

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: August 1, 2013.....* Agenda Item #6

Company(s): All Utilities

Docket No. U-999/R-13-24

In the Matter of Possible Amendments to Rules Governing Utility Proceeding,
Practice, and Procedure, Minnesota Rules Chapter 7829, Excluding Part
7829.2550, Which is Subject to a Separate Pending Rulemaking

Issue: Whether to publish a Notice of Intent to Adopt Rules

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The attached materials are workpapers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

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Relevant Documents

- Comments in Docket No. E,ET,IP-999/R-12-1246, Legalectric, Inc. January 23, 2013
- Request for Comments, published in the *State Register*..... February 19, 2013
- Comments, Charter Fiberlink COO, LLC and Charter Fiberlink CC VIII, LLC April 8, 2013
- Comments, Minnesota Department of Commerce..... April 8, 2013
- Comments, Office of the Attorney General – Antitrust and Utilities Division April 8, 2013
- Comments, Xcel Energy April 8, 2013
- Comments, CenturyLink..... April 8, 2013
- Comments, Otter Tail Power Company..... April 8, 2013
- Comments, Legalectric, Inc. June 10, 2013

I. Background

The Commission's current rules of Practice, Proceeding, and Procedure, Minn. R. ch. 7829, were adopted in 1994, with few modifications since.¹

The Commission directed staff to open a rulemaking to consider amending the Commission's rules of practice and proceeding. The rulemaking is intended to eliminate outdated rule language, to address statutory changes, to clarify existing Commission procedures, and to establish procedural requirements that permit the Commission to more effectively perform its quasi-legislative and quasi-judicial functions.

The attached rules draft reflects proposed rule amendments developed with the input of Commission staff, and revised in light of the comments discussed below. At this stage in the rulemaking process, the Commission can decide to publish a Notice of Intent to Adopt Rules or appoint an advisory committee to comment on the proposed rules. The Revisor has assigned this Rulemaking project tracking number R-04159.

II. Request for Comments Published in the *State Register*

On February 19, 2013, the Commission published a Request for Comments in the *State Register* and did a mass mailing to the general rulemaking list, requesting comments on amending the rules and on whether the Commission should appoint an advisory committee. The Commission received a range of comments on the rulemaking.

Additionally, On January 23, 2013, in Docket No. E,ET,IP-999/R-12-1246, Legalectric, Inc. filed comments in response to a request for comments in another pending Commission rulemaking. Some of the comments pertained to the rule parts under consideration in this proceeding. Specifically, the comments addressed Rules 7829.0700, .0800, .1000, .1100, .2600, and .2700.

On June 10, 2013, Legalectric, Inc. filed comments in this docket, stating that it had not received notice of the request for comments. The comments from Legalectric, Inc. filed on January 23 and June 10 are addressed below.

The comments received are summarized below, arranged by rule part. Unless otherwise noted, the attached draft incorporates the recommendations of the commenting parties. On some occasions, conflicting recommendations on the same rule part could not simultaneously be incorporated into the attached draft. In those instances, the draft contains the language that Staff believes most closely adheres to the scope and goals of the rulemaking without exceeding the Commission's authority.

III. Public Comments

The Commission received comments on the following rule parts:

¹ Rule parts concerning notice plans for transmission lines and pipelines were later added. One of those rule parts, Minn. R. 7829.2550, is currently the subject of another pending rulemaking and will likely be relocated.

7829.0100 DEFINITIONS

Subp. 18: Legalectric, CenturyLink, and Charter Fiberlink COO, LLC and Charter Fiberlink CC VIII, LLC (the Charter Entities) commented on the definition of “protected data.” See the comments on Rule Part 7829.0500 and the Staff Discussion in Section IV, below, for a full discussion of the subject of protected data. Legalectric and the Charter Entities made the following specific recommendations:

Request for Comments (RFC) Draft Language	a. <u>properly identified as nonpublic data under the Minnesota Government Data Practices Act, Minnesota Statutes 13.37, or</u>
Recommended Language Legalectric, Inc.	a. <u>properly identified and justified as nonpublic data under the Minnesota Government Data Practices Act, Minnesota Statutes 13.37, or</u>
Recommended Language The Charter Entities	a. <u>nonpublic data or private data on individuals under the Minnesota Government Data Practices Act, Minnesota Statutes 13.37, or</u>

The Charter Entities’ recommended language is incorporated in the attached draft.

Subp. 21: The Charter Entities and the Minnesota Department of Commerce (the Department) recommend the following revisions:

RFC Draft Language	"Utility" means a gas, electric, or <u>telecommunications service provider</u> telephone company subject to the jurisdiction of the commission.
Recommended Language The Charter Entities	"Utility" means a gas, electric, or telephone company, <u>or telecommunications carrier</u> , subject to the jurisdiction of the commission.
Recommended Language The Department	"Utility" means a gas, <u>or electric service provider</u> , or telephone <u>utility</u> company subject to the jurisdiction of the commission.

The Department’s recommendation is reflected in the attached draft. In Section VI, below, staff recommends an additional slight modification to this language.

Legalelectric, Inc. recommends that the Commission define “exigent circumstances,” which appears in Rule 7829.2800. This recommendation is not reflected in the draft because it is appropriate and within the Commission’s authority to find exigent circumstances on a case-by-case basis.

Legalelectric, Inc. also recommends that the Commission define “qualified complainant,” which appears in 7829.1600. This recommendation has been incorporated in the attached draft. The added definition, “a person authorized by statute to make a formal complaint to the commission,” is not intended to substantively change the application of rule 7829.1600, but to capture the operational definition that has applied to the phrase. Such authorizations appear variously throughout Minnesota Statutes (e.g., § 216B.17, subd. 1, and § 237.081, subd. 2.). Rather than attempt to include and maintain an exhaustive list of such authorizations, the definition as drafted captures all of them, wherever they may appear.

7829.0400 SERVICE AND FILING REQUIREMENTS

The Office of the Attorney General – Antitrust and Utilities Division (the OAG) recommends that the rule provision concerning service and filing requirements be revised to allow filing through midnight, and to add electronic filing requirements for spreadsheets. These recommendations are reflected in the attached draft.

7829.0411 REPRESENTATIONS TO THE COMMISSION

In the attached draft this part has been renumbered 7829.0250. The Charter Entities recommend revising this rule part, which is new language modeled on Rule 11 of the Federal Rules of Civil Procedure, the Minnesota Rules of Civil Procedure, the California Public Utilities Commission Rule 1.1,² and on language previously used by the Commission for a similar purpose.³

The Charter Entities contend that the draft language of 7829.0411 should more closely conform to the analogous Minnesota Rule of Civil Procedure, and as drafted may tend to stifle legitimate debate. Specifically, the Charter Entities highlight that Minn. R. of Civ. P. application is limited to pleadings, motions, and similar filings. They recommend the following revisions:

RFC Draft Language	Recommended Language
<u>Any person who signs a filing or enters an appearance at a commission meeting, by doing so, represents that he or she is authorized to do so and has a good faith belief that statements of fact made are true and correct, and that legal assertions made are warranted by</u>	<u>Any person who signs a pleading, motion or similar filing or enters an appearance at a commission meeting, by doing so, represents that he or she is authorized to do so and has a good faith belief that statements of fact made therein are true and correct, and that</u>

² Cal. Code Regs. Tit. 20, § 1.1.

³ Notice Seeking Comments (March 11, 2011), Docket No. E-017/M-10-1082.

<u>existing law or by a reasonable extension or reversal of existing law.</u>	<u>legal assertions made by him or her therein are warranted by existing law or by a reasonable nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.</u>
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Legalelectric, Inc. agrees with the Charter Entities comments, and recommends that the Commission include a statement referring to “Rule 11 or other applicable professional code of conduct,” to apply to both attorneys and non-attorneys.

The recommendations are not included in the attached draft. Differences between the draft rule and the Minnesota Rules of Civil Procedure serve two important Commission objectives. First, the Commission is not a court. The Commission does not have the authority to modify or establish common law in the sense that a judicial entity may. Accordingly, rule language implying the Commission has such authority may be inappropriate.

Additionally, the draft language intentionally departs from the rule of civil procedure by governing oral representations to the Commission. The California Commission rules contain similar language. Requiring good faith efforts in oral presentations as well as written filings advances the Commission’s interest in a record that provides a sound basis for Commission decision making. The draft language applies equally to attorneys and to non-attorneys with business before the Commission.

7829.0420 MOTION FILINGS

Xcel recommends that the rule allow 14 days to respond to a motion rather than 10. This recommendation is reflected in the attached draft.

7829.0500 PROTECTED DATA

The Department asserts that in the past the Commission has adapted its procedures when dealing with voluminous or highly sensitive data. The Department recommends that the proposed rule not limit the Commission’s flexibility in this regard, though states that the draft rule does not appear to do so.

The Charter Entities recommend clarifying language for the rule part concerning protected data.

RFC Draft Language	Recommended Language
Nothing in this chapter requires the public disclosure of privileged proprietary information, trade secrets, or other privileged information.	Nothing in this chapter requires the public disclosure of privileged proprietary information, trade secrets, or other privileged information <u>protected data.</u>

The recommended language is incorporated in the attached draft.

Otter Tail Power Company recommends reorganizing and slightly rewording and reorganizing subpart 2.

RFC Draft Language	Recommended Language
<p>Persons filing documents containing proprietary information, trade-protected data or other privileged information shall <u>file one copy of the document with the information redacted, and one copy without redactions, designated as required in subpart 4 and identified as a nonpublic document during the electronic submission process.</u> excise this information in all copies but the original and six copies. <u>The first page or cover page of a document from which protected information has been excised must be clearly captioned in bold print “PUBLIC DOCUMENT—NONPUBLIC (or PRIVILEGED) DATA HAS BEEN EXCISED. The beginning and end of the excised protected data must be identified.</u></p>	<p>Persons filing documents containing proprietary information, trade secrets, protected data or other privileged information shall <u>file one copy of the document with the information redacted.</u> excise this information in all copies but the original and six copies. <u>The first page or cover page of a document from which protected information has been excised must be clearly captioned in bold print “PUBLIC DOCUMENT—NONPUBLIC (or PRIVILEGED) DATA HAS BEEN EXCISED. The beginning and end of the excised protected data must be identified. One copy of the document without redactions shall be filed, designated as required in subpart 4, and identified as a nonpublic document during the electronic submission process.</u></p>

The reorganization suggestion is incorporated in the attached draft.

Otter Tail Power Company also recommends either clarifying or eliminating the use of the word “privilege” in the rule part. It contends that the terms “protected” and “nonpublic” are sufficient for purposes of the rule, and use of the word privilege creates potential for confusion. It suggests, alternatively, that “an explanation should be added in the Rule to clarify that references to ‘privileged’ data and information are not intended to imply a compulsion to disclose communications covered by legal privilege (even in non-public filings).”

Rule 7829.0500, subp. 1, seems to address Otter Tail Power’s suggestion. It reads: “Nothing in this chapter requires the public disclosure of privileged proprietary information, trade secrets, or other privileged information.”

CenturyLink expresses concern about the effort needed to comply with the draft rules concerning protected data. This concern is addressed in greater detail in section IV, below.

7829.0600 GENERAL SERVICE LIST

Xcel recommends that the rule encourage or require parties desiring to be on a general service list to provide an email address. This recommendation is reflected in the attached draft.

Legalelectric, Inc. asserts that the utilities have an unacceptable measure of discretion in administration of general service lists and recommends that the Commission maintain the lists. This recommendation is not incorporated in the draft, as it constitutes a substantial change from the status quo and it is not apparent what benefits it would provide. The draft, consistent with the scope of the rulemaking described in the request for comments, simply updates the existing language to accommodate electronic service.

7829.0700 OFFICIAL SERVICE LIST

Otter Tail Power Company recommends that the Commission add the following language:

RFC Draft Language	Recommended Language
<p>A party or participant who wishes to change the name or address of a person receiving service on behalf of the party or participant shall provide written notice of the change to the executive secretary and to persons on the official service list.</p>	<p>A party or participant who wishes to change the name or address of a person receiving service on behalf of the party or participant shall provide written notice of the change to the executive secretary and to persons on the official service list. <u>Persons are responsible for maintaining current paper and electronic service address information. When a person is served and the mail is returned as undeliverable two times to a serving party, the Commission may remove the person from the applicable service list. A person may be added to the applicable service list at a later time by filing a request with the Commission.</u></p>

Legalelectric, Inc. made the following recommendations:

7829.0700, subp. 1

RFC Draft Language	Recommended Language
<p>The official service list for each proceeding consists of the names of the parties and the names of participants who have filed a written request for inclusion on the service list with the executive secretary.</p>	<p>ADD: <u>The official service list shall be limited to one individual per party. Those on service lists must identify party represented. Access to officially filed documents shall be available through subscription to eDockets or</u></p>

	<u>viewing the website for a particular docket.</u>
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7829.0700, subp. 3

RFC Draft Language	Recommended Language
On its own motion or at the request of a party, the commission shall limit the service list to parties to the proceeding if it finds that requiring service on participants is unduly burdensome.	ADD: <u>The official service list shall be limited to one individual per party. Access to officially filed documents shall be available through subscription to eDockets or viewing the website for a particular docket.</u>

7829.0700, subp. 5

RFC Draft Language	Recommended Language
In proceedings before an administrative law judge in which the judge establishes a service list, the names on that service list must remain on the official service list for the remainder of the proceeding.	ADD: <u>The official service list in a contested case hearing shall be limited to one individual per party.</u>

The recommendations of both Otter Tail Power Company and Legalectric, Inc. are reflected with slight modification in the attached draft.

7829.0800 PETITION TO INTERVENE

Legalectric, Inc. made the following recommendations:

7829.0800, subp. 1

RFC Draft Language	Recommended Language
A person who desires to become a party to a proceeding shall file a petition to intervene within the time set in this chapter. The petition must be served on known parties and those persons on the utility's general service list for the matter, if applicable.	ADD: <u>If during the contested case the scope of impacts is broadened, the intervention deadline shall be extended to allow intervention by newly affected parties. The administrative law judge, with the consent of all parties, may waive the requirement that the petition be in writing.</u>

7829.0800, subp. 2

RFC Draft Language	Recommended Language
The petition must allege the grounds for intervention and [. . .] or the person's interests are not adequately represented by one or more other parties participating in the case.	ADD: <u>Parties wishing to intervene jointly, and counsel representing more than one party, must specify distinct interests and demonstrate that distinct interests are not in conflict or</u>

	<u>duplicative. Where interests overlap or are duplicative, such petitioners shall petition to intervene as one party.</u>
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7829.0800, subp. 5

RFC Draft Language	Recommended Language
If there is no objection to intervention and a petition to intervene is not denied or suspended within 15 days of filing, the petition to intervene must be considered granted, unless the matter is referred to the Office of Administrative Hearings for contested case proceedings before the expiration of the 15-day period.	ADD: <u>Once granted party status, party intervenors are not required to submit testimony or maintain any level of participation to retain party status.</u>

These recommendations are not incorporated in the attached draft. The draft language maintains the Commission flexibility to address petitions for intervention on a case-by-case basis. Additionally, to the extent that recommendations pertain to proceedings conducted by the Office of Administrative Hearings, they are outside the scope of the Commission’s authority and are not incorporated for that reason.

7829.1100 PUBLIC HEARING

Legalelectric, Inc. made the following recommendation:

RFC Draft Language	Recommended Language
When a public hearing is held in connection with a contested case proceeding, the commission shall, whenever possible, schedule the public hearing to be held before the evidentiary hearings.	When a public hearing is held in connection with a contested case proceeding, the commission shall, whenever possible, schedule the public hearing to be held before the evidentiary hearings <u>in the area where the infrastructure in question would be located.</u>

This recommendation is not incorporated in the attached draft. The suggested requirement is a statutory requirement for large electric power facility hearings under Minn. Stat. § 216E.03, subd. 6, which need not be repeated in the Commission’s rules. Additionally, to the extent the recommendation pertains to procedural authority statutorily granted to the chief administrative law judge (e.g., under Minn. Stat. § 216E.16), it is outside the scope of the Commission’s authority and is not incorporated for that reason.

7829.1250 UNCONTESTED PROCEEDING SUBCOMMITTEE

In the attached draft this part has been renumbered 7829.1050 to be adjacent to 7829.1000, another rule describing referral of Commission matters. This part pertains to what is sometimes informally referred to as the “consent calendar,” for uncontroversial items that have unanimous consent to be delegated for expedited disposition.

The Charter Entities recommend clarifying this part to repeat language from Minn. Stat. § 216A.03, subd. 8(b) and (c), or expressly reference those paragraphs. Legalectric recommends this rule part be on an opt-in basis, and should provide for objection by a “person” and not a party.

To the extent they are not already addressed by the existing draft language, these recommendations are not reflected in the attached draft. The draft expressly cites Minn. Stat. § 216A.03. Repetition of statutory language in rules is neither necessary nor good practice.

The draft, consistent with the scope of the rulemaking described in the request for comments, reflects existing Commission practice and is consistent with Commission statutory authority concerning subcommittee delegations. Changing the rule to be opt-in rather than opt-out would represent a departure from Commission practice that would substantially diminish the Commission’s capacity to effectively perform its functions.

However, the rule could provide more clarity to practitioners without impairing the Commission’s implementation. In Section VI, below, more detailed language for this rule is recommended.

7829.1300 MISCELLANEOUS FILINGS

The Charter Entities requested clarification of miscellaneous filings requirements. In particular, the Entities request that the rules clarify the circumstances for applying either subpart 3 or subpart 4. They also recommended a 20-day time period for compliance filings following Commission orders.

The first recommendation is addressed in the attached draft by consolidating subparts 3 and 4 and clarifying when additional description is required. The compliance filing deadline recommendation is not incorporated in the attached draft, as the 10 day period in the draft serves the Commission’s purpose to effectively perform its regulatory functions.

The Department recommends language clarifying that application of procedures to miscellaneous filings apply only to the extent procedures are not otherwise prescribed by statute or rule. To that end, the Department recommends adding a sentence to the definition of Miscellaneous Filing in 7829.0100, subp. 9:

RFC Draft Language	Recommended Language
The inclusion of a particular type of filing in this list does not require a	The inclusion of a particular type of filing in this list does not require a

filing that would not otherwise be required or confer jurisdiction that would not otherwise be present.	filing that would not otherwise be required or confer jurisdiction that would not otherwise be present. <u>Procedures established in this Rule apply only to the extent that procedures relating to certain listed filings have not otherwise been prescribed by statute or rule.</u>
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Rule 7820.0200, subp. 2 addresses the Department’s concern. That subpart reads: “This chapter governs practice and procedure in matters before the commission except when a statute or a rule on a specific topic contains procedural requirements in direct conflict with this chapter. Then, the statute or rule on a specific topic controls insofar as it is in direct conflict with this chapter.”

Xcel recommends that the rule limit service of information requests for miscellaneous filings when the requests are made prior to the filing of comments. Xcel recommends that information requests made prior to filing of comments be served only on the entity and upon those electing to be notified of those information requests. Xcel states that it is “common practice” to serve data requests on the General Service List. However, there does not appear to be anything in the rule that requires this practice, and it is not evident that a clarification is needed.

7829.1700 FORMAL COMPLAINT

The Department recommends revising the language of this part to reflect electronic filing requirements.

RFC Draft Language	Recommended Language
<p>Subp. 2. Mailing and filing. A formal complaint must be mailed to the respondent, the department, and the Residential Utilities Division of the Office of the Attorney General, as well as filed with the commission.</p>	<p>Subp. 2. Mailing and filing. A formal complaint must be mailed to the respondent, the department, and the Residential Utilities Division of the Office of the Attorney General, as well as filed with the commission. <u>Formal complaints may also be filed in a manner consistent with the electronic filing requirements of Minn. Stat. § 216.17, subd. 3. If filed electronically in this manner, a formal complaint does not need to be mailed to the state agencies.</u></p>

This recommendation is reflected in the attached draft.

7829.2400 FILING REQUIRING DETERMINATION OF GROSS REVENUE

The OAG recommends that the Commission revise subpart 5 as follows:

RFC Draft Language	Recommended Language
The commission shall reject a filing under this part that is found to be substantially out of compliance with Minnesota Statutes, section 216B.16 or 237.075 , or other requirement imposed by rule, statute, or previous commission order.	The commission <u>may accept</u> a filing under this part that is found to be substantially out of compliance with Minnesota Statutes, section 216B.16 or 237.075 , or other requirement imposed by rule, statute, or previous commission order <u>if it finds that the filing does not impair the parties' ability to evaluate the need for a change in gross revenue of a utility.</u>

Because the OAG’s recommended language may appear to imply the Commission has authority to accept filings that it determines do not comply with statutory requirements, the attached draft has been revised using different language, but in a manner consistent with the OAG’s suggestion.

7829.2560 NOTICE PLANS WHEN SEEKING CERTIFICATION OF PIPELINES

Legalelectric, Inc. recommends moving this part to a rule part pertaining to pipelines, similar to the relocation of 7829.2550 being done in the concurrent rulemaking in Docket 12-1246. This recommendation is not reflected in the draft because the suggestion was left for a time when the Commission is focused on rules pertaining to that subject area, at which time it is anticipated that the rule may be relocated. Because this rule pertains to proceedings under multiple rule chapters, simply moving the rule at this time may introduce more confusion than clarity to Commission process.

7829.2560 STAFF COMMENTS

Legalelectric, Inc. made the following recommendation:

RFC Draft Language	Recommended Language
Written comments on a filing by commission staff must be made available to those persons on the service list at the same time they are provided to the commission. If commission staff recommend action not advocated by any party, all parties must be granted oral comment at the request of any party.	Written comments on a filing by commission staff must be made available to those persons on the service list at the same time they are provided to the commission. If commission staff recommend action not advocated by any party, all <u>interested and formal parties must be provided opportunity for written comment, and written commentors be granted oral comment at the request of any interested or formal party.</u>

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This part has been revised in the attached draft to provide all parties an opportunity to comment at the request of any party, without specifying the form the comments must take. The draft language appropriately allows the Commission to receive comments in whatever format they feel will best inform their decisionmaking, and with procedures appropriate to the circumstance. Additionally, the recommendation to add the word “formal” is not incorporated as it is surplusage that could cause unnecessary confusion. The word “party” is already defined in Rule 7829.0100.

7829.2700 PROCEDURE AFTER ADMINISTRATIVE LAW JUDGE REPORT

Legalelectric, Inc. made the following recommendation:

RFC Draft Language	Recommended Language
<p>Subpart 1. Exceptions to administrative law judge's report. Except in cases subject to statutory deadlines, parties shall file and serve on the other parties any exceptions to an administrative law judge's report within 20 days of its filing. In cases subject to statutory deadlines, exceptions must be filed and served within 15 days of the filing of the report.</p> <p>Subp. 2. Replies to exceptions. Except in cases subject to statutory deadlines, a party shall file and serve on all other parties any replies to exceptions within ten days of the due date for exceptions. In cases subject to statutory deadlines, replies are not permitted.</p> <p>Subp. 3. Oral argument. Parties must be granted an opportunity for oral argument before the commission as required under Minnesota Statutes, section 14.61.</p>	<p>Subpart 1. Exceptions to administrative law judge's report. Except in cases subject to statutory deadlines <u>not waived by applicant</u>, parties shall file and serve on the other parties any exceptions to an administrative law judge's report within 20 days of its filing. In cases subject to statutory deadlines, exceptions must be filed and served within 15 days of the filing of the report.</p> <p>Subp. 2. Replies to exceptions. Except in cases subject to statutory deadlines <u>not waived by applicant</u>, a party shall file and serve on all other parties any replies to exceptions within ten days of the due date for exceptions. In cases subject to statutory deadlines <u>not waived by applicant</u>, replies are not permitted.</p> <p>Subp. 3. Oral argument. Parties must be granted an opportunity for oral argument before the commission, <u>when requested</u>, as required under Minnesota Statutes, section 14.61.</p>

These recommendations are not incorporated in the attached draft. Even in cases where a party has waived a statutory right to enforce a deadline, it is still in the public’s interest that Commission proceedings be conducted with diligence. Accordingly, it is proper for the

Commission to maintain these reasonable time frames for filings after an administrative law judge report.

The recommendation to include “when requested,” in subpart 3 appears to heighten the threshold for presentation of argument in a manner that exceeds the Commission’s authority. The requirement that parties be provided an opportunity to present argument, whether or not requested, is statutory.⁴

7829.2900 DECISION AND ORDER

Legalelectric, Inc. made the following recommendation:

RFC Draft Language	Recommended Language
The executive secretary shall serve a decision and order of the commission on all parties and participants in the proceeding <u>on the official service list.</u>	The executive secretary shall serve a decision and order of the commission on all parties and participants in the proceeding, <u>including those on the official service list.</u>

This recommendation is not incorporated in the attached draft. The proposed language does not impose any additional meaningful or enforceable requirement, and may be deemed defective by the Office of Administrative Hearings. And, because parties and participants can use the electronic filing system to subscribe and receive electronic notice of all filings in Commission dockets, it is unclear that requiring service on persons besides those on the official service list would serve a purpose.

7829.3000 PETITION AFTER COMMISSION DECISION

CenturyLink contends that the timing of a petition for reconsideration can serve as a trap for the unwary as it relates to the statutory deadlines concerning certiorari review of Commission decisions to the Minnesota Court of Appeals. CenturyLink recommends the following clarifying language be added to the rule:

RFC Draft Language	Recommended Language
A party or a person aggrieved and directly affected by a commission decision or order may file a petition for rehearing, amendment, vacation, reconsideration, or reargument within 20 days of the date the decision or order is served by the executive secretary.	A party or a person aggrieved and directly affected by a commission decision or order may file a petition for rehearing, amendment, vacation, reconsideration, or reargument within 20 days of the date the decision or order is served by the executive secretary. <u>In order to stay the deadline for appeal provided in Minn. Stat. § 14.63, a motion for reconsideration of</u>

⁴ Minn. Stat. § 14.61, subd. 1.

	<u>an order pursuant to Minn. Stat. Ch. 237 should be filed within 10 days.</u>
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The language CenturyLink recommends exceeds the Commission’s authority concerning the referenced statutory deadlines. In lieu of CenturyLink’s recommended language, the following is added to subpart 1 of the attached draft: “This subpart does not affect any statutory limit on the time allowed for a petition for judicial review that may run concurrently.”

7829.3150 UNTIMELY FILINGS

Xcel recommended a slight modification (with which Legalectric, Inc. agreed):

RFC Draft Language	Recommended Language
<u>On its own motion or at the request of any party or participant, the commission may exclude from the record a document not filed within a time period established by rule or commission order if the commission determines that the value of the document to the commission’s deliberative process is outweighed by prejudice to a party, participant, or the public interest.</u>	<u>On its own motion or at the request of any party or participant, the commission may exclude from the record a document not filed within a time period established by rule, notice, or commission order if the commission determines that the value of the document to the commission’s deliberative process is outweighed by prejudice to a party, participant, or the public interest.</u>

This recommendation is reflected in the attached draft.

The Department recommends clarifying language (with which Legalectric, Inc. agreed):

RFC Draft Language	Recommended Language
<u>Subp. 2. Required statement.</u> <u>A person filing a document not within a time period established by rule, notice, order, or statute shall include a statement explaining why the filing was untimely and why it should be considered by the commission.</u>	<u>Subp. 2. Required statement.</u> <u>A person filing a document not within a time period established by rule, notice, order, or statute shall include a statement explaining why the filing was untimely and why it should not be excluded by the commission.</u>

This recommendation is reflected in the attached draft.

Legalectric, Inc. also recommends providing for opposition to motions. The draft language provides for such opposition in Rule 7829.0420, subp. 2.

IV. Staff Discussion

This discussion section will address the comments pertaining to protected data. The rule parts pertaining to protected data drew the most comments. Because several of the comments addressed the rule parts concerned with protected data, it was not feasible to incorporate every recommendation.

Otter Tail Power, CenturyLink, the Charter Entities, and the Minnesota Department of Commerce provided suggestions on rule 7829.0500 and the definition of “protected data” in Rule 7829.0100. CenturyLink suggested reviewing the rules concerning protected data in other jurisdictions.

A. Background of This Commission’s Rules Concerning Protected Data

This Commission’s treatment of nonpublic data is subject to the Minnesota Government Data Practices Act.⁵ The Data Practices Act has undergone substantial changes since the Act’s enactment, and the currently adopted Rule 7829.0500 predates many of the revisions. Additionally, in September 1999 pursuant to a provision of the Data Practices Act, the Commission adopted and published procedures for the handling of trade secret and privileged data.⁶ Most recently, the Data Practices Act was amended in 2013.⁷

B. Protected Data Rules in Other Jurisdictions

Staff reviewed the administrative rules of utilities commissions in seven states: California, Colorado, Illinois, Iowa, North Dakota, South Dakota, and Wisconsin. Staff selected these states because they have detailed rules of practice, or because they are states that also regulate utilities regulated by this Commission.

Administrative rules concerning protected data vary in three significant ways: (1) the application of different terms required by different state laws; (2) the procedural and substantive requirements to seek and obtain protected treatment for filed information; and (3) the nature of notice required on redacted and unredacted documents. Below, relevant rules in the states examined are briefly summarized.

i. California

California statutes concerning commission records are substantially different from the Minnesota Data Practices Act. No California Commission rules specifically pertain to nonpublic data. However, the Commission describes certain filing requirements and guidance on the Commission’s web site.

⁵ Minn. Stat. §§ 13.01 – .99.

⁶ Revised Procedures for Handling Trade Secret and Privileged Data, September 1, 1999, <http://www.puc.state.mn.us/PUC/consumers/data-practices/ssLINK/000671> (from the Commission home page, click on “Data Practices” and then click on “Trade Secret and other Privileged Data.”).

⁷ 2013Minn. Laws Ch. 82 § 1.

Parties must make a motion to file documents under seal. Documents subject to a request for filing under seal cannot be e-filed, but must instead be filed in hard copy in an envelope with the title page taped to the outside.

A redacted copy of the documents should be e-filed labeled with the words “PUBLIC VERSION” on the title page. There are three approved methods for redactions: complete removal of the confidential portions, placeholder characters between text indicating “Confidential Begins” and “Confidential Ends,” and black out.

ii. Colorado

Colorado commission rules concerning confidential information are extensive and highly detailed. Rules 1100 and 1101⁸ pertain to “confidential information.” The rules require a good faith effort to identify confidential data, and authorize sanctions including attorney fees for improperly identified information. The rule has in-depth procedural requirements for disputes about confidential information designations. Documents filed under the rule are presumed protected unless and until a challenge is brought and a contrary determination is made.

The rule requires the following notice on public versions of confidential documents: “NOTICE OF CONFIDENTIALITY: A PORTION OF THIS DOCUMENT HAS BEEN FILED UNDER SEAL.” The cover page of each copy of the document filed in the public record shall list each document filed under seal, shall list each page number of each document on which confidential material is found, and shall indicate the nature of the documents which are filed under seal. All pages and copies of the information claimed to be confidential shall be clearly marked as "confidential" and shall be filed on microfilmable paper.

iii. Illinois

Ill. Admin. Code tit. 83 § 200.430 requires a protective order be entered. Documents submitted and marked as proprietary will be treated as such pending submission and ruling on a motion for a protective order. A public redacted version of each document must also be submitted with the proprietary version. Protective orders are subject to a time limit of no more than five years from the date of submission, unless good cause is shown.

iv. Iowa

Iowa Admin. Code §§ 199—14.12 and 1.9(6) govern confidential documents filed with the Iowa Utilities Board. They require that confidential information be identified, and the party requesting confidential treatment submit a request supported by affidavit for confidential treatment.

The rule further requires labeling of the public and nonpublic versions of the document in a manner similar to the existing Minnesota Rule 7829.0500.

The two versions of the document shall be named according to the following convention: “Document Title – Public” and “Document

⁸ 4 CCR 723-1 (2013).

Title – Confidential.” It is the responsibility of the person submitting a public version of the electronic document to take appropriate measures to ensure that any embedded information for which confidential treatment is sought is nonviewable, nonsearchable, and nonreversible. Each page of the confidential version of the document shall be marked in a way that identifies it as belonging to the confidential version of the document. The confidential material itself shall be highlighted or otherwise distinguished on the page to identify what specific information is confidential.⁹

v. North Dakota

Trade secret information is defined by North Dakota statute, and N.D. Admin. Code Ch. 69-02-09 describes North Dakota Public Service Commission trade secret procedures. Filers requesting trade secret protection must include an application addressing six points justifying protection:

1. A general description of the nature of the information sought to be protected;
2. An explanation of why the information derives independent economic value, actual or potential, from not being generally known to other persons;
3. An explanation of why the information is not readily ascertainable by proper means by other persons;
4. A general description of the persons or entities that would obtain economic value from disclosure or use of the information;
5. A specific description of known competitors and competitors' goods and services that are pertinent to the tariff or rate filing; and
6. A description of the efforts used to maintain the secrecy of the information.

Staff reviews the application and makes a recommendation upon which the Commission must act. The trade secret material must be separately bound and placed in a sealed envelope, or other appropriate, sealed container, which must be labeled: TRADE SECRET – PRIVATE.

vi. South Dakota

Under S.D. Admin. R. 20:10:01:39 – :43, a request for confidential treatment must accompany confidential information. Information is then treated as confidential until the designation is challenged, at which time the Commission makes a determination. Applications for confidential treatment must include:

1. An identification of the document and the general subject matter of the materials or the portions of the document for which confidentiality is being requested;

⁹ Iowa Admin. Code § 199—14.12.

2. The length of time for which confidentiality is being requested and a request for handling at the end of that time. This does not preclude a later request to extend the period of confidential treatment;
3. The name, address, and phone number of a person to be contacted regarding the confidentiality request;
4. The statutory or common law grounds and any administrative rules under which confidentiality is requested. Failure to include all possible grounds for confidential treatment does not preclude the party from raising additional grounds in the future; and
5. The factual basis that qualifies the information for confidentiality under the authority cited.

Each page must clearly be marked “confidential” in large, bold letters. Information submitted by mail or hand delivery must be in a separate, sealed envelope and clearly state in large, bold letters on the envelope that confidential treatment is requested. If filed electronically, the information must be filed as a separate document.

vii. Wisconsin

Wis. Admin. Code PSC 2.12 governs confidential handling of documents filed with the Wisconsin Public Service Commission. A filing designated as confidential must be accompanied by a request for confidential handling, along with an affidavit supporting the request. The request must include:

1. The name and address of the person making the request.
2. The name and position of the individual filing the request on the person's behalf.
3. An accurate and complete summary of the contents of the record.
4. How the record satisfies one of the criteria warranting protection under Wisconsin rule or statute.

Records only partially eligible for confidential handling must be submitted in both unredacted and redacted versions. The Commission must then make a determination. The rules do not specify any particular requirements for labeling of the redacted or unredacted versions.

C. Discussion of Draft Protected Data Rule in Light of Commission Rulemaking Goals and Authority and Practices in Other States

In preparing the proposed rule amendments prior to the Request for Comment, staff reviewed the existing rule, the present language of the Minnesota Government Data Practices Act, and the Commission’s Revised Procedures for Handling Trade Secret and Privileged Data.

The revisions were chiefly limited to: (1) expressly defining a class of data as “protected data” so that the term may be used consistently in rules; and (2) incorporation of aspects of the Commission’s Revised Procedures for Handling Trade Secret and Privileged Data in the rule so

that the rule reflects established Commission practice and so Commission requirements are easier for practitioners to find.

Having now additionally reviewed the protected data rules in other states, staff did not find any consensus among the states in the process of seeking protected status of data, nor about the manner of labeling or redacting public versus nonpublic versions of protected documents. The rule draft appears to be among the less burdensome, as it requires no affidavit, motion, or Commission action to initially protect nonpublic data.

The use of the term “nonpublic” rather than “trade secret” or “confidential” in the draft Rule 7829.0500 reflects the use of terms defined in the Minnesota Government Data Practices Act. Nonpublic data under the statute includes “trade secret information,” “security information,” and other classes of information, all with their own definitions.¹⁰ The term “confidential” carries its own distinct meaning under the statute.¹¹ Substitution of similar terms for the purpose of conforming this Commission’s rule to the rules of another state could be a source of confusion.

Accordingly, labeling protected data as “nonpublic” rather than “confidential,” or “trade secret,” better advances the Commission’s goal of clarity in its rules.

V. Additional Changes Reflected in Draft

In addition to the public comments discussed above, the attached draft reflects additional internal discussions about the draft that have taken place since publication of the Request for Comments. These changes consolidate repetitive rule parts, add clarifying language, and update additional rule parts to accommodate electronic filing or electronic communication where appropriate. The Draft also reflects technical recommendations of the Revisor’s office.

VI. Recommended Changes Not Reflected in Draft

Additional internal discussion lead to two recommendations to be incorporated in the proposed rule that are not reflected in the attached draft.

The first concerns adding additional detail to the definition of utility so it does not appear to be circular. The recommendation of the Department for 7829.0100, subp. 21, was to incorporate the definition of “telephone utility” contained in 7810.0100, sup. 37. Staff recommends that the definition in 7829.0100 expressly reference that definition, as follows:

Recommended Language	"Utility" means a gas or electric service provider, or telephone utility, subject to the jurisdiction of the commission.
Revised Recommended Language	“Utility” means a gas or electric service provider, or telephone utility <u>under Rule 7810.0100, subp. 37</u> , subject to the jurisdiction of the commission.

¹⁰ Minn. Stat. § 13.37.

¹¹ See Minn. Stat. § 13.02, subd. 3, “Confidential data on individuals.”

The second recommended revision would add detail to the provision describing the Commission’s uncontested proceeding subcommittee, as follows:

<p>Recommended Language</p>	<p>7829.1050 UNCONTESTED PROCEEDING SUBCOMMITTEE Subpart 1. Consent calendar subcommittee. The commission may refer filings to a subcommittee for disposition as authorized by Minnesota Statutes, section 216A.03, subdivision 8, when</p> <ul style="list-style-type: none"> a) the proceeding involves no disputed or novel issues, and b) no person has requested that the proceeding not be delegated to a subcommittee.
<p>Revised Recommended Language</p>	<p>7829.1050 UNCONTESTED PROCEEDING SUBCOMMITTEE Subpart 1. Delegation of uncontested proceedings. As authorized by Minnesota Statutes, section 216A.03, subdivision 8, the commission may by order establish a subcommittee for the purpose of acting on uncontested proceedings. This subcommittee will act on behalf of the commission only when</p> <ul style="list-style-type: none"> a) commission staff determines that a proceeding involves no disputed or novel issues, and b) no party, participant, or commissioner has requested that the proceeding not be delegated to a subcommittee. <p>The commission will maintain a list on its website of proceedings delegated under this subpart, and upon disposition will indicate the subcommittee’s disposition of each proceeding. Electronic filing of an order reflecting subcommittee disposition constitutes receipt by parties, participants, and commissioners for purposes of Minn. Stat. § 216A.03, subd. 8(b).</p>

The revised recommendation adds detail about how the Commission will delegate matters under this rule part, and how the public will be informed of those delegations. The revised recommendation also provides the opportunity to object to a “party, participant, or commissioner,” which are the persons entitled to object under the statute.

These recommendations have not been reviewed by the Revisor's office. Staff intends to consult with the Revisor to identify and resolve technical drafting concerns arising from incorporation of any changes to the attached draft.

VII. Advisory Committee

Minn. Stat. § 14.101, subd. 2, authorizes the Commission to appoint a committee to offer advice on the subject matter of proposed rules. The Request for Comments solicited comments addressing whether or not the Commission should appoint an advisory committee.

Only Legalectric, Inc. recommended that the Commission appoint an advisory committee. Otter Tail Power and Xcel expressed interest in participating if one is appointed. CenturyLink suggested that a workshop focused on protected data rules (Minn. R. 7829.0100, subp. 18, and 7829.0500) might be warranted. This could be construed as a suggestion that the Commission appoint an advisory committee limited to that subject.

VIII. Alternatives for Commission Action

- A. Direct staff to prepare a Statement of Need and Reasonableness and to publish a Notice of Intent to Adopt in the State Register with the attached draft in consultation with the Revisor and incorporating the recommendations in Section VI.
- B. Direct staff to prepare a Statement of Need and Reasonableness and to publish a Notice of Intent to Adopt in the State Register with the attached draft and in consultation with the Revisor, with modifications that the Commission deems appropriate.
- C. Appoint an advisory committee to provide recommendations on Minn. R. 7829. Delegate to the Executive Secretary authority to determine the size and composition of the advisory committee.
- D. Appoint an advisory committee to provide recommendations on Minn. R. 7829.0100, subp. 18, and 7829.0500. Delegate to the Executive Secretary authority to determine the size and composition of the advisory committee.
- E. Take other action as the Commission deems appropriate.