PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
962 Wayne Ave • Suite 610 • Silver Spring, MD 20910

November 17, 2021

Via email to kate.kahlert@state.mn.us

Kate Kahlert
Public Utilities Commission
121 7th Place East, Suite 350
Saint Paul, MN 55101- 2147

Re: COMMENTS ON Proposed Amendment to Rules Governing Certificates of Need and Site and Route Permits for Large Electric Power Plants and High-Voltage Transmission Lines, Minnesota Rules Chapters 7849 and 7850 and Governing Notice Plan Filing Requirements, Minnesota Rules, part 7829.2550; and Request to Schedule a Rules Hearing

Dear Ms. Kahlert,

Public Employees for Environmental Responsibility (PEER) is a nonprofit organization that assists federal, state, and local public employees in fighting for the ethical management of natural resources, strong environmental laws and policies, and accountability and transparency in government actions. PEER respectfully submits these comments on the Minnesota Public Utilities Commission's (Commission) above-captioned notice of proposed rulemaking (the proposed amendments). PEER requests a public hearing on the rulemaking and PEER opposes the proposed rules in their entirety because they are the product of a delayed, incomplete, and blinkered process that fails to propose reasonable standards that are sufficient to protect Minnesotans and the environment from industry-captured permit decisions.

The Commission must abandon these proposed amendments and promptly restart the process in a way that fully consults with stakeholders and accounts for the threats posed by climate change. The Commission should complete this process after a thorough and inclusive public process but cannot take another nine years to propose final rules. Any rule that fails to re-position the Commission to respect tribal sovereignty, protect environmental justice and low-income communities, assure full public participation, and force project proposers to fully account for their climate change impacts and vulnerabilities is unreasonable—the Commission's current proposal fails on all these counts.

In the alternative, the Administrative Law Judge should disapprove of this proposal for numerous violations of standards in Minn. R. 1400.2100(D), (E), and (F), as detailed further below.

1. **This rulemaking is so delayed that its proposed amendments are out of date and out of touch with current state policy**

It is clear at this point, in 2021, that the Commission's choice of stakeholders to guide this rulemaking in 2012 is no longer relevant to the most important issues of the current day. The

stakeholder group selected by the Commission's staff included: three state agency units;[1] a regional grid operator;[2] all of Minnesota's investor-owned utilities; a joint representation of municipal and cooperative power providers;[3] representatives of businesses that oppose regulatory costs and rate increases;[4] a large transmission line operator;[5] wind energy industry advocates;[6] a contractor that frequently works for utility project proposers;[7] citizen-activist organizations that oppose some or all energy infrastructure projects in their areas;[8] several individuals who are frequently opposed to development of alternative energy projects such as wind farms;[9] and one lawyer who furthers environmental protection.[10] It is no surprise that this group, heavily biased towards industry perspectives and special interests, would fail to set goals sufficient to assure the proposed regulations protect the public interest. It is also unsurprising that stakeholder priorities identified nearly a decade ago are already thoroughly out of touch with the climate crisis and social consciousness of the current day.

The makeup of the stakeholders appearing before the Commission has shifted significantly since 2012, and only listening to those who have been active in utilities regulation for decades is a recipe for hidebound decision making and industry capture. Without representation from tribal governments, Indigenous organizations and representatives, low-income advocates, organizations working on a just transition away from fossil fuel industries, climate change advocates, labor organizations, and the other relevant stakeholders who have involved themselves with Commission dockets in the recent past, the Commission appears set to reaffirm in regulation a bias for industry. In recent years the Commission has overseen dozens of dockets that brought out diverse constituencies with valid concerns about its work. While the 2012 stakeholder group included a single environmental representative, it is unreasonable to believe one attorney can speak for the varied perspectives that have come up in dockets covering Certificates of Need, Powerplant Siting, and the routing of transmission lines. At a minimum, staff should re-start the stakeholder process reaching out to participants in recent ratemaking,

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[1] *See In the Matter of Possible Amendments to Rules Governing Certificates of Need and Site and Route Permits for Large Electric Power Plants and High Voltage Transmission Lines*, Minnesota Rules, *Chapters 7849 and 7850; and to Rules Governing Notice Plan Requirements for High-Voltage Transmission Lines,* Minnesota Rules, *part 7829.2550,* Docket Nos. E,ET,IP-999/R-12-1246, STAFF BRIEFING PAPERS, (March 9, 2017), eDocket ID No. 20173-129606-01 at 1 (listing Minnesota Department of Commerce, Energy Environmental Review and Analysis and Division of Energy Resources, and Minnesota Department of Transportation as participants).

[2] *Id.* (Midcontinent Independent Transmission System Operator).

[3] *Id.* at 2 ("Jointly, Rochester Public Utilities, Southern Minnesota Municipal Power Agency, Missouri River Energy Services, Minnkota Power Cooperative, and Dairyland Power Cooperative, and Otter Tail Power Company.").

[4] *Id.* at 1 (Richard Savelkoul; David Aafedt; Jerry Von Korff; Chamber of Commerce).

[5] *Id.* (ITC Midwest LLC).

[6] *Id.* (Minnesota Wind Coalition).

[7] *Id.* (Barr Engineering).

[8] *Id.* (NoCapX 2020 and United Citizens Action Network; North Route Group).

[9] *Id* at 2 ("Several other interested individual stakeholders also provided input throughout the advisory committee process, including Marie McNamara, Barbara Stussey, and Kristi Rosenquist.").

[10] *Id.* at 1 (Just Change Law).

Certificate of Need, Routing Permit, and Power Plant Siting dockets for their comments on what updates to the rules would serve the public interest.

2. The proposed changes fail to address important legal and social issues that the Commission must address in its rules

While the Commission is necessarily a specialist independent agency with specific tasks assigned by the Legislature, it is also an agency whose mission is to serve the public. As a result, the limited updates contemplated by this notice fail to address important legal, social, and scientific issues that the Commission must incorporate into its work.

As one principal example of the current failings, the Legislative Auditor noted in 2020 that the Commission fails to properly notify tribes regarding cases that affect them[11] because the Commission only adopted a consultation policy in 2019 and the Commission's regulations do not require adequate notification of tribes in all relevant instances.[12] It is of paramount importance that the proposed amendments address identified failings in a more comprehensive update of the regulations. To the extent that Commission staff do not fix these deficiencies, it will be appropriate for the Administrative Law Judge to disapprove of the Commission's proposal consistent with Minn. R. 1400.2100 (D), (E), & (F).[13]

a. While updating the rules to comply with statutes, the agency ignores relevant treaties and failed to consult with tribes as required by Commission and state policy

The fact that the Commission has yet to update its regulations to reflect a change in statutes enacted sixteen years ago is obviously a remarkable delay. However, it's important to also acknowledge that treaties with the tribes in the state of Minnesota date to the 1850s and earlier.[14]

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[11] *See* OFFICE OF THE LEGISLATIVE AUDITOR, PUBLIC UTILITIES COMMISSION'S PUBLIC PARTICIPATION PROCESS: 2020 EVALUATION REPORT, at S-1 (calling on the Legislature to require the PUC to consult with tribal governments), [hereinafter "LEGISLATIVE AUDITOR REPORT"] https://www.auditor.leg.state.mn.us/ped/pedrep/puc2020sum.pdf.

[12] *Id.* at S-3.

[13] *See, e.g.*, *In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers, Minnesota Rules parts 7050.0130, 7050.0220, 7050.0224, 7050.0470, 7050.0471, 7053.0135, 7053.0205, and 7053.0406*, REPORT OF THE ADMINISTRATIVE LAW JUDGE, OAH Docket No. 80-9003-34519, Revisor R-4324 (Jan. 9, 2018) (disapproving of the Minnesota Pollution Control Agency's proposed sulfate standard for wild rice because it violated federal and state law and ignored submissions on wild rice waters from tribes), https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf.

[14] Ann McCammon-Soltis and Kekek Jason Stark, Great Lakes Indian Fish & Wildlife Commission Division of Intergovernmental Affairs, *Fulfilling Ojibwe Treaty Promises – An Overview and Compendium of Relevant Cases, Statutes and Agreements*, 1 (2009) https://glifwc.org/minwaajimo/Papers/Legal%20Paper%20-%20DIA.pdf ("In treaties signed in 1836, 1837, 1842, and 1854, the tribes reserved hunting, fishing and gathering rights in the areas (land and water) ceded to the United States. It must be emphasized that these ceded territory rights were not given or granted by the United States, but were reserved by the tribes for themselves.").

It follows that while the Commission may be sixteen years late complying with state law, it is clearly also more than 160 years late in complying with federal law.

Treaties are federal law, supreme and above state law according to the U.S. Constitution's Supremacy Clause.[15] The U.S. Supreme Court and other federal courts have been consistently clear on the point that: "A state law that burdens a treaty-protected right is pre-empted by the treaty."[16] Minnesota's Native Nations have long reserved rights over lands they have ceded to the federal government and any subsequent landholders, and have proven in federal courts that these rights continue to nullify inconsistent state law and policy.[17] Treaty-making is the tribes' and federal government's prerogative, displacing states' authority over natural resources.[18] In the face of established treaty rights retained by tribes, generally-applicable state laws must give way to what the federal government and tribe agreed between themselves.[19] Additionally, individual tribal members can assert treaty rights on their own behalf against state regulations even when tribes are not parties to a case.[20] With all of these issues to consider, it is not only inappropriate for the Commission to ignore treaty rights, it can expose the regulations and individual permit decisions to legal challenges for failing to align with such treaty rights.

For example, Ojibwe tribes have used treaties to preserve their rights to hunt, fish, and gather in ceded territories.[21] Federal courts have made extensive findings concerning Ojibwe knowledge and traditions preserved by these treaty rights.[22] To the extent that any large energy infrastructure permitted by the Commission would impair these rights to hunt, fish, and gather—by limiting access to the resources, harming the resources themselves, or encumbering the cultural practices in other manners—the Commission would be in violation of the treaty and federal law. The

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[15] U.S. CONST, Art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[16] Wash State Dept. Of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1015 (2019); *see also* Chase v. McMasters, 573 F.2d 1011, 1018 (8th Cir. 1978) ("We hold that New Town's action is precluded by the Supremacy Clause because it impaired Chase's right . . . to enjoy the beneficial use of land held in trust for her without the obligation to pay local taxes and thereby interfered with the operation of an important means of implementing a policy adopted by the federal government"); U.S. v. Gotchnik, 222 F.3d 506, 510 (8th Cir. 2000) (Finding that modern weaponry, but not modern transportation, could be used in the exercise of treaty-based hunting and fishing rights in a wilderness area.).

[17] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[18] *Id.* at 204 ("Although States have important interests in regulating . . . natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.").

[19] Washington State Department of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2019) (invalidating gasoline tax on tribal business as inconsistent with treaty right).

[20] Herrera v. Wyoming, 139 S.Ct. 1686, 1697 (2019).

[21] McCammon-Soltis and Stark, *supra* note 14, at 1.

[22] *Id.* at 1 n.6 (citing Lac Courte Oreilles Band v. Wisconsin, 653 F. Supp. 1420, 1422-1429 (W.D. Wis. 1987), Mille Lacs Band v. State of Minnesota, 861 F.Supp. 784, 791-793 (D. Minn. 1994))

interpretation of treaties is complicated, and the Commission should not attempt to do so without the guidance of potentially-impacted tribes and treaty authorities.[23]

The stakeholder group convened in 2012 included no tribal representatives. Not only does this failure to consult appear to violate the agency's 2019 consultation policy,[24] the Commission's failure to fully consult is directly contrary to the Walz Administration's stated goal to better coordinate efforts with Minnesota's Native nations.[25] As explained in Executive Order 19-24, it is in the state's own interest to respect tribes' rights: "Meaningful and timely consultation between the State of Minnesota and the Minnesota Tribal Nations will facilitate better understanding and informed decision making by allowing for collaboration on matters of mutual interest and help to establish mutually respectful and beneficial relationships between the State and Minnesota Tribal Nations."[26] In 2019 the Commission's chair informed Governor Walz that the Commission intended to abide by Executive Order 19-24.[27]

Other state agencies have—sometimes under court order—actively coordinated with tribes to assure their treaty rights continue to be respected.[28] Since the 1980s Ojibwe tribes have had an active role in managing resources in northern Minnesota, sharing responsibility with various

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[23] *See generally id.* (giving background on the complex interpretation of Ojibwe treaty rights and courts' interpretations of these rights against state laws).

[24] TRIBAL NATIONS CONSULTATION POLICY FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION, https://mn.gov/puc/about-us/tribal-relations/ (last visited Nov. 10, 2021).

[25] Press release, Office of Gov. Tim Waltz & Lt. Gov Peggy Flanagan, Governor Walz Signs Historic Order to Expand Tribal-State Relations (April 5, 2019), https://mn.gov/governor/news/?id=1055-379072 .

[26] Exec. Order No. 19-24 (April 4, 2019), https://mn.gov/governor/assets/2019_04_04_EO_19-24_tcm1055-378654.pdf. [hereinafter "EO 19-24"].

[27] LEGISLATIVE AUDITOR REPORT, *supra* note 11, at 26.

[28] MINNESOTA DEPARTMENT OF NATURAL RESOURCES, MILLE LACS LAKE MANAGEMENT PLAN 2021-2026 PUBLIC REVIEW DRAFT – MARCH 2021 1 (2021), https://files.dnr.state.mn.us/fisheries/largelakes/millelacs/mplan.pdf ("On Mille Lacs Lake, harvest of several species is shared between tribes signatory to the 1837 Treaty and the state, based on legal agreements. The State of Minnesota respects tribes' self-regulation and will continue to cooperatively manage the Mille Lacs fishery into the future. This plan primarily directs the work of the MN DNR's Fish and Wildlife Division and complements planning by the 1837 Treaty Fisheries Technical Committee (FTC), the court stipulated venue for the MN DNR's cooperative management with 1837 Treaty bands."); *see also* MINNESOTA DEPARTMENT OF NATURAL RESOURCES, MINNESOTA DNR RESPONSE TO TRIBAL COMMENTS: DRAFT MINNESOTA WHITE-TAILED DEER MANAGEMENT PLAN (2018) https://files.dnr.state.mn.us/wildlife/deer/plan/deerplan_tribal.pdf; News Release: Minnesota Department of Transportation, MnDOT to Install Signage Acknowledging 1854 Tribal Treaty Boundaries (Nov. 5, 2021), http://dot.state.mn.us/news/2021/11/04-d1-treaty.html; Michael Dockry, Michael Benedict, Alexandra Wrobel & Keith Karnes, *Innovations in Partnerships and Tribal Forest Management: A Panel Discussion*, PROCEEDINGS OF THE 2019 NATIONAL SILVICULTURE WORKSHOP (2019), https://www.fs.fed.us/nrs/pubs/gtr/gtr-nrs-p-193papers/13-dockry-gtr_nrs-p-193.pdf.

agencies.[29] "Overall, inter-tribal involvement in resource management has clearly been a positive development that has promoted sustainability of the natural resources and benefited all users of the resources, not just Ojibwe tribal members."[30] Tribal authorities manage lands and resources in their own right,[31] and have the ability to provide state agencies with expert information that leads to better outcomes for all parties. In order to avoid conflict and the destruction of irreplaceable cultural resources, the Commission must assure that procedures in its regulations protect the interests of all relevant tribal nations' cultural sites—regardless of whether the site is clearly protected by an existing treaty right or another federal law such as the National Historic Preservation Act.

Moreover, both in rewriting the proposed amendments and in every permit approval processes it oversees the Commission must meaningfully consult with tribes directly, not through a project proposer or another state agency.[32] Because only the Commission can speak for its ability to take a certain action, only the Commission can provide the "meaningful and timely consultation" that is expected of state agencies.[33] Relying on other agencies or project proposers to initiate and conclude consultation is insufficient, and should be corrected throughout the Commission's processes and regulations. By consulting with tribes on rewriting the regulations, the Commission should be able to find a way to meaningfully consult without breaching *ex parte* rules.

b. The Commission's "notice list" system fails to meet its commitments to tribal consultation

Specific parts of the proposed amendments clearly fail to meet the Commission's commitment to fully informing and consulting tribes. For example, the "notice list" system furthered by the proposed amendments must be rethought and include significantly more outreach to impacted communities and tribes. The proposed amendments include language for Minn. R. 7849.0125, subp. 6, concerning a "Local and tribal government contact list" and requires that:

> An applicant must maintain and make available to the commission and department upon request a list of local units of government,

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[29] *See* Tom Busiahn & Jonathan Gilbert, *The Role of Ojibwe Tribes in the Co-Management of Natural Resource in the Upper Great Lakes Region: A Success Story* (2009), http://glifwc.org/minwaajimo/Papers/Co-management%20Paper%20Busiahn%20%20FINAL.pdf.

[30] *Id.* at 1.

[31] *See* LEECH LAKE BAND OF OJIBWE DIVISION OF NATURAL RESOURCES, https://www.llojibwe.org/drm/ (last visited Nov. 10, 2021); Leech Lake Band of Ojibwe Division of Natural Resources, *Leech Lake Reservation's 2021-2021 Hunting & Trapping Season Dates & Seasonal Limits* (2021), https://www.llojibwe.org/drm/2021seasonDates.pdf.

[32] While the Commission often relies upon the Department of Commerce's expertise in advising Commission decisions, since the divisions of the Department that do this work have no authority over the Commission it is not meaningful consultation to have the divisions handle government-to-government coordination with tribes. Without the ability to make binding decisions on applications, other agencies cannot fill in for the Commission.

[33] *See* EO 19-24, *supra* note 26, at 1.

> including each local unit of government's chief executive, located in the proposed project footprint. The list must include each: [municipal, local, regional, watershed and soil district, and] tribal government[.]

It is clear error and an improper delegation to rely on applicants to maintain a list of tribal governments that would be impacted by their project. No proposer can be expected to understand the centuries of history and modern-day interests that would determine whether a tribe is interested in a particular project. Unlike local governments, which are organs of the state with limited local interests that do not stretch over large regions, tribal governments existed before the state of Minnesota, and they have legal rights over massive land cessions. These land rights existed prior to state regulatory systems, and tribes' treaty rights are in not subject to the authority of the Commission. It is not appropriate to allow project proposers to determine which tribes are impacted, nor is it appropriate for the Commission to pass off the notification requirement to a private party lacking government-to-government responsibilities under the law.[34]

There are many ways the Commission, in consultation with all relevant stakeholders, could improve the notice list. The state and tribes have established several clearinghouses of information where the Commission could present relevant information directly to the tribes who may be impacted by state action. Since 1963 the state has had an Indian Affairs Council, established in state statute,[35] that serves as a way for the state to liaise with the eleven tribes within the same geographic area.[36] Furthermore, other state agencies regularly present information to quarterly meetings of the Minnesota Tribal Environmental Committee (MNTEC),[37] where tribes' environmental technical staff are able to interact with agency staff and get information they may need in order to decide how to respond.[38] Importantly, MNTEC comprises both Tribal Nations and Treaty Authorities in the state of Minnesota,[39] so it would not only have expertise to assess agency information but would also include most of the relevant tribal and inter-tribal entities that the state must actively notify when impacting treaty resources. Proper consultation with tribes in

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[34] *See* TRIBAL NATIONS CONSULTATION POLICY FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION, https://mn.gov/puc/about-us/tribal-relations/ (last visited Nov. 10, 2021) (noting the "unique government-to-government relationship exists between federally recognized Tribal Nations in Minnesota, the State of Minnesota and the United States federal government").

[35] MINN. STAT. § 3.922 (2021).

[36] *See* HISTORY: INDIAN AFFAIRS COUNCIL (last visited Nov. 10, 2021), https://mn.gov/indianaffairs/miachistory.html. Contacting and coordinating with these existing eleven nations and groups is likely necessary but not sufficient, as tribes outside the boundaries of Minnesota also have historical claims to lands that may be impacted by utility projects, and the Commission must find an adequate way to contact all tribes directly without an intermediary of a project proposer or other agency.

[37] *See*, *e.g.*, Minnesota Pollution Control Agency, *MPCA Highlights for Minnesota Indian Affairs Council (*2020), https://mn.gov/indianaffairs/documents/MPCA.MIAC%2011.2020.pdf.

[38] *See*, *e.g.*, EPA Region 5 Tribes, *2017 Summary of Facts for EPA Region 5 Tribes*, IX TRIBAL AIR RESOURCES JOURNAL 3 (2017) https://www.ntaatribalair.org/wp-content/uploads/2019/12/Region-5-Tribal-Air-Resources-Journal-2017-edition.pdf.

[39] ABOUT: MINNESOTA TRIBAL ENVIRONMENTAL COMMITTEE, https://mntechomepage.wixsite.com/mysite/about (last visited Nov. 10, 2021).

redoing this rulemaking would help clarify which entities would be the most productive for the Commission to notify and consult with.

c. Prohibited sites must include those subject to treaty rights where tribes have not been properly consulted or haven't consented

Similar to the notice list, the proposed amendments contain a "prohibited sites" list that fails to cover all lands that the Commission should view as protected from large energy infrastructure siting. The proposed amendments language for Minn. R. 7850.4400 prohibits siting power plants and transmission lines within federally- and state-protected areas such as parks, monuments, nature preserves, and wilderness areas. While this is necessary protection for conservation lands, it is insufficient because it fails to also protect lands subject to treaty rights.

The tension between inadequate procedures and what the Commission saw as important considerations was memorialized in the Line 3 Order approving that project's environmental impact statement, Certificate of Need, and Routing Permit:

> The Commission expressed serious concern with the Project's impacts to indigenous populations, acknowledging that the Project would traverse ceded territories where Minnesota's Ojibwe and Chippewa tribes hold usufructuary hunting, fishing, and gathering rights. But the Commission concluded that denying the certificate of need would have disproportionate and serious effects on the Leech Lake reservation—as the Leech Lake Tribal Government clearly asserted to the Commission on multiple occasions through the process—because it would require continued disruptive maintenance of Existing Line 3 and increase the risk of an accidental oil spill on those lands.
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> Lastly, the Commission found that granting the certificate of need was consistent with all applicable laws and policies, including Minnesota's energy policy.[40]

The Commission paradoxically found both that the project would impact lands necessary for protected treaty rights and that it "was consistent with all applicable laws"—a determination that is legally unsound since treaty rights are applicable laws. It seems apparent that the Commission was put in this difficult position because its regulations fail to account for treaty rights. The Commission may have reached a better overall outcome on Line 3 if it had had better regulatory tools. Amending the "prohibited sites" list to include areas of relevance to tribes would give the Commission tools it has a demonstrated need for. While tribes have every right to allow and regulate large energy infrastructure within their reservation lands, they also have reserved rights

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[40] *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border,* Docket Nos. PL-9/CN-14-916 ORDER FINDING ENVIRONMENTAL IMPACT STATEMENT ADEQUATE, GRANTING CERTIFICATE OF NEED AS MODIFIED, AND GRANTING ROUTING PERMIT AS MODIFIED (May 1, 2020), eDocket ID No. 20205-162795-01, at 13.

over large regions of the state, and the Commission must determine that projects do not violate these rights before it authorizes the placement of any power plant or transmission line. At a minimum, the Minn. R. 7850.4400 "prohibited sites" list must include ceded territory over which tribes retain rights when: 1. Tribes view the project as harmful to their reserved treaty rights; or 2. Tribes have not been adequately consulted.

d. Prohibited sites should also include environmental justice areas of concern, the Commission must take further comment on how to identify and protect environmental justice communities

While updating the list of prohibited sites to respect tribal interests, the Commission has an opportunity to add additional important communities and considerations to the "prohibited sites" list, such as environmental justice communities. By consulting with low-income advocates and environmental justice organizations the Commission can best craft prohibitions on siting polluting infrastructure through environmental justice areas—consistent with state policy promoting sustainability and environmental justice.[41]

Protecting these communities would not require the Commission to expend significant resources. The Commission could rely on existing data to craft a standard, the Pollution Control Agency already maintains a map of the areas of environmental justice concern in the state.[42] The Commission can seek comment from members of the identified environmental justice communities on how to best address their needs in siting and routing decisions. By adding appropriate exclusions to Minn. R. 7850.4400 the Commission can better serve the needs of Minnesotans and protect the most vulnerable.

3. The proposed changes put too much power in the hands of applicants and take too much away from the public

A July 2020 assessment by the Legislative Auditor found that the Commission "has done a poor job educating the public about PUC's unique role and processes, and has not provided adequate resources to help the public participate."[43] Unfortunately, instead of remedying this situation, the proposed amendments are likely to make a bad situation worse by favoring project proposers' timelines over the rights of the public to participate in the agency's decision making processes.

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[41] *See, e.g.,* Gov. Tim Walz, *Sustainability Month Proclamation* (2021), https://mn.gov/governor/assets/10.01.21%20Sustainability%20Month_tcm1055-501635.pdf.

[42] The environmental justice communities featured include, but are not limited to, federally-recognized reservation boundaries. *See* Minnesota Pollution Control Agency, UNDERSTANDING ENVIRONMENTAL JUSTICE IN MINNESOTA, https://mpca.maps.arcgis.com/apps/MapSeries/index.html?appid=f5bf57c8dac24404b7f8ef1717f57d00 (last visited Nov. 10, 2021).

[43] LEGISLATIVE AUDITOR REPORT, *supra* note 11, at S-1.

a. The proposed amendments put the permitting timeline in the hands of the project proposer, and can make the updated timeline secret to the public

As written, the proposed amendments allow project proposers to control the timeline, and therefore the ultimate quality of agency review, of their permit process. In Minn. R. 7849.1000, subp. 4, and Minn. R. 7850.1680, subp. 3, the Commission proposes to add a new "process schedule" that controls all further timelines in the permitting of applied-for facilities. The proposed amendment language envisions a process where Commission staff set the schedule behind closed doors with applicants and the Department of Commerce. Further, Minn. R. 7849.1000, subp. 4, states that only the Department or the applicant may formally object if they disagree with the process schedule. This cuts the public entirely out of any say in how the schedule is set and whether it is adequate to protect the public's interests or accommodate their capacity to comment. This is the codification of back-room deals between utilities and agencies with no possible role of the public in setting an essential procedural issue.

What's more, the proposed amendment language of Minn. R. 7849.1710, subp. 4, governs "process schedule update[s]" which occurs whenever the Commission's executive secretary deems a site or route permit application complete. After staff updates the process schedule it is provided to the Department of Commerce and the applicant, but only "made available to the public upon request." This indicates that not only will the process schedule be kept secret from the public until it is requested, but staff will expend resources distributing what is obviously a public document to individual members of the public. Those who don't know they have to request the schedule will not understand that the process is proceeding upon an undisclosed fixed timeline.

Throughout the remainder of the proposed amendments, the process schedule sets the speed of agency review of all parts of the application. The rules would require that all agency actions follow the process schedule, essentially forcing agencies to make decisions whether or not they have all the information they may need.

By adding the process schedule requirement and cutting the public out of its creation and review, the Commission would decrease the amount of information available to the public while providing inadequate resources to support public participation.[44] The process schedule in the proposed amendments should be scrapped or seriously rethought for the sake of good governance. While applicants have an interest in keeping the process schedule as short and hectic as possible, the public clearly has an interest in regulatory flexibility that is entirely out of the applicant's control. These two interests cannot be reconciled if the applicant is able to set the process schedule with agencies, but with no transparency or input from the public. Authority for scheduling should remain within a public process, and timelines should be set by unbiased decision makers such as Administrative Law Judges.

[44] This is remarkably consistent with the public participation failures found by the Legislative Auditor's 2020 review. *See generally* LEGISLATIVE AUDITOR REPORT, *supra* note 11.

b. Comment periods that run concurrently or are administered by the project proposer will confuse the public and depress participation

Within the "draft permit application" period envisioned by the proposed amendments the public will be presented with a series of confusing and conflicting notices for comment periods that may have little to no utility. The Commission should retool its proposed amendments to assure that the public is not required to comment upon multiple regulatory stages at the same time.

According to the proposed amendments' Minn. R. 7850.1680, subp. 2, during the draft period the Commission must consider whether to appoint an advisory task force, and is required to notify general contacts, public agencies, landowners, and local and tribal governments about a comment period on that topic.[45] However, according to Minn. R. 7850.1650, at the same time the applicant must notify the same lists of people that its draft application has been filed, numerous other details about the proposed project, and that the Commission "is soliciting comments on the draft application from interested persons." (It is not clear on the face of the proposed amendments if there actually is a general comment period on the draft application at this point, but the applicant is nonetheless required to state that there is one.) At the same time, under Minn. R. 7849.0130 the applicant must send the same recipients another notice that, among other things, tells the public that they will be able to provide comment on the project at a later date (Minn. R. 7849.0130, subp. 2(C)(7))—seemingly contradicting the other notices that the public, governments, and landowners receive from the Commission and the applicant.[46] Any recipient of these multiple notices would be, at best, overwhelmed with the issues they are expected to deal with all at once, but more likely they would simply be confused and unable to meaningfully engage with the information.

In addition, the proposed amendments conflate two distinct periods for public involvement, leading to far less opportunity for public input on proposed projects. In the language for Minn. R. 7850.2300 the Commission proposes to do both the initial public information meeting (introducing the public to the project for the first time) as well as finalize plans for scoping (a step in the process that determines whether issues are excluded from consideration). Thus, the same evening that the public first hears of a project in their area, they will also be required to have final comments prepared on the scope of environmental review. If the Commission is serious about soliciting public input, it cannot truncate the provision of all the information on a project and the public's feedback on that project into the same meeting.

Ultimately, the proposed amendments must be rejected for having comment periods that run concurrently, notices that provide the public with inconsistent or incorrect information on opportunities to comment, or expect the public to address two fundamental topics at the same time. In order to assure the transparency and public participation rights assured by statute,

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[45] It is unclear how the Commission could decide on whether to have such a task force without having the applicant's final permit application before it. The timing of this comment period appears to incentivize draft applications that misconstrue issues that would normally lead to the appointment of a task force.

[46] Under Minn. R. 7849.0130, subp. 7, this last notice can be defective without harming the applicant's ability to proceed, so it remains to be seen whether or not these many requirements would even be followed as written.

comment periods cannot run concurrently, and scoping should only begin after the public has had the opportunity to review the project proposal. The proposed amendments would chill public participation and confuse would-be commenters about what they should discuss and when comments on any particular regulatory step are being collected.

4. The climate crisis requires the PUC to start again and include better policies throughout these regulations

Likely due to the limited feedback garnered nearly a decade ago from the stakeholder group, the proposed amendments fail to address central issues of concern that the Commission is active in assessing on behalf of the state of Minnesota. In order to protect shared resources and the public, the Commission must revisit the factors it uses to vet projects, and it must set strong standards for decommissioning any projects it approves.

a. Factors considered must include climate change emissions and impacts on biodiversity, as well as projects' vulnerability to climate change impacts

Similar to the "prohibited sites," discussed above, the proposed amendments include a list of "factors considered" that is incomplete and inadequate as currently written. In the proposed amendments language for Minn. R. 7850.4100 the Commission proposes to only add "information on electric and magnetic fields" in the existing list of factors. While the existing factors do include "effects on the natural environment" and unavoidable damage to human health and the environment, they do not explicitly call for balancing climate change impacts with the other factors. This is a missed opportunity for an agency which is the main driver of Minnesota policy on reducing climate change emissions.[47] It is also contrary to state policy seeking ways for the state to do more in reducing emissions and improving resiliency to climate change risk.[48]

Likewise, the proposed amendments fail to require any applicant-provided information on or Commission action regarding climate change adaption—that is, assuring infrastructure is resilient considering the enhanced risks posed by a changing climate. This failure to acknowledge that new projects are exposed to climate change risks is out of step with current science and state policy. For example, the Environmental Quality Board has established methods for all state agencies to analyze and plan for climate change impacts, including knowing what adaptation is

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[47] *See*, *e.g.*, Minn. Stat. § 216H.06 https://www.revisor.mn.gov/statutes/cite/216H.06; *see also* Minn. Stat. § 216H.03 https://www.revisor.mn.gov/statutes/cite/216H.03.

[48] *See* Exec. Order 19-37 (Dec.2, 2019), https://mn.gov/governor/assets/2019_12_2_EO_19-37_Climate_tcm1055-412094.pdf; Minnesota Environmental Quality Board, *Climate Solutions and Economic Opportunities: A Foundation for Minnesota's State Climate Action Planning*, https://www.eqb.state.mn.us/sites/default/files/documents/CSEO_EQB.pdf; Minnesota Environmental Quality Board, *Minnesota and Climate Change: Our Tomorrow Starts Today*, https://www.eqb.state.mn.us/sites/default/files/documents/EQB%20Climate%20Change%20Communications.pdf; *see also* Office of Gov. Tim Walz & Lt. Gov Peggy Flanagan, *Governor Walz, Lieutenant Governor Flanagan, House and Senate DFL Energy Leads Announce Plan to Achieve 100 Percent Clean Energy in Minnesota by 2040*, (2021) https://mn.gov/governor/news/?id=1055-463873 (expressing an intention to pass legislation that would convert Minnesota to 100 percent clean electricity by 2040).

necessary for major projects requiring state permits.[49] The Commission's proposed amendments must be brought in line with these government-wide requirements for better resiliency planning, likely by adding climate change risk and adaptation as separate "factors considered" in the existing list of factors.

Furthermore, as already stated, state policy embraces considering and mitigating harms to environmental justice communities—another factor that should be added to Minn. R. 7850.4100, to assure that the Commission does not approve projects that harm the most vulnerable communities. Also, consistent with state and federal protections of listed species, the Commission should include impacts on biodiversity as another factor to consider in approving proposed projects. It cannot be the case that the only missing detail in the existing factors list is more information on electric and magnetic fields—there are significant social, resource, and climate issues to weigh in making permitting decisions that serve the public.

b. No project should be permitted without a full decommissioning plan

The proposed amendments fail to impose an across-the-board requirement that any project requiring a Certificate of Need, siting, or routing permits first present a full decommissioning plan to be approved by the Commission. This is a missed opportunity that should be remedied to assure that Minnesotans are protected from picking up the costs of stranded utility assets. The Commission has identified decommissioning as an important issue for recently approved clean energy projects, and it is a major omission to not include standards for decommissioning plans in the proposed amendments.

While the Commission requires solar and wind developers to have a decommissioning plan in place prior to operation and is actively studying the issue of best practices for such facilities' decommissioning,[50] the Commission has failed to use the proposed amendments to impose similar conditions on large energy infrastructure with a higher likelihood of becoming toxic stranded assets in the coming energy transition. Without a rule in place requiring all permittees to account for decommissioning, the Commission is required to address this issue on an ad hoc basis. By enacting a consistent and rigorous decommissioning plan requirement in regulations, the Commission can decrease the risk imposed on Minnesotans by projects that may leave legacy pollution without funds for remediation.

Conclusion

The proposed amendments, based on opinions offered by the 2012 stakeholder group, favor the interest of large businesses over small ratepayers, state authority over tribal sovereignty, and utility profits over transitioning the electrical system away from polluting technologies.

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[49] Minnesota Environmental Quality Board, *Revised Environmental Assessment Worksheet (EAW) Guidance: Developing a Carbon Footprint and Incorporating Climate Adaptation and Resilience* (2022) https://www.eqb.state.mn.us/sites/default/files/documents/EQB_Revised%20EAW%20Form%20Guidance_Climate_Sept%202021.pdf.

[50] *See In the Matter of the Department of Commerce Workgroup on Wind and Solar Facilities*, MPUC Docket No. E-999/M-17-123, ORDER REQUESTING GUIDANCE MATERIALS, eDocket ID No. 20217-176627-01.

At a minimum, the Commission must reconvene a new stakeholder group to update the regulatory priorities for the current day, and propose a new rulemaking based on that feedback. Since tribes, both inside and outside of the state, have longstanding treaty and historical interests in land across the entire state, it is the duty of the Commission—not a project proposer or sister agency—to administer tribal government contacts. Public participation is something that the Commission has failed to foster in the past, and the proposed amendments appear to make a bad situation worse. Giving more power to the project proposer and less clear information to the public will not fix the many issues that the Legislative Auditor found with the Commission's public engagement processes. In the global climate crisis[51] Minnesota has long relied on the Commission for the bulk of its emissions reductions—while the state is likely to miss its greenhouse gas reduction goals economy-wide, the one area where the state has exceeded its goals is in the utility sector.[52] With this in mind, there is ample statutory and scientific support for the Commission to explicitly add climate change impacts and other important matters to the factors considered in its major permitting decisions.

For the reasons stated above PEER opposes the proposed amendments in their entirety and requests a hearing on this rulemaking. The Commission should scrap its current draft and expeditiously restart stakeholder outreach in order to draft regulations that serve the public interest. In the alternative, the Administrative Law Judge should disapprove the proposed rules for failing to comply with applicable law and for improper delegation of authority to applicants.

Hudson B. Kingston
Litigation and Policy Attorney
Public Employees for Environmental Responsibility
962 Wayne Ave., Suite 610, Silver Spring, MD 20910
Tel: (202) 265-7337
hkingston@peer.org | www.peer.org

[51] FACT SHEET: PRESIDENT BIDEN TAKES EXECUTIVE ACTIONS TO TACKLE THE CLIMATE CRISIS AT HOME AND ABROAD, CREATE JOBS, AND RESTORE SCIENTIFIC INTEGRITY ACROSS FEDERAL GOVERNMENT, https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/ (last visited Nov. 10, 2021).

[52] Minnesota Pollution Control Agency & Department of Commerce, Greenhouse Gas Emissions Inventory 2005-2018 (2021), https://www.pca.state.mn.us/sites/default/files/lraq-1sy21.pdf.