



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

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
2013

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

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

Introduction

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.

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

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 125th Legislature.

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 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

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 11, 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 system is difficult to navigate and search without a specific docket number.
- 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.
- PUC does not always make decisions on Ten-Person complaints that go to adjudicatory proceedings within nine months as required by statute.
- PUC lacks a structured process for identifying and addressing emerging issues and common concerns from individual complainants.
- Past associations and current working relationships between PUC staff or Commissioners and utilities they regulate create risk of actual or perceived bias.

In Summary

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

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.

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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.

OPEGA saw evidence of PUC's compliance with Maine and PUC statute and rules. However, these measures mainly focus on conflicts arising from financial interests and do not address all the factors that present risk, or create perceptions, of bias.

Consumers OPEGA spoke with were more concerned with biases arising from relationships among individuals with shared perspectives. In Maine, there is a reliance on personal integrity and ethics to guard against these types of bias.

The PUC's statute also establishes limitations to prevent conflicts of interest. PUC Commissioners and employees may not:

- A. Have any official or professional connection or relation with any public utility or competitive service provider operating within this State;
- B. Hold any stock or securities in any public utility or competitive service provider operating within this State;
- C. Render a professional service against any such public utility or competitive service provider; or
- D. Be a member of a firm that renders service against any such public utility or competitive service provider.

Commissioners are also prohibited from holding any other civil office except notary public and from serving on or under a political party committee. Attorneys who work for the PUC, including Commissioners who are attorneys, must act in accordance with the Maine Bar Rules and Rules of Professional Conduct. These rules provide a framework for the ethical practice of law.

OPEGA saw evidence of PUC's compliance with Maine and PUC statute and rules. However, these measures do not address everything that presents risk, or creates perceptions, of bias. We note, in particular, that they do not address the kinds of "conflicts of interest" mentioned by consumers we spoke to during this review who were concerned more with biases arising from relationships among individuals with commonly held views or shared perspectives rather than direct or indirect financial interests. In Maine there is a reliance on the personal integrity and ethics of public officials to guard against biases that may adversely impact regulatory decisions and actions.

Public Utilities Commission Overview

PUC Organization

The Commission consists of three full-time Commissioners, appointed by the Governor and confirmed by the Legislature, who serve staggered six year terms.

The Commission is made up of three full-time Commissioners who serve staggered six year terms. Commissioners are appointed by the Governor and confirmed by the Legislature. The Governor designates one Commissioner as Chair. Although there are no specific qualifications for Commissioners established in statute, they often have some expertise or knowledge about utility industries and the regulatory system. In addition to deciding rate and other regulatory cases, the Commission also initiates rulemakings and investigations, resolves procedural matters, and responds to legislative directives.

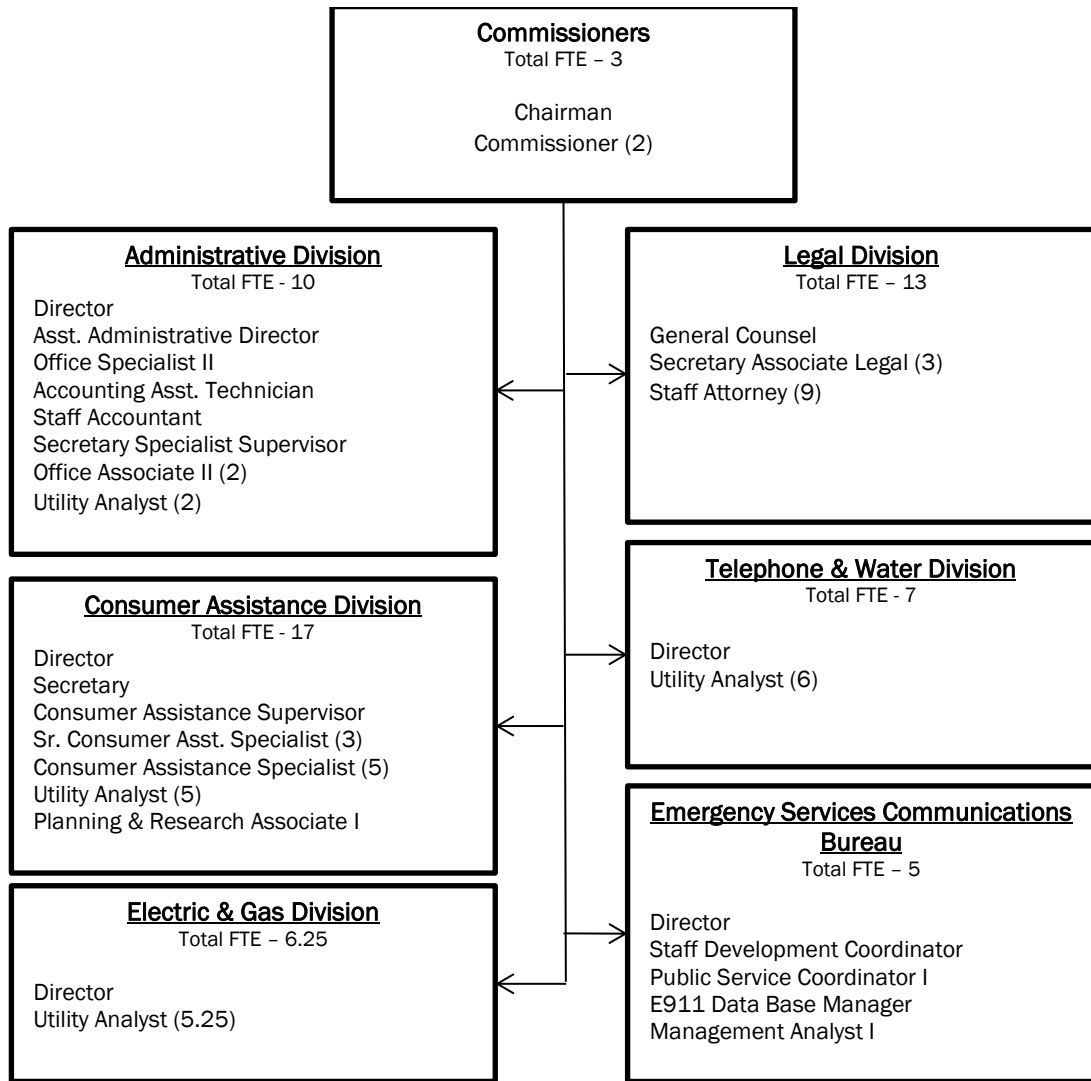
As shown in Figure 1, the three Commissioners are supported by six operating divisions at the PUC. Employees include accountants, engineers, lawyers, financial analysts, consumer specialists, and administrative and support staff. PUC Commissioners work full time at the PUC. They are expected to read all case documents and actively participate in the PUC's work.

The Commissioners are supported by six operating divisions, made up of accountants, engineers, lawyers, financial analysts, consumer specialists, and administrative and support staff.

The staff of two divisions, Telephone and Water and Electric and Gas, work on issues specifically related to those industries such as analyses of utility operations, financial investigations, and analyses of utility applications to issue securities. They also advise the Commission on utility rate base, rate design, revenues and expenses, capital costs, engineering and other technical elements of utility policy analysis.

The Consumer Assistance Division (CAD) is the PUC's largest division and the entry point for consumers with questions, complaints or concerns about public utilities. Individual customer disputes with utilities such as payment arrangements, billing disputes, quality of service, charges, rates and repairs are investigated and resolved by the CAD. Other types of concerns may be referred to one of the other Divisions. In addition, the CAD educates utilities and the public about utility related consumer issues and consumer rights and responsibilities, and evaluates utility compliance with statutes and Commission rules.

Figure 1. Maine Public Utilities Commission Organization Chart



The PUC’s Legal Division provides hearing examiners who manage procedural aspects of cases that come before the Commission. Legal staff also helps prepare and present Commission views on legislative proposals and represents the Commission before Federal and State courts and Federal and regional administrative and regulatory agencies.

Operational management of the Commission, contract and docket management, physical plant and fiscal and personnel matters are the responsibilities of the Administrative Division. The sixth division, the Emergency Services Communication Bureau, oversees the implementation and operation of Maine’s Enhanced 9-1-1 system.

Throughout this report, we will use the term “the Commission” to refer specifically to the three members of the Public Utilities Commission and the term “PUC” to refer to the organization including the Commission and all staff members.

PUC Proceedings

Much of the Commission's regulatory work is associated with cases that come before it. Most cases are initiated by utilities, but some result from consumer complaints or concerns.

Much of the PUC's regulatory activity is associated with cases that come before it. Most cases are initiated by utility companies, but some are the result of consumer complaints or concerns filed as formal Ten-Person complaints or appeals of CAD decisions on individual consumer complaints. The PUC may also initiate investigations in response to informal citizen complaints or other issues it identifies which can become formal cases decided by the Commission.

All Commission meetings, with the exception of executive sessions, are public meetings and live streamed over the internet. The Commission makes decisions in adjudicatory and other PUC proceedings in public by a vote or action of the majority.

Many of the cases before the Commission are opened as formal adjudicatory proceedings, which are much like court cases.

A great deal of the Commission's work takes place in formal adjudicatory proceedings, which are much like court cases. The PUC is required to conduct adjudicatory proceedings in accordance with the Maine Rules of Civil Procedure, Maine Rules of Evidence and the procedural requirements of Maine's Administrative Procedures Act (5 MRSA §8001, *et seq.* as well as 35-A MRSA). To open an adjudicatory proceeding the Commission issues a Notice to Proceed describing the issue and the primary parties in the case. The Commission may take testimony, subpoena records and witnesses, issue orders (decisions), and hold public and evidentiary hearings. Participation of all affected parties including utility customers is encouraged.

Cases opened as adjudicatory proceedings are given a docketed case file number and assigned a PUC staff attorney from the Legal Division who serves as the case Hearing Examiner. The Hearing Examiner coordinates the process for all parties and works with the PUC team in developing a recommendation, referred to as the Hearing Examiner's Report, for the Commission to consider in deciding the case.

PUC staff from all divisions except the Emergency Services Communication Bureau support the Commission in adjudicatory proceedings. They manage the process, assist in developing the case record, request data, analyze information presented by the parties, and question parties. PUC staff may issue its own independent, or Bench, analysis of a case describing how it views a case at a point in time. If approved by all parties, PUC staff can also participate in settlement discussions.

Office of Public Advocate

The Maine Office of the Public Advocate is responsible for representing utility consumers in any matters under the PUC's jurisdiction.

Maine's Office of the Public Advocate (OPA) is also involved in most PUC cases and proceedings. The OPA is responsible for representing utility consumers in any matters under the PUC's jurisdiction. OPA routinely intervenes (becomes a party) in PUC cases, investigates complaints and can ask the PUC to open proceedings. OPA staff can also assist consumers who wish to file a Ten-Person complaint with the PUC and those who are parties to PUC cases.

OPA is charged with representing the interests of all ratepayers. Therefore, OPA usually focuses on economic impacts for the majority of consumers. OPA's position may conflict with those of individual consumers.

Authorized under 35-A MRSA §1701-1712, OPA is charged with representing the “using and consuming public in matters within the jurisdiction of the commission.” It represents all Maine utility consumers before the PUC. When the interests of consumers differ, statute requires that OPA prioritize consumer interests in the following order:

- low-income consumers;
- residential consumers;
- small business consumers (100 employees or less); and,
- other consumers whose interests the Public Advocate finds to be inadequately represented.

It is important to note that OPA is responsible for considering the interests of all ratepayers and usually focuses on the economic impacts of cases for the majority. This can conflict with the positions of individual consumers who may also be parties in PUC cases.

Electronic Access

Information about the PUC including how to participate in cases before the Commission is available on PUC's website. Commission meeting agendas are available and the meetings are live streamed. It is also possible to download audio for archived meetings from the website. Consumers can also submit complaints about individual issues, such as a billing dispute or a new Ten-Person complaint, electronically. The website has information on how to contact the PUC via U.S. mail, email, TTY, main telephone line and a Consumer Assistance Hotline.

The PUC has a fairly new electronic on-line case file system, known as CMS, which contains all the filings for docketed cases. CMS provides more access and transparency for parties and the public, but can be difficult to use.

The PUC has a relatively new electronic case file system, known as CMS (Case Management System), which went live in July 2012. CMS is accessed through the PUC website. CMS contains all the filings for docketed cases (i.e. those that have a docket number) such as adjudicatory cases, appeals of CAD decisions regarding individual billing or service cases, and Ten-Person complaints.

The PUC and parties to those cases file all case documents electronically in CMS. The system automatically notifies all parties and interested persons when new documents are filed in a case. Consumers who are not parties are able to access CMS to review case documents and submit comments on open PUC cases. PUC staff scans written comments submitted via regular mail and files them in CMS. Although the electronic system supports accessibility and transparency, it can be difficult to use and navigate, especially for cases with large numbers of filed documents. (See Recommendation 2.)

Avenues for Consumers with Common Concerns

The primary avenue for a group of consumers to initiate a PUC case is through the formal Ten-Person complaint process. Several other avenues available for consumers to express their individual concerns may also result in the PUC recognizing a concern shared by a broader base of consumers. These avenues include filing complaints with the Consumer Assistance Division and participating in PUC cases by intervening or submitting comments and testimony.

Consumer Assistance Division

The 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, emails and letters flow through the CAD and are triaged as depicted in Figure 2.

Most of the Division's work, and its primary focus, is with individual customers who have billing or service complaints such as:

- individual service problems - outages, line extensions, damage claims, service delays;
- disconnection or threatened disconnection;
- billing - disputed bills and deposits, inability to pay bills; and
- miscellaneous - rates, unauthorized charges on bills, unauthorized changes in service.

Individual complaints or disputes of this nature become CAD cases that are investigated and resolved by Consumer Assistance Specialists. They do not become PUC docketed cases that are heard by the Commission unless the consumer or utility appeals the CAD's decision to the Commission.

In addition to investigating and resolving individual complaints and disputes, Consumer Assistance Specialists in the CAD provide information to people who contact PUC with questions about utility related customer service issues and consumer rights and responsibilities. Callers with questions a CAD Specialist cannot answer may be referred to the appropriate PUC Division. Alternatively, the Consumer Assistance Specialist may research the issue and follow up with the caller directly.

Some calls taken by the CAD are about concerns that are outside its purview to address. In these cases, callers may be told (as appropriate):

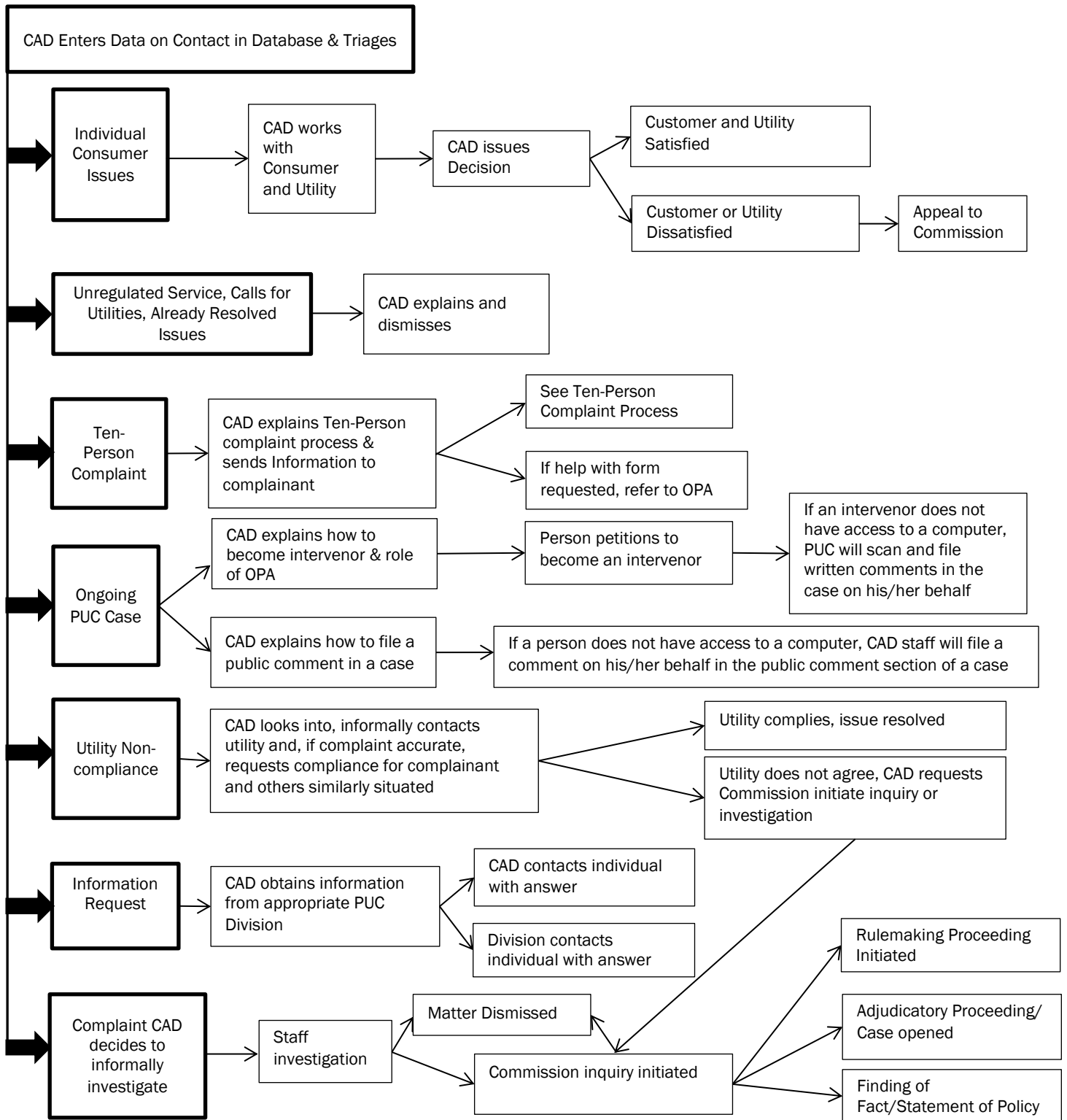
- about the formal Ten-Person complaint process and sent information about how to submit a Ten-Person complaint petition;
- how to become an intervenor in an open case;
- how to submit public comments in an open case;
- to contact the utility the call was intended for directly; or
- the PUC does not regulate the service the call is about, i.e. cable TV and cell phone service.

The CAD interacts directly with consumers more than other PUC divisions and has a strong customer service focus. CAD policies and procedures are designed to ensure it is responsive to individual complaints and does a good job managing cases that result from these complaints. Specialists must follow certain procedures for taking calls. Common expectations for call answering include being consumer friendly and helpful. Weekly reports for each Specialist include how quickly s/he answered calls, the time taken on each call, time busy or out, and call abandonment rate. These statistics are also gathered for the CAD as a whole and measured against call-center industry standards. In addition, the Assistant CAD Director monitors two calls per Specialist per month for tone, content and focus.

Most of the CAD's work is with individual consumers who have billing or service complaints. CAD staff investigate and resolve these types of complaints.

Consumer Assistance Specialists in the CAD also answer consumer questions about utility-related service issues and consumer rights and responsibilities. Some consumer concerns are outside the CAD's purview to address.

Figure 2. Consumer Assistance Division (CAD) Triage Calls/Emails/Letters



Consumer Assistance Specialists enter all consumer contacts into a special database in one of three classifications: Complaints; Information Contacts or Information Counts.

Consumer Assistance Specialists enter or log all calls taken by CAD into a special database in one of three classifications:

- Complaints – individual cases ready for the CAD to work on because the consumers were unsuccessful trying to resolve their disputes with a regulated utility company.
- Information Contacts – individual issues consumers have not yet tried to resolve with a regulated utility company. If unsuccessful, they will come back to the CAD.
- Information Counts – calls regarding other issues that the CAD is not responsible for resolving.

Specialists enter specific caller information such as name, address, and contact number on calls logged as Complaints or Information Contacts. Specific information on the caller and nature of the call is not entered for calls logged as Information Counts, which are only captured in broad categories such as metering, telephone lifeline questions and competitive electric providers.

PUC Division Directors may notice concerns shared by multiple individual consumers and may address these informally with the utility or ask the Commission to open a formal investigation. OPEGA noted, however, that the PUC does not have a structured process for proactively identifying common concerns or emerging issues.

PUC Division Directors or other staff may identify concerns shared by multiple individual consumers. If there are common themes or complaints indicating a larger issue, they may ask the Commission to open an investigation or work to address the issue informally with the utility.

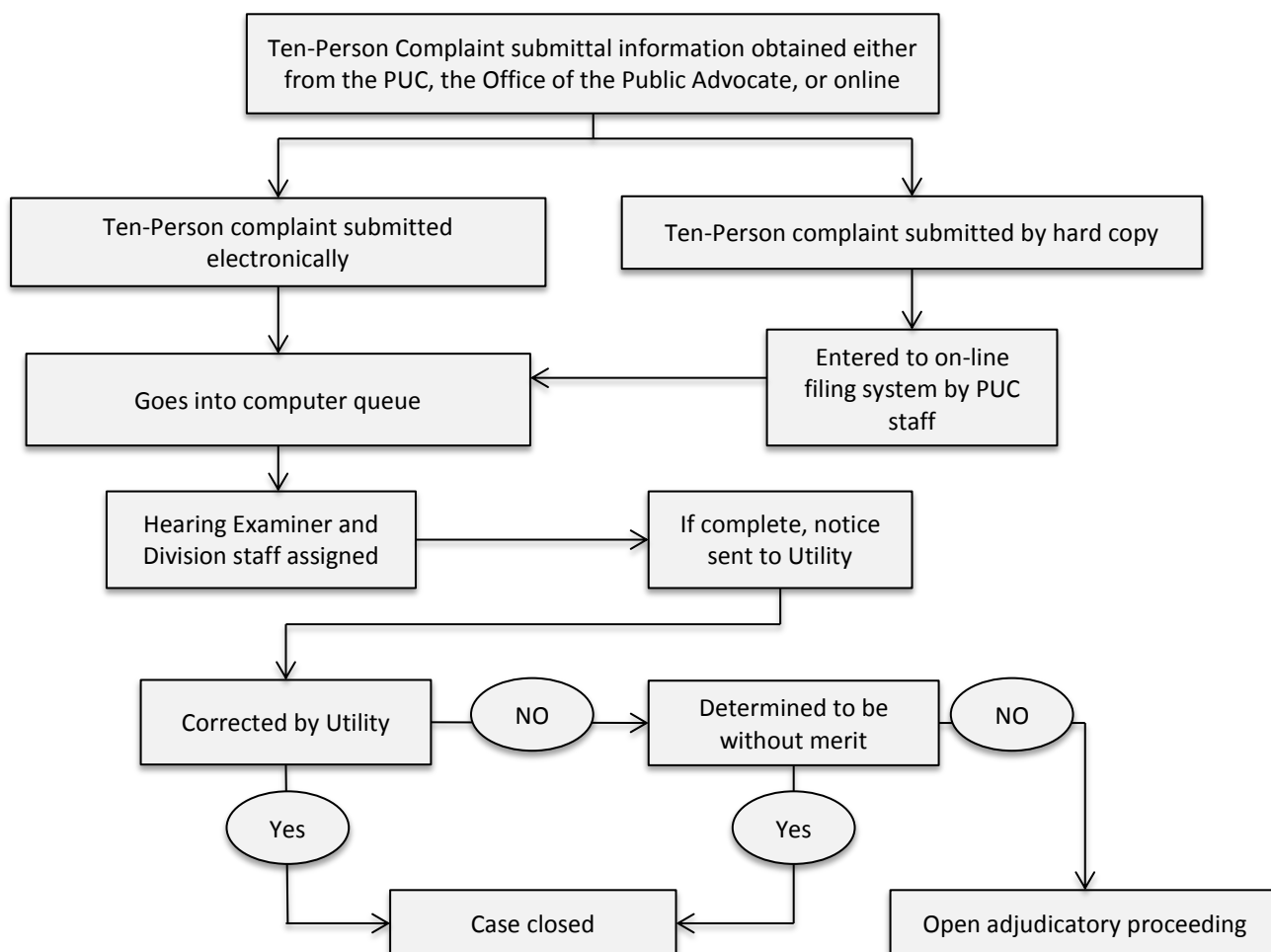
For example, the CAD Director told us his staff noticed a utility had given several ratepayers the same number of months to resolve billing issues without taking into account individual circumstances such as ability to pay and arrearage size. PUC contacted the utility and learned it had initiated a new protocol in violation of a PUC stipulation requiring consideration of individual circumstances. The PUC notified the utility that it was required to come into compliance and document it had done so.

However, the PUC does not have a structured process for recognizing and proactively identifying common concerns or themes. In addition, information collected on calls logged as Information Counts is minimal, cannot be used to obtain additional information from callers and is of little use in theming up issues. (See Recommendation 5.)

The Ten-Person complaint process is the primary avenue for a group of consumers to initiate a PUC case. Maine law provides that the PUC shall consider an investigation when ten or more people file a complaint.

Ten-Person Complaints

Maine law provides that the PUC shall consider an investigation when ten or more people (having ten separate accounts with the utility) file a complaint against a utility. Consumers may request the Commission open a case by filing a petition with ten or more signatures of impacted customers. Statute specifies the complaint must be about a utility's rates, acts or practices that the petitioners believe are unreasonable, insufficient or discriminatory, or about the fact that utility service is inadequate or cannot be obtained.

Figure 3. Ten-Person Complaint Process

The PUC administers Ten-Person complaints through a process prescribed in Maine statute and PUC Rules.

As shown in Figure 3, the PUC administers Ten-Person complaints through a process prescribed in Maine statute and PUC Rules. A complaint can be filed either electronically through the PUC on-line filing system (CMS), or on paper, which PUC staff will enter into CMS. The complaint is automatically assigned a docket number, and then distributed to the appropriate Division Director depending on the type of utility, i.e. telephone, electric, gas or water. The Division Director for the appropriate technical division assigns staff members to work on the case, including a Hearing Examiner from the Legal Division. Once the complaint is deemed to be complete, the PUC must notify the utility in writing that a complaint has been made and the nature of the complaint. The utility must file a response within ten days.

From this point, there are different avenues the complaint may take to reach a resolution:

- The complaint may be dismissed if the utility agrees there is a problem and takes steps to correct the complaint to the satisfaction of the PUC and the complainants.
- The PUC may dismiss the complaint if they make the determination that the complaint is “without merit.”

- A complaint may be withdrawn by the complainants.
- The complaint may be consolidated with another relevant current case before the PUC.
- The PUC may open an adjudicatory proceeding to investigate the complaint formally.

A Ten-Person complaint may be dismissed if the utility corrects the problem or it is determined to be without merit. The complaint may also be withdrawn or consolidated with another existing case. Otherwise, the PUC opens an adjudicatory proceeding to formally investigate the complaint.

The PUC received 42 Ten-Person complaints concerning a variety of issues in the years 2007-2012. They were a small portion of the PUC's workload; only eight resulted in formal investigations and adjudicatory proceedings before the Commission.

If the PUC opens an adjudicatory proceeding, the complainant is automatically a party in the case. If the PUC consolidates the complaint with another case already before the Commission, the complainant is made an intervenor in that case.

The PUC provided OPEGA with a list of all Ten-Person complaints received for the years 2007-2012, which numbered 42 out of over 3,000 docketed PUC cases for those years. Ten-Person complaints represent a small portion of the Commission's workload, but are the primary avenue for groups of ratepayers with a common complaint to initiate a case before the PUC.

The designation "**without merit**" has been interpreted by the Maine Law Court to mean that there is no statutory basis for the complaint, i.e. that the PUC has no authority to grant the relief requested or that the rates, tolls or services are not 'in any respect unreasonable, insufficient, or unjustly discriminatory . . . or inadequate.'

~ *Agro v. Pub. Util. Comm'n*,
611 A.2d 566, 569 (Me. 1992)

The complaints concerned a variety of issues. Twelve of them were about various aspects of the Central Maine Power Smart Meter installation project. Poor service was the next most common complaint, with ten complaints about telephone and electric utilities. Complaints about rates were the next most prevalent, with five complaints. Two complaints involved utility line placement, and other complaints involved such issues as a disputed land sale, concerns about construction around a water supply well, restrictive practices of a utility and excessive noise from a wind farm facility. Types of complaints and their resolution are summarized in Tables 1 and 2 respectively.

| Nature of Complaint | Type of Utility | | | | Totals |
|-----------------------|-----------------|----------|-----------|-----------|-----------|
| | Electric | Gas | Telephone | Water | |
| Smart Meters | 12 | | | | 12 |
| Poor Service | 4 | | 6 | | 10 |
| Rates | | | 3 | 2 | 5 |
| Restrictive Practices | | | | 4 | 4 |
| Line Location | 1 | | 1 | | 2 |
| Other | 2 | 1 | 2 | 4 | 9 |
| Totals | 19 | 1 | 12 | 10 | 42 |

Of the 42 cases, 12 were dismissed after the utility corrected the issue that prompted the complaint, 12 were dismissed as being without merit, six were consolidated with other cases, eight resulted in investigations/adjudicatory proceedings, three were withdrawn, and in one case, the PUC was found to have no jurisdiction by the Law Court. Of the eight cases that advanced to the adjudicatory process/investigation stage, three involved electric utilities, two involved telephone utilities, and three involved water utilities.

| Utility Type | Dismissed- Problem Corrected | Dismissed w/o Merit | Investigation/ Adjudicatory Proceeding | Consolidated w/other Case | No Jurisdiction | Withdrawn | Total |
|---------------|------------------------------------|------------------------|--|---------------------------------|--------------------|-----------|-----------|
| Electric | 5 | 5 | 3 | 6 | | | 19 |
| Telephone | 6 | 2 | 2 | | 1 | 1 | 12 |
| Water | 1 | 5 | 3 | | | 1 | 10 |
| Gas | | | | | | 1 | 1 |
| Totals | 12 | 12 | 8 | 6 | 1 | 3 | 42 |

Complaints about Smart Meters were prevalent during the time period OPEGA reviewed making up 29 percent of all Ten-Person complaints filed in the period and 63 percent of complaints involving electric utilities. Six of the initial 12 complaints about Smart Meters were consolidated with other Smart Meter cases, with two of the remaining cases going to investigation/adjudicatory proceedings. The PUC initially dismissed one Smart Meter case that is currently an open adjudicatory proceeding based on the issues having already been addressed in previous Smart Meter cases. The complainants appealed this decision and the Law Court remanded a portion of the case back to the PUC.

Participating in Commission Proceedings

Consumers may also participate in any PUC case through intervening or submitting comments and testimony.

Consumers learn about cases by seeing notices sent to all customers separately or included in utility bills, public notices published in newspapers or news stories. Consumer Assistance Specialists provide information to callers with questions about how to participate, and explain the difference between commenting, being on the interested persons list and becoming a party (intervening) in a case. This information is also available on PUC's website. Consumers who ask to be on the interested persons list receive notices of filings and hearings for the specific case(s) they are interested in following.

Intervening

An intervenor becomes a party to the case by filing a petition to intervene. Other parties include the specific person or utility whose legal rights, duties or privileges are being determined in the proceeding.

An intervenor is a party to an adjudicatory proceeding before the Commission. In addition to intervenors, parties include the specific person or utility company whose legal rights, duties or privileges are being determined in the proceeding. Becoming a party to a utility case by filing a petition to intervene allows consumers to participate in PUC cases.

When the PUC opens a case it issues a Case Notice of Proceeding that describes what the case is about and has a date by which those wishing to intervene must submit a petition to do so. According to the PUC, petitions to intervene are generally approved, even if they are submitted after the deadline.

There are two types of intervenors: mandatory and discretionary. A mandatory intervenor is "any person that is or may be or a member of a class that is or may be substantially and directly affected by the proceeding and any agency of federal, state or local government..."(PUC Chapter 110 §8). The Commission must allow these entities to intervene. A discretionary intervenor is any interested person otherwise not entitled to intervene who may, at the discretion of the Commission, be allowed to intervene and participate as a full or limited party to the proceeding.

The Office of Public Advocate is entitled under statute to intervene in any proceeding related to the activities in its purview.

Intervenors, as parties to the case, can receive all case documents that are not confidential, file motions and data requests, question witnesses and participate in conferences and discussions. They must comply with the rules applicable to adjudicatory proceedings.

Individuals who are not parties in a case can submit comments on PUC cases by mail or electronically, or testify at public hearings.

OPA, representing the using and consuming public is entitled under statute to intervene in any proceeding related to the activities in its purview when it determines intervention to be necessary. Like other intervenors, OPA must file a petition to intervene.

The PUC may limit the participation of some intervenors based on their interest or expertise or because they are a competing utility company that should not have access to another company's proprietary information. For example, the PUC may limit the participation of a person who is concerned only with the placement of power lines in a case that involves rate calculations and power line placement. The Commission is required to document in the case file a decision to limit or deny an intervenor petition.

Intervenors, as parties to the case, can receive all case documents that are not confidential. Intervenors usually receive an electronic notification when a document is filed in a case. PUC will send hard copies of case documents if an intervenor does not have email or requests regular mail. Like other parties, intervenors can file motions and data requests, question witnesses, and participate in technical conferences, stipulation discussions, etc. Intervenors may also be questioned by the Commission and other parties and must comply with various rules applicable to adjudicatory proceedings such as, but not limited to, Maine Rules of Civil Procedure and Maine Rules of Evidence where applicable.

Commenting and Testifying

Individuals who are not parties in a case can submit written comments on PUC cases by mail or electronically. There is no limit to the number of comments one can submit. Instructions and forms for commenting on a PUC docketed case are available on the PUC and OPA websites. Consumers can also get information on how to submit comments and docket numbers for cases they are interested in by calling the CAD.

In cases of substantial public interest, the PUC holds public witness hearings for the sole purpose of taking public testimony. These hearings may be held at PUC offices or offsite in the community or communities impacted by a case. According to the Public Advocate, offsite hearings are held less frequently now than in the past.

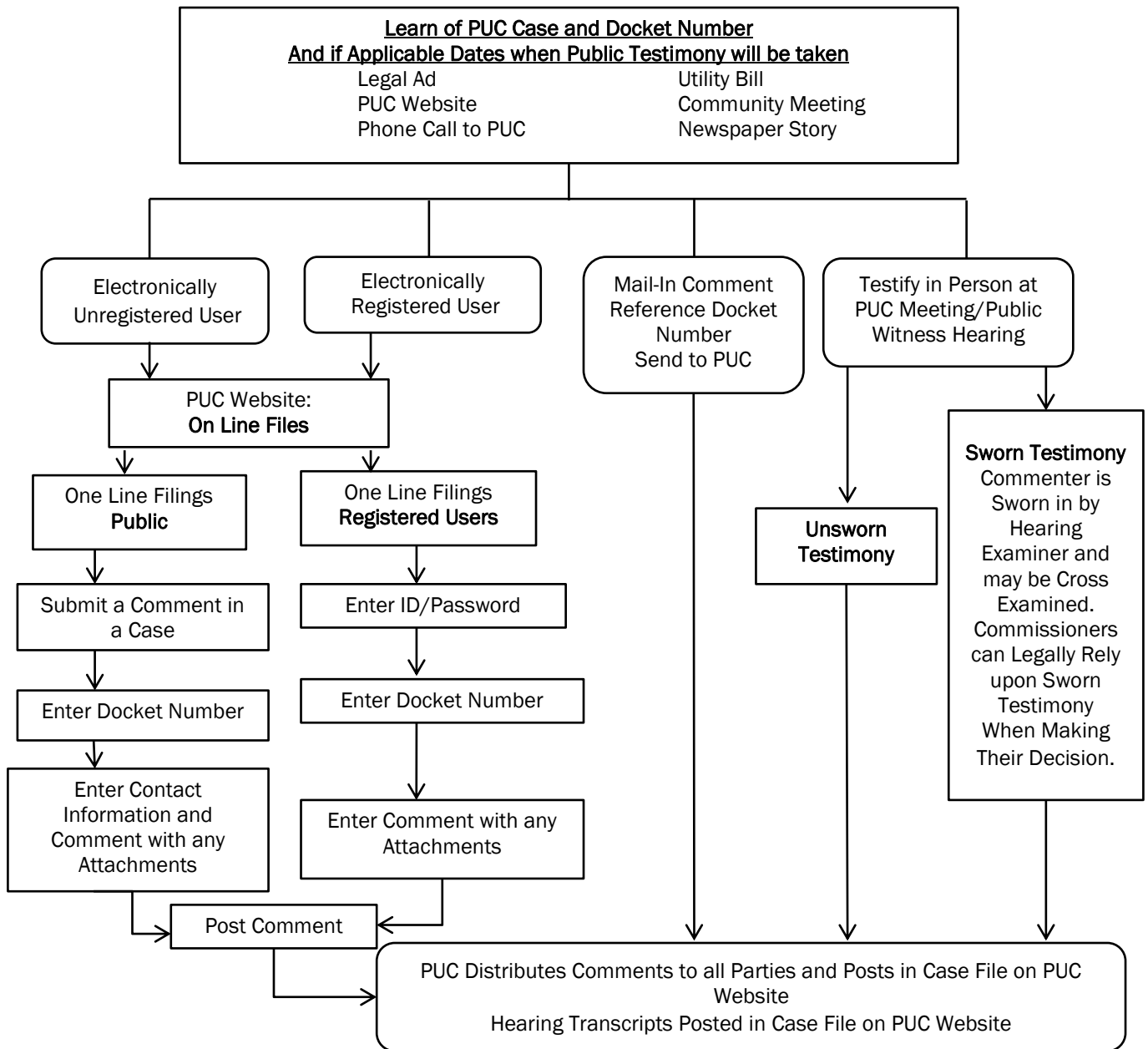
The Hearing Examiner or a Commissioner presides over public hearings and gives instructions for testifying to attendees. Those testifying can choose whether they want to give "unsworn" testimony or take an oath and give "sworn" testimony. Persons providing sworn testimony can be questioned by Commission members and cross-examined by any parties to the case, whereas those providing "unsworn" testimony cannot.

By law, the Commission can only rely on facts given in sworn testimony in making its decisions. Although Commissioners are informed through comments and unsworn testimony, they cannot rely on facts provided in them.

Under the Maine Administrative Procedures Act and Rules of Evidence, only “sworn” testimony can be relied upon in Commission decisions. The Commission cannot rely on facts presented in unsworn testimony and comments. However, Commissioners can take into account the fact that there is a concern, and the nature of that concern, on an issue expressed in unsworn testimony and comments.

Commissioners and PUC staff told OPEGA that Commissioners review all comments submitted to the extent possible, and that comments and unsworn testimony can help inform them and prompt them to make inquiries of parties in the case. Figure 4 illustrates the processes for commenting and testifying in PUC cases.

Figure 4. PUC Public Comment and Testimony Process



Compliance, Accessibility and Responsiveness

OPEGA's Approach

OPEGA developed criteria for gauging accessibility and responsiveness for the Ten-Person complaint process and identified related compliance requirements in statute and rules.

OPEGA was asked to assess the accessibility and responsiveness of avenues groups of consumers have to get common concerns with utility plans and practices considered by the PUC. We approached this from the viewpoint of ratepayers and members of the public, rather than that of regulated utilities. We were also tasked with assessing PUC compliance with relevant statute and rules for the Ten-Person complaint process.

OPEGA developed criteria for gauging accessibility and responsiveness for the Ten-Person complaint process. We then reviewed Maine Statute and PUC Rules associated with Ten-Person complaints and compiled the compliance requirements related to these criteria. The criteria developed are shown in Figure 5.

Figure 5. Criteria Developed by OPEGA for Accessibility and Responsiveness

| |
|---|
| <p><u>Accessibility</u></p> <ul style="list-style-type: none"> • Instructions for participating in the process are readily available and easily understood • The filing process is convenient and straightforward • PUC helpful and friendly in personal contacts on telephone • Participants and public are given proper notice of proceedings activities • The monitoring of, and participation in, proceedings is convenient and straightforward • Individual rate payers are able to represent themselves before the PUC • Compliance with relevant sections of statute and rules <p><u>Responsiveness</u></p> <ul style="list-style-type: none"> • Adherence to timelines in Ten-Person process • Participants treated respectfully and courteously in meetings, in writing and other interactions • Complaint/comment fully understood and seriously considered by PUC • PUC conducted independent analysis/research in developing final decision • The final decision was written clearly and addresses the issues of the complaint • A complete record of the proceeding is maintained and available to the public • Compliance with relevant sections of statute and rules |
|---|

We used the same criteria, as applicable, to assess the avenues available for consumers to participate in cases before the Commission.

OPEGA discussed aspects of the Ten-Person complaint process with the PUC and OPA and generally examined the 42 cases for Ten-Person complaints submitted to the PUC from 2007-2012. We randomly selected approximately 20%, or eight cases, to review in detail. Because of the prevalence of complaints related to smart meters, we judgmentally added one smart meter case increasing our sample to a total of nine. Our in-depth review of these complaints included interviews with six lead complainants, or their representatives, as well as a detailed file review for all nine cases. We also discussed aspects of all sampled cases with the PUC.

We used the same accessibility and responsiveness criteria, as applicable, to assess those avenues that allow consumers to raise concerns by participating in proceedings before the Commission, either as intervenors or by submitting comments and testimony. Our assessment was primarily accomplished by interviewing PUC and OPA staff, and reviewing Maine Statute, Agency Rules, the

PUC website and other available relevant information. We were also informed by interviews done with three Ten-Person complainants whose cases became adjudicatory proceedings, as well as by unsolicited input OPEGA received from consumers over the course of this review.

Ten-Person Complaints

OPEGA found that information about the Ten-Person complaint process and how to file a complaint is readily accessible. The process for actually filing the complaint is also convenient and straightforward.

Accessibility and Responsiveness

OPEGA found information about the Ten-Person complaint process and how to file a complaint is readily accessible. Both the PUC and OPA have guidance on their respective websites for consumers wishing to submit a Ten-Person complaint. The OPA has a Ten-Person complaint form on its website and has staff that will assist consumers with the filing of the form. For those consumers without internet access there is a PUC hotline telephone number listed in local telephone directories and on utility bills. The PUC has written guidance and Ten-Person complaint forms they will send to consumers who request them.

The process for filing a Ten-Person complaint is convenient and straightforward. Ten-person complaints may be filed electronically via the PUC's online filing system or submitted in hard copy. The PUC staff enters hard copy complaints into the electronic system. Complainants interviewed described no major problems with learning about and submitting a complaint.

OPEGA also found, however, that the accessibility and responsiveness of the Ten-Person complaint process, once a complaint has been submitted, seems to vary depending on the path a complaint takes and its ultimate outcome. Ten-Person complaints may take the following tracks:

- Complaint dismissed after source of complaint corrected by the utility.
- Complaint dismissed as being "without merit."
- Complaint consolidated into another related pending PUC case.
- Investigation opened and case processed through an adjudicatory proceeding (complainants representing themselves *pro se* or represented by an attorney).

Based on interviews and file review, OPEGA made the following observations regarding the accessibility and responsiveness criteria we developed:

- Most of the complainants interviewed whose cases were decided through non-adjudicatory means had no complaints about the PUC regarding personal contacts and felt they were treated respectfully and courteously in meetings, in writing and other interactions.
- The PUC gives participants and the public adequate notice of proceedings.
- The PUC was timely in initial processing of complaints and generally diligent in maintaining case files.
- PUC proceedings, as with most government activities, generally take place Monday through Friday during business hours. This obviously makes monitoring and participating difficult for anyone otherwise occupied during those times, but many proceedings are streamed live via the PUC website,

However, accessibility and responsiveness after the complaint was filed varied depending on the path the complaint took and its ultimate outcome.

and participants in a proceeding may join the meeting remotely via the PUC's telebridge system.

OPEGA concluded overall that the Ten-Person complaint process is accessible and responsive for consumers, except in cases where their complaints were addressed through an adjudicatory proceeding.

- Individual ratepayers are able to adequately represent themselves before the PUC in non-adjudicatory cases. It is more difficult for individual ratepayers to represent themselves in cases that become adjudicatory proceedings.
- The PUC complied with the major timelines in the Ten-Person complaint process except for the requirement to issue a decision within 9 months of the complaint filing. (See Recommendation 4.)
- PUC written correspondence was thorough, understandable and professionally written.
- Most complainants interviewed and an assessment of files indicate that PUC fully understood and seriously considered complaints with the possible exception of some health-related Smart Meter complaints.
- There were mixed responses regarding whether PUC conducts independent analysis and research in developing its final decision. The PUC indicates that staff does this in all instances, but some complainants we interviewed said they did not think PUC did any analysis or independent verification of utility provided information in their cases.
- PUC decisions appeared thorough and based on evidence from the case files. Final decision documents were detailed, comprehensive and addressed the issues of the complaint, indicating that submitted information is considered.
- PUC considers records maintained in the on-line filing system to be the official record of a Ten-Person complaint case. The majority of on-line case files contained the major documents one would expect to find. The on-line filing system is readily available to anyone with computer access, and anyone without computer access may contact PUC for copies of the file materials. The on-line filing system was found to have some limitations in identifying cases unless the docket number is known, searching for specific documents, and connectivity issues. (See Recommendation 2.) Despite these limitations, the on-line filing system is a tremendous resource not found in every state agency.
- OPEGA observed that most complaints about the process, or how complainants were treated, tended to be from complainants who went through an adjudicatory proceeding, especially those who represented themselves in the proceedings.

Overall, we concluded that the Ten-Person complaint process seems reasonably accessible and responsive for consumers, except in cases where complaints were addressed through an adjudicatory proceeding. (See Recommendation 1.)

Compliance with Ten-Person Complaint Requirements

Maine Statute and PUC Rules contain requirements pertaining to the accessibility and responsiveness of the Ten-Person complaint process which apply to all Ten-Person complaints. These are:

- The Commission must keep a complete record of all proceedings before it.
- Copies of all documents shall be available through the electronic filing system; anyone not able to access the electronic filing system shall be sent documents through the mail.
- All meetings must be open to the public with proper public notice given.
- The Commission's decision must be in writing.
- All filings must be served on all parties to a proceeding.
- A record of each deliberative session must be kept.
- The Commission shall issue a decision within nine months after the complaint's filing.
- The Commission's decision may be appealed, first to the Commission for reconsideration, and then to the Maine Law Court if necessary.

OPEGA also found that the PUC complied with the majority of the requirements contained in Maine statute and PUC related to the accessibility and responsiveness of the Ten-Person complaint process.

OPEGA found the PUC met the majority of these requirements for most of the nine cases reviewed in detail. We noted, however, that the Commission did not issue its decision within nine months for four of the cases, one file was found to be missing documents and one Ten-Person complaint did not include all required information. A further examination of time prior to a decision on all 42 complaints filed between 2007–2012, showed that the nine-month requirement was exceeded in 12 of them. (See Recommendation 4.)

In addition, statute and rules contain a detailed list of requirements that apply specifically to adjudicatory proceedings. The Ten-Person complaints do not seem to be particularly representative of the adjudicatory process as a whole and our sample only included three cases that actually were processed through an adjudicatory proceeding, two of which are currently on-going. Consequently, we only examined those three cases for compliance with the adjudicatory proceedings requirements most applicable to Ten-Person complaints. These include guidelines for the Hearing Examiner's report, requirements for transcription of hearings, guidelines for presenting evidence, arguments, and examining and cross-examining witnesses, and written appeal guidelines. We did not identify any concerns with regard to these requirements in the cases reviewed.

Participating in a Proceeding

We considered the accessibility and responsiveness of PUC processes for becoming an intervenor and commenting on cases. The PUC and OPA websites have information and guidance for participating in PUC proceedings as a party via the intervenor process or as a commenter. As previously mentioned, a lead complainant for a Ten-Person complaint may become a party in an adjudicatory proceeding either directly or as an intervenor.

Intervening

Information on how to become a party to a case by intervening is publically available and the process for filing a petition to intervene is fairly straightforward.

Information on how to become an intervenor is on PUC's website along with a link to the online filing system. We observed the online instructions on how to file a petition to intervene are not straightforward and there is no online form available for requesting intervenor status. For example, if one clicks on the link to the new online filing system there is nothing specific to becoming an intervenor. However, Consumer Assistance Specialists will assist people who call the PUC and want to file a petition to intervene. Lead complainants for Ten-Person complaints rolled into existing cases that we spoke with found the process very easy because PUC takes care of giving them intervenor status.

However, parties who are unfamiliar with the legal process, even attorneys who do not work on utility cases regularly, can find the adjudicatory process confusing and hard to follow.

The PUC must follow Maine Statutes and PUC Rules governing adjudicatory proceedings. Parties who are unfamiliar with the legal process, even attorneys who do not work on utility cases regularly, can find the process confusing and hard to follow. (See Recommendation 1.) Nonetheless, survey respondents and others who were parties in PUC proceedings told OPEGA that CAD and OPA staff people were very helpful as their cases progressed. They told us that staff provided a clear explanation if they were unable to address an issue. Some intervenors we spoke with did not feel PUC staff or Commissioners tried to help them be more effective and did not feel the PUC treated them consistently or with respect and courteousness.

We noted difficulties with using the PUC's new online system to monitor the case, file case documents and review materials that have been posted.

All parties in a case, including intervenors, are supposed to receive notice of all documents filed in a case (filings) and notification of meetings such as technical conferences and stipulation meetings. When the PUC approves a new intervenor, s/he is added to the list of parties and receives all case documents from that point in time forward. One unsolicited complaint received by OPEGA stated that once one is a party in a case the online filing process for documents is unnecessarily complex and at times difficult to access. OPEGA observed that case documents filed by the PUC, or other parties, are not consistently titled in the online case filing system such that one could tell at a glance something about their content. (See Recommendation 2.)

Utility regulation is complex with many technical issues and calculations that affect the profit margin of utility companies and rates paid by consumers. This complexity can make cases difficult for the public to understand. In addition, as one Commissioner stated, utilities have an interest in making their submissions less clear and therefore less accessible to the public. OPEGA observed that it could be helpful if documents filed in cases were more readable and understandable for the general public. (See Recommendation 1.)

Commenting and Testifying

Instructions for non-parties that wish to comment or testify in a PUC case are readily available and the processes for doing so are straightforward and convenient.

Instructions for submitting comments or testifying in a PUC docketed case are readily available, easily understood and the process is convenient and straightforward. The PUC facilitates the submittal of public comments online with a fillable form and links to the electronic filing system in multiple places on the PUC website. PUC staff scans mailed comments and places them in the electronic case file. All public comments submitted via the online system, or mailed in and scanned, are treated as unsworn testimony.

OPEGA observed that consumers may not be aware the Commission cannot rely on facts contained in comments and unsworn testimony in making its decisions.

Knowing the correct docket number is necessary in order to file comments with the correct case. We noted finding the docket number online is difficult.

PUC staff members noted that the ability to submit an unlimited number of written comments and the option to give unsworn testimony in person without worrying about being cross-examined makes these avenues more accessible to the public. OPEGA observed, however, that people might not be aware that the Commission is more limited in how it can use comments and unsworn testimony versus sworn testimony. (See Recommendation 3.)

We also noted that one must know the docket number in order to file comments with the correct case. While people can call the PUC and get the docket number and other information about a case, finding the docket number online is difficult. It is possible to locate a case docket number online by looking at the list of current open cases, but it is not user friendly, especially to people unfamiliar with the system. (See Recommendation 2.)

Some people, when speaking about issues with PUC's new electronic case filing system, were not sure that all comments were included in the correct case file and provided to the Commission timely, or at all. We also heard from some who expressed doubts about whether each Commissioner reads all the comments submitted. There is no way to know for sure, and Commissioners told OPEGA they try to read all case documents including comments.

Ensuring Unbiased Impartial Decisions ---

The PUC is responsible for making impartial, unbiased decisions in ensuring safe, reasonable and adequate utility service at regulated rates that are just and reasonable to consumers and public utilities.

Various Maine laws establish ethical standards and other mechanisms that help ensure the PUC makes decisions in an impartial, unbiased and transparent manner. OPEGA sought to assess the adequacy of these measures.

The PUC is responsible for making impartial, unbiased decisions in a transparent manner to ensure safe, reasonable and adequate utility service at regulated rates that are just and reasonable to consumers and public utilities. Maine civil and criminal statutes establish ethical standards for members of the executive branch including PUC Commissioners and staff. PUC's governing statute adds additional limitations. These laws along with State Statutes and PUC Rules governing adjudicatory proceedings aim to ensure PUC makes regulatory decisions in an impartial, unbiased and transparent manner.

The criminal statutes address actions such as bribery, improper gifts, improper compensation for past action or services, official oppression (abuse of position), misuse of information and conflict of interest in contracts. Civil statutes prohibit actions such as taking State property off premises for personal use, hiring or promoting a relative and engaging in certain political activities. PUC meetings, including Commission deliberations, must be public, case files are required to be available to the public and there are restrictions on the PUC communicating separately with any party in an open adjudicatory proceeding.

To assess the adequacy of these measures, OPEGA reviewed The Commission on Governmental Ethics and Election Practices' 2009 *Report on Ethics Laws for Executive Branch Employees*, and the State Integrity Investigation (released March 20, 2012), a collaborative project of the Center for Public Integrity, Global Integrity and Public Radio International. We attended the University of Maine School of Law 2013 Governance and Ethics Symposium "*Governance, Ethics and Accountability in the Public and Private Sectors: Lessons Learned, Not Learned and Still to be Learned*," and interviewed the Director of the Ethics Commission, attorneys familiar with Maine's ethics

standards in the Attorney General's Office and people who work at and with the PUC.

Maine Conflict of Interest Statute

Maine law, specifically 5 MRSA §18 and §19, addressing conflict of interest, financial disclosure and restrictions on employment for former executive branch employees are of particular relevance for this review.

Current and former executive employees are restricted from participating in state government proceedings in which they have a conflict of interest.

Conflict of interest is

defined in Title 5 as a direct and substantial financial interest and includes accepting bribes. Every executive employee shall avoid the appearance of a conflict of interest and immediately disclose any conflict to their direct supervisor. There is a civil penalty of \$1,000 for violations.

Some of the specific restrictions found at Title 5 MRSA §18 include prohibiting:

- executive employees from receiving any benefit from a state contract;
- current executive employees from participating in the legislative process in their official capacity if they have any direct or substantial financial interest unless that interest is disclosed at the time of participation;
- current executive employees from acting in an official capacity in any proceeding in which, to his knowledge, the following have a direct and substantial financial interest:
 - him/herself, spouse or dependent children;
 - partners;
 - organizations s/he is negotiating with or has an arrangement concerning prospective employment;
 - organizations s/he has a direct and substantial financial interest in; or
 - any person with whom the employee has been associated as a partner or fellow shareholder in a professional service corporation during the preceding year.

Title 5 §18(3) restricts former executive employees from acting as an agent or attorney for, or appearing personally before, a state or quasi-state agency for anyone other than the State:

- for one year following termination of employment in connection with a proceeding on a specific issue that was pending before the former employee's agency and was directly within the responsibilities of the employee for the period ending 12 months before terminating employment, and;

Title 5 sections 18 and 19 address conflict of interest, financial disclosure and restrictions on employment for former executive branch employees. Conflict of interest is defined as a direct and substantial financial interest.

Conflict of Interest in Maine Statute

5 MRSA §18. (7) "Every executive employee shall endeavor to avoid the appearance of a conflict of interest by disclosure or by abstention...."conflict of interest" includes receiving remuneration, other than reimbursement for reasonable travel expenses, for performing functions that a reasonable person would expect to perform as part of that person's official responsibility as an executive employee."

- at any time in connection with a proceeding on a specific issue that was pending before the former employee's agency and was directly within the responsibilities of the employee during the 12 months immediately preceding the termination of employment.

The PUC's General Counsel told OPEGA this language is confusing and that she prepares a list for departing attorneys of all cases they have worked on at the PUC. Attorneys in the Attorney General's Office we spoke with agreed the statute is confusing and consider the lists of cases PUC prepares for departing attorneys to be a best practice. They noted that Maine courts have interpreted the term "specific issue" narrowly. For example, a government proceeding concerning the same company, product and regulatory matter, but in a different year, would not necessarily be the same specific issue a former employee had worked on.

Title 5 §19 requires employees in certain State positions, including PUC Commissioners and Division Directors, to submit annual financial disclosures. Each source of income over \$2,000 received by the employee or immediate family members must be reported, as well as honoraria over \$2,000, and any gifts. Disclosures are submitted to the Commission on Governmental Ethics and Election Practices. They are public documents and available on the Ethics Commission's website.

According to the Director of Maine's Ethics Commission, Maine's laws are less strict than those of some other states. The 2009 Report on Ethics Laws for Executive Branch employees found that Maine, unlike most states, does not have an independent ethics agency to regulate the professional ethics of the executive branch. The report included recommendations to improve ethics education resources for executive branch employees and centralize State ethics statutes. None of the report's recommendations have been implemented and the Director said he is not sure there is a need for an independent ethics agency in a "good government state" like Maine.

The State Integrity Investigation Report reviewed and graded each state's accountability and transparency framework or "corruption risk indicators" based on responses to 330 questions. Maine received a score of 59% or F. OPEGA looked at how the report scored Maine on some of the indicators associated with Executive Accountability and State Civil Service Management that relate to this review. The report found:

- Maine has effective laws requiring civil servants to recuse themselves from policy decisions where their personal interests may be affected and regulations governing gifts and hospitality offered to civil servants.
- Maine has laws requiring disclosure of income, but not assets. Financial disclosures are reviewed for completeness, but not verified or audited.
- Maine has laws requiring impartial, independent and fairly managed state civil service and laws preventing nepotism, cronyism and patronage, but in practice these laws are not very effective.
- Civil servants are typically independent but are sometimes influenced by political pressure. Appointments and professional assessments are usually based on professional qualifications; however, individuals appointed may have clear party loyalties.

According to the Director of Maine's Ethics Commission, Maine's laws are less strict than those of some other states. A 2009 report by the Ethics Commission included some recommendations to strengthen ethics standards and education in Maine, but none have been implemented.

The 2012 State Integrity Investigation Report reviewed and graded each state's accountability and transparency framework or "corruption risk indicators" based on responses to 330 questions. Maine received a score of 59% - an F.

- Laws restricting civil servants, governors and/or state cabinet-level officials from entering the private sector after leaving government exist, but the study found these laws are not very effective. One example cited was a former PUC Commissioner who moved directly from the PUC to a position with an energy developer.

PUC Statute and Rules

The PUC's governing Statute also establishes some limitations to prevent conflicts of interest for Commissioners and staff.

Commissioners often have some experience in the utility field, but it is not required and there are no limitations on who may be appointed. PUC's Statute, Title 35-A §109, establishes limitations in addition to those in 5 MRSA above to prevent conflicts of interest.

Additionally, Maine Statute and PUC's procedural rules for Commission meetings and adjudicatory proceedings support transparency and help ensure unbiased impartial decisions.

PUC's procedural rules for Commission meetings and adjudicatory proceedings support transparency and help ensure unbiased, impartial decisions. Public notices of all meetings are required and all documents in a case, except those determined to be confidential by the PUC, are public as discussed earlier in this report. People also have opportunities to participate as interested persons, intervenors and by testifying or commenting. All meetings including Commission deliberations (other than executive sessions) must be open to the public and all decisions must be in writing. PUC live streams meetings on its website and recordings of past meetings are available.

Maine Statute and PUC Rules require impartial hearings. They allow any party to file a charge of bias, personal, or financial interest regarding a Hearing Examiner, PUC advisory staff member or Commissioner in the proceeding and request the person(s) recuse him/herself. Each individual whose recusal is requested must determine whether they should recuse themselves on the record. The decision is a matter of personal determination. OPEGA saw evidence of compliance with recusals by Commissioners. If a Commissioner recuses him/herself in response to a request for recusal, a written response is prepared by the Commissioner and made part of the official case file.

State statute and PUC rules also prohibit *ex parte* communication, direct or indirect, between a Commissioner (or any PUC advisory staff) and any party in adjudicatory proceedings. This is because the PUC functions much like a judge in judiciary cases. In court the parties, defense and prosecution, are prohibited from discussing

Conflict of Interest in PUC's Statute: 35-A MRSA §109

"In addition to the limitations of Title 5, section 18, following limitations apply to prevent conflicts of interest.

1. Public utilities. A member or employee of the commission may not:
 - Have any official or professional connection or relation with any public utility or competitive service provider operating within this State;
 - Hold any stock or securities in any public utility or competitive service provider operating within this State;
 - Render a professional service against any such public utility or competitive service provider; or
 - Be a member of a firm that renders service against any such public utility or competitive service provider.
2. Appointment to civil office. No commissioner may hold any other civil office of profit or trust under the Federal Government or State Government except the office of notary public.
3. Political party. No commissioner may serve on or under a committee of a political party."

the case with the judge separately. Commissioners and staff also may not communicate separately with a person with a pending intervenor petition, or any person legally interested (i.e. requested to be on the case list of interested persons who receive all orders in the case) throughout the proceeding.

For the PUC to make any decision there must be a quorum of at least two of the three Commissioners. Consequently, only one Commissioner can recuse him/herself in a case. Maine case law allows a member of an adjudicatory body to participate in situations where he/she might otherwise recuse if participation is necessary for a quorum and otherwise no majority decision would be possible¹. This provision is not unique to Maine and is generally referred to as the “rule of necessity.” It is also addressed in Maine Rules of Professional Conduct (1.11(d)(1)(B) allowing attorneys serving as Commissioners who would otherwise recuse to participate in the decision if a quorum is needed and no one else can be authorized to act.

Attorneys who work for the PUC, including Commissioners who are attorneys, must also act in accordance with the Maine Bar Rules and Rules of Professional Conduct.

Attorneys who work for the PUC, including Commissioners who are attorneys, must also act in accordance with the Maine Bar Rules and Rules of Professional Conduct. These rules provide a framework for the ethical practice of law. They address conflicts of interest with current and former clients, duties to former clients, the “rule of necessity” and conflicts of interest for former and current government employees. For example, lawyers who have left government employment cannot share confidential information they learned while in government with clients. Lawyers coming to government employment cannot share confidential client information they learned while working for a client. Generally, a lawyer working for the PUC cannot work on cases s/he personally and substantially participated in while in private practice. According to PUC’s Chairman, lawyers are trained to set aside bias; however, there is no requirement that any or all Commissioners be lawyers.

Regulatory Capture

Regulatory capture usually refers to industries influencing regulators to make decisions that are in the industries’, not the public, interest.

Regulatory capture usually refers to industries influencing regulators to make decisions that are in the industries’, not the public, interest. Regulators might be captured by taking bribes or because they want to maintain good relationships in anticipation of seeking future employment in the regulated industry. Maine law and PUC rules, as described above, address this type of capture and OPEGA saw evidence of PUC’s compliance with the various provisions. However, traditional regulatory capture and direct financial conflicts of interest do not describe why some people question PUC’s ability to act in an impartial manner and the measures in place in Maine do not address all factors that present risk, or create perceptions of bias, in decisions. (See Recommendation 6.)

Often when people use the term “conflict of interest” they do not mean a direct or financial conflict, but are referring more generally to a bias or shared perspective that adversely influences impartiality. We heard concerns about a revolving door between PUC and utility companies because of ex-utility employees working at PUC, former PUC employees working directly for utilities or law firms representing utilities, and Commissioners having worked for or represented utilities

¹ *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation* 473 A.2d 406 (Me. 1984)

prior to being appointed and/or after leaving the PUC. Some perceive a “chummy” relationship between utility companies and the PUC, especially with the largest utilities PUC deals with most frequently.

Traditional regulatory capture and financial conflicts of interest do not describe why some people are concerned that the PUC is not impartial. The measures in place in Maine do not address all factors that present risk, or create perceptions, of bias.

We heard from intervenors who feel the PUC readily accepts the word of utility companies but questions evidence brought by others. Some who brought issues to the PUC that are different than those typically brought by utilities contend that PUC does not consider their issues or lacks the ability or capacity to analyze their data. Because PUC works frequently with representatives of the utility companies, some intervenors worry about whether inappropriate communications occur. They question whether PUC adheres to the rules governing adjudicatory proceedings. As a result, they feel PUC proceedings are not respectful of people with other views and the Commission’s decisions reflect this bias. Ultimately, this leads some to lack trust in the process.

Complicating matters is the fact that communications can and do occur outside the formal adjudicatory process. For example, PUC staff and Commissioners are able to meet with utility company representatives or other potential parties prior to the initiation of a case. These meetings help PUC manage its caseload and plan staff assignments. At the same time, however, these meetings are an opportunity for the utility to meet with the individuals who will be deciding their case before the case is formally initiated and without the other side present.

Tension between utility companies and consumers is inherent in any regulatory process. The Legislature created the Office of Public Advocate to represent the interests of ratepayers in order to balance the influence of the utilities.

Tension between companies and consumers is inherent in any regulatory process and regulators can be biased for or against regulated industries. The Legislature created the Office of Public Advocate to represent the interests of ratepayers in order to balance the influence of the utilities. Consumers we spoke with who have been involved in PUC cases understand the role of the Public Advocate and its ability to speak to other parties in cases. They told us the people at OPA are helpful and communicate well. However, they also said that when the Public Advocate does not support their view or side in a case, its ability and willingness to assist them is limited.

OPA staff members told us the PUC can sometimes develop institutional bias because commissioners often come from the utility field and the agency is always hearing from the same utilities. OPA staff said that they can also develop a bit of a bias because they work with the utilities and get to know their representatives.

PUC Commissioners and staff are aware of these perceptions but believe they remain unbiased. They note their knowledge of utilities improves their ability to make sound decisions.

PUC staff and Commissioners we spoke with are aware of these perceptions of bias. Some told us they take steps to avoid the appearance of being too close. Others stated unequivocally that this is just a perception and that they are unbiased because they must follow PUC’s statute and rules. They note that their knowledge of and experience with utility companies and the regulatory system improves PUC’s ability to make sound decisions in the public’s interest. According to OPA and PUC, Maine’s Commission does have more expertise and is more technocratic than other state utility commissions. We observe that Commissioners with technical knowledge are better able to analyze utility provided information and understand the impacts of Commission decisions on consumers.

In the course of research, OPEGA found an author who describes other types of “capture” more reflective of the common concerns people raised with us about the PUC – in particular cultural capture.

Cultural capture is a concept that describes how regulators’ beliefs and actions can be shaped by three mechanisms: group identification; status; and relationship networks.

In the course of our research on regulatory capture, we found a researcher and author who describes other types of capture more reflective of common concerns some people raised with us about the PUC. James Kwak ² in *Cultural Capture and the Financial Crisis*, chapter 4 in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*³, discusses:

- Information capture – interest groups take advantage of administrative law requiring review of all submissions and provide copious amounts of complex information to obtain favorable policy outcome.
- Social capture – regulators influenced by their social networks.
- Cognitive regulatory capture – regulators internalize the objectives, interests, and perception of reality of what they are regulating.
- Cognitive capture – regulators problem-solve with regulated entity rather than enforcing existing rules.

Kwak also discussed “cultural capture,” which we found to be a good description of the concerns some people have about the PUC. Cultural capture is a concept Kwak uses to describe how regulators’ beliefs and actions can be shaped by three mechanisms; group identification, status and relationship networks. Specifically it describes how regulators are more likely to adopt positions advanced by people whom they identify with, perceive to have higher social, economic, or intellectual status, and/or are in their social networks.

Risk factors he identifies as making cultural capture a channel of industry influence include:

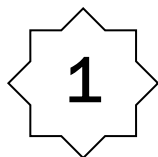
- a high degree of similarity between industry representatives and regulators; an industry with a notable social purpose with which regulators can identify;
- an industry with high social, cultural, or intellectual status;
- many social connections between industry and regulators; and
- technically complex issues, where it is not clear how the benefits of policy alternatives are shared.

Like other types of capture, Kwak acknowledges that cultural capture is difficult to prove and an unavoidable outgrowth of necessary human interactions.

² James Kwak is an Associate Professor University of Connecticut School of Law.

³ Daniel Carpenter and David Moss, eds., (Cambridge University Press, forthcoming).

Recommendations



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.



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.

3

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.

5

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.

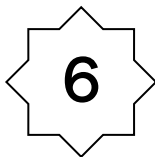
We also noted that even when common concerns or themes are identified, the Division Directors may or may not take steps to look into them further or bring them to the Commission's attention.

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.



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 research⁴, 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.

⁴ 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 126th 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.⁵

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.

⁵ *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 126th 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

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 127th 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.

Acknowledgements

OPEGA would like to thank the management and staff of the Public Utilities Commission and the Office of the Public Advocate for their cooperation during this review. We would also like to thank the following Legislative and State agencies for their assistance in providing information and perspective on our review:

- Law and Legislative Reference Library
- Office of the Attorney General
- Maine Commission on Governmental Ethics and Election Practices

Lastly, we extend our appreciation to the Ten-Person complainants, and their representatives, who were surveyed during this review for responding to our inquiries.

Appendix A. Scope and Methods

The scope for this review, as approved by the Government Oversight Committee, consisted of several questions. To answer these questions fully, OPEGA:

- conducted interviews as needed with:
 - managers and staff of the Maine Public Utilities Commission;
 - managers and staff of the Maine Office of the Public Advocate;
 - the Director of the Maine Ethics Commission;
 - staff in the Maine Attorney General's office;
 - a sample of Ten-Person complaint lead complainants and their representatives ;
- reviewed Maine Statute, PUC Rules and the Maine Bar Rules and Rules of Professional Conduct;
- developed criteria for gauging accessibility and responsiveness for the Ten-Person complaint process;
- reviewed in detail the online case files for nine Ten-Person complaints;
- reviewed the PUC's on-line filing system, CMS, and other information available to the public on the PUC and Public Advocate websites;
- researched other state's conflict of interest and public utilities laws;
- observed PUC proceedings;
- reviewed the Commission on Governmental Ethics and Election Practices' 2009 *Report on Ethics Laws for Executive Branch Employees*;
- reviewed the State Integrity Investigation (Released March 20, 2012), a collaborative project of the Center for Public Integrity, Global Integrity and Public Radio International;
- attended the University of Maine School of Law 2013 Governance and Ethics Symposium "*Governance, Ethics and Accountability in the Public and Private Sectors: Lessons Learned, Not Learned and Still to be Learned*", and
- conducted general research on ethics, bias, conflict of interest and regulatory capture.



STATE OF MAINE
PUBLIC UTILITIES COMMISSION

THOMAS L. WELCH
CHAIRMAN

HARRY LANPHEAR
ADMINISTRATIVE DIRECTOR

DAVID P. LITTELL
MARK A. VANNOY
COMMISSIONERS

August 20, 2013

Beth Ashcroft, Director
Office of Program Evaluation and Government Accountability
82 State House Station
Augusta, Maine 04333-0082

Dear Beth:

On behalf of the Commissioners and staff at the Maine Public Utilities Commission (MPUC), we would like to thank you and your staff for the care you have taken with your evaluation of the compliance, accessibility and responsiveness of certain MPUC processes. As our response to your recommendations reflects, we are in general agreement with your Report with respect to areas where accessibility and responsiveness can be improved. We are pleased that you found that, with very few exceptions, we operate in full compliance with our rules and statutes and are accessible and responsive to citizens and ratepayers.

We appreciate the work you and your staff put in to understand the MPUC's often complicated regulatory and legal processes. Your Report has been reviewed carefully and confidentially by the Commissioners and Division Directors, and our Agency Response includes specific steps we will take to address your Recommendations.

We are grateful for the effort, courtesy and professionalism that you and your staff exhibited throughout this review. Please contact me directly if you have any questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads 'Th. L. Welch'.

Thomas L. Welch
Chairman