

No. A11-352

STATE OF MINNESOTA

IN COURT OF APPEALS

ALLETE, Inc. d/b/a Minnesota Power,

Relator,

vs.

Minnesota Public Utilities Commission

Respondent.

**BRIEF AND APPENDIX OF THE RESIDENTIAL AND
SMALL BUSINESS UTILITIES DIVISION, STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUE

Did the Commission act in accordance with its statutory authority when it found that “exigent circumstances” existed and reduced Minnesota Power’s interim rate?

The Commission acted in accordance with Minn. Stat. § 216B.16, subd 3(b) and other applicable law in determining that exigent circumstances existed and that as a result of these exigent circumstances, Minnesota Power’s interim rate would be reduced.

Apposite Authorities

Minn. Stat. § 216B.16, subd. 3

Minn. Stat. § 216B.27

Minn. R. 7845.7000

Minn. R. 7845.7400

In re Petition of Inter-City Gas Corp. for Authority to Change its Schedule of Rates For Gas Serv. in Minnesota, 389 N.W.2d 897 (Minn. 1986)

In the Matter of the Application of Peoples Natural Gas Co. for Authority to Increase Rates for Gas Util. Serv. in Minnesota, 389 N.W.2d 903 (Minn. 1986)

In re Petition of Otter Tail Power Co. for Authority to Increase its Rates for Electric Serv. in Minn., 417 N.W.2d 677 (Minn. Ct. App. 1988)

STATEMENT OF FACTS

On December 30, 2009, the Minnesota Public Utilities Commission (“Commission”) issued an Order Setting Interim Rates (“Interim Order”) wherein it determined “on its own motion, [to] reduce the Company’s total interim rates revenue requirement, based on a finding of exigent circumstances and careful balancing of the competing interests and equities of the Company and ratepayers.” Relator’s Addendum (“Rel Add.”) 3. The Commission identified that “[t]hree extraordinary circumstances combine to create exigent circumstances in this case: the unprecedented size of the proposed rate increase (nearly twice the size of any other increase requested by this company in the past 22 years); the extremely short window (one day) between the effective date of the Company’s last rate increase and this rate increase request; and the worst economic downturn in the past 60 years.” *Id.* The Commission noted that “[t]hese facts are generally known and based on publicly available information.” *Id.* at fn. 4. As demonstrated by the record, the Commission acted in accordance with its statutory authority in determining that exigent circumstances existed and reducing Minnesota Power’s (“MP”) interim rate.

MP has a history of requesting extremely large rate increases that have had no relation to the final rate increase approved by the Commission. Rel. Add. 3-4; Relator’s Appendix (“Rel. App.”) 22-23. In its 1987 rate case, filed May 1, 1987, MP requested an annual rate increase of \$4,353,474. Rel. App. 22. The Commission not only refused the rate increase but ordered a decrease in rates of \$8,342,232, a reduction of over \$12 million dollars. *Id.* In its 1994 rate case, filed January 3, 1994, MP requested an

annual rate increase of \$34.35 million. *Id.* The Commission found that MP was not entitled to a rate increase anywhere near \$34.35 million. Rel. App. 22. Instead, the Commission ordered that effective November 22, 1994, rates would be increased by \$22,929,330 and effective January 1, 1995, rates would be set at a lower increase of \$18,984,476. *Id.* In its rate case filed May 2, 2008, MP requested a \$45 million rate increase. *Id.* On October 29, 2009, the Commission ordered a rate increase of \$20,421,631, more than 50% lower than requested. *Id.*

On November 2, 2009, four days after the Commission approved the just-mentioned \$20 million final rate increase for MP, and one day after the final rates took effect, MP filed a new rate case seeking an additional \$81 million rate increase. Rel. App. 23. The Commission approved significantly lower rates than MP sought and granted a \$53,530,424 rate increase. Rel. App. 127. Accordingly, over the last two decades, the Commission considered four rate cases by MP and each time set the rates far below what MP asserted it needed:

Rate Case Yr	Increase Requested	Increase Approved	\$ Difference	Percentage Difference
1987	\$4,353,474	\$(8,342,232)	\$(12,695,706)	(192%)
1994	\$34,350,000	\$18,984,476	\$(15,365,524)	55%
2008	\$45,000,000	\$20,421,631	\$(24,578,363)	45%
2009	\$81,000,000	\$53,530,424	\$(27,363,516)	66%

As part of its November 2, 2009 rate filing, MP sought an interim rate increase of \$73,296,560, significantly more than the \$53,530,424 that the Commission ultimately approved as just and reasonable rates for MP. Rel. App. 1-5; 127. In response to MP's excessive interim and final rate increase request and the fact that its rate case followed on the heels of a material rate increase, ratepayers objected to the interim rate increase (and later the final rate increase).

On November 2, 2009, the Commission sent a "Notice of Comment Period on Acceptance of Setting for Contested Case Hearing" to "Potentially Interested Parties." Residential Utilities Division Appendix ("RUD App.") 1-9. On November 13, 2009, the Large Power Interveners ("LPI's") publicly filed an unsolicited letter with the Commission as an immediate response to MP's 2009 rate case filing. Rel. App. 7-8. The LPI's are large companies within MP's service territory and included: 1) ArcelorMittal USA; 2) UPM-Blandin Mill; 3) Boise Inc.; 4) Hibbing Taconite Company; 5) Mesabi Nugget Delaware, LLC; 6) NewPage Corporation; 7) Polymet Mining, Inc.; 8) Sappi Cloquet, LLC; 9) United States Steel Corporation; and 10) United Taconite LLC. Rel. App. 7 fn. 1. The LPI's urged the Commission to determine that the "size and timing of the increase requested in the 2009 Rate Case warrant a modification to Minnesota Power's interim rate schedule." Rel. App. 7. The LPI's addressed the fact that "the timing for this increase could not be worse for Minnesota Power's customers," especially considering that the \$20 million increase had only gone into effect the day prior to MP's rate case filing. *Id.* With regard to the economic condition, the LPI's further elaborated that:

Each class of customers on the Minnesota Power is currently feeling the pinch of the recession and \$20 million increase from the 2008 rate case. No customer should be forced to bear a 17% increase on the heels of a \$20 million increase in the present economy. LPI believes the unprecedented state of the economy justifies a finding of exigent circumstances by the Commission under section 216B.16 subd. 3(b) of the Minnesota Statutes to modify the interim rate schedule and cap the interim rate increase at 5%.

Rel. App. 7-8.

The Office of the Minnesota Attorney General, Residential and Small Business Utilities Division (“OAG-RUD”) also publicly filed an unsolicited letter on November 13, 2009 in response to MP’s interim rate request. Rel. App. 9. Pursuant to Minn. Stat. § 8.33, the Attorney General “is responsible for representing and furthering the interests of residential and small business utility consumers through participation in matters before the Public Utilities Commission involving utility rates ... to residential or small business utility customers.” Minn. Stat. § 8.32, subd. 2.¹ In its November 13, 2009 letter, OAG-RUD noted that MP “filed its current rate increase request before the ink dried on the Commission’s recent Order to approve an increase in MP’s rates by over \$20 million, most of which was borne by the residential and small business customer classes.” Rel. App. 9. OAG-RUD also pointed out the state of the economy in MP’s service territory:

With near-record unemployment rates affecting the Minnesota Power service territory, and with MP’s customers entering into the winter electric heating season, combined with the recent imposition of higher rates and the threat of interim rates on top of that, the OAG asserts that no interim rate increase is “just and reasonable” at this time.

¹ This duty is distinct from the OAG’s representation of the Commission or Department of Commerce.

Id. The OAG-RUD urged the Commission to find that “pursuant to Minn. Stat. § 216B.16 subd. 3(b) and previous Commission Orders, such ‘exigent circumstances exist’ as would require the Commission to refrain from imposing any interim rate increase on the residential and small business customer classes.” *Id.*

Boise Inc. (“Boise”) an LPI and large MP customer also publicly filed unsolicited comments on November 13, 2009 arguing that exigent circumstances existed to not impose the high interim rate requested by MP. Rel. App. 10-13. Boise stated that the “Mill is vital to the economy of northern Minnesota, employing over 800 local residents, with an annual payroll of over \$70 million” and providing “an estimated 360 secondary jobs to the local economy and state tax base.” Rel. App. 11. Boise also stated that it “is the largest taxpayer in the county and spends more than \$100 million annually within Minnesota on goods and services used in its paper manufacturing process, making the Mill’s vitality critical to the vitality of the northern Minnesota economy.” Rel. App. 11-12. With regard to its manufacturing operations, Boise stated that it “relies on purchased power for over 50% of its needs, making the impact of the proposed MP rate increase significant to Boise’s cost structure.” Rel. App. 12. Boise noted that the products it “manufactures at the Mill are widely available and can be readily produced by competitors including those with domestic operations and others operating in low cost regions like Brazil.” *Id.* Boise explained that “market conditions beyond Boise’s control determine the price for the commodity products that Boise manufactures, and the price for any one of these products may fall below Boise’s costs, particularly if the Mill must face the kind of staggering electric power cost increases proposed by MP in its

Application.” *Id.* Boise stated that “*any* increases in the Mill’s cost structure will have serious impacts on the Mill.” Rel. App. 13. In discussing the severe economic conditions in MP’s service territory, Boise stated:

As the Commission is well aware from MP’s last rate case, the economic slowdown has hit northern Minnesota hard, leading to production cutbacks at several of MP’s Large Power customer facilities. The Mill has often operated at reduced levels over the past year in order to match production with weaker customer demand. Moreover, Boise terminated its salaried pension plan and froze employee salaries earlier this year to help manage costs in this difficult environment. Boise recognizes that the pain of the economic downturn has been felt by *all* of MP’s customer classes, not just Boise and not just the large Power class. However, the fact remains that Large Power customers such as Boise are already struggling and significant cost increases at this time will almost inevitably lead to further reductions in production levels, negatively affecting the overall regional economy and, in turn, negatively affecting members of MP’s other customer classes. In such an environment, Boise respectfully submits that ‘exigent circumstances’ exist, such that no interim rate increase should be imposed on Boise or other Large Power customers. *See* Minn. Stat. § 216B.16, subd. 3(b). At most, no class of customers should be forced to bear more than a 5% interim rate increase, as proposed by LPI.

Id.

MP filed Reply Comments Pursuant to Notice of Completeness and addressed the comments filed by LPI, Boise, and OAG-RUD regarding its interim rate. Rel. App. 14. MP recognized the distressed economy and the impact its request would have on its ratepayers and stated that “the rate increase [MP] seeks will not be well received by any of its ratepayers, especially in these hard times.” Rel. App. 16.

The *Staff Briefing Papers* (“Briefing Papers”) provided to the Commission for the December 15, 2009 meeting date raised the issue of “[s]hould this filing be accepted, the proposed rates suspended, this matter referred to the Office of Administrative Hearings,

and interim rates set as requested by the Company?” Rel. App. 21-52. It is standard practice in rates cases for the Commission to hold a preliminary meeting to determine these three issues, which includes the setting of interim rates. The Briefing Papers outlined the three prior rate cases filed by MP and the Commission’s ultimate orders for each case. Rel. App. 22-23. The Commission Staff also included a narrative under the topic of “Should Exigent Circumstances be Found on a Broad or Global Basis, Limiting the Request for an Interim Increase?” and recapped the arguments made by LPI, Boise, and OAG-RUD. Rel. App. 36-39. With regard to the economic issue, the Briefing Papers stated:

On the other hand, the state of the economy cannot be ignored. MP is also a part of the economy. There may be a point where the conditions of the service territory cannot sustain further increases. What if the increase causes large paper facilities to close? Would that exacerbate the downward spiral causing the need for more rate increases which may drive more load off of the system? Will proposals to bypass MP’s system be reintroduced? To this extent, is it possible to ignore the state of the economy?

Rel. App. 43. The Briefing Papers recognized that “customers would prefer not to pay excessive interim rates in this economy, even with the assurance of a refund, [and thus] it is desirable that interim rates be set at a level that reasonably approximates the outcome” and that “there is no way to determine the final outcome, until the Commission meets for the final determination.” Rel. App. 44. The Commission Staff noted that “history suggests that the requests for final rate increases filed by utilities are considerably larger than the final amount approved” and provided the following data as respected MP’s rate case history:

- MP 2008 rate case, sought about \$45 million, awarded about \$20.5 million, about 45%
- MP 1994 rate case, sought about \$34.5 million, awarded about \$19 million, about 56%
- MP 1987 rate case, sought about \$4.4 million, awarded about (\$8.5 million)
- Xcel 2008 rate case, sought about \$156 million, awarded about \$91 million, about 58%

Rel. App. 44. The Commission Staff then raised the question of whether there would “be [a] basis to find exigent circumstances based on the actual experience with MP rate filings, coupled with the state of the economy, and limit the interim rate increase to approximately 60% of MP’s \$81 million request for final rate increase?” *Id.*

On December 3, 2009, the Commission issued its “Notice of Commission Meeting” (“Notice”) and indicated that “the items listed on the attached agenda will be heard at the Commission’s regularly scheduled meeting on Tuesday, December 15, 2009 at 9:30 AM.” OAG-RUD App. 10. Item No. 3 on the Agenda referenced MP’s rate request and identified the following agenda items:

Should this filing be accepted, the proposed rates suspended, this matter referred to the Office of Administrative Hearings and interim rates set as requested by the Company?

Id. This Notice was served on many potentially interested parties. *Id.* On December 15, 2009 the Commission, pursuant to its standard practice, held its meeting and deliberated on the issue of “should the filing be accepted, should the proposed rates be suspended, and should the matter be referred to the Office of Administrative Hearings for a contested rate case proceeding and “what level of interim rates should be set.” Transcript of December 15, 2009 Commission Meeting (“T.”) 2. Chairman Boyd stated that he “would

like to hear from the parties on the issue of exigency” noting that “it would only be reasonable for us to hear a little bit more about their positions on why they think we’re in exigent circumstances.” Chairman Boyd also recognized that “it is a unique period of time in the economy.” T. 11-12. Commissioner Wergin requested that comments be limited to exigent circumstances and “not go to the merits of the case.” T. 12.

At the December 15, 2009 commission meeting, Energy CENTS spoke to the Commission on the issue of exigent circumstances in order “to provide a little more context on the economic circumstances in the 24 counties within Minnesota Power’s service territory.” T. 29. Energy CENTS advised the Commission that in all but two of the 24 counties in MP’s service territory, unemployment had risen since MP’s last rate case, and significantly in a number of counties. T. 29-30. Energy CENTS provided examples of these increased unemployment rates including: Lake County, unemployment raised from 4.6 to 8 percent; Chisago County, unemployment raised from 6 to 8.4 percent; and in Mower County, unemployment raised from 6.3 percent to 9 percent. T. 30. Further explaining the stressed economy in MP’s service territory, Energy CENTS stated:

And my fear is, particularly given the timing, these folks that are getting hit with enormous rate increases, particularly those who heat with electricity, we’re going to see increased inability to pay and service disconnections at exactly the moment when we should be trying most diligently to keep people connected to service. The whole issue that, well this money could be refunded doesn’t really help anybody who is in the position of having to pay that kind of increase upfront only with the promise of a potential refund later, when getting through the winter is the most immediate concern.

Id.

Boise also outlined for the Commission the dire financial realities in MP's service territory:

Mr. Anderson noted that this is in large part a rate base case, and certainly there's a significant degree of truth to that statement and it's certainly, I think, unprecedented also in my memory that we have a company looking to increase its investment by nearly 50 percent, 43 percent ... in a one-year span simultaneously with its service territory facing the most serious economic crisis in over a generation. But getting back to Boise's specific concerns and the record that we've put before you in our written comments is we've discussed Boise's been operating at reduced levels already for over a year, Boise's terminated its pension plan, it's frozen its salaries. It operates in a very competitive global market where it is highly sensitive to any cost increases and simply isn't in the position of absorbing increases of the nature that we're talking about here when customers like Boise face the circumstances and the option is to further reduce costs somehow, often by further reducing production. And that's obviously not good for anyone. It's a tough spot for MP to be in, it's a tough spot for Boise to be in, it's a tough spot for you to be in. But we believe this does qualify as exigent circumstances.

T. 19-20. LPI concurred and stated:

... this is the worst recession in decades. As Minnesota Power's own testimony notes, taconite production is at its lowest point since 1964. Industry is struggling, but so are individuals. People have been laid off at their jobs and this is ... a service territory issue that all rate payers are facing. And we believe that the--these economic conditions warrant a finding of exigent circumstances ...

T. 23-24.

The OAG-RUD acknowledged that "if these are not exigent circumstances it's difficult to know what would be exigent circumstances" and stated that it is "not a matter of dispute that the service territory of Minnesota Power is suffering from a deep recession and that is very difficult for ratepayers to be hit with another and much larger rate increase at this time." T. 13-14.

In discussing the issue of exigent circumstances, Commissioner O'Brien noted that in his view "we do have exigent circumstances" and described them as "highly significant and painful levels of unemployment, further reductions in government service at state, county, and local units of government, aligned expenditures with available revenues, of course the onset of cold weather, and a new and recent large rate increase within a matter of months of these proposed interim rates." T. 43. Commissioner O'Brien further stated that it was appropriate to "balance interests" and that the Commission cannot "accept the company's proposed interim rates without an opportunity or reflection or adjustment as we are representing the public interest in an attempt to determine what is fair and reasonable as we balance those interests." *Id.* Commissioner Pugh noted that the Commission has "to kind of balance who is more likely to survive the next 13 months if somebody either overpays or underrecovers ... and if we have any doubts we have to resolve that in favor of the ratepayers." T. 50-51.

On December 30, 2009 the Commission issued its Order Setting Interim Rates ("Interim Order"). Rel. Add. 1-5. The Commission found that "three extraordinary circumstances combined to create exigent circumstances" to justify a reduction in the interim rate request. Rel. Add. 3. First, the unprecedented size of the proposed rate increase (nearly twice the size of any other increase requested by this company in the past 22 years). *Id.* In this rate case, MP requested \$81,000,000 compared to previous rate increase requests ranging from \$4.4 million to \$45 million. *Id.* Second, the Company filed its rate case one day after the effective date of MP's last rate case went into effect whereas its prior rate cases were filed in 1987, 1994 and 2008. Rel. Add. 3. Third, "the

nation - and Minnesota Power's service territory - are in the grip of a severe economic downturn, marked by widespread and persistent unemployment and reduced commercial and industrial output." *Id.*

In its Interim Order, the Commission stated that the "requested 17% increase in the price of electricity, an essential service for every household and business in the Company's service territory, raises serious concerns about rate shock and economic harm for the Company's ratepayers." Rel. Add. 3. The Commission considered MP's position and noted that "the other side of the equation is the impact on the Company of reducing its interim rate request." *Id.* In reviewing the historical record, the Commission identified that over the past 22 years the revenue amount ultimately approved by the Commission had never exceeded 56% of MP's initial rate request. *Id.* The Interim Order further addressed that the refunds provided by section 216B.16 "may not make some ratepayers whole" and that households and businesses "struggling under the current adverse economic conditions - especially given the magnitude of this rate increase and its nearness in time to the last rate increase - may face economic deprivations, business losses, and even disconnections that an eventual refund would not redress." Rel. Add. 3-4. Based on these circumstances, the Commission appropriately found "exigent circumstances." Rel. Add. 4.

The Commission determined that "the most reasonable and equitable course of action under these exigent circumstances is to reduce the Company's interim rates revenue requirement to 60% of its rate increase request, [or \$48.5 million,] an amount slightly in excess of any final revenue requirement found in previous Company rate cases

in the last 22 years.” *Id.* MP’s ratepayers had already been paying an interim rate increase from MP’s 2008 rate case of \$35.5 million for the period from August 1, 2008 until January 1, 2010, when final rates of \$20.1 million were implemented, and on that same date MP’s ratepayers were hit with the interim rate increase in the current rate case of \$48.5 million, which was in place for 17 months. Rel. App. 42.

In its final order setting rates, the Commission ultimately approved a significantly lower rate increase than requested by MP: \$53.5 million versus the requested \$81 million. Such final rates were approximately \$5 million more than the level of interim rates. Rel. App. 59-130.

With regard to the residential and small commercial ratepayers, these classes of customers had been paying an exorbitant rate increase of 11.34% since January of 2010 under the interim rates approved. The Commission determined in November of 2010 that the just and reasonable rates were actually a 3.9% increase for the residential and 5.4% for the small commercial classes, not the 11.34% interim rate. *Id.* Had the Commission not ultimately lowered the interim rate request based on a finding of “exigent circumstances”, these residential and small commercial ratepayers would have had to pay even higher rates during the interim rate period. Further, as the overall final rate increase is greater than the interim rate increase, these residential and small commercial class customers will not receive any refund for the exorbitant rates they paid during the interim rate period, instead they will be surcharged. Yet, MP files this appeal seeking to recover the \$5 million it was not awarded in interim rates, and argues that in this economic recession the Commission was required by law to ignore exigent circumstances and make

overburdened ratepayers pay an additional \$27.3 million in interim rates (i.e. an interim rate of over \$73 million) so that MP could hold and use the \$20 million in excess of final rates during the pendency of the rate case.

LEGAL ARGUMENT

I. THE COMMISSION REDUCED MINNESOTA POWER'S INTERIM RATE IN ACCORDANCE WITH MINNESOTA LAW AND PURSUANT TO ITS STATUTORY AUTHORITY.

Minn. Stat. § 216B.16 entitled "Rate Change; Procedure; Hearing" outlines the statutory process for a public utility to change its rates. Minn. Stat. § 216B.16 (2010).

Subd. 3 of Section 216B.16 sets forth the process for the Commission to set interim rates:

Subd. 3. **Interim rate.** (a) Notwithstanding any order of suspension of a proposed increase in rates, the commission shall order an interim rate schedule into effect not later than 60 days after the initial filing date. The commission shall order the interim rate schedule ex parte without a public hearing. Notwithstanding the provisions of sections 216.25, 216B.27, and 216B.52, no interim rate schedule ordered by the commission pursuant to this subdivision shall be subject to an application for a rehearing or an appeal to a court until the commission has rendered its final determination.

(b) Unless the commission finds that exigent circumstances exist, the interim rate schedule shall be calculated using the proposed test year cost of capital, rate base, and expenses, except that it shall include: (1) a rate of return on common equity for the utility equal to that authorized by the commission in the utility's most recent rate proceeding; (2) rate base or expense items the same in nature and kind as those allowed by a currently effective order of the commission in the utility's most recent rate proceeding; and (3) no change in the existing rate design. In the case of a utility which has not been subject to a prior commission determination, the commission shall base the interim rate schedule on its most recent determination concerning a similar utility.

...

Id. at subd. 3. As the record demonstrates, the Commission followed the law in reducing MP's interim rate due to exigent circumstances.

A. Minnesota Power's Argument That The Commission Had to Follow the Statutory Formula After Finding Exigent Circumstances Violates the Plain Language of the Statute.

Minn. Stat. § 216B.16, subd. 3 is clear and unambiguous that *if no exigent circumstances exist*, the Commission is to follow the formula for determining interim rates set forth in 216B.16. Minn. Stat. § 216B.16, subd. 3 (2010). Conversely, *if exigent circumstances exist*, the Commission does not follow the formula for determining interim rates set forth in section 216B.16. *Id.* It is simply nonsensical to argue that whether or not exigent circumstances exist, the Commission still must follow the statutory formula. To read it as MP argues would render the statute meaningless.

Minnesota law requires that "every law shall be construed, if possible, to give effect to all its provisions" and when, as here "the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16 (2010). This Court and the Minnesota Supreme Court have previously agreed. *See In re the Application of Peoples Natural Gas. Co. for Authority to Increase Rates for Gas Utility Service in Minn.*, 389 N.W.2d 903, 907 (Minn. 1989)(section 216B.16, subd. 3 permits departure from the statutory formula when there are exigent circumstances); *In re Petition of Otter Tail Power Co. for Authority to Increase its Rates for Electric Service in Minn.*, 417 N.W.2d 677, 680 (Minn. Ct. App. 1988)(the Commission should calculate interim rates in accordance with the statute, unless exigent circumstances exist).

According to MP, “the context of the ‘exigent circumstances’ language limits its application only to the elements of the interim rate formula.” MP Brief at 27. Thus, according to MP, “an ‘exigent circumstance’ must be relevant to the specific formula in the statute, i.e. one that impacts the Company’s cost of capital, rate base, revenues, or expenses.” MP Brief at 27-28. The statutory language, “Unless the commission finds that exigent circumstances exist, . . .” is a conditional clause, such that only if exigent circumstances do *not* exist will the elements of the interim rate formula apply. Because the Commission found exigent circumstances, the interim rate formula did not come into play in setting interim rates.

However, if the Court followed MP’s tortured reading of the statute, even when finding exigent circumstances, the Commission would somehow have had to base interim rates on MP’s cost of capital, rate base, revenues, or expenses. However, MP does not provide any examples or guidance on how the Commission could find exigent circumstances and still adhere to the interim rate formula. MP’s construction is a logical impossibility, counter to the statutory presumption that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable.” Minn. Stat. § 645.17(1) (2010).

The Commission appropriately varied from the statutory formula in setting rates due to its finding of exigent circumstances.

B. There is No Law Dictating the Interim Rate Calculation When Exigent Circumstances Exist.

Minn. Stat. § 216B.16, subd. 3, does not dictate how rates are to be set when exigent circumstances exist. Rather, it is silent on that issue. This is not surprising as it would be difficult, if not impossible, for the legislature to consider every possible scenario that could be an “exigent circumstance” and then set forth a new method to determine the interim rate for each scenario. Instead, it is left to the Commission to determine the interim rates when exigent circumstances exist and the Commission appropriately fulfilled that role.

While LPI, Boise, and OAG-RUD requested an interim rate increase of 0% to 5%, the Commission disagreed with these requests and determined, on its own motion, the appropriate interim rate. The Commission determined this rate by balancing the interests of MP and its ratepayers and based on the best information it had available to it, MP’s historical rate cases. After balancing these interests, the Commission ordered an interim rate increase of 11.34% or \$48.5 million, 60% of MP’s proposed \$81 million². See *In Re Petition of Inter-City Gas Corp. for Authority to Change its Schedule of Rates for Gas Serv. in Minnesota*, 389 N.W.2d 897, 903 (Interim rates must also be just and reasonable). The Commission acted in accordance with the law by using its well reasoned judgment in setting MP’s interim rate.

² The interim rate increase was much more aligned to MP’s final rates than what MP proposed, i.e. \$48.5 million to \$53.5 million, versus \$73.3 million to \$53.5 million.

II. THE COMMISSION WAS CORRECT IN DETERMINING THAT EXIGENT CIRCUMSTANCES EXISTED.

The Commission clearly had a basis to find exigent circumstances. The Commission had all the information it needed, absent the unsolicited comments, to recognize that Minnesota, and particularly MP's service territory was, and continues to suffer, from "the worse economic downturn in the past 60 years." It is incontrovertible that these are difficult economic times, more difficult than most have seen in their lives. There was no need for "extrinsic evidence" to prove this fact. Further, there was no "extrinsic evidence" needed for the Commission to recognize that this was the largest rate increase MP had filed in over 22 years and that it followed one day after the implementation of its prior rate case's final rates.

The Commission listened to concerned ratepayers and those who spoke on behalf of residential and small commercial customers as to the impact the severe economy was having on them. The stories were the same -- ratepayers simply could not afford another large interim rate increase one day after the final rates were to be implemented in the worst economy in decades. The LPI's told MP and the Commission that MP's customers were already "feeling the pinch of the recession" and that the "timing for this increase could not be worse for Minnesota Power's customers." Both the OAG-RUD and Energy CENTS made note of the high unemployment rates in MP's service territory and the difficulty these ratepayers were going to have absorbing another rate increase just as they were entering the heating season. Boise explained the real effects that another high interim rate increase would have not just on its own business, but the ripple effects that

would occur if Boise lost more of its customer base due to the increased costs and how that could ultimately impact the entire service territory as well as further exacerbate MP's financial concerns. Boise, which stated that it is directly and indirectly responsible for sustaining over 1,200 jobs in MP's service territory and spends over \$100 million annually in Minnesota on goods and services, expressed very real concerns that any increase in rates could have very serious impacts on its business. Boise and other LPI's had already reduced expenses and reduced production as a result of the economic slowdown. Boise noted that further cost increases could lead to further reductions in production levels, negatively affecting the overall regional economy and, in turn, negatively affecting other MP ratepayers and MP as well.

The Commission heard these comments and balanced them with the comments made by MP. After balancing the interests of MP and its ratepayers, the Commission appropriately determined that exigent circumstances existed.

III. MINNESOTA POWER HAS NO ARGUMENT THAT THE COMMISSION VIOLATED MINN. STAT. § 216B.16 BY CONSIDERING UNSOLICITED COMMENTS REGARDING EXIGENT CIRCUMSTANCES.

MP argues that by accepting unsolicited comments from Boise, LPI and OAG-RUD regarding interim rates the Commission violated Minn. Stat. § 216B.16's requirement that the "Commission shall order the interim rate schedule ex parte without a

public hearing³.” Minn. Stat. § 216B.16, subd. 3(a)(2010). MP waived this argument by not raising it in its request for rehearing and, in any event, is incorrect.

A. Minnesota Power Waived Any Argument that the Commission Could Not Consider Comments by Boise, LPI, OAG-RUD and Energy CENTS.

Minn. Stat. § 216B.27 Subd. 2 provides what issues can be appealed after a final rate case:

Subd. 2. Contents of application; condition precedent for review. The application for a rehearing shall set forth specifically the grounds on which the applicant contends the decision is unlawful or unreasonable. No cause of action arising out of any decision constituting an order or determination of the commission or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petitioner in the action or proceeding within 20 days after the service of the decision, shall have made application to the commission for a rehearing in the proceeding in which the decision was made. No person or corporation shall in any court urge or rely on any ground not so set forth in the application for rehearing.

Minn. Stat. § 216B.27, subd. 2 (2010). Accordingly, MP may not “in any court urge or rely on any ground not so set forth in the application for rehearing.” Minn. Stat. § 216B.27 subd. 2(2010). MP’s Petition for Reconsideration and Request for Clarification did not raise the issue of ex parte communications within the document or within MP’s letter and memorandum of January 6, 2010 that MP purported to incorporate

³ The only other reference to a “public hearing” is found in Minn. Stat. § 216B.16, subd. 2 that states: “[i]f the commission finds that all significant issues raised have not been resolved to its satisfaction, or upon petition by ten percent of the affected customers or 250 affected customers, whichever is less, it shall refer the matter to the Office of Administrative Hearings with instructions for a public hearing as a contested case pursuant to chapter 14, except as otherwise provided in this section.” Minn. Stat. § 216B.16, subd. 2 (2010)

into its request. *See Rel. App. 131-137 and 53-58.* As MP did not raise the issue of “ex parte” communications in its request for rehearing, it forever waived that argument and may not raise it for the first time in this appeal.

B. The Commission is Entitled to Consider Publicly Filed Comments.

MP attempts to convince this Court that the term “ex parte” somehow means that the Commission must ignore all extrinsic data and rely solely on the information provided to the Commission by MP. MP Brief at 38-39. MP’s notion that the Commission cannot accept third-party comments on interim rates is a complete misreading of the law.

Minn. Stat. § 216B.16 simply states that the “commission shall order the interim rate schedule ex parte without a public hearing.” Minn. Stat. § 216B.16, subd. 3. Minn. R. pt. 7845.7400, subp. 4, as it read in 2009 described permissible ex parte communications with regard to interim rate proceedings:

Subp. 4. Interim rate proceedings; compliance filings. Commissioners and decision-making personnel may receive or generate written or oral ex parte communications with a party in the setting of interim rates or the review of compliance filings following the issuance of a final order or order after reconsideration. Commissioners and decision-making personnel who receive or generate written or oral ex parte communications in these situations shall place a signed note in the commission's public file containing the name of the party or participant, date, docket number of proceeding, and topic as soon as practicable, but no later than the issuance of the interim rate order or the compliance filing order.

Minn. R. 7845.7400, subp. 4 (2009)(emphasis added).⁴ Thus, the “Commissioners and decision-making personnel” are expressly allowed to “receive or generate written or oral *ex parte*⁵ communications with a party⁶ in the setting of interim rates” as long as the required disclosure is filed. Minn. R. 7845.7400, subp.4 (2010)(emphasis added).

Thus, Minnesota law simply provides that the Commission may receive or generate written or oral *ex parte* communications regarding interim rates if done so in accordance with Rule 7845.7400, subp. 4, and that the Commission does not need to develop a record by having a contested case proceeding to set interim rates. This provision thereby allows a party, and now also a participant, to communicate *ex parte* about the interim rate with no notice to other parties or participants. Nothing in the law, however, provides that ratepayers, and those speaking on their behalf, are forbidden from providing public input to the Commission that they are

⁴ MP did not cite this rule in its brief. The OAG-RUD identifies this rule in the interest of completeness. The letter and spirit of the Commission’s Code of Conduct were satisfied by the Commission’s consideration of publicly filed comments in this instance.

⁵ The term “*ex parte*” means “an oral or written off-the-record communication made to or by commissioner or commission decision-making personnel, without notice to parties, that is directed to the merits or outcome of an on-the-record proceeding.” Minn. R. 7845.7400 (2009). The language was changed to read “to parties or participants” in 2010. *id.* (2010). The term “participant” means “a person who files comments or appears in a proceeding, other than public hearings held in contest cases and other commission proceedings conducted to receive general public comments, to present views without becoming a party.” Minn. R. 7845.7000 (2010).

⁶ The term “party” means “a person by or against whom a proceeding before the commission is commenced or a person permitted to intervene in a proceeding before the commission. A party includes a petitioner, complainant, intervener, applicant, and respondent, and their attorneys, agents, or representatives.” Minn. R. 7845.7000 (2009 & 2010).

concerned over the interim rate. Surely a ratepayer has a right at anytime to write to the Commission and express its concerns and, with disclosure, the Commission is allowed to consider such input in its determination of whether or not exigent circumstances exist.

IV. MINNESOTA POWER IS NOT ENTITLED TO A REFUND.

MP argues that it is entitled to the \$5 million difference between interim and final rates because the Commission improperly found exigent circumstances and granted it “only” 60% of the \$81 million in interim rates it requested. First, the Commission properly found that exigent circumstances existed and therefore this issue is moot. Second, even if the Commission would have improperly found that exigent circumstances existed, there is nothing in the law that allows MP to collect additional monies.

Minn. Stat. § 216B.16, subd. 3 only allows MP to collect additional rates from the date of the final order until the date of the implementation of the rates:

If, at the time of its final determination, the commission finds that the interim rates are less than the rates in the final determination, the commission shall prescribe a method by which the utility will recover the difference in revenues *between the date of the final determination and the date the new rate schedules are put into effect.*

Minn. Stat. § 216B.16, subd. 3(c)(2010)(emphasis added). Section 216B.16, subd. 3 does not provide any mechanism for MP to recover the difference between its interim rates and final rates for the period prior to the final order. MP acknowledges that there is no mechanism to recover this difference, yet still seeks a refund. *See* MP Brief at 18.

MP is essentially arguing that this Court should find that it was entitled to \$73.3 million in interim revenues, which would, in effect, have resulted in a 17-month

“loan” of approximately \$24.8 million from MP’s ratepayers to MP due to the over collection. *See* MP Brief at 18. If MP had been authorized to collect its requested \$73.3 million in interim rates, MP’s ratepayers would have been compensated later at the *de minimis* prime rate of interest on \$24.8 million⁷. Minn. R. pt. 7825.3300.

The Commission balanced the equities and recognized that, if MP’s final rates required it to make refunds to ratepayers, “the refund may not make some ratepayers whole.” Rel. Add. 3. The Commission thus considered historical rate case results by comparing MP’s requested increases and MP’s authorized increases, and noted that MP was never granted more than 56% of its initial rate increase request. Finding exigent circumstances, the Commission set the interim rate increase at 60% of MP’s interim rate request. This substantially reduced the size of the potential “loan” from ratepayers. The Commission’s \$48.5 million interim rate allowance came remarkably close to the final rates granted and there is no basis in law for a refund.

⁷ Considering the Commission granted MP \$20.1 million and \$53.5 million in its two most recent back-to-back rate cases, and that MP has more than a \$1 billion rate base,⁷ it is doubtful that MP’s only motivation in filing this appeal is to recoup the \$5 million difference between interim and final rates. Rather, it is likely the loss of what it could have earned on this \$ 24.8 million “loan” over collected from ratepayers that appears to underlie MP’s appeal.

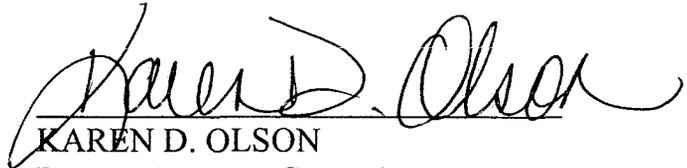
CONCLUSION

For all the reasons set forth above, OAG-RUD respectfully requests that this Court affirm the Commission's December 30, 2009 Order.

Dated: May 31, 2011

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