

STATE OF MINNESOTA  
PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed  
Rules Governing Intervenor  
Compensation, Minn. Rules,  
parts 7831.0100 to 7831.0800

ISSUE DATE: May 3, 1990  
DOCKET NO. U-999/R-89-1  
STATEMENT OF NEED AND  
REASONABLENESS

I. INTRODUCTION

The Minnesota Public Utilities Commission (Commission) proposed to adopt a rule establishing procedural and substantive criteria for reimbursing an intervenor for its intervenor costs.

The initial draft of this rule was written by the Revisor of Statutes. The Revisor's services were used because the Commission lacked a rule writing attorney at that time.

After the Revisor's draft was reviewed and revised by Commission staff, a solicitation for comment was made through the State Register. Eighteen comments from interested parties were received.

The Commission chose not to request the aid of a task force on this rule, because the Commission is thoroughly familiar with intervenor procedure. Also, the Commission felt the rule was relatively noncontroversial and thus did not necessitate task force input.

All of the comments were reviewed and considered in finalizing the proposed rule.

II. STATEMENT OF COMMISSION'S STATUTORY AUTHORITY

The Commission's statutory authority to adopt the rule is set forth in Minn. Stat. Section 216B.08 (1988), the Commission's rulemaking authority, and in two compensation statutes, one governing gas and electric utilities, and the other governing telephone companies.

Authority to provide compensation for intervenors from gas and electric utilities is provided in:

Minn. Stat. Section 216B.16 (1988) Rate changes; procedure; hearing

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Subdivision 10. Intervenor payment. The commission may order a utility to pay all or a portion of a party's

intervention costs not to exceed \$20,000 per intervenor in any proceeding when the commission finds that the intervenor has materially assisted the commission's deliberation and the intervenor has insufficient financial resources to afford the costs of intervention.

Authority to provide compensation for intervenors from telephone companies is provided in:

Minn. Stat. Section 237.075 (1988 and 1989 Supp.) Rate changes

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Subdivision 10. Intervenor reimbursement. The commission may order a telephone company to pay all or a portion of a party's intervention costs not to exceed \$20,000 per intervention in any general rate case when the commission finds that the intervenor has materially assisted the commission's deliberation and the intervenor has insufficient financial resources to afford the costs of intervention. No entity which provides telephone services of any kind is eligible for reimbursement of intervention costs under this subdivision.

Under these statutes the Commission has the necessary statutory authority to adopt the proposed rules.

In addition, the Minnesota Supreme Court acknowledged the necessity of the Commission's fashioning a rule establishing standards for intervenor reimbursement in telephone rate cases in Application of Northwestern Bell Telephone, 386 N.W.2d 723 (Minn. 1986).

### III. STATEMENT OF NEED

Minn. Stat. Ch. 14 (1988) requires the Commission to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the Commission must set forth the reasons for its proposal, and the reasons must not be arbitrary or capricious.

However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists which requires administrative attention, and reasonableness means that the solution proposed by the Commission is appropriate. The need for the rules is discussed below.

The proposed rules are meant to establish criteria and procedures upon which the Commission may base an award or denial of intervenor compensation, based upon the two-prong tests of "material assistance" and "insufficient financial resource" under Minn. Stat. Section 216B.16, subd. 10 and Minn. Stat. Section

237.075, subd. 10. The Minnesota Supreme Court has expressed the necessity of a Commission rule utilizing those criteria which best further the purpose of the telephone intervenor compensation statute. Application of Northwestern Bell Telephone, 386 N.W.2d 723 (Minn. 1986). Although the Supreme Court in the cited case was addressing the issue of telephone intervenor compensation and not compensation from gas or electric utilities, it is necessary to apply the same criteria for the two statutes which have identical two-prong tests.

#### IV. STATEMENT OF REASONABLENESS

The Commission is required by Minn. Stat. Ch. 14 (1988) to make an affirmative presentation of facts establishing the reasonableness of the proposed rules. Reasonableness is the opposite of arbitrariness or capriciousness. It means that there is a rational basis for the Commission's proposed action. However, the proposed rule need not be the most reasonable solution to the situation which created the need for a rule. The proposed rule is not unreasonable simply because a more reasonable alternative exists or a better job of drafting might have been done.

Nevertheless, for the reasons given below, the Commission believes that its proposed rule is the most reasonable approach to the issue presented based on its own experience and expertise and comments from interested persons.

##### A. Reasonableness of the Rules as a Whole

The Commission solicited the help of the Revisor of Statutes to produce a first draft of the proposed intervenor compensation rules. At the time that the intervenor compensation rulemaking procedure was commenced, the Commission did not have a rule writing attorney on staff. For this reason, and because the Revisor of Statutes offers rule drafting as a service to administrative agencies, the Commission made use of the Revisor's assistance.

Because the Revisor wrote the first draft of the proposed rule and was consulted on subsequent drafts, it can be expected that interested parties would perceive the drafted rule as objective. This fact can minimize conflict and facilitate the production of the final proposed rule.

In writing the first draft of the intervenor compensation rules, the Revisor employed three main models: a federal statute; Wisconsin compensation rules; and California compensation rules.

The federal Public Utilities Regulatory Policies Act of 1978 ("PURPA"), 16 USC Section 2601 et seq. (Supp III 1979) provides a

system for compensation to electric consumers for costs of participation or intervention in a utility proceeding. PURPA establishes certain criteria which the state regulatory authority must employ to determine compensation eligibility.

The Revisor also looked to the California intervenor compensation rules, 20 California Rules, Article 18.7. The California rules were selected as a model because they are well-drafted and because California is generally considered to be a leader in utility law.

The final model upon which the Revisor based the first draft of our proposed rules was the Wisconsin intervenor compensation rule, Wisconsin Administrative Code, Chapter PSC 3. The Wisconsin rule was examined because Wisconsin is a neighboring state and because Wisconsin has been employing its compensation rule successfully.

A further reason that the Revisor chose Wisconsin and California compensation rules as models was the fact that these rules were drafted in a direction that the Commission initially favored. The Commission particularly liked the system of preliminary determination on eligibility found within both state compensation rules.

The Commission felt that a preliminary determination was the most fair system for the intervenor, the Commission and the utility companies. Under this method, an intervenor would not have to risk costly participation without at least a presumptive determination of compensation eligibility. The system is fair for the Commission, because it sets up objective criteria upon which the Commission may rely in determining eligibility. It also establishes certain information and financial filings which all compensation applicants must submit. Finally, the Commission deemed the preliminary eligibility determination most fair to the utility companies. The intervenor must prove the intervenor's value to the proceeding, using certain objective criteria, before compensation will be granted.

After the Revisor submitted a first draft, using the aforementioned models, the draft rule went through a process of reworking within the Commission staff. The Commission then published a Notice of Intent to Solicit Outside Information in the State Register. See 14 S.R. 115 (July 17, 1989). In its Notice, the Commission published the draft rule and asked for information or opinions from outside sources. The Notice also mentioned the availability of a Commission staff report explaining the draft rules. The Commission in its Notice expressed special interest in receiving comment on the following issues:

1. Part 7831.0100, subparts 11 and 16. Should the definition of

intervenor costs include costs, fees, or charges incurred for judicial appeal or judicial review? Should the definition of proceeding include matters considered during judicial appeal or review?

2. Part 7831.0800, subpart 2. Should the rule governing material assistance state that:

Intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail?

Compensation cannot be denied solely on the basis that the intervenor prevailed?

No one rule criterion for determining material assistance is dispositive?

The Commission received comments from fourteen interested parties in response to its Notice. All comments were considered by the Commission in arriving at the proposed rule. The Commission did not go beyond the comment process and employ a task force. No task force was utilized because of the Commission's extensive experience with the intervenor process, and because of the relatively noncontroversial nature of the rule.

The proposed intervenor compensation rule is reasonable because the Commission has followed the most reasonable methods in arriving at the rule. By employing the Revisor to write the first draft, the Commission began with a product which would be viewed by interested parties as objective. The models upon which the Revisor based his draft are time-tested, working solutions to the intervenor compensation issue. The administrative models, and the resulting proposed rule, are viewed by the Commission as the fairest approach to intervenor compensation. To give interested parties a chance to comment on the rule's fairness, and any other aspect of the rule, the Commission published the draft rule and solicited comment from interested parties. The Commission has employed reasonable methods to arrive at a reasonable rule for intervenor compensation, and the Commission therefore proposes this rule for adoption.

#### B. Reasonableness of Individual Rules

The following discussion addresses the specific provisions of the proposed rules.

#### **7831.0100 DEFINITIONS**

##### **Subp. 1. Scope.**

The terms used in this chapter are assigned the meanings given them in part 7831.0100. This is reasonable in order to establish a frame of reference for the rule.

## **Subp. 2. Attorney fees.**

Under Minn. Stat. Section 216B.16, subd. 10 and Minn. Stat. Section 237.075, subd. 10, the Commission may order a utility to pay all or a part of a party's intervention costs in a rate proceeding when the intervenor fulfills certain criteria. A definition of intervention costs is necessary to implement these statutes.

"Reasonable attorneys fees" are included under the term "other reasonable [intervention] costs" under PURPA, the federal utility regulation statute. The Wisconsin intervenor compensation rule includes "reasonable attorney fees" under the definition of "compensable [intervenor] costs". It is therefore reasonable to provide a definition of reasonable attorney fees, as a necessary factor in intervention costs.

The proposed definition of attorney fees provides objective criteria which the Commission may employ to determine if attorney fees are reasonable, within the definition of intervenor costs. Attorney billings and costs must be submitted to the Commission by the applicant. To ensure fairness in billing rate, attorney costs must be computed at the rate normally charged by that attorney for comparable services, or at the prevailing market rate, whichever rate is lower. These are appropriate measurements of compensable attorney fees within the definition of intervention costs.

## **Subp. 3. Attorney General.**

The proposed definition of the term "Attorney General" is reasonable because it will help avoid needless repetition of the full title of the Minnesota Residential and Small Business Utilities Division of the Office of the Attorney General.

## **Subp. 4. Commission.**

The proposed definition of the term "Commission" is reasonable because it will help avoid needless repetition of the full title of the Minnesota Public Utilities Commission.

## **Subp. 5. Compensation.**

The proposed definition of compensation follows closely the wording of the two relevant intervenor compensation statutes. It is a reasonable means of expressing the statutory concept of payment to a party of all or part of its intervention costs in a proceeding.

## **Subp. 6. Department.**

The proposed definition of the term "Department" is reasonable

because it will help avoid needless repetition of the full title of the Minnesota Department of Public Service.

**Subp. 7. Expert witness fees.**

Under Minn. Stat. Section 216B.16, subd. 10 and Minn. Stat. Section 237.075, subd. 10 the Commission may order a utility to pay all or a part of a party's intervention costs in a rate proceeding when the intervenor fulfills certain criteria. A definition of intervention costs is necessary to implement these statutes.

"Expert witness fees" are included under the term "other reasonable [intervention] costs under PURPA, the federal utility regulation statute. The Wisconsin intervenor compensation rule includes "expert witness fees" under the definition of "compensable [intervenor] costs". It is therefore reasonable to provide a definition of expert witness fees, as a necessary factor in intervention costs.

Under the proposed definition, expert witness fees are the reasonable, itemized billings and costs incurred by an intervenor for the services of an expert witness. The requirement of itemization puts the intervenor on notice that the intervenor must produce hard data which can be reviewed by all parties as well as the Commission. The definition further requires that the expert witness fees be reasonable in order to be compensable.

The proposed definition of expert witness fees provides logical, objective criteria which the Commission may employ to determine if expert witness fees are reasonable, within the definition of intervenor costs. To ensure fairness in billing rate, expert witness fees must be computed at the rate normally charged by that witness for comparable services, or at the prevailing market rate, whichever rate is lower. These are reasonable measurements of compensable witness fees within the definition of intervention costs.

**Subp. 8. Final determination.**

The proposed definition has the meaning given it in Minn. Stat. Section 216B.16, subd. 2, par. (c), and 237.075, subd. 2, par. (c). It is reasonable for the rule to be consistent with the statute in this regard.

**Subp. 9. Insufficient financial resources.**

The two-prong test for compensation under Minn. Stat. Section 216B.16, subd. 10 and Minn. Stat. Section 237.075, subd. 10 is a finding of material assistance and insufficient financial resources. A definition of insufficient financial resources is necessary to implement the statute.

The "but-for" test found in the proposed definition is taken from the Wisconsin and California compensation rules. The Wisconsin rule describes a person eligible for compensation as a party "...who would find full intervention in the proceeding to be significant financial hardship without compensation from the public service commission". Wisconsin PSC 3.03 (2). Under the California rules, one part of the definition of "significant financial hardship" (similar to our insufficient financial resources) is that the uncompensated party "cannot afford to pay the costs of effective participation". California Rule 76.52(f)(2). Wisconsin and California rules have been used successfully and together add up to a reasonable basis for the proposed definition of insufficient financial resources.

To provide reasonable, objective criteria upon which to judge the issue of insufficient financial resources, the proposed rule states four factors to consider under 7831.0800 sub. 3.

#### **Subp. 10. Intervenor.**

The proposed rules define intervenor as a person permitted to intervene in a proceeding, but intervenor does not include a provider of telephone services of any kind, or an agency, representative, employee, authority, or political subdivision of a federal, state, county, home rule charter or statutory city or town government or combination of them.

The exclusion of any entity which provides telephone service of any kind is taken directly from Minn. Stat. Section 237.075, subd. 10.

The exclusion of governmental units from the definition of intervenor stems from the fact that governmental bodies have their own budgets and some discretion over taxing and spending. It would, therefore, be unlikely for the Commission to find that the governmental unit lacked sufficient resources to cover the costs of intervention. As an example, in an NSP gas rate case, Docket No. G-002/GR-85-108, the Commission denied compensation for the City of St. Paul. The City had the available resources, but did not allocate sufficient resources in its budget to cover the costs of intervention.

A further reason for excluding local governments from the definition of intervenor is the fact that these bodies often participate through testimony at public hearings rather than through formal intervention.

#### **Subp. 11. Intervenor Costs.**

Under PURPA, attorney fees, expert witness fees, and other reasonable costs are included under the concept of "compensable



[intervenor] costs".

In order to maintain consistency with the definition of "proceeding" found at 7831.0100 Subp. 16, which excludes matter considered during judicial appeal or review, the proposed definition of intervenor costs excludes costs, fees, or charges incurred for judicial appeal or judicial review.

#### **Subp. 12. Issue.**

The proposed definition of issue is a reasonable clarification of a term which is used frequently throughout the proposed rules, particularly in the context of the factors to be considered for material assistance. For example, the proposed rules direct the Commission to consider whether the intervenor has simplified complex issues, or whether the intervenor's position on an issue was relevant. (See 7831.0800 Subp. 2[B] and [C]).

#### **Subp. 13. Materially assisted.**

Material assistance is an essential element of the statutory two-prong test for intervenor compensation (along with insufficient financial resources). A definition of material assistance is therefore necessary to implement the statute.

In 7831.0800, Subp. 2, the Commission is directed to six factors which it must consider in determining the issue of material assistance. This proposed definition of material assistance provides an overall "philosophy" or "framework" for the application of the six factors. Judged overall, the intervenor's participation and presentation must be "useful", "seriously considered", or must otherwise have "substantially contributed to the Commission's deliberations in the proceeding".

#### **Subp. 14. Other reasonable costs.**

"Other reasonable costs" are listed as potentially compensable items under PURPA and the Wisconsin compensation rules.

A person's services, computed at a rate normally charged by that person, or at fair market rate, is a compensable item. Again, this two-part test for rate computation provides a choice for the more fair method. The person's services could include clerical help and other staff support.

Out-of-pocket expenses listed as potentially compensable under the proposed rule derive from the Wisconsin rule and its logical extensions. These items are reasonable because they are limited to expenditures **directly related to participation in the proceeding**, and would thus not provide compensation for expenditures which would have been incurred regardless of intervention.

### **Subp. 15. Position.**

The definition of position used in the proposed rules denotes a separate, distinct viewpoint advocated by the intervenor in connection with a relevant issue before the Commission. This definition is particularly useful under 7831.0800 Subp. 2, the list of factors to be considered to determine material assistance. The six material assistance factors focus on certain criteria for the intervenor's viewpoint, including uniqueness, relevance, usefulness, and clarity. The definition of position defines the types of intervenor's viewpoints which must fulfill the material assistance criteria.

### **Subp. 16. Proceeding.**

Minn. Stat. Section 216B.16, subd. 10 allows intervenor compensation in an amount not to exceed \$20,000 per intervenor in any proceeding under Minn. Stat. Section 216B.16, the statute governing rate change proceedings for gas and electric utilities. Minn. Stat. Section 237.075, subd. 10 allows intervenor's compensation in an amount not to exceed \$20,000 per intervenor in any general rate case under Minn. Stat. Section 237.075, the statute governing rate change proceedings for telephone companies. The definition of proceeding is thus any rate change proceeding under Minn. Stat. Section 216B.16 or any general rate case under Minn. Stat. Section 237.075.

If an intervenor has participated in a proceeding from its inception through its conclusion, the question may arise as to whether separate compensation can be awarded for the intervenor's participation in the different procedural stages. This question was answered in the Commission's ORDER DENYING INTERVENOR COMPENSATION TO THE CITY OF SAINT PAUL, Docket No. G-002/GR-85-108. In this Order, the Commission stated that the different procedural elements that comprise a proceeding do not each rise to the level of a separate proceeding. The proposed definition of proceeding includes the following procedural elements to be included in one proceeding: motions; orders; settlements; prehearing conferences, determinations, or procedures; contested case hearings; reconsiderations or rehearings; and remanded hearings.

The proposed rule specifically excepts matters considered during judicial appeal or review from the definition of proceeding. This is consistent with Public Utilities Commission Practice and Procedure rules, Chapter 7830, which do not include judicial review or appeal within the definition of proceeding.

### **Subp. 17. Telephone company.**

The proposed definition of telephone company has the meaning

given it in Minnesota statutes, and thus provides consistency between statute and rule.

**Subp. 18. Utility.**

The proposed rule provides a definition of utility which derives from Minnesota statute, and is reasonable because of its consistency with the statute.

**7831.0200 PURPOSE**

The purpose for the rules, as stated in this section, is to provide procedural and substantive criteria for intervenor reimbursement as provided for in Minn. Stat. Section 216B.16, subd. 10 and Minn. Stat. Section 237.075, subd. 10.

The Commission is empowered to establish procedural and substantive criteria under Minn. Stat. Section 216B.08 (1986), which authorizes the Commission to make rules in furtherance of its regulatory duties. The Minnesota legislature has charged the Commission with ordering intervenor's compensation when the intervenor has passed the broad statutory two-prong test of insufficient financial resources and material assistance. It is entirely reasonable, indeed a necessity, for the Commission under the proposed rules to provide the procedural and substantive framework for the test.

**7831.0300 REQUEST FOR COMPENSATION**

**Subp. 1. Request filing and notice.**

The specifications for the proposed compensation filing and notice are largely taken from the California rule.

The requirement of service on each known party to the proceeding is in conformity with overall procedure, and provides the best possible protection for all parties.

The applicant must file the request as soon after notice of a proceeding or prehearing conference as is reasonably possible, but at least 75 days after the proceeding begins or 30 days before the beginning of evidentiary hearings in the proceeding, whichever occurs first. These time requirements are reasonable, because they provide the intervenor sufficient time after the commencement of the proceeding to file a request, yet require the filing of applications before the time the Commission is focused on evidentiary hearings.

**Subp. 2. General information.**

The general filing requirements of name, address, type of organization and purpose, provide the minimum information with

which the Commission can distinguish the intervenor and evaluate the application.

**Subp. 3. Insufficient financial resources.**

Under Minn. Stat. Section 216B.16, subd. 10 and Minn. Stat. Section 237.075, subd. 10, a finding of insufficient financial resources is one of the two threshold requirements for intervenor compensation. In order to evaluate the statutory factor of insufficient financial resources, the Commission requires that the applicant submit a summary description of finances, distinguishing between funds committed to specific projects and discretionary funds. The application must specifically address the four factors listed in 7831.0800 sub. 3. These factors form the reasonable, objective criteria upon which the Commission may base a finding on insufficient financial resources.

The proposed rule sets out the following items which must be included in the summary description of finances:

(1) A listing of actual annual revenues and expenses for the previous year, projected revenues and expenses for the current year, and principal revenue sources;

This requirement is taken from the Wisconsin intervenor compensation rules. It is a necessary filing because it allows the Commission to assess the overall financial "picture" of the intervenor.

(2) A listing of actual assets and liabilities or balance sheet for the previous year and projected assets and liabilities or balance sheet for the current year;

This, too, is a requirement modeled after the Wisconsin rules. Calculated along with revenues and expenses, this requirement allows the Commission to see a complete picture of the intervenor's financial health.

(3) The amount of assets and revenues that are firmly committed to other expenditures and how intervention, but for an award, may constrain programs of public benefit;

Not all assets or sources of revenue are available to the intervenor's discretion. An intervenor's internal rules, for example, may limit the intervenor's control over funds.

Even if the funds are technically available for the costs of intervention, expenditure of the funds may prohibit implementation of worthwhile programs. This fact should be available for Commission review, so that competing interests may be weighed.

(4) The amount of its own funds the applicant will spend on its participation;

The intervenor is expected to expend funds which are available to it if it has sufficient financial resources. This subpart requires the intervenor to make a showing of the funds it will be expending on participation in the proceeding.

(5) An explanation of why the applicant cannot use the excess of assets over liabilities, if any, to cover its intervenor costs;

This requirement is taken from the Wisconsin intervenor compensation rules. It is a logical followup to subpart (2), which is also based on the Wisconsin rules. If the intervenor's filed information shows that it has an excess of assets over liabilities, it is reasonable to require the intervenor to provide this explanation.

(6) If the applicant is an organization, the scope or amount of benefit in comparison to the organization's estimated intervenor costs.

This requirement measures the amount of "windfall" which may befall the organization if it prevails in the proceeding. If the intervenor may be greatly benefited financially in comparison to its cost, it may be reasonable to require a greater financial contribution than otherwise would be required.

This requirement in subpart (6) is based on the California intervenor compensation rules.

Given the costs of today's legal participation, the statutory "cap" of \$20,000 per proceeding may fall far short of the intervenor's actual costs. Two items in this subsection attempt to save intervenor costs where possible. First, if the applicant files a copy of its audited financial statements, these statements may be referenced to satisfy the financial disclosure requirements. Second, if the Commission has determined within the previous year that the applicant has met its burden of showing insufficient financial resources, and if the applicant can attest that there has been no substantial financial change, the applicant may refer to that decision to satisfy the financial disclosure requirements. These are reasonable means of saving unnecessary intervenor cost while providing sufficient information to the Commission.

#### **Subp. 4. Budget.**

The applicant must file an estimate of its intervenor costs, the basis for the estimate, and a specific budget showing the total compensation, not exceeding the statutory cap, to which the

applicant believes it may be entitled.

The budget, taken together with the applicant's financial disclosure under Subp. 3, will enable the Commission to arrive at a determination of insufficient financial resources as part of the process of preliminary determination on eligibility under 7831.0500 discussed below. It is reasonable for the Commission to require evidence of both parts of the financial picture: the applicant's overall financial state, and the costs it anticipates incurring in the proceeding.

**Subp. 5. Statement of participation.**

The applicant must file a statement of its planned participation in the proceeding, along with an assessment of the nature, extent, and significance of the participation.

Just as the Commission must utilize the financial disclosure filing to form a preliminary determination of insufficient financial resources, the Commission must review the applicant's statement of participation if it wishes to form a preliminary determination of material assistance. Although the Commission is not bound to make a preliminary determination of material assistance, it is reasonable for the Commission to require a filing which will enable it to make a preliminary determination of material assistance, should it so choose.

**7831.0400 STATEMENT IN RESPONSE**

This portion of the proposed rule is patterned after the existing California compensation rules.

By allowing interested parties 15 days within which to file a responsive statement, the proposed rules keep the process of determining compensation an open one. The Department, the Office of the Attorney General, or other party may use this opportunity to comment on any application. It is especially helpful to allow comment at this juncture, since the Commission will shortly be issuing a preliminary determination on eligibility, which will have a presumptive effect on final determination.

**7831.0500 PRELIMINARY DETERMINATION ON ELIGIBILITY**

**Subp. 1. Required determination.**

As previously discussed under Section IV(A) of this Statement, the Commission feels that a system of preliminary determination of intervenor compensation is most fair for the Commission, the intervenor, and the utility companies.

Under this subpart, 45 days are allowed for the preliminary determination. The time frame is sufficient for Commission

deliberations, yet provides the intervenor a response within a reasonable period from application submission.

The Commission is required to determine two factors, whether the applicant is considered an intervenor under the rule, and whether the intervenor has made a showing of insufficient financial resources.

A threshold determination of "intervenor" is necessary in order for the Commission to decide if the applicant is properly before the Commission with a request for compensation. If the applicant is not a person who is entitled or permitted by law, or permitted under rule of the Commission or by order of the presiding officer, to intervene in a proceeding (the definition of "intervenor" under 7831.0100 Subp. 10), no consideration should be given to the applicant's compensation request.

The Commission must next determine if the applicant has made the requisite showing of insufficient financial resources. This is a reasonable requirement because it is one of the two statutory tests for intervenor compensation. It is also a determination which can be made preliminarily, because the applicant's financial disclosure statement and budget, which are required in the initial filing, will form a factual basis for the determination. Unlike the other main statutory test, material assistance, insufficiency of financial resources can be measured by objective data. There is no reason that a preliminary determination should not be made, giving all parties greater certainty regarding the eventual compensation determination.

#### **Subp. 2. Discretionary determinations.**

Although the Commission must give a preliminary determination regarding intervenor status and financial capability, certain other preliminary determinations are discretionary.

The Commission may make a preliminary determination on material assistance. This is a reasonable preliminary finding, because material assistance is one of the two main statutory tests for intervenor compensation. While allowing this determination, the proposed rules do not require it because it is a "softer" conclusion than that of financial resources. Financial data will seldom be helpful in determining material assistance issues. The Commission also recognizes that in some cases issues and information developed during the proceeding itself may result in variations in parties' positions. It would be unfair to all parties to require a preliminary determination on this issue, when in some cases a finding of material assistance will have to be reexamined at the close of the proceeding.

The Commission may also make a preliminary determination on the following factors:

B. Address whether the application lists duplicate positions taken or presentations made by staff, or whether they may be more economically or efficiently presented under common representation;

C. Recommend use of common legal representation in cooperation with other applicants or participants;

D. Provide a listing of other known applicants and participants advocating or proposing substantially similar positions or presentations;

E. Point out any unrealistic expectations for compensation; or

F. Address any other information that may affect an applicant's claim for an award of compensation for intervenor costs.

These preliminary discretionary determinations are reasonable because they focus on matters which the intervenor should be aware of early in the proceeding. Items B, C and D address issues of economy and efficiency, which are concerns for all the parties. Factors B and C reflect PURPA, which states that a preliminary determination may require that persons with the same or similar interests have a common legal representative in the proceeding as a condition to receiving compensation. It is reasonable to be allowed to preliminarily determine these matters now, when the various parties may benefit by consolidating their representation.

Paragraph E allows the Commission to make a preliminary determination on whether the intervenor's expectations for compensation are unrealistic. This factor is based on the Commission's ORDER DENYING INTERVENOR COMPENSATION in the Evan J. Henry Case, Docket No. P-421/GR-83-600. In this decision, the Commission found that the intervenor, Mr. Henry, began his participation in the rate case prior to the passage of Minn. Stat. Section 237.075, subd. 10. The intervenor therefore could not have had a reasonable expectation of compensation for his participation. It is reasonable for the proposed rules to allow such a determination before the intervenor has undergone the expense of participation.

The last discretionary determination, found at Paragraph E, allows the Commission a broad category under which it may form a preliminary determination of intervenor eligibility. It is reasonable to allow the Commission some latitude in case there are unanticipated circumstances which would warrant a preliminary determination.

### **Subp. 3. Effect of preliminary determination.**



This proposed subpart is a blend of the California and Wisconsin rules, and PURPA.

Under the Wisconsin rules, the Wisconsin commission determines insufficient financial resources and material assistance at the beginning of the proceeding, subject to reconsideration. At the end of the proceeding, the applicant must submit a claim for approved costs, which the commission will grant unless the applicant failed to provide the representation for which its application was approved.

Under the California rules, the California commission makes a preliminary determination on insufficient financial resources; a party who has insufficient financial resources is eligible to receive compensation. After the proceeding, an eligible party requests compensation, which is granted if the person provided material assistance.

PURPA similarly states that a State Commission's procedure for awarding compensation may include a preliminary determination on insufficient financial resources.

Our proposed rules require the Commission to preliminarily determine insufficient resources, which creates a presumption in favor of a finding of insufficient financial resources at the close of the proceeding. The Commission may also initially determine material assistance, which creates its own presumption. If no preliminary determination of material assistance, or any other factor under 7831.0500, subp. 2, is made, no presumption is created.

The reason for having a presumption against the applicant is to alert the applicant that a preliminary determination against him or her is a good indication that compensation will be denied after the proceeding. This is fairer than letting the applicant think the Commission's preliminary determination will be easily changed. Otherwise, the applicant would be encouraged to expend sums that the Commission would probably deny, based on its preliminary determination. This approach is also fairer to the applicant than not having a preliminary determination at all, then denying compensation after the proceeding, when the applicant has already invested time and money.

The presumptions in this subpart are also fair to the parties if the Commission's preliminary determination is to award compensation. The applicant will surely request compensation at the end of the proceeding, and is entitled to some assurance that the Commission will not change its preliminary determination without sufficient reason. The presumption in favor of awarding compensation protects the applicant while still allowing the Commission flexibility to deny compensation if warranted. For

instance, an applicant may state at the beginning of the proceeding that it will produce certain evidence that it does not, or it may acquire additional money during the proceeding to afford the costs of intervention.

#### **7831.0600 CLAIM FOR COMPENSATION**

##### **Subp. 1. Filing claim.**

Under the proposed rules, the intervenor must file a claim with the Commission within 90 days after the later of:

A. The date the Commission issues its final determination and the time for petitioning for reconsideration or rehearing has elapsed; or

B. The date the Commission issues its order following reconsideration or rehearing.

By including the time for reconsideration or rehearing, the proposed rules are meant to eliminate situations in which claims would most likely be revised or increased. The proposed rule is reasonable because it allows the greatest possible certainty for intervenor and Commission.

##### **Subp. 2. Required information.**

The proposed rule makes a further requirement that the claiming intervenor provide a detailed description of the costs of its participation, the relationship of costs to issues considered, and the material assistance of the intervenor. This presentation is necessary for the Commission's final deliberations on the statutory two-prong test for compensation.

##### **Subp. 3. Response.**

This proposed subpart is modeled after the California compensation rules. By allowing all parties 30 days to respond at this point, petitions for reconsideration or rehearing may be reduced.

##### **Subp. 4. Reply.**

The claiming intervenor has the burden of producing and defending the required information for its application and claim. By allowing the intervenor 15 days in which to file with the Commission a reply to a response under subpart 3, the proposed rule allows the intervenor to complete its information obligation.

##### **Subp. 5. Amended claim.**

Remanded hearings are included under the definition of proceeding in 7831.0100 Subp. 16. Under the definition, a remanded hearing is a procedural or supplemental matter which is considered part of the main proceeding if it is decided or conducted by the Commission or an administrative law judge on an issue or position considered in or supplemental to the main proceeding.

Under the Minnesota intervenor compensation statutes, the claiming intervenor is eligible for a maximum of \$20,000 per proceeding. Since a remanded hearing is considered part of the main proceeding, an amended claim under this subpart is necessary rather than a separate claim for compensation.

#### **7831.0700 FINANCIAL REVIEW**

This proposed subpart is patterned after the California compensation rule. In the California rule, however, the focus is entirely on an audit of the intervenor's books and records. An audit, which can be a highly expensive undertaking, is more appropriate in California, where an intervenor's compensation award is unlimited by statute. In Minnesota, where statutes provide a \$20,000 compensation cap, the cost of the audit could be a disproportionate part of the award.

The proposed rule allows for a request by the Commission or its staff for further information showing the intervenor's costs incurred and financial condition. A full picture of the financial burden of participation includes revenues and assets as well as costs. If the financial information produced by the intervenor does not sufficiently clarify or substantiate the claim, the Commission has the option of auditing the intervenor.

#### **7831.0800 AWARD OF COMPENSATION**

##### **Subp. 1. Decision.**

The Commission is bound to issue a decision awarding or denying compensation within 120 days of the filing of a claim or within 45 days of the filing of additional information or an audit, whichever is later. This proposed subpart is reasonable because it allows the Commission sufficient time to deliberate and review supplemental information, yet provides an answer for the intervenor within a reasonable period.

##### **Subp. 2. Materially assisted.**

Because material assistance is one of the two statutory tests for intervenor compensation under Minn. Stat. Section 216B.16, subd. 10 and Minn. Stat. Section 237.075, subd. 10, it is an absolute prerequisite for compensation under the proposed rules. The proposed list of six determinative factors is especially helpful because the concept of material assistance does not lend itself

to hard data measurement.

In addition, the Minnesota Supreme Court favors fashioning a rule which selects certain criteria to implement the two statutory tests for compensation. Application of Northwestern Bell Telephone, 386 N.W.2d 723 (Minn. 1986).

In the Northwestern Bell case, the Court warned that the Commission must not premise a compensation award solely on the fact that a party prevailed on a contested issue. The Court stated that "...to prevail is not the sine qua non for reimbursement, but only one of a number of criteria to be considered." Northwestern Bell at 727. The Minnesota Supreme Court thus clearly favors consideration of a number of factors in deciding on an award of intervenor compensation. For this reason, the proposed rule states that no one factor is to be dispositive in determining material assistance.

The six factors to be considered in determining material assistance are:

A. Whether the intervenor represented an interest that would not otherwise have been adequately represented in the proceeding;

This factor derives from the California rule and reflects the public policy behind the intervenor compensation concept. The whole purpose of the compensation statutes is to allow a fair hearing to all interested qualified parties, regardless of the parties' financial resources.

B. Whether the intervenor's position or presentation on an issue was relevant or important for a fair decision in the proceeding.

This is an important factor. It is a reasonable criterion, because it would be possible for a party to provide extensive input into proceedings, yet provide little or no true assistance to the deliberations. Such a party should not be compensated, and this proposed subsection reflects that policy.

C. The intervenor's ability to clarify complex information, to simplify complex issues, to make timely and appropriate procedural recommendations, or to otherwise contribute to the efficiency or progress of the proceeding.

This factor focuses on the word **assistance** in material assistance. No matter how sophisticated a party's presentation, it is useless if it does not assist the progress of the proceeding. Efficiency is a major consideration for the Commission, because efficient, cost-conscious proceedings are most helpful for the intervenor, the Commission, and the utilities.

D. Whether the intervenor's position or presentation promoted a public purpose or policy;

An intervenor could provide a most efficient, relevant, timely and clear presentation, yet be advocating a position which is against public policy. The position could also be of no application beyond the intervenor's limited set of circumstances. This factor allows the Commission to consider these possibilities in determining material assistance.

E. Whether the intervenor raised new or different arguments in support of a position, provided materially useful information not of common knowledge, raised a different issue, presented or elicited new or different facts or evidence, or took a different position from that of another party;

This criterion is taken from the Northwestern Bell case cited above. It is a reasonable factor to consider because it reflects the Minnesota Supreme Court's view of reasonable criteria.

F. Whether the Commission adopted, in whole or in part, a position advocated by the intervenor.

This factor is also taken from the Northwestern Bell case. In the Bell case the Court stated that the Commission may consider whether an intervenor prevailed in determining compensation eligibility. The Court cautioned, however, that a failure to prevail should not be the sole determinative factor.

### **Subp. 3. Insufficient financial resources.**

Because insufficiency of financial resources is one of the two statutory tests for intervenor compensation under Minn. Stat. Section 216B.16, subd. 10 and Minn. Stat. Section 237.075, subd.10, it is an absolute prerequisite for compensation under the proposed rules.

The four factors proposed for Commission consideration are objective criteria for determining if the intervenor would be financially unable to afford intervenor costs incurred to participate effectively in the proceeding, but for reimbursement. (See 7831.0100 Subp. 9).

The four factors to be considered in a determination of insufficient financial resources are as follows:

A. Whether the intervenor's financial status, following examination of the financial information provided in the intervenor's request and claim, and audit, if any, indicate the intervenor can afford, in whole or in part, its intervenor costs.

This paragraph, which is derived from PURPA and the Minnesota intervenor compensation statutes, reflects the essence of the "but-for" test for financial resources: Would the intervenor be precluded from effective participation, but for intervenor compensation? The paragraph also distinguishes this determination from the preliminary determination under 7831.0500 by providing for review of all financial disclosure under the request and claim, including an audit where applicable.

B. Whether the intervenor made use of common legal representation, or otherwise consolidated positions or presentations, when appropriate.

This is a reasonable criterion because economy and efficiency are important goals for all the parties to the proceeding. If an intervenor's position was presented well, but was duplicative of another party's presentation, the intervenor may not be eligible for compensation.

C. Whether the intervenor costs alleged in the intervenor's claim reflect reasonable attorney fees, expert witness fees, and other reasonable costs, as defined in part 7831.0100.

The definitions of "attorney fees", "expert witness fees" and "other reasonable cost" under 7831.0100 provide formulas for determining reasonableness of these costs. Under this paragraph the formulas are used as one criterion for determining sufficiency of financial resources.

D. Whether a partial award of compensation may be appropriate.

An intervenor may have made a sufficient showing of insufficient financial resources to justify partial compensation, yet not be eligible for full reimbursement. This paragraph enables the Commission to allow such a partial claim. This provision is reasonable, because it may allow valuable input from entities which would otherwise be prevented from participation.

#### **Subp. 4. Bases for commission decision.**

For each issue addressed by the intervenor, the Commission must issue its decision awarding or denying compensation. The decision must describe the bases for deny or awarding compensation.

This is reasonable because it will provide the greatest information for all the parties. Demands for reconsiderations will be lessened, because the parties will be able to understand the rationale behind the award or denial. Future parties will be able to make a reasoned decision regarding joining a proceeding, based on prior Commission decisions. In the long run, this requirement for the Commission may save all parties time and

money.

The Minnesota Court of Appeals has indicated that written findings and conclusions are necessary when an agency acts officially. A reviewing Court will find a substantive agency decision which is unsupported by written findings arbitrary and capricious. Such decisions are unfair to the appealing body and highly impractical for the reviewing body. See, Reserve Mining Company v. Minnesota Pollution Control Agency, 364 N.W.2d 411 (Minn. Ct. App. 1985) and In Re Authorization to Discharge and Construct Waste Water Treatment Facilities, 366 N.W.2d 118 (Minn. Ct. App. 1985).

**Subp. 5. Maximum amount awarded.**

This proposed subpart restates the "cap" on intervenor compensation as stated in Minn. Stat. Section 216B.16, subd. 10 and Minn. Stat. Section 237.075, subd. 10.

**Subp. 6. Payment.**

The utility or telephone company which was the subject of the proceeding has been apprised of the possibility of intervenor compensation by means of the preliminary determinations under 7831.0500. The utility or telephone company has been allowed to respond to the application, and to review the intervenor's claim filings and the Commission's decision. Because the utility has been fully informed throughout the proceeding, it is not unreasonable to require the utility or telephone company to pay an award of compensation within 30 days of the Commission's decision.

In order to complete the file, the utility or telephone company must furnish proof that it paid the amount of compensation awarded to the intervenor.

Fairness requires that if the award is made in a proceeding involving more than one utility or telephone company, payment must be made by each utility or telephone company in a proportion determined by the Commission. Since the Commission has previously made detailed findings on material assistance and insufficient financial resources for **each issue** decided by the Commission, the Commission should be able to proportion the award among the utilities or telephone companies most affected by each issue.

**V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING**

Minn. Stat. Section 14.115, subd. 2 (1988) requires the Commission, when proposing rules which may affect small businesses, to consider certain methods for reducing the impact on small businesses.

Minn. Stat. Section 14.115, subd. 1 (1989 Supp.) defines small business as:

Definition. For purposes of this section, "small business" means a business entity, including farming and other agricultural operations and its affiliates, that (a) is independently owned and operated; (b) is not dominant in its field; and (c) employs fewer than 50 full-time employees or has gross annual sales of less than \$4,000,000. For purposes of a specific rule, an agency may define small business to include more employees if necessary to adapt the rule to the needs and problems of small businesses.

Small businesses regulated by the Commission are not exempt from this statute. Minn. Stat. Section 14.115, subd. 7 (1989 Supp.) states:

Applicability. This section does not apply to:  
(1) emergency rules adopted under sections 14.29 to 14.36;  
(2) agency rules that do not affect small businesses directly, including, but not limited to, rules relating to county or municipal administration of state and federal programs;  
(3) service businesses regulated by government bodies, for standards and costs, such as nursing homes, long-term care facilities, hospitals, providers of medical care, day care centers, group homes, and residential care facilities, but not including businesses regulated under chapter 216B or 237; and  
(4) agency rules adopted under section 16.085.

Small businesses regulated under Chapter 216B or Chapter 237 are utilities and telephone companies. The proposed rules address intervenors. By statute and rule, telephone companies are excluded from the category of intervenor. Although gas and electric utilities may be intervenors, they are most unlikely to qualify for compensation under the proposed rule, because they do not lack sufficient financial resources for intervention. They would thus not be affected as an intervenor under the rule.

Most intervenors are non-profit public interest organizations such as the North American Water Office or the Senior Citizen Coalition. These intervenors do not strictly fit the statutory definition of small business as a business entity, since they are not operated with a profit motive. There are reasons of policy, however, for expanding the definition.

Given the similar statutory objectives behind Minn. Stat. Section 14.115 and the intervenor compensation statutes, all intervenors should be considered small businesses for the purpose of this



part of the rulemaking procedure. Minn. Stat. Section 14.115 was framed as a protection for small business entities which might be impacted unfavorably by a proposed rule. Because of the relatively weak position of these businesses, the legislature required special protections to be an integral part of rulemaking procedure.

The same legislative motive of protection for the financially weak lies behind the intervenor compensation statutes. By focusing on the statutory criterion of insufficient financial resources, the legislature allowed compensation for those participants who would be unable to intervene effectively without it.

Considering all intervenors as small businesses under Minn. Stat. Section 14.115, subd. 2 (1989 Supp.), it must be determined which parts of the statute apply to the proposed intervenor compensation rules. Under the statute, the Commission, when proposing rules which may affect small businesses, must consider the following methods for reducing the impact on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small businesses;
- (b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) the consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and
- (e) the exemption of small businesses from any or all requirements of the rule.

Methods (a), (b) and (c) direct the Commission to consider less stringent compliance and reporting requirements. The intervenor compensation rule, however, has already set out the minimal compliance and reporting requirements for intervenors which will still allow the Commission to make an informed decision. Throughout the intervenor compensation rule, the statutory reimbursement "cap" of \$20,000 per proceeding was kept in mind. As an example, the California method of requiring an audit to be submitted with every intervenor's claim was rejected in favor of less onerous financial filings. The rule consistently favors economy of time and effort in the intervenor compensation proceeding. The Commission cannot require less than the minimal intervenor compliance and reporting requirements already set out

in the rule.

Method (d) does not apply to the proposed rules because the rules do not contain design or operational standards.

Method (e) addresses the exemption of small businesses from any or all rule requirements. The proposed intervenor compensation rule does not exempt small businesses from its provisions. On the contrary, considering intervenors as small businesses, the entire rule is structured for the intervenor/small business.

There is one other possible way in which small business may be affected by the proposed rule. The rule may affect a utility/small business not as an intervenor, but because the rule requires the utility/ small business to expend funds for intervenor reimbursement. Part 7831.0800 subp.6.

Examining the business impact from this perspective, it can be determined that the five statutory methods for reducing impact on small business do not apply.

Methods (a), (b), and (c) do not apply because the intervenor, not the utility/small business faced with possible reimbursement costs, must comply with reporting requirements.

Method (d) does not apply to the proposed rules because the rules do not contain design or operational standards.

Method (e) does not apply because there is no provision under statute or rule for exempting small businesses from possible intervenor compensation obligations.

## VI. LIST OF WITNESSES AND EXHIBITS

### A. Witnesses

In the event that an administrative rulemaking hearing is necessary, this Statement of Need and Reasonableness contains the Commission's verbatim affirmative presentation of the need and reasonableness of the proposed rules.

If a public hearing is held the following members of the Commission and Office of Attorney General Staff will be available to answer questions about the proposed rules or to summarize briefly all or a portion of this Statement of Need and Reasonableness if requested by the Administrative Law Judge:

1. Janet Gonzalez  
Energy Analyst  
Public Utilities Commission

2. Louis Sickmann  
Financial Analyst  
Public Utilities Commission
3. Diane Wells  
Telecommunications Analyst  
Public Utilities Commission
4. Rosellen Condon  
Office of the Attorney General  
Public Utilities Commission Division
5. Ginny Zeller  
Staff Attorney  
Public Utilities Commission

B. Exhibits

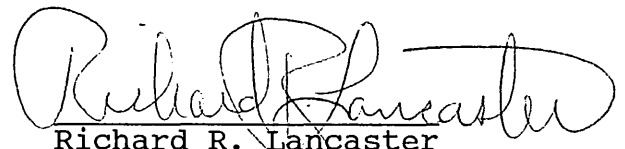
The following documents are referenced in this Statement of Need and Reasonableness:

<u>Exhibit No.</u>	<u>Document</u>
1.	Minn. Stat. §216B.08 (1988)
2.	Minn. Stat. §216B.16, subd. 10 (1988)
3.	Minn. Stat. §237.075, subd. 10 (1988)
4.	<u>Application of Northwestern Bell Telephone,</u> 386 N.W. 2d 723 (Minn. 1986)
5.	Minn. Stat. Ch. 14 (1988)
6.	Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §2601 <u>et seq.</u> (Supp. III 1979)
7.	20 California Rules, Article 18.7
8.	Wisconsin Administrative Code, Chapter PSC 3
9.	Notice of Intent to Solicit Outside Information (14 S.R. 115, July 17, 1989); draft rules
10.	Comments received on the draft rules
11.	ORDER DENYING INTERVENOR COMPENSATION TO THE CITY OF ST. PAUL, Docket No. G-002/GR-85-108
12.	Minn. Rules, Chapter 7830

13. ORDER DENYING INTERVENOR COMPENSATION, Docket No. P-421/GR-83-600
14. Reserve Mining Company v. Minnesota Pollution Control Agency, 364 N.W. 2d 411 (Minn. Ct. App. 1985)
15. In Re Authorization to Discharge and Construct Waste Water Treatment Facilities, 366 N.W. 2d 118 (Minn. Ct. App. 1985)
16. Minn. Stat. §14.115 (1988 and 1989 Supp.)

#### VI. CONCLUSION

Based on the foregoing, the proposed intervenor compensation rule, Minn. Rules, parts 7831.0100 through 7831.0800, are both needed and reasonable.



Richard R. Lancaster

Executive Secretary