STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

Proposed Permanent Rules
Relating to Utility Service
Disconnection During Cold
Weather.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on January 17, 1990, at 9:30 a.m. in the Commission's Large Hearing Room, American Center Building, 150 East Kellogg Boulevard, St. Paul, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Public Utilities Commission (Commission) has fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those originally proposed.

Rosellen Condon, Special Assistant Attorney General, 780 American Center Building, 150 East Kellogg Boulevard, St. Paul, Minnesota 55101 appeared on behalf of the Commission at the hearing. The agency panel appearing in support of the proposed rules consisted of Betty Ware, Supervisor, Consumer Affairs Division of the Commission; Deborah Smith, Consumer Mediator, Consumer Affairs Division of the Commission; and Dan Lipshultz, Rulemaker.

Approximately 45 persons attended the hearing; 32 persons signed the hearing register. The Administrative Law Judge received 48 exhibits as evidence during the hearing. The Commission offered exhibits 27-31. Exhibits 32-34 are comments received by the Commission prior to the hearing. Exhibit 35 is a copy of A New Energy Policy, Report of the Legislative Task Force on Low Income Energy Policy, January 24, 1989. Exhibits 36-48 were submitted by the public. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the hearing or February 6, 1990. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. On February 6, 1990, the rulemaking record closed for all purposes.

In addition to the oral comments at the hearing, the Administrative Law Judge received 19 letters from interested persons. The Administrative Law Judge received written comments from the following: Minnesota Public Utilities Commission, Minnegasco, Great Plains Natural

Gas Company, Peoples Natural Gas Company, Ottertail Power Company, The St. Paul Foundation, the Minnesota CAP Directors' Association, Inc., Minnesota Department of Jobs and Training, Northern States Power Company, Minnesota Office of the Attorney General, Midwest Gas--a division of Iowa Public Service Company, Interstate Power Company, West Central Minnesota Communities Action, Inc., Northern Minnesota Utilities, Minnesota Department of Public Service, Minnesota Power, Duluth Community Action Program and Consumer Credit Counseling Service of Lutheran Social Services of Minnesota.

The Commission must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commission of actions which will correct the defects and the Commission may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commission may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commission does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commission elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commission may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commission makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commission files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On November 8, 1989, the Public Utilities Commission (Commission) filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.

(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness (SONAR).
(f) A Statement of Additional Notice.
(g) The names of Commission personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(h) All materials received following a Notice of Intent to Solicit Outside Opinion published at 12 State Register 299 State Register 299 81787 and a copy of the Notice.

2. On November 27, 1989, a Notice of Hearing and a copy of the proposed rules were published at 14 State Register 1313.

3. On November 17, 1989, the Commission mailed the Notice of Hearing to all persons and associations who had registered their names with the Commission for the purpose of receiving such notice.

4. At the hearing, the Commission filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) A copy of the State Register containing the proposed rules.
(f) Petitions requesting a rule hearing.

5. The documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to February 6, 1990, the date the record closed.

Nature of the Proposed Rules.

6. Minn. Rules pt. 7820.1500 to 7820.2300 prohibit disconnection of a residential utility customer who is unable to pay for utility service during cold weather months, October 15 to April 15. Collectively these rules are referred to as the "Cold Weather Rules." The proposed rules amend the Cold Weather Rules by adding a requirement that certain eligible customers who pay 10% of their net income to their utility cannot be disconnected from residential service. Further, the proposed rules establish proration procedures between utilities; set income and eligibility standards; require verification of income; and require budget counseling and referral to weatherization service.

Statutory Authority.

7. In its SONAR, pt. II, the Commission states that its authority to adopt the proposed rules is derived from Minn. Stat. § 216B.08 (1988), and Minn. Stat. § 216B.095 (1989 Supp.). Minn. Stat. § 216B.08 (1988) authorizes the Commission to promulgate rules in furtherance of the laws

governing the regulation of public utilities and the duties of the Commission. Several commentators asserted that section 216B.08 does not authorize the Commission to amend Minn. Rules pt. 7820.2300, the part that authorizes reconnection at the beginning of the cold weather period (October 15 - April 15). However, it was pursuant to section 216B.08 that the reconnection part of the Cold Weather Rules was first promulgated over ten years ago. Furthermore, no statutory provision has since been enacted which prohibits the Commission from amending the reconnection rules. Minn. Stat. § 216B.095 (1989 Supp.) provides in part:

> The Commission shall amend its rules governing disconnection of residential utility customers who are unable to pay for utility service during cold weather . . .

8. On the basis of the cited provisions the Administrative Law Judge concludes that the Commission has the statutory authority to promulgate the proposed revisions to the Cold Weather Rules.

Small Business Considerations in Rulemaking.

9. Minn. Stat. § 14.115, subd. 2 (1988) requires state agencies proposing rules affecting small businesses to consider methods for reducing adverse impact on those businesses. In the SONAR, the Commission acknowledged that the proposed rules could affect small utilities. The Commission considered and rejected establishing less stringent compliance or reporting requirements; setting less stringent schedules or deadlines for meeting reporting requirements; and consolidating reporting requirements. The Commission's primary reason for rejecting these option is the need of the customer to be informed of any change in utility status. The minimal reporting requirements set forth in the proposed rules direct information at the customer, not the Commission. The proposed rules contain no operational or design standards. The exemption of any utility from this proposed rule would violate an entitlement, created by statute, in favor of Minnesota utility customers. The Commission has met the requirements of Minn. Stat. § 14.115, subd. 2 with respect to the impact of the proposed rules on small businesses.

Fiscal Note.

10. Minn. Stat. § 14.11, subd. 1 requires proposers of rules requiring the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for a two-year period. The Commission estimates that the total cost of implementation will not exceed $100,000 in either of the two years.

Impact on Agricultural Land.

11. Minn. Stat. § 14.11, subd. 2 requires proposers of rules that have a "direct and substantial adverse impact on agricultural land in this state" to comply with additional statutory requirements. These rules have no impact on agricultural land and, therefore, the additional statutory provisions do not apply.

Need for and Reasonableness of the Proposed Rules.

12. The question of whether a rule is needed usually focuses on whether a problem exists that requires regulation. See, Beck, Bakken and Muck, Minnesota Administrative Procedure, 393 (1987). In order to satisfy the need requirement, the Commission must make a presentation of facts that demonstrate the existence of a problem requiring some administrative attention. The Commission's current rules governing utility service disconnection of residential customers during the cold weather months are over ten years old. In 1987 the Commission determined that its Cold Weather Rules needed to be updated. It solicited outside information and opinion regarding amendments, and received many comments and responses. The Commission formed an Advisory Task Force to review and discuss the solicited comments and draft rule amendments. The task force consisted of representatives from the utilities, state agencies, and consumer groups, all of whom responded to the Commission's Notice of Intent to Solicit Outside Information.

13. The Minnesota Legislature enacted Minn. Stat. § 216B.095 (1989 Supp.) while the advisory task force was still meeting. Section 216B.095 directs the Commission to amend its Cold Weather Rules. The intent of the new legislation is to extend cold weather protection from disconnection to more people while simultaneously requiring financial responsibility in paying for energy used. Minn. Stat. § 216B.095 (1), (2) and (6). This legislative intent will be realized as a result of the amendments to the Cold Weather Rules. Following the enactment of section 216B.095, the Commission invited other affected organizations to participate in the Advisory Task Force meetings. These persons were intimately involved in assisting the Commission Staff in incorporating the new law into the proposed rule amendments. Throughout the process of revising these rules, close cooperation occurred between the Advisory Task Force, other interested persons, and the Commission.

14. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connections agency's choice of action to be taken." Manufactured Housing Institute v. Peterson, 347 N.W.2d 238, 244 (Minn. 1984).

15. In support of the adoption of the proposed changes the Commission prepared a detailed SONAR. The Commission relied upon its SONAR as its affirmative presentation at the hearing. The Commission supplemented the reasoning presented in the SONAR with oral comments at the public hearing and with written comments following the hearing.

16. The Administrative Law Judge finds that, except as otherwise indicated, the Commission has affirmatively demonstrated the overall need for and reasonableness of the proposed amendments to the Cold Weather Rules.

17. This report will not discuss each proposed change. The report will focus on those provisions that the Administrative Law Judge or members of the

public questioned and contested. Because many of the utilities interested in the rules made nearly identical comments, a representative utility comment may be referred to when discussing particular parts. This is intended to eliminate redundancy and improve the readability of this report, as opposed to listing every utility and referencing each minor variation between the utilities' proposals. Persons or groups who do not find their particular comments in this report should know that the Administrative Law Judge has read and considered each and every suggestion. A part not commented on in this report is hereby found to be needed and reasonable and does not exceed the Commission's statutory authority for the promulgation thereof. It is further found that on those parts not commented on, the Commission has documented its need and reasonableness with an affirmative presentation of facts.

PART BY PART ANALYSIS

Part 7820.1600 -- Definitions (and related substantive provisions where applicable.

18. Part 7820.1600, subpart 2a defines "Financial Counseling Provider" as an entity which is capable and qualified, with proven expertise, to provide budget counseling to residential utility customers. The proposed part enumerates three criteria one of which must be satisfied in order for an entity to qualify as a Financial Counseling Provider. The Commission added this definition to the rules in response to the new legislation which requires that customers receive, "from the local energy assistance provider or other entity, budget counseling." Minn. Stat. § 216B.095(6) (1989 Supp.).

19. Proposed rule part 7820.2010, subpart 1 is the substantive provision in the Cold Weather Rules on budget counseling. This part requires, pursuant to the new legislation, that residential customers who declare their inability to pay or request the Ten Percent Plan receive budget counseling from "a local energy assistance provider, financial counseling provider, or other entity that provides budget counseling." The Commission lists in this part financial counseling provider as just one of three types of entities from whom a residential utility customer can get budget counseling. The Commission's SONAR, at 24 explicitly states that "other entity" includes such entities as churches and community groups. However, energy assistance providers and others testified at the public hearing that the definition of financial counseling provider is much too narrow. Their concern was that this definition could limit a customer's ability to find budget counseling, because the definition seemed to exclude such entities as churches and other community groups.

20. To avoid the potential confusion and to make it clear that a customer can obtain budget counseling from such organizations as churches and community groups as they are within the meaning of the term "other entity", the Commission proposes in its Commission Response To Public Comments to amend the language of the substantive budget counseling rule, part 7820.2010, subpart 1 to read as follows:

> Subpart 1. Requirement. The following residential customers shall receive budget counseling from a local energy assistance provider, financial counseling provider or other entity that provides budget counseling <u>such as a church, community or outreach worker employed by a public or private social service agency</u>: . . . .

21. This amendment clarifies the resources available to a customer for budget counseling. The Administrative Law Judge finds that the proposed modification to part 7820.2010, subpart 1 is needed and reasonable and does not constitute a substantial change from the rules as originally published in the State Register.

22. Proposed Subpart 2b defines "household income" as the income of the customer and all persons residing with the customer. Further, the definition excludes energy assistance received by customer from household income. The Commission's definition is consistent with Minn. Stat. § 216B.095 (4) and with the common usage of the term. Minnegasco and Peoples Natural Gas (Peoples) specifically supported this definition. The Commission established that a definition of "household income" is necessary since Minn. Stat. § 216B.095 (1) extends cold weather protection to persons with a household income less than 185% of the federal poverty level. Using this definition is reasonable since the definition is consistent with other statutes, rules and common usage among utilities. Proposed Subpart 2b is found to be needed and reasonable.

23. Part 7820.1600, subpart 2d defines "monthly income" to mean "the actual monthly income . . . of a residential customer". The term monthly income is used in the ten percent disconnection plan and is one of two payment alternatives available to the customer. Minnegasco and Peoples express concern that this definition of monthly income appears to be defined too narrowly to include only the residential customer's income and not the "household income" as defined in proposed part 7820.1600, subpart 2b. These utilities are concerned that based upon the wording of the Ten Percent Plan and the monthly income definition, a household that is income eligible for the Ten Percent Plan, eligibility being based on the household's income, could switch service to the name of the occupant with the lowest income and pay 10 percent of the lowest income in the household. For this reason Minnegasco recommended that the definition of monthly income being expanded to include the income of all persons residing in the household of the residential customer.

24. The Commission in its Commission Response to Public Comment states that Minnegasco's proposed changes accurately reflect the Commission's intent. Therefore, to clarify this issue which could be misunderstood and potentially abused as asserted in the comments of Minnegasco and Peoples, the Administrative Law Judge recommends that the Commission amend this definition to reflect Minnegasco's recommended changes as follows:

> Subpart 2d. Monthly Income. "Monthly Income" means the actual monthly income <u>of all persons residing in the household</u>, as defined in Minnesota Statutes Section 290A.03, Subdivision 3. For a residential customer who is normally employed . . . monthly income is the average monthly income of the residential customer computed on an annual calendar year basis, <u>added to the monthly income of all persons residing in the household</u>. Monthly income does not include any amount received for energy assistance.

25. This amendment clarifies what is to be included in calculations of monthly income for purposes of the Ten Percent Plan. It prevents the incongruous and unlikely result that might arise from basing eligibility for

the Ten Percent Plan on the total income of all household members and then determining actual payments on the basis of income of only one member of the same household. The Administrative Law Judge finds that these changes to the definition of monthly income are needed and reasonable to effectuate the Commission's intent accurately. The Administrative Law Judge finds that this modification to part 7820.1600, subpart 2d does not constitute a substantial change from the rules as originally published in the State Register.

26. Proposed Subpart 3a establishes the benchmark of 185% the federal poverty level by making specific reference to Public Law 97-35, as amended. This statute sets the federal poverty level. The statute is readily accessible, widely used as a reference standard and not subject to frequent change. The incorporation of this statute is appropriate to give meaning to the Legislative scheme of the Cold Weather Rules by quantifying customer eligibility for cold weather protection. The Commission has changed the language used throughout the substantive portions of the rules so that the phrase "less than 185 percent of the federal poverty level" appears throughout the rules. This pervasive change is needed to conform the rule standard to the statutory standard. See, Minn. Stat. § 216B.095(1). The change does not constitute a substantial change. Since the alterations are identical, they will only be discussed in this Finding and not be discussed in any subsequent Finding. Subpart 3a is needed and reasonable.

27. Part 7820.1600, subpart 4a defines "reasonably on time with payments" to mean payments within seven calendar days of agreed-to payment dates." This term is used in the existing Cold Weather Rules but is undefined. The Commission believed that it would be in the best interest of all parties to quantify the term. The term as proposed would be applicable to both the Inability to Pay Plan and the proposed Ten Percent Plan. The Commission believes that this is a reasonable amount of time, especially considering the consequences to a customer for not making a reasonably on time payment-potential disconnection during the cold weather months. Northern States Power Company (NSP), Minnegasco and other utilities would assert that this time period should be reduced. NSP recommends that the proposed rule require payment by the date required under current rules regarding payment due dates. Minn. Rules pts. 7820.5100 to 7820.5600. The utilities argue that the seven day time-frame is unreasonable because it may confuse customers by causing payments to be received by the utility too late to be included in the determination of the customer's next bill.

28. The Commission states in its SONAR that it presently uses a seven day grace period as its standard determinant for the Cold Weather Rules. It seem logical and reasonable to also extend this grace period to the proposed Ten Percent Plan. This will protect the vulnerable customer from the uncertainty of what the Commission or a utility will consider to be "reasonable" in terms of payment period. The administrative Law Judge finds that quantifying the term "reasonably on time with payments" is needed and reasonable.

29. Subpart 4b defines "reconnection plan." All the objections to reconnection related to the substantive provisions of reconnecting customers who had been disconnected prior to the cold weather months. The discussion of these objections will be done in paragraphs 61-63. The definition of "reconnection plan" is needed and reasonable.

30. The scope of the proposed rule is established by the definition of

"utility" found in Subpart 6a. The definition includes public utilities as defined in Minn. Stat. § 216B.02 as well as cooperative electric associations and municipally-owned gas and electric utilities. The City of Kasson and the Minnesota Municipal Utilities Association (MMUA) objected to the inclusion of municipally-owned gas and electric utilities in the definition. MMUA asserts that the Commission lacks the statutory authority to include municipally-owned utilities in the proposed rule.

31. The Commission includes electric cooperatives and municipally-owned utilities in the proposed rule to the limited extent the Commission is authorized to regulate the practices and activities of these entities pursuant to Minn. Stat. §§ 216B.026 and 216B.17, subd. 6a. The definition of "utility" is needed and reasonable to establish the scope of the proposed rule.

Proposed Rule 7820.1750 -- Deposits and Delinquency Charges Prohibited.

32. This proposed rule part would prohibit a utility from requiring a late fee or deposit from any income-eligible customer who has declared an inability to pay (ITP) or requested participation in the Ten Percent Plan. The Commission bases this rule upon the utilities' practice of waiving late fees for fixed income customers and the waiver of deposits by some utilities (such as Northern States Power and Minnegasco). The utilities, including Northern States Power (NSP) and Minnegasco, objected to this proposed rule. NSP asserted that its present practices do not constitute a "waiver" and that it wishes to retain the ability to charge late fees or deposits, the former to encourage timeliness of payments and the latter when service has been disconnected and is to be restored. Minnegasco argues that prohibiting late fees removes incentive for prompt payment and deposits are needed in reconnection cases. The Commission asserts that where, as here, the intent is to protect low-income persons from disconnection and a minimum payment of 10% is established by the Legislature, any further payments, either in late fees or deposits is unreasonable. Customers applying for Ten Percent Plan or ITP status are already under threat of disconnection. Prohibiting delinquency charges prevents the mere fact of obtaining relief from also having a "cost" in terms of an additional fee added to the unpaid balance. The Commission has shown that the proposed rule is needed to protect the established minimum payment of 10% and reasonable when applied to customers who are experiencing difficulty in making their utility payments. The Commission is specifically authorized to prohibit deposits and late fees.

Part 7820.1800 -- Disconnection Restriction for Occupied Residential Units.

33. This part presents the two Cold Weather Rules residential customer protection plans: (1) The Inability to Pay Plan (hereinafter also referred to as the "ITP") and (2) the Ten Percent Plan (hereinafter also referred to as the "TPP"). The ITP plan has been in effect for over ten years the ITP plan prohibits utilities from disconnecting a customer's heat-related utility service if the customer qualifies for this protection. To qualify, a customer (1) must be income eligible, (2) express a willingness to enter into a mutually acceptable payment schedule, and (3) must have been reasonably on time with payments under a payment schedule as of the billing cycle immediately proceeding the start of the cold weather months. If a customer qualifies for the ITP plan that customer is not required to make any payments during the cold weather months to remain connected. However, pursuant to eligibility

requirement 3 above if a customer has not been reasonably on time with payments the customer is ineligible for ITP and stands a chance of being disconnected during cold weather months.

34. As an alternative for customers who do not qualify for the ITP plan, the Commission proposes the TPP plan. The proposed TPP plan implements Minn. Stat. § 216B.095 (Supp. 1989) which requires, among other things, that the Commission establish a plan that provides a customer protection against utility shut-off if the customer pays at least ten percent of income or the full amount of the utility bill. Minn. Stat. § 216B.095 in relevant part provides as follows:

> The Commission shall amend its rules governing disconnection of residential utility customers who are unable to pay for utility service during cold weather to include the following:
>
> > (2) A requirement that a customer who pays a utility at least ten percent of the customer's income or the full amount of the utility bill, whichever is less, in a cold weather month cannot be disconnected during that month.

To qualify for cold weather protection under the Ten Percent Plan a customer's household income must be less than 185 percent of the federal poverty level and the customer must pay the utility the lesser of the following amount: (1) At least ten percent of the residential customer's monthly income, or (2) the full amount of the current month's utility bill not including arrearage.

35. Two significant disputes in this proceeding arise over the Commission's proposed implementation of section 216B.095. The first dispute is whether the Legislature intended to eliminate the ITP plan and substitute the TPP plan for it. The second dispute focuses on the proper interpretation of language contained in subsection 2 that refers to the "full amount of the utility bill".

A. Whether the Legislature Intended to Eliminate the ITP.

36. The Commission interprets section 216B.095 as requiring the addition of the TPP plan to the rules as an alternative form of protection along with the ITP plan. The utilities interpret section 216B.095 as requiring the replacement of the ITP plan with the TPP plan, in other words, a substitution.

37. The utilities assert that section 216B.095 is ambiguous and therefore, it is necessary to ascertain what the Legislature intended by reviewing the testimony given during the legislative process by the authors of the legislation. The utilities contend that the testimony of legislators who sponsored the new law shows that the legislators were concerned about the short-comings of the existing ITP plan and sought to eliminate it by simply substituting the TPP plan. Under the ITP plan a customer is allowed to pay nothing during the entire cold weather season and thereby accrues significant arrearage. The utilities claim that the sponsors recognized this feature of the ITP plan as a significant shortcoming. To remedy this problem the utilities assert that the Legislature desired that the TPP plan be substituted for the ITP plan thus, requiring customers to pay at least ten percent of

monthly income to maintain cold weather protection. This substitution, the utilities contend, facilitates the Legislature's long term goal of making these customers financially responsible for their energy consumption.

38. The Commission asserts that the Legislature intended that the TPP be included in the Cold Weather Rules to provide additional protection to income eligible customers. The Commission states that one of the purposes of section 216B.095 is to protect customers that do not qualify for ITP status because they are not "reasonably on time with their payments." Therefore, requiring the TPP plan in addition to the ITP plan provides a secondary form of protection for those who would otherwise be disconnected.

39. The Commission claims that the statute is clear on its face and free from ambiguity. For this reason the Commission asserts that the use of extrinsic materials to determine legislative intent is not permitted citing Minn. Stat. § 645.16 (1988) and Feick v. State Farm Mutual Automobile Insurance Company, 307 N.W.2d 772, 775 (Minn. 1981). The Commission also argues that if the Legislature had intended to replace the existing ITP with the TPP it would have expressed this intent plainly, by using the word "replace" instead of the word "include" in section 216B.095. Because the Legislature used the word "include" in the section, it intended that the TPP plan be included with the existing ITP plan in the Cold Weather Rules.

40. After careful review and consideration of this matter including a review of the subject legislative transcripts and correspondence, the Administrative Law Judge is persuaded that the Legislature did not intend to substitute the Ten Percent Plan for the Inability to Pay Plan. The Administrative Law Judge concurs with and adopts the analysis and reasoning set forth by the Commission. Moreover, the Legislature is presumed to pass laws with deliberation and full knowledge of existing statutes on the same subject. Qualle v. County of Beltrami, 420 N.W.2d 256, 259 (Minn. App. 1988); County of Hennepin v. County of Houston, 229 Minn. 418, 421-22, 39 N.W.2d 858, 860 (Minn. 1950). Section 216B.095 refers specifically to the Commission's existing Cold Weather Rules therefore, the Legislature is presumed to be aware of the existing rule's "inability to pay" protection, deliberated over this matter and decided to "include" the Ten Percent Plan in the Commission's Cold Weather Rules. Finally, the interpretation of this section proposed by the utilities would narrow the protection provided to customers during cold weather months. Remedial legislation such as this must be interpreted liberally to accomplish the humane public policy intended by the Legislature. Minnesota Life and Health Insurance Guaranty Association, 400 N.W.2d 769, 773 (Minn. App. 1987).

41. While the Legislature's long-term goal may well be to make these customers more financially responsible for their energy consumption, the Legislature has not chosen to do this by rescinding the Inability to Pay Plan. The Administrative Law Judge finds that the Commission's proposed addition of the Ten Percent Plan to the Cold Weather Rules is needed and reasonable and effectuates the legislative intent of section 216B.095(2).

B. Meaning of "Full Amount of the Utility Bill".

42. There is also a significant dispute over the Legislature's meaning of the phrase "full amount of the utility bill". The Commission, as observed in the proposed parts 7820.1600, subp. 5a and 7820.1800, subp. 1, item B, interprets this language to mean the current month's bill minus arrearage. The utilities assert that the "full amount of the utility bill" must include arrearage.

43. The Commission's reasons for interpreting this phrase so as to exclude arrearage are four fold. (1) If arrearage were to be included, then ten percent of the customer's income would always be the lesser amount. This would render meaningless the "whichever is less" language of the statute. To support this contention the Commission references the exhibit NSP presented at the public hearing. See Commission Response to Public Comment at 5. This Exhibit depicts an average, 100 percent federal poverty level customer's payment profile and shows this customer's monthly bill as always exceeding ten percent of the monthly income during the cold weather months; (2) if the customer were able to pay the current bill and arrearage, the customer would not be in the threat of disconnection; (3) "full amount of the utility bill" is modified by the words "in a cold weather month"; and (4) adding arrearage to a low income customer's monthly bill during the winter months could likely put those bills far beyond the reach of any conservation efforts that might be reasonably be expected to result in monthly payments less than ten percent of income.

44. The utilities assert that the term "full amount of the utility bill" must include arrearage to make customers more financially responsible for their energy consumption. This translates into the requirement that a customer must chip away at arrearage in instances where the utility bill for that month's energy consumption in terms of dollars consumed is less than ten percent of the customer's monthly income. This does not mean that all arrearage is to be paid off. It means that if in any cold weather month ten percent of a customer's monthly income is greater than the cost of energy that customer consumed, that customer will be required to pay the ten percent. This reduces the customer's arrearage, but never requires the customer to pay more than ten percent of income in any given cold weather month.

45. The utilities argue that the Legislature by enacting Minn. Stat. § 216B.095 (1989 Supp.) established ten percent of a customer's monthly income, as a minimum reasonable amount to be spent on a primary heat source. Minnegasco states in its Post Hearing Reply Comments that the NSP exhibit of a customer's payment profile used in argument by the Commission is misleading. The exhibit uses a customer who is at 100 percent federal poverty level. Minnegasco points out, however, that the Legislature has extended the Cold Weather Rules coverage to customers whose income is up to 185 percent of the federal poverty level. Minnegasco offers exhibit 1 attached to its Reply Comments to demonstrate that customers approaching 185 percent federal poverty level, more often than not have current bills less than ten percent of their monthly income. Minnegasco demonstrates that these customers will have opportunities to pay their current bills and also reduce their arrearage without paying more than the minimum amount established by the Legislature--ten percent of monthly income.

46. NSP asserts in its Reply Comments that the meaning of the statute is clear on its face and free from ambiguity. NSP states that the ordinary meaning of the phrase "full amount of the utility bill" means the entire bill, including arrearage. NSP reasons as follows:

> Furthermore, the Commission's interpretation of the phrase "full amount of the utility bill" does not follow from the clear meaning of the statute. The word "full" means "all that is normal or possible; fulled; not

deficient or partial; complete; of maximum or highest degree of development" See, The American Heritage Dictionary, New College Edition (Boston: Houghton Mifflin Co., 1976).

47. The Legislature has established ten percent of a customer's monthly income as a reasonable minimum amount to be paid for primary heat source for cold weather protection under the Ten Percent Plan. Under the Commission's interpretation of the language "full amount of the utility bill" a customer may pay less than ten percent of monthly income and still participate in the ten percent plan. The Administrative Law Judge does not believe that this is a result intended by the Legislature. Apparently the Commission does not view this as a likely result. The Commission claims that ten percent of a customer's income will always be the lesser amount. However, Minnegasco's Exhibit 1 attached to its Reply Comments demonstrates that for certain customers the monthly bill minus arrearage may be less than ten percent of income. (The Administrative Law Judge recognizes that the Commission has had no previous opportunity to respond to this Exhibit, but expects that the Commission will do so if the Exhibit is erroneous.)

48. The Commission's argument that there is no disconnection issue if the customer pays the current bill plus arrearage is compellingly seductive in its logic. But, on closer review the Administrative Law Judge recognizes that certain eligible customers whose incomes are at the higher end of the 185% of poverty level will be able to pay their current utility bill minus arrearage with less than ten percent of their income. The Administrative Law Judge does not believe that it is reasonable to allow these customers to pay less than ten percent of income for cold weather protection when other customers are required to pay ten percent of income to maintain cold weather protection under the Ten Percent Plan. In other words, requiring a customer at the 100% federal poverty level to pay ten percent monthly income while a customer at the 185% federal poverty level pays only the current month's energy consumption bill which may amount to less than ten percent monthly income is an unreasonable result not intended by the Legislature.

49. Including arrearage encourages a customer to be more financially responsible for energy consumption by requiring the customer to reduce arrearage when the customer's utility bill is less than ten percent of income. One of the purposes of Minn. Stat. § 216B.095 is to encourage customers to be more responsible for their energy consumption. For example, subsection 6 requires budget counseling and referral to weatherization, conservation or other "programs likely to reduce energy consumption". It is inconsistent to encourage participation in programs such as these on the one hand and at the same time not require customers to be financially responsible for energy consumption up to the ten percent statutory minimum.

50. The Administrative Law Judge finds that the Commission's interpretation of Minn. Stat. § 216B.095 (2) (1989 Supp.) so as to exclude arrearage and as reflected in proposed parts 7820.1600, subpart 5a and 7820.1800, subpart 1, item B, to be unreasonable and inconsistent with the legislative intent. To correct this defect the Commission must amend parts 7820.1600, subpart 5a and 7820.1800, subpart 1, item B, so as to redefine the term "full amount of the utility bill" to mean the inclusion of arrearage.

51. The Administrative Law Judge finds that the Commission's interpretation of Minn. Stat. § 216B.095 (2) (1989 Supp.) so as to exclude

arrearage and as reflected in proposed parts 7820.1600, subpart 5a and 7820.1800, subpart 1, item B, to be a violation of a substantive provision of law. Minn. Stat. § 14.50(i) and (ii).

52. The Administrative Law Judge does not believe that this modification will constitute a substantial change. The modification will not affect a class of persons who could not have reasonably been expected to comment on the proposed rules at the rulemaking hearing.

53. The modification does not go to new subject matter of significant effect. The modification implements the new legislation as intended by the Legislature in a more equitable and just fashion. This issue was discussed in depth in the Commission's SONAR and at the public hearing. At the public hearing the Commission and other interested parties had no complaints about requiring customers at the 100 percent federal poverty level to pay ten percent monthly income. Based upon this observation there should be no reason to assume they would contest a customer at the 185 percent federal poverty level being required to pay the same percentage of monthly income for cold weather protection.

C. Proration of Ten Percent Plan Payments.

54. Proposed Rule 7820.1800, Subpart 2 prorates Ten Percent Plan payments among utilities when two or more provide service during cold weather months. Subpart 2 would direct 70% of the 10% payment to the utility providing the major portion of the energy cost. The remaining 30% would be divided equally between any other energy providers. The utilities objected to this provision, but only to the extent that, if mechanically applied, a customer could, under the Ten Percent Plan, pay 70% of the total utility payment to the primary provider, and pay the minor provider the amount of the utility bill. The utilities hypothesize that, in some instances, the minor provider's bill could amount to less than 30% of the total 10% amount. Thus, the utilities conclude, the rule could treat customers preferentially if only two providers are present.

55. A further objection was raised where the primary energy used by a residential customer is propane or oil. The normal practice for these suppliers is to provide the fuel only on a cash basis, with nothing less than full payment being accepted. No allocation could take place when one provider is paid in full, even prior to a determination of which is the major provider. The Commission responds that oil and propane suppliers do not fall under the jurisdiction of the Commission and, therefore, the Commission has no authority to regulate their conduct. The Commission's refusal to include oil or propane suppliers in the proposed rules is appropriate. Although the allocation problem remains unresolved, both the Commission's lack of authority and the mandatory language of Minn. Stat. § 216B.095(3) justify the Commission's omission of providers other than utilities.

56. The Commission may wish to modify the language of Subpart 2 to expressly state that any remaining portion of the 30% of 10% (when the minor suppliers are paid in full) must be paid to the major supplier. Such a change would clarify the meaning of Subpart 2, while complying with the legislative requirement that "at least ten percent" of the customer's income be applied to energy costs. The suggested change was discussed fully at the hearing in this matter and does not constitute a substantial change. Whether or not any change is made, Subpart 2 is needed and reasonable.

Proposed Rule 7820.1900 -- Declaration of Inability to Pay or Plan Request.

57. Proposed Rule 7820.1900, Subpart 1 sets forth the specific methods by which utilities, prior to disconnection, inform customers of the impending action, appeal rights, conservation information, local energy assistance providers, budget counselors and a form to declare inability to pay or request the Ten Percent Plan. Further, the information to be supplied by the consumer is specified. Subpart 1 did not receive adverse comments. The subpart is needed and reasonable to establish an efficient program.

58. Subpart 1a requires specific information be sent to local energy assistance providers by the utility prior to disconnection. As with Subpart 1, this Subpart received no adverse comment and is needed and reasonable.

59. Subpart 1b governs income verification by the local energy assistance providers and appeal by the customer, if found to be ineligible. The rule, as originally proposed, required that local energy assistance providers verify the income of applicants for cold weather protection within 21 days of receiving the appeal. Both the utilities and the local energy assistance providers suggested that the utilities be given the discretion to decline the request for verification when the utility was not challenging the customer's meeting the income level requirement. In response to these comments, the Commission has changed Subpart 1b to permit the utility to determine income when, 1) it has the information available to do so, and 2) should the local energy assistance provider not verify a customer's income within 21 days. The Commission justifies these changes as being cost-effective, faster and in accordance with the Legislature's intent. Testimony at the hearing from energy assistance providers clearly showed an inability on the part of those providers to handle the volume of verifications projected, without additional funding. Minn. Stat. § 216B.095 does not provide any funding for the additional duties imposed on these providers.

60. Since appeal to the Commission is available in the event of a disagreement, permitting a utility to make the initial determination is reasonable. The 21-day verification provision resolves an unanswered issue in the original rules, that is, what happens when a local energy assistance provider cannot meet the 21-day deadline. Minn. Stat. § 216B.095(5) uses the "include" language to require verification of income. There is nothing in the statute to indicate the Legislature intended to make verification the exclusive province of local energy assistance providers. The Administrative Law Judge finds that the modifications to subpart 1b are needed and reasonable. The modifications do not constitute a substantial change.

61. Minnegasco suggested that applicants be required to make "reasonable payments" while any appeal was being resolved. The Commission declines to follow that suggestion on the ground that no mechanism has been suggested to calculate what is a "reasonable payment."

Proposed Rule 7820.2300 -- Reconnection at the Beginning of Cold Weather Months.

62. As a part of this rulemaking proceeding, the Commission altered the existing reconnection rule to establish a "Reconnection Plan" which would permit customers to reconnect service, if the customer remained disconnected at the beginning of the cold weather season. The Reconnection Plan would require

the payment of 10% of the customer's annualized income (total year's income divided by 12, multiplied by .1 equals 10%). The utilities and the Minnesota Department of Public Service (DPS) objected to this portion of the plan as having the potential for "pyramiding" arrearage. Pyramiding occurs when, over a year, the amount of utility bills exceeds the amount required to be paid over that year. The net result is an arrearage which is carried over into the next year of service, resulting in a higher arrearage at the end of the second year.

63. The utilities opposed the Reconnection Plan on two other grounds. First, the utilities asserted that the Commission lacks the statutory authority to propose a reconnection plan. Second, the utilities argued that any protection extended by the Reconnection Plan should only exist during the cold weather months.

64. DPS proposed a year-round approach to the problem by permitting payment of the statutorily mandated 10% minimum during the cold weather months and requiring that any arrearage be paid, one-sixth per month, during the non-cold weather months. Such a system offers several advantages. First, the purpose of the cold weather protection statute is achieved by setting a minimum payment of 10% of the customer's income during the cold weather months. Second, any arrears accrued over the cold weather months are evenly distributed over the non-cold weather months, so that the customer is not faced with disconnection immediately upon termination of cold weather protection. Third, the arrearage would be paid during months when the customer has greater control over energy expenditures. Fourth, when the cold weather season resumes, there are no arrears outstanding to prevent extending cold weather protection to the customer, should the need remain for that protection.

65. The Commission did not base the proposed reconnection rule on Minn. Stat. § 216B.095. The Commission used its general statutory authority for rulemaking, Minn. Stat. § 216B.08. The proposed rule is not all new language, but rather an expansion of the existing rule on reconnection. The Commission has the specific statutory authority necessary to promulgate the Reconnection Plan. The Commission has decided, as a result of the comment received at the hearing on this matter, to modify the Reconnection Plan so that it is available only during the cold weather months, and limit reconnection to persons with a household income of less than 185% of the federal poverty level. Part 7820.2300, subpart 2 as modified would read as follows:

> Subpart 2. Reconnection Plan. Under a Reconnection Plan, the residential customer must pay the current utility bills and arrearage and monthly installments <u>during the cold weather months.</u> Each monthly installment must not exceed ten percent of 1-12th of the residential customer's annual income. <u>The Reconnection Plan only provides to the cold weather months.</u>

66. The modifications of the provision are in accordance with the nature of the rules proposed under Minn. Stat. § 216B.095, and the proposed rule part, as modified, is needed and reasonable to assure disconnected customers have access to heating energy during the cold weather months. The change was fully discussed at the hearing on this matter, and does not constitute a substantial change.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Commission gave proper notice of the hearing in this matter.

2. That the Commission has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the Commission has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Finding 51.

4. That the Commission has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Finding 50.

5. That the amendments and additions to the proposed rules which were suggested by the Commission after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 and 4 as noted at Finding 50.

7. That due to Conclusion 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

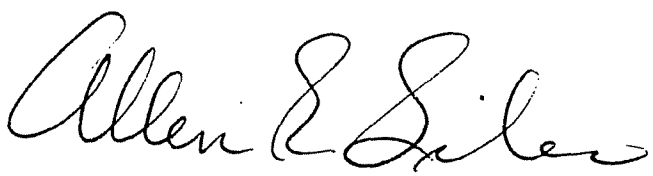
9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Commission from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated: March 8, 1990.



ALLEN E. GILES
Administrative Law Judge