

**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert St.
Minneapolis, Minnesota 55101**

**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147**

In the Matter of the Application of)
Minnesota Power for Authority to) OAH Docket No. 5-2500-34078
Increase Rates for Electric Service) PUC Docket No. E-015/GR-16-664
in Minnesota.)

**MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, MOTION TO
CERTIFY QUESTION TO THE FULL PUBLIC UTILITIES COMMISSION,
AND FOR EXPEDITED REVIEW**

COMES NOW AARP, pursuant to Minn. R. 1400.8300, 1400.7600, and 1400.6200, and respectfully petitions for reconsideration of order denying its petition for formal intervention as a party in the above-captioned matter. In the alternative, AARP moves that the Administrative Law Judge (“ALJ”) certify the question of its intervention in this extremely important Minnesota Power (“MP” or “Company”) electric rate case to the full Minnesota Public Utilities Commission (“PUC” or “Commission”).

The ALJ’s April 13, 2017 “Order Denying Petition to Intervene by AARP” and the accompanying Memorandum (“Order”) are unlawful and unreasonable, in that they are based upon a serious misapprehension of the facts and a misapplication of the law, and as well violate AARP’s constitutional procedural due process rights and its rights to equal protection under the law.

AARP is further requesting that this issue be resolved on an expedited manner. There was a 44-day delay in-between AARP’s *timely and uncontested* Petition to

Intervene and the Order denying its intervention. This delay has already resulted in a serious infringement of AARP's ability to prepare its direct testimony, which is due on May 31, 2017. To adequately represent its own unique interests, AARP requires the opportunity to conduct multiple rounds of its own discovery, including access to information that may be classified as confidential by the Company. Without AARP's ability to intervene, these procedural rights will be forever denied. Failure to redress the denial of AARP's right to intervene in this matter in a timely fashion will cause irreparable harm to the organization, resulting in a violation of due process rights that cannot be adequately remedied subsequent to the issuance of the ALJ's recommended order.

Reconsideration

1. As was detailed in its March 1, 2017 Petition to Intervene, AARP set out its unique and specific interest in this rate case: MP residential electric customers who are aged 50 and over, and the reasons why this interest differs from the general public interest:

People aged 50 and over are more vulnerable to increases in energy prices. These consumers also devote a higher percentage of their total spending than do other age groups towards residential energy costs. Many older consumers also have special needs and safety concerns regarding their access to electric service.¹

This is a specific subset of residential electric consumers that is not the same as the body of all residential electric consumers.

2. The specific reason given by the ALJ for denying AARP's Petition in this matter was stated thusly:

¹ Id., Paragraph 2.

None of the current parties to this proceeding objected to the intervention of AARP. However, AARP's constituency is identical to that of a current party: the Energy CENTS Coalition (ECC). The ECC intends to analyze the impact of Minnesota Power's proposed rate increase on residential customers, particularly low-income and low-use residential customers.²

This is a factual misstatement. Contrary to this statement in the Order, AARP's constituency is not "identical" to the constituency of ECC.

3. The "Order Denying Petition to Intervene by AARP" fails to acknowledge or to understand the differences between the missions of the respective organizations, and thus is unsupported by the facts and does not correctly apply the law. AARP is not an organization that primarily represents the interest of low-income utility customers. Conversely, ECC is not an organization that primarily represents older consumers. While there may be some overlap in the consumer interests that each party represents, there are large segments of the ratepaying public represented by each organization that fall outside of the other organization's representation and concern.

4. It is likely (as it has happened in previous electric rate cases at the PUC) that the interests of AARP and ECC will diverge in this case on certain rate design issues. In recent Xcel Minnesota electric rate cases, AARP and ECC have had different perspectives on issues relating to the way that residential electric rates should be designed and thus took different positions. In the most recent OAH rate case for Xcel³, ECC reached a settlement with the utility, presented a joint position together with the utility, and excused itself from participation at the hearing. Contrary to that position, AARP opposed the settlement, continuing to represent its own unique interest through the testimony of its own expert witness and through cross-examination at the hearing.

² Order Denying Petition to Intervene by AARP, p. 2

³ PUC Docket No. GR-15-826 (pending).

Had AARP's intervention been denied in that Xcel rate case, then its interest in representing consumers aged 50 and over would have gone unprotected at the hearing.

4. The Order is based upon an incorrect statement of the facts and thus misapplies the Commission's rule on intervention, Rule 1400.6200. As explained above, AARP's interest in protecting the electric bills paid by older consumers is *not* "adequately represented by another party" under the language of Subpart 3 of that rule, and the rule should not have been applied by the ALJ in the way that it was in the Order. Therefore, pursuant to the standards of reconsideration in Minn. R. 1400.8300, the ALJ's Order should be reconsidered, since it is "inconsistent with substantial justice and . . . is not justified by the evidence, or is contrary to law".⁴

5. Several other factors explain why substantial justice requires that AARP be permitted to intervene in this matter. AARP has been actively following and participating in the controversial debate over MP's cost allocation proposal under the Energy-Intensive and Trade Exposed (EITE) law through three previous cases filed under that law and recently resolved at the PUC. During that debate, MP raised the justification of its belief that large industrial customers within the MP service territory are generally "subsidizing" residential consumers. Since November 2015, AARP has consistently been questioning such class cost allocation claims by MP, urging that the debate on this issue take place in a full rate case, where all parties may be allowed to test these claims with their own evidence of class cost disparities. Now that MP has filed a full rate case, it is manifestly unjust that AARP would be abruptly denied the opportunity to probe the grounds for such class cost allocation claims and potentially to offer evidence of its own that contradict MP's claims. To be denied that opportunity,

⁴ Ibid., Subsection F.

would be to silence AARP's opportunity to face Minnesota Power's evidence with its own evidence.

6. This current rate case proposal presents a dramatically large percentage impact upon AARP members. While the overall revenue requirement proposal would only increase Minnesota Power's annual revenue by 9%, it is proposing to take a disproportionate share of that increase from residential consumers; the percentage increase is more than twice upon residential consumers—19%! And this proposed increase would be on top of the recent EITE shift of costs onto residential consumers.

7. Because the stakes are so high for its members, AARP has spent significant resources to retain the services of counsel, as well as the services of an expert witness, Mr. Scott J. Rubin, to assist it in its investigation of Minnesota Power's request for increased electric rates. On April 6, 2017, AARP sent its initial round of information requests to Minnesota Power. Mr. Rubin needs answers to the information requests that it have been sent to the utility, including the opportunity to follow-up information requests and the ability to view information confidential information, so that Mr. Rubin may complete his investigation and prepare direct testimony for filing in the rate case in a timely manner on May 31st. MP has communicated that, although it has no objection to AARP's intervention in this rate case, it cannot provide answers to its April 6, 2017 information requests until AARP has been formally granted intervention. If AARP is continued to be denied intervention, along with the opportunity for it to conduct a thorough class cost investigation, then these efforts will be wasted, and the Commission will be denied the opportunity to review AARP's evidentiary analysis.

8. AARP has also communicated its intent to participate with the other parties in the settlement conference scheduled for July 25-27, 2017 in this matter. At this point, without the benefit of being able to conduct discovery, it is hard to even speculate what differences AARP may have with other parties, or to what creative methods of resolving this case may be possible in those discussions.

It is frankly quite dangerous to *presume* that one party would be able to represent another party's interest before all parties even have the opportunity to view each other's direct testimony. It is also dangerous to exterminate the ability of AARP to intervene and engage in discovery, before it is even known what other parties may propose as issues that may specifically and adversely impact AARP's interest. How would AARP respond to evidence that is offered at some later point in this case that directly impacts its members?

9. AARP intervenes in utility rate cases before dozens of state Public Utility Commissions across the country. AARP has previously been a responsible party to previous Minnesota Office of Administrative Hearings and the Minnesota PUC rate cases, where it has presented evidence that no other party presented. AARP is an active contributor to the National Association of Regulatory Utility Commissioners and is a member of the National Association of State Utility Consumer Advocates. AARP is nationally recognized as an important stakeholder in matters of utility ratemaking.

Occasionally, a utility in some other state will oppose AARP's attempt to intervene in a case, but counsel is aware of no cases where such intervention has ever before been denied. Certainly, no such a denial of AARP's right to intervene has ever taken place *sua sponte* by an ALJ, where not a single party objected to AARP's

intervention, where the utility itself has specifically stated that it does not oppose AARP's intervention. AARP questions how it can be "just and reasonable" to deny its intervention (along with all meaningful procedural due rights in this matter) when the question of intervention has not even been challenged by any other party to the rate case. For the ALJ to issue an order denying all intervenor rights to AARP without the opportunity for the back and forth of normal motion practice between opposing parties has itself unreasonably denied AARP's procedural rights.

10. Several questions of procedural logic are raised by the Order Denying Petition to Intervene by AARP. How can the ALJ know whether a party's interest in revenue requirement or rate design can be represented by another party until that other party has filed its direct testimony? What is the legal recourse for AARP if that other party fails to represent its interest?

What if was AARP that had filed for intervention before ECC? Assuming the same false predicate (the incorrect statement that both AARP and ECC represent the same interests), would that situation have led to the ALJ denying ECC's ability to intervene in this rate case? In other words, has the ALJ set up a "first through the gate" standard for parties wishing to intervene? If so, how is that fair? What if the latter party has more resources to procure expert witnesses than the first party to file its request for intervention for similar interests. Either way, the opportunity to present the Commission with different evidence and different policy options that would otherwise be available would now be lost forever.

11. The truth is that a utility ratemaking proceeding before a public utility commission differs considerably from other kinds of litigation. These proceeding often

involve dozens of parties and hundreds of issues, with shifting allegiances and perspectives on each of the many issues and sub-issues presented to the ALJ for resolution. Although the impacts of decisions in utility ratemaking cases involve real dollars allocated among a variety of interests, many of those issues involve choices of public policy preference and perspective, not to mention different analyses by different expert witnesses. That is why even two parties that may purport to represent the very same interest can differ in the positions that they take. It is very common for environmental organizations to differ among themselves on a particular issue, just as it is very common for advocates residential electric ratepayers can fight among themselves on a particular issue, even if those parties are representing the very same subgroup of residential consumers. Sometimes it is a matter of differing emphasis upon which subgroup of residential consumers are being impacted to the benefit or detriment of another subgroup. Sometimes the disagreements are simply a matter of differing policy judgments or litigation strategy. Even residential consumer advocates with the very same mission disagree with each other frequently!

12. It seems that the Order denying AARP's rights is based upon the faulty and unmentioned assumption that one residential consumer advocate can adequately represent all residential consumers. That is assumption would be false. And as explained earlier, it is often unknown how the position of parties will differ until there has been some discovery and direct testimony presented. AARP should not be forced to rely upon other organizations to adequately represent its unique interests in this matter, nor is there is any justification for AARP be relegated to second-class party status

compared to ECC or to any other intervenor. AARP deserves to be afforded the same procedural rights as ECC, or as are afforded to Walmart for that matter.

13. Clearly a major issue in this rate case will be the choice of a proper rate design between (and among) different customer rate classes, with the threat of a much larger percentage impact on residential consumers (more than double the average increase) coming in the form of MP's proposal. Who knows at this point what additional impacts the large industrial customers may propose? How can it be just and reasonable for the ALJ to deny the right of AARP to represent its members, while the ALJ summarily approves the intervention of multiple parties that purport to represent large customer groups?

Do the interests of Walmart overlap the interests of the Chamber of Commerce or of the Large Power Intervenors? Sure, they do. Why were no large consumer parties denied intervention because they represent the same interests as other large consumer parties? To be clear, AARP supports the intervention of these large customer parties, but raises this point to show that the Order denying AARP intervention is being applied in a discriminatory manner that does not grant equal protection to the representatives of smaller consumers. There is absolutely no rational basis to deny the rights of AARP, while granting full intervenor rights to Walmart, the Chamber of Commerce and the Large Power Intervenors.

13. As explained above, the denial of AARP's right to intervene infringes upon its procedural due process rights and its right to equal protection under the law. These are rights that are guaranteed by the Due Process Clause and the Equal

Protection Clause of the US Constitution⁵, as well as the Equal Protection Clause of the Minnesota Constitution.⁶

Certification

14. In the alternative, provided that the ALJ does not reconsider its Order and allow intervention, AARP requests that the ALJ promptly certify this question of AARP's intervention to the full PUC. Commission Rule 1400.7600 states in part:

Any party may request that a pending motion or a motion decided adversely to that party by the judge before or during the course of the hearing, other than rulings on the admissibility of evidence or interpretations of parts 1400.5100 to 1400.8400, be certified by the judge to the agency. **In deciding what motions should be certified, the judge shall consider the following:**

A. whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; or

B. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing; or

C. whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or

D. whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or

E. whether it is necessary to promote the development of the full record and avoid remanding; or

F. whether the issues are solely within the expertise of the agency. **[Emphasis added].**

⁵ Fifth and Fourteenth Amendments to the US Constitution.

⁶ Minn. Const. art. I, § 2.

Reason for certification of the issue at hand can be found in three of the considerations listed in the rule. Subsections A, D, and E all apply to AARP's denial of intervention rights in this rate case and require that certification of this issue be sent to the full Commission without delay.

15. Subsection A of 1400.7600 states that substantial difference of opinion over a controlling question of law justifies certification. The difference of opinion over the proper interpretation of Rule 1400.6200, Subpart 3. As explained above, AARP disagrees with the ALJ that its specific and unique interest in protecting the electric bills paid by consumers 50 and older is *not* "adequately represented by another party" under the language of that rule and how the facts as pled, and further AARP does not agree that this rule allows an ALJ to deny a timely and uncontested petition for intervention. This rule is open to significant interpretation, despite its potential to severe important rights, and thus disputes under this rule deserve a ruling from the full Commission.

16. Subsection D of 1400.7600 states that certification is warranted when waiting to resolve the issue until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning. This consideration is directly applicable to the issue of AARP's intervention rights. After the ALJ has issued his recommended final order to the Commission, the hearing will be completed and AARP will no longer have any opportunity to conduct discovery to investigate the claims of MP, whether or not confidential information is involved. At that late date, intervention would be moot and make impossible for reversal to have any meaning. AARP would most likely not at that date be allowed to intervene and to put on evidence after the OAH hearing is concluded, given the statutory deadlines involved,

even if the PUC expresses disagreement with the ALJ's ruling. No adequate remedy would be available, no matter how much the full Commission may disagree with the denial of AARP's intervention rights, since at that time, there would not be adequate time to re-open the hearing and re-litigate the entire rate case again. If the ALJ fails to reconsider AARP's intervention, or to at least certify the question, then the Order will stand as a "death penalty" to AARP's procedural due process rights.

17. Subsection E of 1400.7600 states that certification is warranted when it would promote the development of a full record. AARP's perspective is different than any other party to this rate case, its witness Mr. Rubin can investigate and analyze the issues in this rate case from a different perspective than any other consumer witness, and if given the chance to conduct its own discovery, AARP may present different evidentiary testimony. The Commission deserves to hear AARP's unique perspective and the potential solutions it may present to issues raised in this proceeding. The Commission will be denied having AARP's evidentiary options in the record, if it is denied intervention. This case is too important, and the impacts potentially too severe for AARP members, for the ALJ and the Commission to be denied the opportunity to have those positions available to it within the evidentiary record. And for that opportunity to be meaningful, it must include the ability to conduct discovery and to review information labelled confidential by the utility.

WHEREFORE, for the reasons stated above, AARP respectfully requests that the ALJ reconsider its denial of its Petition to Intervene, issuing a new order entitling AARP to fully participate as an intervenor in this proceeding.

In the alternative, AARP requests that the ALJ certify the question of its intervention to the full Commission.

Because time is of the essence, because delay will further inhibit AARP's ability to conduct discovery, and because no party objects to its intervention, AARP requests that the ALJ act expeditiously to resolve this matter, so that AARP may choose its next procedural steps. Failure to redress the denial of AARP's right to intervene in this matter in a timely fashion will cause irreparable harm to the organization, since no adequate procedural remedy may correct this violation of intervention rights after the hearing is complete and the recommended order has been issued.

Respectfully submitted,

/s/ John B. Coffman

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Attorney for AARP

Dated: April 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to official service list in Docket No. E-015/GR-16-664 at the Minnesota Public Utilities Commission, on this 18th day of April 2017.
