

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266-1946

Richard Sweet
Assistant Director
(608) 266-2982



Terry C. Anderson
Director
Legislative Council Staff
(608) 266-1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701-2536
FAX: (608) 266-3830

CLEARINGHOUSE RULE 00-080

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

a. Section 16.957 (4), Stats., sets forth a number of requirements for establishing the amounts of public benefits fees. These requirements include that the amounts must be established by the department by rule, the fees must be set to raise the specified amount of revenue each year, based upon statutory formulas that include parameters that change by year, the fees may vary between classes of electric utility customers but must be uniform within a class, and each customer's fees may not exceed 3% of the total of every other charge for which the customer is billed over the specified approximately eight-year period. The rule does not conform with all of these requirements. For example, the amount of the fees are not set in the rule but in utility collection plans approved by the department. While the fees must, in general, be uniform within a class of customers served by a particular utility, the fees may vary between utilities for the same class of customers. Also, the 3% cap is implemented on a monthly basis by the utility collecting the fee rather than over the approximately eight-year period specified in the statute.

Based on conversations with department staff, it appears that this noncompliance is due to a variety of factors including conflicts between the statutory requirements and prohibitively high administrative expenses to directly implement the requirement. To craft a workable rule, the department's solution to this situation appears to be to forgo implementing some of the requirements, modifying others and deferring others to implementation by the utilities collecting the fees.

The department should review the entire rule to ensure that it has minimized the irreconcilable conflicts among statutory requirements in setting the amounts of the public benefits fees and provide in the analysis accompanying the rule a description of how the rule treats each statutory requirement so that a reader can determine the department's priorities in addressing these conflicts.

b. Under the rule, each nonmunicipal electric utility must collect public benefits fees from its residential and nonresidential customers. See, for example, s. Adm 43.07 (3). As defined in s. Adm 43.03 (14) and (16), the combination of customers who are "nonresidential customers" and "residential customers" may not equate to all of the customers of a nonmunicipal electric utility. As a result, some customers may not be subject to the public benefits fee. This is contrary to s. 16.957 (4) (a), Stats., which requires "each electric utility . . . shall charge *each* customer a public benefits fee" [Emphasis added.] If the department plans on interpreting "nonresidential customers" to include all customers that are not "residential customers," then the definition of "nonresidential customer" should be clarified to either be customers that are not residential customers or expanded to include the other types of electric utility tariffs that establish other types of customer classes, such as street lighting.

c. Under s. 16.957 (2) (c) 4., Stats., the department's rules must require each electric utility to allow its customers to include voluntary contributions *with bill payments for electric service* to assist in funding one or more of the department's public benefit programs. Section Adm 43.10 (1) requires each electric utility to include with the annual public benefits report mailing an insert and return envelope for a customer to use to make a voluntary contribution to the department's programs. While the department appears to have the authority to require this insert and return envelope, the use of the insert and return envelope does not comply with the requirement in s. 16.957 (2) (c) 4., Stats., for the creation of a mechanism for a customer to make a contribution via the customer's bill payment to the utility.

2. Form, Style and Placement in Administrative Code

- a. The treatment clause for SECTION 1 should end with a colon rather than a period.
- b. All section titles in the rule should be written with an initial capital letter and in bold print, but not underscored. [See s. 1.05 (2) (b), Manual.]
- c. All subsection and paragraph numbering within the rule should be enclosed in parentheses, not brackets. [See s. 1.03 (3) and (4), Manual.]
- d. The definitions in s. Adm 43.03 which are identical to statutory definitions should use a consistent format. For example, s. Adm 43.03 (7) uses the phrase "has the meaning specified in" and s. Adm 43.03 (11) uses the phrase "has the meaning set forth in."
- e. The definition of "public benefits fee" in s. Adm 43.03 (15) includes the substantive phrase "and is identified as a non-taxable fixed charge on a customer's electric bill." Under the preferred drafting style, substantive provisions are not incorporated as part of a definition. [See s. 1.01 (7) (b), Manual.]

f. Once a rule defines a term, portions of the definition should not be repeated when the term is used in the text of the rule. This style was not followed, for example, in s. Adm 43.05 (1) where the phrase “to be collected from all electric providers” follows “aggregate public benefits fee” and repeats part of the definition of “aggregate public benefits fee” in s. Adm 43.03 (1).

g. In general, s. Adm 43.06 relates to the procedures the department will follow in allocating the public benefits fee to each nonmunicipal electric utility. Since s. Adm 43.06 (2) (e) does not relate to this allocation procedure, but instead to a process for a customer to seek relief from its nonmunicipal electric utility when its combined public benefits fees exceed \$750 in any month, it appears that par. (e) should be placed in a different section in the rule, such as s. Adm 43.07.

h. Section Adm 43.06 (2) (intro.) is not properly drafted as introductory material since it does not end in a colon and lead into the subunits that follow. [See s. 1.03 (8), Manual.] It should be numbered as par. (a) and the following paragraphs should be renumbered.

i. The department should consider placing the contents of s. Adm 43.09 (1) in multiple subsections. In addition to having provisions relating to the department’s review of a nonmunicipal electric utility’s administrative expenses, as indicated by the subsection title, this subsection also contains provisions relating to the process for a utility to request these expenses, the contents of the request, the treatment of approved expenses and the appeal of the department’s determination of eligible expenses.

j. The preferred style for expressing a prohibition is to state “no nonmunicipal electric utility may . . .” or “a nonmunicipal electric utility may not . . .” This style was not followed in the second sentence in s. Adm 43.11 (4).

k. Notes may not include substantive requirements and are not part of the substantive provisions of the rule. [See s. 1.09 (1), Manual.] As such, the content of the note following s. Adm 43.12 (3) relating to implementation of the public benefits fee collection plan in fiscal year 2001 and modifying deadlines for these plans for fiscal year 2000, should be incorporated into the text of the rule.

3. Conflict With or Duplication of Existing Rules

Section 16.957 (4) (a), Stats., directs each nonmunicipal electric utility to charge each customer a public benefits fee in an amount established in the department’s rules. Under s. 16.957 (4) (am), an electric utility must include a public benefits fee “in the fixed charges for electricity in a customer’s bill.” The definition of “public benefits fee” in s. Adm 43.03 (15) requires the fee to be identified as a “non-taxable fixed charge on a customer’s electric bill.” While a separate nontaxable fixed charge may not be consistent with the intent of s. 16.957 (4) (a), Stats., staff at the department report that the separate charge requirement was established to conform with the billing requirements established by the Public Service Commission in s. PSC 113.16 (1) and to enable a customer to compute the amount of taxes owed on a bill and the total

amount of a bill. Under s. PSC 113.16 (1), all charges, credits and taxes must be itemized on the bills provided by large investor-owned electric utilities to their customers.

4. Adequacy of References to Related Statutes, Rules and Forms

a. Since the rule includes provisions relating to voluntary contributions to the department's public benefits programs and methods for determining the amounts of various factors in the "low-income need," the analysis accompanying the rule should include s. 16.957 (2) (c) 4. and 5., Stats., in the list of statutes authorizing rule-making.

b. The reference in the analysis to the rule interpreting s. 16.957, Stats., is unduly broad as this section includes the department's duties to create various public benefits programs and provisions relating to municipal electric utilities' and retail electric cooperatives' commitment to community programs, which are not addressed in the rule.

c. Section 16.957 (4) (b), Stats., directs the department to promulgate rules establishing the amount of public benefits fees in consultation with the Council on Utility Public Benefits. The analysis accompanying the rule should indicate that this consultation has taken place. If it has not, the department should consult with the council prior to promulgating the rule.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The analysis accompanying the rule needs to be more elaborate. It should contain sufficient details to enable the reader to understand the content of the rule, including the steps that will be followed to calculate a nonmunicipal electric utility customer's public benefits fee. See also comment 1. a.

b. The definition of "aggregate public benefits fee" in s. Adm 43.03 (1) is potentially confusing as this definition refers to "the total annual fee to be collected . . . from all electric providers." Since this definition is written with the collection language in the passive voice, it is not clear who is collecting this fee. If this phrase refers to the department collecting the fee, then the definition should be revised to reflect the fact that under s. 16.957 (5), Stats., the department does not collect a fee from electric providers that are retail electric cooperatives or municipal electric utilities unless the municipal utility or retail electric cooperative agrees to contribute part or all of the public benefits fees that it charges to the department's public benefits programs. If the phrase refers to the electric providers collecting the fee, then the definition should be revised to end with "by all electric providers."

c. The department should review its definition of "public benefits fee" in s. Adm 43.03 (15) to ensure that the rule uses this term consistently and that this use is consistent with the statutory use of the term. Subsection (15) defines the term to be the total amount that the department will collect from a nonmunicipal electric utility; that is, the sum of the fees that the utility collects from its residential and nonresidential customers. Section 16.957 (4) (a), (am) and (b), Stats., use the term to refer to the charge assessed an individual customer of a nonmunicipal electric utility. In the rule, the term is used sometimes in the collective sense, see ss. Adm 43.06 (2) (intro.) and 43.07 (1); sometimes as the individual fee, see s. Adm 43.06 (2)

(e) and the last sentence in s. Adm 43.07 (3); and sometimes in a way that it is not clear, see s. Adm 43.06 (2) (c) and (d).

d. A nonmunicipal electric utility must make monthly payments to the department of “the amount invoiced” by the department to the utility under s. Adm 43.08 (1). The amount that is invoiced is the public benefits fee that the department allocates to the utility under s. Adm 43.06 (2). Since the definition of “public benefits fee” in s. Adm 43.03 (15) includes the utility’s portion of the aggregate public benefits fee plus the utility’s *reasonable and prudent expenses*, as drafted, the department will be collecting each nonmunicipal electric utility’s reasonable and prudent expenses rather than providing for the recovery of those expenses by these utilities. Is this the department’s intent? If it is the department’s intent, then the authority for the department collecting these expenses rather than allowing the utilities to recover these expenses is not apparent.

e. The rule contains a number of vague references to data sets compiled by either units within the department or by federal agencies. The department should review the entire rule and clarify these references so that a reader will know which specific data set is being used in the implementation of the particular provision in the rule. See, for example, ss. Adm 43.04 (1) to (3), 43.05 (2) and 43.06 (1).

f. The department should review the calculations called for in the rule to ensure that the time periods covered in the calculations clearly correspond to the periods in the formulas in s. 16.957, Stats., used to calculate public benefits fees. For example, the computation of “low-income need percentage” under s. 16.957 (1) (o), Stats., requires the computation of the “low-income need” in fiscal year 1998-99. It is not clear how specification of the “most current data available” in s. Adm 43.04 (1) to (3) used to calculate low-income need under the rule relates to low-income need in fiscal year 1998-99. Also, the specification of which data will be used would be clearer if rather than using references such as to the “most current data available” or “most recently published data,” as in ss. Adm 43.04 (3) and 43.05 (2), the rule relates the date of the data to the schedule for the development of a given fiscal year’s aggregate public benefits fee and nonmunicipal electric utility public benefits fees under ss. Adm 43.05 (1) and 43.06 (2).

g. As drafted, the department will be using two different counts of nonmunicipal electric utility customers in calculations under the rule. The department will use energy information administration data to allocate the aggregate public benefits fee between the portion to be collected from residential customers and the portion to be collected from nonresidential customers under s. Adm 43.05 (3). The department will use federal energy regulatory commission data to determine the residential and nonresidential components of the public benefits fee to be invoiced to each nonmunicipal electric utility under s. Adm 43.06 (2). Is it the department’s intent to use two potentially different counts of the same customers?

h. If the department makes an adjustment to an estimated residential or nonresidential component or the public benefits fee that the department intends to invoice a nonmunicipal electric utility under s. Adm 43.06 (2) (c) or (d), that results in a shortfall in total revenues, the rule is not clear how the total revenues from public benefits fees required under s. 16.957 (4) (c) 1. and 3. will be maintained.

i. The purpose of the use of “may” rather than “shall” in the third sentence of s. Adm 43.08 (3) (a) is not clear. The use of “may” implies that, if the amount collected in a fiscal year is less than the amount invoiced by the department, the amount under-collected does not have to be added to the amount to be collected for the succeeding year. What happens if a nonmunicipal electric utility does not include the amount under-collected in the amount to be collected in the succeeding fiscal year? If “may” is used to allow for payment of uncollected fees initially paid by a utility and subsequently reimbursed to the utility under s. Adm 43.08 (4), then sub. (3) (a) should be clarified to specify the mechanism by which uncollected fees are originally paid.

j. In s. Adm 43.08 (3) (c), “the” before “s. Adm 43.12” should be deleted. Also, a period should be placed at the end of this paragraph.

k. The reference to “(t)his cost” in the last sentence of s. Adm 43.08 (4) is vague. Does the department mean the amount recorded as an accounts receivable, the amount recognized as uncollectible or either amount?

l. The department should revise the first sentence in s. Adm 43.09 (1) to clarify the reference to “. . . expenses incurred in the collection . . . of its public benefits fee collection plan”

m. In interpreting what constitutes reasonable and prudent expenses that a nonmunicipal electric utility may recover in complying with ch. Adm 43, the department provides in s. Adm 43.09 (1) one specific criterion relating to whether the expenses are recovered by a utility in a current tariff. If the department intends to apply other criteria in determining what constitutes a reasonable and prudent expense, such as a limit based on a portion of the fees collected by a utility, the department should consider amending s. Adm 43.09 to provide more specific guidance in its interpretation of this term.

n. Section Adm 43.09 (2) directs a nonmunicipal electric utility to “provide all necessary documentation” of reasonable and prudent expenses that it seeks to recover. If the department intends this documentation to include other specific elements in addition to the actual cost for the previous calendar year specified in s. Adm 43.09 (1), the rule should clarify what constitutes “necessary documentation” and identify this additional documentation. If the department intends to provide flexibility to these utilities in the documentation of their reasonable and prudent expenses, s. Adm 43.09 (2) should be rewritten to state “A nonmunicipal electric utility shall document reasonable and prudent expenses”

o. Section Adm 43.10 (1) directs each electric utility to provide an opportunity for its residential and nonresidential customers to make voluntary contributions to the department’s public benefits programs by including an insert and return envelope with the mailing containing the annual public benefits report. This subsection does not indicate who is to prepare or pay for the insert and return envelope. If the department intends to require each electric utility to prepare and pay for these items, the department should review s. Adm 43.09 to ensure that the reasonable and prudent expenses include these costs. As drafted, it appears that s. Adm 43.09 only applies to reasonable and prudent expenses in the administration of the public benefits fee collection plan which relates to the collection of required public benefits fees.

p. The reference to the “fund administered by the department” in s. Adm 43.10 (2) is vague. Does the department mean the utility public benefits fund?

q. The reference in s. Adm 43.11 (2) to a nonmunicipal electric utility’s financial report including “details of the application of its public benefits fee collection plan” is vague. What details, in addition to those specified in sub. (2), is the department seeking in a financial report?

r. In the second sentence in s. Adm 43.12 (1), “or modification” should be inserted after “denial” to be consistent with the first sentence in this subsection.

s. In s. Adm 43.12 (3), “the secretary’s” should be inserted before “designee.”