OAH 80-2500-31888
MPUC E-999/CI-14-643

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Further Investigation into Environmental and Socioeconomic Costs Under Minnesota Statute 216B.2422, Subdivision 3

ORDER REGARDING BURDENS OF PROOF

This matter is before Administrative Law Judge LauraSue Schlatter pursuant to a Notice and Order for Hearing issued by the Public Utilities Commission (Commission) on October 15, 2014.[1]

Leigh Currie and Kevin Reuther, Minnesota Center for Environmental Advocacy, appeared on behalf of the Izaak Walton League of America – Midwest Office, Fresh Energy, Sierra Club, and Minnesota Center for Environmental Advocacy (Clean Energy Organizations or CEO).

Tristan L. Duncan, Thomas J. Grever and Erin Vaughn, Shook, Hardy & Bacon, LLP, Kansas City, Missouri, appeared on behalf of Peabody Energy Corporation (Peabody).

Linda Jensen, Assistant Attorney General, appeared on behalf of the Minnesota Department of Commerce, Division of Energy Resources (DOC) and the Minnesota Pollution Control Agency (PCA) (jointly, the Agencies).[2]

Eric F. Swanson and David M. Aafedt, Winthrop & Weinstine, PA, appeared on behalf of the Lignite Energy Council (LEC).

B. Andrew Brown, Michael Ahern, and Thomas Lorenzen, Dorsey & Whitney, LLP, appeared on behalf of Great River Energy (GRE), Minnesota Power (MP) and Otter Tail Power Company (OTP).

James R. Denniston, Assistant General Counsel, appeared on behalf of Northern States Power Company, d/b/a Xcel Energy (Xcel).

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[1] *In the Matter of the Further Investigation into Environmental and Socioeconomic Costs Under Minn. Stat. § 216B.2422, Subd. 3,* Docket No. E-999/CI-14-643 (CI-14-643), NOTICE AND ORDER FOR HEARING (October 15, 2014) (ORDER FOR HEARING).

[2] The PCA filed its Motion to Intervene on the day of the second prehearing conference, but was not yet formally a party at the time. It has since been admitted as a party.

Margaret E. Dalton and Andrew P. Mortazka, Stoel Rives, LLP, appeared on behalf of Minnesota Large Industrial Group (MLIG).

During the November 25, 2014, first prehearing conference, several of the parties raised questions regarding which party or parties will bear the burden of proof regarding the environmental cost of carbon dioxide (CO_2) and the criteria pollutants at issue in this proceeding - sulfur dioxide (SO_2), nitrogen oxides (NO_x) and/or particulate matter less than 2.5 microns in diameter ($PM_{2.5}$) under Minn. Stat. § 216B.2422, subd. 3 (2014). The Administrative Law Judge is treating the requests for a determination as to the proper burdens of proof as a Motion in Limine brought jointly by the parties.

The following parties filed Memoranda of Law on February 4, 2015, regarding burdens of proof issues: CEO; DOC; Xcel; and MLIG, Peabody, and MCC, jointly.[3] Responses were filed on February 18, 2015, by: CEO; Xcel; MLIG, Peabody and MCC, jointly; and GRE, MP, and OTP, jointly.[4] The Administrative Law Judge heard oral argument on burdens of proof issues at the prehearing conference.[5]

Based upon the submissions of the parties, and for the reasons set forth in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. A party or parties proposing that the Commission adopt a new environmental cost value for CO_2, including the Federal Social Cost of Carbon, bears the burden of showing, by a preponderance of the evidence, that the value being proposed is reasonable and the best available measure of the environmental cost of CO_2.

2. A party or parties proposing that the Commission adopt a new environmental cost value for one or more of the criteria pollutants – SO_2, NO_x, and/or $PM_{2.5}$ – bears the burden of showing, by a preponderance of the evidence, that the cost value being proposed is reasonable, practicable, and the best available measure of the criteria pollutant's cost.

3. A party or parties proposing that the Commission retain any environmental cost value as currently assigned by the Commission bears the burden of showing, by a

[3] *See* Memorandum from CEO on Burden of Proof (Feb. 4, 2015) (CEO Memo); Memorandum from the DOC on Burden of Proof (February 4, 2015) (DOC Memo); Memorandum from Xcel on Burden of Proof (Feb. 4, 2015) (Xcel Memo); Memorandum from MLIG, Peabody, and MCC on Burden of Proof (Feb. 4, 2015) (Industrial Memo).

[4] *See* Responsive Memorandum on Burden of Proof from CEO t (Feb. 18, 2015) (CEO Response); Responsive Memorandum on Burden of Proof from Xcel (Feb. 18, 2015) (Xcel Response); Responsive Memorandum on Burden of Proof from MLIG, Peabody, and MCC (Feb. 18, 2015) (Industrial Response); and Responsive Memorandum on Burden of Proof from GRE, MP, and OTP (Feb. 18, 2015) (Power Response).

[5] *See* CI-14-643, Tr. Second Prehearing Conference at 2.

preponderance of the evidence, that the current value is reasonable and the best available measure to determine the applicable environmental cost.

4. An environmental cost value currently being applied by the Commission is presumed to be practicable, as required by Minn. Stat. § 216B.2422, subd. 3. A party challenging an existing cost value on the grounds that it is not practicable bears the burden of demonstrating impracticability by a preponderance of the evidence.

5. A party or parties, opposing a proposed environmental cost value must demonstrate, at a minimum, that the evidence offered in support of the proposed values is insufficient to amount to a preponderance of the evidence. This requirement does not apply to a party challenging an existing cost value based on its alleged impracticability, as described in paragraph 4, above.

6. Any proponent of an environmental cost value, including existing environmental cost values, shall file direct testimony in support of its proposal according to the schedule set forth in the Second Prehearing Order in this matter.

7. A party advocating for retention of an existing cost value may not refer by reference to evidence or testimony from the Commission's CI-93-583 docket or related dockets, but must introduce any evidence on which it intends to rely in this docket, whether the evidence is drawn from an older docket or is new evidence.

8. A party may propose an environmental cost value not proposed in direct testimony in the party's rebuttal testimony only if the new cost value is offered in response to a cost value proposed in direct testimony.

9. The order in which the parties will conduct direct and cross-examination at the evidentiary hearings will be determined at later dates after rebuttal testimony has been filed, but at least two weeks before either evidentiary hearing.

10. The Administrative Law Judge incorporates the following portions of the Commission's Notice and Order for Hearing into this Order:

a. the parties will use a damage cost approach; and[6]

b. any DOC consultant must use reduced-form modeling.[7]

Dated: March 27, 2015

s/LauraSue Schlatter
LAURASUE SCHLATTER
Administrative Law Judge

[6] CI-14-643, NOTICE AND ORDER at 8.
[7] CI-14-643, NOTICE AND ORDER at 8.

MEMORANDUM

Parties' Arguments

The parties generally agreed that anyone proposing a new cost value must support that value with a preponderance of the evidence.[8] The focus of the disagreement among the parties was the proper burden of proof when a party advocates that an existing value be maintained. In addition, the parties presented arguments about the burden a party bears when opposing another party's proposed value.

The DOC and the CEO argued that, while no party has an obligation to affirmatively put forth its own proposed values, if it opposes another party's proposed values, it "must either establish that the evidence offered in support of the proposed values is insufficient, or [it] must counter the evidence with a greater weight of evidence demonstrating the incorrectness of the proposed values."[9]

While apparently agreeing that a party should bear an individual burden as to the evidence it presents to support its case by a preponderance of the evidence, Xcel also argued that, because this proceeding is a Commission investigation, the Administrative Law Judge and Commission "should consider the more persuasive evidence" while requiring that the Commission's determination in this proceeding be supported by a preponderance of the evidence.[10]

In the Industrial Memo the parties argued that because the Commission initiated this proceeding following a motion by the CEO, the burden of proof is different for parties other than the CEO or the DOC, which supported the CEO's position. The Industrial parties argued that a party opposing adoption of new values "may counter the proposed evidence with evidence demonstrating the incorrectness of or impracticality of adopting the proposed value ranges and/or may suggest alternative values."[11]

Finally, in their combined Reply Memorandum, Great River Energy, Minnesota Power, and Otter Tail Power agreed with the preponderance standard for a party proposing a new value, but asserted that a party opposing a particular value "faces a lesser burden since that party must only show the evidence in support and opposition of

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[8] *See* Tr. Second Prehearing Conference at 21-34; DOC Memo at 4, CEO Memo, Xcel Memo at 1, Industrial Memo at 7. Xcel also argued that a party that "presents modeling or other information for which it has superior access . . . should also have the burden of *production"* and be required to provide access to the other parties to thoroughly examine the evidence presented. Xcel Memo at 1. While the Administrative Law Judge generally agrees that parties should make evidence upon which they base their position available to other parties, that is a matter for discovery, rather than an issue of the overall burden of proof.

[9] DOC Memo at 5, *quoting In the Matter of the Quantification of Environmental Costs Pursuant to Laws of Minnesota 1993, Chapter 356, Section 3, Docket No. E-999/CI-93-583* (CI- 93-583), FINDINGS OF FACT, CONCLUSIONS, RECOMMENDATION AND MEMORANDUM at 10, ¶ 26 (March 22, 1996) (CI-93-583 RECOMMENDATION).

[10] Xcel Memo at 2.

[11] Industrial Memo at 10.

the proposed value is at best equally balanced and thus the proposed value is not supported by the greater weight of the evidence."[12]

Discussion

In its review of the CI-93-583 docket, the Minnesota Court of Appeals affirmed that no special burden of proof attaches to proceedings under Minn. Stat. § 216B.2422 (2014). Based upon the standard contested case procedure, the court concluded that all of the parties were required to support their positions by a preponderance of the evidence.[13] The court's decision is consistent with, and supported by, Minn. R. 1400.7300, subp. 5 (2013), which imposes a preponderance of the evidence burden on a "party proposing that certain action be taken."[14]

In deciding that it should refer this matter for a contested case hearing, the Commission "determined that the scientific evidentiary support for the existing values had been reasonably called into question . . . ."[15] This language does not constitute a clear rejection by the Commission of the existing values. However, the conclusion that the scientific evidence on which those values are based has "been reasonably called into question" creates a hurdle which a party advocating for those values must overcome. Therefore, a party advocating for the existing values whose reasonableness the Commission has called into question must demonstrate, by a preponderance of the evidence, that there is scientific evidentiary support for the position that the existing values are reasonable.[16]

Given that the existing values are currently being used, and the Commission was silent on the issue of practicability, the Administrative Law Judge finds that there is a rebuttable presumption that the existing values are practicable. If a party advocates for an existing value, a party opposing the existing value on the basis of its practicability would have the burden of showing by a preponderance of the evidence that continuing to use the existing value is impracticable.

The Administrative Law Judge cautions any parties advocating for the existing values that they bear a burden of production as well. They may not rely on references to the record in the CI-93-583 docket but must produce any evidence from that docket on which they wish to rely, or introduce new evidence to support their positions.

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[12] Power Reply at 2.

[13] *In re Quantification of Environmental Costs Pursuant to Laws of Minnesota 1993, Chapter 356, Section*, 578 N.W.2d 794, 801 (Minn. Ct. App. 1998) (*Quantification* case).

[14] Xcel's argument that the preponderance burden should somehow be removed to the Commission while the parties should bear a burden of persuasion is both confusing, in view of its own earlier arguments, and at odds with the Court of Appeals' decision in the *Quantification* case. In that case, the court specifically rejected LEC's argument that the Administrative Law Judge "improperly shifted the commission's burden of proof . . . ." *In re Quantification,* 578 N.W. 2d at 801. There is no basis for employing a different burden of proof in this proceeding.

[15] CI-14-643, NOTICE AND ORDER at 2.

[16] It is the case that, if no other values are shown to be reasonable and practicable, the Commission might be left with the status quo by default. A party hoping for that outcome could choose to focus on attacking other proposed values and take the risk that none would be found reasonable and practicable.

The Commission also concluded that it would be "premature" to adopt the federal social cost of carbon (FSCC) as the CO_2 measure urged by the Agencies and CEO.[17] Instead, Commission charged the Administrative Law Judge with determining whether the FSCC is "reasonable and the best available measure to determine the environmental cost of CO_2 and, if not, what measure is better supported by the evidence."[18] Given this language, a party advocating for the FSCC, or any other cost of CO_2, will also be required to demonstrate its position by a preponderance of the evidence.

A party opposing a particular proposal need only demonstrate that the proponent of proposed value cannot meet the preponderance requirement, because the proponent's evidence is flawed, or the proposal is impracticable. If the weight of the evidence is evenly balanced, for and against, the opponent has met its burden because the proponent will not have achieved the required preponderance of the evidence.

The parties expressed concerns about the order in which they will present their cases and be permitted to cross-examine witnesses at the evidentiary hearings. Once the pre-filed direct and rebuttal testimonies are available, the Administrative Law Judge will review the parties' positions, consult with them during prehearing status conferences, and then issue further orders regarding the sequence of the presentation of witnesses and cross-examinations in the evidentiary hearings.

L. S.

[17] CI-14-643, NOTICE AND ORDER at 4.
[18] CI-14-643, NOTICE AND ORDER at 4.

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March 27, 2015

See Attached Service List

Re: In the Matter of the Further Investigation into Enviromental and Socioeconomic Costs Under Minn. Stat. § 216B.2422, subd. 3 (2014)

OAH 80-2500-31888
MPUC E-999/CI-14-643

To All Persons on the Attached Service List:

Enclosed and served upon you is the Administrative Law Judge's **ORDER REGARDING BURDENS OF PROOF** in the above-entitled matter.

If you have any questions, please contact my legal assistant Rachel Youness at (651) 361-7881 or rachel.youness@state.mn.us.

Sincerely,

s/LauraSue Schlatter

LAURASUE SCHLATTER
Administrative Law Judge

LS:ry
Enclosure

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CERTIFICATE OF SERVICE

In the Matter of the Further Investigation into Enviromental and Socioeconomic Costs Under Minn. Stat. § 216B.2422, Subd. 3 (2014)	OAH Docket No.: 80-2500-31888

Kendra McCausland certifies that on March 27, 2015 she served the true and correct **ORDER REGARDING BURDENS OF PROOF** by eService, and U.S. Mail, (in the manner indicated below) to the following individuals

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