

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF PUBLIC SERVICE

In the Matter of the Adoption of
the Rules of the Department of
Public Service Relating to
Conservation Improvement
Programs. Minn. R. Chapter 7690.

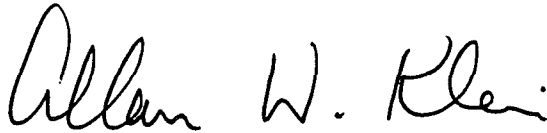
ORDER ON REVIEW OF
RULES UNDER MINN.
STAT. § 14.26

The Department of Public Service (agency) is seeking review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26. On September 18 1997, the Office of Administrative Hearings (OAH) received the documents from the agency required to be filed under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rule.
2. The rules were adopted in compliance with the procedural requirements of Minn. Stat., chapter 14 and Minn. R., chapter 1400, except that the Statement of Need and Reasonableness did not contain information regarding the probable costs to other agencies in the implementation and enforcement of the proposed rule as required by Minn. Stat. § 14.131(2). The administrative law judge concludes that the omission did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process and therefore constitutes harmless error under Minn. Stat. § 14.26(3)(d)(1).
3. The adopted rules are not substantially different from the rule as originally proposed.
4. The record for the adopted rules demonstrates a rational basis for the need for and reasonableness of the proposed rule.
5. The following provisions of the adopted rules are being **DISAPPROVED** as not meeting the constitutional requirements of Minn. R. 1400. 2100, items D and E; 7690.0550; 7690.1400; 7690.1440 and 7690.1600. (See Memorandum.)

Dated this 15th day of October, 1997.



Allan W. Klein
Administrative Law Judge

MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the Department has submitted these rules to the administrative law judge for a review of their legality. As stated in the above order, the rules meet the statutory authority, procedural, substantial difference, and rational basis requirements of Minn. Stat. § 14.26 and Minn. R. 1400.2100. However, portions of the rules are being disapproved as not meeting the constitutional standards under Minn. R. 2100, items D and E, because of excessive agency discretion and vagueness that exist in some of the rule provisions as described below.

7690.0550 Program Status Report.

Proposed rule 7690.0550 provides in part:

By April 1 of each year, an electric utility shall file with the department, and by May 1 of each year, a natural gas utility shall file with the department, a status report on each project operated during the previous year. The status report must include the following information for each project:...

E. The cost effectiveness of the project based on the results of previous years and the actual expenditures, as calculated from the utility, participant, ratepayer, and societal perspectives, *when appropriate*. (Italics added.)

The use of the phrase "when appropriate" in item E above implies that the status report may or may not have to include the information listed in item E. Therefore, the rule is vague in that it lacks adequate guidance as to when a utility has to supply this information. The administrative law judge recommends either that the agency delete the phrase "when appropriate," or supply the necessary criteria as to when the information would have to be supplied in the status report.

7690.1400 Proposed Changes to Existing Project; Supplemental Procedures.

The last sentence in proposed rule 7690.1400 states: "The commissioner *may* allow some modification and expansion to a program without formal approval (e.g., a letter)." (Italics added.) The use of the word "may" in this part implies excessive discretion on the part of the commissioner. The rule does not state guidelines as to when a utility is allowed to use the "informal" versus the "formal" approval method for a

modification and expansion to a program. The administrative law judge recommends either that the agency clarify in the rule under what circumstances the informal approval method can be used or delete the last sentence of the rule if it does not add anything beyond the commissioner's decision made under 7690.1300.

7690.1440 Timelines for Different Program Filings.

In Minn. R. 7690.1440, subparts 2 to 4, the agency has summarized the timelines for the various filings required to be made under the rules. All of the filing times and dates of decisions are already specified in other parts of the rules. As specified in subpart 1, the summary is intended to serve as a reference guide to the regulated industry. However, because it is a summary, the language in this part does not match exactly the timeframes that are actually set out in the other parts of the rule.

For example, under subpart 2 of the summary, the action listed is the Notice of Completion and the Due Date listed is "10 calendar days after biennial CIP filing." The corresponding rule part for this action is contained in part 7690.0500, subpart 3, which states: "The department staff's findings must be mailed within ten days after receipt of the plan." Part 7690.0500 is specific in stating the findings must be mailed within ten days, the summary is not specific as to when the ten days ends. Other discrepancies between other rule parts and the summary are located throughout subparts 2 through 4. Such discrepancies between the original rule part and the summary conflict and may cause confusion in the implementation of the rule.

Therefore, the administrative law judge recommends that the agency either rewrite the summary to be more precise or to place an asterisk with the "abbreviated" language with a warning to the check the corresponding rule for exact filing requirements. A third option would be to delete the summary provisions from the rule.

In addition, a technical correction should be made in this part. In subpart 1, the reference to 7690.1400 should be changed to 7690.1430.

7690.1600 Rule Variances.

In proposed rule 7690.1600, subpart 4, the rule provides: "The request *should* state the variance requested and how the request meets the three requirements outlined in subpart 1. (Italics added.) The administrative law judge recommends that the word "should" be replaced with the word "must." If the commissioner is going to grant or deny a variance request based on the criteria stated in subpart 1, then the request asking for a variance must contain an analysis of how the request meets those requirements in subpart 1.

7690.0500 Biennial Conservation Improvement Program Filing.

Proposed Minn. R. 7690.0500, Biennial Conservation Improvement Program Filing, subpart 2, provides in part:

Subp. 2. Contents. The biennial conservation improvement program filing must include:...

E. an estimate of the expected cost effectiveness of the each project to the utility, to the project's participants, and to the utility's customers ratepayers, and to society. (Italics added.) (Similar language is also contained in parts 7690.1200, subp. 1, item C and 7690.0550, item E.)

In the agency's Statement of Need and Reasonableness (p. 24-25), the agency explains that the four perspectives (utility, ratepayer, participant and societal) for estimating cost-effectiveness of demand-side management (DSM) programs are outlined and explained in the *Standard Practice Manual for Economic Analysis of Demand-Side Management Programs* published by the California Public Utilities Commission and California Energy Commission (*Standard Practice Manual.*) The agency explains that the CIP utilities already evaluate their CIP's from these perspectives, and that all four perspectives are used nationwide.

The administrative law judge recommends that the agency further evaluate whether the Standard Practice Manual should be incorporated by reference in the rules. The administrative law judge recommends that the Standard Practice Manual be incorporated in the rules if the agency intends for the regulated parties to be bound by the California standards; if not, then no incorporation is necessary.

7690.1430 New Project Proposals; Terminating Existing Projects.

The administrative law judge recommends the addition of a few words in the rule provision to clarify the intent and meaning of the rule. For example, the administrative law judge recommends the following amendment in one of the sentences: "...Department staff shall conduct a completeness review of alternative, or new utility project or existing project termination proposals in the time frame and manner specified in part 7690.0500, subpart 3...." This amendment is necessary if it is the intent of the agency that existing project termination proposals also have a completion review conducted. The completion review is important because the end of the completion review process starts the beginning of the 15 day written comment period.

In addition, in this same part, the following sentence should also be amended to provide: "...The party submitting the alternative or new proposal shall provide a copy of the alternative or new utility project proposal to any person, upon request." The party submitting either the new or alternative proposal, not just the alternative proposal, must provide a copy of the alternative or new utility project proposal to any person, upon

request. The above language additions are recommendations, if the agency has a different way of clarifying the provision, they may make such recommendations upon resubmission of the rule for review.

Pursuant to Minn. Stat. § 14.26, subd. 3(b) and Minn. R. 1400.2300, subp. 6, this order will be submitted to the chief administrative law judge for approval. Under Minn. R. 1400.2300, subp. 8, the agency may resubmit the rule to the chief judge for review after changing it and may request that the chief judge reconsider the disapproval.

A. W. K.