

No. A07-653

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Review of the 2005 Annual Automatic
Adjustment of Charges for All Electric and Gas Utilities

**REPLY BRIEF OF APPELLANT
MINNESOTA PUBLIC UTILITIES COMMISSION**

Eric Swanson (ID# 188128)
David M. Aafedt (ID# 27561X)
WINTHROP & WEINSTEIN, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN

**ATTORNEYS FOR RESPONDENT
CENTERPOINT ENERGY
MINNESOTA GAS**

LORI SWANSON
Attorney General

Kari Valley Zipko (ID# 0330413)
Assistant Attorney General
MINNESOTA ATTORNEY
GENERAL'S OFFICE
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 296-1408

**ATTORNEYS FOR APPELLANT
MINNESOTA PUBLIC UTILITIES
COMMISSION**

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SUMMARY OF ARGUMENT

In its response, CenterPoint Energy Minnesota Gas (“CenterPoint”) again takes no responsibility for its repeated and persistent errors and asks that its ratepayers pay the entire cost of its mistakes. The Minnesota Public Utilities Commission (“Commission”) respectfully asks this Court to reject CenterPoint’s request and affirm the Commission’s decision. The Commission’s decision is based on substantial evidence in the record, reflects the Commission’s careful consideration and deliberation, and recognizes the material distinctions between this case and prior cases regarding variances to Minn. R. 7825.2700, subp. 7 (2005) (“True-Up Rule”).

Contrary to CenterPoint’s claims, this case is simply unprecedented. In no prior case has the Commission granted a variance to the True-Up Rule to go back and recover four years of unrecovered gas costs from ratepayers that resulted from the utility’s own self-initiated accounting error, where the error was repeated month after month and year after year. Further, the Commission has *never* granted a variance where amounts at issue went unnoticed until the amounts had accumulated for *five years*. The Commission recognized the significant factual differences between this case and prior cases and distinguished the prior cases in its orders.

The court of appeals impermissibly usurped the Commission’s legislatively-delegated authority and substituted its judgment for that of the Commission on issues the Commission has the authority and expertise to decide. The court of appeals found that the facts at issue here were not “meaningfully distinguishable” from the facts at issue in

the two prior cases in which the Commission had granted a variance to the True-Up Rule. However, whether the facts at issue here satisfied the standard for a variance to the True-Up Rule and whether the accounting errors and their resulting effect on the utility and the public were distinguishable is directly within the Commission's specialized knowledge and expertise. Accordingly, the opinion of the court of appeals must be reversed and the Commission's decision affirmed.

ARGUMENT

I. THE STANDARD OF REVIEW IS WHETHER THE COMMISSION'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD OR IS ARBITRARY AND CAPRICIOUS.

CenterPoint argues in error that the Commission's determination that the amounts at issue did not impose an excessive burden on the Company and that the public interest was not adversely affected by denying a variance to the True-Up Rule is a question of law. CenterPoint confuses an interpretation of law with the analysis of facts. *See Citizens Advocating Responsible Development v. Kandiyohi County Bd. Of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) ("*CARD*") (where this Court first addressed the correct definition of a rule provision and then proceeded to review the facts to determine whether the requirements of the rule were satisfied).

The appropriate standard of review in this case is whether the Commission's decision is arbitrary and capricious and whether substantial evidence in the record supports the Commission's decision. The issue is whether the facts in this case establish that CenterPoint has met the standard for a variance to the True-Up Rule. The

Commission is the agency with the expertise in this matter to determine whether the amounts at issue impose an excessive burden on the Company and whether a decision to grant a variance would adversely affect the public interest. Minn. R. 7829.3200, subp. 1; *see Minnesota Power & Light Co. v. Minnesota Pub. Util. Comm'n*, 342 N.W.2d 324, 330 (Minn. 1983).¹

Contrary to CenterPoint's arguments, the determination of whether there is an excessive burden on the applicant and whether granting the variance would not adversely affect the public interest is precisely within the agency's specialized expertise and is recognized by the Minnesota Legislature. Minn. Stat. § 216B.01 (2006). Such decisions require the Commission to apply its specialized knowledge in utility matters, in general and with respect to individual companies. The Commission applies its expertise in regulating utilities in a manner that balances the interests of the public and the utility's shareholders, and makes informed decisions based on the factual record in a given case.

“[W]hen applying the substantial evidence test to that type of finding, the reviewing court should determine whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record.” *Minnesota Power & Light*, 342 N.W.2d at 330 (citation omitted). The burden is

¹ No party argues that granting the variance would conflict with standards imposed by law. The court of appeals incorrectly inferred that the Commission found the variance would conflict with standards imposed by law. Rather, the Commission found inadequate support in CenterPoint's legal analysis, *i.e.* application of precedent, to justify a variance to the True-Up Rule. APP17.

on CenterPoint to demonstrate that the Commission's findings are not supported by the evidence in the record, considered in its entirety. *CARD*, 713 N.W.2d at 833.

CenterPoint argues in error that this Court's decision in *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457 (Minn. 2002) ("*MCEA*") is not on point. Contrariwise, this Court's holding in *MCEA* requiring deference to an agency's interpretation is directly applicable to this case. Similar to *MCEA*, the Commission's decision here involved a detailed technical analysis of the facts presented.

At issue in *MCEA* was the decision of the Minnesota Pollution Control Agency ("*MPCA*") that a paper mill's proposed energy efficiency project that would increase the mill's maximum wood consumption did not have the potential for significant environmental effects and, therefore, an environmental impact statement ("*EIS*") was not required. *Id.* at 459.

The *MCEA* had argued that the *MPCA*'s decision not to prepare the *EIS* was contrary to law and, because the issue required interpretation of the statute and rules, review of the *MPCA*'s decision was *de novo*. *Id.* at 464. This Court disagreed and explained that the statute required an *EIS* if Boise's project would result in "significant environmental effects" and held, "[a] determination whether significant environmental effects result from this project is primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented. Accordingly, it is appropriate to defer to the agency's interpretation of whether the statutory standard is

met.” *Id.* The Court thereafter reviewed the MPCA’s decision for whether it was unsupported by substantial evidence or was arbitrary and capricious. *Id.*

Also at issue was MCEA’s claim that the MPCA’s use of the 1994 Generic EIS for Timber Harvesting and Forest Management (“Forestry GEIS”) was improper. *Id.* at 464. The Court emphasized that the Environmental Quality Board (“EQB”) specifically approved the Forestry GEIS for use in this project and that it remained adequate for use in accordance with Minn. R. 4410.3800, subp. 8. *Id.* The Court explained that it defers to an agency’s interpretation of its own regulations and that the MPCA had the technical expertise to evaluate the issues in that case and deferred to the MPCA regarding the use and application of the Forestry GEIS. *Id.* at 456.

The matter at issue in the present case is directly analogous to that at issue in *MCEA*. Here, the issue is whether giving effect to the True-Up Rule imposes an “excessive burden” on CenterPoint and does not adversely affect the public interest. Minn. R. 7825.3200, subp. 1 (2005). The Commission’s decision is primarily factual and necessarily requires application of the Commission’s technical knowledge and expertise to the facts presented. *Id.* The Legislature has delegated to the Commission the authority to regulate public utilities and to determine the reasonableness of rates they charge to their customers. Minn. Stat. § 216B.16 (2006); *Computer Tool and Eng’g v. Northern States Power Co.*, 453 N.W.2d 569, 572 (Minn. Ct. App. 1990).

This Court adheres to “the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to

the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). The agency's judgment concerning the inferences to be drawn from the facts shall not be rejected even though the Court may be inclined to draw contrary inferences. *Id.* Nonetheless, the court of appeals in this case improperly substituted its judgment for that of the Commission on issues the Commission has the specialized knowledge, authority, and expertise to decide.

The Court should reject CenterPoint's spurious argument that the determination of whether the rule requirements were met did not involve the application of the Commission's expertise and called solely for a "simple comparison of the numbers." CenterPoint Br. 19. Rather, the determination requires looking at the amounts at issue and their effect on CenterPoint, its shareholders, and its ratepayers. This is just the sort of decision requiring policy considerations and value judgments within the expertise of the Commission and to which this Court defers. *In re Application of the Grand Rapids Pub. Util. Comm'n to Extend Its Assigned Serv. Area.*, 731 N.W.2d 866, at 871 (Minn. Ct. Appl. 2007).

CenterPoint cites to no applicable legal authority to support its argument that the Commission is not entitled to deference when applying its expertise in regulating utilities in a manner that protects the public interest and provides for the operational integrity of the utilities themselves. Minn. Stat. § 216B.01 (2006). Rather, the cases cited by CenterPoint *support* the proposition that the Commission is entitled to deference here.

CenterPoint Br. 18-20; *see MCEA*, 644 N.W.2d at 464 (the agency's determination is primarily factual and necessarily requires the agency's technical expertise and the agency's interpretation of its own regulation is entitled to deference); *Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874 (Minn. Ct. App. 1995) (deferring to agency determination that a project did not have the potential for significant environmental effects that would require the preparation of an environmental impact statement ("EIS")); *Trout Unlimited, Inc. v. Minn. Dep't of Agriculture*, 528 N.W.2d 903 (Minn. Ct. App. 1995) (only reversing agency decision that EIS was not required where agency admittedly failed to consider comments received into the record and the record, including analysis provided by several other state agencies, indicated that the proposed project had the potential for significant environmental effects).²

In this case, the court of appeals found the Commission's decision to be arbitrary and capricious for failing to follow the Commission's precedent. This Court's role when reviewing agency action is to determine whether the agency has taken a "hard look" at the problem and whether it has genuinely engaged in reasoned decision-making. *CARD*, 713 N.W.2d at 832 (citation omitted). The record developed in this proceeding and the Commission's repeated review and thorough deliberation reflects that the Commission carefully considered the matters in this case. R. 99 and Respondent's App. ("RA") 1-19.

² In contrast, the record in this case demonstrates that both the Minnesota Department of Commerce and the Minnesota Office of the Attorney General provided analyses indicating that CenterPoint did not prove the elements necessary for a variance to the True-Up Rule, and the Commission specifically addressed their respective analyses. APP14-APP17.

The proceeding before the Commission lasted nearly 18 months, involved numerous filings, and three separate hearings. As the transcripts demonstrate, the hearings in this matter were lengthy proceedings during which the Commissioners heard arguments, asked questions and were presented with the thoughts and opinions of the other Commissioners. In its December 6, 2006 order, the Commission unanimously determined that CenterPoint had not met the standard for a variance to the True-Up Rule. R. 99 at 51. On reconsideration, the Commission thoroughly discussed the matters in this case and unanimously agreed to amend its order to correct the amount at issue. RA1-19. A motion was made at that time to vary the True-Up Rule to allow CenterPoint to recover one additional year of gas costs. RA15. The Commission carefully and thoroughly considered the issue, but was not convinced that the evidence supported that CenterPoint met the standard for a variance. The motion failed. RA15.

The court of appeals, however, ignored the Commission's careful and thoughtful analysis and improperly substituted its judgment for that of the Commission. The court of appeals does not have the technical knowledge and expertise to make this sort of informed decision.

Further, the Commission's decision clearly satisfies the test for review outlined by CenterPoint. CenterPoint Br. 20. CenterPoint has pointed to no factors on which the Commission relied that the Legislature had not intended the Commission to consider, there is no "important aspect of the problem" that the Commission failed to take into account, the Commission has not offered an explanation that runs counter to the evidence,

and the decision is not so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See *CARD*, 713 N.W.2d at 832 (citation omitted).

II. THE COMMISSION FULLY DISTINGUISHED THE FACTS AT ISSUE HERE FROM THE FACTS PRESENT IN *NSP* AND *INTERSTATE*.

A. The Caselaw Relied On By The Court Of Appeals And CenterPoint Is Not On Point.

Contrary to CenterPoint's argument, the Commission fully distinguished the facts present in this case from those in the two prior cases in which the Commission had granted a variance to the True-Up Rule, *In the Matter of the Review of the 1994 Automatic Adjustment of Charges for All Gas and Electric Utilities*, MPUC Docket No. G,E-999/AA-94-762 (July 13, 1995) ("*NSP*"), and *In the Matter of the Review of the 1997 Annual Automatic Adjustment of Charges for All Gas and Electric Utilities*, MPUC Docket No. G,E-999/AA-97-1212 (May 28, 1998) ("*Interstate*"). The court of appeals and CenterPoint both confuse caselaw regarding an agency's changed interpretation of a statute with caselaw reviewing an agency's decision distinguishing facts between cases. Following the court of appeals below, CenterPoint primarily cites to caselaw from the U.S. Courts of Appeals as authority for its argument. However, CenterPoint fails to address that the cases cited: 1) address fundamental changes in interpretation of law rather than distinguishing the facts between cases; and 2) are not controlling on this Court. CenterPoint Br. 21-22.

In the first instance, the Commission in its initial brief fully distinguished *Hatch v. Federal Energy Regulatory Comm'n*, 654 F.2d 825 (D.C. Cir. 1981), from the present

matter. Commission Br. 42-43. CenterPoint, however, fails to recognize that the agency in that case was changing its interpretation of a statute that had been applied for over 40 years. Further, CenterPoint's reference to *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771 (D.C. Cir. 2005), is equally unavailing. CenterPoint Br. 22. In that case, the agency failed to support its action with a reasoned explanation. *Burlington Northern*, 403 F.3d at 776. In contrast, as explained above, the Commission explained its decision and the facts supporting its orders. The Commission has not failed "to come to grips" with its decisions in *NSP* and *Interstate* but, rather, has found different circumstances here that warrant a different result.

The Commission did not indicate in its orders that it intended to depart from past practice. Rather, the Commission identified the facts at issue in this case that were substantially distinct from prior cases and explained why the presence of those facts lead to a different result here. The Commission explained that CenterPoint's legal analysis, *i.e.* regarding application of precedent, failed to justify the requested variance.

Contrary to CenterPoint's argument, the instant case and the prior cases are not alike. In neither of the prior cases had the amounts gone unnoticed month after month and year after year, nor had the utility undergone the review of two general rate cases in which the utility's revenues and expenses were thoroughly examined, and rate increases authorized according to the reasonable requests made in the utility's application. Accordingly, the Commission not only found the cases substantially distinct, the Commission thoroughly addressed the differences in its orders.

CenterPoint self-initiated an accounting change without notifying the Commission, and, thus, the reasons behind the failure to correctly bill customers were entirely within CenterPoint's control. In contrast, the cases in which the Commission had granted a variance to the True-Up Rule involved inadvertent mistakes which the Commission reasonably concluded were based on significantly different facts.

The Commission's decision here is fully supported by the only decisions from the court of appeals that are directly on point, *Peoples Natural Gas Company v. Minnesota Public Utilities Commission*, 342 N.W.2d 348 (Minn. Ct. App. 1983) ("*Peoples*"), and *In re Petition of Northern States Power Gas Utility for Authority to Change Its Schedule of Gas Rates*, 519 N.W.2d 921 (Minn. Ct. App. 1994) ("*NSP-Gas*"). CenterPoint fails to reconcile the court of appeals' decision in this case with either *Peoples* or *NSP-Gas*. In both *Peoples* and *NSP-Gas*, the court of appeals recognized that the Commission distinguished the facts between cases, finding that the evidence in the records of those cases supported a different result. *Peoples*, 342 N.W.2d at 353 ("What changed the result in the present Peoples' case was the evidence in the record. The [Commission] did not depart from the principles it established."); *NSP-Gas*, 519 N.W.2d at 925 ("the agency is not bound to a rigid adherence to precedent, and where evidence in the record differs from previous cases, results may differ as well"). Even if CenterPoint's cite to *Westar Energy, Inc. v. Federal Energy Regulatory Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir.

2007) (*Westar*) were relevant, CenterPoint Br. 21, 36 and 41, the Commission has pointed to significant distinctions between the cases.³

B. The Facts At Issue Here Are Substantially Distinct From The Facts Presented In The Cases Cited By CenterPoint As Precedent.

CenterPoint incorrectly argues that *NSP* and *Interstate* involved “similarly situated parties and substantially similar material facts.” CenterPoint Br. 28. As noted, the facts between the cases differ substantially. In neither of the prior cases had the amounts gone unnoticed month after month and year after year, nor had the utility itself indicated the amounts at issue were so small so as to escape notice.

Similar to its brief before the court of appeals, CenterPoint misstates the facts at issue in *NSP*. Although CenterPoint indicates that it was an accounting change, CenterPoint Br. 29, in that case, the error was, “due to an internal *reporting* change,” that was necessitated by circumstances not under the control of the utility Add. 51. *NSP* had continued its existing accounting practice despite a change in billing from its natural gas commodity supplier. The Commission found *NSP*’s error inadvertent. Add. 51. Similarly, in *Interstate*, the company failed to include the transportation charges for synthetic storage gas. Add. 67. The Commission also found *Interstate*’s error “inadvertent.” Add. 68. In contrast, the error here was a deliberate act by CenterPoint to

³ In *Westar*, the Federal Energy Regulatory Commission (“FERC”) refused to grant *Westar*’s request for a waiver to file a revised 2001 report after the deadline but allowed another utility to do so. In contrast to the Commission’s decision at issue in this case, FERC’s explanation that FERC itself caused the delay was not supported by any evidence in the record. *Westar*, 473 F.3d at 1243.

change its accounting methods, without notice to the Commission or the Department, and the unapproved change was implemented incorrectly. CenterPoint repeated its errors month after month for over five years, not noticing the undercollection until the total amount reflected a cumulative balance for the five year period.⁴ The facts present here are simply not the “substantially similar material facts” CenterPoint asserts. These were not inadvertent mistakes, but rather were the result of deliberate actions not drawn to the attention of agencies that have regulatory authority over CenterPoint’s operations.

Further, in neither of the prior cases had the utility gone through the extensive examination of a rate case during the time periods at issue. In the present matter, the amounts at issue continued to go unnoticed after CenterPoint had *twice* gone through the extensive examination of a rate case. If these amounts had been significant enough to impose an excessive burden in each of the years at issue, then the examination of CenterPoint’s financial records during the two rate case reviews should have alerted CenterPoint that errors had occurred which imposed the excessive burden CenterPoint alleges.

CenterPoint asserts that a simple comparison of the amounts at issue is sufficient for determining whether an amount imposes an “excessive burden” on one utility versus another. However, this first step of the variance analysis requires the Commission to determine whether enforcing the rule would impose an excessive burden on the applicant

⁴ CenterPoint continued to misstate the amounts at issue by over \$6 million over a year after CenterPoint had initially filed its 2004-2005 true-up. APP111-APP114.

or others affected by the rule. A certain dollar amount may impose an excessive burden on one company and not on another. The review must analyze all of the facts of the case. Certainly in *NSP* and *Interstate*, the missing amounts were recognized years before the amounts were recognized in the present case.

Further, contrary to CenterPoint's analysis, the Commission did not simply conclude that \$21 million does not impose an excessive burden. The Commission fully considered the facts presented and arguments of the parties and determined that amounts too small to notice do not impose an excessive burden. CenterPoint attempts to inflate the impact by referring only to the total amount accumulated over the four prior true-up years. However, CenterPoint fails to recognize that the appropriate analysis views these amounts on an annual basis. CenterPoint did not realize the amounts were unrecovered during any of the years at issue.

Similarly, CenterPoint presented an analysis showing the yearly impacts exceeded those found to impose an excessive burden in *NSP* in its petition for reconsideration. But CenterPoint was unable to reconcile the fact that in *NSP*, the amounts at issue had not gone unnoticed month after month and year after year for five years, *NSP* had not undergone the review of a rate case during the time period at issue, and *NSP* did not indicate that the amounts were too small on a monthly or yearly basis to be noticed. Accordingly, the Commission looked at all of the facts of this case to determine that the standard for a variance had not been met. Likewise, in *Interstate*, the utility had not undergone the review of a rate case during the time period at issue and *Interstate* did not

indicate that the amounts were too small on a monthly or yearly basis to be noticed. CenterPoint repeatedly cites to *Westar*, a decision of the U.S. Court of Appeals for the District of Columbia Circuit, for the proposition that an agency must identify relevant distinctions between cases. CenterPoint Br. 36 and 43. Although that case is not controlling on this Court, the Commission's decision nonetheless follows the holding in that case where the Commission specifically addressed the manner in which the facts of this case differed from prior cases and where those distinctions were clearly relevant to the determination that a standard for a variance had not been met here.

C. The *Kansas Ad Valorem* Case Does Not Apply.

The standard for granting a variance is that the enforcement of the rule imposes an excessive burden on the applicant or others affected *and* granting the variance does not adversely impact the public interest. CenterPoint has not demonstrated that the up to ten-year mismatch between ratepayers that received the gas and those that would pay does not adversely impact the public interest.

CenterPoint impermissibly attempts to diminish the unprecedented intergenerational inequity in the present case by relying on the Commission's decision in the *Kansas Ad Valorem* tax case. CenterPoint Br. 40. CenterPoint makes the spurious claim that the 10-year difference in ratepayers who will pay the costs and those that received the gas in the present case is not meaningfully distinguishable from the 18-year difference in the *Kansas Ad Valorem* case. CenterPoint Br. 41. The refund of taxes collected under the *Kansas Ad Valorem* tax bears no relationship to the matters at issue

here. The issue in front of the Commission in that case was the manner in which a refund under Minn. R. 7825.2700, subp. 8 (“Refund Rule”) would be distributed. The matter simply did not involve issues related to the True-Up Rule.

The refund at issue in the Kansas Ad Valorem case had been in and continued to be in litigation for several years. The proceeding at the Commission was ultimately triggered by the September 10, 1997 Order of the FERC implementing the decision of the U.S. Court of Appeals for the District of Columbia that the ad valorem tax levied by the State of Kansas was not a state severance tax within the meaning of Section 110 of the Natural Gas Policy Act of 1978, and that refunds would be due going back to 1983. *Order Granting Variances, Requiring Interim Report and Refund Plans*, MPUC Docket No. G999/AA-98-332 (June 2, 1998), RA21. Mobil, a producer who had been assessed and paid the Kansas ad valorem tax and who had recovered that tax in the gas price it charged to pipelines such as Northern, chose to refund to Northern approximately \$30 million. RA21. The refund to Northern included approximately \$12.1 million for Minnesota local gas distribution companies (“LDCs”). RA21. Northern had previously recovered the amounts it paid from its customers, the LDCs, and accordingly passed along the refunds to those LDCs. RA22. The issue before the Commission was how the LDCs should proceed to refund their customers. RA21.

The Refund Rule specifically provided for refunds received from suppliers or transporters of purchased gas and attributable to the cost of gas previously sold, and outlined a methodology for distributing those refunds. Due to the uncertainty of the

amount of the refund, however, there was the possibility that anyone who received an immediate refund could later be subject to a surcharge. RA22. Accordingly, the Commission granted the requested variance and ordered further proceedings so that the final refund amounts could be ascertained. RA25. Further, the variance was specifically granted to avoid customer surcharges in the future. RA22.

Clearly, the issues in the Kansas Ad Valorem case are fundamentally different from those in the instant matter. Not only is the very rule at issue not the same, but the circumstances surrounding the request for a variance are the result of a FERC Order issued after lengthy and protracted litigation. The issue was how to equitably distribute a refund received from a supplier or transporter of natural gas, not whether the refund should be distributed. The circumstances necessitating a refund were certainly not the self-initiated accounting error of the regulated utility.

Further, contrary to CenterPoint's argument, the court of appeals did not find that the Commission's decision could not be reconciled with this case. CenterPoint Br. 41. In fact, although CenterPoint argued to the court of appeals that the Kansas Ad Valorem case applied here, the court of appeals did not address the case at all.

III. THE COURT OF APPEALS' DECISION LEADS TO AN ABSURD RESULT.

Under the court of appeals' analysis, only those utilities that mismanage their operations badly enough will obtain a variance. Those who manage their businesses more effectively will not. Such a result is absurd and fails to fully analyze the requirements of

the rule. CenterPoint's argument, in effect, amounts to a change to the True-Up Rule itself from providing for a one-year lookback period to a limitless lookback period.

Under CenterPoint's analysis, any utility, no matter how big or small, would by right be able to recover any amounts left unrecovered in a prior year so long as the amounts were equal to or greater than those in *NSP* or *Interstate*. Further, if the amount affects the utility's authorized return on equity ("ROE") by ten percent, that amount will thereafter qualify the utility for a variance regardless of the other facts at issue in the case. That is, the utility would go from an *authorized* ROE (providing the utility the opportunity to earn a particular ROE) to a *guaranteed* ROE, in direct contrast to the principles of ratemaking.⁵ This unfairly places the burden entirely on ratepayers for errors later discovered that resulted from management-initiated changes, and it relieves the utility of any responsibility for its actions.

The court of appeals and CenterPoint fail to recognize that variances are always fact- and situation-specific. The Commission carefully considered the circumstances here to find that a standard for a variance had not been met.

Further, while CenterPoint correctly points out that prior to this proceeding, there were only two occasions where utilities requested variances to the True-Up Rule to allow

⁵ The Commission applies the "test year" concept of ratemaking. In determining rates, the Commission looks at revenues, expenses and other costs in a test year. This approach reflects a balancing between the interests of ratepayers and shareholders. It provides an incentive to the utility to keep costs low and protects ratepayers from shouldering unnecessary risks of the utility. See *In re Minnesota Power for Authority to Change Its Schedule of Rates*, 435 N.W.2d 550, 556 (Minn. Ct. App. 1989) (citing *Northwestern Bell Tel. Co. v. State*, 253 N.W.2d 815 (Minn. 1977)).

recovery of unrecovered amounts from prior periods, CenterPoint Br. 26, CenterPoint fails to acknowledge that other utilities have had unrecovered gas costs, but have not always sought a variance to pass those past costs on to future ratepayers. *See Order, In re Review of Northern States Power Company d/b/a Xcel Energy 2005 Annual True-Up Filing*, MPUC Docket Nos. E,G999/AA-05-1403, G002/AA-05-1425 (Feb. 14, 2007), found at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=3781382>.

IV. CENTERPOINT TAKES NO RESPONSIBILITY FOR ITS OWN REPEATED AND PERSISTENT ERRORS.

A. CenterPoint Asks For Recovery That Holds Ratepayers Entirely Responsible For CenterPoint's Mistakes.

It is important to note that ratepayers have no functional control over the utility. Ratepayers play no part in the management of CenterPoint. Nonetheless, CenterPoint asks ratepayers to bear the entire burden of its repeated errors. CenterPoint has not offered to share in any way the costs of its mistakes. Despite clear statutory language precluding the recovery of interest on these amounts, Minn. Stat. § 216B.098, subd. 4 (2006), CenterPoint repeats its argument that it has foregone carrying costs. CenterPoint Br. 11. CenterPoint attempts to reframe its assessment by indicating it has suffered the “time value of money” due to its errors. CenterPoint Br. 41. Since CenterPoint is prohibited by law from recovering any interest on the gas costs at issue, CenterPoint simply cannot rely on foregone interest or the time value of money as evidence of it sharing responsibility with its ratepayers.

CenterPoint attempts to inflate the impact of the unrecovered amounts on the company, and de-emphasize the impact on ratepayers. Throughout this proceeding, CenterPoint has paid little or no regard to the impact of this amount on its ratepayers. CenterPoint implies that an impact of “approximately” \$30 per customer is of little consequence and does not adversely affect the customer, regardless of ability to pay or whether the costs were incurred by that customer.⁶ CenterPoint Br. 10. In comparison, CenterPoint argues that the amounts at issue, amounts that went unnoticed month after month and year after year, impose an excessive burden on CenterPoint, the State’s largest natural gas distribution utility.

Although CenterPoint argues that “over-charged costs must be refunded to customers,” CenterPoint Br. 25, CenterPoint fails to acknowledge that the rule provides for a one-year look back period. Whether over-charged costs would be required to be refunded in any particular circumstance would be a fact-specific inquiry.

B. CenterPoint Failed To Avail Itself Of The Rule Provision That Provides For Timely Recovery Of Gas Costs.

Although CenterPoint states that the costs at issue in this case were prudently incurred, whether or not the costs were prudently incurred is not the issue before this Court. Rather, the issue is, when CenterPoint failed to file for recovery as specifically

⁶ CenterPoint appears to have calculated its analysis of the monthly bill impact per customer. CenterPoint Br. 10. However, this figure is not found in the record and should be disregarded.

provided for under the True-Up Rule, whether the standard for a variance had been met that would permit CenterPoint to recover past gas costs from future ratepayers.

Contrary to CenterPoint's claims, the Commission has not denied it the opportunity to recover these gas costs. CenterPoint Br. 12. CenterPoint fails to address that it has had the opportunity for each of the years at issue to recover these amounts and has failed to do so. Add. 1-46. Further, the review of those annual proceedings were lengthy processes, as the orders reflect. Add. 1-46. For each of the years at issue, CenterPoint filed an annual true-up report on September 1 following the end of the most recent true-up year. Add. 1-46. The review of each of those filings lasted approximately a year or more. Add. 1-46. Despite this repeated and lengthy review, however, CenterPoint did not notice that these amounts were unrecovered. Amounts too small to notice simply do not impose an excessive burden.

CenterPoint argues repeatedly that it is the policy of the Legislature that gas costs be recovered. CenterPoint Br. 24. However, CenterPoint fails to cite to any provision that it is the policy of the Legislature to allow a utility to recover from future ratepayers the past costs that were unrecovered due to the utility's own errors. In fact, there is no such policy. The statutes and rules provide for timely recovery of costs incurred. If a utility fails to avail itself of those opportunities for cost recovery, it is not the ratepayer's burden to make up the difference.

V. CENTERPOINT FAILS TO MEET ITS BURDEN TO DEMONSTRATE THAT IT MEETS THE STANDARD FOR A VARIANCE.

It is CenterPoint's burden to demonstrate that it meets the standard for a variance. It is not the Commission's burden to prove that it does not. CenterPoint erroneously argues that the Commission "speculated" that CenterPoint may have recovered these amounts in the two rate cases that had proceeded during the time period at issue. CenterPoint Br. 2, 13. CenterPoint fails to acknowledge the manner in which the Commission addressed the prior rate cases. Contrary to CenterPoint's and the court of appeals' statements, the Commission did not state that the rate cases demonstrated that CenterPoint had been fully compensated with respect to these costs.⁷ Rather, the Commission found that there was no evidence CenterPoint had not been fully compensated. This is a significant distinction. CenterPoint has not met its burden of proof.

Further, the Court must disregard CenterPoint's reference to the independent auditor's report. First, the audit is not part of the record in this proceeding and was ordered as part of the on-going investigation of the 2004-2005 true-up year not at issue in this case. APP20. Second, CenterPoint cites only to snippets from the auditor's report and impermissibly represents that it confirms the invalidity of the Commission's

⁷ Further, whether CenterPoint has been "fully compensated" during the time period at issue does not depend on whether there has been dollar for dollar recovery of the amounts at issue here. Rather, the issue is whether CenterPoint has been made whole from an earnings standpoint. R. 99 at 9. There was no evidence presented that indicated CenterPoint had not been fully compensated during these time periods.

“suggestion” that the amounts at issue here were recovered in the rate cases. CenterPoint Br. 13.⁸

CenterPoint’s statements are entirely improper. The court of appeals expressly rejected CenterPoint’s attempt to supplement the record in this proceeding with the report. The report is subject to review in the first instance by the Department of Commerce, the Office of the Attorney General and, finally, the Commission itself. That review is currently pending. Second, CenterPoint’s statement must be rejected as misstating the Commission action in this proceeding. The Commission did not state that the amounts at issue were recovered in the rate cases. Rather, the Commission indicated there was no evidence that the intervening rate cases did not fully compensate CenterPoint during the years at issue. APP17. The evidence did support a finding that undercollection of gas costs had imposed an excessive burden on CenterPoint or its shareholders.

The Commission recognizes that it initially incorrectly stated the amount at issue. The Staff briefing papers in this matter fully describe how the error developed. R. 93 at 8-10. However, the Commission addressed its mistake on reconsideration. Contrary to CenterPoint’s argument, however, the Commission’s analysis and review reflects that the Commission took a “hard look” at this issue and thoroughly addressed whether the standard for a variance had been met. The Commission explained that while it clarified

⁸ CenterPoint impermissibly states that the report disproves the Commission’s claims that the presence of the rate cases are relevant. CenterPoint Br. 13, n.4. This Court should disregard such statements as clearly outside of the record.

this amount, it reaffirmed its rationale for denying the variance requested as set forth in that same order.⁹ APP43. The Commission recognized that the amounts were the result of CenterPoint's self-initiated accounting errors, the errors were repeated every month for a five-year period, and the Company did not notice the errors until five years after the accounting change had been initiated. APP43. Contrary to CenterPoint's argument, the Commission carefully considered its error and found the evidence in the record still did not support granting a variance.

CenterPoint repeatedly emphasizes that it had to file a form 8-K with the Securities and Exchange Commission, informing investors of the amounts CenterPoint failed to recover in its annual true-ups from 2000-2001 through 2003-2004. CenterPoint Br. 41-42. CenterPoint fails to indicate how this is relevant to the determination of whether the enforcement of the True-Up Rule imposes an excessive burden on CenterPoint. For purposes of its decisionmaking, the Commission accepted as true that the amounts were as described.

CenterPoint surprisingly considers the Commission's comparison of the amounts at issue to total costs of gas during the time period at issue an "irrelevant yardstick." CenterPoint Br. 33. However, this is the analysis that CenterPoint itself presented in its argument before the Commission and that the Department explained was the only "applies to apples" comparison provided. APP104; R. 76 at 8. CenterPoint's argument

⁹ Accordingly, CenterPoint's assertion that the Commission's rationale for its decision is "obsolete" is clearly in error. CenterPoint Br. 39.

that denial of even a small fraction of gas costs will affect CenterPoint's profits is not the issue. The issue here is whether enforcing the True-Up rule imposes an excessive burden and does not adversely affect the public interest.

The Commission sets rates that provide a regulated utility with the opportunity to earn a rate of return. The Commission cannot guarantee the utility will earn the rate of return. If, due to the utility's own action, it fails to earn its authorized rate of return, that is an issue for the utility and its shareholders. Ratepayers are not required to make up the difference. As recent market developments have demonstrated, companies do mismanage their operations and have to deal with the consequences of their mistakes. CenterPoint simply cannot be allowed to use the regulated process to make ratepayers responsible for protecting CenterPoint's shareholders from CenterPoint's management errors.

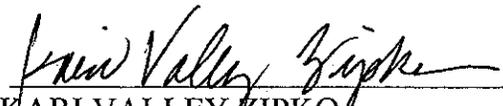
CONCLUSION

For the reasons set forth above, the Commission respectfully requests this Court reverse the decision of the court of appeals and affirm the Commission's orders.

Dated: September 29, 2007

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota


KARI VALLEY ZIPKO
Assistant Attorney General
Atty. Reg. No. 330413
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 296-1408 (Voice)
(651) 296-1410 (TDD)

CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 6,516 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.


KARI VALLEY ZIPKO

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