

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Barbara Beerhalter	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
Darrel L. Peterson	Commissioner

In the Matter of the Petition of Northern States Power Company for Authority to Change Its Schedule of Gas Rates for Retail Customers Within the State of Minnesota

ISSUE DATE: December 8, 1987

DOCKET NO. G-002/GR-85-108

In the Matter of the Proposal of Northern States Power Company for Recovery of Gas Conservation Expenditures

DOCKET NO. G-002-GR-85-282

ORDER AFTER REMAND REVISING
RATESETTING ORDER OF
DECEMBER 30, 1985

PROCEDURAL HISTORY

This matter is before the Commission on remand from the Minnesota Supreme Court.

The case is a general ratemaking case filed with the Commission by Northern States Power Company (NSP or the Company) on February 28, 1985. The Commission accepted the filing and referred the matter to the Office of Administrative Hearings for contested case proceedings before an Administrative Law Judge (ALJ). The ALJ submitted his report to the Commission on November 8, 1985.

The Commission considered the Company's request for a rate increase on the basis of the contested case record, the ALJ's report, and oral argument by the parties before the Commission. On December 30, 1985 the Commission entered an order granting the Company a \$16.8 million rate increase.

These proceedings occurred in normal course and were in accord with the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7830.0100 through 7830.4400.

On January 15, 1987 it was reported in the press that Commissioner Leo Adams had negotiated with the Company regarding employment during the time he had participated and voted in deliberations

on the rate case. This was confirmed by Commissioner Adams and the Company.

At this point all parties filed petitions for responsive action by the Commission. The Company, the Department of Public Service (DPS), and the Residential Utilities Division of the Office of the Attorney General (RUD-AG) filed petitions for rehearing.

On January 21, 1986 DPS filed a petition to dismiss the rate case. Minnesota Public Interest Research Group (MPIRG), the City of St. Paul (St. Paul), the Minnesota Department of Energy and Economic Development (DEED), and the RUD-AG filed a joint statement supporting the petition.

On February 19, 1986 the Commission dismissed the rate case as irrevocably tainted by Commissioner Adams' conflict of interest. The Commission stayed its Order pending appeal on March 18, 1986. The Company appealed by certiorari to the Minnesota Supreme Court.

On October 23, 1987 the Minnesota Supreme Court reversed the Commission's decision to dismiss the rate case. The Court ordered the Commission to do the following:

Upon remand, the Commission shall, after providing the parties with an opportunity to be heard, determine those rate increases about which there is controversy and revise its order fixing rates accordingly. While the record before the ALJ was completed prior to the initiation of employment contacts and may itself be free of either actual or apparent impropriety, we recognize the difficulty facing members of the Commission as they, upon remand, attempt to quantify the nature and extent of any influence and to separate it, in whatever form it may have taken, as an element of the ultimate rate increase. We anticipate that because Adams' vote was decisive as it related to components totalling approximately \$780,000 of the total increase, that at least that amount will be excluded from the ultimate rate increase ordered.

On November 4, 1987 the Commission informed all parties it intended to hold a conference on November 10, 1987 to discuss issues and procedures under the remand order. The parties who attended the conference were the Company, the DPS, the RUD-AG, and the City of St. Paul. At the conference the parties decided to meet and try to determine jointly which items in the first ratemaking order were tainted and should be disallowed. The Commission approved discussions by the parties and agreed to review any Stipulation resulting from them.

The parties submitted a Stipulation to the Commission on November 19, 1987. On November 23, 1987 they presented oral argument supporting the Commission's adoption of the Stipulation as its final order.

FINDINGS AND CONCLUSIONS

Statement of the Issue

The issue before the Commission is which parts of the original ratemaking order were tainted by

Commissioner Adams' conflict of interest and should therefore be disallowed on remand.

The Nature and Provisions of the Stipulation

The Stipulation states its purpose as follows:

The parties to the Stipulation intend that its provisions will carry out the mandate of the Supreme Court Order to "quantify the nature and extent of any influence [of Commissioner Adams upon the case] and to separate it, in whatever form it may have taken, as an element of the ultimate rate increase." Order, p. 11.

Stipulation, p. 4.

The Stipulation disallows all items approved in votes in which Commissioner Adams' vote was decisive, except for two marketing programs involving expenditures totalling \$42,420, a gas value appliance program and a cogeneration program. The parties stated that these two items should be allowed because no one opposed them during the rate case. The parties saw these items as uncontroversial and therefore saw no need to examine the circumstances of their inclusion for taint.

The Stipulation also reduced the Company's allowable rate case expenses by \$17,000.

Finally, the Stipulation provides that it is voidable by any party if rejected by the Commission or challenged in court. Section IV. A. It also contains provisions captioned "Reservations," stating the parties' intentions that, in the event of its rejection by the Commission, the Stipulation will not be binding on any party nor admissible in any proceeding. Section IV. B.

The Commission's Acceptance of the Stipulation

The Commission agrees with the parties that all the items they have identified as tainted are tainted and should be disallowed. All these items passed in votes in which Commissioner Adams' vote was decisive. The Commission also agrees that a \$17,000 reduction in the Company's rate case expenses is appropriate and should be made.

The Commission agrees with the parties' removal of the Faribault clean-up expenses, the conservation expenses under Commission-established programs, and the excess accumulated deferred income tax amounts. These items were removed both because of taint and because they are treated in the subsequent 86-160 case.

The Commission disagrees with the conclusion of the parties, however, that two marketing programs passed by a 3-2 vote, with Commissioner Adams voting in the majority, were untainted due to the fact that none of the parties opposed them. The Commission recognizes that these programs were part of a package, and that other parts of the package aroused more controversy than they did. The Commission also recognizes that the Commissioners who voted against the package might have been willing to vote for the two programs standing alone.

The Commission concludes, however, that at this point it is impossible to predict with any certainty whether the two programs standing alone would have been allowed. The fact that they were unopposed by any party is instructive, but not determinative. The Commission can, and on occasion does, act contrary to the consensus of the parties. Unlike the traditional function of civil courts, the Commission's primary function is not to resolve disputes between litigants, but to affirmatively protect the public interest and to find just and reasonable rates. The fact that the programs were unopposed is therefore not dispositive.

Furthermore, the fact that two Commissioners considered these programs expendable to the point of voting against the package containing them suggests they may have been defeated standing alone. It is not unreasonable to conclude that, had they been considered crucial to the public interest, they would have been segregated for a separate vote.

As the Supreme Court noted in its remand order, determining how the case would have gone without the influence resulting from Commissioner Adams' employment negotiations is difficult. The Commission can only make its best effort. Given the fact that two Commissioners voted against these programs, however, and the fact that Commissioner Adams' vote was decisive, the Commission finds that it is more likely than not that the vote was tainted. Furthermore, the Commission finds that it is appropriate to resolve doubts regarding taint against the Company, whose conduct necessitated this difficult process.

The Commission's Rejection of the Stipulation's Reservations

The Commission finds it necessary to address the restrictions and reservations in the Stipulation because, although it largely agrees with the judgments made in the Stipulation, it has found it necessary to modify the Stipulation regarding marketing expense. If the reservations are valid, the Commission could not make this modification. However, for the reasons addressed below, the Commission finds that the reservations are not valid and must properly be removed from the Stipulation.

A reservation withdrawing the Stipulation if it is not accepted by the Commission in total is not in the public interest. Such reservation restricts the Commission from performing its affirmative duty to protect the public interest as well as to comply with the Court Order. While the Commission recognizes that there may be differences of judgment regarding the Court's instructions, it has found that the Court directed it to remove all tainted items, which by review of the Commission's deliberative processes clearly included the marketing expense.

Moreover, if the Commission is to give recognition to this Stipulation as being distinct from a settlement, the restrictions and reservations appear inconsistent with that distinction. The stipulation represents a statement of the parties' understanding of the facts, law, and conclusions, not a compromise. Because the Stipulation represents agreement, it is also not clear that the parties would assert different facts if the Stipulation is not accepted in total.

However, the Commission may take the same facts as understood by the parties and disagree regarding the law or the conclusions. The Stipulation thus cannot bind the Commission to reach the

same judgment as reached by the parties. Thus, in order to give proper effect to the Stipulation, the Commission cannot find that the restrictions and reservations are a necessary element of the agreements otherwise stated there.

Furthermore, the Commission may resolve this matter on the record before it, including the Stipulation, without giving effect to the restriction and reservation paragraphs. The Commission has followed the process directed by the Court on remand. It has afforded parties the opportunity to be heard before deliberating on the question of taint upon its Order. During the hearings, parties had opportunities to address the marketing issue and to present their arguments in response to Commissioners' questions. No party has proposed that a fact-finding hearing would better identify issues affected by tainted votes. Because the facts regarding the marketing issue are clear, the only question remaining concerns the inferences and conclusions to be drawn from those facts. The Commission can and has addressed the facts and reached different conclusions than did the parties. It could do so without regard to the reservation paragraphs because it had followed the appropriate hearing process.

The Commission appreciates the efforts of the parties to assist in this difficult task. The Commission will adopt their Stipulation as its Order, with the exception of excluding the two marketing programs discussed above, and the provisions limiting the use of the Stipulation.

ORDER

1. The Stipulation and Agreement of the parties, submitted in this matter on November 19, 1987 and attached hereto as Exhibit A, is adopted by the Commission with the following exceptions:
 - A. Expenditures for the two marketing programs discussed on pages 7 to 8 are disallowed; and
 - B. The provisions of Section IV. A. that the Stipulation is voidable if rejected by the Commission or challenged in court is rejected and declared to be void; and
 - C. Section IV. B., captioned "Reservations," is rejected and declared to be void.
2. This Order is effective immediately.

BY ORDER OF THE COMMISSION

Mary Ellen Hennen
Executive Secretary

(S E A L)