OFFICIAL OPINION NO. 79-16, AUTOMATIC FUEL ADJUSTMENT CLAUSES

June 18, 1979

South Dakota Public Utilities
Commission
State Capitol
Pierre, South Dakota 57501

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AUTOMATIC FUEL ADJUSTMENT CLAUSES

Dear Commissioners:

The Commission has requested a clarification of my letter of June 1, 1979, in response to Mr. Stead's letter of May 14, 1979. Due to the public interest following that exchange of letters, I deem your request for clarification on June 8 as a request for an official opinion.

QUESTION:

What was the effect of the amendment of SDCL 49-34A-35 by the 1979 Legislature?

The first change made by the new legislation was the striking of the words: "Notwithstanding any other provisions of this chapter." Therefore, SDCL 49-34A-25 was no longer to be read without reference to other sections of SDCL 49-34A. Prior to this change in § 25, the PUC could have allowed an automatic adjustment clause (AAC) without a hearing. The change was to require that the establishment of an AAC meet the requirements of SDCL 49-34A-12 and other applicable statutes. This new law was to ensure that any AAC adopted as part of the rate schedules would be subjected to public and Commission inspection prior to its implementation. Had the words "notwithstanding any other provisions of this chapter" not been struck, the PUC could have allowed an AAC as part of the rate schedule without consumers and other interested parties having the benefit of 30 days notice, expert opinion, substantiating documents, exhibits and other information for the establishment of a fair AAC. The striking of the clause beginning 'notwithstanding' also had another important protection created for the consumer. SDCL 49-34A-11 which requires the utility to carry the burden of proof that any rate filed is just and reasonable now applies to the original consideration of the AAC whereas prior to the change

it did not. Therefore, the burden is on the utility to show that the proposed AAC accurately reflects the changes in its costs when applied.

The second change in the law was the change of the word "may" to "shall." This change requires that the PUC as a part of the rate schedule adopt an automatic adjustment process. This change in the statute conforms to actual practice because the Commission now allows all utilities an AAC. The law states that this process must provide for the adjustment of certain charges in direct relation to the increased or decreased cost. The Commission must therefore exercise a wide range of discretion in the adoption of an AAC which becomes a part of the rate schedule. The Commission must be vigilant that the adjustment is in direct relation to the allowed increased or decreased costs. Furthermore, due to the amendment by the Legislature the Commission has a duty to insure that the passed-through costs to the consumer are in direct relation to changes in costs for energy, fuel, and taxes. The Legislature required that the Commission not allow any request of adjustment but only those in direct relation to the actual cost to the utility.

The remaining question is the type of hearing, if any, required by the new statute, SDCL 49-34A-25. The original establishment of the design of the AAC is subject to a hearing required by SDCL 49-34A-12. This requirement is the result of the striking of the words "notwithstanding any other provisions of this chapter." The Commission must establish an AAC at the conclusion of the § 12 hearing which would normally be a part of a general rate hearing.

Once the AAC has become a part of the rate schedule, the Commission must oversee the mathematical adjustment to the rate schedule. Assuming changes in cost of energy, fuel or taxes, the AAC will operate to vary up or down the ultimate cost of power to South Dakota consumers. Because of the legislative change of SDCL 49-34&A-25, the consumer and the Commission have had an opportunity for input into the AAC. Obviously, the Legislature did not intend a full SDCL 49-34A-12 hearing each time the Commission considered a mathematical adjustment required under an approved AAC.

The logic of this approach is best stated by the Massachusetts Supreme Court when considering a similar situation:

Rate proceedings have been notoriously slow as well as expensive. In times of inflation, dependence on lumbering rate proceedings to accommodate the rates to rapidly increasing costs would threaten utilities with unrecoverable expenses destructive of reasonable

returns. Therefore, the demand arose to build into the rates provisions by which increases in certain costs to the utilities (and to be fair, decreases as well) would in accordance with the formula be automatically passed on to the consumer as fluctuations of the charges to them, without the burden and expense to the utilities-which would ultimately fall upon consumers-of instituting and carrying out separate rate proceedings to justify the varying charges. *C.O.F.E.E. v. Dept. of Public Utilities*, 335 N.E.2d 341, 345.

The rate schedule of which the AAC is a part having been once established, the adjustments do not require the application of SDCL 49-34A-9, 12, 13, 14, 16, 17, etc. Rather, an adjustment under an approved AAC must be subject to a set procedure whether it be a hearing or other administrative process to insure that the costs to be passed on to the consumer are in all respects proper. Far from having "no power to control those clauses" operations' the PUC has a duty to control the operation. The PUC must insure that the adjustment requested is proper. For example, a utility should not be allowed to pass costs which are the result of nonprudent purchases of fuel from a sweetheart supplier when the same fuel can be purchased on the open market for much less. Apparently the Legislature, in directing that an AAC be a part of the rate schedule, also wished to insure that the adjustment was properly supervised and approved by the Commission. In short, the term "direct relation" is also qualified by the Commission's oversight.

Neither the Commission by rule nor the Legislature has provided any method for the proper implementation and review of adjustments required by the AAC. However, as to changes in wholesale gas prices, a procedure is set forth in § 25 to make adjustments to the rate schedules and ultimately the retail price of gas to the consumer. The Commission should adopt by rule a similar procedure for the future application of the AAC in non-gas areas.

The change in legislation would appear to have broadened the protection to consumers. Inasmuch as the Commission has allowed all utilities in the past automatic adjustment clauses, the Legislature conformed the statute to the actual practice of the Commission. But the Legislature further required the Commission to place an AAC in the rate schedules only after a hearing and consumer participation, which protection was not present prior to the amendment. Further, the Legislature obviously intended the Commission not to passively accept all requested adjustments under an AAC. The Commission must review in some method the amount requested in an efficient and speedy manner to insure that the automatic adjustment clause reflects actual and proper costs, and if so, to at once implement needed changes in consumer costs whether up or down.

If the Commission should request further clarification of my letter of June 1, I shall be happy to respond.

Respectfully submitted,

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Attorney General

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