auditor found that the imbalance of authority over administrative resources between the PUC and the Administrative Division caused conflicts between these two interdependent entities, and created a poor environment for decision making. Following the auditor's recommendations, the 1980 Legislature spun the Public Service Commission off into a separate agency, renamed the Public Utilities Commission (*Laws 1980, ch. 614*). The remaining Administrative Division was renamed the Department of Public Service.
- 1999** Governor Jesse Ventura, by executive order, merged the energy and telecommunications divisions of the Department of Public Service into the Department of Commerce.
- 2001** The legislature completed the merger of the Department of Public Service with the Department of Commerce (*Laws 2001, first spec. sess., ch.4*). Commission structure, function, and operation were unaffected by the merger, as were the functions and operations of Commerce, with respect to utility issues. Those remained the same as under the old Department of Public Service.

<sup>11</sup> During this period, the agency's authority included setting rates and terms of service for railroads, trucks and buses, warehouses, grain elevators, and livestock buying. These responsibilities were transferred to the departments of Transportation, Agriculture, and Public Service between 1970 and 1980.

## Agency Structure

**Commissioners.** As an independent regulatory commission, the PUC consists of five commissioners, each appointed by the governor with the advice and consent of the state Senate. For the commission to take official action at least three commissioners must be present and a majority of those commissioners present must vote on the same side.

Each commissioner is appointed for a six-year term and is removable only for cause. Commissioner terms are staggered, so that only one commissioner is scheduled to leave and be replaced at any one time, which minimizes the impact of the loss and replacement of commissioners on PUC decision making. Minnesota law requires that the commission be geographically and politically balanced.<sup>12</sup>

In addition to these structural safeguards, commissioners are also protected procedurally from undue influence, through:

- ▶ Ex parte restrictions on communications with parties appearing before the commission<sup>13</sup>
- ▶ Judicial-type proceedings in most instances
- ▶ Open meeting law requirements
- ▶ Temporary bans on employment with regulated entities

**Commission staff.** Since its separation from the Department of Public Service in 1980, the PUC has maintained its own staff. Commission staff are divided into six units:

- ▶ The energy and telecommunications units consist of analysts who review commission matters relating to electricity, natural gas, and telecommunications.
- ▶ The legal unit drafts the commission's orders and rules.
- ▶ The consumer affairs office assists consumers with complaints against utilities under PUC jurisdiction and administers the state's cold weather disconnection and the Link-up Minnesota programs.<sup>14</sup>
- ▶ The administrative management unit coordinates and facilitates the flow of information (notices, comments, orders, information requests, etc.) between the commission and

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<sup>12</sup> "Not more than three commissioners shall belong to the same political party. At least one commissioner must have been domiciled at the time of appointment outside the seven-county metropolitan area." Excerpted from [Minnesota Statutes 2001, section 216A.03](#), subdivision 1.

<sup>13</sup> Ex parte restrictions refer to limitations on communications between parties to a docket currently before the PUC and PUC commissioners and staff.

<sup>14</sup> Link-up Minnesota is part of a national telephone connection program to help Americans get telephone service if they are currently without telephone services. This program provides a discount on the installation charges when installing new telephone service. The cold weather disconnection program provides protections and assistance for consumers in danger of having their primary source of heat disconnected between October 15 and April 15.

parties to commission proceedings. In addition, this unit administers the agency's budget, human resources, and other administrative functions.

- ▶ The executive office provides administrative support for the five commissioners and the commission's executive secretary.<sup>15</sup>

## The Role and Function of the Commission

**Shared functions.** In addition to being unique among Minnesota agencies, the PUC is unlike almost any other independent regulatory commission in the country, due to the unique sharing of responsibilities between the commission and the Department of Commerce's Telecommunications and Energy Divisions.

In almost every other state, the utility regulatory commission is charged with the sole performance of each of three major functions: *legislative*, *quasi-judicial*, and *administrative* functions. In Minnesota, these functions are divided between the commission and the Department of Commerce as follows:

Function	Description	Agency Responsible
Legislative	Rate-setting and policymaking	Commission
Quasi-judicial	Dispute resolution and adjudication	Commission
Administrative	<ul style="list-style-type: none"><li>• investigation</li><li>• enforcement</li><li>• management of staff and appropriations</li><li>• development of budgets and legislative initiatives</li><li>• issue analysis and advocacy</li></ul>	Shared between the commission and Commerce

This allocation of responsibilities has its roots in the recommendations of a 1957 legislative panel convened to reform the Railroad and Warehouse Commission. Initially, this sharing of functions was proposed in order to avoid a potential constitutional conflict perceived by the 1957 panel regarding the separation of the executive and legislative branch powers. The potential conflict, as it turned out, was mistaken, but the bifurcated structure endures to this day, primarily because this structure provides some degree of separation between the decision maker (the PUC) and the advocate (the department).<sup>16</sup> See below for details.

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<sup>15</sup> The executive secretary is the chief administrative officer of the commission "with responsibility for personnel, budget and other administrative details related to the work of the commission..." [Minn. Stat. § 216A.04](#).

<sup>16</sup> Advocates for this policy of separation of functions are concerned both that: (1) the public advocate may exert too great an influence on the rulings of the decision maker (relative to other parties) if the two were in the same agency; and (2) the decision maker may exert too great an influence over the policies advanced by the advocate.

## The Historical Roots of the Unique Division of Functions

### 1957: Legislative Panel Recommends Reforms

In 1955, a panel of legislators was delegated the task of reviewing the structure and operations of the Railroad and Warehouse Commission. That task force, which included Lawrence Yetka, a future (now former) Minnesota Supreme Court Justice, published a report in 1957 detailing a series of structural and functional reforms.

The task force saw the Railroad and Warehouse Commission, and its successor agency, as an “arm of the legislature exercising powers which the legislature could use directly, but must be delegated to a body of qualified individuals....” The primary recommendation of the task force was to have the legislature elect the commissioners, rather than the general electorate, as was the case at the time. This recommendation raised constitutional concerns for the task force.

Although the legislature viewed the commission as an extension of the legislature rather than an executive branch agency, the commission routinely performed functions that were executive in nature. The task force was concerned that this commingling of legislative and executive branch powers performed by a legislatively appointed commission would violate the constitutional requirement for a separation of powers.

In order to resolve this perceived potential constitutional conflict, the task force recommended that the legislative and executive branch powers of the Railroad and Warehouse Commission be vested in a newly created Department of Public Service, but separated internally.

Within this new department, the task force recommended the creation of two divisions, a regulatory division and an administrative division. The regulatory division would consist of the Public Service Commission, whose members would be elected by the legislature and would perform all economic regulation and other policymaking and decision-making functions that the legislative panel determined were primarily legislative in nature, such as the setting of utility rates. The administrative division would perform all executive functions, such as appointing and supervising all agency staff, making work assignments, preparing the agency’s budget, distributing appropriated funds, and enforcing commission orders. A director appointed by the governor for a six-year term, removable only for cause, would oversee the administrative division.<sup>17</sup>

### 1967: Legislature Implements Reforms

When the 1967 Legislature passed the law transforming the Railroad and Warehouse Commission into the Department of Public Service, it adopted the structure proposed by the legislative task force, but did not provide for either legislatively elected commissioners or an independent director. Instead, it provided for the current procedure, in which the governor appoints the members of the commission who each serve for six years, and the director of the Administrative Division, who serves at the pleasure of the governor.

<sup>17</sup> See generally *The Report of the Commission to Study the Railroad and Warehouse Commission* (1957).

Thus, the 1967 reforms created the structure recommended by the 1957 panel, a single entity in which the executive branch functions and the legislative functions were separated, but left the entities that performed those functions entirely interdependent, in terms of function, staff, and budget.

### **1980: Legislature Creates PUC and DPS**

In 1979, the legislative auditor found that this level of interdependence did not make for an effective decision-making environment and recommended that the two divisions be separated into two separate agencies.<sup>18</sup> The 1980 Legislature followed that recommendation and created the Department of Public Service, which was granted the executive responsibilities of the old Administrative Division, and the Public Utilities Commission, which inherited the policy- and decision-making responsibilities of the Public Service Commission. Note, however that the 1980 reforms resulted in granting the commission executive/administrative responsibilities it did not have previously. After those reforms were implemented, the commission was able to:

- › hire and manage its own staff to analyze issues before the commission;
- › prepare and present its own budget and legislative initiatives to the administration;
- › spend money that the legislature appropriated to it directly;
- › initiate investigations of regulated entities; and
- › take action to enforce commission rules and orders.

These were functions that were previously solely the purview of the Department of Public Service.

As noted above, the commission is charged with the sole performance of two of the three major functions, the legislative and quasi-judicial functions.<sup>19</sup> These will be discussed below, but in essence it means that the PUC can both issue forward-looking policy directives and adjudicate past wrongs.

The administrative function will be discussed in the section on the Department of Commerce.

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<sup>18</sup> As described in a study done by the Management Analysis Division of the Department of Administration in 1986, the Director of the Administrative Division “had total authority for and control over the entire Department’s budget, personnel, and other resources. The Commission, under the umbrella of the Department, had neither a staff nor a budget of its own. Without control over its own staff or resources, the Commission could not direct staff and budgetary resources in a rate case and policy areas as it saw appropriate, without the concurrence of the Director.” Management Analysis Division report, *Management Study of the Minnesota Public Utilities Commission* (1986): 5.

<sup>19</sup> A *judicial* inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. *Legislation* on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

**Legislative.** The PUC acts in a *legislative* manner when it establishes policies to be applied in the future.<sup>20</sup> Among the commission's most important legislative functions are the:

- ▶ Establishment of rates for electric and natural gas service;
- ▶ Development and adoption of broad industry policies and standards applying in the future, such as rules and orders governing service quality, resource planning, and customer service.

Although for most people, the dominant impression of the PUC is akin to that of a court, the commission's primary duties, in terms of the amount of time and resources it expends, relate to policymaking in the performance of its legislative function.

**Quasi-judicial.** The PUC acts in a *quasi-judicial* capacity when it adjudicates disputes involving past behavior.<sup>21</sup> Examples include the:

- ▶ Determination of the reasonableness of a utility's rates or its allowed rate of return set in the past by the commission;
- ▶ Resolution of consumer complaints regard utility services; or
- ▶ Finding of a violation of state law or PUC order or rule by a utility, and the imposition of sanctions penalizing the violation.

**Commission process.** The principle mechanism that the PUC uses in performing its responsibilities, both legislative and quasi-judicial, is through the use of court-like procedures that have been called "the traditional regulatory model."<sup>22</sup> The traditional regulatory model uses a series of procedural rules that restrict and control the information that flows to the commission, in order to ensure due process to affected parties and to ensure the validity and completeness of the decision-making record, in case of judicial review. In the words of one observer,

Modeled on court procedures, regulatory procedures [of the traditional regulatory model] were developed to manage the flow of information and to guide it along

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<sup>20</sup> Minnesota law defines the PUC's legislative function as "the establishment and promulgation of all rules, orders, and directives of general or particular applicability, governing the conduct of the regulated persons or businesses, together with such investigative procedures as are incident thereto and all valid acts and procedures which are historically or functionally legislative in character." [Minn. Stat. § 216A.01](#), subd. 2.

<sup>21</sup> Minnesota law specifies that the PUC's quasi-judicial function is "the promulgation of all orders and directives of particular applicability governing the conduct of the regulated persons or businesses, together with procedures inherently judicial." [Minn. Stat. § 216A.02](#), subd. 4.

<sup>22</sup> This is the term used by David Wirick, manager of the Commission Transformation Program at the National Regulatory Research Institute (NRRI). The NRRI was established by the National Association of Regulatory Utility Commissioners (NARUC) in 1976 at Ohio State University and is the official research arm of NARUC. NARUC is a nonprofit organization founded in 1889, made up of commissioners of the utility regulatory commissions in the 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

prescribed pathways. If information flowed outside the process, sanctions were created and applied to errant participants; if it was deemed on review that a regulatory proceeding was “polluted” by information from outside the prescribed path, the proceeding was sometimes deemed inappropriate and reversed on appeal. These restricted flows helped provide a transparent process able to be replicated and reviewed.<sup>23</sup>

In Minnesota, this process generally involves:

- ▶ A petition by a utility or other party requesting the PUC to exercise (or refrain from exercising) its regulatory authority in a specified circumstance;
- ▶ A response filing by Commerce, detailing its initial analysis of the petition and advocacy for the department’s initial position concerning the request;
- ▶ The development of service lists for information flows, consisting of parties who have received permission to intervene in the proceeding (either by statute or by the commission);
- ▶ The dissemination of information requests by Commerce and Attorney General staff (also PUC staff and even commissioners) and other parties, directed to specific parties, to clarify issues, gather information, and otherwise assist in the development of the decision-making record;
- ▶ The development, negotiation, and distribution of one or more rounds of comments and reply comments by and to parties, detailing the parties’ position; and
- ▶ The development and circulation of briefing papers by commission staff to the commissioners and to the service lists, summarizing the record for the commissioners.

The above process describes a noncontested case proceeding. A contested-case proceeding would be much more judicial in nature, taking place before an Administrative Law Judge (ALJ) and involving numbers of witnesses, filed testimony, and cross-examination. The record for such a proceeding, once closed, would then be certified by the ALJ to the commission for a decision.

The traditional regulatory model has been described as:

A linear, winnowing process designed to limit information flow to circumscribed paths and to narrow the scope of information ultimately used for the decision. Few players were allowed to present information, and all information had to pass through institutional “information gates.” Once it passed through the information gate, information was further subjected to “raking criticism,” further winnowing

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<sup>23</sup> NRRI report, *The Creation of Dynamic Regulatory Institutions* (January 2001): 44.

the information available to decision makers.<sup>24</sup>  
Several assumptions are embedded in the traditional regulatory model, such as:

- The information must be reliable;
- The information must be simultaneously known to all parties to ensure fairness;
- The PUC should serve as the information gate, both to make decisions and to aggregate the information necessary for decision making; and
- The adversarial process leads to good outcomes.<sup>25</sup>

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<sup>24</sup> Id., 42.

<sup>25</sup> Id., 42-45.

## Chapter 2: Related Agencies

### The Telecommunications and Energy Divisions of the Department of Commerce

**The department's mission.** Commerce's mission with respect to its activities at the PUC is the subject of some debate, which will be discussed in chapter three. The Telecommunications and Energy Divisions of the Department of Commerce are by statute a party in all PUC proceedings. The department acts as one of the two regular government interveners in PUC proceedings,<sup>26</sup> providing analysis and making recommendations to the commission.

**The history of the department.** The history of the department's energy and telecommunications functions is described in detail on page 5.

**Agency structure.** Commerce is headed by a commissioner appointed by the governor for a term no longer than the governor's term of office. That commissioner, unlike the chair of the PUC, is a member of the governor's cabinet.<sup>27</sup> Although not required by statute to do so, the current Commissioner of Commerce appointed deputy commissioners for both telecommunications and energy.<sup>28</sup>

The state's Reliability Administrator, appointed by the commissioner for a four-year term, is located within the department, and acts "as a source of independent expertise and a technical advisor to the commissioner, the commission, the public, and the legislative electric energy task force on issues related to the reliability of the electric system."<sup>29</sup> See appendix 1 for additional details on the administrator.

The Telecommunications Division and the Energy Planning and Advocacy Unit within the Energy Division represent the department in PUC proceedings. In addition, the Energy Planning

#### Agency Snapshot

**Description:** One of two government entities with the statutory authority to intervene in PUC proceedings; advocates for the general public interest

**Budget for regulatory affairs:** approximately \$3.5 million per fiscal year; (funded through utility assessments)

**Personnel:** Two deputy commissioners (one for energy, one for telecommunications); 50 staff (32 analysts for commission advocacy – 22 energy, 10 telecommunication)

**Primary functions:** Analysis, advocacy, and investigation

<sup>26</sup> The other government intervener is the Attorney General's Residential and Small Business Utilities Division, which is charged with advocating on behalf of residential and small business utility consumers.

<sup>27</sup> The Department of Commerce regulates and oversees a number of industries, unrelated to telecommunications and energy, such as banking, insurance, real estate, residential construction, and securities.

<sup>28</sup> Under previous administrations, the Telecommunications and Energy Divisions were overseen by assistant commissioners.

<sup>29</sup> Minn. Stat. § 216C.052.

and Advocacy Unit acts as the state's Energy Issues Intervention Office, which represents "the interests of Minnesota residents, businesses, and government before bodies and agencies outside the state that make, interpret, or implement national and international energy policy," such as the Federal Energy Regulatory Commission.<sup>30</sup>

The Energy Division also houses:

- ▶ The State Energy Office, which provides grants and loans intended to "maximiz[e] the benefits of energy efficiency and renewable energy through promoting energy conservation in buildings and demonstrating energy technologies, with the objective of bringing them closer to market realities."<sup>31</sup> The State Energy Office also provides conservation information to Minnesota consumers, through the Energy Information Center; and
- ▶ The Economic Security Energy Unit, which administers the Low-Income Heat Energy Assistance program providing assistance to pay home heating costs, and the Weatherization Assistance Program, which provides assistance to homeowners to implement conservation measures, thereby reducing the cost of home energy.

The department's Regulatory Information Center provides document archiving and management services to the department and the PUC.

**The role and function of the department.** Commerce's responsibilities in matters relating to the PUC are primarily *administrative*.<sup>32, 33</sup> Commerce investigates the activities of regulated entities, and is charged by statute with enforcing the obligations imposed on them by the legislature or the commission. Although it is under no statutory obligation to do so, the department has historically provided two other important services to the PUC:

- ▶ It provided the commission and each party with an initial analysis of each filing made to the commission; and
- ▶ It developed and advocated for positions that it felt best balanced the public and private interests affected by the filing.

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<sup>30</sup> [Minn. Stat. § 216A.085](#).

<sup>31</sup> The Department of Commerce, *Energy Policy and Conservation Report 2000*: 5.

<sup>32</sup> Minnesota statute defines the administrative function as performing: "All duties and procedures concerning the execution and enforcement of the laws, rules, orders, directives, duties, and obligations imposed for the control and government of the persons or businesses regulated, together with investigative activities incident thereto and procedures inherently administrative or executive in character." [Minn. Stat. § 216A.02](#), subd. 3.

<sup>33</sup> The department has decision-making responsibilities in a couple of instances, most notably in its administration of the state's energy conservation program, the Conservation Improvement Plan (CIP) program. Under this program, rate-regulated energy utilities are required to submit a conservation-spending plan to the department for approval by the commissioner. [Minn. Stat. § 216B.214](#). The PUC has jurisdiction over the utility's recovery of conservation expenses incurred under a CIP plan, as well as any incentives approved by the commission to promote conservation activities.

As noted previously, commission staff in the vast majority of states provide these services to their commissions.<sup>34</sup>

In providing these services to the PUC, Commerce has historically acted as an extension of the commission balancing the public and private interests in shaping its recommendations to commissioners. As will be discussed more fully in chapter three, the role and function of Commerce seems to be evolving from this historical, traditional role as an extension of the PUC. The department may be transforming from this historical “regulator” role to one that focuses more strongly on providing public interest advocacy at the commission.

## The Residential and Small Business Utility Division (RUD)

**The RUD’s mission.** Minnesota Statutes, section 8.33, specifies that the attorney general is responsible for representing and furthering the interests of residential and small business utility consumers through participation in matters before the PUC involving utility rates and adequacy of utility services.

The Residential and Small Business Utilities Division (RUD) was created for the purpose of carrying out the attorney general’s statutory duty to advocate for the interests of small utility consumers. It is a public interest advocate, but one that is solely focused on this aspect of the overall public interest.

**The history of the RUD.** The RUD was created in 1978 as the Residential Utility Consumer Unit (RUCU) within the Office of Consumer Affairs at the Department of Commerce. At that time, the RUCU was overseen by a Board of Residential Utility Consumers, consisting of nine voting members appointed by the governor.<sup>35</sup>

### Agency Snapshot

**Description:** One of two government entities with the statutory authority to intervene in PUC proceedings; advocates for residential and small business utility consumers

**Budget:** Approximately \$750,000 per fiscal year (funded from appropriations from the general fund)

**Personnel:** One division manager; eight and one-half staff (three attorneys, one analyst, one investigator, two consumer complaint mediators and one and one-half support staff)

**Primary function:** Advocacy

<sup>34</sup> In those states, commission staff are divided into “advisory” and “advocacy” roles for each proceeding. Advisory staff advise the commission on issues relating to the proceeding. Advocacy staff analyze the issues raised in the proceeding and advocate for a commission decision that best advances the public interest. Advocacy staff are prohibited from discussing issues related to the proceeding with the commission and advisory staff. Prior to the 1980 reforms, Commerce provided both “advisory” and “advocacy” staff to the commission. The department employs this same procedure in administering the Conservation Improvement Plan (CIP) program: assigning certain staff to advise the commissioner in deliberations as to whether to approve or modify a utility’s CIP plan; assigning other staff to advocate for a particular decision by the commissioner; and prohibiting contact between these staff on CIP issues.

<sup>35</sup> Laws 1978, ch. 746.

The RUCU was transferred from the Department of Commerce to the Office of Attorney General in 1983, and the Board of Residential Utility Consumers was repealed.<sup>36</sup>

**Agency structure.** The RUD is made up of a division manager, three attorneys, one financial analyst, one investigator, two consumer complaint mediators, and one and one-half administrative support staff.

**The role and function of the RUD.** The RUD unit works to protect the interests of small utility consumers by participating in:

- selected PUC dockets;
- litigation before judicial bodies; and
- legislative proceedings.

The RUD also mediates consumer complaints and takes consumer enforcement action against utility companies for violation of state consumer laws. Unlike Commerce which elects to participate in every commission proceeding, the RUD, due to resource constraints, participates only in those proceedings which have the greatest potential impact on small utility consumers.

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<sup>36</sup> Laws 1983, ch. 289, §§ 23-31 and 119.

## Chapter 3: Discussion of Issues

In the 20 years since the legislature last imposed significant structural and operational changes on the PUC, all three industries overseen by the commission (natural gas, electricity, and telecommunications) have undergone radical and fundamental changes. In the ensuing years, policymakers and industry leaders have sought to introduce market dynamics and competition into these highly regulated industries. During that period, Minnesota has maintained low rates and high customer satisfaction for utility services. However, many observers agree, that the “traditional quasi-judicial, command and control model of regulation is not likely to continue to provide effective regulation of public utilities...”<sup>37</sup>

Recently, discussions have focused on assisting regulatory agencies in adapting to this new regulatory environment. This chapter is intended to inform policymakers about the issues and options that have been discussed. Nothing in this chapter should be construed either as support of the specific issues or options discussed, or of the notion generally that Minnesota’s regulatory structure is broke and needs to be fixed.

### The “Future Commission”

**NRRI.** The National Regulatory Research Institute of Ohio State University convened a group of utility regulatory commissioners from around the country in 1996 to look at the needs of future commissions. That group of commissioners determined that a number of reforms in their commissions’ structure, function, and operation were necessary to make future commissions more effective.<sup>38</sup> Building on the work of that initial group of commissioners, the NRRI created the Commission Transformation program.

In a recent publication, the NRRI lists four critical functions that effective commissions will be expected to perform in the future.<sup>39</sup> The critical functions are listed below along with a discussion of how they may apply to Minnesota’s public utility regulation.

**Critical function #1: Unbiased enforcement of industry laws and policies.** Notwithstanding the many changes to the industries the PUC oversees, many key aspects of these industries will

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<sup>37</sup> NRRI report, “New Models of Regulatory Commission Performance: The Diversity Imperative,” (November 1999): 1.

<sup>38</sup> The group of commissioners found that the effective “future commission” would do more than current commissions to: (1) utilize collaborative processes, mediation, dispute resolution, and increased use of public policy forums for building consensus; (2) gather and share information among interested parties and among commissioners; (3) reduce reliance on backward-looking adjudication and increase implementation of forward looking policymaking; (4) be more proactive in its activities and communications with legislators, regulated entities, consumers, and other interests; (5) increase the access by policymakers to neutral and professional analysis and reduce reliance on adversarial advocacy; and (6) conduct additional planning and provide parties with more future-oriented analysis about utility regulatory policy. NRRI report, *Transforming PUCs in the New Regulatory Environment: Some Issues and Ideas for Managing Change* (July 1996): 5-6.

<sup>39</sup> *The Creation of Dynamic Regulatory Institutions*: 4-6.

remain under PUC's comprehensive regulatory authority. Minnesota citizens and policymakers will continue to expect the PUC to actively and aggressively enforce the regulatory laws and rules that apply to these industries and service providers.

**Critical function #2: Effective participation in policymaking processes.** As these industries evolve, it may be increasingly important for the PUC to be more involved in establishing industry-wide policies, rather than focusing on its traditional single-utility rate-setting responsibilities. This involvement may require increased interaction between the PUC and the legislature. This increased interaction may result in conflicts between competing policy goals. On the one hand, as the state's policy decision-making bodies on utility issues:

- ▶ the legislature may need to hear from the commission on utility issues before it; and
- ▶ the commission may need to have a better and more clear sense of the legislature's policy goals in order to effectively implement utility legislation passed by the legislature.

However, the PUC may not feel comfortable engaging in legislative advocacy on utility matters, and others may not feel that doing so is a proper role for the commission. Several techniques may be useful in balancing these policy goals:

- ▶ The PUC and the legislature could arrange for more generic interaction. Legislators could invite commission members to attend legislative hearings on utility issues. The commission could invite legislators to participate in its informational hearings.
- ▶ The PUC could be called on to provide more formal input to legislative committees that are considering issues that affect the commission, regulated industries, utility consumers, or other utility policy interests. For example, the commission could be asked to provide a "regulatory impact analysis" of legislative proposals, similar to fiscal notes that agencies provide to the legislature.

**Critical function #3: Proactive dispute transformation.** In the past, PUC resources have been focused on resolving disputes through litigation. The NRRI report suggests that the commission might need to become more active in: (1) preventing disputes and (2) resolving disputes without resorting to its resource-intensive adjudication procedures.

The traditional regulatory model:

- ▶ Functions best in retrospectively determining facts;
- ▶ Tends to emphasize fairness and integrity of process over outcomes and effectiveness;
- ▶ Is reactive, rather than proactive;
- ▶ Stifles creative and flexible problem solving, because of the need to base decisions on a record derived from an adversarial process; and

- ▶ Makes consensus building difficult due to the adversarial nature of the proceedings.<sup>40</sup>

The PUC has already taken a number of steps to reduce its reliance on the traditional regulatory model. For example, it has conducted technical conferences on important policy issues to ensure a common level of understanding of such issues among the regulators and the entities it regulates. In addition, the PUC has encouraged parties to mediate their disputes prior to involving the full panoply of the commission process and authority; in certain circumstances, PUC commissioners have agreed to guide such mediation attempts.

Often, disputes can arise out of situations where the regulated entities are simply not sure of the rules of the game. This confusion can occur either because applicable rules had not been enacted or adopted, or because the commission implemented conflicting sets of rules.

One of the key concerns that interested parties raise about PUC decisions is the tendency of the commission to lurch between bureaucracy (generally to decide to do things “the way we’ve always done them”) and “adhocracy” (generally, ignoring precedent and making decisions on an ad hoc basis, based only on the experience and record in front of the decision maker). Bureaucracy provides for stability and predictability, but can lead to stagnation. Adhocracy provides for creative learning and adaptive response, but can lead to chaos.

To counteract this tendency, the Department of Administration’s Management Analysis Division (MAD) recommended the commission create its own policy and planning unit (MAD conducted a management study of the commission in 1986). The Department of Administration contemplated an entity whose functions would include:

- ▶ coordinating, developing, and drafting rules;
- ▶ creating and maintaining a commission-precedent tracking and retrieval system
- ▶ researching public utility policy areas, and
- ▶ analyzing the affects of federal initiatives on the state.

Such a policy and planning unit within the PUC could help it smooth out the lurches between bureaucracy and adhocracy, providing balance between stability and predictability on the one hand with learning and adaptation on the other. In this way, the commission could prevent some disputes from occurring.

Similarly, the PUC could be granted the explicit authority to issue policy white papers, addressing key issues of concern to regulated entities and other interested parties. Policy guidances such as these could also assist the commission to provide a balance between bureaucracy and adhocracy. The policy guidance would describe in some detail how the commission might treat a given situation should that situation arise, providing the regulatory

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<sup>40</sup> *New Models of Regulatory Commission Performance*: 23, 24. As one commentator quipped, regarding the traditional regulatory model, “There is no more wasteful institution than bureaucracy, and no more wasteful process than litigation. We have married the two, we have bureaucratized litigation and we are all the poorer for it.” Office of the Governor, Reorganization Plan No. 001-1994, New Jersey Register, June 6, 1994, CITE 26 N.J.R. 2171.

equivalent of “signaling your turn.”

The commission, at one time, issued such guidances but stopped after complaints that the guidances were rules issued without utilizing the rulemaking procedures provided for under Minnesota law.<sup>41</sup> If policymakers believe that such policy statements could be useful to the commission and the industries it regulates, the legislature could explicitly authorize the PUC to issue such statements.

**Critical function #4: Consumer protection.** As previously regulated industries are deregulated (such as local telephone service), the NRRI report recommends that the PUC should consider opportunities to shift its focus from the regulation of the service provider to the protection and education of the consumer.<sup>42</sup>

The NRRI thesis is as follows. Regulation by the commission is not merely a substitute for competitive markets that can be dismantled as soon as competitive markets emerge and are created. The commission exists to serve the public interest that is embedded in the provision of, and access to, necessary utility services. Even if a competitive market for a certain utility service is created, it may be necessary for government to attend to these public interests (such as service reliability, universal service, economic development, safety, and environmental concerns). Even if, or when, effectively competitive markets reduce the need for the commission to comprehensively regulate a utility service, the commission will still need to attend to consumer protection.

As regulation over certain aspects of these regulated industries is relaxed, policymakers may want the commission to do more to police abuses such as unfair trade practices, covert coercion, undue influence, deception, and incomplete information and disclosure, or needlessly confusing information presented by service providers.

**The commission’s Delphi project.** In 1997-98, the PUC initiated the Delphi project, an open dialogue with its broad range of stakeholders, inviting participation from all affected utilities, industry and consumer groups, and government sectors. The purpose of the project was to identify the PUC’s principal strengths and weaknesses. The commission used a survey to solicit input from stakeholders (essentially, parties who represent various interests before the PUC on a regular basis) and hired a project manager from the State’s Department of Administration and an Administrative Law Judge from the State’s Office of Administrative Hearings to oversee and implement the project. The survey process was designed to protect the anonymity of participants.

The following table lists the principal findings of the Delphi project, listing the top ten comments of the stakeholders.

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<sup>41</sup> See, for example, Legislative Commission to Review Administrative Rules staff report, *Public Service Commission Use of Policy Statements to Establish Statewide Policy on Public Utility Service Issues* (1978).

<sup>42</sup> *The Creation of Dynamic Regulatory Institutions*: 6.

Priority	Stakeholder Concern
1	Commissioners have highly variable levels of commitment, involvement, and ability.
2	Appointments of commissioners should stress expertise of candidates and focus on those who can complete their terms.
3	Commission staff filters information to commissioners and prepares “positional” briefing papers.
4	Some commission staff advocate repeatedly to commissioners without providing opportunities for parties to respond.
5	Routine matters should be delegated to commission staff and the executive secretary.
6	The commission is understaffed and underbudgeted.
7	The commission’s decision-making process is too slow and cumbersome, and needs to be streamlined.
8	The infighting, lack of trust and power struggles between the commission and Commerce are disruptive.
9	A complete overhaul and consolidation of the state’s regulatory process should be considered.
10	The roles of the commission, Commerce, and the RUD need clear definition.

The commission responded to the concerns about process (raised in priorities five and seven) by seeking and implementing authority from the legislature to:

- ▶ allow individual commissioners to act as a lead commissioner in a proceeding, overseeing the development of the decision-making record;
- ▶ allow the commission to create subcommittees that have the commission’s decision-making authority, subject to appeal to the full commission; and
- ▶ develop a list of types of utility files that are to be deemed approved unless an objection is raised.<sup>43</sup>

The commission has also expanded the types of decisions that can be or have been delegated to the executive secretary, and has established a consent calendar process for noncontroversial cases.

A number of observers, including past and current commissioners, support consideration of a staffing option that could address some of the concerns raised about commissioners and staff (priorities one, three, and four). Under the current process, commission staff are assigned to

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<sup>43</sup> [Minn. Stat., § 216A.03](#), subds. 7-9.

individual dockets. When a particular docket is coming up for a decision, the staff assigned to that docket brief all five commissioners on the issues raised in the docket and the decision alternatives through the drafting of briefing papers; the briefing papers are issued to the individual commissioners and made available to the parties and to the public. Briefing papers have often been controversial; one party or another may feel commission staff has slanted the briefing papers in favor of a particular outcome.

In lieu of briefing papers drafted by PUC staff and distributed to the full commission, staff could be assigned to individual commissioners. Under this staffing proposal, all current commission analysts would be reassigned to Commerce and pooled with the department analysts. Each PUC commissioner would select a number of staff analysts from this pool to work with. The analysts selected would act like law clerks for individual commissioners, reviewing the cases that are coming to the commission and briefing their commissioner individually on the issues for decision in that docket. Analysts selected would serve their commissioner for some specified period and then would return to the pool.

Proponents of this new staffing structure argue that individual commissioners would be more involved in the development of each case and would better understand the issues for decision. It would allow them to develop a level of trust and rapport with their staff, and thus they would better be able to talk through issues with their analysts prior to having to make hard decisions. Commerce would obtain additional analytic resources, and both the commission and the department would benefit from the movement of staff from the pool to the commission and back. In addition, if an individual staff person advocated for a specific decision, that advocacy would be restricted to a single commissioner, rather than the commission as a whole. Others argue that the commission benefits from the current staffing structure because it allows a staff person to become more familiar with a specific docket, thus that person is in a better position to brief the commissioners. In addition, this reform proposal raises concerns with many on its potential impact on current commission staff.

The issue raised in priority ten (clarifying roles of agencies) on this list will be discussed both in the section on the advocacy mission of the department, and in the section detailing the overlapping functions of the three agencies. Concerns raised dealing with commissioner appointments, commission budget, the lack of trust/infighting/power struggles between the commission and the department, and the need for an overhaul of regulatory system (priorities two, six, eight, and nine), will be briefly discussed in the section dealing with the interdependence of the commission and the department.

## **The Advocacy Mission of the Department**

The advocacy mission of the department is the matter of some debate. That mission is not clearly prescribed in statute or rule. The key question in the debate is whether Commerce is primarily a regulator that advocates at the PUC or a public interest advocate with some regulatory

responsibilities. The lack of an answer to that key question causes the department to provide unclear information as to its advocacy mission, resulting in confusion among legislators and the public.

**Regulator or advocate.** Historically, Commerce has acted as an extension of the PUC, assisting it to shape and issue decisions that balance the public and private interests in a manner that is consistent with the overall public interest. Commerce did so by participating in nearly every commission proceeding, to “identify issues, present various alternatives by which the issues can be resolved, and make recommendations which, in its opinion, are in the best interests of the entire public.”<sup>44</sup> In this manner, the department acted more like a regulator—providing expert analysis and balanced recommendations—than a public interest advocate.

In recent years, however some observers have come to believe that the department’s role should be to advocate strongly for the public interest (the public policy goals established by the legislature or advanced by an administration) and that the private interests, such as the utility or large commercial customers who often appear at the commission, should advocate on their own behalf. The commission, then, would be responsible for developing a balance of the various public and private interests on its own, without the assistance of Commerce.

The outcome of this debate had important consequences for the PUC and Commerce. In its role as an extension of the commission, the department has historically participated in every proceeding and provided initial analysis to the commission of the issues presented there. However, as a public interest advocate, the department may decide, as the RUD does, to focus its resources on those proceedings which have the potential for the greatest impact on the public interest.<sup>45</sup> If Commerce decided to change its historical role, some proceedings may have no government intervener participating.<sup>46</sup> Moreover, some may question whether relying on Commerce for objective analysis is consistent with its role as public interest advocate. The PUC may then have to rely on its staff to provide the necessary analysis for its decisions.

**Confusion.** Commerce’s web site and publications contribute to the confusion regarding its mission. The web site provides somewhat conflicting information as to its advocacy on telecommunications issues, stating that the Telecommunications Division:

- ▶ advocates at the PUC for the “broad public interest;” and

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<sup>44</sup> *The Biennial Report of the Minnesota Public Service Department* (1974-1976): 4, describing the duties of the Administrative Division, which was the historical predecessor of the department’s telecommunications and energy divisions.

<sup>45</sup> Note that the statutes only authorize the Department’s involvement in each commission proceeding. That participation is not mandated.

<sup>46</sup> Having the PUC staff conduct the initial analysis of filings before the commission would require a significant change to PUC practice and procedures, and, potentially, re-allocation of resources between the PUC and Commerce.

- ▶ acts as a consumer advocate at the PUC.<sup>47</sup>

Energy Division publications demonstrate a similar confusion with regard to its PUC advocacy on energy issues. Commerce's *Universal Service Report* from February 2002 states that it advocates on behalf of "the broad public interest" in matters before the commission, but its 2000 *Energy Conservation and Policy Report* specifies that it intervenes as an advocate for ratepayers in commission energy proceedings.<sup>48</sup>

The term "broad public interest" refers, essentially, to all the public and private interests that make up the public interest. Thus, where the department refers to itself as advocating for the broad public interest, it is suggesting that is acting primarily as a regulator, balancing those interests. On the other hand, when the department states that it acts as a consumer advocate, it has identified a single public interest that it intends to advocate aggressively for, leaving the commission to balance affected interests.

Minnesota law provides little guidance to the department. With regard to Commerce's advocacy on energy issues, the statutes provide two separate missions, one for advocacy activities within the state, and one for advocacy outside it. Minnesota Statute, section 216A.085, requires the department to advocate for the "broad public interest" when intervening before "bodies and agencies outside the state that make, interpret, or implement national and international energy policy."

However, when advocating before the PUC, Minnesota Statutes, section 216C.09, requires the department to advocate for a relatively narrow set of public interests, specifically:

- ▶ increased energy efficiency and energy conservation,
- ▶ the development of renewable energy resources wherever possible, and
- ▶ the creation of effective energy forecasting, planning, and education.<sup>49</sup>

The confusion that might result from this contradictory message may be compounded by a review of other pages on the department's web site. For example, on one page of the web site, titled "About Us," the department describes itself as "the state's chief regulator for the ... energy ... and telecommunications industries ..." The web site goes on to state that one of the agency's functions is to "approve utility rate increases and company mergers, after considering fairness to the company and the consumer."<sup>50</sup>

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<sup>47</sup> See the Department's Telecommunications web page: [www.commerce.state.mn.us/pages/TelecomMain.htm](http://www.commerce.state.mn.us/pages/TelecomMain.htm) (August 13, 2002).

<sup>48</sup> Compare the *Minnesota Universal Energy Service Report* (February 2002) at page 3 with the *Energy Conservation and Policy Report* (2000) at page 4.

<sup>49</sup> Minn. Stat. § 216C.09, para. (b).

<sup>50</sup> See department web site at [www.commerce.state.mn.us/pages/AboutUs/AboutUs.htm](http://www.commerce.state.mn.us/pages/AboutUs/AboutUs.htm) (August 13, 2002).

However, it is the PUC, statutorily, that is the state's chief regulator for the energy and telecommunications industries. Moreover, the authority to approve utility rate increases and company mergers is solely and unambiguously vested with the PUC.

Policymakers may find that it would be beneficial to clarify Commerce's advocacy mission, in order to provide guidance to the department as to what the legislature expects of the agency, increasing the department's accountability for its activities. This clarification could also increase the public's understanding of the department's responsibilities. On the other hand, it's widely accepted that department staff do a very good job in developing its positions, advocating for outcomes that the staff generally believe to be in the public interest. Some may argue that constraining the department's discretion to develop positions that it feels are in the public interest is unnecessary micromanagement.

## Overlapping Functions

There are a number of PUC, Commerce, and RUD functions that overlap and could be clarified. The following table lists selected important functions and the agencies that share responsibility for them.

Function	Agencies
Analysis of utility filings	<ul style="list-style-type: none"><li>▶ Commerce (initial analysis upon filing) and</li><li>▶ PUC staff (in developing the decision-making record and summarizing the record for PUC decisions)</li></ul>
Public advocacy	<ul style="list-style-type: none"><li>▶ Commerce and</li><li>▶ RUD (on behalf of small consumers)</li></ul>
Decision making	<ul style="list-style-type: none"><li>▶ Commerce (conservation plans) and</li><li>▶ PUC (all other utility issues)</li></ul>
Consumer complaints	Shared among all three agencies
Participation in federal/regional proceedings	Shared among all three agencies: <ul style="list-style-type: none"><li>▶ Commerce – <a href="#">Minn. Stat. § 216A.085</a></li><li>▶ PUC – <a href="#">Minn. Stat. § 216A.05</a>, subd. 6</li><li>▶ RUD – <a href="#">Minn. Stat. § 8.33</a>, subd. 6</li></ul>
Investigation of regulated utilities	Shared among all three agencies
Enforcement	Shared among all three agencies <sup>51</sup>

<sup>51</sup> Commerce has the nominal responsibility of enforcing PUC orders, or enforcing [chapters 216A, 216B](#), and [237](#), where the energy and telecommunications regulatory statutes are codified. However: (1) the PUC tends to enforce its own orders and statutes, with regard to parties under its jurisdiction; and (2) for matters that require a court's attention or over which the commission does not have jurisdiction, the Attorney General has the sole discretion of bringing suit to enforce commission orders or the regulatory statutes. The department's role, essentially,

## RUD Resource Issues

Aside from issues relating to overlapping functions listed above, there are two other issues that commissioners and other parties have raised with regard to the RUD. The first of those issues is the amount of resources the state makes available for looking after the interests of small consumers. The budget and complement of the RUD is less than a quarter of Commerce's. Due to these resource constraints, the RUD has to be very strategic about the proceedings in which it expends those resources. There are a number of PUC proceedings each year in which small consumers are not represented.

The second area of concern has to do with the significant turnover in RUD personnel in recent years. As attorneys and analysts come and go from the division, RUD experiences a loss of continuity and "sense of the case" in particular dockets, and a loss of experience with and understanding of these very complex regulated industries.

## Commission/Department Interdependence

The PUC, as the state's primary decision maker and policy setter (after the legislature) and Commerce, as the state's primary utility policy advocate, are highly interdependent entities. To be effective, the PUC relies heavily on the department's analysis and advocacy. In turn, the department has no authority to make decisions regarding utility policy—it must convince the commission of its positions.

This interdependence, the result of the historical bifurcation of these agencies that has its roots in the work of the 1957 legislative task force, has both positive and negative effects for the state. One of the benefits of the current structure is evident in the separation between advocacy and decision making. The state also benefits because the department enjoys a special status in proceedings before the commission. By relying on the department for the initial analysis of each petition filed for commission decision, the PUC gives Commerce the opportunity to shape the direction of each docket towards what Commerce believes is the correct outcome for the public interest.

However, the department's ability to influence PUC decisions is augmented in many respects by its status as a cabinet-level agency within the administration. As such, the department is in a position to affect administration support of PUC budget and policy initiatives and to influence the administration's choices regarding PUC appointments and (perhaps more importantly) re-appointments of sitting PUC commissioners. The PUC and Commerce both realize the political reality of the current structure: the department is a member of the administration, whereas the PUC is an independent regulatory commission, an orphan entity affiliated with, but not embraced by, any of the three branches of government.

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has been to either petition the commission to take up an enforcement matter, or to request the Attorney General to bring suit in court.

Because of this influence, there is a concern that the PUC, ostensibly an independent regulatory body, may not act fully independently. The 1980 reforms adopted by the legislature were meant to address these very issues, but it may be that those reforms did not result in as strong a separation between the advocate and decision maker as some might consider necessary. There is a perception that, at times, the commission or its members may amend its activities and decisions (both inside and outside the commission's hearing room) to defer to the department's closer ties to the administration.<sup>52</sup>

One potential example of this deference may be the PUC's lack of involvement in legislative activities, discussed previously. Most administrations insist on a single voice for their utility policy positions and prefer that Commerce (whose commissioner serves at the pleasure of the governor) speak for the administration on such issues. To the extent that the PUC feels it is part of an administration, that preference can act to enhance the commission's institutional reticence (a by-product of its adjudicative responsibilities) to stay away from the legislature and legislative proceedings. However, as the agency that will be responsible for implementing legislation, many legislators want to hear from the PUC.

Another set of concerns involve issues of in-fighting and tension between the two agencies. In periods when the PUC does not defer to Commerce on the direction of utility policy in the state, tensions between the two entities rise dramatically. Recall that this was one of the primary concerns raised by stakeholders in the commission's Delphi process.

There are a number of alternatives that have been suggested in recent years to address these concerns. These alternatives fall into two categories: (1) alternatives that modify the current structure and process; and (2) alternatives to re-organize the current structure. The following table lists these various alternatives.

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<sup>52</sup> Note that these concerns may have their root in the decision of the 1967 Legislature not to adopt the recommendation of the 1957 legislative task force to have the director of the Administrative Division have the same level of independence enjoyed by the members of the commission. The 1957 task force recommended that the director be appointed for a six-year term removable only for cause, which would have insulated the Administrative Division from political considerations in the same manner as the commission.

<b>Issue</b>	<b>Alternative</b>	<b>Comment</b>
Commissioner selection	Have PUC commissioners appointed from a pool of two or three candidates selected by a panel of experts, in the same way that candidates for judicial offices are often selected.	Legislation to require this selection process moved through both bodies of the 1999 Legislature, but the provision was removed on request of the administration.
PUC budget	Create a special revenue or revolving fund account, in lieu of biennial legislative appropriation.	This was a recommendation of the Management Analysis Division in its management study of the PUC. <sup>53</sup>
PUC budget	Allow the PUC to send its biennial budget request and legislative initiatives directly to the legislature, rather than to the administration for approval.	Many federal independent regulatory agencies enjoy what's termed an "OMB by-pass" for their budget and legislative initiatives, rather than send these to the federal Office of Management and Budget for approval. <sup>54</sup>
PUC chair	Make the PUC chair a member of the governor's cabinet.	This would be consistent with the Management Analysis Division recommendation that the chair be granted elevated status among the PUC members and an increased salary. <sup>55</sup>
Legislative interactions	Require the PUC to provide legislative committees with a regulatory impact analysis of utility legislation.	Discussed above
Legislative interactions	Provide regular opportunities for interaction between the PUC and legislators, such as joint hearings on policy issues.	Discussed above
Agency Reorganization	<ul style="list-style-type: none"> <li>▶ Eliminate the department and combine its advocacy functions with those of the Attorney General</li> <li>▶ Transfer the responsibility for conducting initial analyses of utility filing and all other functions and responsibilities to the PUC.</li> </ul>	This was a recommendation of the Minnesota Commission on Reform and Efficiency in 1993. <sup>56</sup>

<sup>53</sup> MAD study at 32.

<sup>54</sup> Marshall J. Breger and Gary J. Edles, "Established by Practice: The Theory and Operation of Independent Federal Agencies," *Administrative Law Review*, Volume 52, Number 4 (Fall 2000): 1236-1294.

<sup>55</sup> MAD study, 16.

<sup>56</sup> CORE report, *Recommendations for Reorganizing the Executive Branch* (1993): 101. The CORE also recommended that the Attorney General's advocacy functions and the department's advocacy functions be combined in an Executive Office of Public Advocacy. CORE members included Glen Taylor, John Brandl, and Arlene Lesewski, among others.

Issue	Alternative	Comment
Agency Reorganization	Recombine the PUC and the department into a single agency, but this time make the commission the administrative head of the agency. This is the structure of the vast majority of states with a unified regulatory commission.	This was a suggestion of the Center of the American Experiment in its <i>Minnesota Policy Blueprint</i> , issued in 1998. <sup>57</sup> Legislation to implement this structure has been proposed several times over the past decade, but has not been adopted.

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<sup>57</sup> Center of the American Experiment report *Minnesota Policy Blueprint* (1998): 31.

## Appendix 1

### The Reliability Administrator

**Creation.** The 2001 Legislature determined that there was a need for neutral, expert technical information on issues related to the reliability of the electric system. Since legislators viewed the electric utilities and the Department of Commerce as advocates on various sides of these reliability issues, and the PUC as not having the necessary resources to provide this type of technical information, the 2001 Legislature created a new entity: the independent Reliability Administrator.<sup>58</sup>

**Duties.** [Section 216C.052](#), subdivision 1, creates the independent administrator and specifies its duties: “The administrator shall act as a source of independent expertise and a technical advisor to the commissioner, the commission, the public, and the legislative electric energy task force on issues related to the reliability of the electric system. In conducting its work, the administrator shall:

1. model and monitor the use and operation of the energy infrastructure in the state, including generation facilities, transmission lines, natural gas pipelines, and other energy infrastructure;
2. develop and present to the commission and parties technical analyses of proposed infrastructure projects, and provide technical advice to the commission; and
3. present independent, factual, expert, and technical information on infrastructure proposals and reliability issues at public meetings hosted by the task force, the environmental quality board, the department, or the commission.”

**Administrative issues.** The administrator is appointed by the Commissioner of Commerce for a four-year term. [Minnesota Statutes, section 216C.052](#), subdivision 2, requires the commissioner to:

- oversee and direct the administrator’s work;
- review the administrator’s expenses; and
- approve the administrator’s budget.

To the extent the administrator’s expenses are consistent with the budget previously approved by the commissioner, the Department of Commerce is required to pay expenses incurred by the administrator and assess energy utilities to reimburse Commerce for these expenses (not to exceed \$1.5 million annually for general administrative costs).

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<sup>58</sup> The statute creating the administrator ([Minn. Stat. § 216C.052](#)) expires June 30, 2006. The current Reliability Administrator was appointed in May 2002, for a term that could extend to May 2006.

Subject to this oversight by the commissioner, the statute authorizes the administrator to:

- ▶ hire staff, and
- ▶ contract for technical expertise “when existing state resources are required for other state responsibilities or when special expertise is required.”

**Independence.** Although subject to the oversight of the Commissioner of Commerce, the statute presumes and requires the Reliability Administrator and its staff to work independently of the department. This independence is reflected in a number of ways in section [216C.052](#).

1. **The administrator’s term of service:** The statute specifies that the administrator serve for a specified term of years. Other appointees in unclassified service explicitly serve at the pleasure of the commissioner.<sup>59</sup>
2. **Administrator staff:** The statute authorizes the administrator to hire its own staff, and to hire outside consultants when circumstances warrant.
3. **Budget:** The statute provides for a budget somewhat independent of the department’s.
4. **Prohibition on advocacy before the PUC:** The statute prohibits the administrator (and presumably, the staff and consultants hired by the administrator) from advocating for any particular outcome in a PUC proceeding. As discussed previously, Commerce’s primary function with respect to the PUC is to advocate for particular outcomes in commission proceedings.
5. **Ex parte communications:** The statute specifies that the administrator (and, again, its staff) is not to be considered a party or a participant in any proceeding before the PUC. The department, in contrast, is a party in all PUC proceedings it participates in. Parties to commission proceedings are subject to the commission’s rules regarding ex parte communications.<sup>60</sup> Commerce (the commissioner, deputy commissioners, and all of its staff) is subject to these restrictions on communications with the commission, but the administrator and its staff are not.
6. **Duties:** The statute requires the administrator to “act as a source of independent expertise . . . on issues related to the reliability of the electric system.”

*For more information about utilities, visit the utilities area of our web site,  
[www.house.leg.state.mn.us/hrd/issinfo/pubutil.htm](http://www.house.leg.state.mn.us/hrd/issinfo/pubutil.htm).*

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<sup>59</sup> See, for example, [Minnesota Statutes, section 15.06](#), subdivision 7, which states that “A deputy commissioner serves at the pleasure of the commissioner.” Note, however, that the administrator’s budget is entirely within the discretion of the commissioner. The commission could arguably decide not to approve the budget of an administrator with whom the commissioner objects.

<sup>60</sup> As described on the PUC’s web site: “Generally, the ex parte rules prohibit [members of the commission and its staff] from engaging in informal communications with parties that could influence how a case is decided. Under the rules of ex parte communications, parties may not, for example, present information to commissioners about the facts or merits of a case.” [www.puc.state.mn.us/about/exparte.htm](http://www.puc.state.mn.us/about/exparte.htm)