

G,E-999/R-85-847ADOPTING RULES

STATE OF MINNESOTA  
PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Rules Governing the Determination of Significant Investment for Energy Conservation Improvement Programs, Minn. Rules, part 7840.1150.

ISSUE DATE: February 1, 1989

DOCKET NO. G,E-999/R-85-847

FINDINGS OF FACT, CONCLUSIONS, AND  
ORDER ADOPTING RULES

The above-entitled matter came on for decision before the Minnesota Public Utilities Commission (Commission) on the 31st day of January, 1989. After affording all interested persons the opportunity to present written and oral data, statements and arguments to the Commission, in accordance with statutory requirements regarding the adoption of noncontroversial rules, after considering the Statement of Need and Reasonableness, after considering all of the evidence adduced upon the records, files and proceedings herein, the Commission, being fully advised in the premises, hereby adopts the following Findings of Fact, Conclusions, and Order:

FINDINGS OF FACT

1. Notice of the Commission's intent to adopt the above rules without a public hearing was published in the State Register on October 10, 1988, and was sent by mail to all persons on the list maintained by the Commission pursuant to Minn. Stat. sections 14.14, subd. 1a and 14.22 (1988) on October 5, 1988.
2. The Statement of Need and Reasonableness was prepared prior to mailing and publication of the notice and was made available to the public.
3. All persons were given the opportunity to submit comments on the rule for 30 days after notice of proposed rulemaking. The 30 day comment period, as set out in the notice, expired on November 9, 1988.
4. During the comment period the Commission received two requests for public hearing from the Minnesota Department of Jobs and Training and Interstate Power Company, neither of which were subsequently withdrawn. Therefore, the Commission did not receive requests for a public hearing from 25 or more persons which were not withdrawn.
5. No requests for notice of submission to the Attorney General were received by the Commission.
6. During the comment period the Commission received four written comments from the Minnesota Department of Jobs and Training, Interstate Power Company, Minnegasco, and the

Minnesota Department of Public Service. During the comment period the Commission received one oral comment from Otter Tail Power Company.

The Commission also received a late-filed written comment from Northern States Power Company responding to the DPS's written comments.

Each comment is discussed below.

a. Minnesota Department of Jobs and Training (DJT)

The Economic Opportunity Office of the DJT stated that the proposed rule does not succeed in defining significant investments nor does it provide guidance for determining whether the proposed program's investments or expenditures are significant.

The DJT strongly recommended amending the rule to include a definition of significant or a policy statement that guides the interpretation of significance, and a description of how each of the nine criteria, separately or as a whole, will impact the Commission's determination of significance.

Staff recommends not making the change in approach suggested by the DJT. The Commission adopted the approach recommended by the Task Force formed to examine a number of CIP issues, including determination of significant investment. The Task Force consisted of three representatives of state government, six utility representatives, and six representatives of community-based groups and local units of government. The Task Force recommended that significant investment be determined by evaluating a set of criteria without giving a pre-determined weight to each criterion. Moreover, the Commission has used this approach in successfully reviewing CIP projects for a number of years.

The Commission explained the reasonableness of its approach in pages 5 through 7 of the Statement of Need and Reasonableness, issued October 3, 1988:

The Commission's selection of qualitative, as opposed to hard-and-fast quantitative, criteria to determine whether a utility program results in "significant investments in and expenditures for energy conservation improvements" is reasonable in light of the difficulty of formulating a quantitative standard that can be fairly applied to all utilities.

Customer needs will change; knowledge of which conservation programs are effective will increase; and the ability of utilities to deliver programs will most likely change. In addition, what is significant for one utility may be insignificant to another because of differences in conservation potential, rates, size of utility, types and sizes of customers, and the different value of conservation to different utilities. Adopting the same standard for every utility cannot take these variables into effect. The Commission must be able to determine significant investment at levels appropriate for each utility.

The Commission recognizes that the proposed criteria are not precise "design" criteria which a utility can use to guarantee approvability of a program. However, the rule establishes a clear procedure for making a significant investment determination and a clear list of criteria which are relevant to the determination and which give the utilities guidance in formulating their programs. As discussed below, this type of approach to standard setting has been found by the Minnesota Supreme Court to provide sufficiently clear guidance to regulated persons.

The Minnesota Supreme Court has recognized that circumstances exist where quantitative standards are impossible to formulate and have upheld against a challenge of unconstitutional vagueness rules which are similar in nature to the rule proposed here. In Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1979), the court considered the claims of the packaging industry that the Minnesota Pollution Control Agency (MPCA) rules entitled "Regulations for Packaging Review" (hereinafter "Regulations") were so vague and imprecise that prudent persons could not discern how to comply with the regulatory scheme and that, therefore, the Regulations were unconstitutionally vague. ...

The Regulations did not establish quantitative standards for distinguishing a "good" package from a "bad" package; such standards were found by the MPCA to be impossible to formulate given the complexity of the subject area. Rather, the Regulations set out a review procedure and ten criteria that the MPCA would consider in reviewing a package. There was no indication as to what weight would be given each criterion. The court recognized, "[i]t is possible that the relative weights could change for different types of packages" and, "[i]t is unlikely that the regulations could be significantly more precise in this type of regulatory scheme." 289 N.W.2d at 423. ...

The principles which emerge from the court's decision in Can Manufacturers are also applicable to the proposed rules establishing criteria for the "significant investment" determination. As in the case of the MPCA's Regulations, the significant investment determination which the Commission is called upon to make by Minn. Stat. section 216B.241, subd. 2 (1986) involves the exercise of a significant amount of discretion and the need for flexibility.

For these reasons, the Commission finds that the approach used in the proposed rule should not be changed in the manner suggested by the DJT.

The DJT was also very concerned that the proposed rule does not provide enough consideration for low-income customers. The DJT strongly recommended that an investment be significant only if:

1. low-income customers are not excluded from the program either explicitly or implicitly, that is, by virtue of their inability to pay;
2. low-income customers can expect benefits from the program at least equal to those expected for other customers.

The Commission finds that the standards recommended by the DJT would result in some form of income assistance to insure that low-income customers are not excluded from the programs, by virtue of their inability to pay, and to insure that low income customers receive the same benefits from the programs as other customers. The other customers would ultimately finance this assistance through their utility rates. The Commission does not have a legislative directive to make income assistance a goal in determining whether a utility has made significant investment for energy conservation improvements. Absent legislative direction, the Commission must follow the mandate currently expressed in Minn. Stat. section 216B.241, subd. 2 (1988).

Minn. Stat. section 216B.241, subd. 2 (1988) states:

The commission shall nevertheless insure that every public utility with operating revenues in excess of \$50,000,000 operate one or more programs, under periodic review by the commission, which make significant investments in and expenditures for energy conservation improvements. The commission shall give special consideration to the needs of renters and low income families and individuals. (Emphasis supplied.)

The statute requires "special consideration" of the needs of low-income customers. It does not require that an investment be considered significant only if the needs of low-income customers are addressed in every instance. The DJT's recommendation would result in the Commission basing its determination of significant investment upon only the needs of low-income customers. For example, the DJT's suggestion would prevent the Commission from approving CIP programs for commercial and industrial customers of the utilities. This is

contrary to the stated intent of Minn. Stat. section 216B.241, subd. 2 (1988).

Moreover, the statute requires "special consideration" of the needs of renters, as well as the needs of low-income customers. The needs of renters may differ from the needs of low-income customers. The Commission must give special consideration to both groups. Therefore, the DJT's suggested standard would not satisfy Minn. Stat. section 216B.241, subd. 2 (1988).

The proposed rule requires the Commission to consider information that illustrates whether or not the needs of low-income customers are being met. Item D of the proposed rule requires the Commission to consider the number of low-income customers expected to be affected by the CIP program. Items A and H require the Commission to consider the energy savings from those projects and the benefits to participants. The number of low-income customers expected to be assisted and the implied achievement of a certain level of energy savings and other benefits provide a objective indications of how well the needs of low-income customers are being met. Further, item I allows other objective measures to be used, if relevant, in determining significant investment.

b. Otter Tail Power Company (Otter Tail)

Otter Tail expressed concern in its oral comment that the proposed rule was not specific enough, but did not propose alternative language.

The Commission addressed this issue in pages 5 to 7 of its Statement of Need and Reasonableness, quoted earlier. For the reasons given there, the Commission finds that the proposed rule establishes a clear procedure for making a significant investment determination and a clear list of criteria which are relevant to the determination and which give the utilities guidance in formulating their CIP programs.

c. Interstate Power Company (Interstate)

Interstate suggested modified language for subparts 2 and 3 of the rule.

The originally proposed subpart 2 states:

Subp. 2. Approval. On determining that the proposed program or modified program will result in significant investments in and expenditures for energy conservation improvements, the commission shall approve the program or modified program.

The originally proposed subpart 3 states:

Subp. 3. Disapproval and modification. On determining that the proposed program or modified program will not result in significant investments in and

expenditures for energy conservation improvements, the commission shall disapprove the proposed program or modified program and order a program that will result in significant investments in and expenditures for energy conservation improvements.

Interstate suggested modifying subparts 2 and 3 as follows:

Subp. 2. Approval. On determining that the proposed program or modified program will result in energy savings at a total cost to the utility less than the cost to the utility to produce or purchase an equivalent amount of new supply of energy, the commission may approve the proposed or modified program.

Subp. 3. Disapproval and modification. On determining that the proposed program or modified program will not result in energy savings at a total cost to the utility less than the cost to the utility to produce or purchase an equivalent amount of new supply of energy, the commission may disapprove the proposed program or modified program and order a program that will result in energy savings at a total cost to the utility less than the cost to the utility to produce or purchase an equivalent amount of new supply of energy.

The changes repeat one of the factors used in determining significant investment. See subpart 1, item B. The changes also make Commission approval, disapproval, or modification discretionary.

The Commission finds that highlighting one of the factors (item B) would imply that factor carried more weight than the other eight factors in the determination of significant investment. This was not the intent of the rule. The Commission chose a variety of criteria because of the difficulties associated with choosing one criterion that could be fairly applied in all circumstances. This approach was also recommended by the Task Force which examined the issue.

Interstate's suggestion also intertwines two separate tests: significant investments and cost effectiveness. Cost effectiveness corresponds to item B while significant investments comprises all nine rule factors, of which cost effectiveness is only one. Both standards lose coherency when blurred in this manner.

The Commission further finds that Interstate's other suggestion, that Commission approval, disapproval, or modification be discretionary, is inconsistent with Minn. Stat. section 216B.241, subd. 2 (1988). Subparts 2 and 3 of the proposed rule require the Commission to approve programs that result in significant investments and to disapprove or modify programs that do not. The proposed rule is consistent with Minn. Stat. section 216B.241, subd. 2 (1988), which states:

The commission shall nevertheless insure that every public utility with operating revenues in excess of \$50,000,000 operate one or more programs, under periodic review by the commission, which make significant investments

in and expenditures for energy conservation improvements. (Emphasis supplied.)

The proposed rule should not attempt to do less than what the statute requires.

d. Minnegasco

Minnegasco suggested modifying three items in the proposed rule, items A, B and E:

Proposed item A states:

A. impact of the program or modified program on short-term and long-term peak and average energy consumption;

Minnegasco seeks to clarify the time periods referred to in item A by including "peak hours, peak day and annual average energy consumption."

The Commission finds that a clarifying change should be made to the rule so that modified item A would read:

A. impact of the program or modified program on:

(1) short-term peak, including peak hours and peak day,

(2) long-term peak, and

(3) average energy consumption, including annual average energy consumption;

The amended language is reasonable because it illustrates the types of peak and average energy consumption data that will be examined by the Commission. This will assist the utilities by providing additional direction to them.

However, it does not preclude the Commission from considering other types of short-term peak, such as monthly peak, or other types of average energy consumption, such as 5 year average energy consumption. The modified language recognizes that the appropriate types of data may vary with the particular CIP program and utility involved.

Therefore, the Commission's modification to item A is needed and reasonable.

Proposed item B states:

B. total cost to the utility of the energy saved by the program or modified program compared to the cost to the utility to produce or purchase an equivalent amount of new supply of energy;

Minnegasco seeks to clarify that item B includes more than just the cost of the energy saved in "total cost to the utility". Minnegasco was concerned that "total cost to the utility" not exclude CIP program cost.

Minnegasco suggested modifying item B to read:

B. total cost to the utility of the program or modified program compared to the cost to the utility to produce or purchase an equivalent amount of the energy which was conserved.

The Commission finds that item B should be modified to address Minnegasco's concern. However, the Commission finds that instead of Minnegasco's suggested language, item B should be modified to read:

B. total cost to the utility of a program or modified program, resulting in energy savings, compared to the cost to the utility to produce or purchase an equivalent amount of new supply of energy;

This modification is consistent with Minn. Stat. section 216B.241, subd. 2 (1988) which states:

The commission may order a utility to make an energy conservation improvement investment or expenditure whenever the commission finds that the improvement will result in energy savings

at a total cost to the utility less than the cost to the utility to produce or purchase an equivalent amount of new supply of energy. (Emphasis supplied.)

The originally proposed item B was an attempt to be faithful to the statute without paraphrasing or duplicating the statutory language. Proposed item B was intended to capture the statute's consideration of "improvement" which "will result in energy savings at a total cost to the utility". Item B was not intended to limit the scope of the statute to the cost "of the energy saved". For instance, the total cost of energy savings can include other costs, such as CIP program costs, in addition to the cost "of the energy saved" referred to in proposed item B.

When a program CIP program is filed, each proposed cost item is carefully reviewed by the Commission. Since determinations of "cost" vary depending on the particular facts of the case and the item and arguments presented, it is not feasible to identify in a rule the costs applicable to each specific case. Therefore, the Commission finds that individual cost items should not be specifically identified in the rule. The Commission also notes that Minnegasco did not make such a request in its comments, presumably for the same reason.

The Commission also finds that its language is more appropriate than Minnegasco's suggested language. Minnegasco's suggestion does not refer to "energy savings" even though the statute does. Nor does Minnegasco's suggestion refer to "new supply of energy" even though that language is in the statute. Minnegasco's language could create confusion, which is exactly what the utility and the Commission are trying to prevent.

In this instance, a slight paraphrasing of the statutory language is necessary so that the reader can understand item B. As Minnegasco demonstrated, confusion results when other language is substituted for the statutory language. However, the Commission notes that if the statute were duplicated word for word, item B would not be grammatically correct. The Commission's modification to item B is the closest possible paraphrase of the statute.

Finally, the Commission's modification to item B is consistent with state law.

Minn. Stat. section 14.07, subdivision 3 (1988) states that the Office of the Revisor of Statutes "shall minimize duplication of statutory language". Since the statutory language is used only once in the proposed rule and is not used elsewhere in the CIP rule chapter 7840, the duplication has been minimized as required by subdivision 3 of Minn. Stat. section 14.07 (1988).

Subdivision 5 of Minn. Stat. section 14.07 was repealed in 1984. Subdivision 5 had required the Office of the Attorney General to determine that duplication of the language is crucial to the ability of a person affected by a rule to comprehend its meaning and effect. That law was repealed because state agencies often found it necessary to duplicate statutory language under the "crucial to comprehension" test in former subdivision 5.

For these reasons, the Commission's modification to item B is needed and reasonable.

Minn. Rules, part 2010.1000, of the Office of the Attorney General requires it to disapprove a rule that is substantially different from the proposed rule as noticed.

The Commission finds that the modifications to items A and B do not affect classes of persons who could not reasonably have been expected to comment on the proposed rule as originally noticed because the same gas and electric utilities and interested persons are affected and they were noticed that they would be affected. Similarly, the impact of the program on energy consumption and the cost-effectiveness of the program were raised by items A and B and the substance of these items has not been changed. Therefore, the modifications to items A and B do not introduce significant new subject matter. Finally, the modifications to items A and B are clarifying changes rather than major substantive changes that were not raised by the proposed rule as originally noticed in such a way as to invite reaction.

Proposed item E states:

E. total dollars spent on energy conservation improvements annually, expressed as a percentage of gross revenues;

Minnegasco recommended quantifying the total dollars spent on energy conservation in terms of cost per Mcf saved.

The Commission finds that the information requested is already a part of the rule and, therefore, item E does not need to be modified. That is, the dollar amount of the cost of energy saved can be computed from the information considered in items A and B.

Item B considers the total cost to the utility and item A considers the energy savings. To determine the total dollars spent in terms of cost per Mcf saved, the amount in item B is divided by the appropriate information from amount item A. Therefore, the Commission will have the information suggested by Minnegasco available to it.

Moreover, judgments about conservation projects and programs should not be based solely on short-term comparisons of conservation costs and energy costs. In the long run, both the energy savings from conservation and the energy costs are likely to change. This is particularly evident in the electric utility industry, where the absence of conservation implies future construction of large, expensive generating facilities, which has the effect of raising the cost of energy.

e. Department of Public Service (DPS)

The DPS recommended that in addition to the nine criteria in the proposed rule, two additional criteria be added:

1. Utility forecasts, including (if available) End-Use Energy Analyses and Load Shape Analyses. For electric utilities, the Minnesota-Wisconsin Power Suppliers Group Advanced Forecast, submitted annually to the DPS and the Minnesota Environmental Quality Board (EQB) will fulfill this criterion; for gas utilities, the information submitted annually to the DPS and maintained in the Regional Energy Information System (REIS) will fulfill this criterion; and

2. Avoided Cost Data, as contained in the Cogeneration and Small Power Production Tariff annual filings for electric utilities pursuant to Minnesota Rules, part 7835.0300 and, for gas utilities, an estimate of the Company's entitlement costs as used in analyses of cost-effectiveness.

The Commission finds that the suggested criteria should not be added to the proposed rule for the following reasons.

First, the suggested criteria are not criteria in the same sense as the other criteria in the proposed rule. The suggested additions are data sources rather than criteria for decision-making. As data sources, they do not constitute factors that would provide guidance to the Commission in determining significant investment. For instance, the forecasts submitted by electric utilities consist of hundreds of numbers and many pages of discussion of assumptions and methodology. The Commission does not believe this data is capable of being used as a concise, understandable criterion for decision-making purposes.

Second, the information provided by the suggested additions provide information on criteria that are already considered under the proposed rule. Utility forecasts (#1 above) give information on a utility's capacity and any likely capacity deficits. Proposed item A in the rule is the "capacity" criterion. The information suggested by the DPS on utility forecasts could be considered in conjunction with item A. Avoided cost data (#2 above) give information on the costs incurred by the utility. Proposed item B in the rule is the "cost effectiveness" criterion specified by the statute. Therefore, the information suggested by the DPS on avoided costs could be considered in conjunction with item B.

The data sources recommended by the DPS are available to the Commission for consideration in conjunction with items A and B. The DPS may also highlight the data during the CIP review process.

Moreover, under the current CIP rules, the Commission may require from the utility any additional information that it determines is necessary. See Minn. Rules, part 7840.0500, item L. These rules are being looked at for possible amendment and the Commission may wish to consider adding these data sources to the utility's filing requirements under part 7840.0500.

#### f. Northern States Power Company (NSP) Response to DPS Comments

In addition to the four timely-filed written comments discussed above, NSP filed written comments with the Commission on December 12, 1988.

The Commission finds that NSP's comments were untimely because they were filed after the 30-day comment period specified in the notice of rulemaking expired on November 9, 1988. NSP filed its late comments in response to the DPS's timely filed comments.

The Commission will not consider NSP's comments because it finds that it is not required by the Administrative Procedure Act, Minn. Stat. chapter 14 (1988) to consider late-filed comments.

7. The Commission adopts the Statement of Need and Reasonableness, in its entirety, as the factual basis for the proposed rules. The Commission hereby incorporates the Statement of Need and Reasonableness into these findings except as modified in Finding No. 6.
8. The above-captioned rule is needed and reasonable.

### CONCLUSIONS

1. The Minnesota Public Utilities Commission duly acquired and has jurisdiction over this proceeding pursuant to Minn. Stat. section 216B.241 (1988).
2. The Commission published and served due, timely, and adequate notice of the intent to adopt the rules without a public hearing.
3. The Commission has complied with all relevant legal and procedural requirements of statute and rule.
4. The modifications to the proposed rules are supported by the record and do not result in a substantial change in the proposed rule.

ORDER

1. The Commission hereby adopts Minn. Rules, part 7840.1150, governing the determination of significant investment for conservation improvement programs.

BY ORDER OF THE COMMISSION

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Mary Ellen Hennen  
Executive Secretary