Guide for Involvement by Tribal Governments in Infrastructure Siting Cases at the Michigan Public Service Commission

Updated November 2020

This guide was developed for Tribal Governments to explain what communication to expect from the MPSC and MPSC Staff (Staff), as well as the primary options for Tribes to provide input in the following types of infrastructure siting cases involving contested case hearings at the Michigan Public Service Commission[1]:

- Electric transmission line siting under Act 30 of 1995
- Electric certificate of necessity or integrated resource plans under Act 341 of 2016[2]
- Oil or other liquid pipeline siting under Act 16 of 1929
- Intrastate natural gas pipelines under Act 9 of 1929

For all of the above-referenced contested cases, the MPSC will identify whether the proposed activity may be appropriate for Tribal consultation as described in Executive Directive No. 2019-17. If so, the MPSC will provide initial outreach to Tribal Governments as described below:

Email update: The MPSC will provide an email to Tribal Governments with a link to the application and case file in the MPSC's "e-dockets" system. The email will provide a preliminary timing estimate and expectations for future consultation with the MPSC as described in more detail later in this guide. A Staff contact will also be provided if there are follow-up questions.

Notice of application and contested case hearing: The applicant will be instructed to provide notice in a form prescribed by the MPSC to all Tribal Governments in the state. The notice will include instructions on intervention and a prehearing conference date.

This document also describes the three primary methods available to Tribes to provide input in the case: Formal Intervention, Tribal Consultation with the MPSC, and Public Comment. The guide describes what participants can expect for each method regarding timing, resource requirements, and how the input can be used by the Commission. When considering involvement in an MPSC

[1] For purposes of this guide, the MPSC assumes these cases will be contested cases under the Michigan Administrative Procedures Act with the Commissioners subject to prohibition under state law from engaging in *ex parte* communications, meaning that the Commissioners cannot discuss legal or factual issues with any individuals, including Tribal or other local, state, or federal governmental entities. MCL 24.282.

[2] Siting of electric generation facilities (e.g., wind, solar, natural gas) is handled by local governments in Michigan. An integrated resource plan (IRP) lays out how an electric utility plans to meet customer needs and could include proposed investments in electric generation facilities, energy waste reduction, and other programs to reduce demand for electricity. IRPs are required at least every five years for utilities regulated by the MPSC. A utility must also file with the MPSC for a certificate of necessity (CON) for generation sources over 225 MW included in an IRP, and may file for a CON for certain other investments of more than $100 million. In CON and IRP proceedings, the Commission does not site generation facilities, rather it considers the need and determines reasonableness and prudence of the utility's plan for cost recovery/ratemaking purposes.

case, Tribal Governments may want to consider factors such as nature of the case, level of Tribal interest in the case, and available Tribal resources to participate. In some cases, as explained further below, Tribal Governments may choose to use more than one method of involvement.

Formal Intervention in the Case

Overview: The most influential option for involvement is to seek formal intervention as a party to the case. Tribal Governments may petition to intervene during a time period prior to the prehearing conference, typically no less than seven days before the date of the prehearing as described in the Notice of Prehearing. Historically, the petitioner for intervention must satisfy a "two-prong test" showing that (1) it has or will suffer an injury in fact; and (2) its affected interests fall within the zone of interest to be protected or regulated by statute or the constitutional guarantees in question. This is known as "intervention by right." Permissive intervention is another option, where the Commission has the discretion to permit a party to intervene in the case where that party can provide useful information to the Commission or a unique perspective on the issues in the case. If the intervention is granted by the administrative law judge (ALJ),[3] the intervening party will have the opportunity to present evidence and arguments to be considered in the Commission's decision making. In the event that the ALJ denies the request for intervention, the ALJ's ruling may be appealed to the Commission.

If the request for intervention is granted, the intervenor will have the opportunity to choose its level of involvement in the case and whether to participate in phases such as discovery, testimony, cross examination, briefing, and other matters. If the Intervenor chooses to provide expert testimony, the expert may be subjected to cross examination by other parties in the case and any testimony that is deemed admissible will be included in the evidentiary record. Testimony, briefings, and other case filings by the intervenor will be fully considered by the Commission in its decision. The Commission's order will explain its decision in writing, including rationale for the Commission's findings and conclusions. To the extent one or more Tribes are parties to the case and present evidence and arguments for consideration by the Commission, the order will also explain how their input was considered in the final decision.[4] Once the MPSC case is concluded,

[3] The administrative law judge oversees the evidentiary proceeding under the Administrative Procedures Act (MCL 24.201 et seq.) and the MPSC's Rules of Practice and Procedure (Mich Admin Code, R 792.10401 et seq.).

[4] Executive Directive 2019-17 provides that as follow-up to the consultation; "the department or agency must then provide feedback to the tribe(s) involved in the consultation to explain how their input was considered in the final decision or action. This feedback must be in the form of a written communication from a senior department or agency official involved in the consultation to the most senior tribal official involved in the consultation."

intervenors will also have the ability to appeal the Commission's decision to the applicable court of law.

Advantages: Because the Commission's decisions must be based on the evidence presented in the proceeding,[5] the option of formal intervention is the only method of involvement that will ensure the information and positions of Tribal Governments can form the basis of findings of fact by the ALJ and the final decision by the Commission.

Disadvantages: Parties must submit petitions to intervene within the designated timeframe in the Notice of Prehearing. Requests for intervention may be denied by the ALJ or the Commission, or the ALJ may allow intervention with a limited scope. While intervenors can choose their level of involvement, a higher level of involvement may require significant time and expense by the intervenor, including representation by an attorney and potentially the hiring of technical experts to serve as witnesses.

Consultation with the MPSC

Overview: The MPSC will offer two phases of consultation with Tribal Governments, an Initial Consultation and a Formal Consultation.

Initial Consultation*:* Prior to the prehearing conference, Staff will be available to meet with Tribal Governments via web/teleconference at a mutually agreed upon date and time to walk through the application and the Commission's process. Staff will seek input from Tribal Governments about initial concerns with the application or contested case process. Comments and concerns shared during the initial consultation and case overview will assist Staff in preparing for formal consultation.

Formal Consultation*:* Prior to the submittal of Staff testimony in the case,[6] Tribal Governments in Michigan will be invited to an in-person[7] formal consultation with MPSC Staff, including the

[5] MCL 24. 276 and 24.285; Mich Admin Code, R 792.10427.

[6] Like other parties in the contested case process, MPSC Staff submit "expert witness" testimony and a briefing to support their positions to the Commission. In this capacity, MPSC Staff operate independently of the Commissioners who make the final decision based on the full evidentiary record and arguments of all parties to the case.

[7] During the COVID-19 pandemic, or for other reasons relating to public health and safety, in-person consultations may be moved to an online or virtual platform.

chief operating officer,[8] Tribal liaison, and key Staff working on the case.[9] The specific date and location will be agreed upon between the interested Tribes, the MPSC and State Tribal Liaisons, and the Staff participants. The option to participate virtually or by phone will be offered as well. The consultation will promote open dialogue and allow all participants to review information, ask questions, voice concerns and discuss issues relating to the case and the process. Any concerns or new information discussed during the consultation will be considered by Staff as it formulates its formal position in the case. The Staff's formal position in the case may or may not agree with the position(s) of the Tribe(s) participating in consultation. The Staff will include in written testimony a summary or a transcript of the consultation process.

Additional follow-up discussions may take place at the request of Tribal Governments. Tribes that are intervenors in the case as well as non-intervening Tribes may participate in the consultation with Staff. In addition, as discussed above, the Commission's final order will explain in writing the rationale for the final decision and how input was considered.

Advantages: Consultation provides an opportunity to work directly with Staff to identify issues, voice concerns, and discuss the merits of the case. Discussions and information brought forth during consultation will be fully considered by Staff and may have a meaningful impact on Staff's review, testimony, and positions in the case.

Disadvantages: Staff cannot submit testimony on behalf of Tribes and cannot guarantee that positions of Tribes will be reflected in Staff's position presented in the contested case proceeding.

Public Comment

Overview: Any interested person, including Tribes, may comment on a case at any point during the proceeding without filing a formal petition for leave to intervene. Comments can be used to inform Staff and Commissioners of public opinion and may raise issues or present information not previously considered. Verbal comments can be provided at Commission meetings during the allotted public comment period, at public hearings which may be held to accept public comment on the case, or at a hearing on the case as provided by the presiding officer under Rule 413 of the Commission's Rules of Practice and Procedure. In addition, written comments can be submitted via email to mpscedockets@michigan.gov, or by mail to: Michigan Public Service Commission, 7109 W. Saginaw Highway, Lansing, MI 48917. While not required, it is recommended that

[8] MPSC Staff are led by the chief operating officer.

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comments include the MPSC case or docket number. A Tribe may submit public comment and participate in consultation with MPSC Staff Experts as described in Option II.

Advantages: Interested persons have the opportunity to provide written comment at any time and on any topic relevant to the case without the assistance of legal counsel or becoming a party to the case. Verbal comments may be submitted at any Commission meeting and as permitted by the presiding officer in public hearings held in the case.[10]

Disadvantages: Based on the Administrative Procedures Act and case law, public comments will not be considered formal evidence in the case and therefore cannot serve as the formal basis for the MPSC findings of fact.

[10] Verbal comments provided at public hearings are governed by Rule 413 of the Commission's Rules of Practice and Procedure.