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## Public Utilities Commission - Improvements to Avenues for Consumers to Raise Concerns Possible; Risk of Actual and Perceived Bias Persists

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Report No. SR-PUC-12

**Issues OPEGA noted during this review:**

- PUC's adjudicatory proceedings/process can be confusing and intimidating for consumers who want to represent themselves as parties in PUC cases. (pg. 31)
- On-line case file system is difficult to navigate and search without a specific docket number. (pg. 33)
- Consumers may not be aware that unsworn testimony and on-line comments submitted in PUC cases cannot be relied upon in the Commission's decision-making. (pg. 35)
- PUC does not always make decisions on Ten-Person complaints that go to adjudicatory proceedings within nine months as required by statute. (pg. 36)
- PUC lacks a structured process for identifying and addressing emerging issues and common concerns from individual complainants. (pg. 37)
- Past associations and current working relationships between PUC staff or Commissioners and the utilities they regulate create risk of actual or perceived bias. (pg. 39)

September  
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a report to the  
Government Oversight Committee  
from the  
Office of Program Evaluation & Government Accountability  
of the Maine State Legislature

## Public Utilities Commission – Improvements to Avenues for Consumer Concerns Possible; Risk of Actual & Perceived Bias Persists

### Introduction

The Maine Legislature's Office of Program Evaluation and Government Accountability (OPEGA) has completed a review of the Public Utilities Commission. OPEGA performed this review at the direction of the Government Oversight Committee (GOC) for the 125<sup>th</sup> Legislature.

The PUC's purpose is to regulate electric, gas, telephone and water utilities to ensure Maine citizens have access to safe, reliable utility services at rates that are just and reasonable for all ratepayers and public utilities.

Maine's Public Utilities Commission (PUC) was created by the Legislature in 1913 and began operation in 1914. Statutory authority and direction for the PUC is found in Title 35-A of the Maine Revised Statutes §101 *et seq.* Its purpose is to regulate electric, gas, telephone and water utilities to ensure that Maine consumers have access to safe, reliable utility services at rates that are just and reasonable for all ratepayers and public utilities.

The PUC regulates approximately 430 utility companies and districts. It establishes rates, grants operating authority, monitors utility operations for safety and reliability, investigates possible violations of State laws by utilities and regulates service standards. The PUC reviews anything a regulated public utility does, or plans to do, that affects or may affect utility service rates, operations, or the safety and reliability of those services for customers and citizens. To a limited degree, the PUC also regulates water transportation in Casco Bay. In addition to its regulatory responsibilities, the PUC performs other functions assigned by the Legislature such as holding auctions for standard offer electricity supply, soliciting bids for long-term energy contracts, and overseeing the statewide E-9-1-1 system.

OPEGA's review focused on aspects of compliance, accessibility and responsiveness of avenues available for consumers with common utility-related concerns.

OPEGA's review focused on aspects of compliance, accessibility and responsiveness of certain PUC processes, which included Ten-Person complaints and other avenues available to consumers with common utility-related concerns. This was done from the viewpoint of ratepayers and members of the public, rather than that of regulated utilities. OPEGA also considered the adequacy of measures in place to ensure that the PUC acts in an impartial and unbiased manner when regulating public utilities. We did not examine the quality, appropriateness, or results of specific decisions made by the PUC. The specific questions addressed by OPEGA were approved by the GOC prior to the review's initiation. See Appendix A for complete scope and methods.

## Questions, Answers and Issues

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1. Is the PUC acting in compliance with its statute and rules when handling Ten-Person complaints filed with the Commission under 35-A MRSA §1302(1)? Is the process accessible to citizens and responsive to their concerns?

see pages 13 and 20 for more on this point

OPEGA found that, overall, the PUC acts in compliance with its statutes and rules when handling Ten-Person complaints, though we did note instances where the Commission did not issue a decision within the nine-month timeframe required by statute. We also found that the Ten-Person complaint process is generally accessible and responsive to consumers' concerns in most instances. However, it is notably less so for complaints in which the PUC opens an investigation and deals with the complaint through an adjudicatory proceeding, particularly when complainants are representing themselves before the Commission.

2. What other avenues are available to groups of consumers with common concerns about utility plans and practices? Are those avenues accessible and responsive to their concerns?

see pages 14, 16 and 22 for more on this point

Individual consumers can call or email the PUC's Consumer Assistance Division (CAD) with complaints or concerns. Consumers can also make their concerns known by participating in proceedings before the Commission, becoming intervenors who are parties to the case or submitting comments and public testimony for the Commission's consideration.

The CAD is accessible, with a strong customer focus. It is also responsive in addressing individual billing and service complaints that are its primary function, and providing general information about the PUC. CAD staff may identify common concerns raised by multiple consumers. PUC Directors may also discuss issues that come to their attention during regular management meetings or meetings with Commissioners. The PUC has no set procedure or method for identifying common concerns or emerging issues. Those that are identified are brought to the Commissioners' attention at the Directors' discretion.

PUC's intervenor process for allowing individual ratepayers to become parties to cases before the Commission is accessible. However, these cases are also handled as adjudicatory proceedings, which by their nature, are difficult for laypersons to effectively participate in without legal representation. The processes for non-parties to submit written comments or testify in cases are also accessible and straightforward. However, while the Commission is informed through these avenues, it can only rely on formally sworn testimony in its decision-making – a fact that those providing comments and testimony may not realize.

3. What measures are in place to ensure the PUC acts in an unbiased and impartial manner when regulating public utilities? Are those measures adequate? Is the PUC acting in accordance with those measures?

see page 24 for more on this point

PUC is responsible for making impartial, unbiased decisions. State and the PUC's statute and rules include measures to support impartial unbiased proceedings and decisions. Maine's ethics laws are less strict than some other states and other factors, such as the State's "good government" culture and small size, as well as the personal integrity of public officials, are often cited as sufficient to minimize ethical issues. However, complying with the law and relying on personal integrity do not fully address the risk of bias and perceptions some people have about PUC's ability to act in an impartial way.

OPEGA identified the following issues during the course of this review. See pages 31-41 for further discussion and our recommendations.

- PUC's adjudicatory proceedings/process can be confusing and intimidating for citizens who want to represent themselves as parties in PUC cases.
- On-line case file systems difficult to navigate and search without specific case number.
- Consumers may not be aware that they can request an independent commission's assistance. The Commission cannot be relied upon for the Commission's decision-making.
- PUC does not always make decisions on legal issues complaints. In particular, complaints are often dismissed without a hearing or trial as determined by a PUC.
- PUC has a history of not disclosing information and processing information in a timely manner, often with from individual complainants.
- Post-issuance and enforcement of decisions is often slow and incomplete. Some complainants feel that they are not getting a resolution from the PUC.

## In Summary

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There are several avenues for consumers to bring concerns about utilities to the PUC.

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The PUC's Consumer Assistance Division is the initial point of contact for most consumers. The CAD has a strong customer service focus. Its primary function is to help resolve the billing or service complaints of individual consumers.

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A group of consumers with a common concern can file a Ten-Person complaint. The PUC must process Ten-Person complaints in accordance with requirements in Maine statute and PUC Rules.

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OPEGA found the PUC to be in substantial compliance with those requirements. We also found this avenue to be accessible and responsive to consumers, unless the complaint is addressed through a formal PUC adjudicatory proceeding.

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There are several avenues for members of the public to bring their concerns about utilities before the Public Utilities Commission (PUC). The PUC's Consumer Assistance Division (CAD) is the primary way utility customers connect with the PUC. Its mission on PUC's website reads in part, "to ensure that customers, utilities, and the public receive fair and equitable treatment through education, resolution of complaints and evaluation of utility compliance." All PUC hotline and consumer related calls flow through the CAD.

The CAD has a strong customer service focus. Most of the Division's work and its primary focus involve individual customers with billing or service complaints. CAD policies and procedures are designed to ensure the CAD does a good job managing cases and is responsive to these types of complaints.

While the CAD deals primarily with individuals, groups of ratepayers who have a common concern may get together and submit what is known as a Ten-Person complaint. Customers may request the Commission open a case by filing a petition with ten or more signatures of impacted customers. The complaint must be about a utility's rates, acts or practices, which the petitioners believe are unreasonable, insufficient or discriminatory, or about the fact that utility service is inadequate or cannot be obtained.

Ten-Person complaints are the primary avenue for groups of ratepayers with a common complaint to initiate a case before the PUC, but they represent a small portion of the Commission's workload. Of the 3,164 docketed PUC cases for the years 2007-2012, only 42 were initiated by a Ten-Person complaint.

Both the PUC and the Office of the Public Advocate (OPA) have guidance information on their respective websites for consumers wishing to submit a Ten-Person complaint. Information about the Ten-Person complaint process is readily accessible and understandable, and filing a Ten-Person complaint is convenient and straightforward. Once submitted, the PUC administers Ten-Person complaints through a process prescribed in Maine statute and PUC Rules. There are different avenues the complaint may take to reach a resolution. If the complaint is not dismissed, consolidated or withdrawn, the PUC opens an adjudicatory proceeding to formally investigate it. Only eight of the 42 Ten-Person complaints filed in OPEGA's review period were opened as individual adjudicatory proceedings.

While OPEGA found a few instances of non-compliance, it is our judgment that the PUC, overall, is in substantial compliance with sections of statutes and rules pertaining to processing Ten-Person complaints. The accessibility and responsiveness of the Ten-Person complaint process after a complaint has been filed seems to vary depending on the path a complaint takes. The Ten-Person complaint process is reasonably accessible and responsive in most instances, especially for those complaints dismissed because the utility corrected the problem or because they were determined to be without merit. However, the process is less so for complaints in which the PUC opens an investigation and adjudicatory proceeding. Occasionally, the PUC will consolidate Ten-Person complaints into cases already open before the Commission and make the lead complainants intervenors.

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Consumers can also raise issues by intervening in a PUC case. An intervenor becomes a party to an adjudicatory proceeding before the Commission. The process is accessible for consumers.

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An intervenor is a party to an adjudicatory proceeding before the Commission. Consumers can file petitions to intervene, and thus become parties, in any PUC case and this is another avenue through which consumers can raise issues. The process to become an intervenor is very accessible and the PUC says they rarely turn down a petition to intervene. In addition to intervenors, parties include the specific person or utility whose legal rights, duties or privileges are being determined in the proceeding.

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OPEGA found, however, that participating as parties in PUC adjudicatory proceedings, whether as Ten-Person complainants or intervenors, can be difficult for consumers – particularly if they are not represented by an attorney.

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An adjudicatory proceeding is a formal legal case, similar in many ways to a court proceeding. It is conducted in accordance with the Maine Rules of Civil Procedure and the procedural requirements of Maine's Administrative Procedures Act (5 MRSA §8001, et seq. as well as 35-A MRSA) and Chapter 110 of the PUC Rules. All parties to a case, including intervenors, must comply with the various rules applicable to adjudicatory proceedings. Parties receive all case documents (unless they are confidential) and may file motions and data requests, question witnesses and be questioned by other parties, and participate in technical conferences and stipulation discussions, etc.

OPEGA found that the PUC's adjudicatory proceedings can be difficult for consumers to participate in as parties. This is particularly true when consumers, untrained in adjudicatory procedures, are representing themselves (appearing *pro se*, i.e. without an attorney) before the Commission. In addition, the formality of adjudicatory proceedings and requirements such as those pertaining to *ex parte* communications can limit the PUC's ability to be of assistance to *pro se* parties.

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Consumers can express concerns in PUC cases without becoming parties through submitting comments or testifying at a hearing. This avenue is very accessible, although the Commission is somewhat limited in how it is able to use some consumer input in its decision-making.

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Consumers may also raise issues by submitting comments on a case through the on-line filing system, by mail, or by testifying at public hearings. Submitting a comment or testifying is an easy and accessible avenue for consumers to express their views. Written comments are included in the online case file and Commissioners in attendance hear oral testimony. However, because written comments and unsworn oral testimony are not subject to cross-examination, the Commission cannot rely upon them in making a final decision.

The PUC is responsible for making impartial unbiased decisions. OPEGA reviewed measures in place to ensure the PUC acts in an unbiased and impartial manner when regulating public utilities. State law and rules including PUC's statute and rules include some ethical standards and other measures to support a transparent public process and impartial unbiased decisions.

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State laws and PUC rules include ethical standards and other measures to support a transparent public process and impartial unbiased decisions.

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Maine statute contains restrictions for current and former executive employees participating in state government proceedings in which they have a conflict of interest. Conflict of interest is defined as a direct and substantial financial interest. The law sets a penalty and states that every executive employee shall avoid the appearance of a conflict of interest and immediately disclose any conflict to their direct supervisor. State statute also requires employees in certain state positions to submit financial disclosures of income.

## Recommendations

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### ***PUC Should Explore Ways to Assist Consumers Appearing Pro Se in Commission Proceedings***

The Commission conducts much of its official business through formal legal cases following an adjudicatory proceedings process prescribed in Maine Statute and PUC Rules. Being a party to a case is one way that consumers can get their concerns before the Commission. However, OPEGA heard and observed that adjudicatory proceedings, by their nature, are difficult and intimidating for consumers to follow and participate in. This is particularly true for consumers appearing *pro se* (not represented by an attorney).

Adjudicatory proceedings are similar in many ways to a court proceeding. The PUC may take testimony, subpoena witnesses and records, issue decisions or orders, and hold public and evidentiary hearings. Parties to the case may submit evidence, bring witnesses, file data requests, cross-examine witnesses and are included in technical conferences. PUC Rules state that non-attorneys appearing before the PUC are expected, as a condition of representation, to be familiar with PUC Rules Chapter 110, the Maine Rules of Civil Procedure where applicable, the Maine Rules of Evidence where applicable, and to abide by Maine Rules of Professional Conduct for attorneys. The typical citizen probably does not meet these requirements.

Interviewees and unsolicited comments received by OPEGA during this review specifically noted that in order to participate one really needs an attorney and when one has an attorney the PUC treats them better. One lead complainant for a Ten-Person complaint told OPEGA that the PUC recommended he hire an attorney, possibly because the adjudicatory process PUC must use is legalistic and easier for attorneys familiar with the rules and procedures to navigate. PUC's General Counsel told OPEGA they try to be flexible by holding pre-hearing conferences and creating opportunities for intervenors to ask questions and get a better understanding of the process, but it is by nature a legal process. OPEGA heard from PUC staff members and a Commissioner that intervenors without legal representation can be challenging to work with in part because they do not understand, or ignore, the process and procedures the PUC is required to follow. However, hiring an attorney can be expensive and is not always feasible for consumers.

PUC Commissioners OPEGA spoke with noted that the public is at a disadvantage with the utilities in terms of resources and expertise. As one Commissioner noted, utilities have an interest in presenting issues opaquely and the PUC and utilities could present issues in a more understandable way such as by using less technical jargon and acronyms. Another Commissioner said that consumers intervening in cases might not exactly understand the specific issues that are before the PUC. Consequently, they may not ask questions or make comments directly related to the material issue and, as a result, the Commission may not consider their remarks in deciding the case.

The PUC told us it tries to help consumers who intervene in cases by using what it calls a "hot bench." A hot bench means that Commissioners actively question parties during proceedings and it enables staff to pick up the issues of a case and press them in conferences with other parties. Commissioners can ask questions intervenors may want to ask, but may not know how to do so effectively. However, according to one Commissioner, it is difficult to help people better articulate their case. Attitudes consumers bring about utility companies can also be an obstacle to their understanding of a case and there can be differences in interpretation of stipulation language between consumers, the utility and PUC.

Rules prohibiting *ex parte* communications during cases that are in the investigation/adjudicatory proceedings phase also limits the PUC's ability to assist consumers during the proceedings. *Ex parte* communications refer to communications between one or more, but not all, parties and the deciding body and its advisory staff in an adjudicatory proceeding. In PUC cases, Commissioners and staff assigned to the case, such as the Hearing Examiner and Division staff, are deciding the case. Therefore, they cannot speak with any parties separately about any decision, issue of fact, or law unless all parties are provided notice and an opportunity to participate. Any violation of the *ex parte* rule must be disclosed to all parties within 48 hours of realizing it occurred. Parties are not prohibited from discussing the case with one another.

The PUC staff can speak with parties about procedural matters and PUC Division Directors report spending a lot of time talking about the process with consumers who are representing themselves. The PUC also will suggest that consumers speak with OPA about their case and they usually do. If asked, OPA will assist as much as possible, but as a party in a case OPA may or may not agree with, or be able to support, the citizen's position. OPA is required by statute to represent the interests of all ratepayers, so OPA itself may take a different position on issues. Consequently, the complainants or intervenors can be left without much assistance or guidance regarding substantive matters in the case.

OPEGA also observed concerns and frustration on the part of consumers participating in proceedings regarding the way PUC staff and Commissioners treated them. Some had developed mistrust in the process and the PUC partly because of this. PUC strives to be accessible and responsive to consumers and, in many ways, they succeed. However, with the exception of the Consumer Assistance Division, the PUC is not designed to be a customer service agency. PUC staff in the other divisions interacts primarily with legal and other representatives of regulated utilities within the context of PUC cases. Unlike CAD staff, they are not trained in customer service, nor is that their primary responsibility.

Overall, the complexity and formality of adjudicatory proceedings limit accessibility and responsiveness for consumers whose complaints and concerns are considered through such proceedings. Consumers are able to represent themselves before the PUC, but not effectively or easily. Even attorneys who are not involved in utility cases regularly can find the process confusing and hard to follow. There may be ways for PUC to make the adjudicatory proceedings a bit more user friendly for consumers. OPA and PUC staff suggested some to us that should be explored.

**Recommended Management Action:**

The PUC and OPA should together explore ways to facilitate consumers' ability to effectively represent themselves in adjudicatory proceedings before the Commission and implement those ideas deemed feasible. Specifically, they should consider assigning a staff person(s), or perhaps creating a position, in either the PUC or OPA that is not subject to *ex parte* communication rules to assist and advise members of the public in navigating the adjudicatory process and various procedures at the PUC.

The function of this position would not be to represent or advocate, rather to assist by providing as much guidance as allowable under statute and rules. For example, this consumer-oriented function could actively assist consumers who are involved in cases as parties/intervenors or commenters by explaining how the process works, what rules and laws participants are required to comply with, how to submit evidence, how to communicate effectively with the Commission, and what types of information are helpful or have been effective with the Commission. The person might also be responsible for developing simple brief written materials to educate and provide guidance in these areas and others, such as navigating the Ten-Person complaint process.

The function would require someone with a broad perspective and some authority who understands the types of cases, as well as the process and underlying legal procedures and requirements, and could speak with people at length to understand and answer their questions.

Additionally, the PUC should consider:

- establishing guidelines for parties to follow in preparing testimony and submitting documents in cases that promote readability and understandability for the general public as much as possible, i.e. avoiding technical jargon, acronyms, and/or defining technical terms used; and
- possible revisions to current Rules and procedures that would make it easier for consumers to represent themselves before the Commission.



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### ***PUC Should Continue to Improve the Usability and Accessibility of Its On-line Case File System***

The PUC uses a web-based electronic on-line filing system called iGOVERN Complaint and Quality Management. The part of this system that contains and manages the official files for the Commission's docketed cases is called the Case Management System (CMS), and is accessed through the PUC's website. Parties to a case create an account in this system and then may submit filings electronically. CMS also notifies parties automatically when a new filing is posted. Any member of the public can also use CMS to review filings and submit public comments on cases that are before the Commission. This is a new system, implemented in July of 2012, and is a tremendous resource for ratepayers and members of the public. However, we noted a number of areas where CMS could be made more accessible and user friendly.

The key to using CMS for open and closed cases is obtaining the docket number for a case the user is interested in. Without the docket number, it can be difficult to find a particular case file. The PUC's website has a list of active cases with some information about them and their docket numbers. However, as of this report, that list contained approximately 130 cases and the list is not sortable. Also, there is no on-line list available for closed cases.

The system does have some search capabilities to help the user find the correct case docket number. Users can search by Date, Case Type and Subtype, Utility Type and Subtype, Case Status, Filing Party and Utility/Company Name. However, the terms used in some of the drop down menus to refine the search are not ones that the general public may be familiar with and cases are not categorized consistently.

It is possible to contact the PUC and CAD staff will assist the user in finding the correct case and docket number. However, even after gaining access to the correct case file it can also be difficult to understand what the documents filed in that case are and also difficult to find a specific document. This appears to be because the person filing the documentation is also filling in the "Title" and "Description of Filing" fields. These are simply text boxes into which the filer enters anything s/he wants.

The PUC provides guidance on how to submit documents, but there is no guidance on naming conventions or what should be selected from the pre-set drop down categories that the filer may choose from. There is also no guidance on what submitters should put in the "Title" or "Description of Filing" fields or how much information to include. While the documents in the case file may also be searched and sorted by "Date Filed", "Filed BY", and "Title" some case files contain hundreds of documents. Without good titles or descriptions it can be very difficult to determine what each document is and whether it is of interest. As a result users often must take the time to open and look at each document.

Lastly, there also appear to be some technical issues with the system. At times OPEGA simply had trouble getting the system to open. These technical issues seem to have gotten better over the course of the review, but we continued to encounter occasional difficulties.

#### **Recommended Management Action:**

The PUC should continue to work with the system developers to minimize the technical accessibility issues. In addition, the PUC should continue to improve the usability of CMS for the average citizen. Such improvements should include improving search functions such that case docket numbers and specific documents can be more easily located, and users are able to more readily determine the nature and content of documents in the case files. To accomplish this, the PUC could establish a consistent case categorization system, make the "Description of Filing" field either more consistent, more descriptive or both, and perhaps have someone assigned to review all submittals for proper classification.

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### **PUC Should Clarify How Different Types of Information Submitted in a Case Can Be Used in the Commission's Decision-Making**

Members of the public who are not parties to a case can submit testimony to the Commission in person at public witness hearings. Testimony provided may be "sworn" or "unsworn" depending on whether the individual agrees to give the testimony under oath. Consumers can also submit written comments on a case electronically via the "comment" function of the on-line filing system or by sending them to the PUC via regular mail, in which case PUC staff will post them in the on-line filing system. How the Commission is allowed to use these various types of input differs, a fact that consumers may not be aware of when they are choosing how to provide information and express concerns in cases that are before the Commission.

Under the Rules of Evidence the Commission must abide by, only "sworn" testimony is subject to cross-examination and can be relied upon by the Commission in making its final decisions. The Commission hears the "unsworn" testimony and reads the comments submitted, and the Commission and staff may use this input to make further inquiries or investigation of the parties. However, "unsworn" testimony and comments cannot be considered "evidence" the Commission can rely on. The Commission and other parties are also not able to question those providing "unsworn" testimony or submitting comments. Consequently, there is the risk of Commissioners not fully understanding the submitted information or issues and having no opportunity to ask for additional clarification.

The distinction between "sworn" and "unsworn" testimony is somewhat described on the Commission's "How to Participate at the Commission" website page as follows:

*"Sworn Testimony is part of the official record of the case and is reviewed by the Commission before it makes its final decision. The hearing examiner will administer an oath to all those planning to give sworn testimony stating that what you are about to say is the truth.*

*Unsworn Testimony will not be part of the official case record, but can provide the basis for further Commission investigation."*

Presumably the PUC also explains the distinction at public hearings when the Hearing Examiner asks those testifying if they are providing "sworn" or "unsworn" testimony and is administering oaths.

OPEGA noted that the PUC's description differs from that on OPA's website, which has more detailed information on public hearings, including what to expect and how to prepare testimony. OPA encourages people to testify under oath as shown in this website excerpt:

*"Before accepting testimony, the Hearing Examiner will always ask whether the witness will make a statement under oath (sworn statement) or without taking an oath (unsworn statement). NO WEIGHT IS GIVEN TO PUBLIC STATEMENTS NOT MADE UNDER OATH. For this reason, the Public Advocate urges consumers to make sworn statements. Only sworn statements become part of the official record and can be considered by the Commissioners in making their decisions in the case.*

*Those who make unsworn statements probably do so because they underrate the value of the evidence they present or because they will not then become subject to questions from attorneys in the case. But there is no reason to be intimidated by the questioning process (also known as cross examination)."*

We also noted that there is no explanation regarding how the Commission uses comments that are submitted on either the PUC's "How to Participate at the Commission" webpage or in the on-line filing system through which comments are submitted. The OPA website also does not discuss comments. The opportunity to submit unlimited comments, particularly through electronic means, facilitates citizen participation in cases. However, it should be clear to commenters that the Commission is limited in how it can use their input via this avenue so they can decide whether they want to provide "sworn" testimony if there is a public hearing.

**Recommended Management Action:**

The PUC should expand upon the information available on its website to ensure it is clear to consumers how the Commission can use the public testimony or comments they may submit.



**PUC Should Take Steps to Address the Need for Time Extensions in Ten-Person Complaints**

Maine Statute, 35-A MRSA §1302, and PUC Rules Chapter 110 §12 both state that the Commission shall issue its decision on Ten-Person complaints within nine months after the complaint's filing. Four of the nine Ten-Person complaints OPEGA reviewed in detail, and 12 of the list of 42 complaints from 2007-2012, were not completed within the nine month time frame. Three of the four cases in the sample, and seven of the 12 overall, that exceeded the nine month requirement were processed through investigation/adjudicatory proceedings.

The PUC stated that the nine-month timeframe may be extended by agreement of the parties. OPEGA observes that, given the requirements of the adjudicatory process, an extension of the nine-month deadline seems appropriate in complicated cases. There is, however, no provision to allow for an extension found in statute or rules and no evidence of any written extension agreements in any of the on-line case files we reviewed.

**Recommended Management Action:**

The PUC should put any agreement among parties to extend the nine month deadline on a Ten-Person complaint case into writing and include the written agreement in the official case file. The PUC should also consider adding a provision allowing an extension of the nine month deadline to 35-A MRSA §1302, and PUC Rules Chapter 110 §12, at the next opportunity.

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## ***PUC Should Establish a More Structured Approach for Identifying and Addressing Issues Potentially Affecting Multiple Consumers***

Consumers contact the PUC's Consumer Assistance Division (CAD) with complaints or concerns they have about regulated utilities. Individual billing or service issues within CAD's purview, and that consumers are unable to resolve directly with the utility, become CAD cases that are investigated and decided by the CAD. Complaints or concerns outside the CAD's purview may be referred to other PUC Divisions. These consumers may also be encouraged to contact OPA and/or advised of the opportunity to bring their concern forward in a Ten-Person complaint or by participating in a current case before the Commission.

PUC Division Directors told us that they sometimes notice themes in the issues brought to their attention via consumer complaints and may initiate actions that range from making an informal inquiry of the utility to requesting that the Commission initiate a formal inquiry. OPEGA observed, however, that PUC has no structured approach for proactively identifying common concerns or emerging issues affecting multiple consumers. We also observed that whether to initiate action and bring these concerns or issues to the attention of the Commissioners is at the discretion of the PUC Division Directors that become aware of them. Consequently, there is a risk that PUC will miss or overlook issues that are affecting, or could potentially affect, multiple consumers.

CAD Consumer Assistance Specialists log all contacts from consumers into the CAD database. The CAD database is primarily designed to gather and maintain data on individual contacts the CAD is, or may become responsible for resolving. Calls on issues that do, or may become, CAD cases are logged in the database as Complaints or Information Contacts for which Specialists capture consumer information such as name, address, telephone number, as well as details about the consumers' particular concerns.

When CAD Specialists receive contacts about issues that will not become CAD cases, they log them into the CAD database as Information Counts. In 2012, the CAD logged about 8,000 contacts and recorded 4,425 as Information Counts. Information Counts are logged in one of twenty-four broad categories. For example, a call about Smart Meters and one about meter readings would both be logged as calls about "metering." One of the categories is "Miscellaneous" and 21.5% of the contacts received in 2012 were logged in this category. No caller contact information or detail about the callers' issues is captured in the database for Information Counts. Directors in PUC's other divisions indicated that those divisions also do not necessarily formally capture any contact information or other detail on contacts that are transferred to them.

The PUC's CAD Director told OPEGA he and his staff identify complaint themes during staff meetings when calls are discussed, or when he is reviewing the database to see if there have been multiple calls with similar issues. If something appears to be a trend, the CAD Director may report it to the Commissioners without identifying any individuals, or he may bundle similar issues or complaints that indicate a larger problem with a regulated utility and ask the Commission to open an investigation. Alternatively, he may try to address the issue informally by contacting the utility. Division Directors said another way PUC identifies themes is

during regular management meetings or meetings with Commissioners. One Division Director told us that if he heard the same thing from several different individuals, he might raise it internally or send it to the Office of the Public Advocate, but does not follow up with callers.

Utility violations of rules or stipulations can also come to the attention of the CAD during work done resolving individual cases. When Consumer Assistance Specialists identify a violation distinct from the subject of an individual case, they enter it in a separate Violation Spreadsheet. OPEGA estimates this subset to be about 100 violations a year. Of these violations, a smaller subset affects multiple consumers. Although the violations are identified because of a CAD case, they may be unrelated to the case and of a broader nature affecting multiple consumers. In some cases, if the supervisor or Director approves, the CAD will send a violation letter to the utility only. However, OPEGA was told deciding to do this is somewhat subjective.

OPEGA observed that identifying themes or emerging issues from consumer complaints occurs on an ad hoc basis as there is no formal or regular analysis of information contained in the CAD database or violations spreadsheet. PUC directors told OPEGA that the organization is reactive, not proactive, and generally does not try to find emerging utility issues. Furthermore, the general categories used to log Information Counts in the database do not provide the PUC with enough detailed information to determine if consumers are reporting common issues the Agency should address. Since PUC does not retain any contact information in the CAD database for Information Counts, it has no way to ask a caller follow up questions or gather additional information. Even if the PUC staff decides to start collecting data from callers with a specific complaint or initiates an inquiry, they are unable to follow up with the consumers who contacted them in the first place. As a result, these consumers may never know something was done and may feel their concern was not addressed.

We also noted that even when common concerns or themes are identified, the Division Directors may or may not take steps to look into them further or bring them to the Commission's attention.

#### **Recommended Agency Action:**

PUC should establish a structured process and procedure for identifying and addressing common concerns or emerging issues that are within the PUC's jurisdiction, particularly those that fall outside of the CAD's area of responsibility. The process should include following up with consumers when the PUC takes action on concerns they reported. PUC should consider adding this responsibility to an existing position at PUC, but outside the CAD, to enable the agency to systematically identify emerging issues and common concerns. Alternatively, the agency should consider creating a new position, perhaps the position suggested in Recommendation 1 on page 31. This position could:

- respond to complaints and concerns outside the CAD's purview;
- identify themes based on consumer concerns and raise those issues within PUC; and
- follow up with consumers when PUC had decided to act on their complaints.

The CAD database should be updated to capture additional detail on contacts logged as Information Counts that relate to concerns, complaints and issues within the PUC's jurisdiction. The detail should include some description of the issues being reported and contact information for consumers.



## 6

### ***PUC Should Take Additional Steps to Minimize Risk of Actual or Perceived Bias in Its Regulatory Activities***

Much of the PUC's work is with a small number of utilities and their professional representatives. This work is highly technical and cases follow a formal legalistic process. Commissioners and staff often have prior professional experience working for, or representing, utility companies or may have similar connections to stakeholder groups. During any given year and over time, many cases involve the same utilities and the same utility representatives or stakeholder groups. Past associations and current working relationships of this nature create the risk of actual or perceived bias and can diminish public trust in the agency and its decisions.

We observed the term "conflict of interest" is often used to describe situations presented by these relationships where it seems the PUC is too close to utility companies and industries it regulates. There are mechanisms in PUC statute and rules, as well as other Maine statutes, to address potential conflicts of interest. These are primarily focused on preventing regulators and other public officials from being influenced by opportunities for financial or professional gain for themselves or family members.

However, those measures, even if fully complied with, do not address the concerns of conflicts and biases expressed by some of the consumers and other people OPEGA spoke with during this review. These concerns stem more from the perception that Commissioners and PUC staff are influenced by their relationship networks and group identification. OPEGA notes from the history of concerns brought to this Office, and our current research<sup>4</sup>, that citizen concerns about public officials being influenced, perhaps subconsciously, by factors other than direct personal gain are not unique to the PUC, utility regulation, or Maine in general.

Commissioners and staff acknowledge the perception of bias, but insist it is just perception. In fact, one Commissioner said that utilities are concerned that staff who have worked for utilities prior to coming to the PUC may be less favorably inclined toward utilities. They contend their utility knowledge and experience improves the Agency's ability to make sound decisions in the public's interest. They cite the PUC's rules, which are designed to ensure an open and transparent process, and reference their adherence to conflict of interest laws and other State rules that are in place. They also note that some Commissioners and staff must follow Maine's Rules of Professional Conduct for attorneys, which include rules regarding ethical behavior such as conflicts of interest and duties to former clients.

<sup>4</sup> Kwak, James. Cultural Capture and the Financial Crisis. In Daniel Carpenter and David A. Moss (Eds.), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it*. New York, NY: Cambridge University Press. (2013 forthcoming)

OPEGA saw evidence of the PUC's compliance with State statutes and PUC rules. For example, the Commissioners and management team had all filed the required income disclosures and we saw evidence of compliance with recusals by Commissioners. However, the 2012 State Integrity Investigation Report found that Maine conflict of interest and ethics laws are not very strong. Earlier this year the 126<sup>th</sup> Legislature took some action on these findings by increasing financial reporting requirements and tightening revolving door restrictions for legislators and designated Executive branch employees.

Overall, however, Maine is heavily reliant on personal integrity and ethics of regulators and other public officials to acknowledge and avoid risks, and perceptions, of conflicts and bias in their regulatory activities. In 2009, the Maine Ethics Commission was tasked by the Legislature as per Resolve PL 2009, Ch. 88, to examine existing ethical standards that govern members of the executive branch and develop advisory recommendations regarding the establishment of statutory ethical standards. The Ethics Commission made a number of recommendations for heightening ethical awareness within State government generally. At the time of this report, none of those recommendations have been implemented.

Maine public officials and others often cite the fact that Maine is generally considered a "good government" state with few ethical scandals. They point to Maine's small size and culture as helping prevent unethical actions, and as reasons for not needing to implement stronger measures regarding ethics. There is research, however, that describes reasons, based on behavioral analysis, that people have blind spots and unintentionally make unethical decisions.<sup>5</sup>

With regard to PUC specifically, OPEGA observes there are a number of factors, including frequent interactions between the same individuals on multiple cases, which present the risk of actual bias and contribute to the perception of impartiality. We believe there could be value to the PUC implementing some of the recommendations included in the Ethics Commission report, particularly since the PUC does not exclusively employ attorneys and there is no requirement that Commissioners be attorneys. Additionally, there are several other steps the PUC could take to help address perceptions of bias and impartiality.

#### **Recommended Agency Action:**

We observed that the risk of conflict and bias exists and the perception of bias is real. PUC would benefit from developing additional internal standards and procedures the risks and perceptions such as:

- requiring staff working on cases to complete independence statements;
- requiring Commissioners to announce or address all recusals in public meetings, including those not requested by a party; and
- explaining to parties when and how the PUC staff and consultants will be independently analyzing information submitted.

<sup>5</sup> *Blind Spots: Why We Fail to Do What's Right and What to Do about It* which was background reading for the 2013 UMaine School of Law Ethics Symposium. The author proposes asking oneself, "What would Mom do?" to help make better ethical decisions.

PUC should also require ethics training. Many states offer or require ethics training and attorneys, like many professionals, are required to attend ethics training each year. Some states provide online training including explanations of the law and examples of situations employees may find themselves in illustrating ethical and non-ethical choices. In addition to traditional types of ethics training, PUC should consider training that can enhance the organization's ability to recognize blind spots and factors other than personal gain that may be influencing actions and decisions of Commissioners and staff.

**Recommended Legislative Action:**

During the 126<sup>th</sup> Session, the Legislature enacted legislation prohibiting people who held major policy influencing positions in the Executive Branch from lobbying for one year after leaving State employment. It also considered and rejected creating a task force to examine Maine's ethics and transparency laws and placing limits on the hiring of lobbyists for certain State government positions.

Specific to the PUC, the Legislature might consider some revisions to PUC's statute to address the risk and perception of bias such as:

- increasing the number of Commissioners;
- requiring that certain interests be represented on the Commission;
- requiring Commissioners to have certain qualifications; and
- creating independent advocates within the PUC to represent contrarian viewpoints.

OPEGA recognizes there are potential drawbacks to each of these ideas that should be fully explored before any changes are made.

In the future, the Legislature might also reconsider the recommendations in the 2009 Ethics Commission report.

## Agency Response

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In accordance with 3 MRSA §996, OPEGA provided the Public Utilities Commission an opportunity to submit additional comments after reviewing the report draft. The PUC's response letter can be found at the end of this report. The PUC is proposing to take the following actions in response to issues identified in this report.

**1**

### **The PUC Should Explore Ways to Assist Consumers Appearing *Pro Se* in Commission Proceedings**

During Fall 2013, the PUC will collaborate with the OPA to explore ideas to help facilitate consumer participation, including looking into the creation of a position that would assist *pro se* intervenors and other consumers participating in Commission proceedings.

The Commission will review its rules to determine if there are other ways to ease requirements on consumer intervenors, mindful of the fact that most of the rules governing adjudicatory proceedings are mandated by the Maine Administrative Procedure Act, 5 MRS §§8001-11008.

The Commission will establish guidelines for the public to follow in preparing documents and submitting documents.

**2**

### **PUC Should Continue to Improve the Usability and Accessibility of Its Online Case File System**

The Commission will work to ensure system access issues are minimized. On July 30, 2013, in conjunction with the Office of Information Technology (OIT), PUC conducted technical testing with select end-users of the system. PUC will continue working with OIT and system developers to resolve the identified issues by October 31, 2013.

The Commission will continue to improve overall system usability. At the next external user group meeting, scheduled for September 19, 2013, the PUC will address the items noted in this report.

The Commission agrees to review how documents are described in the system to help enhance the ability of users to both find and access documents more readily.

**3**

### **PUC Should Clarify How Different Types of Consumer Input Can Be Used in the Commission's Decision-Making**

By January 2014, the Commission will expand on the information available on its website (and for manual distribution if necessary) to ensure it is clear to consumers how the Commission can use public witness testimony or comments submitted by consumers.

4

**PUC Should Take Steps to Address the Need For Time Extensions for Ten-Person Complaints**

The Commission is now documenting in a procedural order any agreement of the parties to extend the nine-month deadline in a Ten-Person complaint case. In addition, the Commission will consider seeking specific legislative authority to extend the nine-month deadline in time for the 127<sup>th</sup> Legislative Session..

5

**PUC Should Establish a More Structured Approach for Identifying and Addressing Issues Potentially Affecting Multiple Consumers**

By March 2014, the Commission will develop a more formal procedure of recording non-CAD inquiries and plans to institute a process whereby non-CAD staff record the name, contact information and subject matter of calls. This will allow follow-up or further contact in the future, if necessary. For example, if a person called and discussed tree trimming around a power line, that person could be contacted in the future should the Commission open a case involving that issue. The issues raised by callers will be discussed at the monthly meetings the Commission holds with staff in each utility industry area.

The Commission's CAD is now recording the name, contact information, and subject for all calls within the Commission's jurisdiction that are currently logged as Information Counts.

6

**PUC Should Take Additional Steps to Minimize Risk of Actual or Perceived Bias in Its Regulatory Activities**

During Fall 2013, the Commission will begin maintaining internal documents concerning recusal decisions by the Commissioners or any staff.

The Commission will also clarify on its website how its advisory staff independently analyzes issues in a case and have Staff describe that process to the public early in the case at a case conference or hearing.

Currently all lawyers on staff attend annual ethics training but the Commission plans to expand ethics training to all staff beginning in 2014.

