

E-999/CI-93-583 ORDER DENYING MOTION FOR RECONSIDERATION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
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In the Matter of the Quantification of
Environmental Costs Pursuant to Laws of
Minnesota 1993, Chapter 356, Section 3

ISSUE DATE: June 21, 1994

DOCKET NO. E-999/CI-93-583

ORDER DENYING MOTION FOR
RECONSIDERATION

PROCEDURAL HISTORY

I. PROCEEDINGS TO DATE

On March 1, 1994, the Commission issued its Order establishing interim environmental cost values pursuant to Minn. Stat. §216B.2422 (Supp. 1993). On March 3, 1994, the Commission issued an Order initiating a contested case to establish final cost values to replace the interim ones.

On March 21, 1994, the Lignite Energy Council (Lignite Council or Petitioner) filed a petition asking the Commission to reconsider its March 1 Order. The Commission met to consider this matter on April 7, 1994.

FINDINGS AND CONCLUSIONS

II. ISSUES RAISED BY PETITIONER

The Lignite Council argues that the Commission's March 1 decision is flawed in the following respects:

1. the interim values were set without the benefit of a rulemaking or contested case proceeding;
2. the Lignite Council and public were denied the opportunity to comment on the specific interim values selected;
3. the determination to assign values to CO₂ was unreasonable, arbitrary and capricious;
4. the Commission did not establish values for **each method** of electric generation as required by statute;
5. the Commission's decision is preempted by federal law;
6. the Commission's Order violates the Commerce Clause of the United States Constitution;

7. the Order deprives the lignite industry and members of the Lignite Council of due process and equal protection under the 5th and 14th Amendments to the United States Constitution; and
8. the Order and the statute under which the Order was issued unconstitutionally interfere with the rights of other states where electric generation affected by the Order may be located.

Each of the Petitioner's assertions is addressed in turn below. It should be noted that all but the following three issues were addressed in the Commission's March 1 Order: (1) whether the Lignite Council had the opportunity to comment in this proceeding; (2) whether the Commission's Order denies the Lignite Council due process and equal protection under the 5th and 14th Amendments; and (3) whether the Commission's Order unconstitutionally interferes with the rights of other states. These three issues and the others raised in the Lignite Council's petition are addressed in the order presented by the Petitioner.

III. INTERIM STATUS OF COMMISSION DECISION

The Commission's March 1 Order was issued pursuant to Minn. Stat. §216B.2422, subd. 3 (b), which provides:

The commission shall establish interim environmental cost values . . . by March 1, 1994. These values expire on the date the commission establishes [final] environmental cost values under paragraph (a).

The interim values set forth in the Commission's Order represent reasonable estimates of the external environmental costs associated with five emissions typically released in the generation of electricity. These values, however, were established only as a necessary step in an ongoing process intended to provide more definitive externality values. Therefore, neither the Commission's March 1 Order nor this Order is final. The interim values will be replaced by final values at the conclusion of the contested case, which is already underway.

The Commission understands the Petitioner's concern that the interim values will be used in some instances before the adoption of permanent values. However, these values will only be applied to the evaluation and selection of new resources in other proceedings, principally resource plan proceedings. The values will be subject to challenge in those proceedings and will only be considered in conjunction with many other factors, including direct costs, socioeconomic effects, reliability and ratepayer impact. Minn. Rules, part 7843.0500, subp. 3.

The Commission's overriding responsibility is to ensure that utility resource plans serve the public interest. The statute requiring the quantification of environmental costs makes this clear, directing the Commission to "approve, reject or modify the [resource] plan of a public utility consistent with the public interest." Minn. Stat. §216B.2422, subd. 2 (emphasis added). The consideration of the interim values established in this proceeding is but one component of the broad public interest inquiry that must take place in the planning process. Environmental externalities will help utilities and the Commission compare various alternatives but will not by themselves be determinative.

Any decisions affected by the interim values can be revisited in subsequent resource plan proceedings after permanent values have been adopted. Resource plans look 15 years into the future; yet they must be filed every two years. This gives utilities sufficient opportunity to adjust previous plans based on new information. Utilities that apply the interim values can and should adjust their plans as needed once final values are established. The Commission expects to adopt final values within the next 12 to 24 months. This will ensure that no utility files more than one resource plan using the interim numbers.

IV. ADEQUACY OF PROCESS AND OPPORTUNITY FOR COMMENT

The Lignite Council maintains that the interim values are invalid because they were not adopted in a rulemaking or contested case. The Commission addressed this point in its March 1 Order, pointing out that the statutory deadline precluded the use of those more formal and lengthy processes. In applying the March 1 deadline to **interim** values only, the Legislature clearly recognized that interim values would be established on an accelerated basis using an abbreviated process different from the more lengthy process ultimately employed to adopt final values. The expedited procedures used to develop interim numbers satisfied the statutory mandate appropriately.

The Petitioner and others had sufficient opportunity to comment in this docket. A long list of parties received notice of the proceeding, including those who had expressed an interest in this area and all utilities potentially affected by the interim values. The Commission received responses from Western Fuels Association, Inc. (Western Fuels) and others around the country who had not been directly notified of the proceeding, indicating the widespread dissemination of the Commission's notice. No other process prescribed in Minnesota Statutes would have provided more complete notification.

The Commission's expedited process provided 110 days for written comment and included a hearing where all parties were given the chance to make oral presentations directly to the Commission. Over 20 parties actually participated in the proceeding, including Western Fuels, which raised most of the issues and arguments presented subsequently by the Lignite Council. Although the Lignite Council did not participate initially, it did present its views to the Commission both orally and in writing as part of its motion for reconsideration. The Commission has considered the Petitioner's views and arguments carefully in reaffirming its March 1 decision here.

The extensive notice and comment procedures in this proceeding reflect the import the Commission attaches to the interim values. However, it must be noted that neither the March 1 Order nor this one will directly affect the rights of any parties. The interim values were developed for consideration in other proceedings where the Commission will determine their impact. All parties will have the opportunity to address the direct application of these values in those proceedings. The mere existence of environmental cost estimates in this proceeding will not dictate utility resource decisions. These estimates will simply provide a starting point for the evaluation of the environmental ramifications of resource alternatives. As indicated above, other costs and factors must be considered in a complex analysis to determine the most appropriate mix of resources for additional electric generating capacity.

V. REASONABLENESS OF CO₂ VALUES

The Commission's March 1 Order specifies an interim range for CO₂ of \$5.99 to \$13.60 per ton. The Petitioner argues that this range is unreasonable, lacking adequate evidentiary support and arbitrarily relying on studies in other states. The Commission disagrees.

The Commission's range of CO₂ values is grounded firmly in the record. The valuation of this emission reflects the risk of environmental damage and future economic regulation or fees, which were documented in the comments of a number of parties to the proceeding. The record clearly shows a potential link between global warming and CO₂ emissions, creating a significant threat to water supplies and agriculture in the United States. The harm would be particularly grave in Minnesota, which depends heavily on water and agricultural resources. The record also recounts numerous proposals to regulate or tax CO₂ emissions around the country and in Minnesota.

In criticizing the Commission's decision to quantify CO₂, the Lignite Council stresses the lack of certainty regarding the environmental and economic risks associated with this emission. The Petitioner's emphasis on uncertainty ignores the nature of the task to which these values will be put. As indicated above, the values established in this docket will be applied prospectively in planning for future electric generating capacity. Planning of this kind covers long periods of time

and must necessarily be based on estimates and projections. Decisions must involve an assessment of the long-range risks posed by various resource alternatives, even if no harm has actually occurred. The quantification of CO₂ costs in this proceeding should help focus attention on alternative resource options that would allow utilities to avoid the environmental and economic risks associated with this emission. This will help facilitate effective contingency planning, a critical part of the resource planning process.

The Commission's CO₂ range reasonably reflects the environmental and economic risks of this emission. The values were developed by Pace University and the Bonneville Power Association (BPA) after long and thorough study. They are consistent with the cost estimates adopted in the other states that have quantified this externality and reflect many of the legislative proposals for CO₂ regulation. The \$5.99 per/ton value at the bottom of the range adopted here closely approximates the \$6.00 per/ton carbon tax proposed by both Houses of the Minnesota Legislature in 1992. The Commission's range also closely tracks other proposals, including the \$5 per ton carbon tax proposed by William Cline of the Institute for International Economics. Cline actually recommends raising the tax to \$40 per ton by the year 2000. The Commission's CO₂ values were established after careful review of the available information and they find substantial support in the record of this proceeding.

The Petitioner recommends the Commission adopt zero as the lower value in the range for CO₂. The Commission assigned a zero value as the low end of the SO₂ range based on the possibility that the environmental costs of that emission have been fully internalized as a result of the emissions trading system established under federal law. There is, however, no emissions trading system applicable to CO₂ and no evidence in the record that the environmental costs of CO₂ have been similarly internalized.

Nevertheless, the Commission's March 1 Order requires utilities to provide cost estimates in their resource plans that reflect the direct costs of resources without regard to environmental externalities. This accomplishes the Petitioner's objective since it ensures that the Commission will consider a scenario without an externality value for CO₂. The consideration of costs without externality values underscores the fact that resource selection will not be based solely on the sum of direct costs and estimates of external environmental costs. The two cost components will be looked at individually and together. They will then be evaluated in conjunction with other cost and non-cost factors to determine which combination of resources would best meet Minnesota's future energy needs.

VI. QUANTIFICATION OF EACH GENERATION METHOD

The Petitioner argues that the interim Order is unlawful because it does not quantify environmental costs for each method of electric generation. The Commission's March 1 Order assigns interim values to emissions produced primarily by fossil fuel generation. However, this approach falls well within the Commission's authority.

The statute being implemented in this docket requires the Commission to quantify environmental costs associated with each method of electricity generation "to the extent practicable." The Commission does not consider it practicable to go beyond the emissions identified in the March 1 Order in quantifying interim environmental costs. Other States that have quantified externalities have, after long formal procedures, limited their valuation efforts to these pollutants. The Commission believes it would be imprudent at this interim stage in Minnesota's process to extend environmental cost quantification further than these other jurisdictions.

The Commission may broaden its externality valuation to include other forms of generation when it adopts final values. Parties have, in fact, been directed to explore this issue in the ongoing contested case proceeding. In the Matter of the Quantification of Environmental Costs, Docket No. E-999/CI-93-583, NOTICE AND ORDER FOR HEARING, (March 3, 1994), p. 3. The practicability of additional quantification will be explored fully in the contested case.

VII. FEDERAL PREEMPTION

The Petitioner argues that the March 1 Order is preempted by the Public Utility Regulatory Policies Act of 1978 (PURPA) on the grounds expressed by Western Fuels in its initial comments in this docket. The Commission continues to reject this contention for the reasons set forth in its March 1 Order, which discussed this matter thoroughly. A careful reading of PURPA shows clearly that it does not preclude the quantification of environmental costs for planning purposes. Indeed, the relevant portion of PURPA defines itself as a "supplement [to] otherwise applicable State law." 16 U.S.C. §2621 (a).

VIII. COMMERCE CLAUSE

The Petitioner argues that the March 1 Order violates the Commerce Clause of the United States Constitution. Western Fuel made this same argument in its initial comments in this docket. The Commission continues to reject this claim for the reasons given in its March 1 Order.

IX. DUE PROCESS AND EQUAL PROTECTION

The Petitioner argues that the March 1 Order deprives the lignite industry and the Lignite Council's members of due process and equal protection of the law under the 5th and 14th Amendments to the Constitution of the United States.

The Lignite Council's due process assertion appears to be a claim that the state has deprived its members of a property right without due process. This assertion has no relevance to this proceeding. First, the interim Order has not authorized any deprivation of property; this question would arise, if at all, in specific resource planning dockets. Second, all affected industries have had an opportunity to be heard and present arguments in this case. They will also have an opportunity to make their arguments in any proceeding where these values are applied and in the contested case to establish final values.

The Petitioner's equal protection argument appears to suggest that the Commission has discriminated unreasonably against the lignite industry by assigning interim values that will apply primarily to fossil fuels (e.g., coal) and not other forms of power generation. The Petitioner's argument falls short in several respects.

First, the externality values in the March 1 Order do not apply solely to coal. The values will apply to all generation that produces the emissions identified in the Order, including generation using oil, natural gas, solid waste and even biomass which may emit CO₂ and particulate matter. Second, the Commission's emphasis on fossil fuel emissions reflects the widespread recognition that fossil fuels account for most of the environmental damage associated with electric generation.¹ Finally, all affected parties can assert claims of environmental damage caused by other generation sources in proceedings where the interim values are applied. If, for example, a utility considers building additional nuclear capacity, parties can raise the appropriate environmental concerns related to this type of generation. The Commission's current resource planning rules require consideration of environmental impacts even if these effects have not been quantified. Minn. Rules, part 7843.0500, subp. 3.

X. INTERFERENCE WITH OTHER STATES

The Petitioner argues that the interim Order and the statute under which it was issued unconstitutionally interfere with the rights of other states where electric generation affected by the Order may be located. This assertion is unfounded.

The Commission's interim values do not, as the Petitioner asserts, interfere with the right of other states "to decide for themselves what environmental protection is needed. . . ." These values simply grow out of Minnesota's legitimate interest in protecting the health and welfare of its citizens and environment, helping ensure a rational and accurate basis for resource planning decisions. Other states can regulate for the benefit of their citizens to the extent they see fit.

XI. CONCLUSION

The Commission's March 1 interim Order establishes a list of temporary environmental cost values to use in selecting resources for additional electric generating capacity. The statute under which this Order was issued established a two-stage process, beginning with the adoption of interim values within a very strict time frame. The Commission established these interim values in the expeditious manner contemplated by the Legislature. The procedures used provided broad notification of affected interests and gave all interested parties the opportunity to participate fully and effectively in the development of the interim values. Since the process is ongoing, continuing with a contested case to establish final values, the interim Order is not final.

¹ This broad recognition explains in part why environmental cost quantification around the country has focused almost exclusively on the emissions quantified in the Commission's interim Order.

The interim values derive from a careful review of the quantification efforts in other jurisdictions and their relevance to Minnesota. These values provide a basis for assessing the environmental costs of various resource alternatives. The inquiry, however, does not end with the application of these values. Environmental and non-environmental factors must be considered in a complex analysis to determine the most appropriate mix of resources for additional electric generating capacity. As part of its evaluation the Commission will also review resource costs without including environmental externalities. The evaluation of all relevant factors will serve the ultimate end of the resource selection process: a combination of resources that best serves the public interest.

ORDER

1. The Lignite Council's petition for reconsideration is denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)