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STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Rules Governing Conservation Improvement Program Appeals, Minn. Rules, parts 7840.1500 to 7840.2000.	ISSUE DATE: July 23, 1990 7.6.90 DOCKET NO. G,E-999/R-90-132 STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

In 1983 the Minnesota Legislature enacted Minn. Stat. § 216B.241 governing energy conservation improvement programs (CIPs). Among other things, this legislation authorized the Public Utilities Commission (Commission) to compel public utilities to invest in energy conservation improvements. More specifically, it authorized the Commission to insure that "every public utility with operating revenues in excess of $50,000,000 operate one or more programs, . . . which make significant investments in and expenditures for energy conservation improvements."

In 1989, the legislature amended section 216B.241, transferring responsibility for ordering and reviewing conservation improvement programs from the Commission to the Department of Public Service (Department). As amended, Minn. Stat. § 216B.241 permits parties to appeal to the Commission when dissatisfied with the decision of the Department. The proposed rules set forth the procedures and standards governing these appeals.

The Commission initiated this rulemaking by publishing a notice soliciting outside opinion in the State Register. This notice was published on April 9 along with a preliminary draft of the proposed rules. The notice and preliminary draft were also mailed to persons on the Commission's mailing list for gas and electric matters. The notice requested comment on the subject matter of the rules by May 14, 1990.

The Commission received written comments by the May 14 deadline from Nothern States Power (NSP), Minnegasco and Otter Tail Power Company. The Commission also received oral comment from the Department. These comments were reviewed by Commission staff and the Commission. The proposed rules reflect many of the suggestions offered in these comments.

II. STATEMENT OF COMMISSION'S STATUTORY AUTHORITY

The Commission's statutory authority to adopt the rules is set forth in Minn. Stat. §§ 216B.241, subd. 2 (Supp. 1989) and 216B.08 (1988). Section 216B.241, as amended in 1989, permits parties to petition the Commission for modification or rejection of a Department decision to require a conservation improvement program. This section does not, however, set forth procedures and timelines for these appeals. Nevertheless, section 216B.08 gives the Commission broad authority to adopt rules that further the purposes of chapter 216B. This necessarily includes the authority to prescribe the procedures needed to implement a statutorily mandated responsibility under chapter 216B. Section 216B.08, therefore, provides authority to adopt procedural rules needed to implement the Commission's responsibility over CIP appeals under section 216B.241, subd. 2.

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.

Minn. Stat. § 216B.241 provides for appeals to the Commission when a party is dissatisfied with a Department CIP decision. The statute does not, however, set forth procedures to govern these appeals. The statute provides no deadlines for filing appeal petitions or comments responding to petitions. Moreover, the statute does not specify who must be served with the petition and subsequent comments. The Commission cannot implement its appeal authority efficiently and fairly without established filing deadlines and service requirements. The proposed rules establish necessary filing and service requirements. As such, the rules provide the specificity needed to enable the Commission to carry out its statutory responsibility to hear and decide CIP appeals.

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 its 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 rules need not be the most reasonable solution to the situation which created the need for a rules. The proposed rules are not unreasonable simply because a more reasonable alternative exist or a better job of drafting might have been done.

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

7840.1500 RIGHT OF APPEAL.

This rule part identifies the parties entitled to appeal a Department CIP decision and specifies that an appellant may ask the Commisson to modify or reject that decision. The rule implements and clarifies Minn. Stat. § 216B.241, subd. 2, which specifically permits a utility, a political subdivision, or a nonprofit or community organization that has suggested a conservation improvement program, or the attorney general acting on behalf of consumers and small business interests, to petition the Commission to "modify or revoke a department decision . . .." The language in this rule part differs slightly from the statute in two respects. First, it clarifies the phrase "suggested a program" to include both the proposal of a program and the filing of comments on a proposed program under the Department's CIP rules. Second, the rule part uses the term "reject" instead of the word "revoke" when referring to the specific actions the Commission can take as final disposition of a CIP appeal.

Who may appeal.

NSP recommended in its May 14, 1990 comments that the rules interpret the phrase "suggested a program" to mean the formal proposal of a program under the Department's CIP rules. This would limit the right of appeal to the following: (1) the attorney general acting on behalf of consumers and small business interests; (2) a utility that has proposed a conservation improvement program under part 7690.0500; and (3) a political subdivision or nonprofit or community organization that proposed an alternative program under part 7690.0900. The plain language of the statute is not so limiting.

The legislature could have used the term "proposed" in defining the right of appeal on CIP matters. Its use of the term "suggested" indicates an intent to allow broader access to the appellate process than NSP's recommended language would permit. This broader access is particularly important to nonprofit and community organizations which may lack the time and resources needed to comply with all of the detailed requirements involved

in filing formal CIP proposals. See Minn. Rules, part 7690.0500, subp. 2. Many of these organization may, nonetheless, have substantial interests in the final outcome of the CIP process and may participate in the process short of proposing alternative programs in the manner required by Department rules. These organizations may file extensive comments on a CIP proposal and may consult directly with the utilities or other parties that file program proposals.

The language in the proposed rule part allows any party listed in the statute to appeal if it has proposed a program or submitted comments under the Department's CIP rules. This is consistent with the legislature's intent to permit appeals by the entities named in the statute. The legislature is presumed to intend a statute that is effective and certain in its entirety. Minn. Stat. § 645.17. It is also presumed to intend reasonable results that can be executed. Id. The legislature must, therefore, have intended that all the entities named in the statute as eligible to appeal a Department CIP decision would have a reasonable opportunity to do so. The rule ensures this opportunity by conditioning the right of appeal on a level of involvement that is practical for nonprofit and community organizations.

The Commission considered incorporating the statute's phrase "suggested a program" into the rule to define the right of appeal. This phrase, however, is too vague to implement. Granting the right of appeal to those who have commented in accordance with the Department's rules is a reasonable interpretation of the phrase used in the statute. A party that comments on a CIP proposal is, essentially, "suggesting" an alternative program. A comment critical of a proposed program is really suggesting a program minus the features being criticized. A comment that supports a proposed program is, in effect, suggesting the very program it is commenting upon.

Given the Commission's authority to remake the Department's CIP decision, it would make little sense to give parties the opportunity to comment during the CIP process but deny the opportunity to appeal the results of that process. There is no reason to assume that a party's interest in a CIP proceeding will disappear when the Department's final CIP decision is issued. Requiring parties to file extensive formal proposals to obtain standing to appeal would direct scarce resources unwisely into needless formality and detail. It would place the method of a party's involvement in the process above the interests the party has at stake in the process. Nonprofit and community organizations have historically participated in the CIP process by commenting upon the formal proposals of utilities. This rule part is consistent with that reality.

Use of term "reject" in place of "revoke."

The term "revoke" generally refers to the withdrawal of a license or some other form of permission. The CIP process is not a licensing or permit process. Therefore, a Commission action to overturn a Department decision is more appropriately characterized as a rejection of the decision.

7840.1600 TIMELINESS OF APPEAL.

This rule part requires the filing of an appeal petition within 20 days after the Department issues the decision being appealed. This rule part also provides that a petition is considered filed when received at the Commission offices during normal business hours.

A time limit is needed to prevent any undue delay in the CIP process. The 20 day period allows sufficient time for a party to decide whether to appeal and assemble supporting documentation. The 20 day period is the same period allowed to file a petition for rehearing with the Commission under Minn. Stat. § 216B.27, subd. 1 (1988). A petition for rehearing is analogous to the petition appealing a CIP decision. In both instances, the petition is challenging a decision which has already been made on a well-developed. In the case of a CIP appeal, most of the information a party may wish to provide to the Commission will already have been developed in the CIP process. The 20 day time frame has worked well in the rehearing context. Parties should be accustomed to and have little difficulty complying with this time limit in the context of a CIP appeal.

Considering the petition filed when received at the Commission offices during normal business hours is consistent with standards of administrative law and with both current and past Commission practice.

7840.1700 CONTENTS OF PETITION AND SUPPORTING DOCUMENTATION.

This rule part requires that a petition appealing a CIP decision comply with the Commission's rule of practice and procedure governing petitions (part 7830.2100) and that the petitioner provide the Commission with 15 copies of the petition. This rule part also requires that the petition include a copy of the Department's written decision being appealed and all relevant written materials not already provided to the Commission. The rule part permits the petitioner to incorporate by reference any relevant documents already provided to the Commission.

Requiring compliance with part 7830.2100 of the rules of practice and procedure ensures that a petition filed under these proposed rules will provide the necessary information consistent with petitions filed on other matters. Requiring 15 copies of

petition is consistent with the regular practice of the Commission. The 15 copies are needed to ensure that each Commissioner and appropriate staff have copies.

Requiring attachment of the Department's written decision and all relevant written materials not already provided to the Commission enables the Commission to determine whether the petition, on its face, makes a reasonable argument that the program being appealed is not in the public interest. This is the threshold determination that the Commission must make under Minn. Stat. § 216B.241, subd. 2 (Supp. 1989). Section 216B.241, subd. 2 requires the Commission to reject a petition that fails to make this showing.

7840.1800 SERVICE OF PETITION.

This rule part requires the petitioner to serve the petition and accompanying documents, simultaneous with filing, on persons who were served with the Department's proposed decision under part 7690.1000, subp. 2. The Department's proposed decision is served on the utility, any person who submitted a comment under part 7690.0900, and other persons the Department believes are interested in the public utility's conservation improvement program.

Requiring service of the appeal petition on the parties served with the Department's written decision helps ensure that all those who have shown an interest in the outcome of a CIP proceeding have the opportunity to participate in the appeal. The Commission is authorized to reject or modify a conservation improvement program ordered by the Department. Given the Commission's authority to modify or reject the Department's CIP decision, it would make little sense to give parties the opportunity to comment during the CIP process but deny that same opportunity on appeal. There is no reason to assume that a party's interest in a CIP proceeding will disappear when an appeal is filed. This rule part helps parties protect their interests throughout the CIP process.

Requiring service of the petition to be simultaneous with its filing provides a date certain for service. This helps ensure that no party is substantially disadvantaged in the appeal by being served later than other parties. The simultaneous service requirement also helps ensure that parties have sufficient time to formulate and submit comments on the petition, allowing parties the benefit of the entire 15 day period which runs from the date of filing.

7840.1900 COMMENTS IN RESPONSE TO PETITION.

This rule part permits any person to submit written comments replying to the appeal petition, but requires that the comments

be filed with the Commission within 15 days after the deadline for filing the petition. Allowing any person to submit comments ensures that all interested persons have the opportunity to provide input that may help the Commission decide an appeal.

The 15 day deadline provides adequate time for comment without unduly delaying resolution of the appeal. The Department's CIP rules give parties 45 days to submit written comments on a public utility's program and to submit alternative projects. The Department's rules then provide 30 days for responses to any written comments or alternative projects submitted. Parties, therefore, have a substantial amount of time to develop detailed positions on the issues involved in the CIP process. The material and issues relevant on appeal should be identical or very similar to the material and issues addressed in the CIP process before appeal. Therefore, parties should be able to prepare and submit comments on appeal in less than the time allotted for comment during the initial CIP process. The 15 day period was contained in draft rules published and mailed along with the notice soliciting public comment. None of the commentators objected to the 15 day time frame for comment identified in this rule part.

7840.2000 COMMISSION DECISION.

This rule part (1) identifies the burden of proof and decision criteria governing CIP appeals, (2) provides a process for filing supplemental information with the Commission when the petition and comments are insufficient to support a decision, and (3) specifies what the Commission may order in its final disposition of the appeal.

Subpart 1. Burden of proof and decision criteria.

This subpart provides that the petitioner has the burden of proof on appeal. To obtain a decision in its favor, the petitioner must establish that the Department's decision (1) will result in a conservation improvement program that is ineffective, (2) does not adequately address the needs of renters and low-income persons, or (3) is otherwise not in the public interest. This subpart merely incorporates the relevant language in Minn. Stat. § 216B.241, subd. 2 (Supp. 1989). Incorporating this language in this subpart helps ensure that the burden of proof and decision criteria mandated by statute are applied. It eliminates the need to refer directly to statute when implementing the rules.

Subpart 2. Insufficient information.

This subpart requires the Commission to issue an order requiring supplemental filings when the Commission determines that the information provided in the petition and comments

responding to the petition are insufficient to support a final decision. The supplemental information must be filed and served on the Department, the utility and other parties who filed comments replying to the petition within 15 days after the Commission issues its order requiring supplemental filings.

This subpart also permits comments responding to the supplemental filings. These comments must be filed with the Commission and served on the Department, the utility and the persons who filed supplemental information within 15 days after the deadline for supplemental filings.

The supplemental filing requirement is needed to provide the Commission with a mechanism to ensure that its decision is fully informed and just. Providing an opportunity for responsive comments under this subpart is consistent with the rest of the CIP process. For example, the Department's CIP rules allow responsive comments and part 7840.1900 of these proposed rules allow the same. The 15 day period for supplemental filings and comments responding to these filings is identical to the period allowed for comments responding to the petition. An earlier draft of this rule part allowed 14 days for the supplemental filing and 10 days for responsive comments. These time frames were changed to 15 days in response to public comment which urged uniformity in the various time frames prescribed in the rule. Changing both of the time periods in this subpart to 15 days is consistent with proposed part 7840.1900 which allows 15 days for comments responding to the appeal petition. Public comment did not object to the 15 day time period for responsive comments under part 7840.1900. Fifteen days should, therefore, be acceptable to affected members of the public in the context of supplemental filings as well.

Subpart 3. Final disposition.

This subpart requires the Commission to issue an order which accepts, rejects or modifies the Department's decision, or which orders a contested case under Minn. Stat. ch. 14. This is consistent with Minn. Stat. § 216B.241, subd. 2 (Supp. 1989) which provides that the Commission may "modify or revoke a department decision to require a program." It is also consistent with Minn. Stat. ch. 14 which provides for a contested case where genuine issues of material fact are present requiring a full evidentiary hearing.

V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Minn. Stat. § 14.115, subd. 2 (1988) 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 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.

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

> 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.

The proposed rules may affect small businesses as defined in Minn. Stat. § 14.115 (Supp. 1989). The small businesses that may be affected are the small electric and gas utilities. As a result, the Commission has considered the above-listed methods for reducing the impact of the rules on small businesses.

Methods (a), (b), and (c) address compliance and reporting requirements. The proposed rules do not contain any compliance and reporting requirements. The rules do require parties who wish to appeal a Department CIP decision to file a petition with the Commission and to serve the petition on parties involved CIP process. The rules also establish certain time frames for the filing and service of an appeal petition and responsive comments. These requirements are basic essentials of any appeal process and cannot be applied selectively to some parties and not others without rendering the process unfair or unworkable. The rules do permit service by mail. This will benefit small utilities that do not have the resources to execute personal service throughout the state. The other requirements and time frames are reasonable and will not impose any undue hardship on small utilities. If an

undue hardship would result in any particular case, a party can always seek a variance under Minn. Rules, part 7830.4400.

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. Since the requirements in these rules are not overly burdensome, there is no need to exempt small businesses from them. Moreover, as indicated above, the requirements are essential components of a reasonable appeal process. Exempting small utilities from the procedures established in these rules would leave them without a process through which they could exercise their appeal rights under Minn. Stat. § 216B.241, subd. 2 (Supp. 1989).

VI. CONCLUSION

Based on the foregoing, the proposed Minn. Rules, parts 7840.1500 to 7840.2000 are both needed and reasonable.

Richard R. Lancaster
Executive Secretary

8/6/90

MINNESOTA PUBLIC UTILITIES COMMISSION

August 6, 1990

Maryanne Hruby, Director
The Legislative Commission to Review Administrative Rules
55 State Office Building
St. Paul, Minnesota 55155

Dear Ms. Hruby:

Enclosed pursuant to 1990 Minn. Laws, ch. 422, sec. 6 is a copy of the statement of need and reasonableness (SNR) for the proposed rules governing conservation improvement program appeals, parts 7840.1500 to 7840.2000. These rules were published in the State Register today along with a notice of intent to adopt rules without a public hearing.

Please do not hesitate to contact me if you have any questions. My phone number is 6-9617.

Sincerely,

Dan Lipschultz

Dan Lipschultz
Staff Attorney
Minnesota Public Utilities Commission

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