

ISSUE DATE: January 30, 1998

DOCKET NO. G-002/CIP-96-440.04

ORDER FINDING JURISDICTION, GRANTING STAY, AND ESTABLISHING FURTHER  
PROCEDURES

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Neighborhood Energy Consortium's Appeal of the Commissioner of Public Service's Decision to Discontinue the Redesigned Insulation Project

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**PROCEDURAL HISTORY**

On December 15, 1997 the Neighborhood Energy Consortium (NEC) filed an appeal under Minn. Stat. § 216B.241 from the decision of the Commissioner of the Department of Public Service (the Department) to eliminate the Redesigned Insulation Project, an NEC project, from the group of projects funded by Northern States Power Company as part of its Conservation Improvement Program. Northern States Power Company (NSP), like all Minnesota gas utilities, is required to develop, fund, and administer a Conservation Improvement Program under the Department's supervision.<sup>1</sup> NEC claimed that without its Redesigned Insulation Project, NSP's Conservation Improvement Program did not meet statutory standards for Conservation Improvement Programs.

On December 30, 1997 NSP filed comments on the appeal. NSP supported the Department's decision to discontinue the project for failure to meet cost-effectiveness standards set by the Department.

On December 30, 1997 the Department filed comments. The Department claimed the Commission did not have jurisdiction to hear the appeal. In the alternative, the Department claimed the Redesigned Insulation Project was properly defunded for failure to meet cost-effectiveness goals.

On January 8, 1997 the NEC filed a request for a stay of the Commissioner's decision until this Commission had acted on its appeal. The Commission scheduled a January 22, 1998 hearing on the appeal and the request for a stay.

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<sup>1</sup>Minn. Stat. § 216B.241, Minn. Rules Chapter 7690.

That morning NSP filed a motion to defer hearing until all parties had had opportunity to file additional written comments. At hearing the Department joined in NSP's motion.

To avoid extending the procedural schedule at NEC's expense, both parties proposed that the Commission stay the Department's decision until March 1. NEC concurred in the proposal. Although NSP did not oppose extending the stay until April 1 to permit full development of the record, the Department stated it would withdraw its request to file further comments rather than agree to extend the stay past March 1.

Fifteen members of the public and representatives of community organizations appeared at the hearing and spoke in support of continued funding for the project. The Commission received letters from 12 community organizations and four members of the public supporting the project.<sup>2</sup> The Commission also received a letter from the Mayor of the City of Saint Paul and a unanimous resolution of the Saint Paul City Council urging the Commission to reinstate funding for the project.

Individual Commissioners have received several electronic communications (e-mail) from members of the public supporting the project. These communications have been printed and placed in the public file.<sup>3</sup>

Having reviewed the entire record herein, the Commission makes the following findings, conclusions, and Order.

## FINDINGS AND CONCLUSIONS

### **I. Factual Background**

The Conservation Improvement Program (usually called the CIP program) is a statutory program designed to promote conservation and energy efficiency. The CIP statute (Minn. Stat. § 216B.241) requires Minnesota's gas and electric utilities to invest specified percentages of their gross operating revenues in conservation activities under the supervision of the Department of Public Service. The implementing regulations require affected utilities to prepare two-year plans for delivering conservation services. Minn. Rules, part 7690.0500.

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<sup>2</sup>NEC's original filing also included letters from members of the public and community groups.

<sup>3</sup>NSP stated that if the e-mails were solicited by an organization of which NEC is a member, they might run afoul of the Commission's *ex parte* rules, Minn. Rules, parts 7845.7000-7845.7600. To avoid any appearance of impropriety and to ensure a chance for review by the parties, the Company suggested the e-mails be printed and placed in the public file. This has been done.

Utilities typically rely heavily on community organizations to deliver these services, especially to residential customers.

The Redesigned Insulation Project provides insulation services to homeowners and landlords<sup>4</sup> in the east metro area. Independent contractors actually install the insulation; the project offers needs assessment and contract management services.

Project staff work with property owners to determine insulation needs, select an appropriate contractor, prevent or resolve disputes between customer and contractor, and verify that the work has been properly done before final payment. The project can also make referrals to appropriate lenders and provides a rebate of 15% of the cost of the work, up to \$150.

In program year 1997 the project provided contract management services to 360 east metro homeowners and landlords.

## **II. The Commission Has Jurisdiction Over this Appeal**

The Department claimed the Commission does not have jurisdiction over this case because its appeal authority is limited to reviewing decisions to *approve* programs such as the Redesigned Insulation Project, while NEC seeks review of a decision to reject such a program.

The statute requiring the Commission to hear appeals of CIP decisions reads as follows:

A utility, a political subdivision, or a nonprofit or community organization that has suggested a program, the attorney general acting on behalf of consumers and small business interests, or a utility customer that has suggested a program and is not represented by the attorney general under section 8.33 may petition the commission to modify or revoke a department decision under this section, and the commission may do so if it determines that the program is not cost-effective, does not adequately address the residential conservation improvement needs of low-income persons, has a long-range negative effect on one or more classes of customers, or is otherwise not in the public interest. The person petitioning for commission review has the burden of proof. The commission shall reject a petition that, on its face, fails to make a reasonable argument that a program is not in the public interest.

Minn. Stat. § 216B.241.

The Department contends that, by limiting the grounds for reversal to those listed, all of which relate to defects in approved programs, the statute fails to give the Commission authority to review claims that programs or projects should have been approved. The Commission disagrees.

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<sup>4</sup>Owners of residential rental properties of up to four units are eligible to participate.

The statute is not a model of clarity; it must be read as a whole and in context. Having done this close reading, the Commission rejects the Department's position for three reasons: (1) it fails to give effect to all of the portions of the statute; (2) it leads to absurd and unfair results; (3) a more plausible interpretation is available. These findings are explained below.

**A. The Department's Interpretation Does Not Give Effect to All Portions of the Statute**

The statute lays out very carefully who may appeal the Department's CIP decisions. The potential appellants are the utility, a political subdivision, a nonprofit or community organization that has suggested a program, the Attorney General, or a utility customer that has suggested a program.

The only plausible reason for giving appeal rights to customers and nonprofit or community organizations that have suggested programs is to let them challenge decisions rejecting their suggestions. Reading the statute to deny them this right fails to give effect to every portion of the statute, as required under Minn. Stat. § 645.16.

Similarly, the statute permits organizations or consumers that have suggested programs to "petition the commission to modify or revoke a *department decision* under this section," emphasis added. This suggests a right to appeal any adverse decision, not just decisions approving programs other than those suggested.

**B. The Department's Interpretation Leads to Absurd and Unfair Results**

Furthermore, reading the statute to limit appeal rights to attacking approved programs yields absurd and unfair results. Under Minn. Stat. § 645.17 such interpretations are to be avoided.

Reading the statute to apply only to program approvals suggests that the Legislature saw no need for an administrative check on the rejection of programs but did see a need for a check on their approval.<sup>5</sup> It suggests that the Legislature was willing to tolerate the rejection of programs for any reason -- no matter how arbitrary, capricious, or discriminatory -- but was not willing to tolerate the approval of programs that were not cost-efficient or otherwise failed the appeal standards listed in the statute. This makes no sense on its face, and there is nothing in the statute to explain it.

The construction urged by the Department produces a fundamentally unfair appeals process that does not advance the purposes of the CIP statute. The process is skewed in favor of the winners and against the losers in the Department's program selection process. The losers cannot attack the decision to reject their programs; they can only attack the merits of the programs selected instead of theirs. They cannot prevail by demonstrating that their programs are superior to those selected; they can only prevail by demonstrating that the selected programs fail minimum selection criteria.

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<sup>5</sup>Of course, the parties would retain any right of appeal to the Court of Appeals.

Finally, the Department's interpretation creates a structural incentive to reject programs opposed by anyone, since approvals are subject to appeal and rejections are not. In fact, at oral argument the Department stated one of its considerations in rejecting the NEC program was that approving the program would leave the Department vulnerable to an appeal by NSP.

The Commission will not lightly assume that the Legislature intended to establish an appeal process that is patently unfair to persons listed as qualified appellants, skews the process in favor of unopposed programs, and does not permit Commission review of the selection of inferior programs over superior ones.

### **C. A More Plausible Interpretation is Available**

There is another interpretation of § 216B.241, reflected in interpretive rules, that resolves the conflict between the narrow statutory grounds for overturning Department decisions and the broad language granting appeal rights of "a department decision under this section" to groups whose programs were rejected. That interpretation assumes that § 216B.241 blurs the distinction between "programs," a utility's entire two-year program of energy conservation improvements, and "projects," the individual conservation programs that make up the utility's two-year program.

Under this interpretation, when the statute speaks of "programs" in the list of appeal decision criteria — the "program" is not cost-effective, is not in the public interest, etc. — it is speaking of the utility's program as a whole. When it speaks of "programs" in the list of persons to whom it grants appeal rights -- non-profit or community groups that have suggested a "program" — it is speaking of the individual projects such groups would suggest.

Thus, someone who has suggested a project that was rejected may appeal that rejection on grounds that the utility's two-year program is not in the public interest without it. That is no doubt why NEC's petition alleges that "[d]iscontinuing the *Project* results in an NSP Gas CIP *program* that is ineffective and not in the public interest." Appeal of Decision of the Commissioner of the Department of Public Service, November 24, 1997, p. 2.

While the statute uses the term "program" for both the utility's comprehensive two-year program and the individual programs or projects of which it consists, in the interests of clarity the interpretive rules of both the Department and the Commission make the program/project distinction. For example, the Department's rules require utilities to file "a comprehensive description of the program, including a description of each project making up the program," and set deadlines for nonprofit and community organizations to file "alternative projects." Minn. Rules 7690.0500, subp. 2; 7690.0900. See also Minn. Rules, 7690.0600 and the Department's CIP rules as a whole, Minn. Rules Chapter 6790.

Similarly, the Commission's CIP appeal rules provide that qualified appellants may appeal rejections, eliminations, or modifications of projects, with the issue on appeal being whether the challenged decision will result in the utility's two-year program failing the statutory tests. Minn. Rules 7840.1500.

For all the reasons set forth above, the Commission concludes that NEC may appeal the Department's decision to discontinue its project and that the Commission has jurisdiction over this matter.

### **III. The Commission Will Stay the Department's Decision Until April 1, 1998**

#### **A. The Positions of the Parties**

NEC sought a stay of the Department's decision until the Commission ruled on its appeal. NEC argued that even if it prevailed on appeal, it would suffer irreparable hardship in the meantime by being forced to lay-off staff and turn down requests for service during its season of peak demand.

On the morning of the hearing the Department and NSP asked the Commission to defer a decision on the merits of this appeal until all parties had filed further comments. They proposed that the Commission stay the Department's decision until March 1 to avoid extending the procedural schedule at NEC's expense. NEC concurred in this proposal.

NSP stated it would not object to extending the stay until April 1 to permit full development of the record. The Department stated it would withdraw its support of the request to file further comments rather than agree to a stay past March 1.

#### **B. Commission Action**

##### **1. A Stay is Appropriate**

The Commission agrees with the Department and NSP that a stay is appropriate in this case to avoid extending the procedural schedule at NEC's expense.

Without a stay, NEC effectively loses regardless of the appeal's outcome. Even if it wins, it will have to rebuild its program and overcome the effects of staff lay-offs and failed commitments during the 1997-98 heating season. While a strong probability of failure on the merits might offset these concerns, a preliminary review of the history and merits of the project does not demonstrate such a probability. The Commission therefore agrees with all parties that in this case a stay is reasonable and equitable

##### **2. The Stay Will Last Until April 1**

The parties disagreed about the length of the stay. NSP and NEC agreed to a stay until April 1. The Department would not agree to a stay past March 1. Because of the complexity and importance of this case, the Commission believes it will need more time than the March 1 deadline supported by the Department. It will grant a stay until April 1.

First, this case is very fact-intensive. While the relevant facts appear to be in the administrative record, the original procedural schedule did not give the parties the time required to organize,

analyze, and present them in enough detail to permit an informed decision. Another round of comments, as requested by the Department and NSP, will be helpful. It is possible, however, that that round will demonstrate the need for a final round or for information requests to clarify the facts.

Second, as the first CIP appeal heard by the Commission, this case raises legal issues of first impression, such as scope of review, standard of review, and the jurisdiction issue resolved today. Such issues necessarily involve some sequential decision-making and occasionally supplemental briefing. While the Commission is committed to acting promptly on all matters before it, it is equally committed to taking the time required to make sound decisions on these important issues.

The Commission will therefore not limit the stay to the thirty-nine days recommended by the Department but will grant a stay until April 1. This will permit full, if expedited, development of the facts and the law by all parties and by the Commission. It will prevent any of the parties from sacrificing accuracy or clarity to meet deadlines. It will permit the Commission to schedule a final hearing on the case in mid-March and to issue a final Order by April 1, when the stay expires.

All parties have agreed that NEC should continue accepting work on a *pro rata* basis during the stay, and the Commission agrees. This will permit the organization to perform the same work it would normally perform during the period of the stay.

### **ORDER**

1. The Commission finds that it has jurisdiction over the appeal filed by the Neighborhood Energy Consortium.

2. The Commission stays the November 24, 1997 decision of the Commissioner of the Department Public Service to discontinue the Redesigned Insulation Project.
3. The Commission delegates to the Executive Secretary the authority to establish further comment, briefing, hearing, and deliberation schedules in this case.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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