

ISSUE DATE: July 7, 1999

DOCKET NO. U-999/R-97-902

ORDER ADJUSTING REGULATORY ASSESSMENTS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Rulemaking Governing
Uniform Statewide Standards for Users of
Public Rights-of-Way

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ASSESSMENTS

PROCEDURAL HISTORY

In 1998 the Minnesota Legislature amended the statute directing the Commission to bill Minnesota's telephone companies for the costs of regulating the telecommunications industry, to permit the Commission to bill other parties as well.¹ The amendments permitted, but did not require, the Commission to bill all parties to Commission proceedings, with exceptions for state agencies and non-profit mutual help associations, among others.

On October 23, 1998, the Commission issued a notice soliciting comments on whether it should adjust the regulatory assessments in this case, a major rulemaking establishing statewide standards for construction in the public rights-of-way. To the date of the notice, only gas, telephone, and electric companies had been billed, although local government units and non-utility right-of-way users had also been active in the case.

The following persons filed comments in response to the notice: the Minnesota Association of Townships, the League of Minnesota Cities, the Minnesota Association of Community Telecommunications Administrators, the Minnesota Business Utility Users Council, the Suburban Rate Authority, the Minnesota Telephone Association, GTE Minnesota, the Minnesota Rural Electric Association, Northern States Power Company, and the following industry stakeholders, filing jointly -- the Minnesota Telephone Association, the Minnesota Independent Coalition, U S WEST Communications, Inc., AT&T Corp., Sprint of Minnesota, MCI, Northern States Power Company, Minnegasco, Minnesota Power, Peoples Natural Gas Company, Northern Minnesota Utilities, and the Minnesota Cable Commission Association.

Generally, the gas, telephone, and electric companies urged the Commission to expand the billing process to include other rulemaking participants, while the other rulemaking participants urged the

¹ Minn. Stat. § 237.295, subd. 1.

Commission to bill only the utilities.

The case came before the Commission on February 9, 1999, when the Commission tabled the matter to permit the parties to seek legislative resolution of the issues. The parties' efforts resulted in a statute directing the Commission to allocate up to \$30,000 of its 1998-99 budget to offset any regulatory assessments billed to local units of government in connection with the right-of-way rulemaking.²

On June 22, 1999, the case came before the Commission again.

FINDINGS AND CONCLUSIONS

I. Legal and Factual Background

A. This Rulemaking

This rulemaking grew out of state and federal actions opening the local telephone market to competition. State legislators recognized that increasing the number of local telephone carriers would increase activity in the public rights-of-way, complicating their management and potentially straining the resources of the local government units that manage them. The Legislature therefore required the Commission to undertake a fast-track rulemaking to establish uniform statewide standards for construction in the public rights-of-way.³

This fast-track rulemaking was unique both substantively and procedurally — substantively, because it brought within Commission jurisdiction a new class of stakeholders (local government units) and a new set of responsibilities (setting and enforcing right-of-way construction standards); procedurally, because the rulemaking process outlined in the statute did not track the standard rulemaking process outlined in the Administrative Procedure Act. (For example, the statute required an advisory task force, specified the membership of the task force, required the task force to submit a formal report, and required the Commission to incorporate task force recommendations into its final rules).

² Minnesota Laws 1999, Chapter 223, § 51.

³ Minnesota Laws 1997, Chapter 123, §§ 8 and 9. Although the right-of-way rulemaking mandate was codified in Chapter 237 with the telecommunications statutes, the mandate clearly extended to all uses of the public rights-of-way, and the rules reflect that scope.

The rulemaking began with the passage of the statute and ended on April 26, 1999, when the right-of-way rules became legally effective. Total regulatory costs to the date of the June 22 meeting were approximately \$209,226.41, of which all but \$48,358.39 had been billed and paid by Minnesota utilities. Costs had been allocated on the basis of annual gross revenues, first on an industry basis, then on a company basis.

B. The Law on Regulatory Assessments

Historically, the costs of utility regulation have been billed to regulated utilities and included in their rates. In 1998, however, the Legislature amended the telecommunications assessment statute to permit the Commission to bill regulatory costs to all parties to certain proceedings, not just to telephone companies.⁴

The new statutory authority to bill non-utility parties is limited to cases in which the Commission or the Department finds it “necessary, in order to carry out the duties imposed on it, to investigate the books, accounts, practices, and activities of any company . . . ” Only “parties” may be assessed, and “party” is defined to exclude the following:

- the department of public service;
- the residential utilities division of the office of the attorney general;
- any entity or group instituted primarily for the purpose of mutual help and not conducted for profit;
- intervenors awarded compensation under section 237.075, subd. 10;
- any individual or group or counsel for the individual or group representing the interests of end users or classes of end users of services provided by telephone companies or telecommunications carriers, as determined by the commission.

The statute explicitly permits the Commission to determine “that a party should not pay any allocated costs of the proceeding. . . .”

At its February 9, 1999 hearing on how to assess the costs of the right-of-way rulemaking, the Commission tabled the matter to permit the parties to seek legislative clarification. That clarification took the form of the following statute:

The public utilities commission shall use available general fund appropriations made during the biennium ending June 30, 1999, to pay for up to \$30,000 of the costs allocated and assessed to local units of government for right-of-way rulemaking proceedings. The allocation and assessment of costs to the local units of government shall be canceled to the extent paid pursuant to this section.

⁴ Minn. Stat. § 237.295, subd. 1.

Minnesota Laws 1999, Chapter 223, § 79.

II. Positions of the Parties

A. The Utilities

The utilities urged the Commission to assess all costs incurred in this docket from the effective date of the new assessment statute on a 50/50 basis between right-of-way users and local government units. (Essentially, “right-of-way users” here means “utilities”; the utilities used the two terms interchangeably and did not identify any other right-of-way users the Commission should tap.) They recommended assessing the local government units through their trade associations, directing those associations to submit a plan for billing and collection.

The Minnesota Independent Coalition, Northern States Power Company, and UtiliCorp United Inc. also recommended changing the basis for allocating costs between the three utility industries from gross revenues per industry to 50% telecom, 25% gas, 25% electric. No one opposed this proposal.

B. The Local Government Units

The local government units opposed assessing any costs to them, individually or as part of the trade associations that were active in the case.

They argued that rulemakings did not fit the statutory description of proceedings in which non-utility parties could be billed, because they did not involve investigating the books, accounts, practices, or activities of any company. They argued that rulemakings had no “parties,” and that there were therefore no parties to bill. They argued that, in any case, it was contrary to public policy to discourage public participation in rulemakings by billing participants.

The League of Minnesota Cities, the Minnesota Association of Townships, and the Suburban Rate Authority claimed exemptions from assessment as groups “instituted primarily for the purpose of mutual help and not conducted for profit.”

C. The Minnesota Business Utility Users Council

The Minnesota Business Utility Users Council claimed it was exempt from assessment as a group “instituted primarily for the purpose of mutual help and not conducted for profit.” The Council also cautioned against chilling public participation in rulemakings by billing commenting parties.

III. Commission Action

A. Issues Raised by the Parties

Although this case involves three new statutes, it is less a case of first impression than a unique

factual and policy conundrum requiring a unique solution.

The parties have raised intriguing questions -- whether rulemakings fall within the letter or the spirit of the 1998 amendments to the assessment statute; whether and how one becomes a “party” to a rulemaking; whether trade associations representing local government units are exempt from assessment as non-profit, mutual-help organizations; whether the members of those trade associations can be assessed without regard to the associations’ exempt or non-exempt status.

All these questions, however, are rendered slightly off the mark by the unique facts of this case. For this rulemaking has been atypical from the start.

For example, whether rulemakings normally have “parties” or not, in this rulemaking the Legislature created something very close to parties by designating the members of the advisory task force and vesting them with extraordinary rights and duties. By statute, the task force had to be made up of “engineering and other experts representing, in equal proportions: (1) local government units; and (2) affected utilities and other users of the public rights-of-way.” The statute also carefully delineated the issues the task force should address and required the Commission to incorporate the recommendations of the task force into the final rules.⁵ Parties or not, the local government units and the utilities clearly played a unique role in this rulemaking.

Similarly, although rulemaking is normally a policy-intensive, inherently legislative process -- which might cut against billing participants -- this rulemaking had many of the earmarks of adjudication. It involved two major stakeholder groups with competing interests and claims. Instead of simply tracking the rulemaking process of the Administrative Procedure Act, it included a preliminary, legislatively-mandated task force process designed to give the stakeholders more ownership and control. In short, this case had special adjudicative-like qualities absent in traditional rulemakings.

Finally, however the questions raised by the parties would play out in a standard rulemaking, in this case the Legislature has decided two things: (1) the local government units can be assessed; and (2) protecting local government budgets is a significant concern. That is the clear import of the 1999 legislation, which both authorizes the Commission to assess the local government units and directs the Commission to offset the first \$30,000 of any assessment against its own budget. It is therefore unnecessary to decide the issues outlined above.

B. Local Government Units Assessed

The remaining issue is whether the Commission should exercise its discretion to allocate and assess any of the costs of this rulemaking to local government units. The Commission believes that it should. It would be inequitable to force the utilities to bear the entire cost of this rulemaking, when local government units made just as great a claim on the state’s regulatory resources and benefitted just as much.

⁵ Minnesota Laws 1997, Chapter 123, § 9.

At the same time, the Commission respects and shares the Legislature's concern for local government budgets. Those budgets, already strained by the provision of local services, are very unlikely to include line items for even a quasi-adjudicative administrative rulemaking.

Furthermore, utility rates, unlike property taxes, have traditionally funded the costs of utility regulation; they already have rough estimates of those costs built into them. It would be clearly inequitable and contrary to public policy for the utilities to reap a windfall from transferring normal regulatory costs to the local government units. (Of course, this lengthy and complex rulemaking arguably resulted in above-normal costs.)

Finally, there are significant administrative obstacles to billing the thousands of municipalities, townships, and other local government units affected by this rulemaking. The League of Minnesota Cities estimated the number of affected local government units at 4,000.

Weighing all these factors, the Commission concludes that some cost-sharing between utilities and local government units is appropriate, that local government budgets should be insulated from this unexpected and anomalous expense, and that it would not be a wise use of public resources to try to master the logistics of billing local government units for the costs of this case.

Unbilled rulemaking costs currently total approximately \$48,500. The Commission will allocate and assess \$30,000 of this amount to the local government units, offsetting that amount from its 1998-99 budget, as authorized by the Legislature. The remainder of pending and future regulatory costs will be allocated and assessed to the utilities. Past regulatory assessments will remain undisturbed.

C. Inter-Industry Assessment Formula Changed

The Minnesota Independent Coalition, Northern States Power Company, and UtiliCorp United Inc. recommended changing the basis for allocating costs between the three utility industries from gross revenues to 50% telecom, 25% gas, 25% electric. They argued that basing per-industry assessments on gross revenues inflated the liability of electric utilities, whose higher revenues reflected only the capital-intensive nature of their business, not greater ability to pay on the part of themselves or their ratepayers. No one opposed this proposal. The Commission agrees that in this case the proposed 50/25/25 split is equitable.

The comparative gross revenues test is equitable in most cases; it is familiar and it does result in symmetry between rate levels and regulatory expense levels. Here, however, the total expense is so large that continuing to impose so much of it on electric customers is disproportionate. It was telecommunications competition, after all, which made the rulemaking necessary, and it is appropriate to allocate half of pending and future assessments in this rulemaking to that industry. The Commission will so order.

ORDER

1. The Commission allocates and assesses to the local government units that participated in this rulemaking \$30,000 of pending and future regulatory costs. That amount shall be offset and paid from general fund appropriations made to the Commission during the biennium ending June 30, 1999, under Minnesota Laws 1999, Chapter 223, § 79.
2. Pending and future regulatory assessments in this case to utilities shall be allocated as follows: 50% to the telecommunications industry, 25% to the electric industry, 25% to the natural gas industry.
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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