STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Permanent Rules Governing the Determination of Significant Investment for Energy Conservation Improvement Programs

Issue Date: October 3, 1988

Docket No. G,E-999/R-85-847

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

The Minnesota Public Utilities Commission (Commission) proposes to adopt a rule relating to significant investments in and expenditures for energy conservation improvements, Minn. Rules, part 7840.1150.

The proposed rule, if adopted, will establish criteria for the Commission to determine whether a proposed conservation improvement program or modified program will result in significant investments in and expenditures for energy conservation improvements.

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 (1986), which provides general authority for the Commission to adopt rules in order to carry out its authorities and duties. One of the Commission's authorities is set forth in Minn. Stat. section 216B.241 (1986). Subdivision 2 of the statute provides:

> The commission may order public utilities to make investments and expenditures in energy conservation improvements, explicitly setting forth the interest rates, prices, and terms under which the improvements shall be offered to customers. The commission shall order at least one public utility to establish a pilot program to make investments in and expenditures for energy from renewable resources such as solar, wind, or biomass. The commission shall evaluate the program on the basis of cost-effectiveness and the reliability of technologies employed. The order of the commission shall provide to the extent practicable for a free choice, by consumers participating in the program, of the device, method, or material constituting the energy

conservation improvement and for a free choice of the seller, installer, or contractor of the energy conservation improvement, provided that the device, method, material, seller, installer, or contractor is duly licensed, certified, approved, or qualified, including under the residential conservation services program, where applicable. The commission may order a utility to make an energy conservation improvement investment or expenditure whenever the commission finds that the improvement will result in energy savings at a total cost to the utility less than the cost to the utility to produce or purchase an equivalent amount of new supply of energy. The commission shall nevertheless insure that every public utility with operating revenues in excess of $50,000,000 operate one or more programs, under periodic review by the commission, which make significant investments in and expenditures for energy conservation improvements. The commission shall give special consideration to the needs of renters and low income families and individuals. Provisions of the previous sentences shall expire on January 1, 1993. Investments and expenditures made pursuant to an order shall be treated for ratemaking purposes in the manner prescribed in section 216B.16, subdivision 6b. No utility shall make an energy conservation improvement pursuant to this section to a building envelope unless it is the primary supplier of energy used for either space heating or cooling in the building.

(Emphasis supplied.)

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

In addition, the Commission has been directed by the Minnesota Court of Appeals to adopt interpretive rules addressing the Commission's criteria for analyzing conservation improvement plans. Hanna Mining Company v. Minnesota Public Utilities Commission, 375 N.W.2d 550 (Minn. Ct. App. 1985).

III. STATEMENT OF NEED

Minn. Stat. ch. 14 (1986) requires the Commission to make an affirmative presentation of facts establishing the need for and reasonableness of the rule 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 rule is discussed below.

The major thrust of the proposed rule is to establish criteria and procedures for the Commission to determine whether a proposed conservation improvement program will result in "significant investments in and expenditures for" energy conservation improvements within the meaning of Minn. Stat. section 216B.241, subd. 2. (1986). The proposed rule is needed because the Commission has been directed by the Minnesota Court of Appeals to adopt interpretive rules addressing the Commission's criteria for analyzing conservation improvement programs. Hanna Mining Company v. Minnesota Public Utilities Commission, supra.

IV. STATEMENT OF REASONABLENESS

The Commission is required by the Administrative Procedure Act, Minn. Stat. ch. 14 (1986) to make an affirmative presentation of facts establishing the reasonableness of the proposed rule. 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, the Task Force Report, and comments from interested persons.

A. Reasonableness of the Rule as a Whole

After Minn. Stat. section 216B.241 (1986), requiring conservation improvement and renewable resource programs, was amended in 1983 to require significant investments in and expenditures for energy conservation improvements, the Commission established a Task Force to address the various policy issues. One policy issue was how to determine whether a utility made a significant investment in and expenditure for a conservation improvement program. The Task Force consisted of six utility representatives, six representatives of community-based groups and local units of government, and three representatives of state government. In September of 1984, the Task Force submitted its Final Report in which it recommended criteria to be used in evaluating significant investments. The Commission has incorporated the Task Force's recommendations in the proposed rule. See proposed rule part 7840.1150, subpart 1, items B, C, D, E, and F.

On October 24, 1985, the Court of Appeals of Minnesota found that the criteria used by the Commission in determining significant investments were an interpretitive rule and, hence, the Commission was required to follow the adoption procedures of the Administrative Procedure Act, Minn. Stat. ch. 14 (1986). Hanna Mining Company v. Minnesota Public Utilities Commission, supra.

In response to this directive, the Commission published a Notice to Solicit Outside Opinion in the State Register. See 10 S.R. 1478 (December 30, 1985). In its Notice, the Commission described the criteria recommended by the Task Force and asked commenters to discuss whether significant investments should be defined or whether specific criteria should be used to determine significant investments. The Notice also asked what criteria should be used and whether the rule should require the submission of data to evaluate significant investments.

The Commission received sixteen comments in response to its Notice to Solicit Outside Opinion. Some of the commenters suggested defining significant investments as a specific percentage of gross revenues, e.g. 1%. This view was supported by other commenters. See the February 14, 1986 comments of the Natural Resources Corporation, the February 13, 1986 comments of the Minnesota Department of Energy and Economic Development, the February 12, 1986 comments of the West Hennepin Human Services Planning Board, the February 3, 1986 comments of the Lakes and Pines Community Action Council, Inc., and the January 9, 1986 comments of the Arrowhead Economic Opportunity Agency.

However, the majority of commenters supported the criteria recommended by the Task Force. See the December 31, 1985 comments of the Wright-Hennepin ECA, the February 5, 1986 comments of the Red Wing Energy Education Center, the February 12, 1986 comments of the Minnesota Department of Public Service, the February 13, 1986 comments of Minnesota Power, the February 13, 1986 comments of the Inter-City Gas Corporation, the February 13, 1986 comments of Peoples Natural Gas Company, the February 13, 1986 comments of Northern States Power Company, the February 13, 1986 comments of Minnegasco, the February 13, 1986 comments of the City of Richfield, the February 18, 1986 comments of Otter Tail Power Company, and the February 21, 1986 comments of the City of Thief River Falls.

Some of the commenters also suggested additional criteria beyond the criteria recommended by the Task Force. See the February 18, 1986 comments of Otter Tail Power Company, the February 13, 1986 comments of the City of Richfield, and the February 13, 1986 comments of Minnegasco. The Commission evaluated these suggestions in light of its experience in reviewing utility conservation improvement programs and added criteria to the

proposed rule. See proposed rule part 7840.1150, items A, G, H, and I.

The proposed rule consists of nine criteria for determining significant investments in and expenditures for energy conservation improvements. The proposed criteria have been applied in specific cases based upon the particular facts of each case. See Order Approving Northern States Power Company's (Electric Utility) Conservation Improvement Program and Requiring New Projects and Informational Filings In the Matter of the Implementation of an Energy Conservation Program for Northern States Power Company (Electric Utility), Docket No. E-002/M-87-234 (January 27, 1988). Based on its experience and expertise in reviewing conservation improvement programs, the Commission has found the criteria in the proposed rule to be reasonable. Moreover, participants in the conservation improvement program process have not objected to the application of these criteria. Nor has the Commission any reason to believe that the former Task Force would object to the proposed criteria.

The Commission's selection of qualitative, as opposed to hard-and-fast quantitative, criteria to determine whether a utility program results in "significant investments in and expenditures for energy conservation improvements" is reasonable in light of the difficulty of formulating a quantitative standard that can be fairly applied to all utilities.

Customer needs will change; knowledge of which conservation programs are effective will increase; and the ability of utilities to deliver programs will most likely change. In addition, what is significant for one utility may be insignificant to another because of differences in conservation potential, rates, size of utility, types and sizes of customers, and the different value of conservation to different utilities. Adopting the same standard for every utility cannot take these variables into effect. The Commission must be able to determine significant investment at levels appropriate for each utility.

The Commission recognizes that the proposed criteria are not precise "design" criteria which a utility can use to guarantee approvability of a program. However, the rule establishes a clear procedure for making a significant investment determination and a clear list of criteria which are relevant to the determination and which give the utilities guidance in formulating their programs. As discussed below, this type of approach to standard setting has been found by the Minnesota Supreme Court to provide sufficiently clear guidance to regulated persons.

The Minnesota Supreme Court has recognized that circumstances exist where quantitative standards are impossible to formulate and have upheld against a challenge of unconstitutional vagueness

rules which are similar in nature to the rule proposed here. In Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1979), the court considered the claims of the packaging industry that the Minnesota Pollution Control Agency (MPCA) rules entitled "Regulations for Packaging Review" (hereinafter "Regulations") were so vague and imprecise that prudent persons could not discern how to comply with the regulatory scheme and that, therefore, the Regulations were unconstitutionally vague. The Regulations were adopted pursuant to the requirement of Minn. Stat. section 116F.06, subd. 3 to adopt "guidelines identifying the types of new or revised containers and packaging that are subject to the [MPCA's] review" and addressed the MPCA's authority to prohibit the sale of a new or revised package or container in the state if the MPCA found that the new or revised package constituted "a solid waste disposal problem" or was "inconsistent with state environmental policies."

The Regulations did not establish quantitative standards for distinguishing a "good" package from a "bad" package; such standards were found by the MPCA to be impossible to formulate given the complexity of the subject area. Rather, the Regulations set out a review procedure and ten criteria that the MPCA would consider in reviewing a package. There was no indication as to what weight would be given to each criterion. The court recognized, "[i]t is possible that the relative weights could change for different types of packages" and, "[i]t is unlikely that the regulations could be significantly more precise in this type of regulatory scheme." 289 N.W.2d at 423. In upholding the Regulations against the vagueness attack, the court stated:

> While there is a significant amount of discretion in this kind of agency decision, and plaintiffs' concern with their ability to predict whether a particular package will be approved by the agency is understandable, we are not persuaded that the package review procedure would be overturned. We are impressed by the need for flexibility in the review process. Section 116F.06 and the MPCA's regulations constitute a unique regulatory scheme designed to help alleviate a problem which has only been recently recognized. In the future, knowledge and evaluation tools are likely to change. Different packages might present different kinds of problems, and it would be unwise to require that the same weight be attached to each factor each time a different type of package is reviewed. The criteria established and the decision making provided in the package review process are broad, but the complexity and sophistication of the solid waste generation problem coupled with the other environmental objectives provided in Minn. Stat. ch. 116F mandate the

flexibility contained in the statute and the regulations.

Id. The court was impressed with the fact that the types of factors listed in the MPCA's criteria called for the type of information which was within the knowledge of the packaging industry. The Court stated:

> Additionally, while plaintiffs may not be able to predict the importance the agency will assign to each of the criteria . . . until the MPCA actually begins to review packages, plaintiffs, because of the criteria, will be aware of the general boundaries of the MPCA's consideration. The packaging industry will, for example, know that the MPCA is concerned with whether components of the package might have potential for biological harm, the kinds of resources used in the package, the potential for recycling of the package, the energy needed to produce the package, and the effect the package might have upon generation of solid waste. These are factors about which the packaging industry should have information or which should be part of any conscientious decision involving the material components of a package.

Id.

The principles which emerge from the court's decision in Can Manufacturers are also applicable to the proposed rules establishing criteria for the "significant investment" determination. As in the case of the MPCA's Regulations, the significant investment determination which the Commission is called upon to make by Minn. Stat. section 216B.241, subd. 2 (1986) involves the exercise of a significant amount of discretion and the need for flexibility.

The criteria established by the proposed rule involve evaluation of information of the type which utilities are uniquely knowledgeable. Therefore, the proposed criteria provide the utilities with sufficient guidance to design a conservation improvement program which is likely to be approved by the Commission. The Commission's approach to drafting the criteria is therefore reasonable.

B. Reasonableness of Proposed Rule Part 7840.1150

The following discussion addresses the specific provisions of proposed rule part 7840.1150. This rule governs the approval, disapproval, or modification of a conservation improvement program or modified program regarding significant investments in and expenditures for energy conservation improvements.

The existing conservation improvement program rules contain the procedure for reviewing proposed programs. See Minn. Rules, chapter 7840. Under these rules, utilities must annually file their energy conservation proposals with the Commission. Interested persons have an opportunity to comment on the proposed program and submit proposed modifications to the Commission. The utility, any other interested person, and the Commission itself may propose modifications to a utility's proposed program. The Commission considers all of the information on the proposed program and the proposed modifications to the program when deciding whether the proposed program or modified program will result in significant investments in and expenditures for energy conservation improvements.

Proposed subpart 1 lists nine criteria to be examined when the Commission evaluates whether a program or modified program results in significant investments in and expenditures for energy conservation improvements.

The nine criteria will be considered in analyzing the appropriateness of the program or modified program. Not only is the money expended by the utility considered, but also the benefits and advantages that result from the money expended. The future benefits are considered because they are the return on the funds invested in the program or modified program. The value of an investment is partially measured by the future return it provides. Therefore, considering the cost as well as the benefits of a program or modified program is a reasonable approach to use when determining whether a program or modified program will result in significant investments in or expenditures for energy conservation improvements. This approach is also consistent with the Commission's recognition that utilities and their circumstances differ so that a pure cost analysis is insufficient.

The reasonableness of each criterion of proposed subpart 1 will be discussed in turn. As noted earlier, the comments received in response to the Commission's Notice to Solicit Outside Opinion support the criteria recommended by the Task Force. The Task Force recommendations are found in items B, C, D, E, and F of the proposed rule.

Item A requires the Commission to consider the impact of the program or modified program on short-term and long-term peak and average energy consumption. This item must be a factor in the Commission's determination of significant investments or expenditures for several reasons.

Minn. Stat. section 216B.241, subd. 1, clause (b) (1986) defines energy conservation improvement as:

> the purchase or installation of any device, method, or material that increases the efficiency in the use of electricity or natural gas ....

Examining the effect of a conservation improvement program on energy consumption is a reliable and practical means of measuring the "efficiency in the use of electricity or natural gas".

Moreover, it makes sense to determine whether energy has been conserved by considering the amount of energy consumption estimated to occur after the energy conservation program has been implemented. Reductions in short-term and long-term peak and average energy consumption indicate that the program will meet the objective of conserving energy. Therefore, item A is reasonable because it ensures that the program or modified program will result in a significant investment or expenditure by the utility in energy conservation improvements.

Item B requires the Commission to consider the total cost to the utility of the energy saved by the program or modified program compared to the cost to the utility to produce or purchase an equivalent amount of new supply or energy.

This item comes from Minn. Stat. section 216B.241, subd. 2 (1986), which states in part:

> The commission may order a utility to make an energy conservation improvement investment or expenditure whenever the commission finds that the improvement will result in energy savings at a total cost to the utility less than the cost to the utility to produce or purchase an equivalent amount of new supply of energy.

The statute makes it clear that an important factor for the Commission to consider in reviewing a program is the energy cost savings to the utility compared to the cost of producing or purchasing the same amount of new energy.

And, if the cost to conserve the energy is less than the cost to acquire new energy, the program is worthwhile and efficient in resource utilization. Therefore, item B is reasonable because it recognizes an important fact to consider in determining if a program or modified program will result in a significant investment in and expenditure for energy conservation.

Item C requires the Commission to consider the short-term and long-term impact of the program or modified program on utility rates.

Minn. Stat. section 216B.241, subd. 2 (1986) states in part that:

> Investments and expenditures made pursuant to an order shall be treated for ratemaking purposes in the manner prescribed in section 216B.16, subdivision 6b.

Minn. Stat. section 216B.16, subd. 6b (1986) states:

> All investments and expenses of a public utility as defined in section 216B.241, subdivision (1), clause (c), incurred in connection with energy conservation improvements shall be recognized and included by the commission in the determination of just and reasonable rates as if the investments and expenses were directly made or incurred by the utility furnishing utility service.

These statutes recognize that energy conservation programs will have an effect on utility rates. The costs associated with providing programs must be considered by the Commission when it sets rates for a utility. Therefore, it is reasonable to evaluate the impact on utility rates as one factor in determining whether a conservation improvement program will result in significant investments in and expenditures for energy conservation improvements.

Item D requires the Commission to consider the total number of low income and rental customers expected to be affected by the program or modified program.

Minn. Stat. section 216B.241, subd. 2 (1986) states in part that:

> The Commission shall give special consideration to the needs of renters and low income families and individuals.

The statute requires that special consideration be given to the needs of these groups because the Minnesota Legislature recognized that renters and low-income families and individuals face barriers which hamper their energy conservation efforts. Renters may lack the financial incentive to conserve because their landlords receive the direct benefit of energy savings from conservation measures. Low-income customers may lack the financial resources to implement the measures. Therefore, these customers, as a group, have a greater-than-average need for conservation services offered by the utilities.

Item D of the proposed rule requires the Commission to consider the number of renters and low-income families and individuals expected to be assisted by the program or modified program. That number, which implies achievement of a certain level of energy savings, provides a quantified indication of how well the needs of low-income and rental customers, as a group, will be met by

the program or modified program. Therefore, item D is a reasonable addition to the criteria in the proposed rule.

The Commission notes that the current rules also address the needs of renters and low-income families and individuals. Minn. Rules, part 7840.0500, states what a public utility must include in its energy conservation improvement program filing. Item C requires a statement of the anticipated percentage of use of each project among low-income families and individuals, and renters. Item H requires an explanation of how the proposed residential projects provide special consideration for renters and low-income customers. The Commission meets its legislative mandate to give special consideration to renters and low-income families and individuals by examining the information provided by the utilities, by examining the total number of customers expected to be affected by the program, and by modifying the program where appropriate.

Item E requires the Commission to consider the total dollars spent on energy conservation improvements annually, expressed as a percentage of gross revenues.

This item is reasonable because it provides a measure of the level of expenditures made by a utility for energy conservation improvements. A specific percentage is not required because utilities vary in size and circumstance. Therefore, a determination as to what percentage of gross revenues constitutes a significant investment in and expenditure for energy conservation improvements will vary depending on the particular utility and the other criteria in the rule.

Item F requires the Commission to consider the total number of customers expected to participate in the program or modified program expressed as a percentage of the total number of customers in a utility's service area.

The relative number of customers participating in the program is another reasonable indication of whether a utility has a significant investment in energy conservation improvements. In order to be beneficial and result in energy conservation, customers must participate in the program. Expressing participation as a percentage of the customers served by a utility is reasonable because it gives meaning to the number of participants.

Item G requires the Commission to consider the diversity of customer classes expected to participate in the program or modified program.

As with item F, this item is a reasonable indication of significant investment. The greater the number of customer classes expected to participate in the program, the greater is

the total potential customer participation and the potential energy savings from the program. It is also reasonable to consider diversity because diversity promotes fairness by ensuring that the program or modified program is offered to more than a select group of customers.

Item H requires the Commission to consider the benefits of the program or modified program to participants.

Minnegasco, in its comments received February 13, 1986, suggested the Commission consider the benefit to participating and non-participating customers such as lower heating bills, greater comfort, greater gas availablity, and so on. The Commission agrees with Minnegasco that this is an important consideration.

The energy conservation programs rely upon customer participation for their success. Customers will participate and conserve energy only if they expect to benefit from the energy conservation improvement program. Further, these benefits may not be captured in the other criteria. Therefore, customer benefit is a reasonable criterion for determining whether a program results in significant investments in and expenditures for energy conservation improvements.

Item I requires the Commission to consider any other facts and circumstances concerning a particular utility which are relevant to determining the overall importance of the investment in energy conservation improvements.

Otter Tail Power Company recommended adding this criterion in its comments, received February 18, 1986. Otter Tail Power Company stated that it did not think a party in a particular proceeding should be limited to the criteria recommended by the Task Force in an argument that a particular investment is or is not significant. However, the company recognized that an additional criterion would be relevant only if there was a showing that the criterion was rationally related to the ultimate determination of significance.

The Commission agrees that item I is needed to cover situtations where the prior eight criteria do not cover the particular facts and circumstances surrounding a program or modified program. It is impossible to predict all the events that may impact the development of a conservation improvement program. Each utility and each program is unique. To consider only the prior eight criteria could deprive the Commission of other, as yet unknown, pertinent factors that merit consideration.

In addition to the nine criteria contained in the proposed rule, the Commission considered adding a criterion suggested by the City of Richfield in its February 13, 1986 comments. The City of Richfield recommended the Commission consider the extent to which

a municipality or group of municipalities has participated in the program design, and desires and is capable of program delivery. The City of Richfield recommended this criterion because it indicates that a program which provides significant investment by the utility, when coordinated with significant local investment, has the greatest ability to reduce fuel consumption and reach target populations such as lower income elderly and single parent households.

The Commission has several concerns with this criterion. First, although the approach suggested by the City of Richfield encourages worthwhile municipal participation, it has the adverse effect of concentrating the funds available for energy conservation in those municipalities which provide the most participation. This contradicts the purpose behind other criteria in the proposed rule.

For instance, item B considers the total energy cost savings to the utility. Item F examines the total number of customers expected to participate in the program or modified program. Item G examines the diversity of customer classes expected to participate. Item H considers the benefits of the program or modified program to participants. Item I includes other facts and circumstances concerning a particular utility that are relevant to determining the overall importance of the investment.

These criteria evaluate the program or modified program in terms of the overall benefit to all the utility's customers. Introducing consideration of individual municipalities would fragment the overall approach used in the proposed rule. That is, energy conservation improvement funds would not be spread uniformly throughout the utility's service area and the utility's customers would not benefit equally from the program or modified program.

Low-income and rental customers are an exception to this overall approach. They are given special consideration under item D because the statute requires them to be so treated. See Minn. Stat. section 216B.241 (1986). No similiar statutory provision exists for municipalities. In addition, all low-income and rental customers are treated equally throughout a utility's service area. For the reasons given above, the proposed rule is reasonable without giving special consideration to the individual contribution a municipality makes to a program or modified program.

Proposed subpart 1 also states that the public utility must provide the information required by the criteria in its filing. In its comments, Minnegasco stated that the relevant data can and should be included in the utility's filing. In its February 12, 1986 comments, the Minnesota Department of Public Service also agreed that the utilities should be required to quantify the

proposed rule criteria in the filings rquired by Minn. Rules, part 7840.0500. However, some of the commenters stated that the existing rule part 7840.0500, Conservation Improvement Program Filing, would include the information listed in the significant investment criteria. See comments of Minnesota Power, received February 13, 1986, and Northern States Power Company, received February 13, 1986.

The Commission does not agree that existing rule part 7840.0500 includes the necessary information required by the proposed rule in every instance. For example, item A of part 7840.0500 requires a utility to file a comprehensive description of the proposed program, including a description of each project making up the program. However, the description may or may not include the number of customers expected to participate in the program (item F of the proposed rule). The Commission needs the information required by the proposed rule to effectively consider the criteria. It is reasonable to ensure that all necessary information will be available to the Commission by requiring a utility to include the information in its filing.

The Commission considered amending part 7840.0500 in this rulemaking. The Commission chose instead to conduct a separate rulemaking to amend its existing conservation improvement procedural rules, Minn. Rules, chapter 7840, which include part 7840.0500. The proposed rule was completed before the procedural amendments to chapter 7840. To more speedily comply with the requirement of Hanna Mining Company v. Minnesota Public Utilities Commission, supra, the Commission began this rulemaking. However, the amendments to the procedural rules of chapter 7840 will be consistent with the proposed rule.

In requiring the utilities to file the necessary information, the Commission continues to recognize that it is not prohibited from considering sources other than the utilities. The proposed rule requires the utilities to submit the information because they have ready access to the data and, therefore, are the most logical source. However, this does not preclude other sources from supplying data or the Commission from relying on data from other sources.

For the above reasons, it is reasonable to state in proposed rule part 7840.1150, subpart 1, that a utility's filing must include the information in items A through I for considering whether a program or modified program results in significant investments in and expenditures for energy conservation improvements.

Proposed subpart 2 addresses the effect of a finding by the Commission that a program or modified program will result in significant investments in and expenditures for energy conservation improvements. If the Commission makes such a determination, it must approve the program or modified program.

This is the logical consequence of a finding of significant investments in and expenditures for energy conservation improvements and, therefore, is reasonable.

As stated earlier, the utility, any other party or interested person, or the Commission itself may propose modifications to a utility's proposed program. However, the Commission has the sole responsibility for determining whether the proposed program or a proposed modification to the program will result in significant investments or expenditures. Upon making this determination, the Commission must approve the proposed program or modified program.

Proposed subpart 3 governs the effect of a finding by the Commission that a program or modified program will not result in significant investments in and expenditures for energy conservation improvements. If the Commission makes such a determination, it must disapprove the proposed program or modified program and order a program or modified program that will result in significant investments in and expenditures for energy conservation improvements.

Minn. Stat. section 216B.241, subd. 2 (1986) requires the Commission to ensure that every public utility with a certain level of operating revenues operate programs which make significant investments in and expenditures for energy conservation improvements. Subpart 3 is reasonable because it enables the Commission to satisfy its statutory duty by requiring the Commission to order programs that result in significant investments in and expenditures for energy conservation improvements.

V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Minn. Stat. section 14.115, subd. 2 (1986) requires the Commission, when proposing rules which may affect small business, to 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 for 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.

Minn. Stat. section 14.115, subd. 1 (1986) defines small business as:

> Definition. For purposes of this section, "small business" means a business entity, including 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.

The Commission believes that the public utilities affected by the rule do not fall within the statutory definition of small business. The proposed rule only applies to public utilities with operating revenues in excess of $50,000,000. See Minn. Stat. section 216B.241, subd. 2 (1986). Therefore, the public utilities affected by the rule have gross annual sales in excess of $4,000,000.

Furthermore, the Commission notes that in Minn. Stat. ch. 216B (1986), it has been authorized by the legislature to regulate public utilities in Minnesota. Some of the basic tenets of utility regulation are that utilities are:

- affected with a deep public interest;

- obligated to provide satisfactory service to the entire public on demand; and

- obligated to charge fair, non-discriminatory rates.

A general freedom from substantial direct competition and the opportunity to make a fair return on investment are among the benefits utilities receive from regulation. Given this regulatory scheme, it is clear that the legislature views utilities differently from other concerns defined as small businesses. The degree of government intervention in the operations of a public utility is considerably higher than in other types of businesses.

Even if some small utilities could be viewed as "small businesses" as that term is defined, they, nevertheless, would be excepted from this statute. Minn. Stat. section 14.115, subd. 7 (1986) establishes exceptions to the general obligations created by the statute and applies to rules promulgated by the Commission. In pertinent part, it states:

> Applicability. This section does not apply to: (c) service businesses regulated by government bodies, for standards and costs, such as nursing homes, long-term care facilities, hospitals, providers of medical care, daycare centers, group homes and residential care facilities.

Utilities fall within this broad definition. They are certainly service businesses regulated by government bodies for standards and costs. The words following the phrase "such as" merely provide some examples of government regulated businesses and are not exclusive. For the foregoing reasons, Minn. Stat. section 14.115 (1986) is not applicable to this rulemaking procedure.

VI. CONCLUSION

Based on the foregoing, proposed Minn. Rules, part 7840.1150, is both needed and reasonable.

M E Hennen

Mary Ellen Hennen
Executive Secretary