

Minnesota Attorney General: Administrative Rules Proceedings

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August 20, 2018

no Statutory authority stated in Notice of Intent implied authority OK

MJC

RULE REVIEW CHECKLIST

File No. 1766
DATE RECEIVED 11-28-90
REVIEW DATE 12-7-90
DUE DATE 12-12-90
(DIS)APPROVED 12-12-90
WITHDRAWN _____

Docket No. 05-009-0729
ADOPTED W/O HEARING _____
EMERGENCY RULE _____
TO REVISOR ON 12-5-90
REVISOR (DIS)APPROVED _____
FILED W/SEC. OF STATE 12-18-90
RETURNED TO AGENCY _____

_____ Rule as adopted (4 copies)

✓ Notice to Solicit Outside Information/Opinion (if applicable)
July 17, 1989 Date published in State Register
✓ Comments

_____ Petition for Adoption of a Rule

✓ Board's Authorizing Resolution
May 31, 1990 Date adopted

_____ Proposed Rule
_____ Revisor's Certificate

✓ Notice of Intent to Adopt Rule
216.B.16 subd 16 Statutory Authority no authority 237.075 subd 10
NA Small Business Statement
NA Expenditure of public money statement
undated Signature

✓ Statement of Need and Reasonableness (if applicable)
✓ Small Business Statement
NA Fees - § 16A.128

✓ Affidavit of Mailing Notice of Intent to Adopt Rule
July 3, 1990 Dated 30/25 days before adoption
_____ Notice attached indicates it is attached
_____ Copy of rule or summary attached

✓ Publication in State Register
July 9, 1990 Date 30/25 days before adoption

_____ 180-day deadline from:
no authority stated Effective date of law requiring rule (14.12) (both rules) amendments don't apply
✓ end of comment period (§ 14.26) (rules without hearing)
_____ effective date of statutory authority (§ 14.29) (emergency rules)

✓ Resolution Adopting
Oct 30, 1990 Date adopted

✓ Findings of Fact, Conclusions & Order Adopting
Oct 30, 1990 Date - undated

✓ Written Requests, Submissions or Comments

✓ Declaration of Attorney
Roselleen Condon Name of SAAG representing agency

_____ Notice of Submission to Attorney General (if applicable)

_____ Affidavit of Mailing Notice to Attorney General (if applicable)

DEPARTMENT: Office of the Attorney General **STATE OF MINNESOTA**

OFFICE MEMORANDUM

DATE: December 19, 1990

TO: CAROLINE HEIL
Public Utilities Commission

FROM: MARTHA J. CASSERLY
Special Assistant
Attorney General

PHONE: 296-6839

SUBJECT: In the Matter of the Adopted Rule Relating to Intervenor Cempensation

The above-referenced rule has been approved as to its legality by the Attorney General on December 12, 1990.

Enclosed is your copy of the approved rule. This office has already filed two copies with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth is being retained by this division of the Attorney General's Office for its records.

Also enclosed are any petitions, requests, submissions or comments along with any extra copies of documents which you submitted to the Attorney General.

Your next step is to arrange for publication of the Notice of Adoption in the State Register. In a day or two, you should receive from the Revisor's Office three copies of the notice of adoption of your rule. You should submit two copies of the Notice of Adoption to the State Register for publication. A permanent rule without a hearing does not become effective until five days after a notice of adoption is published in the State Register in accordance with Minn. Stat. § 14.27. An emergency rule becomes effective five working days after approval by the Attorney General; however, the agency must publish a notice in the State Register in accordance with Minn. Stat. § 14.34.

If you have any questions in this regard, please contact me.

MJC:sc

cc: Rosellen Condon
William Brown, Chief Judge
MaryAnn Hruby

RECEIVED
NOV 19 1990
MINNESOTA PUBLIC UTILITIES COMMISSION

Public Utilities Commission

Adopted Permanent Rules Relating to Intervenor Compensation

Rules as Adopted

7831.0100 DEFINITIONS.

Subpart 1. **Scope.** The terms used in this chapter have the meanings given them in this part.

Subp. 2. **Attorney fees.** "Attorney fees" means the reasonable, itemized billings and costs incurred by an intervenor for the services of an attorney in a proceeding before the commission. The costs for services of the attorney are reasonable when computed at the rate normally charged by that attorney for comparable services, or at the prevailing market rate or fair market value to obtain comparable and available services of an attorney of comparable training and experience, whichever rate is lower.

Subp. 3. **Attorney general.** "Attorney general" means the Minnesota Residential and Small Business Utilities Division of the Office of the Attorney General.

Subp. 4. **Commission.** "Commission" means the Minnesota Public Utilities Commission.

Subp. 5. **Compensation.** "Compensation" means reimbursement or payment to an eligible intervenor for all or part of the intervenor costs, as determined by the commission under this chapter, for participation in a proceeding.

Subp. 6. **Department.** "Department" means the Minnesota Department of Public Service.

Subp. 7. **Expert witness fees.** "Expert witness fees" means the reasonable, itemized billings and costs incurred by an intervenor for the services of an expert witness in a proceeding before the commission. The costs for services of the expert witness are reasonable when computed at the rate normally charged by that witness for comparable services, or at the prevailing market rate or fair market value to obtain comparable

and available services of an expert witness of comparable training and experience, whichever rate is lower.

Subp. 8. **Final determination.** "Final determination" has the meaning given it in Minnesota Statutes, sections 216B.16, subdivision 2, paragraph (c), and 237.075, subdivision 2, paragraph (c).

Subp. 9. **Insufficient financial resources.** "Insufficient financial resources" means that but for the reimbursement of all or part of its intervenor costs, the intervenor is financially unable to afford intervenor costs incurred to participate effectively in the proceeding as determined by the commission under part 7831.0800, subpart 3.

Subp. 10. **Intervenor.** "Intervenor" means a person who is entitled or permitted by law, or permitted under rule of the commission or by order of the presiding officer, to intervene in a proceeding. For purposes of awarding compensation for intervenor costs under this chapter, intervenor does not include (1) a provider of telephone services of any kind, or its representative, agent, or affiliate, nor (2) an agency, representative, employee, authority, or political subdivision of a federal, state, county, home rule charter or statutory city, or town government or combination of them.

Subp. 11. **Intervenor costs.** "Intervenor costs" means attorney fees, expert witness fees, and other reasonable costs incurred in a proceeding. Intervenor costs do not include costs, fees, or charges incurred for judicial appeal or judicial review.

Subp. 12. **Issue.** "Issue" means a question, dispute, or controversy to be resolved in a proceeding held under Minnesota Statutes, section 216B.16 or 237.075.

Subp. 13. **Materially assisted.** "Materially assisted" means that the intervenor's participation and presentation was useful and seriously considered, or otherwise substantially contributed to the commission's deliberations in the proceeding, following consideration by the commission of the factors listed in part 7831.0800, subpart 2.

Subp. 14. **Other reasonable costs.** "Other reasonable costs" means reasonable fees and charges actually incurred by an intervenor in a proceeding before the commission, such as the costs for:

A. the services of a consultant or an employee of the intervenor computed at the rate normally charged by that person for comparable services, or at the prevailing market rate or fair market value to obtain comparable, available services of persons of comparable training and experience, whichever is lower; and

B. out-of-pocket expenses directly related to and necessary for participation in the proceeding, for example, costs of filing, copying, travel, travel-related expenses, and preparation of studies, displays, or exhibits.

Subp. 15. **Position.** "Position" means a factual contention, legal contention, or specific policy or procedural recommendation made by an intervenor relating to an issue addressed and decided in a proceeding.

Subp. 16. **Proceeding.** "Proceeding" means a rate change proceeding under Minnesota Statutes, section 216B.16, or a general rate case conducted under Minnesota Statutes, section 237.075. For purposes of this chapter, a procedural or supplemental matter is considered part of the main proceeding under Minnesota Statutes, section 216B.16 or 237.075, if it is decided or conducted by the commission or an administrative law judge on an issue or position considered in, related to, or supplemental to the main proceeding, or on the issue of intervenor compensation awarded. Procedural or supplemental matters include, for example: motions; orders; settlements; stipulations; prehearing conferences, determinations, or procedures; contested case hearings; reconsiderations or rehearings; and remanded hearings. Proceeding does not include matters considered during judicial appeal or review.

Subp. 17. **Telephone company.** "Telephone company" has the meaning given it in Minnesota Statutes, sections 237.01, subdivision 2; 237.01, subdivision 3, if the company is subject

to general rate regulation by the commission; and 237.075, subdivision 9, if the company has made the election provided in that subdivision.

Subp. 18. **Utility.** "Utility" has the meaning given "public utility" in Minnesota Statutes, section 216B.02, subdivision 4.

7831.0200 PURPOSE.

The purpose of this chapter is to establish procedural and substantive criteria for reimbursing an intervenor for its intervenor costs incurred in a rate change proceeding under Minnesota Statutes, section 216B.16, subdivision 10, or a general rate case under Minnesota Statutes, section 237.075, subdivision 10, when the intervenor has insufficient financial resources to afford its intervenor costs and has materially assisted the commission in its deliberations in the proceeding.

7831.0300 REQUEST FOR COMPENSATION.

Subpart 1. **Request filing and notice.** An applicant for an award of compensation shall file with the commission a request for compensation. The applicant shall also serve a copy of the request on each known party to the proceeding and shall file with the commission an affidavit of service. The request must be filed as soon after notice of a filing, proceeding, or prehearing conference as is reasonably possible, but at least 75 days after the notice or 30 days before the beginning of evidentiary hearings in the proceeding, whichever occurs later. The request must satisfy the requirements of subparts 2 to 5.

Subp. 2. **General information.** The request for compensation must contain the following information, as applicable:

A. the name and address of the applicant or representative of an organization;

B. for an organization, the names, addresses, and titles of the members of its governing body, a description of the organization's general purposes, size, and structure, and whether it is a nonprofit organization incorporated under

Minnesota Statutes, chapter 317; and

C. the proceeding for which the compensation is requested.

Subp. 3. **Insufficient financial resources.** The applicant shall show as part of the request that, but for an award of compensation for its intervenor costs under this chapter, the applicant has insufficient financial resources to intervene and participate effectively in the proceeding. The request must address the factors set forth in part 7831.0800, subpart 3. The applicant shall provide a summary description of finances, distinguishing between grant funds committed to specific projects, if applicable, and discretionary funds, showing the financial status of the applicant, including at least:

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

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

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

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

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

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

If available, the applicant shall file a copy of its audited financial statements. The applicant may reference its audited financial statements to satisfy items (1) to (6).

If the commission has determined within the previous year before receiving the request that the applicant has met its burden of showing insufficient financial resources and if the

applicant can attest that there has been no substantial change in available discretionary resources, the applicant may refer to that decision to satisfy the requirement of this subpart.

Subp. 4. **Budget.** The applicant shall file as part of the request an estimate of its intervenor costs, the basis for the estimate, the extent of financial commitment to participation, and a specific budget showing the total compensation, not to exceed the maximum amount allowed by Minnesota Statutes, section 216B.16, subdivision 10, or 237.075, subdivision 10, to which the applicant believes it may be entitled.

Subp. 5. **Statement of participation.** The applicant shall file as part of the request a statement of the nature and extent of planned participation in the proceeding as far as it is possible to set it out when the request is filed. The statement must include a list of positions and issues that the applicant intends to present, raise, or respond to in the proceeding, an explanation of how an issue affects the applicant's interest in the proceeding, and a clear indication of which viewpoints or ideas the applicant believes are substantive, novel, or significant and why their presentation would contribute to a fair determination of an issue in the proceeding.

7831.0400 STATEMENT IN RESPONSE.

The department, attorney general, or other party to the proceeding, within 15 days after an applicant has filed a request under part 7831.0300, may file with the commission a statement commenting on any part of the request and on duplications of positions, issues, or presentations, and make recommendations to the commission. The statement must be served on the applicant and known parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on the applicant and known parties.

7831.0500 PRELIMINARY DETERMINATION ON ELIGIBILITY.

Subpart 1. **Required determinations.** Within 45 days of receiving a request under part 7831.0300, the commission shall issue a preliminary determination addressing whether the

applicant is eligible for an award of compensation of intervenor costs. The determination must address:

A. whether the commission considers the applicant to be an intervenor as defined in part 7831.0100, subpart 9; and

B. whether the applicant has made a sufficient showing that, but for an award of compensation for all or part of its intervenor costs, it has insufficient financial resources to intervene and participate fully and effectively in the proceeding, assuming all information in the request filing is true and accurate pending an audit that may be required under part 7831.0700, and pending a decision awarding or denying compensation under part 7831.0800.

Subp. 2. **Discretionary determinations.** The determination on eligibility may also, but is not required to:

A. address whether the applicant has demonstrated its ability to materially assist the commission in its proposed statement of participation, assuming its accuracy, under part 7831.0300, subpart 5;

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

C. recommend use of common legal representation or expert witnesses in cooperation with other applicants or participants;

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

E. point out any unrealistic expectations for compensation; or

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

Subp. 3. **Effect of preliminary determination on eligibility.** A preliminary determination on eligibility does not guarantee either a grant or a denial of an award of

compensation for intervenor costs. If a preliminary determination is not made on a discretionary factor in subpart 2, items A to F, no presumption arises regarding that factor.

A. After a preliminary determination granting compensation for intervenor costs, the commission must overcome in an applicant's claim for compensation a presumption, for the reasons stated in the preliminary determination, that the applicant should be granted an award of compensation for intervenor costs.

B. After a preliminary determination denying compensation, an applicant may elect to intervene and may intervene if granted permission by the commission or presiding officer. If, however, the applicant does intervene, the applicant must overcome in the claim for compensation a presumption, for the reasons stated in the preliminary determination, that the applicant should be denied an award of compensation for intervenor costs.

7831.0600 CLAIM FOR COMPENSATION.

Subpart 1. **Filing claim.** An intervenor shall file a claim for an award of compensation of its intervenor costs within 90 days after the later of:

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

B. the date the commission issues its order following reconsideration or rehearing.

Subp. 2. **Required information.** The claim must include, at a minimum:

A. adoption or amendment by the intervenor of the information submitted in the request filed under part 7831.0300;

B. a detailed, itemized description of services and intervenor costs related to specific issues addressed in the proceeding, for which an award of compensation is sought; and

C. a description of how the intervenor's contribution to the proceeding may have materially assisted the commission in

its deliberations.

A copy of the claim must be served on all parties to the proceeding and the claim must have attached to it an affidavit of service on all parties.

Subp. 3. **Response.** Within 30 days after service of the claim, a party may file a response to the claim with the commission. A copy of the statement must be served on the claiming intervenor and other parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on the applicant and known parties.

Subp. 4. **Reply.** The claiming intervenor may file with the commission a reply to a response under subpart 3 within 15 days after the response is filed. A copy of the statement must be served on other parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on known parties.

Subp. 5. **Amended claim.** When additional costs are incurred as a result of a remanded hearing, the intervenor may file an amended claim within 30 days after the commission issues its order following remand. Subparts 1 to 4 apply also to an amended claim.

7831.0700 FINANCIAL REVIEW.

At any time after a request for compensation is filed, the commission or its staff may request additional financial information from the intervenor to clarify or substantiate the claim. The requested information may include, among other things, records, receipts, invoices, and other documents showing the intervenor's expenses incurred and financial condition.

If considered necessary by the commission, an applicant for compensation shall grant the staff of the commission and the department access to audit and examine pertinent books, documents, papers, and records, to the extent necessary to verify that the intervenor has insufficient financial resources to afford its intervenor costs and to verify the basis for the amount claimed.

Approved applicants shall retain the records relevant to supporting a claim for three years after receiving compensation.

7831.0800 AWARD OF COMPENSATION.

Subpart 1. **Decision.** Within 120 days of the filing of a claim or amended claim for an award of compensation for intervenor costs, or within 45 days of the filing of an audit or additional information, whichever is later, the commission shall issue a decision awarding or denying compensation.

Subp. 2. **Materially assisted.** To be granted an award of compensation, in whole or in part, for intervenor costs, the intervenor must have materially assisted the commission in its deliberations. The commission shall consider the following factors, no single one of which is dispositive, in making its decision awarding or denying compensation:

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

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

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

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

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

F. whether the commission adopted, in whole or in part, a position advocated by the intervenor.

Subp. 3. **Insufficient financial resources.** To be granted an award of compensation for intervenor costs, the intervenor

must show that it has insufficient financial resources, but for the award, to afford all or part of its intervenor costs necessarily incurred to participate effectively in a proceeding. The commission shall consider the following factors, as applicable, in making its decision awarding or denying compensation, in whole or in part, for intervenor costs:

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

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

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

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

Subp. 4. **Bases for commission decision.** For each issue addressed by the intervenor and decided in the proceeding:

A. On finding that an intervenor materially assisted the commission and has insufficient financial resources to afford its intervenor costs, the commission shall issue its decision awarding compensation. The decision must describe the bases for assistance found and for the amount of compensation awarded.

B. On finding that an intervenor either did not materially assist the commission or has sufficient financial resources to afford all of its intervenor costs, the commission shall issue its decision denying compensation. The decision must describe the bases for denying compensation.

Subp. 5. **Maximum amount awarded.** The total amount of the award for a proceeding may be all or part of the amount claimed,

but must not exceed the maximum allowed under Minnesota Statutes, section 216B.16, subdivision 10, or 237.075, subdivision 10.

Subp. 6. **Payment.** The utility or telephone company that was the subject of the proceeding shall pay the award of compensation to the intervenor within 30 days after the commission issues its decision awarding compensation. The utility or telephone company shall file with the commission proof that it paid the amount of compensation awarded to the intervenor.

APPROVED AS TO FORM AND LEGALITY

December 12 1990

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BY M J Cassedy

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED

DEC 18 1990 MJ

Joan Anderson Growe

Secretary of State

1:08

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

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

ISSUE DATE:

DOCKET NO. U-999/R-89-1

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

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

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

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

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

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

II. STATEMENT OF COMMISSION'S STATUTORY AUTHORITY

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

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

> Minn. Stat. Section 216B.16 (1988) Rate changes; procedure; hearing
>
> *****
>
> Subdivision 10. Intervenor payment. The commission may order a utility to pay all or a portion of a party's

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

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

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

*****

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

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

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

III. STATEMENT OF NEED

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

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

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

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

IV. STATEMENT OF REASONABLENESS

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

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

A. Reasonableness of the Rules as a Whole

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No one rule criterion for determining material assistance is dispositive?

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

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

B. Reasonableness of Individual Rules

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

7831.0100 DEFINITIONS

Subp. 1. Scope.

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

Subp. 2. Attorney fees.

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

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

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

Subp. 3. Attorney General.

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

Subp. 4. Commission.

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

Subp. 5. Compensation.

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

Subp. 6. Department.

The proposed definition of the term "Department" is reasonable

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

Subp. 7. Expert witness fees.

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

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

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

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

Subp. 8. Final determination.

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

Subp. 9. Insufficient financial resources.

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

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

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

Subp. 10. Intervenor.

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

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

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

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

Subp. 11. Intervenor Costs.

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

[intervenor] costs".

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

Subp. 12. Issue.

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

Subp. 13. Materially assisted.

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

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

Subp. 14. Other reasonable costs.

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

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

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

Subp. 15. Position.

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

Subp. 16. Proceeding.

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

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

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

Subp. 17. Telephone company.

The proposed definition of telephone company has the meaning

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

Subp. 18. Utility.

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

7831.0200 PURPOSE

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

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

7831.0300 REQUEST FOR COMPENSATION

Subp. 1. Request filing and notice.

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

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

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

Subp. 2. General information.

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

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

Subp. 3. Insufficient financial resources.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subp. 4. Budget.

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

applicant believes it may be entitled.

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

Subp. 5. Statement of participation.

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

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

7831.0400 STATEMENT IN RESPONSE

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

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

7831.0500 PRELIMINARY DETERMINATION ON ELIGIBILITY

Subp. 1. Required determination.

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

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

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

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

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

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

Subp. 2. Discretionary determinations.

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

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

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

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

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

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

E. Point out any unrealistic expectations for compensation; or

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

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

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

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

Subp. 3. Effect of preliminary determination.

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

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

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

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

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

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

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

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

7831.0600 CLAIM FOR COMPENSATION

Subp. 1. Filing claim.

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

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

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

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

Subp. 2. Required information.

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

Subp. 3. Response.

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

Subp. 4. Reply.

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

Subp. 5. Amended claim.

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

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

7831.0700 FINANCIAL REVIEW

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

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

7831.0800 AWARD OF COMPENSATION

Subp. 1. Decision.

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

Subp. 2. Materially assisted.

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

to hard data measurement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subp. 3. Insufficient financial resources.

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

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

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

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

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

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

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

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

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

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

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

Subp. 4. Bases for commission decision.

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

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

money.

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

Subp. 5. Maximum amount awarded.

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

Subp. 6. Payment.

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

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

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

V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

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

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

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

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

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

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

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

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

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

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

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

(a) the establishment of less stringent compliance or reporting requirements for small businesses;

(b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

(c) the consolidation or simplification of compliance or reporting requirements for small businesses;

(d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and

(e) the exemption of small businesses from any or all requirements of the rule.

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

in the rule.

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

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

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

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

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

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

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

VI. LIST OF WITNESSES AND EXHIBITS

A. Witnesses

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

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

1. Janet Gonzalez
   Energy Analyst
   Public Utilities Commission

2. Louis Sickmann
   Financial Analyst
   Public Utilities Commission

3. Diane Wells
   Telecommunications Analyst
   Public Utilities Commission

4. Rosellen Condon
   Office of the Attorney General
   Public Utilities Commission Division

5. Ginny Zeller
   Staff Attorney
   Public Utilities Commission

B. Exhibits

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

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

13. ORDER DENYING INTERVENOR COMPENSATION, Docket No. P-421/GR-83-600

14. Reserve Mining Company v. Minnesota Pollution Control Agency, 364 N.W. 2d 411 (Minn. Ct. App. 1985)

15. In Re Authorization to Discharge and Construct Waste Water Treatment Facilities, 366 N.W. 2d 118 (Minn. Ct. App. 1985)

16. Minn. Stat. §14.115 (1988 and 1989 Supp.)

VI. CONCLUSION

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

Richard R. Lancaster

Executive Secretary

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Rules Governing Intervenor Compensation, Minn. Rules, parts 7831.0100-.0800

DOCKET NO. U-999/R-89-1

DECLARATION OF COUNSEL

I, _____, Special Assistant Attorney General, do hereby declare that I have examined the above-captioned rules and the supporting rulemaking record, and that, based on my examination, the Administrative Procedure Act and Minnesota Rules, ch. 2010 have been followed. For Attorney General billing purposes, the four-digit docket client code is _____.

_____

_____
Special Assistant
Attorney General

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

In the Matter of Proposed Rules Governing Intervenor Compensation, Minn. Rules, parts 7831.0100-.0800

Docket No. U-999/R-89-1

AFFIDAVIT OF MAILING

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

Maggie Diedrich, being duly sworn, deposes and says:

That on the 3rd day of July, 1990, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the State of Minnesota Central Mail System or in the United States mail for first class mailing at said City of St. Paul, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who have requested that their names be placed on file with the Minnesota Public Utilities Commission for the purpose of receiving notice of the proposed adoption of rules by the Minnesota Public Utilities Commission.

Maggie Diedrich

Maggie Diedrich

Subscribed and sworn to before me this 19th day of July, 1990.

Sharon L. Juen

Notary Public

SHARON L. JUEN
NOTARY PUBLIC—MINNESOTA
WASHINGTON COUNTY
MY COMM. EXPIRES JAN. 19, 1991

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Rules Governing Intervenor Compensation, Minn. Rules, parts 7831.0100-.0800	Docket No. U-999/R-89-1 CERTIFICATE OF RULEMAKING LIST

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minn. Stat. § 14.14 (1988) that their names be placed on file with the Minnesota Public Utilities Commission (Commission) for the purpose of receiving notice of the proposed adoption of rules by the Commission is accurate and complete as of this 3rd day of July, 1990.

Karen Sletten

presented. The issues raised by the six intervenors, said the Commission, were "matters of common knowledge or were addressed by other parties." Further, noted the Commission, "None of these parties prevailed completely in obtaining the relief sought, especially when they urged the Commission to dismiss the rate increase case in its entirety." Thus, the Commission concluded, the participation of none of the parties "was a significantly persuasive factor in [the Commission's] reaching its conclusions in this case." As for Evan J. Henry, who had raised accounting and rate design issues and had also urged dismissal of the entire proceedings, the Commission simply said he was not entitled to reimbursement "because Mr. Henry * * * prevailed on none of his claims."

The court of appeals held that while the Commission might consider whether an intervenor had prevailed, it was error to make it the sole determinative factor, as was done in Mr. Henry's case. As for MPIRG and SCAR, the court felt the Commission was saying that if more than one party addressed an issue none could be reimbursed, which would be arbitrary; and the court further felt the Commission's findings inadequately explained what it meant by saying intervenors had raised issues of only common knowledge. Consequently, the court of appeals remanded for the Commission to develop "articulable standards" and adequate findings.

Two issues are presented: (1) Did the Commission employ appropriate criteria in its interpretation of the statutory phrase "materially assisted"? and (2) Assuming the adequacy of the Commission's criteria, did the Commission err in its determination that under the facts of this case none of the intervenors had been of material assistance to the Commission in its deliberations?

I.

[1] If the intervenor "has materially assisted the commission's deliberation and the intervenor has insufficient financial resources," the Commission may reimburse the intervenor. While this two-pronged statutory test for reimbursement seems forthright enough, it requires, as the Commission discovered, interpretation. Consequently, the Commission discussed the criteria it would use in applying the statutory test.

Establishing criteria or standards for implementing a statutory test is a matter of agency discretion. *See MPIRG v. Minnesota Environmental Quality Council*, 306 Minn. 370, 382, 237 N.W.2d 375, 382 (1975) (interpretation of the statutory phrase "need for environmental review" is within agency discretion). The role of the court is limited to whether, on review, the criteria or standards are reasonable and further the purpose of the statute. *See* H.M. Hart, Jr. & A.M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1345–47 (1958).

[2] Here, in determining whether it had received material assistance, the Commission considered whether the intervenors prevailed, whether the issues raised by intervenors were unique, and whether the intervenors raised matters of more than common knowledge. The Commission apparently felt an intervenor should not be reimbursed for simply riding on someone else's coattails. Surely, the selection of these criteria is well within the exercise of the Commission's discretion. All three criteria are reasonable and further the purposes of the statute.

At oral argument the Commission advised us that it was now in the process of promulgating a rule establishing standards for reimbursement.[1] Presumably in the rulemaking proceedings, which will cover both prongs of the statutory test, the Commission will be able to consider a variety of criteria and fashion a rule selecting and using those criteria which best further the purpose of the statute.

[3] While prevailing on an issue may well be a factor in granting reimbursement, to require that an intervenor must prevail to be reimbursed, as the Commission appears to have done in the case of one of the intervenors, is unreasonable. We agree with the court of appeals that to prevail is not the sine qua non for reimbursement, but only one of a number of criteria to be considered. The Commission got sidetracked with its reliance, "[b]y analogy," on *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), wherein the United States Supreme Court, in determining an award of attorney fees under 42 U.S.C. § 1988 (1982), essentially required the plaintiff to prevail. *Hensley* was dealing with an entirely different litigation situation and with a federal statute which explicitly refers to a "prevailing party." Minn.Stat. § 237.075, subd. 10, on the other hand, deals with "assistance" rendered by a utility rate case intervenor. Indeed, the focus of our state statute is not so much on who wins or loses but on the Commission's *deliberations, i.e.*, on whether intervenor has helped the Commission in deciding who wins or loses. We can conceive of situations where a nonprevailing intervenor might nevertheless be of help to the Commission in illuminating a troublesome issue or in providing useful data or in some other way.

[4] One last observation. By saying it must "subjectively judge," the Commission seemed to assign itself an overly introspective standard. True, the Commissioners must "make up their minds," but they do so based on objective criteria applied to the facts and circumstances of the record at hand. Their discretion is not unlimited and must be explained. By over-emphasizing the "subjectiveness" of their decisionmaking process, the Commission may fall into the trap, as it did here, of arguing that even if intervenors had established a case of material assistance, the Commission would not have been required to award reimbursement because the statute says only that reimbursement "may" be awarded. At oral argument, the Commission's counsel abandoned this argument, conceding it was incorrect and would, if logically extended, insulate agency caprice from judicial review.

II.

[5, 6] We next consider whether, on the facts of this case, the Commission properly denied the three intervenors' claims for reimbursement. As to Evan J. Henry, the Commission erroneously looked no further than Henry's failure to prevail on the issues he addressed. We remand, as did the court of appeals, Henry's reimbursement request for reconsideration.[2]

[7] We disagree with the court of appeals on the reimbursement requests of MPIRG and SCAR and affirm the Commission's denial of those applications. It

1. If an agency makes a "statement of general applicability and future effect * * * adopted to implement or make specific the law enforced or administered by it * * *," such a statement would be a rule. Minn.Stat. § 14.02, subd. 4 (Supp.1985). To be valid, any rule, including an interpretative rule, must be promulgated pursuant to the rulemaking requirements of our Administrative Procedure Act. *See Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984). On the other hand, if an agency's interpretation of a statute it is administering corresponds with the plain meaning of the statute, no rulemaking is involved. *See id.* Sometimes it is a thin line between whether an agency statement is or is not a rule.

Here, the Commission did not submit its statement of criteria to the rulemaking process, but no one in this appeal questions its failure to do so, so we do not have the issue before us. At oral argument, the Commission said there was not time to promulgate a rule but that it has now instituted the rulemaking procedure to establish a rule on intervenor reimbursement. In its order denying reimbursement, the Commission said its denial was based on the particular facts of the case "and is not intended to be precedent for future proceedings." For a discussion of the need for an administrative agency, in certain circumstances, to have the discretion to proceed by rulemaking or adjudication or a combination of both, see 2 K. Davis, Administrative Law Treatise § 7.25 (1979).

2. Mr. Henry's request for reimbursement includes expenses incurred prior to May 3, 1984, the effective date of the reimbursement statute. We agree with the court of appeals' holding that the Commission had no authority to award reimbursement for expenses prior to May 3. Moreover, in remanding Mr. Henry's application, we are not commenting on the merits of what remains of his reimbursement request.

Stat Authority
216B.16 subd 10

The commission may order a utility to pay all or a portion of a party's intervention costs not to exceed $20,000. - -

237.075 subd 10

The commission may order a utility to pay all or a portion of a party's intervention costs not to exceed $20,000 . . .

OK
See SNR
May have implied authority

[redacted] authority to promulgate rules stated in Notice of Intent

End of comment period is August 8, 1990 stated in the Notice of Intent = published in State by July 9, 1990 = 30 days

SOLAR

pages 15-16 part A is missing or they mislettered the points and didn't start with A. Since A isn't addressed in later text maybe it is not an error

Last paragraph on page 16 E should be F it is obvious that it should be F

14.131 doesn't apply

June 22, 1990

Proposed Rules Governing Intervenor Compensation, Minn. Rules, parts 7831.0100-.0800, Docket No. U-999/R-89-1.

Notice of Intent to Adopt Rules Without a Public Hearing and of Intent to Adopt Rules With a Public Hearing If Twenty-five or More Persons Request a Hearing

(1) Notice is hereby given that the Minnesota Public Utilities Commission (Commission) intends to adopt the above-entitled rule without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in Minn. Stat. §§ 14.22 to 14.28 (1988). The Commission's authority to adopt the rule is set forth in Minn. Stat. §§ 216B.16, subd. 10 and 237.075, subd. 10 (1988).

(2) All persons have until 4:30 p.m. on August 8, 1990, to submit comments in support of or in opposition to the proposed rules or any part or subpart of the rules. Comment is encouraged. (3) Each comment should identify the portion of the proposed rules addressed, the reason for the comment, and any change proposed. PLEASE USE DOCKET NO. U-999/R-89-1 ON ALL CORRESPONDENCE.

Any person may make a written request for a public hearing on the rules within the comment period. (4) If 25 or more persons submit a written request for a public hearing within the comment period, a public hearing will be held unless a sufficient number withdraw their requests in writing. (6) Any person requesting a public hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rules addressed, the reason for the request, and any change proposed.

(7) If a public hearing is required, the Commission will proceed pursuant to Minn. Stat. §§ 14.131 to 14.20 (1988). PLEASE NOTE THAT IF TWENTY-FIVE OR MORE PERSONS SUBMIT WRITTEN REQUESTS FOR A PUBLIC HEARING WITHIN THE 30-DAY COMMENT PERIOD, A HEARING WILL BE HELD ON FRIDAY, AUGUST 24, 1990, IN ACCORDANCE WITH THE NOTICE OF PUBLIC HEARING OF THESE SAME RULES PUBLISHED IN THIS STATE REGISTER AND MAILED TO PERSONS REGISTERED WITH THE COMMISSION. To verify whether a hearing will be held, please call the Commission between August 9, 1990, 1990,and August 24, 1990, at (612) 296-7124.

(5) Comments or written requests for a public hearing must be submitted to:

Virginia Zeller
Minnesota Public Utilities Commission
780 American Center Building

150 East Kellogg Boulevard
St. Paul, Minnesota 55101
(612) 297-7072

(8) The proposed rules may be modified if the modifications are supported by data and views submitted to the Commission and do not result in a substantial change in the proposed rule as noticed.

(11) The proposed rules, if adopted, will allow the Commission to award compensation to intervenors in telephone company general rate cases and in gas and electric utility rate change proceedings. A copy of the proposed rules is enclosed. One free copy of the rules is available upon request from the Commission by contacting the Commission's receptionist, Kristine Kline, at the above address or by calling (612) 296-7124.

(12) A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rules and identifies the data and information relied upon to support the proposed rule has been prepared and is available upon request from the Commission by contacting the Commission's receptionist, Kristine Kline at the above address or by calling (612) 296-7124.

(14) You are hereby advised, pursuant to Minn. Stat. § 14.115 (1988), "Small business considerations in rulemaking," that the proposed rules may affect small businesses. Non-profit public interest organizations, which may be broadly characterized as small businesses, may qualify for compensation as intervenors. A utility/small business may be required to expend funds for intervenor compensation.

(13) The adoption of these rules by the Commission will not require the expenditure of public money by local public bodies nor have a direct impact on agricultural land. Therefore, Minn. Stat. § 14.11 (1988) is not applicable to this rulemaking proceeding.

(9) If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the rule submitted to the Attorney General, must submit a written request to Virginia Zeller at the above address.

Richard R. Lancaster

Richard R. Lancaster
Executive Secretary

RESOLUTION ADOPTING RULES

Docket No.U-999/R-89-1

BE IT RESOLVED, that the Minnesota Public Utilities Commission (Commission) hereby approves and adopts the proposed rules governing intervenor compensation, Minn. Rules, parts 7831.0100-.0800, pursuant to the authority vested in the Commission by Minn. Stat. §§ 216B.16, subd. 10 (1988) and 237.075, subd. 10 (1988).

BE IT FURTHER RESOLVED, that prior to publishing the rules as adopted in the State Register, the Executive Secretary is authorized to make any form changes in the rules that the Revisor of Statutes requires the Commission to make in order to obtain the Revisor's Certificate as required by Minn. Stat. § 14.28 (1988).

BE IT FURTHER RESOLVED, that the Commission adopts the attached Findings of Fact, Conclusions, and Order Adopting Rules and that the Executive Secretary is hereby authorized to sign the above-mentioned document on behalf of the Commission and to perform the necessary acts to provide that the rule shall have the force and effect of law.

Officer of the Commission

Attest by one other Commission member

CERTIFICATE OF RESOLUTION ADOPTING RULES

Docket No. U-999/R-89-1

I, Richard R. Lancaster, do hereby certify that I am the Executive Secretary of the Minnesota Public Utilities Commission (Commission), an agency duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Commission duly and properly called and held on the 30th day of October, 1990, that a quorum was present at said meeting, that a majority of those present voted in favor of the resolution and that said resolution will be set forth in the minutes of said meeting and has not been rescinded or modified:

> BE IT RESOLVED, that the Minnesota Public Utilities Commission (Commission) hereby approves and adopts the rules governing intervenor compensation, Minn. Rules, parts 7831.0100-.0800. pursuant to the authority vested in the Commission by Minn. Stat. §§ 216B.16, subd. 10 (1988) and 237.075, subd. 10 (1988).
>
> BE IT FURTHER RESOLVED, that prior to publishing the rules as adopted in the State Register, the Executive Secretary is authorized to make any form changes in the rules that the Revisor of Statutes requires the Commission to make in order to obtain the Revisor's Certificate as required by Minn. Stat. § 14.28 (1988).
>
> BE IT FURTHER RESOLVED, that the Commission adopts the attached Findings of Fact, Conclusions, and Order Adopting Rules and that the Executive Secretary is hereby authorized to sign the above-mentioned document on behalf of the Commission and to perform the necessary acts to provide that the rule shall have the force and effect of law.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 30th day of October, 1990.

Richard R. Lancaster
Executive Secretary

Public Utilities Commission

Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Intervenor Compensation, Docket No. U-999/R-89-1.

NOTICE IS HEREBY GIVEN that the Minnesota Public Utilities Commission (Commission) is seeking information or opinions from outside sources in preparing to propose the adoption of a rule governing intervenor compensation. The draft rule is published below.

The adoption of the rule is authorized by *Minnesota Statutes* §§ 216B.16, subd. 10 and 237.075, subd. 10 (1988), which allow the Commission to award compensation to intervenors in telephone company general rate cases and in gas and electric utility proceedings. To be awarded compensation, the intervenor must materially assist the Commission's deliberation and have insufficient financial resources to afford the costs of intervention.

The Commission requests information and opinions concerning the subject matter of the rule. Interested persons or groups may submit data or views in writing or orally. Written statements or comments should be directed to:

Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101
(612) 296-9617

Oral statements or comments will be received during regular business hours, 8:00 a.m. to 4:30 p.m, Monday through Friday.

All statements of information and opinion will be accepted until 4:30 p.m. on August 16, 1989. Any written materials received by the Commission shall become part of the rulemaking record in the event that the rule is adopted. **PLEASE USE DOCKET NO. U-999/R-89-1 ON ALL CORRESPONDENCE.**

Staff has prepared a Report that explains the draft rules. One free copy is available upon request from the Commission by contacting the Commission's receptionist, Tamiko Jackson, at the above address or by calling (612) 296-7124.

The Commission is especially interested in receiving comment on the following issues:

1. Part 7831.0100, subparts 11 and 16. Should the definition of intervenor costs include costs, fees, or charges incurred for judicial appeal or judicial review? Should the definition of proceeding include matters considered during judicial appeal or review?

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

- Intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail?
- Compensation cannot be denied solely on the basis that the intervenor prevailed?
- No one rule criterion for determining material assistance is dispositive?

Mary Ellen Hennen
Executive Secretary

Working Draft Relating to Intervenor Compensation

7831.0100 DEFINITIONS.

Subpart 1. **Scope.** The terms used in this chapter have the meanings given them in this part.

Subp. 2. **Attorney fees.** "Attorney fees" means the reasonable, itemized billings and costs incurred by an intervenor for the services of an attorney in a proceeding before the commission. The costs for services of the attorney are reasonable when computed at the rate normally charged by that attorney for comparable services, or at the prevailing market rate or fair market value to obtain comparable and available services of an attorney of comparable training and experience, whichever rate is lower.

Subp. 3. **Attorney General.** "Attorney General" means the Minnesota Residential and Small Business Utilities Division of the Office of the Attorney General.

Subp. 4. **Commission.** "Commission" means the Minnesota Public Utilities Commission.

Subp. 5. **Compensation.** "Compensation" means reimbursement or payment to an eligible intervenor for all or part of the intervenor costs, as determined by the commission under this chapter, for participation in a proceeding.

Subp. 6. **Department.** "Department" means the Minnesota Department of Public Service.

Subp. 7. **Expert witness fees.** "Expert witness fees" means the reasonable, itemized billings and costs incurred by an intervenor for the services of an expert witness in a proceeding before the commission. The costs for services of the expert witness are reasonable when computed at the rate normally charged by that witness for comparable services, or at the prevailing market rate or fair market value to obtain comparable and available services of an expert witness of comparable training and experience, whichever rate is lower.

Subp. 8. **Final determination.** "Final determination" has the meaning given it in Minnesota Statutes, sections 216B.16, subdivision 2, paragraph (c), and 237.075, subdivision 2, paragraph (c).

Subp. 9. **Insufficient financial resources.** "Insufficient financial resources" means that but for the reimbursement of all or part of its intervenor costs, the intervenor is financially unable to afford intervenor costs incurred to participate effectively in the proceeding as determined by the commission under part 7831.0800, subpart 3.

Subp. 10. **Intervenor.** "Intervenor" means a person who is entitled or permitted by law, or permitted under rule of the commission or by order of the presiding officer, to intervene in a proceeding. For purposes of awarding compensation for intervenor costs under this chapter, intervenor does not include (1) a provider of telephone services of any kind, or its representative, agent, or affiliate, nor (2) an agency, representative, employee, authority, or political subdivision of a federal, state, county, home rule charter or statutory city, or town government or combination of them.

Subp. 11. **Intervenor costs.** "Intervenor costs" means attorney fees, expert witness fees, and other reasonable costs incurred in a proceeding. Intervenor costs do not include costs, fees, or charges incurred for judicial appeal or judicial review.

Subp. 12. **Issue.** "Issue" means a question, dispute, or controversy to be resolved in a proceeding held under Minnesota Statutes, section 216B.16 or 237.075.

Subp. 13. **Materially assisted.** "Materially assisted" means that the intervenor's participation and presentation was useful and seriously considered, or otherwise substantially contributed to the commission's deliberations in the proceeding, following consideration by the commission of the factors listed in part 7831.0800, subpart 2.

Subp. 14. **Other reasonable costs.** "Other reasonable costs" means reasonable fees and charges actually incurred by an intervenor in a proceeding before the commission, such as the costs for:

A. the services of a consultant or an employee of the intervenor computed at the rate normally charged by that person for comparable services, or at the prevailing market rate or fair market value to obtain comparable, available services of persons of comparable training and experience, whichever is lower; and

B. out-of-pocket expenses directly related to and necessary for participation in the proceeding, for example, costs of filing, copying, travel, travel-related expenses, and preparation of studies, displays, or exhibits.

Subp. 15. **Position.** "Position" means a factual contention, legal contention, or specific policy or procedural recommendation made by an intervenor relating to an issue addressed and decided in a proceeding.

Subp. 16. **Proceeding.** "Proceeding" means a proceeding conducted under Minnesota Statutes, section 216B.16 or a general rate case conducted under Minnesota Statutes, section 237.075. For purposes of this chapter, a procedural or supplemental matter is considered part of the main proceeding under Minnesota Statutes, section 216B.16 or 237.075 if it is decided or conducted by the commission or an administrative law judge on an issue or position considered in, related to, or supplemental to the main proceeding, or on the issue of intervenor compensation awarded. Procedural or supplemental matters include, for example: motions; orders; settlements; stipulations; prehearing conferences, determinations, or procedures; contested case hearings; reconsiderations or rehearings; and remanded hearings. Proceeding does not include matters considered during judicial appeal or review.

Subp. 17. **Telephone company.** "Telephone company" has the meaning given it in Minnesota Statutes, sections 237.01, subdivision 2; 237.01, subdivision 3, if the company is subject to general rate regulation by the commission; and 237.075, subdivision 9, if the company has made the election provided in that subdivision.

Subp. 18. **Utility.** "Utility" has the meaning given "public utility" in Minnesota Statutes, section 216B.02, subdivision 4.

7831.0200 PURPOSE.

The purpose of this chapter is to establish procedural and substantive criteria for reimbursing an intervenor for its intervenor costs incurred in a proceeding or general rate case under Minnesota Statutes, section 216B.16, subdivision 10, or 237.075, subdivision 10, when the intervenor has insufficient financial resources to afford its intervenor costs and has materially assisted the commission in its deliberations in the proceeding.

7831.0300 REQUEST FOR COMPENSATION.

Subpart 1. **Request filing and notice.** An applicant for an award of compensation shall file with the commission a request for compensation. The applicant shall also serve a copy of the request on each known party to the proceeding and shall file with the request a copy of the affidavit of service. The request must be filed as soon after notice of a filing, proceeding, or prehearing conference as is reasonably possible, but at least 75 days after the notice or 30 days before the beginning of evidentiary hearings in the proceeding, whichever occurs later. The request must satisfy the requirements of subparts 2 to 5.

Subp. 2. **General information.** The request for compensation must contain the following information, as applicable:

A. the name and address of the applicant or representative of an organization;

B. for an organization, the names, addresses, and titles of the members of its governing body, a description of the organization's general purposes, size, and structure, and whether it is a nonprofit organization incorporated under Minnesota Statutes, chapter 317; and

C. the proceeding for which the compensation is requested.

Subp. 3. **Insufficient financial resources.** The applicant shall show as part of the request that, but for an award of compensation for its intervenor costs under this chapter, the applicant has insufficient financial resources to intervene and participate effectively in the proceeding. The request must address the factors set forth in part 7831.0800, subpart 3. The applicant shall provide a summary description of finances, distinguishing between grant funds committed to specific projects, if applicable, and discretionary funds, showing the financial status of the applicant, including at least:

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

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

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

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

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

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

If available, the applicant shall file a copy of its audited financial statements. The applicant may reference its audited financial statements to satisfy items (1) to (6).

If the commission has determined within the previous year before receiving the request that the applicant has met its burden of showing insufficient financial resources and if the applicant can attest that there has been no substantial change in available discretionary resources, the applicant may refer to that decision to satisfy the requirement of this subpart.

Subp. 4. **Budget.** The applicant shall file as part of the request an estimate of its intervenor costs, the basis for the estimate, the extent of financial commitment to participation, and a specific budget showing the total compensation, not to exceed the maximum amount allowed by Minnesota Statutes, section 216B.16, subdivision 10, or 237.075, subdivision 10, to which the applicant believes it may be entitled.

Subp. 5. **Statement of participation.** The applicant shall file as part of the request a statement of the nature and extent of planned participation in the proceeding as far as it is possible to set it out when the request is filed. The statement must include a list of positions and issues that the applicant intends to present, raise, or respond to in the proceeding, an explanation of how an issue affects the applicant's interest in the proceeding, and a clear indication of which viewpoints or ideas the applicant believes are substantive, novel, or significant and why their presentation would contribute to a fair determination of an issue in the proceeding.

7831.0400 STATEMENT IN RESPONSE.

The department, attorney general, or other party to the proceeding may file a statement within 15 days after an applicant has filed a request under part 7831.0300, commenting on any part of the request and on duplications of positions, issues, or presentations, and make recommendations to the commission. The statement must be served on the applicant and known parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on the applicant and known parties.

7831.0500 PRELIMINARY DETERMINATION ON ELIGIBILITY.

Subpart 1. **Required determinations.** Within 45 days of receiving a request under part 7831.0300, the commission shall issue a preliminary determination addressing whether the applicant is eligible for an award of compensation of intervenor costs. The determination must address:

A. whether the commission considers the applicant to be an intervenor as defined in part 7831.0100, subpart 9; and

B. whether the applicant has made a sufficient showing that, but for an award of compensation for all or part of its intervenor costs, it has insufficient financial resources to intervene and participate fully and effectively in the proceeding, assuming all information in the request filing is true and accurate pending an audit that may be required under part 7831.0700, and pending a decision awarding or denying compensation under part 7831.0800.

Subp. 2. **Discretionary determinations.** The determination on eligibility may also, but is not required to:

A. address whether the applicant has demonstrated its ability to materially assist the commission in its proposed statement of participation, assuming its accuracy, under part 7831.0300, subpart 5;

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

C. recommend use of common legal representation or expert witnesses in cooperation with other applicants or participants;

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

E. point out any unrealistic expectations for compensation; or

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

Subp. 3. **Effect of preliminary determination on eligibility.** A preliminary determination on eligibility does not guarantee either a grant or a denial of an award of compensation for intervenor costs.

A. After a preliminary determination granting compensation for intervenor costs, the commission must overcome in an applicant's claim for compensation a presumption, for the reasons stated in the preliminary determination, that the applicant should be granted an award of compensation for intervenor costs.

B. After a preliminary determination denying compensation, an applicant may elect to intervene and may intervene if granted permission by the commission or presiding officer. If, however, the applicant does intervene, the applicant must overcome in the claim for compensation a presumption, for the reasons stated in the preliminary determination, that the applicant should be denied an award of compensation for intervenor costs.

7831.0600 CLAIM FOR COMPENSATION.

Subpart 1. **Filing claim.** An intervenor shall file a claim for an award of compensation of its intervenor costs within 90 days after the later of:

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

B. the date the commission issues its order following reconsideration or rehearing.

Subp. 2. **Required information.** The claim must include, at a minimum:

A. adoption or amendment by the intervenor of the information submitted in the request filed under part 7831.0300;

B. a detailed, itemized description of services and intervenor costs related to specific issues addressed in the proceeding, for which an award of compensation is sought; and

C. a description of how the intervenor's contribution to the proceeding may have materially assisted the commission in its deliberations.

A copy of the claim must be served on all parties to the proceeding and the claim must have attached to it an affidavit of service on all parties.

Subp. 3. **Response.** Within 30 days after service of the claim, a party may file a response to the claim. A copy of the statement must be served on the claiming intervenor and other parties and the statement must be accompanied by an affidavit of service.

Subp. 4. **Reply.** The claiming intervenor may file a reply to a response under subpart 2 within 15 days after the response is filed.

Subp. 5. **Amended claim.** When additional costs are incurred as a result of a remanded hearing, the intervenor may file an amended claim within 30 days after the commission issues its order following remand. Subparts 1 to 4 apply also to an amended claim.

7831.0700 AUDIT.

At any time after a request for compensation is filed, an applicant for compensation shall grant the staff of the commission and the department access to audit and examine pertinent books, documents, papers, and records, to the extent necessary to verify that the intervenor has insufficient financial resources to afford its intervenor costs and to verify the basis for the amount claimed. The commission and staff of the commission and the department shall preserve the confidentiality of any information in the intervenor's records and books obtained in making the audit, that is not necessary to make findings in the commission's award or denial of compensation. Instead of or in addition to an audit, the commission may request additional information from the intervenor to clarify or substantiate the claim, including records, receipts, invoices, and other documents showing expenses incurred.

Approved applicants shall retain all relevant records supporting a claim for three years after receipt of compensation.

7831.0800 AWARD OF COMPENSATION.

Subpart 1. **Decision.** Within 120 days of the filing of a claim or amended claim for an award of compensation for intervenor costs, or within 45 days of the filing of an audit or additional information, whichever is later, the commission shall issue a decision awarding or denying compensation.

Subp. 2. **Materially assisted.** To be granted an award of compensation, in whole or in part, for intervenor costs, the intervenor must have materially assisted the commission in its deliberations. The commission shall consider the following factors, as applicable, in making its decision awarding or denying compensation:

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

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

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

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

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

F. whether the commission adopted, in whole or in part, a position advocated by the intervenor.

Subp. 3. **Insufficient financial resources.** To be granted an award of compensation for intervenor costs, the intervenor must show that it has insufficient financial resources, but for the award, to afford all or part of its intervenor costs necessarily incurred to participate effectively in a proceeding. The commission shall consider the following factors, as applicable, in making its decision awarding or denying compensation, in whole or in part, for intervenor costs:

A. whether the intervenor's financial status, following examinations of the audit and the financial information provided in the intervenor's request and claim, indicate the intervenor can afford, in whole or in part, its intervenor costs;

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

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

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

Subp. 4. **Bases for commission decision.** For each issue addressed by the intervenor and decided in the proceeding:

A. On finding that an intervenor materially assisted the commission and has insufficient financial resources to afford its intervenor costs, the commission shall issue its decision awarding compensation. The decision must describe the bases for assistance found and for the amount of compensation awarded.

B. On finding that an intervenor either did not materially assist the commission or has sufficient financial resources to afford all of its intervenor costs, the commission shall issue its decision denying compensation. The decision must describe the bases for denying compensation.

Subp. 5. **Maximum amount awarded.** The total amount of the award for a proceeding may be all or part of the amount claimed, but must not exceed the maximum allowed under Minnesota Statutes, section 216B.16, subdivision 10, or 237.075, subdivision 10.

Subp. 6. **Payment.** The utility or telephone company that was the subject of the proceeding shall pay the award of compensation to the intervenor within 30 days after the commission issues its decision awarding compensation. The utility or telephone company shall file with the commission proof that it paid the amount of compensation awarded to the intervenor.

When an award of compensation is made in a proceeding involving more than one utility or telephone company, payment must be made by each utility or telephone company in a proportion determined by the commission in its decision awarding compensation under this part.

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Rules Governing Intervenor Compensation, Minn. Rules, parts 7831.0100-.0800

ISSUE DATE: OCT 3 0 1990 (9)

DOCKET NO. U-999/R-89-1

FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING RULES

The above-entitled matter came on for decision before the Minnesota Public Utilities Commission (Commission) on the 30th day of October, 1990. After affording all interested persons the opportunity to present written and oral data, statements and arguments to the Commission, in accordance with statutory requirements regarding the adoption of noncontroversial rules, after considering the Statement of Need and Reasonableness, after considering all of the evidence adduced upon the records, files and proceedings herein, the Commission, being fully advised in the premises, hereby adopts the following Findings of Fact, Conclusions, and Order:

FINDINGS OF FACT

1. (1) Notice of the Commission's intent to adopt the above rules without a public hearing was published in the State Register on July 9, 1990, and was sent by mail to all persons on the list maintained by the Commission pursuant to Minn. Stat. §§ 14.14, subd. 1a and 14.22 (1990) on July 3, 1990.

(2) 2. The Statement of Need and Reasonableness was prepared prior to mailing and publication of the notice and was made available to the public.

(4) 3. All persons were given the opportunity to submit comments on the rule for 30 days after notice of proposed rulemaking. The 30 day comment period, as set out in the notice, ended on August 8, 1990.

(5) 4. No requests for public hearing were received during the comment period.

(7) 5. No requests for notice of submission to the Attorney General were received by the Commission.

(7) 6. During the comment period the Commission received five written comments from Central Telephone Company (Centel),

the Suburban Rate Authority (SRA), the Department of Public Service (the Department), Northern States Power Company (NSP), and Contel of Minnesota, Inc. (Contel).

7. The Commission finds that modifications sought by the parties in their comments should not be made for the following reasons:

(6)

a. Centel.

In its written comments, Centel proposed deleting Part 7831.0500, subp. 2 (A) and (E) and Part 7831.0500, subp. 3 (A). Centel argued that an intervenor should not be allowed to raise a presumption of material assistance based on arguments and "facts" which are not yet in evidence. If Centel's deletions were implemented, an intervenor would not be entitled to a presumption of material assistance or of expectation of compensation.

Centel also asked the Commission to delete the words "or deny" from Part 7831.0800, subp. 2. This omission would mean that in determining material assistance, no single factor would be dispositive in granting compensation, but a single factor could be dispositive in denying compensation.

The Commission will not adopt Centel's proposed revisions. It is not necessary to preclude intervenors from a presumption of material assistance or expectation of compensation, simply because the intervenor's arguments have not yet been part of an evidentiary proceeding. The presumption is only a presumption; ultimately the Commission will be guided by the full facts in evidence. Furthermore, the presumption provision is specifically meant to aid intervenors before they have incurred the expense of participation in the full process.

The words "or deny" should not be stricken from Part 7831.0800, subp. 2. The Commission finds that all of the factors to determine material assistance are relevant and important, and therefore finds that no single factor should be dispositive in either granting or denying compensation.

b. Suburban Rate Authority.

The Suburban Rate Authority is a joint powers organization which represents 36 Twin City suburban municipalities. In the SRA's written comments (which were actually submitted six days after the close of the comment period) the SRA supported the position previously taken by the City of Saint Paul. The SRA argued that the costs of intervention are beyond the budget capabilities of municipalities, rendering intervenor compensation necessary. The SRA urged the

Commission to delete the words "home rule or statutory city, or town government or combination of them" from Part 7831.0100, subp. 10. This deletion would mean that municipalities would no longer be excluded from the definition of intervenor.

The Commission has addressed this argument in its Statement of Need and Reasonableness. The Commission still finds that cities are capable of providing for intervenor expenses through their budgeting and taxing authority. It is true that it is not always possible to predict what intervenor expenses may occur in the upcoming year. Presumably, however, a municipality which incurred nonbudgeted expenses could recover those expenses in its next planned budget.

c. Department of Public Service.

I. The Department argued that Part 7831.0100 subp. 2 and subp. 7 should be modified to provide for an attorney or expert witness who rendered services to intervenors in the past at a fee lower than market rate. The Department reasoned that such an individual should not be penalized by the provision limiting compensation rates to the individual's usual rate or the prevailing market rate, whichever is lower.

The Commission finds that the method of determining a fair rate of compensation in the proposed rule should remain unchanged. It would be unfair to allow an attorney or expert witness who normally bills at a below-market rate to recover a "windfall" from intervenor compensation. The method found in the rule ensures that a fair rate will be paid and neither the attorney or the utility will be disadvantaged.

II. The Department argued that Part 7831.0100 subp. 11 should be modified to allow compensation for costs incurred for judicial appeal or review.

Intervenor compensation is limited to an amount not to exceed $20,000 per intervenor in any **proceeding** under Minn. Stat. §216B.16 or Minn. Stat. §237.075. Precluding compensation for expenses associated with judicial appeal or review is consistent with Public Utilities Commission Practice and Procedure rules, Chapter 7830, which do not include judicial review or appeal within the definition of proceeding.

III. The Department argued that the "but-for" test found in Part 7831.0300, subp. 3 should be removed. The rule presently provides that a successful applicant will be found to have insufficient financial resources to intervene and

participate effectively, **but for** an award of compensation.

Both enabling statutes for intervenor compensation stress insufficient financial resources as one of the two prerequisites for a recovery of compensation. Given the statutory emphasis on insufficient financial resources, a "but-for" test to determine eligibility does not seem overly stringent.

IV. The Department argued that the wording of Part 7831.0300, sub. 5 should be changed to clarify that intervenors are not limited to previously defined issues for their award of compensation.

The Commission finds that additional language is not necessary to clarify this issue. This provision is meant to enable the Commission to make a preliminary determination of material assistance, should it so choose. It is not meant to limit intervenors to recovery on issues which were included in the statement of participation.

d. Northern States Power Company.

I. In its written comments NSP recommended that the proposed rule be changed so that the intervenor files the application for an award of compensation at the time it files to intervene in the rate proceeding.

The present timeframes for filing found in Part 7831.0300 subp. 1 should remain unchanged. Providing an outermost time limit of "...as soon after notice of a proceeding or prehearing conference as is reasonably possible, but at least 75 days after the proceeding begins or 30 days before the beginning of evidentiary hearings in the proceeding, whichever occurs first" is sufficiently clear. It would be unduly burdensome to require an intervenor to request compensation at the very outset of its participation, when the proceeding is not yet fully developed.

II. NSP again requested that wording be added to the rule spelling out the method of recovery of compensation costs. NSP specifically asked that the following sentence be added to Part 7831.0800 subp. 6: "The utility or telephone company shall recover the payment in the same manner as other rate case expenses for the proceeding."

The Commission finds that the addition proposed by NSP is unsatisfactory. The wording seems to imply a guarantee of recovery of intervenor expenses. No such guarantee of recovery can be granted by the Commission.

e. Contel

Contel suggested adding the following sentence to Part 7831.0800 subp. 6: "The utility or telephone company shall treat intervenor costs the same as all other expenses related to the proceeding for rate setting purposes."

This wording is preferable to that suggested by NSP, because it does not presume eventual recovery of intervenor expenses. While it is not unfairly slanted, it is also not a necessary addition to the proposed rule. There is nothing within the rule or governing statutes which precludes utilities or telephone companies from requesting recovery for compensation as a rate case expense.

8. The Commission adopts the Statement of Need and Reasonableness, in its entirety, as the factual basis for the proposed rules. The Commission hereby incorporates the Statement of Need and Reasonableness into these findings.

9. The above-captioned rule is needed and reasonable.

CONCLUSIONS

1. The Minnesota Public Utilities Commission duly acquired and has jurisdiction over this proceeding pursuant to Minn. Stat. §§ 216B.16, subd. 10 (1988) and 237.075, subd. 10 (1988).

2. The Commission published and served due, timely, and adequate notice of the intent to adopt the rules without a public hearing.

3. The Commission has complied with all relevant legal and procedural requirements of statute and rule.

ORDER

1. The Commission hereby adopts Minn. Rules, parts 7831.0100-.0800 governing intervenor compensation (1990).

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

MINNESOTA PUBLIC UTILITIES COMMISSION

Rec. 5-90
H-5

October 31, 1990

Ms. Christi Eller, Assistant Attorney General
Office of the Attorney General
515 Transportation Building
John Ireland Boulevard
St. Paul, MN 55155

Re: In the Matter of Proposed Rules governing Intervenor Compensation, Minn. Rules, parts 7831.0100-.0800, Docket No. U-999/R-89-1.

Dear Ms. Eller:

On October 30, 1990, the Minnesota Public Utilities Commission adopted the above-captioned rules governing intervenor compensation. No changes were made to the rule as proposed.

Enclosed for your review are the following:

1. Rules as adopted (original and three copies).
2. Findings of Fact, Conclusions, and Order Adopting Rules.
3. Resolution Adopting Rules and Certificate of Resolution Adopting Rules.
4. Notice of Intent to Solicit Outside Opinion (14 S.R. 115, July 17, 1989).
5. Copies of written comments received pursuant to Notice of Intent to Solicit Outside Opinion.
6. Authorization to Proceed with Adoption of Rules Without Public Hearing and Certificate of Authorizing Resolution.
7. Notice of Intent to Adopt Rules Without a Public Hearing and of Intent to Adopt Rules With a Public hearing if Twenty-five or More Persons Request a Hearing (15 S.R. 63, July 9, 1990).
8. Comments received through the end of the comment period.
9. Notice of Intent to Adopt Rules Without a Public Hearing, as mailed.
10. Affidavit of Mailing the Notice of Intent to Adopt Rule Without a Public Hearing and Certificate of Mailing List.

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11. Statement of Need and Reasonableness.

12. Declaration of Counsel.

Very truly yours,

Ginny Zeller

Ginny Zeller
Staff Attorney
(612) 297-7072

MINNESOTA public UTILITIES COMMISSION

AMERICAN CENTER building • kellogg AND ROBERT STS • SAINT PAUL, MN 55101

MINNESOTA public UTILITIES COMMISSION

November 26, 1990

Ms. Patty Nolte
Assistant Attorney General
Office of the Attorney General
525 Park
Suite 500
St. Paul, MN 55103

Re: In the Matter of Proposed Rules Governing Intervenor Compensation, Minn. Rules, parts 7831.0100-.0800, Docket No. U-999/R-89-1.

Dear Ms. Nolte:

Enclosed pursuant to your request are an original and three copies of the above rules as adopted. Apparently, Ron Ray sent me all the copies rather than sending one to you.

Please let me know if there is anything further you require.

Thank you.

Very truly yours,

Ginny Zeller

Ginny Zeller
Staff Attorney
297-7072

AMERICAN CENTER building • kellogg and robert sts • saint paul, mn 55101

MINNESOTA public UTILITIES COMMISSION

November 16, 1990

Ms. Patty Nolte, Assistant Attorney General
Office of the Attorney General
525 Park
Suite 500
St. Paul, MN 55103

Re: In the Matter of Proposed Rules governing Intervenor Compensation, Minn. Rules, parts 7831.0100-.0800, Docket No. U-999/R-89-1.

Dear Ms. Nolte:

Enclosed pursuant to your request is a Declaration of Counsel signed by an Assistant Attorney General assigned to the Public Utilities Commission. You also requested a copy of the rules as adopted with Ron Ray's certification. Ron informed me yesterday that he had just sent you these rules.

I trust that these materials, together with the materials I sent you on October 30, will enable you to review the rule pursuant to Minn. Stat. § 14.26. Please inform me if there is anything further you require.

Thank you.

Very truly yours,

Ginny Zeller
Staff Attorney
(612) 297-7072

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SENIOR CITIZEN COALITION (4)

of Northeastern Minnesota
407 W. Superior St., Duluth, Mn 55802
Telephone (218) 727-0207

August 14, 1989

RECEIVED

AUG 15 1989

MINNESOTA PUBLIC UTILITIES COMMISSION

Caroline Heil
Minnesota Public Utilities Commission
780 American Center Bldg.
150 E. Kellogg Blvd.
St. Paul, MN 55101

Re: Docket Number U-999/R-89-1

Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Intervenor Compensation.

Dear Ms. Heil:

Enclosed are comments of the Senior Citizen Coalition of Northeastern Minnesota in response to the Commission's request for information and opinions in the above-mentioned docket.

COMMRS.
CAROLINE
JANET
DIANE W
ROSELLEN
GREG
LOUIS

Sincerely,

Buddy Robinson

Buddy Robinson,
Staff Director

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Docket No. U-999/R-89-1
Notice of Intent to Solicit Outside Information Regarding
Proposed Rule Governing Intervenor Compensation

Comments of: Senior Citizen Coalition of Northeastern Minnesota
407 W. Superior St.
Duluth, MN 55802

August 14, 1989

Introductory Statement:

The Senior Citizen Coalition of Northeastern Minnesota has specific comments about the Draft Rules Governing Intervenor Compensation, as these rules will pertain directly to our organization. Our comments are grounded in our experience of intervening in several rate cases since the mid 1970's. The Minnesota Public Utilities Commission (PUC) awarded compensation to us in three rate cases. We might have received a fourth award, were it not for a perceived lack of statutory authority for the Commission, which was quickly cleared up in the subsequent legislative session. We believe that our organization has received more intervenor compensation awards, and of larger amounts, than any other consumer organization in the state.

In general, we strongly endorse the PUC's efforts to enact, at long last, administrative rules to formalize the intervenor compensation process. Much legal ambivalence has surrounded it to date, which in turn has caused great uncertainty for consumer organizations wishing to have a meaningful input into general rate cases and other proceedings. We wish to reiterate for the record that while consumer groups can intervene without expending a significant amount of money, doing so puts them at a distinct disadvantage compared to the utility and to large commercial intervenors. Representation without adequate legal staffing or expert witness testimony cannot usually amount to anything beyond a token effort.

We are also very pleased to see the PUC attempt to deal with an inherent problem of the intervenor compensation process, the "Catch-22" syndrome: Intervenors with financial resources small enough to render them in need of a compensation award will typically have difficulty undertaking the financial risk of incurring rate case expenses, without knowing until after the conclusion of the case if compensation will be forthcoming. The mechanism in the draft rules aimed at alleviating this problem merits important discussion.

Our comments will follow, in numerical order, the sections of the draft rules. Secondly, we will respond to the specific questions listed in the Commission's Notice of Intent to Solicit Outside Information.

I. Comments on Provisions of the Draft Rules

7831.0100 DEFINITIONS:

Subp. 11. Intervenor costs, and Subp. 16. Proceeding: Expenses for judicial appeal or judicial review should be considered potentially eligible for compensation, because there are times when key issues are pursued and argued further in the courts. These debates can be extremely important.

7831.0200 PURPOSE:

The statement of purpose in the draft rules re-states the basic wording of the statute, but does not go any farther. It is important that the clause on purpose embody the legislative intent of the statute, as well as the federal PURPA recommendations on intervenor compensation, by specifying that the purpose of these regulations is to encourage and foster participation from consumer representatives who otherwise would be unlikely to be full participants in utility proceedings. It should also specify that the rules are to be liberally construed, in order to maximize the opportunity for consumer input. Conversely, the rules should not be applied with any intent to deter participation from responsible consumer intervenors, particularly those that represent the specific interests of low income residential ratepayers.

The statement of purpose should, with wording similar to what we have suggested above, recognize the fact that residential ratepayers have traditionally been underrepresented in utility proceedings, especially when the number of various intervenors and attorneys is taken into account. What may appear as "duplicative" representation for residential consumers may, in truth, be more like a partial balancing of the forces in a contested proceeding.

7831.0300 REQUEST FOR COMPENSATION:

Subp. 4. Budget: We assume that the Commission recognizes that a budget estimate at the start of a rate case will be very rough. It will usually be possible to estimate expert witness costs and most ancillary costs, but the total amount of attorney time will be difficult to foretell. A best guess can be made based on prior experience.

Subp. 5. Statement of participation: This subpart is the one with which we have the most concern, for two different reasons:
1) It is in the consumer group's interest to file only a general statement on the nature of and reasons for its intervention, because very specific comments may put the intervenor at a disadvantage compared to other parties, who do not have to reveal their strategies and positions until written testimony is filed prior to evidentiary hearings. The consumer intervenor is denied equal protection if other parties can include, in their direct testimony, challenges to the specific positions stated in the consumer group's statement of participation. Furthermore, it is often the situation that new and changing positions are introduced and responded to by parties, which makes it impossible for an intervenor to state in advance all of the major arguements it intends to make during the case.

The deadline for submission of the statement of participation is at least 75 days after the filing or 30 days prior to the start of evidentiary hearings, whichever is later. The Commission's preliminary determination is due within 45 days of receipt of the request. The timing of these deadlines means that a consumer intervenor who wants to receive the Commission's preliminary determination no later that one month before the start of evidentiary hearings must file the application at least 75 days prior to the beginning of those hearings. This scenario could allow for a "last minute" go-ahead to an expert witness to prepare direct testimony, contingent upon a favorable preliminary determination from the Commission. We do have concern that even trying to delay the submission of the application in order to minimize the "lead time" for other intervenors still allows them to modify their direct testimony in response to our application.

2) We note that, in its preliminary determination, it is only optional for the Commission to comment on the anticipated ability of the intervenor to materially assist the Commission, or whether the intervenor's positions duplicate that of any other party.

Since the Commission might not even comment on the material assistance issues in the preliminary determination, it seems less pertinent for the intervenor group to state its positions in its statement of participation.

We can think of one important exception, however: the instance where the consumer intervenor proposes to hire an expert witness to perform, for example, a cost study unlike any other to be done by other parties. In this situation, the intervenor would want the Commission to give a very clear signal as to whether or not the proposed study, and its anticipated conclusions, would be deemed valuable and materially useful. Would the Commission give a preliminary determination on that point? Under the draft rules, not necessarily.

7831.0400 STATEMENT IN RESPONSE:

The comments by DPS, OAG, or other parties in response to the application should be very helpful and illuminating. We would suggest, however, that the applicant should be allowed the opportunity to comment on these responses, say within a very brief time of 5 to 10 days. Our main concern here is that there can be debate over what is a "duplication" of position. For example, in the last Minnesota Power general rate case, both the Senior Coalition and DPS presented marginal cost studies -- yet with very different methodologies and very different results.

7831.0500 PRELIMINARY DETERMINATION ON ELIGIBILITY:

Subp. 1. Required determinations: It would be helpful if the deadline for the Commssion's issuance of a preliminary determination could be shortened from 45 days, to perhaps 30 days; yet we understand that with the Commission's workload, 45 days may be as quick as should be expected.

We believe it is appropriate for the Commission to make a ruling on the applicant's standing as an intervenor and on the applicant's financial ability to undertake the costs of intervention.

Subp. 2. Discretionary determinations: The fact that these are optional is problematic. While it is reasonable for the Commission to want to reserve judgement on whether or not it appears that the intervenor is likely to be of material assistance, it is also reasonable for the intervenor to expect some indication, however tentative and non-binding, of the Commission's initial opinion. At least, consumer groups that have appeared before the Commission before should be able to receive some preliminary comment on this score. If the applicant has never been an intervenor before, then it is more reasonable for the Commission to hold back any opinion.

We believe that a seventh determination should be listed: "address whether the intervenor has participated in proceedings in the past, and whether the intervenor has been awarded compensation in the past; but if the intervenor has not, such lack shall not prevent a favorable determination." In other words, the intervenor's previous track record should have some bearing on the Commission's opinion regarding the anticipated ability of the intervenor to provide material assistance.

Subp. 2. Discretionary determinations (contnued):

On the question of duplicate positions and presentations, care must be made to interpret this in a narrow way, to reflect the fact that presentations can have some similarities while also having significant differences. We would like to see "duplication" defined as "substantially similar evidence and arguements used to reach conclusions that are essentially the same." If the Commission does make a preliminary determination of duplication, it is only fair to the intervenor that the Commission specify in some detail why it believes there is going to be duplication. There will often be some guesswork on this, since duplication can best be proved or disproved after the proceedings have been completed.

As we stated earlier, there must be a liberal interpretation by the Commission on the question of "duplication" where the interests of residential consumers are concerned. Testimony that is similar can serve an important purpose of emphasizing and reinforcing key points that otherwise might be "lost in the shuffle" of mountains of technical data and paperwork. The point cannot be made strongly enough that residential consumers need all the representation they can get, even at the risk of being slightly duplicative. When the situation arises of several large industrial intervenors, together with the utility, arguing in unison for the shifting of more rate responsibility to residential ratepayers, the residential class can well use, for its self-defense, more than one voice.

Subp. 3. Effect of preliminary determination on eligibility: The wording of this subpart presents a reasonable balance in terms of the limited kind of assurance that the Commission would give to an intervenor. The intervenor who receives a positive preliminary determination can take it to mean that there is a probability of receiving compensation, provided that the intervenor performs the kind of representation promised. If the Commission wanted to deny compensation in its final ruling, it would have the burden of proof that the intervenor had failed to perform as expected.

If the preliminary determination is negative, the intervenor understands that it will be difficult to prove that compensation is warranted, and can assess accordingly the financial risk of incurring expenses.

It should be noted here that the strength of the "asssurance" of a positive preliminary determination will depend partly on how much the Commission says in advance regarding the material assistance and duplication questions. The less the Commission says about this in its preliminary determination, the less clear it is to the intervenor what the probability of compensation might be.

7831.0600 CLAIM FOR COMPENSATION:

The information required for the claim is appropriate.

Subp. 5. Amended claim: This subpart should allow for additional costs of judicial review. However, the claim for expenses for judicial review should be processed separately from the initial claim, in order to not delay a decision on compensation for those expenses.

7831.0700 AUDIT:

It is appropriate for the PUC or DPS to be able to audit the intervenor's records to verify information submitted. We would suggest, however, that a decision to do so should be accompanied with an explanation as to why the audit is deemed necessary.

7831.0800 AWARD OF COMPENSATION:

Subp. 1. Decision: A deadline of 120 days is not totally unreasonable for the decision, but a shorter timeline of 60 to 90 days would be appreciated by residential consumer groups, since they typically operate with a limited cash flow.

Subp. 2. Materially assisted: The criteria listed are appropriate, but in item E., which refers to "information not of common knowledge," we note that there is a distinction between information that may be of common knowledge, and information presented as evidence in the rate case record. Decisions are required to be based on the latter.

When granting or denying an award, the Commission should refer to the intervenor's previous performance, if any. The intervenor's prior history with such proceedings helps put the question of material assistance in the immediate case in a larger context: that of on-going encouragement, by the Commission, of a consumer group's role in intervening in various proceedings over time. That sort of encouragement contributes to the development of expertise in organizations outside the standard circle of parties involved in rate cases (the utilities, PUC, DPS, OAG, some municipalities, and commerical user groups). We assume that the development of that expertise would be viewed as a positive resource for the benefit of the Commission. While previous participation and granting of an award does not guarantee that material assistance will be provided in the future, it certainly increases the likelihood, if the intervenor is performing in a consistent manner.

In general, when considering all of the criteria, it is likely that an intervenor who qualifies for compensation will have satisfied more than one criteria. Yet, each of the criteria in the draft rule can be a good reason to justify compensation. Therefore, it seems improper for compensation to be denied in the case where the Commission finds that the intervenor has satisfied only one of the criteria.

Subps. 3, 4, 5, and 6: The criteria on financial resources, the requirement for the Commission's decision to include a rationale, and the time period for payment of compensation following a positive final decision are appropriate.

II. Questions in the Notice of Intent to Solicit Outside Information

1. Yes, the definition of intervenor costs should include expenses incurred in judicial appeal and review. However, claims for these costs should be processed separately, to avoid long delays.

2.a. Compensation should not be denied solely on the basis that the intervenor did not prevail.

b. Compensation should not be denied solely on the basis that the intervenor did prevail. (We assume this question implies the instance where prevailing on the issue is the only criterion the Commission deemed to be satisfied.)

c. Failure to satisfy any one criterion should not be a basis for denying compensation. And, no one criterion should take precedence over all others, since they are all important criteria. However, satisfying one criterion should be able to serve as a justification for awarding compensation.

Minnegasco
A Company of Diversified Energies, Inc.

Tracy B. Bridge
Director
Rates & Tariffs

COMMRS. (5)
CAROLINE
JANET
DIANE W
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August 16, 1989

Ms. Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

RECEIVED

AUG 15 1989

MINNESOTA PUBLIC UTILITIES COMMISSION

Re: Proposed Rule Governing Intervenor Compensation
Docket No. U-999/R-89-1.

Dear Ms. Heil:

Minnegasco hereby submits the following comments regarding the proposed rule governing Intervenor Compensation, Docket No. U-999/R-89-1.

1. The proposed rules do not specify how utilities will recover intervenor compensation costs they are required to pay. We recommend the following be added under 7831.0800 AWARD OF COMPENSATION:

   Subp. 7. Recovery. The utility or telephone company that is required to pay intervenor compensation costs will be allowed to recover those costs. Intervenor compensation costs will be included in the final determination of regulatory expenses during a general rate filing as defined in Minnesota Statutes, Chapter 216B.16. In proceedings that do not change any rates then in force, awarded intervenor compensation costs, including reasonable carrying costs, will be deferred on the books of the utility or telephone company paying those costs until their next general rate filing or until such time as those costs can be recovered by the company.

2. Minnegasco agrees with Commission staff's definition for "materially assisted" (Part 7831.0800, subp 2, and pages 6-7 of the Commission Staff Report).

The following comments respond specifically to the Commission's two questions on page 2 of the Commission's Notice.

Issues

1. Part 7831.0100, subparts 11 and 16. Should the definition of intervenor costs include costs, fees, or charges incurred for judicial appeal or judicial review? Should the definition of proceeding include matters considered during judicial appeal or review?

201 South Seventh Street
Minneapolis, MN 55402

Minnegasco agrees with Commission staff's recommendation that "intervenor costs" should not include costs, fees, or charges incurred for judicial appeal or judicial review. The definition of "proceeding" should not include matters considered during judicial appeal or review.

The statute governing "intervenor compensation" and "proceeding" relates to actions involved with "materially assisting the Commission's deliberation," not in materially assisting appellate courts.

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

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

Minnegasco believes the rule should state that intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail. Compensation should be based on whether the intervenor "materially assisted" the Commission in its deliberation.

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

Minnegasco believes the rule should state that intervenor compensation cannot be denied solely on the basis that the intervenor prevailed. Compensation should be based on whether the intervenor "materially assisted" the Commission in its deliberation.

- No one rule criterion for determining material assistance is dispositive?

Minnegasco believes the rule should state that no one rule criterion for determining material assistance is dispositive. All criterion for determining material assistance should be considered by the Commission in making its decision awarding or denying compensation.

Minnegasco appreciates the opportunity to submit comments on this proposed rule. If there are any questions concerning our comments, please contact me at 342-4723.

Sincerely,

Tracy Bridge

(6)
Commrs.
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Janet
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Rosellen
Greg
Louis

GREAT PLAINS NATURAL GAS CO.

TELEPHONE: 218-736-6935

ADDRESS REPLY TO:
General Office
P. O. Box 176
Fergus Falls, MN 56537

August 14, 1989

Ms. Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

RECEIVED

AUG 16 1989

MINNESOTA PUBLIC
UTILITIES COMMISSION

Re: Proposed Rule Governing Intervenor Compensation
Docket No. U-999/R-89-1

Dear Ms. Heil:

Great Plains Natural Gas Co. is opposed to intervenor compensation since it feels that the current state departments and agencies such as the Department of Public Service, Department of Energy, Attorney General's Office and Public Utilities Commission were either established or are mandated by state law to assure rates paid by the state's regulated utility and telephone customers are just and reasonable to all classes of customers. Great Plains feels that these departments and agencies are sufficient in meeting this assurance. If a person or group of persons outside the above departments or agencies wishes to intervene, the benefits derived from a successful intervention should be considered as sufficient compensation. Additionally, the success of an intervenor representing one class of customers could adversely effect the utility's or telephone company's other classes of customers. Requiring these adversely effected customers to assist in paying the intervenor's costs surely appears unjust and unreasonable.

However, if the majority of the parties involved in this rulemaking determine intervenor compensation is warranted, then the proposed rule should:

1. Specifically state that intervenor compensation will be restricted to only general rate case proceedings.

2. Be worded to prohibit intervention merely to enhance the intervenor's personal income.

3. Specifically state that the utility or telephone company can recover the costs plus carrying costs paid to an intervenor.

4. Include language that indicates the above recovered costs be allocated to only those customer classes benefiting from the intervention.

The following comments respond specifically to the Commission's questions on page 2 of the Commission notice.

1. **Part 7831.0100, subparts 11 and 16. Should the definition of intervenor costs include costs, fees, or charges incurred for judicial appeal or judicial review? Should the definition of proceeding include matters considered during judicial appeal or review?**

   Great Plains feels that intervenor costs should not include costs, fees, or charges incurred for judicial appeal or judicial review. The definition of proceeding should not include matters considered during judicial appeal or review since the state statute refers to ... "the intervenor has materially assisted the commission's deliberation".

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

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

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

   - No one rule criterion for determining material assistance is dispositive?

   The language as proposed in part 7831.0800, subpart 2, is sufficient and the above language need not be included.

Thank you for the opportunity to comment on the proposed rule. If you have any questions, please feel free to contact me.

Yours truly,

GREAT PLAINS NATURAL GAS CO.

Lee J. Franklin, Vice President

LJF/dw

MSF Metropolitan Senior Federation

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August 15, 1989

Ms. Caroline Heil
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St. Paul, MN 55101

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AUG 16 1989
MINNESOTA PUBLIC UTILITIES COMMISSION

MPUC Docket No. U-999/R-89-1
Soliciation of Outside Information
Regarding Proposed Rule Governing
Intervenor Compensation

Re: Metro Senior Federation's response to the above referenced matter.

Dear Ms. Heil:

Thank you for the opportunity to respond to your request for comments relating to the proposed modification of the rules governing Intervenor Compensation.

The Federation is in general agreement with the changes that the Commission has proposed for the rules in governing Intervenor Compensation. The preliminary request filing requirement, with its budget and areas of involvement information, should be beneficial to both the Intervenor and the Commission.

In regard to the two issues that are of special interest to the Commission, the Federation (1) has no information on which to base an opinion regarding compensation for costs incurred for judicial appeal or review, and (2) agrees with the three questions relating to Part 7831.0800, Subpart 2.

The Federation requests clarification of an Intervenor's status or eligibility for compensation when an Intervenor's position(s) and/or issue(s) turn out to be similar to those of the DPS or OAG.

Why is compensation for telephone intervention limited to rate cases only?

Sincerely,

Elmer W. Scott

Elmer W. Scott, Chair
Energy/Utility Committee

EWS:ms

(8)

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Greg
Louis

NORTHERN MINNESOTA UTILITIES

910 Cloquet Avenue
Cloquet, MN 55720-1681

August 15, 1989

Ms. Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
Kellogg & Robert Streets
St. Paul, MN 55101

RECEIVED

AUG 16 1989

MINNESOTA PUBLIC UTILITIES COMMISSION

Re: Proposed Rule Governing Intervenor Compensation
Docket No. U-999/R-89-1

Dear Ms. Heil:

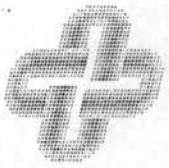
Northern Minnesota Utilities (NMU) has reviewed the proposed rules governing Intervenor Compensation, Docket No. U-999/R-89-1, and offers the following comments:

1. The proposed rules neglect to define recovery of intervenor compensation costs which utilities and telephone companies may be required to pay. NMU recommends that a clause be added under 7831.0800 AWARD OF COMPENSATION which specifies a method of recovery. The clause should clearly state that any costs associated with an award of intervenor compensation which a utility or telephone company is ordered by the Commission to pay are recoverable. In addition, the clause should specify that the costs will be included as regulatory expense during a general rate filing.

2. In response to the two questions which the Commission specifically requested comments NMU offers the following:

   Part 7831.0100, subparts 11 and 15 - NMU believes that there should be no reference to the inclusion of costs, fees, or charges incurred for judicial appeal in the definition of intervenor costs or in the definition of proceeding.

   Part 7831.0800, subpart 2 - NMU believes the rule should be based on whether the intervenor materially assisted the Commission. In addition, NMU believes all criteria for determining material assistance should be reviewed by the Commission and taken into consideration during the decision making process for intervenor compensation awards.



NORTHERN MINNESOTA UTILITIES

NMU thanks the Commission for the opportunity to comment on the proposed rules.

Sincerely,

Mary B. Wirtz
Regulatory Affairs Manager

MBW/ps

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minnesota power / 30 west superior street / duluth, minnesota 55802 / telephone 218-722-2641

Douglas W. Peterson - attorney

August 15, 1989

VIA FEDERAL EXPRESS

RECEIVED

AUG 16 1989

MINNESOTA PUBLIC UTILITIES COMMISSION

Ms. Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

RE: Proposed Rule Governing Intervenor Compensation
Docket No. U-999/R-89-1

Dear Ms. Heil:

Minnesota Power hereby submits the following comments regarding the proposed rule governing Intervenor Compensation, Docket No. U-999/R-89-1.

1. The proposed rules do not specify how utilities will recover intervenor compensation costs they are required to pay. We recommend the following be added under 7831.0800 AWARD OF COMPENSATION:

> Subp. 7. Recovery. The utility or telephone company that is required to pay intervenor compensation costs will be allowed to recover those costs. Intervenor compensation costs will be included in the final determination of regulatory expenses during a general rate filing as defined in Minnesota Statutes, Chapter 216B.16. In a proceeding that is not a general rate filing, awarded intervenor compensation costs, including reasonable carrying costs, will be deferred on the books of the utility or telephone company paying those costs until their next general rate filing or until such time as those costs can be recovered by the company.

2. Minnesota Power agrees with Commission staff's definition for "materially assisted" (Part 7831.0800, subp. 2, and pages 6-7 of the Commission Staff Report).

The following comments respond specifically to the Commission's two questions on page 2 of the Commission's Notice.

1. Part 7831.0100, subparts 11 and 16. Should the definition of intervenor costs include costs, fees, or charges incurred for judicial appeal or judicial review? Should the definition of proceeding include matters considered during judicial appeal or review?

   Minnesota Power agrees with Commission staff's recommendation that "intervenor costs" should not include costs, fees, or charges incurred for judicial appeal or judicial review. The definition of "proceeding" should not include matters considered during judicial appeal or review.

   The statute governing "intervenor compensation" and "proceeding" relates to actions involved with "materially assisting the Commission's deliberation," not appellate courts.

2. Part 7831.0800, subpart 2.

   Minnesota Power believes the rule should state that "no one rule criterion for determining material assistance is dispositive." All criterion for determining material assistance should be considered by the Commission in making its decision awarding or denying compensation.

Minnesota Power appreciates the opportunity to submit comments on this proposed rule. Please call if there are any questions.

Sincerely,

Douglas W. Peterson

DWP:blc

Comms
Caroline
Janet
Diane W
Roseller
Greg
Louis

BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

IN RE: Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Intervenor Compensation	)	DOCKET NO. U-999/R-89-1

Ms. Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 E. Kellogg Blvd.
St. Paul, MN 55101

RECEIVED

AUG 16 1989

MINNESOTA PUBLIC
UTILITIES COMMISSION

Dear Ms. Heil:

Midwest Gas, a division of Iowa Public Service Company, as a public utility defined in Minnesota Statutes, Section 216B.02, subdivision 4, submits four copies of the following comments in response to the Working Draft Relating to Intervenor Compensation as published July 17, 1989 at 14 S.R. 115-20. Please file stamp and return one copy in the enclosed stamped, self-addressed envelope.

1. The "materially assisted" factor as defined in Section 7831.0100 Subp. 13 and applied throughout the draft rule needs to be put into perspective by requiring an applicant to submit cost/benefit analysis and for the Commission to consider cost/benefit analysis in making a determination of the appropriateness of obtaining compensation. An example illustrates the need for such analysis. Suppose that the intervenor's assistance is materially helpful on an issue with a maximum $500 impact on a utility's revenue requirement. However, charging a fair rate results in the expenditure of $20,000 due to the time spent on the issue. To ensure that intervention subject to compensation offers the potential for benefit, the Commission should require an intervenor seeking compensation to make a reasonable estimate of the dollar impact of each issue compared to the dollar cost to be spent on the issue. For those issues in which there is no

quantifiable impact, the intervenor should be required to provide a qualitative statement assessing the benefit cost the intervenor seeks to provide versus the cost the intervenor seeks to impose.

2. The draft rule should be modified to provide for rate recovery of any expense incurred during the course of a proceeding. It would be reasonable to permit recovery of the compensation expense over the same time frame allowed for recovery of the utility's ratemaking expense. Recovery could occur through base rates in a rate case or through an adjustment clause in other proceedings. By not dealing with this issue, the draft rule penalizes smaller Minnesota utilities. Such a penalty occurs because the maximum award allowed under law of $20,000 will be too small to impact rates of a large utility. However, to smaller utilities the amount is not negligible. To avoid disproportionate discriminating against smaller utilities, the determination of compensation should be made in such a fashion as would permit the recovery of that expense.

3. The financial disclosure criteria contained in Section 7831.0300 Subp. 3 may be inadequate in certain circumstances. Currently the draft contains a requirement that information be filed for the previous year and the current year. Depending upon what the intervenor files and when a case is filed, "current year" data may contain projections that cease well before the anticipated conclusion of the proceeding. The Commission should require information to be presented for a time period no shorter than 30 days after the anticipated conclusion of the proceeding.

4. The audit provision in Section 7831.0700 refers to requirements for additional information pertaining to "expenses incurred." Since financial condition depends upon revenues and assets as well as expenses, the term

"expenses incurred" should be deleted and replaced by the words "financial condition."

5. The draft rules address the reasonableness of a "rate" for intervenor costs (e.g., attorney's fees or consultant fees) in various sections without regard to the overall expense for such service. The test for reasonableness of an expense depends not only on the reasonableness of the hourly rate, but on the reasonableness of the number of hours incurred. For example, a consultant could charge a market based rate or even a lower than market rate, but still overcharge because of spending an unreasonable number of hours evaluating an issue. The sections of the draft rule 7831.0100 Subp. 2, 7, and 14 should accordingly be revised to reflect that the Commission's reasonableness evaluation will consist of evaluating both the rate and the length of time devoted to the issue or issues.

6. The final portion of the rule, Section 7831.0800 Subp. 6, requires proportional payments by utilities in proceedings involving more than one utility without containing any guidelines on what constitutes a proportional payment. For reasons noted in Item 2 above, depending upon what proportional payment mechanism is used, smaller utilities could be discriminated against. In order to prevent such discrimination, Midwest Gas proposes that the rule contain criteria for determining the cost allocation to utilities. In cases involving only gas utilities, the payment amount could be based upon each utility's percentage of volume to total gas volume sold by the affected utilities. For proceedings involving multiple types of utilities, the allocation could similarly be made on either net income or revenues basis.

7. Midwest Gas agrees with the draft rule's limitation of compensation recovery to Commission proceedings. Such a limitation is a logical interpreta- 2 issues

tion of Minn. Stat. §216B.16, sub. 10. Had there been a legislative intent to include court cases, the law could easily have been written to specifically reference compensation for court cases.

8. Midwest Gas agrees with the concept that prevailing or not prevailing should not be the dispositive factor in making a compensation award. However, there should not be language indicating that no single criteria can ever be dispositive. The significance of the six designated criteria will inevitably vary from proceeding to proceeding. How the criteria should be weighed should be evaluated on a case-by-case basis.

DATED this 15th day of August, 1989.

Respectfully submitted,

MIDWEST GAS, a division of Iowa Public Service Company

BY Steven R. Weiss

Steven R. Weiss, Senior Attorney
John A. Rasmussen, Jr., Vice President and General Counsel
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RECEIVED

AUG 16 1989

MINNESOTA PUBLIC UTILITIES COMMISSION

August 16, 1989

Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Blvd.
St. Paul, MN 55101

RE: Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Intervenor Compensation, Docket No. U-999/R-89-1.

DPS 9-5-89

Dear Ms. Heil:

Regarding the issues that are of special interest to the Commission:

1. The definition of intervenor costs should include costs, fees, or charges incurred for judicial appeal or judicial review, and the definition of proceeding should include matters considered during judicial appeal or review.

   Intervenors with insufficient financial resources to afford the cost of intervention may qualify for compensation to ensure that the decision-making process ultimately produces a result that best balances the interests of members of society. Judicial review is part of the decision-making process, and all parties included in the process must be able to pursue the process to its ultimate conclusion. If parties that cannot afford the cost of intervention are denied judicial review because of the cost, the balance of the ultimate decision is compromised.

   Failure to include the costs of judicial review in the intervenor compensation rule would grant parties access to the mechanisms of democracy according to how much money they have, rather than according to fair and impartial criteria.

2. Whether or not the intervenor prevails should not be a criterion for awarding or denying compensation. Commission decisions are seldom black and white. Rather, the regulatory framework is supposed to strike the balance among competing interests that is fair to all and most beneficial to society. Compensation should be awarded when the intervenor contributes to the balance of the ultimate decision, including when the intent of the contribution is to improve the regulatory framework.

The North American Water Office has two additional comments regarding intervenor compensation rules.

First, regulated businesses should be required to compensate intervenors that materially assist the commission's deliberation and have insufficient financial resources to afford the cost of intervention into rule-making administrative proceedings that affect the regulatory framework.

Second, adoption of the intervenor compensation rule changes being contemplated by the Commission would seem to preclude the arbitrary and unfounded denial of intervenor compensation to at least two parties to PUC Docket No. E002/GR-87-670. It would therefore be fair to afford these parties, specifically, the Metro Senior Federation and the North American Water Office, the opportunity to petition for compensation for costs incurred during intervention in that case under the provisions of the new rule, once it is adopted.

Sincerely,

George Crocker

George Crocker
Director

Northern States Power Company
Law Department

Gary R. Johnson
Vice President—Law
David A. Lawrence
Director—Law
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Writer's Direct Dial Number

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August 16, 1989

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AUG 16 1989

MINNESOTA PUBLIC
UTILITIES COMMISSION

Ms. Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

Re: Proposed Rules Governing Intervenor Compensation
Docket No. U-999/R-89-1

Dear Ms. Heil:

Northern States Power Company ("NSP") respectfully submits the following comments regarding the proposed rules governing Intervenor Compensation, Docket No. U-999/R-89-1:

- NSP generally supports the proposed rules. The rules establish formal procedures that should prove to be more reliable than the informal process now in place. In the past the Commission has allowed intervenor compensation only in limited circumstances. We believe this is good policy. Since an intervenor usually represents a limited constituency (as opposed, for example, to representation of all ratepayers by the Department of Public Service), that constituency should pay its own intervention costs whenever it has the financial resources to do so. The intervenor should also be required to materially assist the Commission in its decision so that frivolous or repetitive interventions are discouraged. We believe the Commission should attempt to comply with the legislative intent expressed in Minn. Stat. § 216B.16, subd. 10, and Minn. Stat. § 237.075, subd. 10, while minimizing the impact on utility ratepayers. The proposed rules generally appear to do this.

- NSP's most significant concern with the proposed rules is that the rules do not address how intervenor compensation costs paid by a utility are to be recovered in rates. The Commission should include rules allowing utility recovery of these costs, just as Commission rules allow recovery of other regulatory costs related to rate cases. It would be helpful if the § 7831.05 Preliminary Determination of Eligibility provided an estimate of intervenor costs the utility could recover in a general rate case. It would also be more efficient, in general rate cases, to set the deadline for all intervenors at the same time, rather than a different deadline for each intervenor dependent upon receipt of request. The parties would then know

the number of intervenors, the scope of the issue, preliminary eligibility and estimated intervenor compensation costs.

- During the Preliminary Determination of Eligibility (§ 7831.05) the Commission must consider sufficiency of financial resources and may consider whether the intervenor is likely to materially assist the Commission. Section 7831.05, subp. 3, creates a presumption for or against compensation based on the preliminary determination. We believe the presumption should apply only to the question of sufficiency of resources if that is the only element addressed by the Commission in the preliminary determination. In other words, there should not be a presumption in favor of compensation if the Commission has not addressed whether the intervenor is likely to materially assist them in deliberations.

The following comments specifically address the Commission's questions on page 2 of the Commission's Notice.

- NSP opposes granting intervenor compensation for appeals or judicial review. Issues We believe the intent of intervenor compensation statutes is to provide compensation for intervenors who materially assist the Commission's deliberations, not appellate review. The availability of funding may encourage unnecessary or frivolous appeals.

- NSP believes that an intervenor should not be required to "prevail" to receive compensation, so long as the intervenor presents an otherwise unrepresented position and aids the Commission's deliberations. We feel that the proposed rules, as drafted, adequately describe material assistance and therefore extra language is unnecessary.

NSP appreciates the opportunity to submit comments on the proposed rules. If there are any questions regarding our comments, please contact me at 330-7945.

Sincerely,

Michael J. Hanson

Michael J. Hanson

MJH/sl

(15)
Commrs.
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Greg
Louis

NORTHWESTERN BELL TELEPHONE COMPANY
D.B.A. U S WEST COMMUNICATIONS
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MINNEAPOLIS, MINNESOTA 55402
612-344-2844

WILLIAM M. OJILE, JR. (BILL)
COUNSEL

Please Include Room Number in Address

August 15, 1989

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AUG 16 1989

MINNESOTA PUBLIC
UTILITIES COMMISSION

Ms. Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

Re: Proposed Rules Governing Intervenor Compensation
Docket No.: U-999/R-89-1

Dear Ms. Heil:

The following are the comments of Northwestern Bell Telephone Company, d/b/a U S WEST Communication to the proposed rules governing intervenor compensation:

1. The proposed rules change the statutory test regarding the insufficient financial resources prong of Minn. Stat. § 237.075, Subd. 10. The statute provides for recovery of costs of intervention where "the intervenor has insufficient financial resources to afford the costs of intervention." However, the proposed rules add an additional provision which is not contemplated by the statute, namely: ". . . the intervenor is financially unable to afford intervenor costs incurred to participate effectively in the proceeding . . ." Part 7831.0100, Subp. 9; Part 7831.0300, Subp. 3; Part 7831.0500, Subp. 1(D); Part 7831.0800, Subp. 3.

Adding the term "participate effectively" to the definition of insufficient financial resources changes the focus of the statute. Under the statute, the Commission must determine whether an intervenor has insufficient financial resources to afford the costs of intervention. This is an objective analysis the Commission could make reviewing financial information provided by the intervenor. However, under the proposed rules, an additional level of inquiry is added. Not only is the Commission required to determine whether an intervenor can afford the costs of intervention, the Commission must also determine whether the intervenor will be able to afford the cost to "participate effectively." This language adds a subjective element to the Commission's otherwise

objective analysis of an intervenor's financial status. Adding this language could be an invitation to possible abuse by an intervenor.

U S WEST recommends that the language "participate effectively" be removed from Part 7831.0100, Subp. 9, Part 7831.0300, Subp. 3, Part 7831.0500, Subp. 1(D) and Part 7831.0800, Subp. 3.

2. Part 7831.0500, Subp. 3(A) and 3(B), regarding the preliminary determination of eligibility for intervenor compensation, should be changed to reflect the intent of Part 7831.0500. U S WEST would propose replacing Part 7831.0500, Subp. 3(A) and 3(B) with the following:

A. After a preliminary determination that an intervenor may be eligible for an award of intervenor compensation costs, the Commission must overcome a presumption, for the reasons stated in the preliminary determination, that the applicant's Claim for Compensation should be granted, and that an award of intervenor compensation costs should be made.

B. After a preliminary determination that an intervenor may not be eligible for an award of intervenor compensation costs, an applicant may elect to intervene and may intervene if granted permission by the Commission or presiding officer. If the applicant does intervene, it must overcome a presumption, for the reasons stated in the preliminary determination, that the applicant's Claim for Compensation should be denied, and that an award of intervenor compensation costs should not be made.

3. Provision should be made in the rules for the recovery by the telephone company of any intervenor compensation paid. U S WEST proposes that the following subpart be added to the rules:

> Part 7831.0800, Subp. 7. Recovery of costs. A telephone company that is required to pay intervenor compensation costs under Part 7800.0800, Subp. 6 shall be allowed to recover those costs. Intervenor compensation costs shall be included in the final determination of expenses in a general rate proceeding under Minn. Stat. § 237.075. In proceedings that do not result in a change in rates, intervenor compensation costs paid by the telephone company, including reasonable interest, will be charged to an account on the books of the telephone company paying those costs until the next general rate proceeding or until such time as those costs can be recovered by the telephone company.

4. With regard to the specific questions directed to U S WEST in Mary Ellen Hennen's July 14, 1989 Correspondence:

a. Costs of appeal or judicial review. U S WEST agrees that costs of appeal or judicial review should not be recoverable by an intervenor. Minn. Stat. § 237.075, Subd. 10 refers to granting intervenor compensation where the intervenor has "materially assisted the Commission's deliberations." (Emphasis added.) This statute does not contemplate the payment of an intervenor's appeal costs. Moreover, provision is made in the Minnesota Rules of Civil Appellate Procedure for the recovery of the costs of appeal. Minn. R. Civ. App. P. 139. Issues

b. One rule criterion for material assistance. U S WEST believes that an award for intervenor compensation should not be determined by examination of any one criterion. The Commission's decision to grant or deny intervenor compensation should focus on a number of issues, including whether the intervenor prevailed. However, prevailing or not prevailing should not be dispositive.

Please contact me if you have any questions or require further information. Thank you for providing U S WEST the opportunity to comment on the proposed rules.

Sincerely,

William M. Ojile, Jr.

(14)

MINNESOTA
Department of Public Service

Administrative Office
(612) 296-7107

790 American Center
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

August 16, 1989

Ms. Mary Ellen Hennen
Executive Secretary
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

RECEIVED
AUG 16 1989
MINNESOTA PUBLIC UTILITIES COMMISSION

Dear Ms. Hennen:

Attached to this letter are the comments of the Minnesota Department of Public Service regarding the Minnesota Public Utilities Commission's request for information or opinions from outside sources in preparing to propose the adoption of a rule governing intervenor compensation.

The Department's comments and recommendations focus on developing a rule which will prudently encourage intervenor participation. By encouraging intervenor participation, the Department believes that the Commission will ultimately be provided with the broadest possible base of facts which it can utilize in the decision-making process.

Sincerely,

Dennis M. Devereaux

DENNIS M. DEVEREAUX
ASST. COMMISSIONER

Attachment

Comments of The Minnesota Department of Public Service
Concerning the Minnesota Public Utilities Commission's
Proposed Rule Governing Intervenor Compensation
Docket No. U-999/R-89-1
August 16, 1989

Issues Raised By The Commission.

The commission's letter accompanying the proposed rule expressed special interest in comments about the following two specific issues:

Issue 1:

1. Part 7831.0100, subparts 11 and 16. Should the definition of intervenor costs include costs, fees, or charges incurred for judicial appeal or judicial review? Should the definition of proceeding include matters considered during judicial appeal or review?

Department Comments:

The rate case process may be viewed as a continuation process until appeals, if any, are exhausted. This continuation process is typically reflected in many appealed decisions which remand the case back to the commission for further deliberation. If an intervenor qualifies for all or part compensation based upon the commission's use of facts presented by the intervenor in its deliberations, then to the extent these facts are employed in the judicial appeal or review process, the intervenor should also be allowed all or part compensation for charges incurred for, and matters considered in, judicial appeal or review.

Additionally, from a fairness perspective, it would be unfair and prejudicial to not allow an intervenor to continue the ratemaking process into the judicial appeal or review process if the intervenor has legal basis to do so, in that the petitioner and government intervening agencies to a proceeding have the opportunity to seek judicial appeal or review. It should be noted that the commission's decision to award compensation for judicial appeal or review will be subject to the same criteria of materially assisting the commission.

When an intervenor appeals a commission decision, an award of fees for judicial review or appeal is likely to be inherently tied to whether or not the intervenor prevails, since the commission has previously made its decision. For the limited purpose of judicial review or appeal, if the commission prevails on an intervenor's appeal, then it should be considered that the intervenor did not materially assist the commission.

Issue 2:

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

- Intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail?
- Compensation cannot be denied solely on the basis that the intervenor prevailed?
- No one rule criterion for determining material assistance is dispositive?

Department Comments:

An intervenor qualifying for compensation should only need to meet one criterion. Criteria 3, providing that "No one rule criterion for determining material assistance is dispositive" should be excluded because it lacks specificity, and does not comply with the statute. If an intervenor assists the commission for one of the reasons stated, then it should not have to prove another reason.

The rule governing material assistance should provide only that intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail. As the court has held, if the facts presented or elicited by an intervenor assist the commission in reaching a decision about an issue, then the intervenor should be granted compensation even though the intervenor did not prevail.

It is not necessary to state that compensation cannot be denied solely on the basis that the intervenor prevailed. The commission should still be free to determine whether the intervenor materially assisted the commission. The Department notes however, that the commission will have a heavy burden and must clearly articulate its reason for denying compensation where an intervenor prevailed.

Other Department Comments.

7831.0100 (DEFINITIONS), Subp. 2, Attorney fees.

Department Comments:

This definition should be modified so that an attorney who was willing to provide services at below market rates in the past will not have in place a downward ratchet on their compensation award regardless of the services provided. Furthermore, it will be more consistent with cost reimbursement in civil suits.

"The costs for services of the attorney are reasonable when computed ~~at the rate normally charged by that attorney for comparable services, or~~ at the prevailing market rate or fair market value to obtain comparable and available services of an attorney of comparable training and experience, whichever rate is lower."

7831.0100 (DEFINITIONS), Subp. 7, Expert witness fees.

Department Comments:

This definition should be modified, as follows, for the same reason given for attorney fees.

"The costs for services of the expert witness are reasonable when computed at ~~the rate normally charged by that witness for comparable services, or~~ at the prevailing market rate or fair market value to obtain comparable and available services of an expert witness of comparable training and experience, whichever rate is lower."

7831.0100 (DEFINITIONS), Subp. 11, Intervenor costs.

Department Comments:

This definition should be amended to include judicial appeal or judicial review costs for the reasons stated in the Department comments for Issue 1 above.

7831.0100 (DEFINITIONS), Subp. 13, Materially assisted.

Department Comments:

Since the commission seriously considers all facts in a rate case, this definition should be modified as follows:

"'Materially assisted' means that the intervenor's participation and presentation was useful ~~and seriously considered~~, or ~~otherwise~~ substantially contributed to the commission's deliberations in the proceeding, following consideration by the commission of the factors listed in part 7831.0800, Subpart 2."

7831.0100 (DEFINITIONS), Subp. 16, Proceeding.

Department Comments:

Intervenor compensation should not be limited to just general rate cases, but should also include proceedings under Minnesota Statute, section 237.081, which are in effect general rate cases. Compensation should not be denied, for example, for intervention in a proceeding similar to a Northwestern Bell '354' case which was initiated as a complaint proceeding but resulted in a commission-ordered general rate case.

7831.0300 (REQUEST FOR COMPENSATION), Subp. 3, Insufficient financial resources.

Department Comments:

The statute authorizing compensation when intervenors have insufficient financial resources does not require nor contemplate a "but for" test. If an intervenor has insufficient financial resources to intervene and participate effectively in the

proceeding, that should be supported by the financial status of the intervenor requesting compensation. The phrase "but for an award of compensation" places an unduly harsh burden on the intervenor in determining whether or not an intervenor is financially eligible for compensation. This definition should be modified as follows:

"The applicant shall show as part of the request that~~, but for an award of compensation for its intervenor costs under this chapter,~~ the applicant has insufficient financial resources to intervene and participate effectively in the proceeding."

The phrase "but for an award" should also be deleted from Subp. 3 (3), and 7831.0500 (PRELIMINARY DETERMINATION ON ELIGIBILITY), Subpart 1, B.

7831.0300 (REQUEST FOR COMPENSATION), Subp. 3, Insufficient financial resources.

Department Comments:

The Department believes that the California rule presents a better test of what the legislature intended when authorizing compensation for insufficient financial resources. California's rule states:

"Either that the customer cannot afford to pay the costs of effective participation, including advocates fees, expert witness fees and other reasonable costs of participation and the cost of obtaining judicial review or that in the case of a group or organization, the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding."

The above test rather than one that focuses on income, expenses, assets and liabilities is a better indicator of the legislature's intent to permit underfunded individuals and/or organizations (compared to both utility companies and state agencies) to receive compensation in order to widen the views and perspectives presented in cases, so as to better assist the commission in reaching a fair and just result.

7831.0300 (REQUEST FOR COMPENSATION), Subp. 4, Budget.

Department Comments:

The rule should clarify that no intervenor will be limited by their budget, but only by the $20,000 limit specified in the statute. A compensation award should be based upon what is expended and not on what is planned to be expended.

7831.0300, Subp. 5, Statement of participation.

Department Comments:

This statement implies that intervention is limited to predefined issues and positions. Many rate case issues are developed during the discovery process from on-site investigation, information requests and analysis of information provided. It would

be unfair to limit an applicant for compensated intervention to predefined issues, when other intervenors such as the department and the RUD/AG are not limited in this manner.

It would be impossible to predefine an acceptable rate of return before obtaining sufficient information and data upon which to complete an appropriate analysis. Without the opportunity to perform a proper analysis, an intervenor would more than likely be unable to provide the kind of useful information that would materially assist the commission. Consequently, in this example, no intervenor would be eligible for compensation. Similarly, the usefulness of the facts presented in an issue should take precedence over whether or not an intervenor duplicates another party's issue. For example, it is possible that more than one intervenor could file identical rate of return recommendations, with each recommendation based upon different facts and comparable groups. In this instance, compensation should be granted on the usefulness of the facts presented and not denied because a duplicate rate of return was recommended.

7831.0500 PRELIMINARY DETERMINATION ON ELIGIBILITY.

Department Comments:

The rule should state that in the event the commission does not make any preliminary determination, there shall be no presumption and the issue should be decided on the criteria listed in 7831.0800, Subp. 2.

7831.0600 (CLAIM FOR COMPENSATION), Subpart 1, A.

Department Comments:

If compensation is extended to the judicial appeal or review process, then item A of this rule should be modified as follows:

"A. the date the commission issues its final determination and the time for petitioning for reconsideration, rehearing, judicial appeal, or judicial review has elapsed; or"

7831.0700 AUDIT.

Department Comments:

This provision would use both the commission and department staff to audit intervenor financial records to verify that the intervenor has insufficient financial resources and the basis for the amount claimed.

The commission alone should be responsible for verifying an intervenor's financial status. The department is a separate intervenor and should not be placed in the position of verifying the financial status of another intervenor. The commission has sole authority to determine the value of the issues presented by an intervenor seeking compensation, and to what extent the intervenor should be compensated. Therefore, the commission and its staff should also have sole authority in determining the

financial qualifications of such an intervenor, rather than involving the department as a potential party against another intervenor.

The Department also believes that an audit will usually be unnecessary and as written, could have a chilling effect upon potential intervenors. Therefore, the section should be modified to read as follows:

"If the commission is not satisfied that an intervenor has insufficient funds based upon the information filed, it may request further information necessary in order to make the determination. The commission reserves the right to audit the books and records of an intervenor when it has concerns about the veracity of the information filed. All financial information shall be deemed proprietary and confidential."

7831.0800 (AWARD OF COMPENSATION), Subp. 2, Materially assisted.

Department Comments:

An additional provision G should be added as follows:

"or,
G. if an intervenor in any other manner materially assisted the commission."

The above addition is intended as a catch-all clause so that an intervenor that assists the commission under extremely unique circumstances is not prohibited from receiving compensation.

7831.0800 (AWARD OF COMPENSATION), Subp. 3, Insufficient financial resources.

Department Comments:

A better title for this subpart might be: Awarding compensation.

For the reasons previously stated, the phrase "but for the award" should be deleted.

7831.0800 (AWARD OF COMPENSATION), Subp. 3, Insufficient financial resources, A.

Department Comments:

Based on the modification of 7831.0700 recommended above, this section should be revised as follows:

"A. whether the intervenor's financial status, following examinations of ~~the audit and~~ the financial information provided in the intervenor's request and claim, indicate the intervenor can afford, in whole or in part, its intervenor costs;

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, **Linda Chavez**, being first duly sworn, deposes and says:

That on the **16th** day of **August, 1989**, she served the attached **DPS Comments**

Docket No. **U999/R-89-1**

XX by depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid.

XX by personal service

by express mail

by delivery service

to all persons at the addresses indicated below or on the attached list:

See Attached list.

Linda Chavez

Subscribed and sworn to before me

this 16th day of August, 1989

ELIZABETH L. WOODHOUSE
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
MY COMMISSION EXPIRES FEBRUARY 28, 1993

Intervenor Compensation Rules
Docket No U-999/R-89-1

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PEOPLES NATURAL GAS

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(15)
COMMIR
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RECEIVED
AUG 17 1989
MINNESOTA PUBLIC
UTILITIES COMMISSION

August 15, 1989

Ms. Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

Re: Proposed Rule Regarding Intervenor
Compensation - Docket No. U-999/R-89-1

Dear Ms. Heil:

Peoples Natural Gas Company, Division of UtiliCorp United Inc. ("Peoples") submits the following comments regarding the proposed rule governing intervenor compensation, Docket No. U-999/R-89-1.

Minnesota Statutes, Chapter 216B.16(10) provides that the Commission may order a utility to pay intervenor costs when the Commission finds that an intervenor has materially assisted the Commission's deliberation and such intervenor has insufficient financial resources to afford the costs of intervention. Peoples questions whether this situation will ever occur since the Residential Utilities Division of the Minnesota Attorney General's office is responsible for protecting the residential customer, and the Minnesota Department of Public Service is responsible for protecting everyone's interests.

Peoples has the following specific comments on the proposed rules:

1. The costs of intervention should be recovered by the affected utility in the rate case in which the intervenor's costs are incurred. These costs should be included as an addition to the utility's current projected cost in such rate case effective the date of the rate case order.

The following comments are in response to the Commission's questions on page 2 of the Commission's Notice:

Issues:

2. The definition of intervenor costs should not include costs, fees, or charges incurred for judicial appeal or judicial review because such costs are not allowed by Minnesota Statutes, Chapter 216B.16 (10). Costs are allowed under this statute only when the intervenor has materially assisted the Commission's deliberations. Thus, it would also not be appropriate to define "proceeding" to include matters considered during judicial appeal or review.

3. The rule governing material assistance should state that intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail. Furthermore, the rule should state that compensation cannot be denied solely on the basis that the intervenor prevailed. Compensation should be based on whether the intervenor "materially assisted" the Commission's deliberations.

4. Peoples believes that the rule governing material assistance should state that no one rule criterion for determining material assistance is dispositive. The Commission should be given flexibility in deciding whether a particular intervenor materially assisted the Commission in its deliberations.

Peoples appreciates this opportunity to comment on these proposed rules.

Very truly yours,

Richard J. Haubensak
Manager, Rates & Tariffs
(402/221-2024)

jh/365sp

COMMRS. (16)
CAROLINE
JANET
DIANE W
ROSELLEN
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HORACE VAN VALKENBURG (1901 - 1987)
RETIRED
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RALPH H. COMAFORD

WRITER'S DIRECT DIAL NUMBER

347-0337

August 18, 1989

RECEIVED
AUG 21 1989
MINNESOTA PUBLIC UTILITIES COMMISSION

Ms. Caroline Heil
MN Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

Re: Proposed Rule Governing Intervenor Compensation
Docket No. U-999/R-89-I

Dear Caroline:

Attached are Centel's comments on the proposed rules on intervenor compensation. I am aware that they are being provided after the requested date of August 16, 1989. However, the rulemaking process remains at the public comment stage until the record closes for the actual proposed rules. Therefore, we respectfully request that the attached comments be given full consideration. If there is any problem with this request, please give me a call.

Yours truly,

Mike Bradley

Michael J. Bradley

jbd
0071q
Enclosure
cc John Cerwick

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CHRISTOPHER L. FARWELL
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DAVID M. HENRY
MARLA B. RAKERD
NANCY M. KISKIS

L. GLENN PASSETT (1907-1975)
ABBOTT L. FLETCHER (1889-1976)
FRANK J. WARNER (1914-1976)
ROBERT W. BARNETT (1921-1983)
HORACE VAN VALKENBURG (1901-1987)

RETIRED
J. BRAINERD CLARKSON
RALPH H. COMAFORD

WRITER'S DIRECT DIAL NUMBER
347-0337

August 18, 1989

RECEIVED
AUG 21 1989
MINNESOTA PUBLIC UTILITIES COMMISSION

Ms. Caroline Heil
MN Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

Re: Proposed Rule Governing Intervenor Compensation
Docket No. U-999/R-89-I

Dear Ms. Heil:

The Minnesota Public Utilities Commission ("Commission") has published a Notice of Intent to Solicit Outside Information regarding proposed rules governing Intervenor Compensation. Included in that Notice was a series of questions. Central Telephone Company ("Centel") has reviewed and analyzed the Commission's questions and the proposed rules, and based on that review and analysis makes the following comments:

1. Part 7831.0100, subparts 11 and 16, do not include costs related to judicial appeals in the definitions of intervenor costs or the definition of proceedings. That is a correct interpretation of Minn. Stat. §§ 237.075, subd. 10, and 216B.16, subd. 10, (1988). Those provisions allow costs when "the intervenor has materially assisted the commission's deliberation". Activity before a court may assist the Court's deliberation but not the Commission's. As such, appellate activities do not qualify for intervenor compensation.

Issues

In support of this interpretation, it should be noted that in Minnesota each party to ligitation pays its own costs and attorneys' fees, except where there is an express court rule or statute authorizing costs and attorneys' fees. Kostrzewski v. Pennsylvania Gen. Ins. Co., 364 NW2d 910 (Minn. Ct. App. 1985). Therefore, a litigant desiring such costs or fees must find other express statutory or rule authority and recover its costs and attorneys' fees through the courts.

Finally, if an appeal is taken by the utility or telephone company, there is no need for an intervenor to participate in the appeal. In such cases, the Commission will defend its own decision and there is no need for the ratepayers to pay for duplicating the defense. In recognition of this principal, the Department of Public Service and Office of Attorney General have a policy of joining with the Commission to present a single Respondent's brief whenever their respective positions permit a joint effort, rather than present multiple briefs.

2. Part 7831.0800, subpart 2, describes when an intervenor has materially assisted the Commissioner. In the Notice attached to the proposed rules the question was asked whether the rule should expressly include the statement: "Intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail." Centel does not object to adding that statement. It merely reflects the interpretation of the term "materially assisted" by the Minnesota Supreme Court in In the Matter of the Application of Northwestern Bell, 386 NW2d 723, 726 (Minn. 1986).

However, the converse should also be true that prevailing on an issue, standing alone, does not justify the award of intervenor compensation. Centel notes that the sample statement in the Commission's Notice does not adequately express this principle. The correct statement should read: "Compensation cannot be granted solely on the basis that the intervenor prevailed." An example where an intervenor could prevail on an issue but be denied

compensation would be where the issue was not complex and was adequately addressed by the intervenor state agencies.

Centel opposes the suggestion in the Notice of adding a sentence to read: "No one rule criterion for determining material assistance is dispositive." Centel believes that there will be situations where the failure to meet a particular criterion would justify denial of intervenor compensation. Criterion (B), for example, requires that the issue be "relevant or important for a fair decision". A failure to present relevant or important issues should result in the denial of compensation. Criterion (D) requires that the intervenor's "position or presentation promote a public purpose or policy". Activity which is contrary to a public purpose or policy should not be rewarded through compensation.

3. 7831.0500 establishes a process for a preliminary determination of eligibility. Centel believes that it is reasonable to predetermine financial eligibility. It may also be possible to indicate doubt over whether the assistance will be material. However, the rule should not permit a predetermination that the intervenor will provide material assistance.

Inclusion of such a provision will require the parties to litigate the merits of issues in advance of prefiled testimony, discovery, and cross-examination. A predetermination that compensation will be granted also opens avenues for later appeals that the Commission predetermined an issue without the benefit of the full record.

Therefore, Centel recommends that 7831.0500 be rewritten as follows:

- The title should be amended to read, "PRELIMINARY DETERMINATION ON INELIGIBILITY".

- Subpart 1, line 4, should be amended by replacing the word "eligible" with the word "ineligible".

- Subpart 2(A) should be amended on line 1, after the phrase "address whether the applicant has", to strike "demonstrate" and insert "failed to demonstrate". Or in the alternative, subpart 2(A) should be deleted from the rule.

- Subpart 3, line 2, the word "eligibility" in the two locations that word is used should be stricken, and the word "ineligibility" inserted.

- Delete subpart 3(A) from the rule.

With these deletions, the rule is an improvement over the current practice because it forewarns the petitioner of potential difficulties, while leaving disputes over the merits of an intervenor's issues to the contested case hearing process.

If you have any questions concerning these comments, please contact me.

Yours truly,

Michael J. Bradley

Michael J. Bradley

/jbd
0113q
cc John Cerwick

MSF Metropolitan Senior Federation

1885 University Avenue West, Suite 190, St. Paul, MN 55104 (612) 645-4261

COMMRS. CAROLINE JANET DIANE W ROSELLEN GREG LOUIS

August 29, 1989

RECEIVED

AUG 30 1989

MINNESOTA PUBLIC UTILITIES COMMISSION

Ms. Mary Ellen Hennen
Executive Secretary
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
Saint Paul, Minnesota 55101

Re: Docket No. U-999/R-89-1
Proposed Rule Governing Intervenor Compensation. Metropolitan Senior Federation's response to parties' input to the Commission's request for information relating to the above matter.

Dear Ms. Hennen:

The comments of the responding parties have been read and evaluated. The Department of Public Service's comments and suggested language changes to the bill very adequately address the issues (including the two special issues) identified in the Commission's order.

The Federation recommends that the bill, with the DPS's language changes, be forwarded to the Legislature for consideration and passage.

Sincerely,

Elmer W. Scott

Elmer W. Scott
Chair
MSF Energy/Utilities Committee

EWS:ms

Caroline
Janet
Diane W
Rosellen
Greg
Louis

(18)

RECEIVED
SEP 15 1989
MINNESOTA PUBLIC UTILITIES COMMISSION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

IN RE: NOTICE OF INTENT TO SOLICIT OUTSIDE INFORMATION REGARDING PROPOSED RULE GOVERNING INTERVENOR COMPENSATION, DOCKET NO. U-999/R-89-1.

REPLY COMMENTS OF OTTER TAIL POWER COMPANY

Issue #1: Should the definition of intervenor costs include costs, fees, or charges incurred for judicial appeal or judicial review? Should the definition of proceeding include matters considered during judicial appeal or review?

Dsuns

Intervenor compensation should not be expanded to cover costs, fees, or charges incurred for judicial appeal or review. Neither should the definition of "proceeding" be expanded to include matters of judicial appeal or review.

Current statutes and rules limit intervenor compensation to proceedings before the Commission. The current definition in rules of "proceeding" does not include actions of judicial appeal or review. A change in either to include judicial appeal or review would be a change of such substance as to be more appropriately accomplished via change in statute rather than by change in rules.

Issue #2, Subp. 1: Should the rule governing material assistance state that intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail?

The rule should so state. Intervenor compensation should be determined by the intervenor's ability to materially assist the Commission in its decision-making process regardless of whether or not the intervenor prevails.

Issue #2, Subp. 2: Should the rule governing material assistance state that compensation cannot be denied solely on the basis that the intervenor prevailed?

The rule could so state, although it is unnecessary to do so. Intervenor compensation should be determined by the intervenor's ability to materially assist the Commission in its decision-making process regardless of whether or not the intervenor prevails.

Issue #2, Subp. 3: Should the rule governing material assistance state that no one rule criterion for determining material assistance be dispositive.

This change is unnecessary. The determination of eligibility for compensation should be whether or not the intervenor materially assisted the Commission in its deliberations.

MR 7831.0100, Subp. 2: The MDPS, in its comments, apparently wishes to allow attorneys to charge one rate (which may be less than the going market rate) in

nonutility matters and then charge the going market rate for comparable services in connection with utility proceedings. There is no reason for such discrepancy. The reasonableness of an attorney's fees should be based, in part, on "the rate normally charged by that attorney for comparable services" as stated in the proposed rules.

MR 7831.0100, Subp. 7: Here again, the MDPS advocates use of a double standard for fee setting depending upon whether or not Commission deliberation of utility issues is involved. The determination of the reasonableness of the fees charged by expert witnesses should include, among other things, "the rate normally charged by the witness for comparable services."

MR 7831.0100, Subp. 11: The exclusion of costs, fees, or charges incurred for judicial appeal or judicial review should be retained. See the response to Item #1 above for additional comment.

MR 7831.0100, Subp. 13: The determination of an intervenor's eligibility for compensation hinges on its ability to "materially assist" the Commission in its deliberations. It is, therefore, advisable to base that determination, as much as possible, on quantifiable measurements or standards for which there are existing and accepted definitions in the law. "Substantially contributed" is such a standard or measurement. Standards such as "useful" or "seriously considered" are not. The determination of "material assistance" should be determined by the intervenor's "substantial contribution" to the deliberation in question. One of the measures that should always be utilized is whether the intervenor was the initiator or sole advocate of a position accepted by the PUC.

MR 7831.0100, Subp. 16: The exclusion of "matters considered during judicial appeal or review" from the definition of "proceeding" should be maintained.

MR 7831.0300. Subp. 3: Intervenors have a voice in Commission deliberations through the involvement of the public's advocate, the MDPS, and the AG's Office which are already paid for by the state's taxpayers. Additional requests for compensation by intervenor groups, directly and individually participating in Commission deliberations, should be closely examined. Compensation should be provided only in those cases where the intervenor "materially assists" the Commission in its deliberations and where the intervenor clearly has insufficient financial resources to support such intervention. The determination of "insufficient financial resources" should be such that frivolous interventions are precluded. To that end, the "but for" test, as the MDPS refers to it, should remain a part of this Subpart; Subpart 3(3); MR 7831.0500, Subp. 1B; and MR 7831.0800, Subp. 3. The full disclosure of the intervenor's financial status, budget, and extent of participation as called for in the remainder of this rule is also important in avoiding frivolous interventions.

The filing of a "statement of participation" should go a long way toward preventing duplication of interventions and toward the prevention of frivolous interventions. The MDPS's concern about the fairness issue involved in requiring such a statement from intervenors when the Department has no such requirement is easily solved. The Department could be required to file a

"statement of participation." A requirement to think through the issues involved in a pending deliberation in order to present a comprehensive case is not a limiting exercise, but rather an exercise in organization and preparation.

MR 7831.0500: The Commission's failure to make a preliminary determination within the required time frame should be presumed to indicate ineligibility contrary to the Department's comments that such a failure on the part of the Commission should indicate no presumption. This would put pressure on the Commission to make all such determinations requested in a timely matter. This would also put pressure on the intervenors requesting the preliminary determination to provide the Commission with the information it requires for making that determination in a timely fashion. To do as suggested by the Department could provide a means of circumventing the entire preliminary determination process.

MR 7831.0500, Subp. 3B: Can the Commission prevent intervention? If an intervenor is denied compensation and elects to intervene anyway, can the Commission prevent it from doing so? The Commission can prevent the intervenor from being compensated, but can it prevent the intervention itself? Should motions to intervene be scrutinized more rigorously and consolidation of parties required?

MR 7831.0600: Compensation for intervention on judicial appeal or review should not be allowed.

MR 7831.0700: The Commission should do the audit itself, but the Department should be available to provide any and all data, information, or other input at its disposal upon Commission request that might help the Commission complete the audit in a timely manner. Any intervenor anticipating compensation for its activities should be required to submit to an audit by the Commission for the verification its financial position as presented to the Commission in support of its request for compensation. The certainty of a Commission audit will do much to prevent frivolous interventions.

MR 7831.0700, Subp. 2: It would not be in the best interest of the intent of these proposed rules to add a "catch-all clause" to the criteria established by which the Commission determines "material assistance" on the part of an intervenor for purposes of compensation. Such a catch-all clause could be easily abused and could quickly negate all the previous factors for determining whether or not an intervenor "materially assisted" the Commission in its deliberations. The Department should be asked to define "extremely unique circumstances" in support of its suggestion that a "catch-all clause" be added to this Subpart. (Note: unique is a superlative which is inappropriately qualified by any adjective.)

MR 7831.0800, Subp. 3: See the response to MR 7831.0300, Subp. 3 above.

MR 7831.0800, Subp.3A: There is no need to remove the language, "the audit and" as suggested by the Department. See the comments to MR 7831.0700 above.

MR 7831.0800, Subp. 6: The Commission should make available the formula or process it intends to use in prorating or proportioning the awarded intervenor compensation among the utilities involved in a multi-utility proceeding.

Respectfully submitted,

OTTER TAIL POWER COMPANY

Dated: September 13, 1989

Katherine E. Sasseville
General Counsel

RECEIVED
SEP 15 1989
MINNESOTA PUBLIC UTILITIES COMMISSION

STATE OF MINNESOTA)
) SS
COUNTY OF OTTER TAIL)

AFFIDAVIT OF SERVICE BY MAIL

Diane Merz, being first duly sworn, deposes and says that on the 13th day of September, 1989, she served the attached Reply Comments of Otter Tail Power Company in Re: Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Intervenor Compensation in Docket No. U-999/R-89-1 upon the Minnesota Public Utilities Commission by placing true and correct copies thereof in an envelope addressed as follows:

Mary Ellen Hennen, Exec. Secretary
Minnesota Public Utilities Commission
780 American Center Building
160 East Kellogg Blvd.
St. Paul, MN 55101

and depositing the same for delivery by First Class Mail as directed by said envelope.

Copies of the above-mentioned Comments of Otter Tail Power Company were also sent to the following:

Minnesota Dept. of Public Service
790 American Center Bldg.
150 E. Kellogg Blvd.
St. Paul, MN 55101

Office of the Attorney General
340 Bremer Tower
7th Place and Minnesota Street
St. Paul, MN 55101

Diane Merz

Subscribed and sworn to before me this 13th day of September, 1989.

Notary Public

(NOTARIAL SEAL)

ROBERT KRAVA
NOTARY PUBLIC — MINNESOTA
OTTER TAIL COUNTY
My commission expires May 22, 1990

AUTHORIZATION TO PROCEED WITH ADOPTION
OF RULES WITHOUT A PUBLIC HEARING
Docket No. U-999/R-89-1

BE IT RESOLVED, that the Executive Secretary of the Minnesota Public Utilities Commission (Commission) is hereby granted the authority to sign and to give notice of the Commission's intent to adopt, without a public hearing, the attached rules governing intervenor compensation, Minn. Rules, parts 7831.0100-.0800, to all persons who have registered their names with the Commission for that purpose and publish the notice and the rules in the State Register, and to perform any acts incidental thereto, including making any form changes in the rules that the Revisor of Statutes requires the Commission to make in order to obtain the Revisor's certification as required by Minn. Stat. § 14.07, subd. 2 (1988).

BE IT FURTHER RESOLVED, that in the event a public hearing becomes necessary, the Executive Secretary is hereby granted the authority and directed to call a hearing for the purpose of promulgating said rules as well as to perform any and all acts incidental thereto, including but not limited to signing an Order for and Notice of Hearing, as well as acting as the Commission's representative at all hearings.

Darrel L. Peterson
Chair

CERTIFICATE OF AUTHORIZING RESOLUTION
Docket No. U-999/R-89-1

I, Richard R. Lancaster, do hereby certify that I am the Executive Secretary of the Minnesota Public Utilities Commission (Commission), an agency duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Commission duly and properly called and held on the 31st day of May, 1990, that a quorum was present at said meeting, that a majority of those present voted for the resolution and that said resolution will be set forth in the minutes of said meeting and has not been rescinded or modified:

> BE IT RESOLVED, that the Executive Secretary of the Minnesota Public Utilities Commission (Commission) is hereby granted the authority to sign and to give notice of the Commission's intent to adopt, without a public hearing, the attached rules, Minn. Rules, parts 7831.0100-.0800, to all persons who have registered their names with the Commission for that purpose and publish the notice and the rules in the State Register, and to perform any acts incidental thereto, including making any form changes in the rules that the Revisor of Statutes requires the Commission to make in order to obtain the Revisor's certification as required by Minn. Stat. § 14.07, subd. 2 (1988).
>
> BE IT FURTHER RESOLVED, that in the event a public hearing becomes necessary, the Executive Secretary is hereby granted the authority and directed to call a hearing for the purpose of promulgating said rules as well as to perform any and all acts incidental thereto, including but not limited to signing an Order for and Notice of Hearing, as well as acting as the Commission's representative at all hearings.

IN WITNESS WHEREOF, I have hereunto subscribed by name this 31st day of May, 1990.



Richard R. Lancaster
Executive Secretary

Bridges to remain in place must be at least equal in width to the pavement width. H-15 loading is required. Design speed is based on stopping sight distance.

REPEALER. *Minnesota Rules*, parts 8820.9911, 8820.9912, 8820.9913, 8820.9914, 8820.9915, 8820.9916, 8820.9917, 8820.9918, and 8820.9919 are repealed.

Public Utilities Commission

Proposed Permanent Rules Relating to Intervenor Compensation

Notice of Intent to Adopt Rules Without a Public Hearing and of Intent to Adopt Rules With a Public Hearing if Twenty-five or More Persons Request a Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Public Utilities Commission (Commission) intends to adopt the above-entitled rule without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in *Minnesota Statutes* §§ 14.22 to 14.28 (1988). The Commission's authority to adopt the rule is set forth in *Minnesota Statutes* §§ 216B.16, subd. 10 (1988) and 237.075, subd. 10 (1988).

All persons have until 4:30 p.m. on August 8, 1990, to submit comments in support of or in opposition to the proposed rules or any part or subpart of the rules. Comment is encouraged. Each comment should identify the portion of the proposed rules addressed, the reason for the comment, and any change proposed. PLEASE USE DOCKET NO. U-999/R-89-1 ON ALL CORRESPONDENCE.

Any person may make a written request for a public hearing on the rules within the comment period. If 25 or more persons submit a written request for a public hearing within the comment period, a public hearing will be held unless a sufficient number withdraw their requests in writing. Any person requesting a public hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rules addressed, the reason for the request, and any change proposed.

If a public hearing is required, the Commission will proceed pursuant to *Minnesota Statutes* §§ 14.131 to 14.20 (1988). PLEASE NOTE THAT IF TWENTY-FIVE OR MORE PERSONS SUBMIT WRITTEN REQUESTS FOR A PUBLIC HEARING WITHIN THE 30-DAY COMMENT PERIOD, A HEARING WILL BE HELD ON FRIDAY, AUGUST 24, 1990, IN ACCORDANCE WITH THE NOTICE OF PUBLIC HEARING OF THESE SAME RULES PUBLISHED IN THIS *STATE REGISTER* AND MAILED TO PERSONS REGISTERED WITH THE COMMISSION. To verify whether a hearing will be held, please call the Commission between August 9, 1990 and August 24, 1990 at (612) 296-7124.

Comments or written requests for a public hearing must be submitted to:

Virginia Zeller
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101
(612) 297-7072

The proposed rules may be modified if the modifications are supported by data and views submitted to the Commission and do not result in a substantial change in the proposed rule as noticed.

The proposed rules, if adopted, will allow the Commission to award compensation to intervenors in telephone company general rate cases and in gas and electric utility rate change proceedings. The proposed rules are published below. One free copy of the rules is available upon request from the Commission by contacting the Commission's receptionist, Kristine Kline, at the above address or by calling (612) 296-7124.

A STATEMENT OF NEED AND REASONABLENESS that describes the need for and reasonableness of each provision of the proposed rules and identifies the data and information relied upon to support the proposed rules has been prepared and is available from the Commission by contacting the Commission's receptionist, Kristine Kline, at the above address or by calling (612) 296-7124.

You are hereby advised, pursuant to *Minnesota Statutes* § 14.115 (1988), "Small business considerations in rulemaking," that the proposed rules may affect small businesses. Non-profit public interest organizations, which may be broadly characterized as small

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." **ADOPTED RULES SECTION** — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

businesses, may qualify for compensation as intervenors. A utility/small business may be required to expend funds for intervenor compensation.

The adoption of these rules by the Commission will not require the expenditure of public money by local public bodies nor have a direct impact on agricultural land. Therefore, *Minnesota Statutes* § 14.11 (1988) is not applicable to this rulemaking proceeding.

If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the rule submitted to the Attorney General, must submit a written request to Virginia Zeller at the above address.

Dated: 13 June 1990

Richard R. Lancaster
Executive Secretary

Notice of Hearing and Notice of Intent to Cancel Hearing if Fewer Than Twenty-Five Persons Request a Hearing In Response to Notice of Intent to Adopt Rules Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Public Utilities Commission (Commission) will hold a public hearing in the above-entitled matter at the Minnesota Public Utilities Commission, 780 American Center Building, 160 East Kellogg Boulevard, St. Paul, Minnesota 55101, commencing at 9:30 a.m., Friday, August 24, 1990, and continuing until all interested or affected persons will have an opportunity to participate by submitting either oral or written data, statements, or arguments. Statements or briefs may be submitted to the presiding Administrative Law Judge, as hereinafter indicated, without appearing at the hearing.

PLEASE NOTE, HOWEVER, THAT THE HEARING WILL BE CANCELLED IF FEWER THAN TWENTY-FIVE PERSONS REQUEST A HEARING IN RESPONSE TO THE NOTICE OF INTENT TO ADOPT THESE SAME RULES WITHOUT A PUBLIC HEARING PUBLISHED IN THIS *STATE REGISTER* AND MAILED TO PERSONS REGISTERED WITH THE COMMISSION. To verify whether a hearing will be held, please call the Commission between August 9, 1990, and August 24, 1990, at (612) 296-7124.

The matter will be heard before Administrative Law Judge Allen E. Giles, Office of Administrative Hearings, 500 Flour Exchange Building, 310 Fourth Avenue South, Minneapolis, Minnesota 55415, (612) 349-2543. The rule hearing procedure is governed by *Minnesota Statutes* sections 14.131 to 14.20 (1988) and by the rules of the Office of Administrative Hearings, *Minnesota Rules*, parts 1400.0200 to 1400.1200 (1985). Questions concerning the rule hearing procedure should be directed to the Administrative Law Judge at the address and telephone number stated above.

The subject of the hearing will be the proposed rules governing intervenor compensation, *Minnesota Rules*, parts 7831.0100-.0800. The proposed rules are authorized by *Minnesota Statutes* sections 216B.16, subd. 10 (1988), and 237.075, subd. 10 (1988). The proposed rules are published below. One free copy of the rules is available on request by contacting:

Kristine Kline
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101
(612) 296-7124

NOTICE IS HEREBY GIVEN THAT A STATEMENT OF NEED AND REASONABLENESS is now available for review at the Commission offices and at the Office of Administrative Hearings. The Statement of Need and Reasonableness includes a summary of all the evidence and argument which the Commission anticipates presenting at the hearing justifying both the need for and reasonableness of the proposed rules. Copies of the Statement of Need and Reasonableness may be reviewed at the Commission offices or at the Office of Administrative Hearings and copies may be obtained from the Office of Administrative Hearings at the cost of reproduction.

Any person may present his or her views on the proposed rules in one or more of the following ways: by submitting written data to the Administrative Law Judge at any time before the close of the hearing; by submitting oral or written data at the hearing; and by submitting written data to the Administrative Law Judge during the comment period following the hearing. The comment period will be not less than five working days after the public hearing ends. The comment period may be extended for a longer period not to exceed 20 calendar days if ordered by the Administrative Law Judge at the hearing. The written material received during the comment period shall be available for review at the Office of Administrative Hearings. Within three business days after the expiration of the comment period, the Commission and interested persons may respond in writing to any new information received during the comment period; however, no additional evidence may be submitted during this three-day period.

The Commission requests that any person submitting written views or data to the Administrative Law Judge prior to the hearing during the comment period also submit a copy of the written data to Virginia Zeller at the Commission address stated above.

The proposed rules may be modified if the data and views received during the hearing process warrant modification and th modification does not result in a substantial change in the proposed rules.

Any person may request notification of the date on which the Administrative Law Judge's report will be available, after which da the Commission may not take any final action on the rules for a period of five working days. If you desire to be so notified, you ma request notification by sending a written request to the Administrative Law Judge. Any person may request notification of the date o which the rules are adopted and filed with the Secretary of State. The notice must be mailed on the same day that the rules are filed If you want to be so notified you may so indicate at the hearing or send a request in writing to the Commission at any time prior t the filing of the rules with the Secretary of State.

You are hereby advised, pursuant to *Minnesota Statutes* section 14.115 (1988), "Small business considerations in rulemaking," th the proposed rules may affect small business. Non-profit public interest organizations, which may be broadly characterized as sma businesses, may qualify for compensation as intervenors. A utility/small business may be required to expend funds for interven compensation.

The adoption of these proposed rules by the Commission will not require expenditure of public monies by local public bodies no have a direct impact on agricultural land. Therefore, *Minnesota Statutes* section 14.11 (1988) is inapplicable to this rulemakin proceeding.

Please be advised that *Minnesota Statutes* ch. 10A (1988) requires each lobbyist to register with the State Ethical Practices Boar within five days after he or she commences lobbying. A lobbyist is defined in *Minnesota Statutes* section 10A.01, subd. 11 (1988) a any individual:.

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends mor than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for th purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with publi officials; or

(b) Who spends more than $250 not including his own travel expenses and membership dues, in any year for the purpose o attempting to influence legislative or administrative action by communicating or urging others to communicate with public official

The statute contains certain exceptions. Questions should be directed to the Ethical Practices Board, 625 North Robert Street, S Paul, Minnesota 55101-2520, telephone (612) 296-5148.

Richard R. Lancaste
Executive Secretary

Rules as Proposed (all new material)

7831.0100 DEFINITIONS.

Subpart 1. **Scope.** The terms used in this chapter have the meanings given them in this part.

Subp. 2. **Attorney fees.** "Attorney fees" means the reasonable, itemized billings and costs incurred by an intervenor for the service of an attorney in a proceeding before the commission. The costs for services of the attorney are reasonable when computed at the ra normally charged by that attorney for comparable services, or at the prevailing market rate or fair market value to obtain comparabl and available services of an attorney of comparable training and experience, whichever rate is lower.

Subp. 3. **Attorney general.** "Attorney general" means the Minnesota Residential and Small Business Utilities Division of the Offic of the Attorney General.

Subp. 4. **Commission.** "Commission" means the Minnesota Public Utilities Commission.

Subp. 5. **Compensation.** "Compensation" means reimbursement or payment to an eligible intervenor for all or part of the intervenc costs, as determined by the commission under this chapter, for participation in a proceeding.

Subp. 6. **Department.** "Department" means the Minnesota Department of Public Service.

Subp. 7. **Expert witness fees.** "Expert witness fees" means the reasonable, itemized billings and costs incurred by an intervenc for the services of an expert witness in a proceeding before the commission. The costs for services of the expert witness are reasonab

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." **ADOPTED RULES SECTION** — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

when computed at the rate normally charged by that witness for comparable services, or at the prevailing market rate or fair market value to obtain comparable and available services of an expert witness of comparable training and experience, whichever rate is lower.

Subp. 8. **Final determination.** "Final determination" has the meaning given it in *Minnesota Statutes*, sections 216B.16, subdivision 2, paragraph (c), and 237.075, subdivision 2, paragraph (c).

Subp. 9. **Insufficient financial resources.** "Insufficient financial resources" means that but for the reimbursement of all or part of its intervenor costs, the intervenor is financially unable to afford intervenor costs incurred to participate effectively in the proceeding as determined by the commission under part 7831.0800, subpart 3.

Subp. 10. **Intervenor.** "Intervenor" means a person who is entitled or permitted by law, or permitted under rule of the commission or by order of the presiding officer, to intervene in a proceeding. For purposes of awarding compensation for intervenor costs under this chapter, intervenor does not include (1) a provider of telephone services of any kind, or its representative, agent, or affiliate, nor (2) an agency, representative, employee, authority, or political subdivision of a federal, state, county, home rule charter or statutory city, or town government or combination of them.

Subp. 11. **Intervenor costs.** "Intervenor costs" means attorney fees, expert witness fees, and other reasonable costs incurred in a proceeding. Intervenor costs do not include costs, fees, or charges incurred for judicial appeal or judicial review.

Subp. 12. **Issue.** "Issue" means a question, dispute, or controversy to be resolved in a proceeding held under *Minnesota Statutes*, section 216B.16 or 237.075.

Subp. 13. **Materially assisted.** "Materially assisted" means that the intervenor's participation and presentation was useful and seriously considered, or otherwise substantially contributed to the commission's deliberations in the proceeding, following consideration by the commission of the factors listed in part 7831.0800, subpart 2.

Subp. 14. **Other reasonable costs.** "Other reasonable costs" means reasonable fees and charges actually incurred by an intervenor in a proceeding before the commission, such as the costs for:

A. the services of a consultant or an employee of the intervenor computed at the rate normally charged by that person for comparable services, or at the prevailing market rate or fair market value to obtain comparable, available services of persons of comparable training and experience, whichever is lower; and

B. out-of-pocket expenses directly related to and necessary for participation in the proceeding, for example, costs of filing, copying, travel, travel-related expenses, and preparation of studies, displays, or exhibits.

Subp. 15. **Position.** "Position" means a factual contention, legal contention, or specific policy or procedural recommendation made by an intervenor relating to an issue addressed and decided in a proceeding.

Subp. 16. **Proceeding.** "Proceeding" means a rate change proceeding under *Minnesota Statutes*, section 216B.16, or a general rate case conducted under *Minnesota Statutes*, section 237.075. For purposes of this chapter, a procedural or supplemental matter is considered part of the main proceeding under *Minnesota Statutes*, section 216B.16 or 237.075, if it is decided or conducted by the commission or an administrative law judge on an issue or position considered in, related to, or supplemental to the main proceeding, or on the issue of intervenor compensation awarded. Procedural or supplemental matters include, for example: motions; orders; settlements; stipulations; prehearing conferences, determinations, or procedures; contested case hearings; reconsiderations or rehearings; and remanded hearings. Proceeding does not include matters considered during judicial appeal or review.

Subp. 17. **Telephone company.** "Telephone company" has the meaning given it in *Minnesota Statutes*, sections 237.01, subdivision 2; 237.01, subdivision 3, if the company is subject to general rate regulation by the commission; and 237.075, subdivision 9, if the company has made the election provided in that subdivision.

Subp. 18. **Utility.** "Utility" has the meaning given "public utility" in *Minnesota Statutes*, section 216B.02, subdivision 4.

7831.0200 PURPOSE.

The purpose of this chapter is to establish procedural and substantive criteria for reimbursing an intervenor for its intervenor costs incurred in a rate change proceeding under *Minnesota Statutes*, section 216B.16, subdivision 10, or a general rate case under *Minnesota Statutes*, section 237.075, subdivision 10, when the intervenor has insufficient financial resources to afford its intervenor costs and has materially assisted the commission in its deliberations in the proceeding.

7831.0300 REQUEST FOR COMPENSATION.

Subpart 1. **Request filing and notice.** An applicant for an award of compensation shall file with the commission a request for compensation. The applicant shall also serve a copy of the request on each known party to the proceeding and shall file with the commission an affidavit of service. The request must be filed as soon after notice of a filing, proceeding, or prehearing conference as is reasonably possible, but at least 75 days after the notice or 30 days before the beginning of evidentiary hearings in the proceeding, whichever occurs later. The request must satisfy the requirements of subparts 2 to 5.

Subp. 2. **General information.** The request for compensation must contain the following information, as applicable:

A. the name and address of the applicant or representative of an organization;

B. for an organization, the names, addresses, and titles of the members of its governing body, a description of the organization's general purposes, size, and structure, and whether it is a nonprofit organization incorporated under *Minnesota Statutes*, chapter 317; and

C. the proceeding for which the compensation is requested.

Subp. 3. **Insufficient financial resources.** The applicant shall show as part of the request that, but for an award of compensation for its intervenor costs under this chapter, the applicant has insufficient financial resources to intervene and participate effectively in the proceeding. The request must address the factors set forth in part 7831.0800, subpart 3. The applicant shall provide a summary description of finances, distinguishing between grant funds committed to specific projects, if applicable, and discretionary funds, showing the financial status of the applicant, including at least:

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

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

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

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

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

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

If available, the applicant shall file a copy of its audited financial statements. The applicant may reference its audited financial statements to satisfy items (1) to (6).

If the commission has determined within the previous year before receiving the request that the applicant has met its burden of showing insufficient financial resources and if the applicant can attest that there has been no substantial change in available discretionary resources, the applicant may refer to that decision to satisfy the requirement of this subpart.

Subp. 4. **Budget.** The applicant shall file as part of the request an estimate of its intervenor costs, the basis for the estimate, the extent of financial commitment to participation, and a specific budget showing the total compensation, not to exceed the maximum amount allowed by *Minnesota Statutes*, section 216B.16, subdivision 10, or 237.075, subdivision 10, to which the applicant believes it may be entitled.

Subp. 5. **Statement of participation.** The applicant shall file as part of the request a statement of the nature and extent of planned participation in the proceeding as far as it is possible to set it out when the request is filed. The statement must include a list of positions and issues that the applicant intends to present, raise, or respond to in the proceeding, an explanation of how an issue affects the applicant's interest in the proceeding, and a clear indication of which viewpoints or ideas the applicant believes are substantive, novel, or significant and why their presentation would contribute to a fair determination of an issue in the proceeding.

7831.0400 STATEMENT IN RESPONSE.

The department, attorney general, or other party to the proceeding, within 15 days after an applicant has filed a request under part 7831.0300, may file with the commission a statement commenting on any part of the request and on duplications of positions, issues, or presentations, and make recommendations to the commission. The statement must be served on the applicant and known parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on the applicant and known parties.

7831.0500 PRELIMINARY DETERMINATION ON ELIGIBILITY.

Subpart 1. **Required determinations.** Within 45 days of receiving a request under part 7831.0300, the commission shall issue a preliminary determination addressing whether the applicant is eligible for an award of compensation of intervenor costs. The determination must address:

A. whether the commission considers the applicant to be an intervenor as defined in part 7831.0100, subpart 9; and

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." **ADOPTED RULES SECTION** — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

B. whether the applicant has made a sufficient showing that, but for an award of compensation for all or part of its intervenor costs, it has insufficient financial resources to intervene and participate fully and effectively in the proceeding, assuming all information in the request filing is true and accurate pending an audit that may be required under part 7831.0700, and pending a decision awarding or denying compensation under part 7831.0800.

Subp. 2. **Discretionary determinations.** The determination on eligibility may also, but is not required to:

A. address whether the applicant has demonstrated its ability to materially assist the commission in its proposed statement of participation, assuming its accuracy, under part 7831.0300, subpart 5;

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

C. recommend use of common legal representation or expert witnesses in cooperation with other applicants or participants;

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

E. point out any unrealistic expectations for compensation; or

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

Subp. 3. **Effect of preliminary determination on eligibility.** A preliminary determination on eligibility does not guarantee either a grant or a denial of an award of compensation for intervenor costs. If a preliminary determination is not made on a discretionary factor in subpart 2, items A to F, no presumption arises regarding that factor.

A. After a preliminary determination granting compensation for intervenor costs, the commission must overcome in an applicant's claim for compensation a presumption, for the reasons stated in the preliminary determination, that the applicant should be granted an award of compensation for intervenor costs.

B. After a preliminary determination denying compensation, an applicant may elect to intervene and may intervene if granted permission by the commission or presiding officer. If, however, the applicant does intervene, the applicant must overcome in the claim for compensation a presumption, for the reasons stated in the preliminary determination, that the applicant should be denied an award of compensation for intervenor costs.

7831.0600 CLAIM FOR COMPENSATION.

Subpart 1. **Filing claim.** An intervenor shall file a claim for an award of compensation of its intervenor costs within 90 days after the later of:

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

B. the date the commission issues its order following reconsideration or rehearing.

Subp. 2. **Required information.** The claim must include, at a minimum:

A. adoption or amendment by the intervenor of the information submitted in the request filed under part 7831.0300;

B. a detailed, itemized description of services and intervenor costs related to specific issues addressed in the proceeding, for which an award of compensation is sought; and

C. a description of how the intervenor's contribution to the proceeding may have materially assisted the commission in its deliberations.

A copy of the claim must be served on all parties to the proceeding and the claim must have attached to it an affidavit of service on all parties.

Subp. 3. **Response.** Within 30 days after service of the claim, a party may file a response to the claim with the commission. A copy of the statement must be served on the claiming intervenor and other parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on the applicant and known parties.

Subp. 4. **Reply.** The claiming intervenor may file with the commission a reply to a response under subpart 3 within 15 days after the response is filed. A copy of the statement must be served on other parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on known parties.

Subp. 5. **Amended claim.** When additional costs are incurred as a result of a remanded hearing, the intervenor may file an amended claim within 30 days after the commission issues its order following remand. Subparts 1 to 4 apply also to an amended claim.

7831.0700 FINANCIAL REVIEW.

At any time after a request for compensation is filed, the commission or its staff may request additional financial information from the intervenor to clarify or substantiate the claim. The requested information may include, among other things, records, receipts,

invoices, and other documents showing the intervenor's expenses incurred and financial condition.

If considered necessary by the commission, an applicant for compensation shall grant the staff of the commission and the department access to audit and examine pertinent books, documents, papers, and records, to the extent necessary to verify that the intervenor has insufficient financial resources to afford its intervenor costs and to verify the basis for the amount claimed.

Approved applicants shall retain the records relevant to supporting a claim for three years after receiving compensation.

7831.0800 AWARD OF COMPENSATION.

Subpart 1. **Decision.** Within 120 days of the filing of a claim or amended claim for an award of compensation for intervenor costs, or within 45 days of the filing of an audit or additional information, whichever is later, the commission shall issue a decision awarding or denying compensation.

Subp. 2. **Materially assisted.** To be granted an award of compensation, in whole or in part, for intervenor costs, the intervenor must have materially assisted the commission in its deliberations. The commission shall consider the following factors, no single one of which is dispositive, in making its decision awarding or denying compensation:

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

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

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

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

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

F. whether the commission adopted, in whole or in part, a position advocated by the intervenor.

Subp. 3. **Insufficient financial resources.** To be granted an award of compensation for intervenor costs, the intervenor must show that it has insufficient financial resources, but for the award, to afford all or part of its intervenor costs necessarily incurred to participate effectively in a proceeding. The commission shall consider the following factors, as applicable, in making its decision awarding or denying compensation, in whole or in part, for intervenor costs:

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

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

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

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

Subp. 4. **Bases for commission decision.** For each issue addressed by the intervenor and decided in the proceeding:

A. On finding that an intervenor materially assisted the commission and has insufficient financial resources to afford its intervenor costs, the commission shall issue its decision awarding compensation. The decision must describe the bases for assistance found and for the amount of compensation awarded.

B. On finding that an intervenor either did not materially assist the commission or has sufficient financial resources to afford all of its intervenor costs, the commission shall issue its decision denying compensation. The decision must describe the bases for denying compensation.

Subp. 5. **Maximum amount awarded.** The total amount of the award for a proceeding may be all or part of the amount claimed, but must not exceed the maximum allowed under *Minnesota Statutes*, section 216B.16, subdivision 10, or 237.075, subdivision 10.

Subp. 6. **Payment.** The utility or telephone company that was the subject of the proceeding shall pay the award of compensation to the intervenor within 30 days after the commission issues its decision awarding compensation. The utility or telephone company shall file with the commission proof that it paid the amount of compensation awarded to the intervenor.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." **ADOPTED RULES SECTION** — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

U-999/R-89-1 (19)

Jerry

CITY OF SAINT PAUL
OFFICE OF THE CITY ATTORNEY

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JAMES SCHEIBEL
MAYOR

RECEIVED
MAY 15 1990
MINNESOTA PUBLIC UTILITIES COMMISSION

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Roseller
Louis
Dan

May 14, 1990

Richard Lancaster
Executive Secretary
Minnesota Public Utilities Commission
American Center Building
Kellogg and Robert Streets
Saint Paul, MN

Re: Proposed Intervenor Compensation Rules

Dear Mr. Lancaster:

Thank you for your memo of May 3 requesting comments on the proposed rules. Although the time is somewhat short, I will attempt to give as detailed comment as possible.

I am troubled by the provisions contained on lines 19 - 23 of Page 2 which purport to limit the authority of political subdivisions to seek intervenor compensation. My first concern is what I perceive to be the lack of statutory and case law support for this prohibition. Time constraints have prevented me from a detailed search, but I found no support for this prohibition in M.S. 216B.16 or any annotated cases.

The three major forces in rate cases, the MPUC, DPS and the Attorney General's office all have authority to levy costs directly against the filing utility, as it should be. This may be the thought behind the section limiting governmental compensation under this program. However, political subdivisions such as my client are not allowed such a levy, and the merit of excluding our rights to compensation ought to be carefully considered. For many years the City of Saint Paul City Council acted as the rate regulator of NSP, and this many decades tradition is one of the reasons for

Saint Paul's continued involvement in rate matters.

More importantly however, and my second basis of concern, relates to our experience in the rate regulation area and the fact that we often must enter these cases to monitor and act to avoid the attempts of NSP to seriously erode customer class benefits available only to political subdivisions. I draw your attention to the efforts since 1981 of NSP to dramatically alter the two Municipal Pumping classes. In 1981 NSP proposed elimination of the classes, and in the order on that case the MPUC ordered that the class be maintained and NSP to conduct a study before seeking any additional changes in those classes. Despite that mandate NSP has attempted class structure changes in 1985, 1987 and in the pending case. In each case substantial resources had to be expended to avert the changes sought by NSP, and in each of those cases NSP failed to do what was ordered by the Commission in 1981 - to do the rate class studies to support their position.

In the current case to date I have expended 194.7 hours of time, plus costs of expert witnesses, city employees, and other miscellaneous expenses. This is a very real drain on the resources of the City of Saint Paul and the cities who are members of the Municipal Pumpers Group. In a time of budget cutbacks mandated by Legislative reductions in state aid, every nickel counts. How many years will we have to come back and fight the same battles to the same conclusion? Who knows? Who ought to bear the costs of those battles, the taxpayers of the municipalities or the shareholders of the corporation that continues to assert meritless requests?

The Statement of Need and Reasonableness cites the decision of the Commission in Docket No. G-002/GR-85-108, the 1985 NSP gas case. The basis of that decision should not be extended to a blanket exclusion of political subdivision intervenors compensation when valid need for that compensation is proven. Facts and circumstances change, and what was the case in 1985 may not always be the case.

The Statement of Need and Reasonableness also fails to recognize the fact that municipalities are unable to budget for rate cases. Again the current NSP rate case is an example. NSP filed its request on November 2, 1989. The City of Saint Paul 1989 budget was set in October 1988, the 1990 budget in October 1989. How could the City possibly budget for a rate case that was filed after the budget was set? If the City had to wait until it was able to go through the budget process to obtain the necessary funding the case would be over before the money were available.

The conclusion that the City had the available resources but did not allocate them also ignores the current budget crisis facing municipalities, in which a Legislature cut state aids to municipalities with a nearly immediate impact.

In conclusion I urge you to remove the exclusion of political subdivisions from the proposed rule.

Please notify me of all steps in this process so I can remain fully involved.

Sincerely,

Thomas J. Weyandt
Assistant City Attorney

Cc Tom Welna

Directly To Ginny. Used May 16 As Date. (17A)

PEOPLES NATURAL GAS

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Omaha, Nebraska 68102

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Louis
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Carol
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May 16, 1990

Ms. Virginia Zeller
Minnesota Public Utilities Commission
780 American Center Building
160 East Kellogg Boulevard
Saint Paul, MN 55101

Re: Proposed Intervenor Compensation Rules,
Parts 7831.0100 to 7831.0800, Docket No. U-999/R-89-1

Dear Ms. Zeller:

Peoples Natural Gas Company, Division of Utilicorp United Inc. ("Peoples") submits the following comments regarding the proposed intervenor compensation rules:

1. Minnesota Statutes, Chapter 216B.16(10) provides that "The commission may order a utility to pay all or a portion of a party's intervention costs not to exceed $20,000 per intervenor in any proceeding when the commission finds that the intervenor has materially assisted the commission's deliberation and the intervenor has insufficient financial resources to afford the costs of intervention." The proposed rules require that the commission consider, among other factors, whether the intervenor represented an interest that would not otherwise have been adequately represented in the proceeding. (Proposed Rule 7831.0800, subpart 2(A).) Peoples questions whether the situation envisioned by the statute will ever occur since the Residential Utilities Division of the Minnesota Attorney General's office is responsible for protecting residential customers, and the Minnesota Department of Public Service is responsible for protecting everyone's interests.

2. The rules should be modified to provide that the intervenor costs that the commission determines a utility must pay should be recovered by the affected utility in the rate case in which the costs are incurred. The costs should be included as an addition to the utility's currect projected cost in such rate case, effective the date of the rate case order.

Peoples appreciates this opportunity to comment on these proposed rules.

Very truly yours,

Richard J. Haubensak

Richard J. Haubensak
Manager, Rates & Tariffs
(402/221-2024)

j/1008sp

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May 17, 1990

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MAY 17 1990

MINNESOTA PUBLIC UTILITIES COMMISSION

Ms. Virginia Zeller
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

Re: Proposed Rules Governing Intervenor Compensation
Docket No. U-999/C-89-1

Dear Ms. Zeller:

On May 3, 1990, the Minnesota Public Utilities Commission ("Commission") published a Notice of Commission Meeting to Consider Proposed Intervenor Compensation Rules, Minn. Rules, part 7831.0100 - .0800. Pursuant to that Notice, Northern States Power Company ("NSP") submits these comments. NSP also submitted comments dated August 16, 1989, regarding an earlier version of the proposed Rules, which are incorporated herein by reference.

As stated in its earlier comments, NSP generally supports the proposed Rules. The Rules establish formal procedures that should prove to be more reliable than the informal process now in place. In the past the Commission has allowed intervenor compensation only in limited circumstances. NSP believes this is good policy. Since an intervenor usually represents a limited constituency (as opposed, for example, to representation of all ratepayers by the Department of Public Service), that constituency should pay its own intervention costs whenever it has the financial resources to do so. The intervenor should also be required to materially assist the Commission in its decision so that frivolous or repetitive interventions are discouraged. NSP believes the Commission should attempt to comply with the legislative intent expressed in Minn. Stat. § 216B.16, subd. 10, and Minn. Stat. § 237.075, subd. 10, while minimizing the impact on utility ratepayers. The proposed Rules generally appear to do this.

NSP remains concerned that the proposed Rules do not address how intervenor compensation costs paid by a utility

are to be recovered in rates. The Commission should include rules allowing utility recovery of these costs, just as Commission rules allow recovery of other regulatory costs related to rate cases. NSP assumes that the Commission's intention is to allow recovery of intervenor compensation paid by a utility. However, this should be clearly stated in the Rules.

It would be helpful if the § 7831.05 Preliminary Determination of Eligibility provided an estimate of intervenor costs the utility could recover in a general rate case, particularly where the Commission contemplates granting a partial allowance of requested intervenor compensation. It would also be more efficient, in general rate cases, to set the deadline for all intervenors at the same time, rather than a different deadline for each intervenor dependent upon when they filed their request. The parties would then know the number of intervenors, the scope of the issues, preliminary eligibility and estimated intervenor compensation costs.

In its earlier comments, NSP expressed concern that the presumption created in § 7831.05, subp. 3, should not apply to matters not addressed by the Commission in its Preliminary Determination. Language has been added to this section in an attempt to clarify this point. NSP commends the Commission staff for this effort. However, the language proposed in § 7831.0500, subp. 3, is lengthy and is not entirely clear in situations where the Commission makes a partial determination (i.e., does not address all factors). NSP recommends that this section be replaced with the language contained in Attachment A which is shorter, simpler and easier to understand.

NSP again appreciates the opportunity to submit comments on the proposed Rules. If there are any questions regarding these comments, please contact me at 330-7945.

Very truly yours,

Michael J. Hanson

MICHAEL J. HANSON

MJH/sl

Attachment

Attachment A

7831.0500 PRELIMINARY DETERMINATION ON ELIGIBILITY

Subp. 3. Effect of preliminary determination on eligibility.

A preliminary determination on eligibility does not guarantee either a grant or a denial of an award of compensation for intervenor costs. Any determination made under subpart 1 or subpart 2 of this section shall be presumptively established unless overcome by the Commission, the applicant or other party to the proceeding during the Commission's consideration of its decision under part 7831.0800. If a preliminary determination is not made on a discretionary factor in subpart 2, items A to F, no presumption arises regarding that factor.

[Subps. 3A and 3B should be deleted in their entirety.]

MINNESOTA
Department of
Public Service

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1990

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MAY 17 1990
MINNESOTA PUBLIC
UTILITIES COMMISSION

May 17, 1990

Mr. Richard R. Lancaster
Executive Secretary
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

Dear Mr. Lancaster:

Attached to this letter are the comments of the Minnesota Department of Public Service regarding the Minnesota Public Utilities Commission's request for written comments concerning the Proposed Intervenor Compensation Rules, Minn. Rules, part 7831.0100-.0800 and the corresponding Statement of Need and Reasonableness.

Sincerely,

DENNIS M. DEVEREAUX
ASST. COMMISSIONER

Attachment

Comments of The Minnesota Department of Public Service Concerning the Minnesota Public Utilities Commission's Proposed Rule Governing Intervenor Compensation Docket No. U-999/R-89-1 May 3, 1990

The Department believes that the Commission's Statement of Need and Reasonableness dated May 3, 1990, did not adequately address the Department's concerns in the following areas:

7831.0100 (DEFINITIONS), Subp. 2, Attorney fees.
7831.0100 (DEFINITIONS), Subp. 7, Expert witness fees.

Department Comments:

The Commission's Statement of Need and Reasonableness does not address the Department's previous comments that these definitions should be modified so that an attorney who was willing to provide services at below market rates in the past will not have in place a downward ratchet on their compensation award regardless of the services provided. Furthermore, it will be more consistent with cost reimbursement in civil suits.

Proposed rule 7831.0100 (DEFINITIONS), Subp. 2, should be modified as follows:

"The costs for services of the attorney are reasonable when computed at ~~the rate normally charged by that attorney for comparable services, or~~ at the prevailing market rate or fair market value to obtain comparable and available services of an attorney of comparable training and experience, whichever rate is lower."

Proposed rule 7831.0100 (DEFINITIONS), Subp. 7, should be modified as follows:

"The costs for services of the expert witness are reasonable when computed ~~at the rate normally charged by that witness for comparable services, or~~ at the prevailing market rate or fair market value to obtain comparable and available services of an expert witness of comparable training and experience, whichever rate is lower."

7831.0100 (DEFINITIONS), Subp. 11, Intervenor costs.

Department Comments:

This definition should be amended to include judicial appeal or judicial review costs for the following reasons stated in the Department's previous comments:

The rate case process may be viewed as a continuation process until appeals, if any, are exhausted. This continuation process is typically reflected in many appealed decisions which remand the case back to the commission for further deliberation. If an intervenor qualifies for all or part compensation based upon the commission's use of facts presented by the intervenor in its deliberations, then to the extent these facts are employed in the judicial appeal or review process, the intervenor should also be allowed all or part compensation for charges incurred for, and matters considered in, judicial appeal or review.

Additionally, from a fairness perspective, it would be unfair and prejudicial to not allow an intervenor to continue the ratemaking process into the judicial appeal or review process if the intervenor has legal basis to do so, in that the petitioner and government intervening agencies to a proceeding have the opportunity to seek judicial appeal or review. It should be noted that the commission's decision to award compensation for judicial appeal or review will be subject to the same criteria of materially assisting the commission.

When an intervenor appeals a commission decision, an award of fees for judicial review or appeal is likely to be inherently tied to whether or not the intervenor prevails, since the commission has previously made its decision. For the limited purpose of judicial review or appeal, if the commission prevails on an intervenor's appeal, then it should be considered that the intervenor did not materially assist the commission.

7831.0300 (REQUEST FOR COMPENSATION), Subp. 3, Insufficient financial resources.

Department Comments:

The statute authorizing compensation when intervenors have insufficient financial resources does not require nor contemplate a "but for" test. If an intervenor has insufficient financial resources to intervene and participate effectively in the proceeding, that should be supported by the financial status of the intervenor requesting compensation. The phrase "but for an award of compensation" places an unduly harsh burden on the intervenor in determining whether or not an intervenor is financially eligible for compensation. This definition should be modified as follows:

"The applicant shall show as part of the request that~~, but for an award of compensation for its intervenor costs under this chapter,~~ the applicant has insufficient financial resources to intervene and participate effectively in the proceeding.

The phrase "but for an award" should also be deleted from Subp. 3 (3), and 7831.0500 (PRELIMINARY DETERMINATION ON ELIGIBILITY), Subpart 1, B.

7831.0300, Subp. 5, Statement of participation.

Department Comments:

The Commission's Statement of Need and Reasonableness does not address whether or not it is the Commission's intent to limit compensation to predefined issues and positions. The Department raised the following concerns about this matter in it's previous comments:

This statement implies that intervention is limited to predefined issues and positions. Many rate case issues are developed during the discovery process from on-site investigation, information requests and analysis of information provided. It would be unfair to limit an applicant for compensated intervention to predefined issues, when other intervenors such as the department and the RUD/AG are not limited in this manner.

It would be impossible to predefine an acceptable rate of return before obtaining sufficient information and data upon which to complete an appropriate analysis. Without the opportunity to perform a proper analysis, an intervenor would more than likely be unable to provide the kind of useful information that would materially assist the commission. Consequently, in this example, no intervenor would be eligible for compensation. Similarly, the usefulness of the facts presented in an issue should take precedence over whether or not an intervenor duplicates another party's issue. For example, it is possible that more than one intervenor could file identical rate of return recommendations, with each recommendation based upon different facts and comparable groups. In this instance, compensation should be granted on the usefulness of the facts presented and not denied because a duplicate rate of return was recommended.

(2/A

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MAY 17 1990

MINNESOTA PUBLIC UTILITIES COMMISSION

BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

IN RE: Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Intervenor Compensation	)	DOCKET NO. U-999/R-89-1

Ms. Virginia Zeller
Minnesota Public Utilities Commission
780 American Center Building
150 E. Kellogg Blvd.
St. Paul, MN 55101

Dear Ms. Zeller:

Midwest Gas, a division of Iowa Public Service Company, as a public utility defined in Minnesota Statutes, Section 216B.02, subdivision 4, submits four copies of the following comments in response to the Proposed Permanent Rules Relating to Intervenor Compensation as released May 3, 1990. Please file stamp and return one copy in the enclosed stamped, self-addressed envelope.

1. The proposed rule should be modified to provide for rate recovery of any expense incurred during the course of a proceeding. It would be reasonable to permit recovery of the compensation expense over the same time frame allowed for recovery of the utility's ratemaking expense. Recovery could occur through base rates in a rate case. By not dealing with this issue, the draft rule penalizes smaller Minnesota utilities. Such a penalty occurs because the maximum award allowed under law of $20,000 will be too small to impact rates of a large utility. However, to smaller utilities, the amount is not negligible. To avoid disproportionate discriminating against smaller utilities,

the determination of compensation should be made in such a fashion as would permit the recovery of that expense.

2. The "materially assisted" factor as defined in Section 7831.0100 Subp. 13 and applied throughout the proposed rule needs to be put into perspective by requiring an applicant to submit cost/benefit analysis and for the Commission to consider cost/benefit analysis in making a determination of the appropriateness of obtaining compensation. An example illustrates the need for such analysis. Suppose that the intervenor's assistance is materially helpful on an issue with a maximum $500 impact on a utility's revenue requirement. However, charging a fair rate results in the expenditure of $20,000 due to the time spent on the issue. To ensure that intervention subject to compensation offers the potential for benefit, the Commission should require an intervenor seeking compensation to make a reasonable estimate of the dollar impact of each issue compared to the dollar cost to be spent on the issue. For those issues in which there is no quantifiable impact, the intervenor should be required to provide a qualitative statement assessing the benefit the intervenor seeks to provide versus the cost the intervenor seeks to impose.

3. The financial disclosure criteria contained in Section 7831.0300 Subp. 3 may be inadequate in certain circumstances. The proposed rule contains a requirement that information be filed for the previous year and the current year. Depending upon what the intervenor files and when a case is filed, "current year" data may contain projections that cease well before the

anticipated conclusion of the proceeding. The Commission should require information to be presented for a time period no shorter than 30 days after the anticipated conclusion of the proceeding. Updated information can be submitted at the time the intervenor submits a final brief.

DATED this 15th day of May, 1990.

Respectfully submitted,

MIDWEST GAS, a division of Iowa Public Service Company

BY Steven R. Weiss

Steven R. Weiss, Senior Attorney
John A. Rasmussen, Jr.
Vice President & General Counsel
P.O. Box 778
Sioux City, IA 51102

(22)

Otter Tail
POWER COMPANY

215 SOUTH CASCADE STREET
P.O. BOX 496
FERGUS FALLS, MN 56538-0496
218-739-8200

COMMRS
Rosellen
Louis
Ginny
Carol
Janet
Diane

RECEIVED
MAY 18 1990
MINNESOTA PUBLIC UTILITIES COMMISSION

May 16, 1990

Richard R. Lancaster, Exec. Secretary
Minnesota Public Utilities Commission
780 American Center Building
160 East Kellogg Blvd.
St. Paul, MN 55101

Dear Mr. Lancaster:

Re: Notice of Commission Meeting to Consider Proposed Intervenor Compensation Rules, Minn. Rules, part 7831.0100-.0800.

Enclosed for filing are Otter Tail Power Company's Reply Comments in the above subject matter. These Reply Comments are essentially the same comments which were filed by Otter Tail on September 13, 1989, in re: Docket No. U-999/R-89-1, with the exception of an additional comment on the last page under MR 7831.0800, Subp. 7.

If you have any questions, please let me know.

Sincerely,

Katherine E. Sasseville

Katherine E. Sasseville
General Counsel
dm

Enclosures

c: MN Dept. of Public Service
Office of the Attorney General

STATE OF MINNESOTA)
) SS
COUNTY OF OTTER TAIL)

AFFIDAVIT OF SERVICE
BY MAIL

Diane Merz, being first duly sworn, deposes and says that on the 16th day of May, 1990, she served the attached Reply Comments of Otter Tail Power Company in Re: Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Intervenor Compensation in Docket No. U-999/R-89-1 upon the Minnesota Public Utilities Commission by placing true and correct copies thereof in an envelope addressed as follows:

Richard R. Lancaster, Exec. Secretary
Minnesota Public Utilities Commission
780 American Center Building
160 East Kellogg Blvd.
St. Paul, MN 55101

and depositing the same for delivery by First Class Mail as directed by said envelope.

Copies of the above-mentioned Comments of Otter Tail Power Company were also sent to the following:

Minnesota Dept. of Public Service
790 American Center Bldg.
150 E. Kellogg Blvd.
St. Paul, MN 55101

Office of the Attorney General
340 Bremer Tower
7th Place and Minnesota Street
St. Paul, MN 55101

Diane Merz

Subscribed and sworn to before me this 16th day of May, 1990.

Notary Public

(NOTARIAL SEAL)

RAYMOND J. HOLMGREN
NOTARY PUBLIC—MINNESOTA
OTTER TAIL COUNTY
My Commission Expires OCT. 16, 1995

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

IN RE: NOTICE OF INTENT TO SOLICIT OUTSIDE INFORMATION REGARDING PROPOSED RULE GOVERNING INTERVENOR COMPENSATION, DOCKET NO. U-999/R-89-1.

REPLY COMMENTS OF OTTER TAIL POWER COMPANY

Issue #1: Should the definition of intervenor costs include costs, fees, or charges incurred for judicial appeal or judicial review? Should the definition of proceeding include matters considered during judicial appeal or review?

Intervenor compensation should not be expanded to cover costs, fees, or charges incurred for judicial appeal or review. Neither should the definition of "proceeding" be expanded to include matters of judicial appeal or review.

Current statutes and rules limit intervenor compensation to proceedings before the Commission. The current definition in rules of "proceeding" does not include actions of judicial appeal or review. A change in either to include judicial appeal or review would be a change of such substance as to be more appropriately accomplished via change in statute rather than by change in rules.

Issue #2, Subp. 1: Should the rule governing material assistance state that intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail?

The rule should so state. Intervenor compensation should be determined by the intervenor's ability to materially assist the Commission in its decision-making process regardless of whether or not the intervenor prevails.

Issue #2, Subp. 2: Should the rule governing material assistance state that compensation cannot be denied solely on the basis that the intervenor prevailed?

The rule could so state, although it is unnecessary to do so. Intervenor compensation should be determined by the intervenor's ability to materially assist the Commission in its decision-making process regardless of whether or not the intervenor prevails.

Issue #2, Subp. 3: Should the rule governing material assistance state that no one rule criterion for determining material assistance be dispositive.

This change is unnecessary. The determination of eligibility for compensation should be whether or not the intervenor materially assisted the Commission in its deliberations.

MR 7831.0100, Subp. 2: The MDPS, in its comments, apparently wishes to allow attorneys to charge one rate (which may be less than the going market rate) in

nonutility matters and then charge the going market rate for comparable services in connection with utility proceedings. There is no reason for such discrepancy. The reasonableness of an attorney's fees should be based, in part, on "the rate normally charged by that attorney for comparable services" as stated in the proposed rules.

MR 7831.0100, Subp. 7: Here again, the MDPS advocates use of a double standard for fee setting depending upon whether or not Commission deliberation of utility issues is involved. The determination of the reasonableness of the fees charged by expert witnesses should include, among other things, "the rate normally charged by the witness for comparable services."

MR 7831.0100, Subp. 11: The exclusion of costs, fees, or charges incurred for judicial appeal or judicial review should be retained. See the response to Item #1 above for additional comment.

MR 7831.0100, Subp. 13: The determination of an intervenor's eligibility for compensation hinges on its ability to "materially assist" the Commission in its deliberations. It is, therefore, advisable to base that determination, as much as possible, on quantifiable measurements or standards for which there are existing and accepted definitions in the law. "Substantially contributed" is such a standard or measurement. Standards such as "useful" or "seriously considered" are not. The determination of "material assistance" should be determined by the intervenor's "substantial contribution" to the deliberation in question. One of the measures that should always be utilized is whether the intervenor was the initiator or sole advocate of a position accepted by the PUC.

MR 7831.0100, Subp. 16: The exclusion of "matters considered during judicial appeal or review" from the definition of "proceeding" should be maintained.

MR 7831.0300. Subp. 3: Intervenors have a voice in Commission deliberations through the involvement of the public's advocate, the MDPS, and the AG's Office which are already paid for by the state's taxpayers. Additional requests for compensation by intervenor groups, directly and individually participating in Commission deliberations, should be closely examined. Compensation should be provided only in those cases where the intervenor "materially assists" the Commission in its deliberations and where the intervenor clearly has insufficient financial resources to support such intervention. The determination of "insufficient financial resources" should be such that frivolous interventions are precluded. To that end, the "but for" test, as the MDPS refers to it, should remain a part of this Subpart; Subpart 3(3); MR 7831.0500, Subp. 1B; and MR 7831.0800, Subp. 3. The full disclosure of the intervenor's financial status, budget, and extent of participation as called for in the remainder of this rule is also important in avoiding frivolous interventions.

The filing of a "statement of participation" should go a long way toward preventing duplication of interventions and toward the prevention of frivolous interventions. The MDPS's concern about the fairness issue involved in requiring such a statement from intervenors when the Department has no such requirement is easily solved. The Department could be required to file a

"statement of participation." A requirement to think through the issues involved in a pending deliberation in order to present a comprehensive case is not a limiting exercise, but rather an exercise in organization and preparation.

MR 7831.0500: The Commission's failure to make a preliminary determination within the required time frame should be presumed to indicate ineligibility contrary to the Department's comments that such a failure on the part of the Commission should indicate no presumption. This would put pressure on the Commission to make all such determinations requested in a timely matter. This would also put pressure on the intervenors requesting the preliminary determination to provide the Commission with the information it requires for making that determination in a timely fashion. To do as suggested by the Department could provide a means of circumventing the entire preliminary determination process.

MR 7831.0500, Subp. 3B: Can the Commission prevent intervention? If an intervenor is denied compensation and elects to intervene anyway, can the Commission prevent it from doing so? The Commission can prevent the intervenor from being compensated, but can it prevent the intervention itself? Should motions to intervene be scrutinized more rigorously and consolidation of parties required?

MR 7831.0600: Compensation for intervention on judicial appeal or review should not be allowed.

MR 7831.0700: The Commission should do the audit itself, but the Department should be available to provide any and all data, information, or other input at its disposal upon Commission request that might help the Commission complete the audit in a timely manner. Any intervenor anticipating compensation for its activities should be required to submit to an audit by the Commission for the verification its financial position as presented to the Commission in support of its request for compensation. The certainty of a Commission audit will do much to prevent frivolous interventions.

MR 7831.0700, Subp. 2: It would not be in the best interest of the intent of these proposed rules to add a "catch-all clause" to the criteria established by which the Commission determines "material assistance" on the part of an intervenor for purposes of compensation. Such a catch-all clause could be easily abused and could quickly negate all the previous factors for determining whether or not an intervenor "materially assisted" the Commission in its deliberations. The Department should be asked to define "extremely unique circumstances" in support of its suggestion that a "catch-all clause" be added to this Subpart. (Note: unique is a superlative which is inappropriately qualified by any adjective.)

MR 7831.0800, Subp. 3: See the response to MR 7831.0300, Subp. 3 above.

MR 7831.0800, Subp.3A: There is no need to remove the language, "the audit and" as suggested by the Department. See the comments to MR 7831.0700 above.

MR 7831.0800, Subp. 6: The Commission should make available the formula or process it intends to use in prorating or proportioning the awarded intervenor compensation among the utilities involved in a multi-utility proceeding.

MR 7831.0800, Subp. 7: The proposed rules should, as suggested by Minnegasco in its comments on the 1989 proposed rules, specifically state that the utilities be allowed to recover in rates any intervenor compensation amounts they are ordered to pay. See Minnegasco's comments dated August 14, 1989, dealing with this topic as filed with it in reference to Docket No. U-999/R-89-1 for specific wording.

Respectfully submitted,

OTTER TAIL POWER COMPANY

Dated: May 16, 1990

Katherine E. Sasseville

Katherine E. Sasseville
General Counsel

Minnegasco
A Company of Diversified Energies, Inc.

COMMRS. (23)
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LOUIS
GINNY
CAROL
JANET
DIANE W

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MAY 21 1990

MINNESOTA PUBLIC UTILITIES COMMISSION

May 16, 1990

FAX
Original by U.S. Mail

Mr. Richard R. Lancaster
Executive Secretary
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

Re: Proposed Rule Governing Intervenor Compensation
Docket No. U-999/R-89-1

Dear Mr. Lancaster:

Minnegasco hereby submits the following comments regarding the proposed rule governing Intervenor Compensation, Docket No. U-999/R-89-1.

For the most part, the proposed rule is well written, objective and fair to all parties. However, the major concern from a utility point of view, namely how will utilities recover intervenor compensation costs, has not been addressed.

In Minnegasco's August 16, 1989 comments on the proposed rule draft (see Attachment A), language was recommended to address this concern. In the Commission's Statement of Need and Reasonableness, it states that, "All comments were considered by the Commission in arriving at the proposed rule." It does not state why this concern was not addressed in the final proposed rule, nor does it provide the Commission's intention concerning the recovery of intervenor costs. It may be the Commission's intention that the award of compensation to the intervenor by the utility would be a rate case expense and, therefore, recoverable in rates, but there would be no need to argue intentions if it were specifically included in the final rule.

We would appreciate your consideration of this concern and hope that appropriate language will be included in the final rule. If, for some reason, this will not be specifically addressed in the rule itself, we would like to have a written Commission position as to the recovery of intervenor compensation costs.

If there are any questions concerning our comments, please contact me at 342-4602.

Sincerely,

Dawn R. Reimer

Dawn R. Reimer
Manager, Revenue Requirements and
Regulatory Administration

Attachment

cc: Department of Public Service

201 South Seventh Street

ATTACHMENT A

Minnegasco
A Company of Diversified Energies, Inc.

Tracy B. Bridge
Director
Rates & Tariffs

August 16, 1989

Ms. Caroline Heil
Minnesota Public Utilities Commission
780 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

Re: Proposed Rule Governing Intervenor Compensation
Docket No. U-999/R-89-1.

Dear Ms. Heil:

Minnegasco hereby submits the following comments regarding the proposed rule governing Intervenor Compensation, Docket No. U-999/R-89-1.

1. The proposed rules do not specify how utilities will recover intervenor compensation costs they are required to pay. We recommend the following be added under 7831.0800 AWARD OF COMPENSATION:

   Subp. 7. Recovery. The utility or telephone company that is required to pay intervenor compensation costs will be allowed to recover those costs. Intervenor compensation costs will be included in the final determination of regulatory expenses during a general rate filing as defined in Minnesota Statutes, Chapter 216B.16. In proceedings that do not change any rates then in force, awarded intervenor compensation costs, including reasonable carrying costs, will be deferred on the books of the utility or telephone company paying those costs until their next general rate filing or until such time as those costs can be recovered by the company.

2. Minnegasco agrees with Commission staff's definition for "materially assisted" (Part 7831.0800, subp 2, and pages 6-7 of the Commission Staff Report).

The following comments respond specifically to the Commission's two questions on page 2 of the Commission's Notice.

1. Part 7831.0100, subparts 11 and 16. Should the definition of intervenor costs include costs, fees, or charges incurred for judicial appeal or judicial review? Should the definition of proceeding include matters considered during judicial appeal or review?

Minnegasco agrees with Commission staff's recommendation that "intervenor costs" should not include costs, fees, or charges incurred for judicial appeal or judicial review. The definition of "proceeding" should not include matters considered during judicial appeal or review.

The statute governing "intervenor compensation" and "proceeding" relates to actions involved with "materially assisting the Commission's deliberation," not in materially assisting appellate courts.

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

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

Minnegasco believes the rule should state that intervenor compensation cannot be denied solely on the basis that the intervenor did not prevail. Compensation should be based on whether the intervenor "materially assisted" the Commission in its deliberation.

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

Minnegasco believes the rule should state that intervenor compensation cannot be denied solely on the basis that the intervenor prevailed. Compensation should be based on whether the intervenor "materially assisted" the Commission in its deliberation.

- No one rule criterion for determining material assistance is dispositive?

Minnegasco believes the rule should state that no one rule criterion for determining material assistance is dispositive. All criterion for determining material assistance should be considered by the Commission in making its decision awarding or denying compensation.

Minnegasco appreciates the opportunity to submit comments on this proposed rule. If there are any questions concerning our comments, please contact me at 342-4723.

Sincerely,

Tracy Bridge

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
PUBLIC UTILITIES COMMISSION

In the Matter of the
Proposed Rules Governing
Intervenor Compensation,
Minn. Rules, parts
7831.0100-.0800

DOCKET NO. U-999/R-89-1

DECLARATION OF COUNSEL

I, Rosellen Condon, Special Assistant Attorney General, do hereby declare that I have examined the above-captioned rules and the supporting rulemaking record, and that, based on my examination, the Administrative Procedure Act and Minnesota Rules, ch. 2010 have been followed. For Attorney General billing purposes, the four-digit docket client code is 0729.

Rosellen Condon

Special Assistant
Attorney General

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NOV 19 1990

Office of the Attorney General
Government Services Section
Capitol Office Bldg. - Suite 500
525 Park Street
St. Paul, MN 55103

Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Relating to Intervenor Compensation

AGENCY: Public Utilities Commission

MINNESOTA RULES: Chapter 7831

The attached rules are approved for publication in the State Register

Ron Ray
Senior Assistant Revisor

Public Utilities Commission

Proposed Permanent Rules Relating to Intervenor Compensation

Rules as Proposed (all new material)

7831.0100 DEFINITIONS.

Subpart 1. **Scope.** The terms used in this chapter have the meanings given them in this part.

Subp. 2. **Attorney fees.** "Attorney fees" means the reasonable, itemized billings and costs incurred by an intervenor for the services of an attorney in a proceeding before the commission. The costs for services of the attorney are reasonable when computed at the rate normally charged by that attorney for comparable services, or at the prevailing market rate or fair market value to obtain comparable and available services of an attorney of comparable training and experience, whichever rate is lower.

Subp. 3. **Attorney general.** "Attorney general" means the Minnesota Residential and Small Business Utilities Division of the Office of the Attorney General.

Subp. 4. **Commission.** "Commission" means the Minnesota Public Utilities Commission.

Subp. 5. **Compensation.** "Compensation" means reimbursement or payment to an eligible intervenor for all or part of the intervenor costs, as determined by the commission under this chapter, for participation in a proceeding.

Subp. 6. **Department.** "Department" means the Minnesota Department of Public Service.

Subp. 7. **Expert witness fees.** "Expert witness fees" means the reasonable, itemized billings and costs incurred by an intervenor for the services of an expert witness in a proceeding before the commission. The costs for services of the expert witness are reasonable when computed at the rate normally charged by that witness for comparable services, or at the prevailing market rate or fair market value to obtain comparable

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and available services of an expert witness of comparable training and experience, whichever rate is lower.

Subp. 8. **Final determination.** "Final determination" has the meaning given it in Minnesota Statutes, sections 216B.16, subdivision 2, paragraph (c), and 237.075, subdivision 2, paragraph (c).

Subp. 9. **Insufficient financial resources.** "Insufficient financial resources" means that but for the reimbursement of all or part of its intervenor costs, the intervenor is financially unable to afford intervenor costs incurred to participate effectively in the proceeding as determined by the commission under part 7831.0800, subpart 3.

Subp. 10. **Intervenor.** "Intervenor" means a person who is entitled or permitted by law, or permitted under rule of the commission or by order of the presiding officer, to intervene in a proceeding. For purposes of awarding compensation for intervenor costs under this chapter, intervenor does not include (1) a provider of telephone services of any kind, or its representative, agent, or affiliate, nor (2) an agency, representative, employee, authority, or political subdivision of a federal, state, county, home rule charter or statutory city, or town government or combination of them.

Subp. 11. **Intervenor costs.** "Intervenor costs" means attorney fees, expert witness fees, and other reasonable costs incurred in a proceeding. Intervenor costs do not include costs, fees, or charges incurred for judicial appeal or judicial review.

Subp. 12. **Issue.** "Issue" means a question, dispute, or controversy to be resolved in a proceeding held under Minnesota Statutes, section 216B.16 or 237.075.

Subp. 13. **Materially assisted.** "Materially assisted" means that the intervenor's participation and presentation was useful and seriously considered, or otherwise substantially contributed to the commission's deliberations in the proceeding, following consideration by the commission of the factors listed in part 7831.0800, subpart 2.

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by Revisor _____

Subp. 14. **Other reasonable costs.** "Other reasonable costs" means reasonable fees and charges actually incurred by an intervenor in a proceeding before the commission, such as the costs for:

A. the services of a consultant or an employee of the intervenor computed at the rate normally charged by that person for comparable services, or at the prevailing market rate or fair market value to obtain comparable, available services of persons of comparable training and experience, whichever is lower; and

B. out-of-pocket expenses directly related to and necessary for participation in the proceeding, for example, costs of filing, copying, travel, travel-related expenses, and preparation of studies, displays, or exhibits.

Subp. 15. **Position.** "Position" means a factual contention, legal contention, or specific policy or procedural recommendation made by an intervenor relating to an issue addressed and decided in a proceeding.

Subp. 16. **Proceeding.** "Proceeding" means a rate change proceeding under Minnesota Statutes, section 216B.16, or a general rate case conducted under Minnesota Statutes, section 237.075. For purposes of this chapter, a procedural or supplemental matter is considered part of the main proceeding under Minnesota Statutes, section 216B.16 or 237.075, if it is decided or conducted by the commission or an administrative law judge on an issue or position considered in, related to, or supplemental to the main proceeding, or on the issue of intervenor compensation awarded. Procedural or supplemental matters include, for example: motions; orders; settlements; stipulations; prehearing conferences, determinations, or procedures; contested case hearings; reconsiderations or rehearings; and remanded hearings. Proceeding does not include matters considered during judicial appeal or review.

Subp. 17. **Telephone company.** "Telephone company" has the meaning given it in Minnesota Statutes, sections 237.01, subdivision 2; 237.01, subdivision 3, if the company is subject

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to general rate regulation by the commission; and 237.075, subdivision 9, if the company has made the election provided in that subdivision.

Subp. 18. **Utility.** "Utility" has the meaning given "public utility" in Minnesota Statutes, section 216B.02, subdivision 4.

7831.0200 PURPOSE.

The purpose of this chapter is to establish procedural and substantive criteria for reimbursing an intervenor for its intervenor costs incurred in a rate change proceeding under Minnesota Statutes, section 216B.16, subdivision 10, or a general rate case under Minnesota Statutes, section 237.075, subdivision 10, when the intervenor has insufficient financial resources to afford its intervenor costs and has materially assisted the commission in its deliberations in the proceeding.

7831.0300 REQUEST FOR COMPENSATION.

Subpart 1. **Request filing and notice.** An applicant for an award of compensation shall file with the commission a request for compensation. The applicant shall also serve a copy of the request on each known party to the proceeding and shall file with the commission an affidavit of service. The request must be filed as soon after notice of a filing, proceeding, or prehearing conference as is reasonably possible, but at least 75 days after the notice or 30 days before the beginning of evidentiary hearings in the proceeding, whichever occurs later. The request must satisfy the requirements of subparts 2 to 5.

Subp. 2. **General information.** The request for compensation must contain the following information, as applicable:

A. the name and address of the applicant or representative of an organization;

B. for an organization, the names, addresses, and titles of the members of its governing body, a description of the organization's general purposes, size, and structure, and whether it is a nonprofit organization incorporated under

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Minnesota Statutes, chapter 317; and

C. the proceeding for which the compensation is requested.

Subp. 3. **Insufficient financial resources.** The applicant shall show as part of the request that, but for an award of compensation for its intervenor costs under this chapter, the applicant has insufficient financial resources to intervene and participate effectively in the proceeding. The request must address the factors set forth in part 7831.0800, subpart 3. The applicant shall provide a summary description of finances, distinguishing between grant funds committed to specific projects, if applicable, and discretionary funds, showing the financial status of the applicant, including at least:

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

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

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

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

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

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

If available, the applicant shall file a copy of its audited financial statements. The applicant may reference its audited financial statements to satisfy items (1) to (6).

If the commission has determined within the previous year before receiving the request that the applicant has met its burden of showing insufficient financial resources and if the

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applicant can attest that there has been no substantial change in available discretionary resources, the applicant may refer to that decision to satisfy the requirement of this subpart.

Subp. 4. **Budget.** The applicant shall file as part of the request an estimate of its intervenor costs, the basis for the estimate, the extent of financial commitment to participation, and a specific budget showing the total compensation, not to exceed the maximum amount allowed by Minnesota Statutes, section 216B.16, subdivision 10, or 237.075, subdivision 10, to which the applicant believes it may be entitled.

Subp. 5. **Statement of participation.** The applicant shall file as part of the request a statement of the nature and extent of planned participation in the proceeding as far as it is possible to set it out when the request is filed. The statement must include a list of positions and issues that the applicant intends to present, raise, or respond to in the proceeding, an explanation of how an issue affects the applicant's interest in the proceeding, and a clear indication of which viewpoints or ideas the applicant believes are substantive, novel, or significant and why their presentation would contribute to a fair determination of an issue in the proceeding.

7831.0400 STATEMENT IN RESPONSE.

The department, attorney general, or other party to the proceeding, within 15 days after an applicant has filed a request under part 7831.0300, may file with the commission a statement commenting on any part of the request and on duplications of positions, issues, or presentations, and make recommendations to the commission. The statement must be served on the applicant and known parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on the applicant and known parties.

7831.0500 PRELIMINARY DETERMINATION ON ELIGIBILITY.

Subpart 1. **Required determinations.** Within 45 days of receiving a request under part 7831.0300, the commission shall issue a preliminary determination addressing whether the

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applicant is eligible for an award of compensation of intervenor costs. The determination must address:

A. whether the commission considers the applicant to be an intervenor as defined in part 7831.0100, subpart 9; and

B. whether the applicant has made a sufficient showing that, but for an award of compensation for all or part of its intervenor costs, it has insufficient financial resources to intervene and participate fully and effectively in the proceeding, assuming all information in the request filing is true and accurate pending an audit that may be required under part 7831.0700, and pending a decision awarding or denying compensation under part 7831.0800.

Subp. 2. **Discretionary determinations.** The determination on eligibility may also, but is not required to:

A. address whether the applicant has demonstrated its ability to materially assist the commission in its proposed statement of participation, assuming its accuracy, under part 7831.0300, subpart 5;

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

C. recommend use of common legal representation or expert witnesses in cooperation with other applicants or participants;

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

E. point out any unrealistic expectations for compensation; or

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

Subp. 3. **Effect of preliminary determination on eligibility.** A preliminary determination on eligibility does not guarantee either a grant or a denial of an award of

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compensation for intervenor costs. If a preliminary determination is not made on a discretionary factor in subpart 2, items A to F, no presumption arises regarding that factor.

A. After a preliminary determination granting compensation for intervenor costs, the commission must overcome in an applicant's claim for compensation a presumption, for the reasons stated in the preliminary determination, that the applicant should be granted an award of compensation for intervenor costs.

B. After a preliminary determination denying compensation, an applicant may elect to intervene and may intervene if granted permission by the commission or presiding officer. If, however, the applicant does intervene, the applicant must overcome in the claim for compensation a presumption, for the reasons stated in the preliminary determination, that the applicant should be denied an award of compensation for intervenor costs.

7831.0600 CLAIM FOR COMPENSATION.

Subpart 1. **Filing claim.** An intervenor shall file a claim for an award of compensation of its intervenor costs within 90 days after the later of:

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

B. the date the commission issues its order following reconsideration or rehearing.

Subp. 2. **Required information.** The claim must include, at a minimum:

A. adoption or amendment by the intervenor of the information submitted in the request filed under part 7831.0300;

B. a detailed, itemized description of services and intervenor costs related to specific issues addressed in the proceeding, for which an award of compensation is sought; and

C. a description of how the intervenor's contribution to the proceeding may have materially assisted the commission in

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its deliberations.

A copy of the claim must be served on all parties to the proceeding and the claim must have attached to it an affidavit of service on all parties.

Subp. 3. **Response.** Within 30 days after service of the claim, a party may file a response to the claim with the commission. A copy of the statement must be served on the claiming intervenor and other parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on the applicant and known parties.

Subp. 4. **Reply.** The claiming intervenor may file with the commission a reply to a response under subpart 3 within 15 days after the response is filed. A copy of the statement must be served on other parties to the proceeding. Filings under this part must be accompanied by an affidavit of service on known parties.

Subp. 5. **Amended claim.** When additional costs are incurred as a result of a remanded hearing, the intervenor may file an amended claim within 30 days after the commission issues its order following remand. Subparts 1 to 4 apply also to an amended claim.

7831.0700 FINANCIAL REVIEW.

At any time after a request for compensation is filed, the commission or its staff may request additional financial information from the intervenor to clarify or substantiate the claim. The requested information may include, among other things, records, receipts, invoices, and other documents showing the intervenor's expenses incurred and financial condition.

If considered necessary by the commission, an applicant for compensation shall grant the staff of the commission and the department access to audit and examine pertinent books, documents, papers, and records, to the extent necessary to verify that the intervenor has insufficient financial resources to afford its intervenor costs and to verify the basis for the amount claimed.

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Approved applicants shall retain the records relevant to supporting a claim for three years after receiving compensation.

7831.0800 AWARD OF COMPENSATION.

Subpart 1. **Decision.** Within 120 days of the filing of a claim or amended claim for an award of compensation for intervenor costs, or within 45 days of the filing of an audit or additional information, whichever is later, the commission shall issue a decision awarding or denying compensation.

Subp. 2. **Materially assisted.** To be granted an award of compensation, in whole or in part, for intervenor costs, the intervenor must have materially assisted the commission in its deliberations. The commission shall consider the following factors, no single one of which is dispositive, in making its decision awarding or denying compensation:

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

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

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

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

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

F. whether the commission adopted, in whole or in part, a position advocated by the intervenor.

Subp. 3. **Insufficient financial resources.** To be granted an award of compensation for intervenor costs, the intervenor

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must show that it has insufficient financial resources, but for the award, to afford all or part of its intervenor costs necessarily incurred to participate effectively in a proceeding. The commission shall consider the following factors, as applicable, in making its decision awarding or denying compensation, in whole or in part, for intervenor costs:

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

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

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

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

Subp. 4. **Bases for commission decision.** For each issue addressed by the intervenor and decided in the proceeding:

A. On finding that an intervenor materially assisted the commission and has insufficient financial resources to afford its intervenor costs, the commission shall issue its decision awarding compensation. The decision must describe the bases for assistance found and for the amount of compensation awarded.

B. On finding that an intervenor either did not materially assist the commission or has sufficient financial resources to afford all of its intervenor costs, the commission shall issue its decision denying compensation. The decision must describe the bases for denying compensation.

Subp. 5. **Maximum amount awarded.** The total amount of the award for a proceeding may be all or part of the amount claimed,

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but must not exceed the maximum allowed under Minnesota Statutes, section 216B.16, subdivision 10, or 237.075, subdivision 10.

Subp. 6. **Payment.** The utility or telephone company that was the subject of the proceeding shall pay the award of compensation to the intervenor within 30 days after the commission issues its decision awarding compensation. The utility or telephone company shall file with the commission proof that it paid the amount of compensation awarded to the intervenor.

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