BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of the Proposed Amendment of Rules of the Minnesota Public Utilities Commission Relating to Certificate of Need Applications for Large Electric Generating Facilities and Large High Voltage Transmission Lines

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STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

The construction of large electric generating facilities and large high voltage transmission lines requires a certificate of need, according to Minn. Stat. Section 216B.243 (1986). Amended rules governing certificate of need applications for new large electric generating facilities and large high voltage transmission lines were adopted by the Minnesota Energy Agency (MEA) in 1978 and again in 1979. Those amended rules replaced rules which were adopted by the MEA when the Certificate of Need Program began in 1975. The existing rules, Minn. Rules, parts 4220.0100 to 4220.4100, provide a list of informational requirements for certificate of need applications, certain specialized procedures for the need process, and a list of criteria according to which the applications are judged.

In 1983, the Legislature transferred administrative responsibility for the Certificate of Need Program to the Minnesota Public Utilities Commission (Commission). Laws of 1983, Chapter 289, Section 46. In accordance with Minn. Stat. Section 15.039, subd. 3 (1986), the amended rules adopted by the MEA must be used and enforced by the Commission until amended or repealed by the Commission.

The rules are being proposed for amendment at this time for two major reasons. First, the transfer of the certificate of need process to the Commission has caused certain terms and phrases used in the rules to be either meaningless or confusing. Second, several years of experience with the need process and the

existing rules have indicated that certain amendments would be in the public interest.

In preparation for this rulemaking proceeding, the Commission caused to be published in the State Register at 10 S.R. 2349 (May 26, 1986) a notice seeking outside opinion. Commission staff received several phone calls regarding that notice. However, the Commission received no written comments in response to that notice, nor any oral suggestions for specific language changes.

After preparing a first draft of proposed changes, the Commission caused to be published in the State Register at 12 S.R. 369 (August 31, 1987) a second notice seeking outside opinion. In response to that notice, the Commission received written comments from Otter Tail Power Company, Minnesota Power, and the Minnesota Environmental Quality Board (MEQB). In drafting the proposed amendments, the Commission carefully considered those written comments. The Commission also considered comments made about the rules over the several years they have been in effect. In addition, Commission staff discussed certain possible language changes with persons from the Department of Public Service, the State Planning Agency, Otter Tail Power Company, and Northern States Power Company. However, the proposed amendments were drafted by the Commission and its staff, based upon all of the experiences discussed above.

II. STATEMENT OF COMMISSION'S STATUTORY AUTHORITY

The Commission's authority to amend the subject rules is found in Minn. Stat. Section 14.06 (1986), which authorizes the Commission to adopt rules setting forth the procedures which affect the public; Minn. Stat. Section 216A.05 (1986), which authorizes the Commission to prescribe rules with respect to the control and conduct of the businesses coming within its jurisdiction; Minn. Stat. Section 216B.08 (1986), which authorizes the Commission to make rules in furtherance of its regulatory duties; and Minn. Stat. Section 216B.243 (1986), which requires the Commission to adopt procedures and criteria regarding the certificate of need process. Under these statutes, the Commission has the necessary statutory authority to adopt the proposed amended rules.

III. STATEMENT OF NEED

As indicated earlier, certain amendments are needed simply to recognize the transfer of the certificate of need process to the

Commission. For example, the existing rules still contain the terms, "director" and "Minnesota Energy Agency." Those terms need to be replaced by the currently accurate term, "Commission."

A second major consideration necessitating certain rule changes relate to the environmental review process administered by the MEQB under Minn. Rules, parts 4410.0200 to 4410.7800. Parts 4410.7000 to 4410.7800 provide that the Commission shall prepare an environmental report in conjunction with the processing of a certificate of need application for a large electric generating facility (LEGF) or a large high voltage transmission line (LHVTL). In 1986, the MEQB amended those rules to permit an alternative review process for LHVTLs under certain circumstances. Specifically, part 4410.7500 provides that alternative review shall be approved by the MEQB if the Commission demonstrates that the alternative review would meet certain conditions. The conditions are that the alternative review process must satisfy the content requirement of part 4410.7500, subp. 3, be included in the certificate of need hearing record, and be reviewed in accordance with part 4410.7100, subps. 5 to 12. The most efficient form of environmental review would be submission of the required data in the certificate of need application and evaluation of the data during the processing of that application. Before the Commission can request alternative review under part 4410.7500, it needs to make relatively minor changes and additions to its existing rules.

Certain other changes in the rules are needed to define terms used in the rules which currently are undefined, to clarify the circumstances under which the need for a previously-certified facility must be reevaluated, to bring terminology and procedures of the need process into conformance with the other processes administered by the Commission, and to add data requirements in technical areas where applications have been deficient in past certificate of need cases.

Finally, certain minor language changes have been made by the Revisor of Statutes in accordance with the procedures and conventions of that office. No further mention will be made of those changes.

IV. STATEMENT OF REASONABLENESS

The overall approach taken by the Commission to address the needs identified earlier is to propose only those amendments which enhance regulatory efficiency or which help eliminate misunderstandings between process participants. In past certificate of need cases, delays usually have been the result of

a lack of sufficient information at the beginning of the process. On several occasions, this has led to extensive discovery, lengthy cross-examination, or both. The Commission obviously cannot eliminate the need for discovery and cross-examination. However, it is reasonable for the Commission to propose amendments to the existing rules in areas where they are confusing or have led to difficulties in past cases.

The reasonableness of each proposed amendment is discussed below.

PART 4220.0100 DEFINITIONS.

Part 4220.0100, subp. 4. Agency.

The Commission proposes to delete the definition of the term "Agency." Deletion of this definition is reasonable because the transfer of the Certificate of Need Program to the Commission has rendered use of the term confusing and unnecessary.

Part 4220.0100, subp. 7. Annual system demand.

The Commission proposes to change the May 1-April 30 period for determining annual system demand to a flexible 12-month period ending with any given month. Amendment of this definition would help to eliminate confusion with respect to data for winter-peaking utilities. The confusion arises because the existing definition varies from the definition used by the Mid-Continent Area Power Pool (MAPP), of which all of the larger utilities in Minnesota are members. The amendment is reasonable because it is in accord with the MAPP definition familiar to Minnesota utilities and would not result in any loss of information.

Part 4220.0100, subp. 8. Director.

The Commission proposes to delete the definition of the term "director." Deletion of this definition is reasonable because the transfer of the Certificate of Need Program and reorganization of state agencies by the Legislature has made use of the term confusing and unnecessary.

Part 4220.0100, subp. 8a. Capacity factor.

The Commission proposes to add a definition of the term "capacity factor." The proposed definition is needed because the term is used without definition in part 4220.2500, item A, subitem (2). The definition is reasonable because it is consistent with standard use of the term within the electric utility industry and regulatory community.

Part 4220.0100, subp. 8b. Commission.

The Commission proposes to add a definition of the term "commission." The proposed definition is reasonable because it will help avoid needless repetition of the Commission's full name.

Part 4220.0100, subp. 8c. Construction.

The Commission proposes to add a definition of the term "construction." The proposed definition is needed because it is used in the rules without definition. It is reasonable because it is virtually the same as that used in the Minnesota Energy Act by the Legislature when the Certificate of Need Program was created in 1974. Minn. Stat. Section 116J.06, subd. 7 (1986). Reproduction of the full definition in the rules is reasonable because the statutory definition was not transferred to the Commission's enabling statute when the need process was transferred.

Part 4220.0100, subp. 12. LEGF; large electric generating facility.

The Commission proposes to replace the existing definition of LEGF with a cross-reference to the statutory definition set forth in Minn. Stat. Section 216B.2421, subd. 2(a) (1986). Several years ago, the Legislature amended the statutory definition as given in Minn. Stat. Section 216B.2421, subd. 2(a), thereby making the current definition in the rules inaccurate. The amendment is reasonable because it makes direct reference to the statutory definition without repeating it.

Part 4220.0100, subp. 13. LHVTL; large high voltage transmission line.

The proposed amendment is reasonable because it makes direct reference to the statutory definition in Minn. Stat. Section 216B.2421, subd. 2(b) (1986) without repeating it. Under the current statutory definition, the existing and amended definitions of the term are synonymous.

Part 4220.0100, subp. 18a. Nominal generating capability.

The Commission proposes to add a definition of the term "nominal generating capability." A size threshold for need jurisdiction is included in Minn. Stat. Section 216B.2421, subd. 2(a) (1986). As a result, there needs to be some objective measure of the power capability of a proposed LEGF available for comparison with the size threshold. The proposed definition provides such a measure. This

particular measure is reasonable because it is directly analogous to that in common use in the electric utility industry as a rating of the power capability of an existing generating facility. A time period is important in the definition because power must be capable of being sustained over a period of time to be usable to the applicant. It is appropriate to specify a measure which eliminates in-plant use, because a power plant is constructed to satisfy customer demands off the plant site.

PART 4220.0200 PURPOSE OF RULES.

The Commission proposes to amend this rule to delete the second sentence, which now states: "In accordance with Minnesota Statutes, section 216B.243, subdivision 2, no LEGF or LHVTL shall be sited or constructed in Minnesota without the issuance of a certificate of need by the director pursuant to Minnesota Statutes, sections 116J.05 to 116J.30 and consistent with the criteria for assessment of need." It is necessary and reasonable to change this rule because it is inaccurate in view of the transfer of the need process. It is reasonable to delete the second sentence, as proposed, because the intent of the sentence is already contained in Minn. Stat. Section 216B.243, subd. 2.

PART 4220.0300 SCOPE.

Part 4220.0300, subp. 1. Purpose.

The Commission proposes to renumber the existing language as subp. 1 and to add two sentences at the end of subp. 1 to read as follows: "The nominal generating capability of an LEGF is considered its size. If the nominal generating capability of an LEGF varies by season, the higher of the two seasonal figures is considered its size." The added language of the first sentence is reasonable because it ties the definition of "nominal generating capability" to the statutory size threshold for an LEGF. The added language of the second sentence is reasonable because it clarifies which of the seasonal numbers to use if the numbers are different. Seasonal variations can arise due to temperature variations and possibly other factors. Use of the higher number is reasonable for determining need jurisdiction because the current definition of LEGF in part 4220.0100, subp. 12 uses the language "designed for or capable of operation at." The Commission is aware of no reason to adopt a less restrictive interpretation of the statutory threshold than that which has been in effect in the current rules.

Part 4220.0300, subp. 2. Exemption.

The Commission proposes to add a new subp. 2 to read as follows: "Exemption. Notwithstanding subpart 1, a certificate of need is not required for a facility exempted by Minnesota Statutes, section 216B.243, subdivision 8." The proposed addition is reasonable because it specifically indicates that certain statutory exemptions override the provisions of subp. 1. Those exceptions were last reviewed and changed by the Legislature in Laws of 1985, Chapter 304, Section 1.

PART 4220.1100 PURPOSE OF CRITERIA.

The Commission proposes to amend part 4220.1100 to change the word "director" to "commission" and to change "116J.05 to 116J.30" to "216B.2421, subd. 2 and 216B.243." The proposed amendments are reasonable because they correct misleading references in the rules created by the transfer of the need process.

PART 4220.1200 CONSIDERATION OF ALTERNATIVES.

The Commission proposes to amend part 4220.1200 to change "director" to "commission." The proposed amendment is reasonable because it is in accord with changes caused by the transfer of the need process.

PART 4220.1300 CRITERIA.

Part 4220.1300, item B establishes as one of the criteria for a certificate of need that "a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant." The Commission proposes to amend part 4220.1300 by deleting from item B the phrase "by parties or persons other than the applicant." The proposed amendment is reasonable because it removes any possible argument that the rule improperly shifts the burden of proof away from the applicant. While it stands to reason that an applicant will not undercut its own proposal by showing there is a "more reasonable and prudent alternative" available, a few individuals and groups have argued in the past that the existing rules improperly shifts the burden of proof. Elimination of the phrase in question would remove that concern without adversely affecting the rule.

PART 4220.2100 APPLICATION PROCEDURES AND TIMING.

Part 4220.2100, subp. 1. Form and manner.

The Commission proposes to amend subp. 1 by changing "the director" to "this chapter." The proposed amendment is reasonable because it replaces a term (i.e., "the director") which was rendered meaningless by legislative changes affecting the process.

Part 4220.2100, subp. 2. Copies, title, table of contents.

The first two sentences of subp. 2 require the filing of 50 bound copies and one unbound copy of the application and allow the director to require additional bound copies, up to 100 total bound copies. The Commission proposes to replace these two sentences with the following: "The original and 13 copies of the application must be filed with the commission. The applicant shall provide copies of the application to other state agencies with regulatory responsibilities in connection with the proposed facility and to other interested persons who request copies. The applicant shall maintain a distribution list of such copies." This proposed procedure for distributing applications is consistent with that used by the Commission for rate cases and other filings. It contrasts with the procedure in the current rules, which requires the applicant to deliver up to 100 copies to the decision-maker for transmittal to other state agencies and other interested parties. The current procedure often has led to waste, because many copies wind up undelivered in the decision-maker's office. The proposed procedure is reasonable because it removes the Commission as an intermediary in the distribution process, which should help applicants to control their reproduction costs. The proposed procedure also should be less confusing to utility personnel, who will no longer be required to use different procedures for need cases and rate cases. It is reasonable to require applicants to keep distribution lists, because such lists will be needed to distribute copies of corrections to pages of the application. Such corrections were prepared and distributed by several past applicants.

Part 4220.2100, subd. 3. Changes to application.

The Commission proposes to amend subp. 3 by changing "hearing examiner" to "administrative law judge" and "director" to "commission." The name changes are reasonable because they are consistent with changes which have been made by the legislature since the rules were adopted. The Commission also proposes to add an additional sentence to

the end of subp. 3, as follows: "The applicant shall send to persons receiving copies of the application a like number of copies of changed or corrected pages." The proposed addition is reasonable because persons who receive copies of the applications should also receive copies of any necessary corrections. The proposed requirement to distribute corrections is not burdensome to applicants and is necessary to allow the public to participate meaningfully in the need process.

Part 4220.2100, subp. 4. Cover letter.

Subp. 4 requires the cover letter accompanying an application to specify the type of facility for which a certificate of need is sought and the number of copies of the application filed. The Commission proposes to eliminate the requirement to state the number of copies of the application filed. The proposed amendment is reasonable because it eliminates an unnecessary requirement. Under the proposed change to subp. 2, the number of applications submitted will be fixed and does not have to be indicated in response to this section.

Part 4220.2100, subp. 5. Public hearing.

The Commission proposes to delete subp. 5, which cross-references other rules concerning procedures for a contested case hearing on a certificate of need application. The proposed deletion is reasonable because the existing rule is unnecessary. It provides no procedural guidance missing from other applicable rules and statutes. In addition, the existing rule uses outmoded terms.

Part 4220.2100, subp. 6. Timely decision.

The Commission proposes to delete subp. 6, which requires a decision no later than six months from receipt of the application. The proposed deletion is reasonable because the existing language merely is repetitive of provisions of Minn. Stat. Section 216B.243, subd. 5 (1986).

Part 4220.2100, subp. 7. Complete applications.

The Commission proposes to amend subp. 7 by changing "director" to "commission." The name change for the decision-maker is reasonable because it is consistent with legislative intent in the transfer of the need process. The Commission also proposes to lengthen the period for reviewing applications for completeness from "15 days" to "30 days." This change is reasonable because review of an application for completeness is an important step which should be done with care. As indicated earlier, delays in

the processing of need cases have arisen because information was unavailable early in the hearing process. Allowing 30 days for review will provide time for interested parties to comment on the completeness of the application. This in turn will ensure that the completeness review is fair, open and thorough. This process could help identify possible areas of informational inadequacy at the earliest possible time. Allowing comments on the adequacy of filings is consistent with the procedure used by the Commission in its other processes, a procedure which has worked well.

The Commission also proposes to revise the final sentence of this subpart to read: "If the revised application is substantially complete, the date of its submission is considered the application date." The proposed revision to the final sentence is reasonable because it conveys the same meaning without repeating the statutory deadline.

Part 4220.2100, subp. 8. Exemptions.

The Commission proposes to amend subp. 8 by changing "director" to "commission." The proposed change is reasonable because it is consistent with the transfer of the need process. The Commission also proposes to change 1) the time for filing a request for exemption from 20 days prior to the submission of an application to 45 days prior to submission of an application and 2) the time for responding to such a request from 15 days to 30 days. The two time-length changes are reasonable because review of such requests by the Commission is an important and time-consuming procedure. The longer process should not lead to any delays, because initiation of the procedure is within the control of the applicant. Because application preparation takes several months, an applicant reasonably can be expected to make any exemption requests at least 45 days in advance of the planned application date. The longer review period will allow the Commission to receive comments on the request from interested parties.

PART 4220.2200 FILING FEES AND PAYMENT SCHEDULE.

Part 4220.2200, subp. 2. Payment schedule.

The second sentence of subp. 2 provides: "The applicant shall be notified prior to the time its application is acted upon by the director of any additional fees, which fees shall be paid within 30 days of notification." The Commission proposes to replace this language with the following: "The applicant must be notified of and billed for costs not covered by the fee described in subpart 1. The additional fees must be paid within 30 days of

notification." Removal of the term "director" is consistent with the Legislature's decision to transfer the Certificate of Need Program to the Commission. Removal of the time reference (i.e., "prior to the time the application is acted upon") would permit recovery of costs associated with administrative appeals, judicial appeals, and enforcement activities. In the past, failure to collect for these activities has contributed to a revenue deficit for the Certificate of Need Program, which has had to be covered by other funds. The proposed amendment also would allow the Commission to bill for actual costs associated with preparing the final order. Under the current rule, it has been necessary to estimate certain costs in order to issue a final bill prior to release of the order. The proposed language would provide for a billing before the order is released and at least one later billing to cover subsequent costs. Therefore, the proposed amendment is reasonable in that it would promote accuracy, administrative efficiency, and complete collection of program costs.

Part 4220.2200, subp. 3. Payment required.

Subp. 3 provides: "No certificate of need shall be issued until all fees are paid in full." The Commission proposes to replace this language with the following: "The commission shall not issue its decision on the application until the outstanding set fee payments and additional billings under subparts 1 and 2 are paid by the applicant." The proposed change is reasonable because it recognizes that in some cases a certificate of need will not be granted to the applicant. In addition, it allows recovery of all known costs up to the time of the decision, while recognizing that certain subsequent costs would have to be recovered by a later billing. Theoretically, collection of processing fees is more difficult after a certificate of need decision is issued. However, the Commission has had little trouble collecting from utilities to recover costs of other programs, implying that the risk of noncollection is minimal.

PARTS 4220.2300, CONTENTS OF APPLICATION.

Part 4220.2300, subp. 3. Joint ownership and multiparty use.

The existing rule requires certain additional information if a facility is "designed to meet the long-term needs (in excess of 50 megawatts) of a particular utility that is not to be an owner." The Commission proposes to change "50" to "80." The proposed change to "80" megawatts is reasonable because it is consistent with the new size threshold for

jurisdiction over an LEGF. It does not make sense to place more stringent requirements on a non-owner than on an owner, as the rules would do if this change is not made. The Commission also proposes to change both references to "parts 4220.2400 and 4220.2700 to 4220.3000" to "this chapter." This change is reasonable because it recognizes that responses to parts 4220.2500 and 4220.2600 could vary by utility. Finally, the Commission proposes to add the following additional sentence to subp. 3: "Joint applicants may use a common submission to satisfy the requirements of any part for which the appropriate response does not vary by utility." This addition is reasonable because it promotes efficiency and flexibility.

PART 4220.2350 ENVIRONMENTAL REPORT.

Part 4220.2350, subp. 1. Draft report.

Proposed subp. 1 provides that if the application is for an LHVTL, the information submitted in accordance with parts 4220.2400, 4220.2600, and 4220.2900 to 4220.3400 must be designated by the applicant as its "draft environmental report" and shall be distributed in accordance with Minn. Rules, part 4410.7100, subp. 5. Proposed subp. 1 is reasonable because it designates clearly the information which must be included to cover the draft environmental report content requirements described in Minn. Rules, part 4410.7500, subp. 3. The proposed requirement for distribution of the draft environmental report in accordance with Minn. Rules, part 4410.7100, subp. 5 is reasonable because it is a requirement for alternative environmental review as provided for by Minn. Rules, part 4410.7500, subp. 4, item C.

Part 4220.2350, subp. 2. Written responses.

Proposed subp. 2 requires the applicant to submit written responses to all substantive comments entered into the record and requires the responses to become part of the record of the proceeding. This proposed addition is reasonable because it is in accord with the requirement for responses to substantive comments, as given in Minn. Rules, part 4410.7100, subp. 7. It is logical that the preparer of the draft report should respond to meaningful comments. The Commission itself should not issue such responses, because the hearing process will be in the hands of the administrative law judge at this point in the process. Commenting on a portion of the record while the case is in progress is awkward for the decision-maker in the need process.

Part 4220.2350, subp. 3. Final report.

Proposed subp. 3 provides that the "final environmental report" consists of the draft environmental report, written comments, and the applicant's responses to comments, and that the final report shall be distributed in accordance with Minn. Rules, part 4410.7100, subp. 5. This proposed addition is reasonable because it provides for the efficient assembly and distribution of a final report, in accordance with Minn. Rules, part 4410.7100, subps. 5, 8 and 10. Inclusion of the responses ensures that the public will be able to review responses to the concerns raised about the proposed facility and practicable alternatives.

Part 4220.2350, subp. 4. Notice of final report.

Proposed subp. 4 provides that, upon completing the final environmental report, the applicant shall cause to be published in the EQB Monitor a notice indicating such completion. This proposed rule is reasonable because members of the public not actively involved in the hearing process have a right to know that this important report is complete and available for review. Furthermore, such notice is required by Minn. Rule, part 4410.7100, subp. 10.

Part 4220.2350, subp. 5. Supplements.

Proposed subp. 5 requires the applicant to prepare a supplement to the final environmental report if the tests described in Minn. Rules, part 4410.3000, subps. 1 and 2 are met and a certificate of need proceeding on the proposed facility is pending. This proposed rule is reasonable because any proposed changes in a project requiring additional need review should be analyzed for environmental implications. This rule is in accord with Minn. Rules, part 4410.7100, subp. 12.

PART 4220.2400 NEED SUMMARY AND ADDITIONAL CONSIDERATIONS.

Part 4220.2400, subp. 1. Need summary.

The Commission proposes to change "director" to "commission". The proposed change is reasonable because it is in accord with the transfer of the need process to the Commission by the Legislature.

PART 4220.2500 DESCRIPTION OF PROPOSED LEGF AND ALTERNATIVES.

Item A, subitem (1) of part 4220.2500 requires an application for a proposed LEGF to include "a description of the generating capacity of the facility, which includes a discussion of the effect of the economies of scale on the facility type and timing." The Commission proposes to change this language to read as follows: "the nominal generating capability of the facility, as well as a discussion of the effect of the economies of scale on the facility size and timing." The proposed change is reasonable because it more specifically requires the applicant to indicate the size of the proposed facility. The size of the facility is needed to determine whether the Commission has jurisdiction over the facility. The size also is needed to calculate the fee in accordance with Minn. Rules, part 4220.2200 and to calculate the portions of the applicant's generation requirements which would be satisfied by the facility.

The Commission proposes to add a new subitem (4) after existing subitem (3) of item C to require a discussion, for the proposed facility and for each alternative, of "its fuel costs in current dollars per kilowatt-hour." This proposed addition to item C is reasonable because the fuel cost is extremely important in determining the total cost of electricity from a particular alternative. While the requested information can be inferred from responses to the existing rules, it is reasonable that such information should be provided explicitly. In the past, members of the public have stressed the importance of having such data in the application. Providing the fuel cost data will not be burdensome to an applicant, because the data logically is a necessary input into the decision to apply for a particular type of generating facility.

The Commission proposes to add a new subitem (7) of item C to require a discussion of "an estimate of its effect on rates system-wide and in Minnesota, assuming a test year beginning with the proposed in-service date." This proposed addition is reasonable because the public is keenly interested in knowing the effect of utility proposals on the cost of a basic need (i.e., electricity). The rate effect of a proposal cannot necessarily be calculated from the other required information because of the way rates are set by regulatory commissions. Addition of a generating plant to a utility's rate base causes a rate impact early in the life of a plant greater than would be implied by levelized costs. In addition, rate effects of a particular system addition are moderated by the existence of other generating units on the utility's system. Providing rate information will not be burdensome to applicants, because they logically should assemble such data before proceeding with a particular generation option.

The Commission proposes to amend the last subitem of item C to reflect the necessary renumbering of the other subitems and to add the following: "including projected escalation rates for fuel costs and operating and maintenance costs, as well as projected capacity factors." This proposed change is reasonable because it clarifies the type of assumptions for which information is expected. Such assumptions are necessary for the applicant to weigh the considered alternatives, so providing this information will not be burdensome.

PART 4220.2600 DESCRIPTION OF PROPOSED LHVTL AND ALTERNATIVES.

The Commission proposes to amend item B, subitem (1) to require a discussion of the availability of alternatives to the facility, including "new generation of various technologies, sizes, and fuel types." This proposed change is reasonable because it clarifies the type of generation information that is expected. Because generating facilities vary greatly, as do their costs and environmental effects, consideration of a single generation option is an insufficient response, unless generation simply cannot satisfy the alleged need for the proposed facility. Three of the main categories of differences between generating facilities are technology, size, and fuel type, implying that such differences should be considered by an applicant in weighing alternatives.

The Commission proposes to add a new subitem after existing subitem (4) of item C requiring, for the proposed facility and for each alternative, "an estimate of its effect on rates system-wide and in Minnesota, assuming a test year beginning with the proposed in-service date." This proposed addition is reasonable because the public is keenly interested in knowing the effect of utility proposals on the cost of electricity. As indicated earlier, the rate effect cannot necessarily be calculated directly from the other information required by the rules, indicating the need for a separate requirement.

The Commission proposes to amend the last subitem in item C to reflect renumbering of the other subitems. This is reasonable because it makes the rules internally consistent.

PART 4220.2700 PEAK DEMAND AND ANNUAL ELECTRICAL CONSUMPTION FORECAST.

Part 4220.2700, subp. 2. Content of forecast.

Item E of subp. 2 requires submission of "the estimated annual revenue requirement per kilowatt-hour." The Commission proposes to amend item E by adding "for the system in current dollars." The proposed change in item E

is reasonable because it clarifies the requirement. In the past, there has been confusion whether the requirement applied to the proposed facility or the applicant's system as a whole.

Item F of subp. 2 requires submission of "the applicant's system weekday load factor by month." The Commission proposes to amend item F by adding "estimated average" and "in other words, for each month, the estimated average of the individual load factors for each weekday in the month." This proposed change is reasonable because it clarifies how the load factor is to be calculated. In the past, utilities have interpreted the requirement in at least two different ways. It is reasonable to allow estimates of these load factors, because many calculations are necessary to provide an exact number. Such load factors are useful because they provide a rough indication of the potential for and desirability of load management and other load-leveling programs.

Part 4220.2700, subp. 3. Forecast methodology.

The Commission proposes to amend subitem G by deleting the words "to the agency" from the phrase "forecasts submitted to the agency under chapter 4100." The proposed change is reasonable because the forecasts required by chapter 4100 no longer are submitted to the decision-maker in the need process. This was a secondary result of the transfer of the need process to the Commission.

Part 4220.2700, subp. 4. Data base for forecasts.

The Commission proposes to amend subp. 4 to change "director" to "commission" and "hearing examiner" to "administrative law judge." The proposed changes are reasonable because the new names are consistent with current terminology and statutes.

Part 4220.2700, subp 5. Assumptions and special information.

Item D of subp. 5 requires submission of a discussion of the assumptions made regarding "the assumptions made in arriving at any data requested in subpart 2 that is not available historically or not generated by the applicant in preparing its own internal forecast." The Commission proposes to delete the words "the assumptions made in arriving at." The proposed deletion in item D is reasonable because it removes an unintended repetition of "assumptions" in the current rules. No change in meaning is intended.

Part 4220.4100, subp. 1. Authority of commission.

The Commission proposes to amend subp. 1 to change all references of "director" to "commission." The proposed changes are reasonable because they reflect the transfer of the need process to the Commission.

Part 4220.4100, subp. 3a. Proposed changes in size, type, and timing.

The proposed content of this subpart is a reorganization of existing subps. 2 and 3. Some new language also is added. The Commission proposes to change the title to "Proposed changes in size, type and timing." The proposed new title is reasonable because it reflects the content of the subpart. The lead-in to the items is reasonable because it requires changes proposed by an applicant to the certified size, type, or timing to conform to provisions of items A through H. This language introduces in general terms what is required by the items.

Proposed item A essentially is contained in the first sentence of existing subp. 2, item B. The minor changes between the existing and proposed languages are reasonable because they reflect the transfer of the certificate of need process to the Commission.

Proposed item B is a modification of existing subp. 3, item A. It is reasonable to permit utilities some flexibility in facility size to allow for changing conditions. The Commission proposes that changes in size of a certified facility be allowed without recertification up to the lesser of 80 megawatts or 20 percent of the certified capacity of the facility. Eighty megawatts is the threshold size determined by the Legislature for need jurisdiction over most types of power plants. It is therefore logical that plant size increases greater that 80 megawatts should not be allowed without further review by the Commission. The Commission proposes to use 20 percent as the primary limit on size increases allowed without recertification. The 20 percent threshold is commonly used in other certificate of need rules to identify a change in existing plant capacity requiring review by the Commission. Under the proposed rule, the 20 percent limit would apply to all certified facilities up to 400 megawatts. For plants over 400 megawatts, the limit would be 80 megawatts.

Proposed item C is a new provision, which states: "A change in power plant ownership smaller than the lesser of 80 megawatts or 20 percent of the capacity approved in a certificate of need issued by the commission does not

require recertification." This proposed item is reasonable because it is a logical extension or companion of proposed item B. A change in facility ownership achieves much the same purpose as a change in facility size - an adjustment to changes in projected demand or capacity availability which become apparent subsequent to the completion of a certification proceeding. Because of their similarity of purpose, both changes should be handled according to the same general procedure.

Proposed item D is a paraphrase of the second sentence in existing subp. 2, item B. The new language would extend the reporting requirement to changes of facility size and of ownership shares. Such a requirement is reasonable because the Commission needs to know the status of certified facilities for a variety of reasons, such as approving depreciation schedules, considering a plant's effect on reasonableness of rates, and answering questions from the public. The requirement would not impose a burden on the applicant because it could be satisfied with a simple, short filing.

Proposed item E is virtually the same as existing subp. 3, item B, subitem (1). It is reasonable to renumber this provision because it fits better into subp. 3a as restructured.

Proposed item F is a new provision, which states: "A design change required by another state agency in its permitting process for certified facilities is not subject to review by the Commission, unless the change contradicts the basic type determination specified by the certificate of need." Just as minor length changes resulting from the actions of another agency are not reviewable by the Commission, as provided by item E, other minor design changes should not be either. This provision is a reasonable precaution against overlapping jurisdiction and unnecessary delays in the construction of needed facilities. However, it is necessary and reasonable to limit such changes as indicated in the proposed rule, because implied changes in the basic type determination could alter the basis upon which the Commission issued the certificate of need.

Proposed item G is virtually the same as existing subp.3, item B, subitem (2). It is reasonable to renumber this provision because it fits better into subp. 3a as restructured.

Proposed item H is a new provision which would cover all other situations not covered by items A through G. The rule establishes a procedure in which the applicant informs the Commission of a desired change in size, type, timing, or

ownership. The applicant must provide a copy of its submission to each intervenor in the certificate of need proceeding on the facility. Intervenors then have 15 days to comment on the proposed change. The Commission has 45 days from the date of the applicant's request to review the proposal and notify the applicant whether the change is acceptable without further review. The rule also provides that the Commission shall order further hearings if the change, had it been known at the time of the need decision on the facility, could reasonably have resulted in a different decision. The addition is necessary to clarify the procedure used by the Commission to determine whether a proposed change requires recertification of the proposed facility. Lack of such a procedure has proved troublesome in past certification cases. The specified procedure would ensure that interested parties received notice of the proposed change, as well as an opportunity to comment on it. The time requirements specified in the rule ensure an orderly and timely consideration of the request. The 15-day and 45-day deadlines strike a reasonable balance between providing sufficient time to consider the change and preventing unnecessary delay. Finally, the criterion specified in the rule for deciding whether recertification is necessary is reasonable because it is directly tied to the previous certification decision. Under the criterion, new hearings would be ordered if and only if the proposed change could reasonably affect the certification decision. For the reasons given above, adoption of the proposed item would be reasonable and in the public interest.

Part 4220.4100, subp. 4. Permissible fuel types.

The Commission proposes deletion of this current rule, which states: "When a certificate of need is granted for the proposed facility, or modification thereof, the director shall state which fuel types are not permitted in supplying the additional generation capacity certified."

This current rule was adopted in 1975 amid concern over the use of fuel oil and natural gas for base-load generation of electricity. Demand forecasts by electric utilities pointed to the construction of many new power plants by the turn of the century. Those high demands did not materialize, and only two large power plants have been constructed in Minnesota since 1975. The Commission doubts that the rule serves any useful function at the present time. While avoidance of generation using fuel oil and natural gas still makes sense from a public policy standpoint, the high cost of those fuels relative to other fuels likely makes regulatory restrictions on their use unnecessary. Further, the Commission could restrict use of certain fuels under subpart 1 of part 4220.4100, given adequate support in the

record. Therefore, the Commission believes this subpart is unnecessary and should be repealed.

V. SMALL BUSINESS CONSIDERATIONS

Minn. Stat. Section 14.115 (1986) requires a state agency to mitigate the effects of new rules or amendments to existing rules on small businesses and to aid small businesses in participating in the rulemaking process. The Commission has considered a number of factors in determining whether Minn. Stat. Section 14.115 (1986) applies to this rulemaking procedure.

There are two types of entities which might be required to submit need applications under these rules and with might be considered "small businesses" in some context. The first type are smaller electric utilities. The second are individuals or companies which build cogeneration or small power production facilities as defined in the Federal Power Act, United States Code, Title 16, sections 796(18)(A) and 796(17)(A). Based upon the state's 12 years of certificate of need history, the Commission believes it is extremely unlikely that any other types of small businesses would be affected directly by these rules and the proposed amendments thereto.

The Commission notes that in Minn. Stat. Ch. 216B and 237, it has been authorized by the Legislature to regulate gas and electric utilities. Some of the basic tenets of utility regulation are: utilities are affected with a deep public interest; utilities are obligated to provide satisfactory service to the entire public on demand; and utilities are obligated to charge fair, non-discriminatory rates. A general freedom from substantial direct competition and the opportunity to make a fair return on investment are among the benefits utilities receive from regulation. Given this regulatory scheme, it is clear that the Legislature views utilities differently from other concerns defined as small businesses. The degree of governmental intervention in the operations of a public utility is considerably higher than for other types of businesses.

Even if some small utilities could be viewed as "small businesses" as that term is defined, they, nevertheless, would be excepted from the small business statute.

The Commission finds that Minn. Stat. Section 14.115, subd. 7 (1986) establishes exceptions to the general obligations created by the statute and applies to rules promulgated by the Commission. In pertinent part, it states:

> Subd. 7. Applicability. This section does not apply to: (c) service businesses regulated by government bodies, for standards and costs, such as nursing homes, long-term care facilities, hospitals, providers of medical care, daycare centers, group homes and residential care facilities;

The Commission finds that utilities fall within this broad definition. They are certainly "service businesses regulated by government bodies for standards and costs." The words following the phrase "such as" merely provide some examples of businesses regulated by government and are not exclusive.

As for the second type of entity discussed above, qualifying cogenerators and small power producers, they are explicitly exempted from the need process by Minn. Stat. Section 216B.243, subd. 8 (1986), as long as the production facility would be smaller than 80 megawatts. It is unlikely that a small company would build a facility which could produce electric power in excess of 80 megawatts.

In the unlikely event that any small business, as that term is defined, would be directly affected by the rules, the existing rules provide a mechanism for reducing the impact of the rules on such small businesses. Proposed part 4220.2100, subp. 8, provides that an applicant may request exemption from any data requirement in the rules. Such applicants would be required to show that the data requirement is unnecessary or could be satisfied by submission of substitute information. In addition, the rules permit applications to be processed in much less time than the statutory guideline of six months. In the past, applications have been processed in three months or less when the proposed facilities have not been determined to present environmental or other hazards to the public. To go beyond these provisions would circumvent legislative intent as described in Minnesota Statutes, Chapters 116B, 116C, 116D and 216B.

VI. CONCLUSION

Based upon the foregoing, the proposed amendments to Minn. Rules, parts 4220.0100 to 4220.4100 are both needed and reasonable.

BY ORDER OF THE COMMISSION

Mary Ellen Hennen
Executive Secretary

(S E A L)