

ISSUE DATE: September 14, 1998

DOCKET NO. E, G-999/CI-98-651

ORDER INITIATING REPEAL OF RULE, GRANTING GENERIC VARIANCE , AND
CLARIFYING INTERNAL OPERATING PROCEDURES

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendrayner
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Commission Investigation
into Procedures for Reviewing Public Utility
Affiliated Interest Contracts and Arrangements

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PROCEDURAL HISTORY

On September 25, 1997, the Commission opened Docket No. E, G-999/CI-97-1462 to examine possible improvements to the process of reviewing utility contracts with affiliates. Chair Garvey initiated activities in this docket with a letter and list of questions/concerns to stakeholders.

Between October 23, 1997 and April 17, 1998, various parties filed comments and response comments. Parties filing comments were: Interstate Power Company (IP); Enron Capital and Trade Resources Corporation (Enron); Northern Minnesota Utilities and Peoples Natural Gas Company; Minnegasco; Northern States Power Company; the Minnesota Department of Public Service; Otter Tail Power Company (Otter Tail); Minnesota Power Company (MP); the Residential and Small Business Division of the Office of the Attorney General (RUD-OAG); Duke Energy Trading and Marketing, L.L.C. (DETM); Minnesota Association of Plumbing-Heating-Cooling Contractors; Minnesota Mechanical Contractors Association; Sheet Metal, Air Conditioning and Roofing Contractors (SMARCA); and OGE Energy Resources.

Also, during the period December 10, 1997 to April 17, 1998 several Round Table meetings¹ were conducted, as well as several meetings of a subgroup. The Round Table and its subgroup were composed of representatives of the utilities, marketers, contractors, and the public agencies.

On March 26, 1998, the subgroup filed a report recommending commencement of a generic docket to explore refining Commission procedures on affiliate transactions consistent with existing statutory law. In that docket, the subgroup recommended that the Commission should:

¹ Round Table meetings are Commission-sponsored colloquia where Commissioners, their staff, and stakeholders discuss generic issues of policy, procedure, and process. Attendance at and participation in Round Tables is open to all stakeholders and all members of the public.

- interpret Minn. Stat. § 216B.48 to mean that approval of the underlying transaction is for **regulatory** purposes and that rejection of a contract would render it void for **regulatory** purposes;
- commence a limited purpose rulemaking to repeal Minn. Rules, Part 7825.2100; and
- issue a blanket (short term) variance from the requirements of Minn. Rules, Part 7825.2100 until the limited-purpose rulemaking (repeal) had been completed.

On April 28, 1998, the subgroup filed with the Commission its proposed new procedures for affiliate regulation.

On May 15, 1998, the Commission opened the current generic docket (E, G-999/CI-98-651) to consider procedures for reviewing public utility affiliated interest contracts and arrangements. The Commission issued a notice of the new proceeding and requested comment on whether it should order the Round Table subgroup's recommended procedures for affiliated interest filings. The Commission requested that comments be filed by June 12, 1998 and reply comments by June 26, 1998.

On June 9, 1998, the Department filed comments and Otter Tail filed comments the following day, June 10, 1998.

On June 12, 1998, the following parties filed comments: Enron, Minnegasco, NSP, and MP. MP filed comments on June 15, 1998.

In June 26, 1998, NSP and MP filed reply comments.

The Commission met on August 27, 1998 to consider this matter.

FINDINGS AND CONCLUSIONS

I. SUMMARY

In this Order, the Commission takes action to alleviate the burden of certain procedures and time constraints which the Commission has found excessive regarding affiliate interest contracts, while continuing the Commission's oversight on behalf of ratepayers at both the origination of affiliate contracts and at the time rates might be affected.

II. THE SUB-GROUP PROPOSAL

The Round Table sub-group made four recommendations:

- that the Commission interpret Minn. Stat. § 216B.48, subd. 3 (Contracts) to mean that no contract or arrangement is effective for regulatory purposes without written Commission approval;
- that the Commission start a limited-purpose rulemaking to repeal Minn. Rules, Part 7825.2100 which, among other things, requires Commission approval before entering into a contract or arrangement with an affiliated interest;
- that the Commission issue a generic Order varying the application of

Minn. Rules, Part 7825.2100 while repeal of that rule is pending; and

- that the Commission adopt its proposed procedures for affiliated interest filings which 1) require a filing within 30 days of execution of a contract and specify various filing requirements, 2) identify types of arrangements requiring special requirements or arrangements which require no filing, and 3) define situations that would normally justify Department or Commission Staff comments.

III. THE PARTIES' COMMENTS

A. Repeal of Minn. Rules, Part 7825.2100

Enron was the sole party to oppose the repeal of Minn. Rule 7825.2100. Enron argued that the Commission has the responsibility to pre-approve affiliate contracts. Enron added that the Commission performs an important "watch dog" function that both protects against anti-competitive behavior and provides a forum for interested parties to intervene and provide comments.

The Department, Peoples Natural Gas/Northern Minnesota Utilities, Otter Tail Power, Minnegasco, Northern States Power, and Minnesota Power submitted comments supporting repeal of the rule. Essentially, these parties argued that the requirement is not needed to protect the public interest and could prevent utilities from obtaining goods and services from the lowest-cost provider. They noted that frequent requests for a waiver of the requirements under this rule have been necessary.

In response to Enron's position that Minn. Rule 7825.2100 should not be repealed, Peoples and NMU argued that Enron's position is not consistent with the public interest because utilities may lose the opportunity to obtain lower-cost goods and services and large numbers of rule variances are requested. They argued that Enron has not demonstrated that the subgroup's proposed procedures do not adequately protect the public interest.

B. Generic Variance

All the parties that filed written comments on the proposal that the Commission vary the application of Minn. Rules, Part 7825.2100 while repeal of that rule is pending (the Department, Peoples and NMU, Minnegasco, and NSP) supported it.

C. Interpretation of Minn. Stat. § 216B.48

Peoples/NMU, Otter Tail, Minnegasco, NSP, and MP submitted comments supporting the subgroup's proposed interpretation, i.e. that until they were approved by the Commission affiliate contracts were not valid or effective only with respect to "regulatory purposes." The utilities emphasized their desire for this interpretation which, they stated, would assure the commercial viability (execution, performance and enforceability) of their affiliate contracts prior to Commission approval, leaving the regulatory issues (such as recoverability of affiliate contract costs through rates) to be decided subsequently by the Commission.²

² Peoples/NMU presented arguments typifying the utilities' position. Peoples/NMU argued that the statute should be interpreted as providing that no contract or arrangement is effective for regulatory purposes prior to Commission approval. Peoples/MNU explained that its proposed interpretation would allow an affiliate arrangement to go forward

The Department supported the sub-group's proposed interpretation, but advised clarifying that utilities will be required to file all affiliated-interest transactions subject to Minn. Stat. § 216B.48.

D. Procedures for Affiliated-Interest Filings

Peoples Natural Gas/Northern Minnesota Utilities, Otter Tail Power, Minnegasco, Northern States Power, and Minnesota Power recommended that the procedures be adopted. These parties essentially argued that the procedures will create efficient processes for the regulatory agencies and operational efficiencies for utilities while maintaining regulatory protections for the ratepayers. Enron did not address the procedures.

The Department supported the procedures, but included recommended language modifications. In written comments, the Department recommended that the Commission

- insert an additional minimum filing requirement between 4 and 5, requiring the filing of a descriptive summary of the pertinent facts and reasons why such contract or agreement is in the public interest;
- delete or clarify the second sentence of part 5 of Minimum Filing Requirements for all Affiliate Interest Filings on the grounds that multiple transactions should not be disaggregated to achieve exemption;
- add the phrase "an explanation must be included stating" to the second sentence in part 6 of Minimum Filing Requirements for All Affiliate Interest Filings in order to clarify competitive bidding requirements.
- include an additional requirement between part 6 and part 7 of the Minimum Filing Requirements for All Affiliate Interest Filings to show whether credits to retail customers are maximized, as follows:

"If there is a market for a service or good provided to an affiliate, relevant market price information should be included."
- replace the word "tariff" with "tariffed rate" in the first sentence of part 9 of the Minimum Filing Requirements for All Affiliated Interest Filings because some transactions may be covered by a tariff, but not a tariffed rate, and those without a tariffed rate should require approval by the Commission.
- amend the last sentence of the Minimum Filing Requirements for all Affiliate Interest Filings to read as follows:

prior to Commission approval and simply place parties at risk of potential disapproval of an agreement. This proposed interpretation was reasonable, according to Peoples/NMU, because the current interpretation delayed implementation of agreements later found to be in the public interest and many business opportunities are incompatible with such delay.

If the Department determines that the filing is complete and is not potentially harmful to the public interest, it need not file comments on the filing with the Commission. In such an instance, the Department may treat the filing similar to its treatment of a compliance filing; the Department would simply indicate that the matter has been reviewed and satisfies the Commission's filing requirements.

At the hearing and after argument before the Commission and discussion among themselves, the parties modified their positions in several respects, resulting in a version of the proposed Procedures that they all supported.

- The Department withdrew its recommendation that the Commission impose the additional Minimum Filing Requirement that a utility file "relevant market place information". The Department stated that it did so with the express understanding that it (the Department) would be provided such information upon request from the filing utility.
- Peoples/NMU, Minnegasco, and MP withdrew their objections to the Department's proposal to delete the language from item 5 regarding the determination of compensation if there are "two or more simultaneous transactions,"
- Peoples/NMU, NSP, and Minnegasco, the utilities that had objected to the Department's recommendation to replace the word "tariff" in item 9 with the term "tariffed rate schedule" (as that term was clarified by the Department at the hearing), withdrew their objection to that change as well.

E. Code of Conduct

Enron recommended that the Commission adopt a comprehensive code of conduct as part of this docket. Enron argued that this would be the most effective way to achieve the Commission's goal of streamlining the review process of affiliated transactions while assisting the Commission in meeting its obligation to protect against affiliate abuse and to insure that the consumer is in no way harmed by a utility's arrangements with an affiliated interest.

The utilities (Minnegasco, Peoples/NMU, NSP, and MP) disagreed with Enron's recommendation. They argued that a code of conduct should be addressed in an overall review of competition, not in the context of this narrowly focused docket, and should not delay action on the proposed procedures for affiliated transactions. They noted that Minnesota has not yet deregulated the provision of energy services to customers.

IV. COMMISSION ANALYSIS AND ACTION

A. Repeal of Minn. Rules, Part 7825.2100

Minn. Rules, Part 7825.2100 states:

A public utility, prior to entering into a contract or agreement, or making any modifications or revisions to existing contracts or agreements with an affiliated interest, where the total consideration for such contract is in excess of \$10,000 or five percent of the capital equity of the utility, whichever is less, shall petition for and receive approval from the commission by formal written order.

Contracts or agreements requiring commission approval which are entered into after January 1, 1975, without commission approval shall be null and void. Upon determining a contract or agreement null and void, the commission may require any consideration received by the affiliated interest for such contract or agreement to be remitted to the public utility.

Information presented to the department shall be verified under oath by the president, a vice-president, or secretary of the reporting public utility, and is effective as of the date of verification.

The Commission recognizes that the initial goal of this rule was to protect ratepayers from inappropriate costs. With the advent of a market-oriented competitive system, protecting current and potential competitors from anti-competitive behavior by dominant utilities will become an equally important goal for the Commission. However, the Commission finds that at this time the rule in question is no longer a reasonable and necessary way to achieve these goals and should, therefore, be repealed.

The Commission notes that it has granted variances to this rule on a regular basis over the past several years, finding in each instance that requiring the affected utility to abide by the rule would impose an excessive burden upon the utility and that allowing non-compliance would not be contrary to the public interest. This history clearly brings the propriety of the rule into question and with adoption of the agreed-upon process (Attachment A), the Commission finds that maintenance of the rule is no longer warranted. Repeal of the rule will streamline the process without significantly affecting Commission authority or oversight of affiliated-interest transactions. The Commission notes that both public agencies (the Department and the RUD-OAG) recommended that the Commission repeal this rule.

B. Generic Interim Variance

The Commission finds that the Commission's criteria for varying the first two paragraphs of Minn. Rules, Part 7825.2100 for all utilities on an interim basis have been met. See Minn. Rules, Part 7830.3200.

- Requiring adherence to the first two paragraphs of the rule, specifically by insisting that a utility receive Commission approval prior to entering into affiliate contracts exceeding \$10,000 or 5% of the utility's capital equity, would impose an excessive burden on the utility. Given the safeguards left in place and the procedures clarified in this Order, the value of imposing such a requirement is outweighed by the risk of losing lower-cost goods and services.
- Granting a generic variance from the first two paragraphs of Minn. Rules, Part 7825.2100 will not adversely affect the public interest. Given the circumstances described above in the section regarding repeal of Minn. Rules, Part 7825.2100, the Commission has determined that the rule provides no significant incremental public interest benefit. In fact, the variance will benefit the public interest by eliminating an unnecessary expenditure of regulatory resources processing requests for such variances in the meantime.
- The variance in question is not prohibited by law. As discussed in the next section, Minn. Stat. § 216B.48 does not bar the clarification sought by this variance because the statute merely requires Commission approval for *regulatory* purposes.

Accordingly, the Commission will grant a generic variance, applicable to all Minnesota utilities,

from the requirements of the first two paragraphs of Minn. Rules, Part 7825.2100 for a period of one year.

C. Interpretation of Minn. Stat. § 216B.48

Subparagraph 3 of Minn. Stat. § 216B.48 states in relevant part:

Subd. 3. Contracts. No contract or arrangement, including any general or continuing arrangement, providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial or similar services, and no contract or arrangement for the purchase, sale, lease or exchange of any property, right, or thing, or for the furnishing of any service, property, right, or thing, other than those above enumerated, made or entered into after January 1, 1975 between a public utility and any affiliated interest as defined in subdivision 1, clauses (a) to (h), or any arrangement between a public utility and an affiliated interest as defined in subdivision 1, clause (i), made or entered into after August 1, 1993, is valid or effective unless and until the contract or arrangement has received the written approval of the commission.

It is possible to interpret the statute as preventing an effective date for an affiliate agreement that predates Commission approval. Such an interpretation would, in effect, obstruct the intention of the sub-group's recommendation, i.e. to assure the commercial viability of affiliate contracts prior to Commission approval, to assure that they become effective for operational purposes upon execution.

However, the Commission does not find this statutory interpretation appropriate in the circumstances. The Commission finds it more reasonable to understand that the invalidity for non-approved contracts prescribed by a statute appearing in the Public Utilities Chapter of Minnesota Statutes (Chapter 216B), is limited to regulatory concerns.

In short, then, the Commission finds that the pre-approval requirement of Minn. Stat. § 216B.48 applies to "regulatory purposes" only. Such an interpretation will allow parties to an affiliate interest transaction to proceed under an affiliate contract but will hold such parties at risk with respect to rate recovery.

D. Procedures for Affiliate-Interest Filings

In general, the sub-group's proposed procedures create regulatory and operational efficiencies without diminishing any regulatory protections to the public and inter-utility competition. The procedures assure that there is sufficient information disclosed on all affiliate transactions for interested parties to evaluate the affiliated contract and encourages additional detail and support for certain affiliate interest contracts. All interested parties will be able to determine if additional review by the Commission is required.

Regarding the changes made to the subgroup recommendation at the hearing, the Commission finds that these strengthen the procedures. Several changes recommended by the Department and incorporated into the finally proposed procedures achieve important goals. Two merit individual comment. One change is to delete potentially ambiguous language regarding "simultaneous transactions." Another change clarifies that tariff provisions other than tariffed rate schedules will continue to be filed for approval.

The Commission finds that the procedures for affiliate interest filings, as revised by the parties at

the hearing, are reasonable and will endorse them. The procedures represent a reasonable distillation of the requirements of Minn. Stat. § 216B.48 and the Commission's affiliated interest rules and a helpful blueprint for complying with them. The Commission will itself use relevant portions as appropriate internal operating procedures for processing affiliated interest filings.

E. Code of Conduct

The Commission is sensitive to Enron's concern about potential anti-competitive behavior. However, the Commission believes that the development of a comprehensive code of conduct is best undertaken when more is known about the specific form that natural gas unbundling and electrical competition will take in Minnesota. The Commission concludes that consideration of a code of conduct is premature in this docket, given its limited scope: streamlining the administration of affiliated interest filings.

In the meantime, the Commission has considered the core of Enron's concern as it relates to this largely procedural docket. The Commission concludes that the action taken in this Order is fair-handed with respect to competition. The Order preserves the Commission's oversight role, may in fact strengthen the Department's ability to analyze affiliate transactions, does not provide an undue advantage to an affiliate, and does not impede the ability of an interested party to bring anti-competition concerns about any affiliate contract to the Commission.

ORDER

1. The Commission hereby initiates the repeal of Minn. Rules, Part 7825.2100. Docket No. E,G-999/R-98-1307 is opened for that purpose.
2. The provisions of the first two paragraphs of Minn. Rules, Part 7825.2100 are hereby varied for all public utilities for a period of one year.
3. The proposed procedures for affiliated interest filings are endorsed. The Commission will use relevant portions as appropriate internal operating procedures for processing affiliated interest filings. See Attachment A.
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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ATTACHMENT A

MINNESOTA PUBLIC UTILITIES COMMISSION
PROCEDURES FOR
AFFILIATED INTEREST FILINGS

The Commission has undertaken a review of past Affiliated Interest filings made by public utilities pursuant to Minn. Stat. § 216B.48 and has concluded that the regulatory process can be streamlined without the loss of any protections to the public. This streamlining can also be accomplished without changing the Commission's procedural rules.

Regulatory efficiencies can be gained if a public utility's initial filing contains the information needed by the Commission, the Department, the Attorney General and other interested parties to evaluate and determine whether an affiliate transaction is consistent with the standards contained in Section 216B.48. Therefore, all affiliated interest transactions subject to the requirements of Section 216B.48 must contain the following information.

Minimum Filing Requirements for All Affiliate Interest Filings.

Pursuant to Section 216B.48, subd. 3, no contract or arrangement shall be valid or effective for regulatory purposes unless and until approved in writing by the Commission. Within 30 days of executing a contract or arrangement with an affiliate, the utility must make a miscellaneous filing that satisfies the requirements of Minn. rules pt. 7825.2200, B. by including the following information.

1. A heading that identifies the type of transaction.
2. The identity of the affiliated parties in the first sentence.
3. A general description of the nature and terms of the agreement, including the effective date of the contract or arrangement and the length of the contract or arrangement.
4. A list and the past history of all current contracts or agreements between the utility and the affiliate, the consideration received by the affiliate for such contacts or agreements, and a summary of the relevant cost records related to these ongoing transactions.
5. A descriptive summary of the pertinent facts and reasons why such contract or agreement is in the public interest.
6. The amount of the compensation and, if applicable, a brief description of the cost allocation methodology or market information used to determine cost or price.
7. If the service or good acquired from an affiliate is competitively available, an explanation must be included stating whether competitive bidding was used and, if it was used, a copy of the proposal or a summary must be included. If it is not competitively bid, an explanation must be included stating why bidding was not used.
8. If the arrangement is in writing, a copy of that document must be attached.

9. Whether, as a result of the affiliate transaction, the affiliate would have access to customer information, such as customer name, address, usage or demographic information.
10. The filing must be verified.

Transactions that are conducted pursuant to a state or federal tariffed rate schedule need not be filed for approval. Nor is it necessary to file for approval any transaction conducted under a Commission approved ongoing contract or Commission approved quotation or bidding processes.

If the purchase or sale of power supplies, fuel supplies or gas supplies is made under a Commission approved contract or Commission approved quotation or bidding process, the utility shall file with the Commission:

1. The point of receipt and or delivery for the transaction;
2. The price paid and the date the service was rendered; and
3. Evidence that the approved quotation or bidding process was used.

The frequency of the filing shall be determined by the Commission at the time it approves the contract, quotation, or bidding process.

An Affiliate Interest filing shall be treated as a miscellaneous filing subject to the Commission's procedural rules for such matters. If the Department determines that the filing is complete and is not potentially harmful to the public interest, it need not file comments on the filing with the Commission. In such an instance, the Department may treat the filing similar to its treatment of a compliance filing; the Department would simply indicate that the matter has been reviewed and satisfies the Commission's filing requirements.

Matters Deserving Greater Attention.

There are three categories of affiliate transactions that the Commission has identified as particularly significant and, thus, justifying close scrutiny by the Commission. Those three categories are:

1. Any sharing of operating personnel or operating facilities between the utility and an unregulated affiliate. (Excluded from this classification are administrative services and parent-corporate charges, which include but are not limited to: accounting, billing, planning, information services, supervisory, construction, engineering, financial, legal, shareholder, and recovery of the common cost of the parent.)
2. Any arrangement whereby an affiliate should replace the utility and provide a utility function directly to the public.
3. The purchase or sale of power supplies, fuel supplies or gas supplies.

Because these types of transactions are viewed as potentially more significant by the Commission, a public utility's initial filing for such matters should, in addition to providing the information required above also include whatever additional detailed information and support is appropriate.

Transactions that fall within any of these three categories would normally justify a Department Report and Staff briefing papers.