

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey  
Joel Jacobs  
Marshall Johnson  
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Gregory Scott

Chair  
Commissioner  
Commissioner  
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Commissioner

In the Matter of the Center for Energy and Environment's Appeal of the Commissioner of Public Service's Decision to Modify Minnegasco's Low Income Weatherization Project

ISSUE DATE: May 11, 1998

DOCKET NO. G-008/CIP-96-443.02

ORDER REQUIRING THE PRODUCTION OF DOCUMENTS AND INFORMATION

**PROCEDURAL HISTORY**

On March 13, 1998 the Center for Energy and Environment (CEE) filed an appeal under Minn. Stat. § 216B.241 from the decision of the Commissioner of the Department of Public Service to modify the Low Income Weatherization Project, one of the projects making up Minnegasco's Conservation Improvement Program. CEE claimed that the modifications to the project had such far-reaching negative consequences that the Company's Conservation Improvement Program no longer met statutory standards.

On March 30, 1998 the following parties filed first-round comments: the Department of Public Service (the Department), Minnegasco, the Energy CENTS Coalition, the Izaak Walton League of America, Minnesotans for an Energy-Efficient Economy, the Saint Paul Neighborhood Energy Consortium, Energy Savers Insulation, the Energy Conservatory, Environment & Energy Resource Center, and Community Action of Minneapolis.

On April 10, 1998 CEE filed a petition requesting the following relief:

- (1) an Order directing Minnegasco to produce all invoices and attachments submitted by contractors and providers in its Low Income Weatherization Project during program years 1996, 1997, and 1998;
- (2) an Order directing Minnegasco to provide CEE with the information necessary to calculate the overall cost-effectiveness of the Company's Conservation Improvement Program, including for each component of the program the customer costs, incentive costs, utility administrative costs, and any other costs;
- (3) an Order setting new deadlines for final comments, permitting adequate time for analysis of the information requested.

On April 13, 1998 the following parties filed second-round comments on the appeal: CEE,

Minnegasco, the Department, the Energy CENTS Coalition, the Izaak Walton League of America, Minnesotans for an Energy-Efficient Economy, and the Saint Paul Neighborhood Energy Consortium.

On April 17, 1998 Minnegasco filed comments opposing CEE's petition requesting the production of documents and information.

The petition came before the Commission on April 30, 1998.

## **FINDINGS AND CONCLUSIONS**

### **I. Factual Background**

#### **A. The CIP Program**

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 Department).

Every two years, affected utilities must file plans for delivering conservation services to their customers.<sup>1</sup> Typically, these plans are made up of several projects, addressing the needs of different customer classes. Some projects are operated by the utility, some by local government units or community-based organizations. By statute, all CIP plans must specifically address the conservation needs of renters and low income persons.<sup>2</sup>

#### **B. The Low Income Weatherization Project, Past and Present**

CEE operated Minnegasco's Low Income Weatherization Project in Minneapolis, suburban Hennepin County, and Mankato from the fall of 1994 through the fall of 1997.<sup>3</sup> The project provided and installed insulation, storm windows, and air sealing services for households with incomes below 185% of the federal poverty guidelines. Participation was limited to households with above-average natural gas use and to households living in owner-occupied structures of one to four housing units.

In October 1997 Minnegasco proposed to modify the project to meet concerns expressed by the Commissioner of the Department of Public Service. In her Order approving the Company's 1997-98 CIP Plan, the Commissioner had expressed concern about the cost-effectiveness of the

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<sup>1</sup>Minn. Stat. § 216B.241, subd. 2, Minn. Rules, part 7690.0500.

<sup>2</sup>Minn. Stat. § 216B.241, subs. 1b and 2.

<sup>3</sup>The program was operated by community action agencies in the other portions of Minnegasco's service area.

## Low Income Weatherization Project:

*Residential Low-Income Weatherization:* The Commissioner is concerned about the per-participant cost that Minnegasco is reporting and is of the opinion that it is possibly higher than it should be. Because of this, she is requesting that Minnegasco make an effort to reduce the per-participant cost and to report on their efforts in the next status report. . . .

In the Matter of the Implementation of the 1997-98 Conservation Improvement Program for Minnegasco, a NorAm Energy Company, Docket No. G-008/CIP-96-443, FINAL DECISION (August 26, 1996).

In response, Minnegasco proposed to reduce the project's per-participant cost by doing three things: (1) encouraging the organizations operating the project to supplement or "leverage" CIP funds with other funds, such as federal Weatherization Assistance Program funds; (2) ending the practice of limiting participation to high-usage (and high cost) households; (3) soliciting bids for operating the project in Minneapolis, suburban Hennepin County, and Mankato.

The Commissioner approved the proposed modifications on February 24, 1998. It is that approval that CEE appeals.

In the competitive bidding resulting from the modifications, CEE lost out to a community action agency with ready access to federal Weatherization Assistance Program leveraging funds.

## **II. The Legal Standard**

The statute requiring the Commission to hear and determine 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.

## **III. Positions of the Parties**

### **A. Center for Energy and Environment**

The Center for Energy and Environment claims that the modifications to the project not only do not increase its cost-effectiveness but significantly reduce its cost-effectiveness. CEE claims that the Company's remaining CIP program is no longer cost-effective, does not adequately address the needs of low-income persons, will have long term negative effects on one or more customer classes, and is not in the public interest.

CEE argues that, by not counting leveraging funds as project costs, the cost-effectiveness of the project is being substantially overstated. CEE seeks the invoices and attachments from the agency operating the modified project and from all organizations operating the project in 1996, 1997, and 1998 so that it can determine what it considers the true per-participant cost of the modified project.

CEE seeks the information on the overall cost-effectiveness of Minnegasco's CIP program, because the statutory test it must meet to prevail focuses on program-wide cost-effectiveness and public interest issues. Minn. Stat. § 216B.241.

#### **B. The Department of Public Service and Minnegasco**

The Department and Minnegasco opposed CEE's petition for the production of documents and information on three grounds:

- (1) the information sought is irrelevant because (a) the Commission has already determined that it will defer to the Department on cost-effectiveness issues, and (b) federal Weatherization Assistance funds should not be counted as project costs because they are used primarily for health and safety, not conservation, purposes;
- (2) CEE has forfeited the right to the information by failing to seek it during the proceeding below;
- (3) the record in this proceeding should be limited to the record developed below.

#### **IV. Commission Action**

The Commission will grant CEE's petition. The Commission finds that the documents and information sought are relevant, that the Commission is free to supplement the record if necessary to achieve a just result, and that CEE has not forfeited its right to relevant information by improper or dilatory tactics. These findings are explained below.

##### **A. The Information at Issue is Relevant**

On April 3, 1998 the Commission decided its first CIP appeal on the merits.<sup>4</sup> In that decision the Commission clarified that the issue in CIP appeals is the effect of the Commissioner's decision on the company's CIP program as a whole, not the effect of the Commissioner's decision on any individual project. Given this legal standard, the information necessary to calculate the cost-effectiveness of Minnegasco's overall CIP program is clearly relevant.

The invoices and attachments itemizing the amount and application of Weatherization Assistance monies or other leveraging funds used in the Low Income Weatherization project are also relevant. The two objections to producing this information raised by Minnegasco and the Department go to how useful the information may ultimately be, not to its fundamental relevance.

### **1. The "Health and Safety Purposes" Objection**

If it is true, as the Department contends, that federal Weatherization Assistance is used almost exclusively for health and safety purposes, then that will be clear from the invoices and attachments. What is clear at present, however, is that at least some of these funds are used and/or are available to be used for the same purposes as CIP funds -- providing and installing insulation, storm windows, air sealing. This, presumably, is why the Department and Minnegasco promoted their use to "leverage" CIP funds and reduce the cost of the project to Minnegasco and its ratepayers.

No one has produced evidence demonstrating what portion of the Weatherization Assistance funds are used for conservation and what portion for health and safety. No one has produced evidence that there are legal or practical barriers to using these funds for conservation purposes. Under these circumstances, the Commission cannot find that the amount of Weatherization Assistance used in the project and the uses to which those funds were put are not relevant to this appeal.

### **2. The "Defer to the Department" Objection**

Minnegasco and the Department also claimed that the information sought by CEE was irrelevant because the Commission's decision in its first CIP appeal, In the Matter of the Neighborhood Energy Consortium's Appeal of the Commissioner of Public Service's Decision to Discontinue the Redesigned Insulation Project, cited earlier, precluded it from overruling the Department's judgment on cost-effectiveness issues. The Commission disagrees.

The earlier case made it clear that the Commission appreciates the complexities of measuring cost-effectiveness and will not lightly overturn, on technical grounds, the application of established formulas for doing so. In that case, however, the Commission found that even if it measured cost-effectiveness in the manner urged by complainant, the cost-effectiveness of the project at issue and the remaining projects would change only marginally, and there was no possibility the entire CIP program would be rendered not cost-effective. Order at 8.

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<sup>4</sup>In the Matter of the Neighborhood Energy Consortium's Appeal of the Commissioner of Public Service's Decision to Discontinue the Redesigned Insulation Project, Docket No. G-002/CIP-96-440.04, ORDER AFFIRMING DECISION OF COMMISSIONER OF DEPARTMENT OF PUBLIC SERVICE (April 3, 1998).

Here, the potential consequences of the error claimed are much more significant, with CEE stating it believes they could make the entire program not cost-effective. Similarly, an error of the magnitude claimed is more likely to implicate the other three prongs of the statutory test — whether the program adequately addresses the needs of low income persons, whether it has a long range negative effect on one or more customer classes, and whether it is otherwise not in the public interest.

Finally, the Commission notes that even in the Neighborhood Energy Consortium Order on which the Department and Minnegasco rely, the Commission noted that it was required by statute to make an independent judgment on the cost-effectiveness of the company's CIP program. Order at 7. Clearly, then, the Commission is not permitted, let alone required, to refuse to examine claims that the Department's or the Company's cost-effectiveness determinations are wrong.

**B. It is Not Inequitable to Permit CEE to Acquire This Information Now**

The Department and Minnegasco contended that CEE had failed to seek the information at issue at the proper time and should not be allowed to do so now as a matter of fundamental fairness. The Commission disagrees.

The process by which the companies and the Department develop Conservation Improvement Programs is largely collaborative. There are no provisions in the Department's procedural rules for inter-party discovery. CEE had no opportunity during the Department's process to require Minnegasco to produce the documents and information sought here.

Furthermore, CEE had to prepare comments on the proposed project modifications and bid on the modified project at the same time. While the project modifications were under consideration at the Department and would not be acted upon until late February, 1998, Minnegasco had already established a November 3, 1997 deadline to bid on operating the modified project.

As the established provider and a hopeful bidder, CEE's comments to the Department focused on the above-average cost-effectiveness it had been able to achieve while operating the project. The comments did emphasize, however, that the costs of similar projects operated by other organizations were higher than reported, because they did not include federal Weatherization Assistance Program funds.

CEE also stated at oral argument that during the Department proceeding it had informally requested from both the Department and the Company the same type of information sought here, without success.

At least two things are clear: (1) during the proceeding below CEE did make the Department and the Company aware that it believed their cost-effectiveness calculations were compromised by uncounted costs; (2) during the proceeding below CEE lacked the ability to force Minnegasco or the Department to produce the documents and information sought here. It is also clear that CEE was placed in the awkward position of having to criticize the modified program and bid for the right to operate it at the same time.

The Commission concludes that CEE did not engage in dilatory or improper tactics and is not precluded by its prior conduct in this case from seeking the documents and information at issue.

**C. The Commission is Not Limited to Considering the Record Before the Department**

The Department and Minnegasco also contended that the Commission could not consider any facts not in the record developed by the Department, comparing the Commission's role to the role of a court reviewing agency action. The Commission disagrees.

First, the Commission's CIP appeal rules permit the Commission to require any party to file more information when the Commission believes it does not have enough information to reach a sound decision on the merits. Minn. Rules, part 7840.2000, subp. 2. Here the Commission has found that it does not have enough information on the cost-effectiveness of Minnegasco's overall CIP program or on the costs of the Low Income Weatherization Project to resolve the issues raised by CEE.

Furthermore, as the Commission explained in the Neighborhood Energy Consortium Order, the standard of review set for the Commission by the CIP statute is different from the standard of review for judicial review of agency action. The Commission does not review the Department's actions for reasonableness, conformity with the statute, support in the record, or other traditional standards of judicial review.

Instead, the Commission is required to make an independent judgment on four issues: whether the action complained of makes the utility's Conservation Improvement Program, as a whole, (a) not cost-effective; (b) inadequate in addressing the conservation needs of low-income people; (c) harmful in the long run to one or more customer classes; or (d) otherwise not in the public interest. Minn. Stat. § 216B.241.

Making this judgment can require the Commission to obtain information not in the original record. It does in this case.

**D. Conclusion**

For all the reasons set forth above, the Commission will require Minnegasco to produce the documents and information sought by CEE. The rules require the Company to produce them within 15 days of the date of this Order. Minn. Rules, part 7840.2000, subp. 2.

The Commission will delegate to the Executive Secretary the authority to set further comment periods, since it is not clear at this juncture how many comment periods will be necessary or how long they should be.

The Commission will so order.

**ORDER**

1. Within 15 days of the date of this Order Minnegasco shall make available to the Center for Energy and Environment the documents and information sought in its petition.
2. The Commission hereby delegates to the Executive Secretary the authority to set further

comment periods in this proceeding.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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