

ISSUE DATE: September 12, 1996

DOCKET NO. G-008/CN-95-514

ORDER GRANTING CERTIFICATE OF NEED

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs
Marshall Johnson
Dee Knaak
Don Storm

Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Application of
Minnegasco, a Division of NorAm Energy
Corp., for a Certificate of Need for a Large
Liquefied Gas Storage Facility

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PROCEDURAL HISTORY

I. INITIAL PROCEEDINGS

On December 4, 1995, Minnegasco filed an application for a certificate of need to construct, own, and operate a 7,000 Mcf/day propane-air, peak-shaving facility near Alexandria, Minnesota.

As part of the project, Minnegasco planned to install twelve 30,000 gallon propane storage tanks. This portion of Minnegasco's project fits the definition of "large energy facility" under Minn. Stat. § 216B.2421, subd. 2(e). Under Minn. Stat. § 216B.243, Minnegasco is required to obtain a certificate of need prior to siting or construction of a large energy facility.

On December 22, 1995, the Commission issued its ORDER ACCEPTING APPLICATION in which the Commission found that Minnegasco's application was substantially complete.

On December 22, 1995, the Commission also issued its NOTICE AND ORDER FOR HEARING. The Commission referred the matter to the Office of Administrative Hearings, which assigned Administrative Law Judge (ALJ) Steve M. Mihalchick to conduct contested case proceedings.

On July 11, 1996, Minnegasco filed a letter expressing a commitment to pay all fees payable under Minn. Rules, part 7851.0210 which become due and payable after the Commission's decision in this proceeding.

II. PARTIES AND REPRESENTATIVES

Minnegasco was represented in these proceedings by Paul T. Ruxin, Jones, Day, Reavis & Pogue, 901 Lakeside Avenue, North Point, Cleveland, OH 44114, and Brenda Bjorklund, Minnegasco, 800 LaSalle Avenue, Fl 11, P.O. Box 59038, Minneapolis, MN 55459-0038.

The Department of Public Service (the Department) was represented by Julia E. Anderson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota St., St. Paul, MN 55101-2130.

The Minnesota Propane Gas Association (MPGA) was represented by Laurance R. Waldoch, Lindquist & Vennum, 4200 IDS Center, 80 South Eighth St., Minneapolis, MN 55402-2205.

A group of homeowners living in homes located near Minnegasco's proposed site (the East 27 Homeowners) was represented by Amy Townsdin, 4208 Heritage Lane N.E., Alexandria, MN 56308, and Chuck Wiener, 319 E. Lake Geneva Road No., Alexandria, MN 56308.

III. PUBLIC AND EVIDENTIARY HEARINGS; ALJ FINDINGS

Public and evidentiary hearings were held on March 26 and 27, 1996, in Alexandria, Minnesota.

The ALJ filed his Findings of Fact, Conclusions of Law and Recommendation on June 5, 1996.

IV. PROCEEDINGS BEFORE THE COMMISSION

The matter came before the Commission for consideration on August 15, 1996.

FINDINGS AND CONCLUSIONS

I. FACTUAL BACKGROUND

Minnegasco proposes to construct, own and operate a 7,000 Mcf/day propane-air peak-shaving facility near Alexandria, Minnesota. The proposed facility would enable Minnegasco to mix a blend of propane and air with natural gas to meet peaking needs. The Company expects to operate the facility an average of nine days per year; during the rest of the year the proposed facility would simply serve as a propane storage facility.

Minnegasco's proposed site for the facility is located on the northwest corner of the intersection of Highway No. 27 and East Lake Geneva Road in Alexandria Township, Douglas County (about one half mile east of the border of Alexandria, Minnesota). Of the 16.5 acres in the Proposed Site, approximately two acres will be occupied by the facility and the remaining acres will act as a buffer for the surrounding area.

Minnegasco's proposed facility will consist of several small buildings, twelve 30,000 gallon propane storage tanks, and a truck-unloading station.

The peak-shaving facility will generally operate by withdrawing liquid propane from the on-site storage tanks and raising its pressure. At the vaporizer, the liquid propane will be heated, converting it to gaseous form. Simultaneously, a compressor will raise the pressure of air in a tank to a pressure greater than that in the natural gas distribution system. The propane gas will be mixed with the compressed air to produce a propane-gas mixture which will then be injected into the natural gas distribution system.

The proposed facility will provide additional seasonal capacity on a constrained section of Minnegasco's gas distribution system, allowing Minnegasco to meet customers' growing requirements, both in the constrained section and elsewhere on the Company's system. Upon integration of the proposed facility into Minnegasco's existing facilities, capacity on Minnegasco's system as a whole will increase.

II. CERTIFICATE OF NEED CRITERIA; THE ALJ'S FINDINGS

The criteria for granting a certificate of need are set forth in Minn. Stat. § 216B.243 and Minn. Rules, parts 7849.0100-.0120.

Minn. Rules, part 7849.0120 provides four criteria which must be met in order to establish need for the proposed facility.

- A. The probable result of denial would be an adverse effect upon the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states.**

The ALJ stated that Minnegasco has demonstrated that the proposed facility is necessary to meet current and future demand both system-wide and in the Alexandria area, where pipeline capacity to deliver natural gas is constrained. The need is not due to any promotional activities of Minnegasco.

The ALJ found that Minnegasco's forecasts of its system-wide design-day firm peak-day demand requirements for 1995/1996 and the years 1997 through 2000 are accurate, reasonable, and consistent.

According to the ALJ, Minnegasco has shown that denial of the requested certificate of need will adversely affect the future efficiency of natural gas supplies to Minnegasco and its customers. The 7,000 Mcf/day propane-air peak-shaving facility is the most efficient means of expanding Minnegasco's capacity to meet firm customers' needs.

- B. A more reasonable and prudent alternative to the facility has not been demonstrated by a preponderance of the evidence on the record.**

The ALJ stated that Minnegasco has demonstrated in the record that the following alternatives to the proposed facility are not viable: the No-Build Alternative; the Conservation Alternative; the Pipeline Construction Alternative; the Liquefied Natural Gas Facility Alternative; the Alternative Site (to the Alexandria Town Border Station [TBS]) Alternative. Minnegasco has therefore demonstrated that its proposed location of the storage facility at the Alexandria TBS is reasonable and prudent.

After selecting the Alexandria TBS as the best TBS location for the proposed facility, Minnegasco turned to selecting a site for the proposed facility. In selecting the site, Minnegasco examined the following criteria: proximity to the TBS and Minnegasco's distribution system; accessibility; size; zoning; and cost. After applying the criteria, Minnegasco selected four potential sites--the proposed site, and three other alternatives.

The ALJ found that the Commission possesses the exclusive prerogative to determine whether to issue or deny a certificate of need. The Commission's decision will be binding upon other state agencies and local governments.

The ALJ stated that safety is not specifically listed among the necessary assessment criteria to which Minn. Stat. § 216B.243 refers. The ALJ found, however, that the Commission may consider safety issues under the statutory reference to "environmental quality" in Minn. Stat. § 216B.243, subd. 3 and the rule references to "natural and socioeconomic environments" in Minn. Rules, part 7852.0120 (B)(3) and (2). The ALJ also cited Minn. Rules, part 7851.0290 and 7851.0360 as rules which refer to safety specifically.

According to the ALJ, Minnegasco did not compare its proposal with its own alternatives as to safety and reliability, as required in Minn. Rules, part 7851.0290. Instead, the Company chose potential locations which could all comply with the fire safety code of the State Fire Marshal's Office of Pipeline Safety (OPS), and then chose the cheapest option among the alternatives. Neither the OPS, nor any other agency or political subdivision other than the Commission, evaluates alternative sites to determine relative safety.

The ALJ stated that Minnegasco has shown that the risk of a serious accident at the proposed site is extremely remote. The ALJ noted, however, that the site's proximity to residences meant that an accident would have a high potential for injury.

The ALJ also accepted the Homeowner's testimony that siting the facility as proposed would adversely affect their property values.

The ALJ concluded as follows:

Based upon the evidence presented by the Homeowners and upon the failure of Minnegasco to provide comparative safety data for its alternatives as required by Minn. R. 7851.0290, it is found that the Homeowners have demonstrated that the southeast corner of Alternative Site No. 3 is a more reasonable or prudent site than the Proposed Site. Minnegasco eliminated that site from consideration because there was another site available that met all code and other requirements at a lower cost. Tr. 195 (Fransdal). The statute and rules require more than just a comparison of the costs of construction and operation. ALJ's Report at p. 28.

The ALJ recommended that the Commission deny the application at this time and keep the proceedings open while Minnegasco prepares an analysis of the safety and economic impact of the alternative sites. After Minnegasco submitted the analysis, the ALJ would reconvene the hearings to consider the supplemental evidence.

C. By a preponderance of the evidence on the record, the proposed facility, or a suitable modification of the facility, will provide benefits to society in a manner compatible with protecting the natural and socioeconomic environments, including human health.

The ALJ found that the proposed facility would have a positive effect on overall state energy

needs and on development and growth in the Alexandria area.

The ALJ found that the facility would increase energy alternatives for consumers, thus supporting competition and efficiency in the market.

The ALJ noted that natural gas has fewer environmental costs associated with it than alternative fossil fuels.

The ALJ concluded that the proposed facility near the Alexandria TBS would be a benefit to society. However, the consequences of granting the certificate of need for the proposed facility at the proposed site are not more favorable than denying it because of the negative impacts of that site as compared to alternative sites.

D. The record does not demonstrate that the design, construction, or operation of the proposed facility, or a suitable modification of the facility, will fail to comply with relevant policies, rules, and regulations of other state and federal agencies and local governments.

The ALJ found that there has been no showing on the record that the design, construction, or operation of the proposed facility will fail to comply with the relevant regulations or requirements of other government entities.

III. POSITIONS OF THE PARTIES

A. Minnegasco

Minnegasco stated that its petition meets the criteria listed in Minn. Stat. § 216B.243, subd. 3 and Minn. Rules, part 7851.0120.

Minnegasco stated that the Homeowners' opposition to its petition is due to an unfounded fear of the facility and to the Homeowners' desire to have the facility sited anywhere but the proposed site. Minnegasco stated that the Homeowners' fears, though sincere, are unnecessary because the facility and site comply with all relevant policies, rules, and regulations.

Minnegasco has a history of owning and maintaining similar facilities and has never had a "reportable incident." All safety criteria of the State Fire Marshall and the Office of Pipeline Safety have been met or exceeded. Minnegasco stated that the proposed facility is the newest and best propane peaking facility available; if this plan is considered insufficiently safe, no such facility could be authorized. This is clearly not the case.

Minnegasco stated that the Homeowners have not proven by a preponderance of the evidence that a more reasonable and prudent alternative exists, taking into account comparative costs and the effects of the proposed facility and its alternatives on the natural and socioeconomic environments. Minn. Rules, part 7851.0120 (B). Because the risk at both sites is essentially zero, the difference in risk is also essentially zero. In the absence of risk or other negative factors, factors such as efficiency and cost must determine the site; the proposed site is the lowest cost appropriate alternative.

Minnegasco stated that the Homeowners' opinions of the effect of the facility on their property values did not constitute credible record evidence.

According to Minnegasco, the ALJ misconstrued the meaning of Minn. Rules, parts 7851.0290 and 7851.0120(C). Minnegasco stated that these rule requirements of cost/benefit analyses and comparisons of safety, reliability and the effects on the natural and socioeconomic environments refer to alternatives to building the facility, not to alternative sites. Minnegasco duly performed analyses of alternatives such as no-build, conservation, and different types of facilities and showed that the proposed facility is the logical choice.

Minnegasco argued that the MPGA failed to produce evidence controverting the need for the facility or the suitability of the proposed site.

B. The Department of Public Service

The Department stated that Minn. Stat. § 216B.243, subd. 3 places on the applicant the burden of demonstrating by a fair preponderance of the evidence the reasonableness of a proposed certificate of need for a large energy facility. According to the Department, Minnegasco met its burden of proof in its application. The Homeowners and MPGA did not demonstrate by a fair preponderance of the evidence that the facility is not necessary or that an alternative to the facility is more reasonable and prudent.

The Department analyzed Minn. Stat. § 216B.243 and Minn. Rules, parts 7851.0100 and 7851.0290 as they relate to safety issues. The Department concluded that the Commission is not required to extensively evaluate the safety of the proposed facility or even to consider safety pertinent to its decision, although the law clearly provides the authority to do so. The Department stated that the Company had sufficiently demonstrated the safety of the proposed facility for the purposes of the Commission's review. Any further safety concerns would be the business of the Office of Pipeline Safety, which must approve the proposed facility prior to its initial operation. To date, the OPS has found that the proposed facility meets or exceeds every safety standard.

The Department disputed the MPGA's claims that the facility is not necessary and that Minnesota law precludes the issuance of a certificate of need for an expansion into a new service area. According to the Department, issues of shareholder cost responsibility or the application of the Company's New Area Surcharge are not relevant to this proceeding.

The Department concluded that Minnegasco satisfied the statutory and rule criteria for a certificate of need. The Department stated, however, that it would not oppose the ALJ's recommendation for denial of a certificate of need at this time, with the case remaining open to

allow further hearing on the issues of safety and economic impact.

C. The East 27 Homeowners

The East 27 Homeowners did not oppose the construction of a peak-shaving facility, but did oppose Minnegasco's chosen site. According to the Homeowners, placing the facility on the proposed site would not be reasonable and prudent. The consequences of granting the certificate of need are not more favorable than the consequences of denying it.

The Homeowners stated that adherence to safety codes cannot guarantee safety. The Homeowners cited domestic terrorism, tornadoes, lightning, and human error as potential hazards which could endanger the surrounding community. If a disaster should strike, the Homeowners argued, the harm could be greatly mitigated through the placement of the facility on Alternative Site No. 3, which is not settled residentially. Alternative Site No. 3 is a more reasonable and prudent site selection. The Homeowners recommended that the Commission require Minnegasco to analyze the alternative sites and exclude the proposed site from further consideration.

D. The Minnesota Propane Gas Association

The MPGA stated that Minnegasco has failed to demonstrate a need for the facility at this time. In addition, Minnegasco has failed to properly and adequately evaluate alternatives to the proposed facility. If the Commission does allow Minnegasco to build the facility, the Commission should require that the construction take place on Alternative Site No. 3 because it is a more reasonable and prudent choice than the proposed site.

The MPGA stated that Minnegasco cannot base a need for a new facility on anticipated growth in the area. Minnegasco has stated that it does not intend to apply the New Area Surcharge Rider to either of the two new expansion areas; existing ratepayers will thus be subsidizing expansion into new areas. The Commission should require the costs of the facility to be shared by ratepayers and shareholders.

IV. COMMISSION ACTION

A. Summary of Commission Action

The statute and rule criteria for granting a certificate of need for a gas storage facility fall into three main categories--the need for the facility; the applicant's compliance with relevant policies, rules, and requirements; and any showing by a preponderance of the evidence that a more reasonable and prudent alternative to the proposed facility exists.

The ALJ found that Minnegasco has demonstrated a need for the proposed facility and compliance with relevant policies, rules, and requirements. The ALJ found that the Homeowners have shown, by a preponderance of the evidence, that a more reasonable and prudent alternative--that is, Alternative Site No. 3--exists.

The Commission finds that the record shows a clear need for the construction of the facility, and that the proposed facility would conform with the governing rules, requirements, and codes.

The Commission finds that the Homeowners and the MPGA have failed in their burden of proving, by a preponderance of the evidence, that a more reasonable and prudent alternative to the facility exists. Minnegasco has complied with the statutory and rule criteria for a certificate of need; the Commission finds that Minnegasco has made the requisite showing for the granting of a certificate of need.

B. The Need for the Facility

The Commission agrees with the ALJ that Minnegasco has proven that its system would be constrained if the facility were not constructed in the near future. The ALJ found that there is a need for the facility to meet both present and future demand in the Alexandria area. Minnegasco has met its burden to show that the proposed facility is the most efficient and cost-effective means of preventing the otherwise imminent supply shortfall.

Although the MPGA disputed the need for the facility, the MPGA could not point to record evidence to demonstrate the lack of need. The fact that the Alexandria area is growing, and that the proposed facility will serve new customers in the area, does not demonstrate a lack of need. Service to new customers is part of Minnegasco's overall obligation to serve, so long as the Company has not created the need through promotion or a failure to conserve resources. The record shows that neither factor is present.

The Commission finds equally irrelevant the MPGA's ratepayer subsidization arguments, including the question of Minnegasco's application of the New Area Surcharge. In a future rate case proceeding, the Commission will apply its usual prudence and reasonableness analysis to the costs of building this facility. In order for ratepayers to absorb the costs in rates, Minnegasco must justify the propriety of its costs in the rate case. In this instance, for example, relevant evidence may include an updated cost/benefit analysis from the ratepayers' perspective and a breakdown of actual customer growth in the Alexandria area. These issues are not, however, before the Commission in this certificate of need proceeding.

The Commission finds that Minnegasco has amply demonstrated the present and future need for the proposed facility and has thus fulfilled the first criterion of Minn. Rules, part 7851.0120: "the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states."

C. Compliance with Relevant Policies, Rules, and Requirements

The record shows that Minnegasco's proposed propane-air peaking facility will comply with relevant policies, rules, and requirements.

The Minnesota Pollution Control Agency (MPCA) determined that Minnegasco's Environmental Assessment Worksheet was sufficient to meet its requirements and that an environmental impact

statement was not necessary. The MPCA found that the facility “does not have the potential for significant environmental effects.”

Minnegasco obtained approval of a conditional use permit for its proposed site from Douglas County. The approval was appealed to the Minnesota Court of Appeals. On August 14, 1996, the Court of Appeals remanded the matter to the District Court. The issue of the conditional use permit is presently before the District Court.

The Company has obtained, or will obtain prior to any use of the facility, necessary approvals from the Minnesota Department of Health, the Minnesota Department of Transportation, and the Minnesota State Fire Marshal’s Division of the Office of Pipeline Safety.

Neither the MPGA nor the Homeowners contends that the facility, placed at either the proposed site or Alternative Site No. 3 (the other site extensively discussed by the parties), will fail to comply with all code requirements.

The Commission finds that Minnegasco has demonstrated in the record its compliance with all relevant policy, statute, and rule requirements. The application thus fulfills the fourth criterion of Minn. Rules, part 7851.0120: “it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments.”

D. Alternatives to the Proposed Site

The ALJ found that Minnegasco had properly explored and rejected the alternatives to the proposed propane-air peaking facility located at the Alexandria Town Border Station. The Company demonstrated in the record that the proposed facility is preferable to the No-Build Alternative, the Conservation Alternative, the Construction Alternative, the Liquefied Natural Gas Alternative, and the Alternate (to the Alexandria TBS) Site Alternative. The ALJ found that Minnegasco has made its case against alternatives for the proposed peak-shaving facility located at the Alexandria TBS. The Commission agrees with that conclusion.

The Homeowners and the MPGA¹ brought the matter further, to the question of alternative sites within the vicinity of the Alexandria TBS. The ALJ found that the Homeowners had demonstrated on the record that the proposed facility located on Alternative Site No. 3 would be a more reasonable and prudent alternative to the proposed facility placed on the proposed site. The ALJ found that the Homeowners had produced sufficient evidence regarding relative safety and diminution of property value to support their contention.

The Commission disagrees. At best, the Homeowners demonstrated that Alternative Site No. 3 would be *as* suitable as the proposed site for the peak-shaving facility. The Homeowners did not, however, produce sufficient record evidence to show that the proposed site poses a threat to

¹ The MPGA did not submit testimony, however.

community safety or that the placement of the facility on the proposed site would result in the reduction of surrounding property values.

The Commission agrees with Minnegasco that the issue of safety cannot exist in a vacuum--safety must be measured by articulable standards. In this case, there are numerous codes, regulations, and requirements which must be met in order for the facility to be found safe to operate. Minnegasco has amply demonstrated, and the parties do not contest, that the facility as proposed meets or exceeds every applicable safety standard. The governing agencies have thus determined that the proposed facility will not be a hazard to safety. If a hazard to safety does not exist, the Commission cannot find that the alternative site would be *more* reasonable and prudent.

The Homeowners also failed to show by record evidence that the relative effect on property values renders Alternative Site No. 3 a more reasonable and prudent alternative to the proposed site. Although the Homeowners gave their opinions as to the financial impact of the proposed facility, the opinion testimony did not sufficiently support a finding of a more reasonable and prudent alternative.

The Commission notes that the ALJ, while finding that the Homeowners had proven that Alternative Site No. 3 was more a more reasonable and prudent site, recommended further hearings to determine the placement of the proposed facility. The ALJ's recommendation of further proceedings is inconsistent with a finding that a more reasonable alternative had been shown by a preponderance of the evidence.

The Commission finds that the Homeowners, while earnest in their desire to prove the application lacking, have failed in their burden of proving a more reasonable and prudent alternative exists. The MPGA has also failed to meet its burden of proof.

The Commission will not make a specific finding regarding alternative sites for the facility. The question of siting the facility will presumably continue to be developed in the Douglas County conditional use permit process now before the District Court. The Commission here finds that Minnegasco's application, which includes its proposed facility located on its proposed site, fulfills the statutory and rule criteria.²

The Commission finds that the parties have failed in their burden of demonstrating that the application should be rejected. The application for the proposed facility fulfills the second and third criteria of Minnesota Rules, part 7851.0120: "a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of evidence on the record by parties or persons other than the applicant" and "the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate."

² The Commission notes that there is nothing in the record to suggest that the proposed facility would fail to meet the statutory and rule criteria at Alternative Site No. 3.

V. PAYMENT OF FEES

Minn. Rules, part 7853.0210, subp. 3 states that no certificate of need shall be issued until all fees owed by the applicant are paid in full. At this time, it is impossible to calculate the applicant's fees because further cost information must be submitted by the ALJ, the Department, the Office of Attorney General, and the Commission.

In a letter dated July 11, 1996, Minnegasco expressed its commitment to paying any fees which ultimately are due and payable in this proceeding. Minnegasco has also stated that any significant delay in the proceedings could jeopardize the provision of an adequate gas supply in the Alexandria area.

For these reasons, the Commission finds that a variance to Minn. Rules, part 7853.0210 subp. 3 should be granted in order to allow Minnegasco to pay the remainder of its fees after the Commission's decision in this matter has been issued.

This fact situation fulfills the criteria for granting a rule variance found in Minn. Rules, part 7830.4400. First, enforcement of the rule requiring full fee payment before issuance of a certificate would be an excessive burden upon the applicant and the community because the provision of an adequate gas supply would be jeopardized. Second, granting the variance would not adversely affect the public interest because the Company has committed to full payment of the fees. Third, granting the variance would not conflict with standards imposed by law.

ORDER

1. The Commission grants Minnegasco a certificate of need for its proposed propane-air, peak-shaving facility. The Commission does not make a finding as to the specific choice of site for the facility.
2. The Commission grants Minnegasco a variance to Minn. Rules, part 7853.0210, subp. 3 to allow the granting of a certificate of need prior to full payment of applicant's fees. Minnegasco shall pay all applicant's fees when they are fully assessed.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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