

NO. A11-352

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State of Minnesota  
**In Court of Appeals**

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

*Relator,*

v.

Minnesota Public Utilities Commission, Large Power Intervenors,

*Respondent.*

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**BRIEF OF RESPONDENT LARGE POWER INTERVENORS**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....ii

STATEMENT OF THE ISSUES ..... 1

ARGUMENT .....2

    I. INTRODUCTION .....2

    II. STANDARD OF REVIEW .....3

    III. THE COMMISSION WAS WELL WITHIN ITS AUTHORITY IN REDUCING  
MINNESOTA POWER’S INTERIM RATE REQUEST BASED UPON A FINDING  
OF “EXIGENT CIRCUMSTANCES” .....5

        A. Minnesota Power’s Interpretation of the Interim Rate Statute is Incorrect .....5

        B. The Term “Ex Parte” in the Interim Rate Statute Does not Imply the  
Commission’s Decision on Interim Rates is Ministerial .....6

        C. A Finding of Exigent Circumstances is Not Unusual and was Justified by the  
Facts of this Case .....8

        D. The Commission’s Process for Reducing Minnesota Power’s Interim Rate  
Increase was Well Within its Statutory Authority .....14

    IV. EVEN IF THE COMMISSION EXCEEDED ITS AUTHORITY, MINNESOTA  
POWER’S REMEDY IS LIMITED TO THE SURCHARGE ALREADY APPROVED  
BY THE COMMISSION .....15

CONCLUSION .....18

## TABLE OF AUTHORITIES

### Cases

<i>George A. Hormel &amp; Co. v. Asper</i> 428 N.W.2d 47, 50 (Minn. 1988) .....	4, 6
<i>In re Hyman Freightways, Inc.</i> 488 N.W.2d 503, 505 (Minn. Ct. App. 1992).....	4
<i>In re University of Minn.</i> 566 N.W.2d 98, 103 (Minn. Ct. App. 1997).....	4
<i>In the Matter of a Petition by Interstate Power and Light Company for Authority to Increase Electric Rates in Minnesota</i> E-001/GR-03-767 .....	10
<i>In the Matter of a Petition by Peoples Natural Gas Company and Northern Minnesota Utilities, Divisions of UtiliCorp United Inc., for Authority to Increase Natural Gas Rates in Minnesota and to Consolidate the Two Utilities</i> G-007, 011/GR-00-951 .....	10
<i>In the Matter of a Petition for General Rate Case for Xcel Energy</i> G-002/GR-04-1511 .....	9
<i>In the Matter of a Proposed Increase in Electric Rates of Interstate Power and Light Company</i> E-001/GR-05-748 .....	10
<i>In the Matter of a Request by Interstate Power Company for Authority to Increase Its Rates for Electric Service in Minnesota</i> E-001/GR-95-601 .....	10
<i>In the Matter of the Application of Dakota Electric Association for Authority to Increase its Rates for Electric Service in the State of Minnesota</i> E-111/GR-91-74 .....	11
<i>In the Matter of the Application of Interstate Power Company for Authority to Increase its Rates for Natural Gas Service in the State of Minnesota</i> G-001/GR-90-700 .....	12
<i>In the Matter of the Application of Midwest Gas, a Division of Iowa Public Service Company, for Authority to Increase its Rates for Gas Service in the State of Minnesota,</i> G-010/GR-90-678 .....	12
<i>In the Matter of the Application of Minnegasco, a Division of Arkla, Inc., for Authority to Increase Its Rates for Natural Gas Service in the State of Minnesota</i> 565 N.W.2d 706 (Minn. 1997) .....	15
<i>In the Matter of the Application of Minnegasco, a Division of NorAm Energy Company, for Authority to Increase Natural Gas Rates in Minnesota</i> G-008/GR-95-700 .....	10
<i>In the Matter of the Application of Minnegasco, Division of Arkla, Inc., for Authority to Increase Its Rates for Natural Gas Service in the State of Minnesota</i> G-008/GR-92-400 .....	11

<i>In the Matter of the Application of Minnesota Power for Authority to Change Its Schedule of Rates for Retail Electric Service in the State of Minnesota</i> E-015/GR-94-001 .....	10
<i>In the Matter of the Application of Northern States Power Co. for Approval of its 1998 Resource Plan</i> 604 N.W.2d 386, 390 (Minn. Ct. App. 2000).....	4
<i>In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in Minnesota</i> E-002/GR-10-971 .....	9
<i>In the Matter of the Application of Northern States Power Company for Authority to Increase its Rates for Electric Service in the State of Minnesota</i> E-002/GR-89-865 .....	12
<i>In the Matter of the Application of Northern States Power Company, a Minnesota Corporation and Wholly Owned Subsidiary of Xcel Energy Inc., for Authority to Increase Rates for Natural Gas Service in Minnesota</i> G-022/GR-06-1429 .....	9
<i>In the Matter of the Application of Northern States Power Company's Gas Utility for Authority to Change its Schedule of Gas Rates for Retail Customers Within the State of Minnesota</i> G-002/GR-92-1186.....	11
<i>In the Matter of the Petition of Otter Tail Power Co. for Authority to Increase Rates for Electric Service in Minnesota</i> 417 N.W.2d 677, 680 (Minn. Ct. App. 1988).....	passim
<i>In the Matter of the Petition of Peoples Natural Gas Co. for Authority to Increase Rates for Gas Utility Service in Minnesota</i> 385 N.W.2d 684, 688 (Minn. Ct. App. 1984).....	3
<i>In the Matter of the Petition of Peoples Natural Gas Company, a Division of UtiliCorp United, Inc., for Authority to Increase its Rates for Natural Gas Service in the State of Minnesota</i> G-011/GR-92-132 .....	11
<i>Reserve Mining Co. v. Herbst</i> 256 N.W.2d 808, 824 (Minn. 1977) .....	3
<b>Statutes</b>	
MINN. STAT. § 14.69 .....	4
MINN. STAT. § 216.27 .....	16
MINN. STAT. § 216B.16 subd. 3 .....	1, 5, 6, 17
MINN. STAT. § 216B.16 subd. 3(a) .....	1, 6
MINN. STAT. § 216B.27, subd. 1 .....	1
MINN. STAT. § 645.16 .....	6
MINN.R. 7825.3100 subp. 17 .....	6

## STATEMENT OF THE ISSUES

- 1. Did the Commission exceed its statutory authority when it, upon its own motion, determined that the dire circumstances faced by Minnesota Power's ratepayers justified a finding of "exigent circumstances," thus warranting a reduction to Minnesota Power's proposed interim rate increase?**

Upon its own motion, the Commission reduced Minnesota Power's interim rate increase based upon a finding of "exigent circumstances." Rel. Add. 1, 3.<sup>1</sup> This finding was based on the unprecedented size of Minnesota Power's proposed rate increase, filed just one day after its previous rate increase went into effect, which was proposed during the most severe economic recession since the Great Depression. Rel. Add. 3. Minnesota Power preserved its right to appeal this decision via compliance with State law. *See* MINN. STAT. § 216B.27, subd. 1; MINN. STAT. § 216B.16 subd. 3(a).

### **Most Apposite Cases and Statutes:**

*In the Matter of the Petition of Otter Tail Power Co. for Authority to Increase Rates for Electric Service in Minnesota*, 417 N.W.2d 677 (Minn. Ct. App. 1988).

MINN. STAT. § 216B.16 subd. 3.

- 2. Even if the Commission exceeded its authority, is Minnesota Power's remedy nonetheless statutorily limited to surcharging ratepayers over a limited time period under MINN. STAT. § 216B.16 subd. 3?**

Prior to filing its brief, Minnesota Power submitted a compliance filing with the Commission seeking to surcharge its customers approximately \$3,251,479, which represented the difference between interim rates and final rates for the time period between the date of the Commission's final order and June 1, 2011, the date final rates are to take effect. Add. 1. Since the filing of its brief, the Commission approved Minnesota Power's request. Add. 6. Minnesota Power's brief is devoid of reference to its efforts in this regard.

### **Most Apposite Cases and Statutes:**

MINN. STAT. § 216B.16 subd. 3.

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<sup>1</sup> Hereafter, "Rel. Add. \_\_" refers to Relator's Addendum to its Brief and "Add. \_\_" refers to the Addendum attached to this Respondent's Brief.

## **ARGUMENT**

### **I. INTRODUCTION**

There are two issues on appeal. First, whether this Court should reverse the Minnesota Public Utilities Commission (the “Commission”) for misapplication of the interim rate statute. Second, whether Minnesota Power has any claim for recoupment. As explained in detail below, the Commission properly applied the interim rate statute. And even if this Court disagrees, Minnesota Power cannot recoup an amount greater than that approved by the Commission on May 24, 2011.

The term “ex parte” in the interim rate statute does not imply the Commission’s review of a utility’s interim rate petition is a ministerial task. To the contrary, the Commission must first analyze the interim rate petition to determine if “exigent circumstances” exist. If exigent circumstances do not exist, the Commission is bound to approve interim rates based on a statutory formula. If exigent circumstances do exist, the Commission is free to balance utility and ratepayer interests to set a fair and reasonable rate during the interim rate period. It is not unusual for the Commission to find exigent circumstances and approve interim rates that deviate from those calculated using the statutory formula. The only extraordinary aspect of this case is the fact that it was filed in the middle of one of the worst recessions since the Great Depression. Combining this fact with the timing and size of Minnesota Power’s 2009 rate case warranted a finding of exigent circumstances and justified the Commission’s decision.

But even if this Court determines the Commission exceeded its authority in setting interim rates, Minnesota Power's claim for recoupment should be denied. Under the law cited by Minnesota Power, a reversal by this Court would require the Commission to apply the law to determine the reasonableness of Minnesota Power's interim rates. The interim rate statute specifically contemplates the present situation and governs the utility's relief – if the Commission's ultimately approved final rate increase exceeds the interim rate increase, the utility is entitled to surcharge customers for the difference in revenues between the date of the Commission's final order and the date new rates take effect. Minnesota Power has already availed itself of this relief. It should not also be able to recoup lost revenues between the date interim rates took effect until the date of the final order, thereby nearly tripling the statutory surcharge period.

## II. STANDARD OF REVIEW

In general, decisions of the Commission and other agencies “enjoy a presumption of correctness, and deference should be shown by the courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience.” *In the Matter of the Petition of Peoples Natural Gas Co. for Authority to Increase Rates for Gas Utility Service in Minnesota*, 385 N.W.2d 684, 688 (Minn. Ct. App. 1984) (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977)). Appellate courts are authorized under State law to reverse a Commission decision under a number of factors, two of which appear to be asserted by Minnesota Power – (i) that the decision was in excess of the statutory authority of the agency, and (ii) that the decision is

arbitrary and capricious. MINN. STAT. § 14.69. The standard of review for each of these factors is addressed below.

Although agency decisions are generally presumed to be correct and accorded deference by the judiciary, such deference does not normally extend to an agency's interpretation of law. *In the Matter of the Application of Northern States Power Co. for Approval of its 1998 Resource Plan*, 604 N.W.2d 386, 390 (Minn. Ct. App. 2000). But an agency's interpretation of the statutes it administers is entitled to deference and should be upheld unless there is a finding that the agency's interpretation is in conflict with the express purpose of the law and intention of the legislature. *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) (citations omitted). Furthermore, this Court has declined to conduct a de novo review. This Court noted "when an agency reasonably interprets a statute, it is the role of the legislature or the supreme court, *and not the role of this court*, to overrule that interpretation." *Id.* (emphasis added) (quoting *In re University of Minn.*, 566 N.W.2d 98, 103 (Minn. Ct. App. 1997) (citing *In re Hyman Freightways, Inc.*, 488 N.W.2d 503, 505 (Minn. Ct. App. 1992))).

With respect to the second factor, an agency's decision will be found to be arbitrary and capricious if the determination represents the agency's will as opposed to its judgment. *In the Matter of the Petition of Otter Tail Power Co. for Authority to Increase Rates for Electric Service in Minnesota*, 417 N.W.2d 677, 680 (Minn. Ct. App. 1988) (citations omitted).

**III. THE COMMISSION WAS WELL WITHIN ITS AUTHORITY IN REDUCING MINNESOTA POWER'S INTERIM RATE REQUEST BASED UPON A FINDING OF "EXIGENT CIRCUMSTANCES"**

**A. Minnesota Power's Interpretation of the Interim Rate Statute is Incorrect**

The pertinent portion of the interim rate statute reads as follows:

*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 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.*

MINN. STAT. § 216B.16 subd. 3(b) (emphasis added). It should be apparent that the first step in the analysis is whether exigent circumstances exist. If there are exigent circumstances, there is no statutory prescription for setting interim rates. If exigent circumstances do not exist, the Commission is bound to apply the statutory formula. As explained in detail below, it is this bright line distinction that the Commission has consistently used to find exigent circumstances in a vast array of cases in order to modify the statutory formula. *See e.g.*, Rel. Add. 2.

Minnesota Power attempts to read into the statute a requirement that, regardless of whether there are exigent circumstances, the Commission has to incorporate some aspects of the statutory formula. *Relator's Brief*, pgs. 25-27. This strained reading should be rejected because it is contrary to the plain language set forth in the statute. MINN. STAT.

§ 645.16. The operative language preceding the three enumerated considerations is “test year.” The term “test year” is defined to mean “the 12-month period selected by the utility for the purpose of expressing its need for a change in rates.” MINN.R. 7825.3100 subp. 17. Absent exigent circumstances, the utility has to calculate the interim rate schedule using the cost of capital, rate base, and expenses from this 12-month period. But this calculation must also include elements from the utility’s most recent rate proceeding (*i.e.*, the Commission’s order from the last rate case), namely the cost of common equity and similar rate base or expense items. In other words, absent exigent circumstances, the utility calculates the interim rate schedule by using elements from its test year for its current case and elements from the Commission’s order in the most recent rate case. But in a case of exigent circumstances, the Commission is free to fashion interim rates in a just and reasonable manner. This is exactly how the Commission has consistently interpreted the interim rate statute it administers and this interpretation is entitled to deference from this Court. *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) (citations omitted).

**B. The Term “Ex Parte” in the Interim Rate Statute Does not Imply the Commission’s Decision on Interim Rates is Ministerial**

The interim rate statute does not preclude Commission analysis of a utility’s interim rate petition. Under State law, “The commission shall order the interim rate schedule *ex parte* without a public hearing.” MINN. STAT. § 216B.16 subd. 3(a). This sentence was at issue *In the Matter of the Petition of Otter Tail Power Co. for Authority to Increase Rates for Electric Service in Minnesota*, 417 N.W.2d 677 (Minn. Ct. App.

1988). There, the Commission set interim rates lower than those requested by the utility (\$10,782,984 instead of \$12,606,922). *Id.* at 680. This reduction was made after a finding of exigent circumstances and accomplished in part by adopting a cost of common equity that was not only less than the utility's proposal, it was also less than the amount authorized in the utility's most recent rate proceeding. *Id.* at 679. The utility appealed the Commission's decision, arguing that the term "ex parte" in the interim rate statute rendered the Commission's actions ministerial. This Court disagreed. It stated:

The term "ex parte" does not require that the Commission simply adopt a utility's proposal with no examination. Indeed, in filing its petition for an interim rate increase, Otter Tail also filed testimony and documentation in support of that proposal. Certainly, the Commission must be expected to examine the evidence.

...

*In order to find "exigent circumstances," the Commission must first analyze the petition and accompanying evidence.*

*Id.* at 680 (emphasis added).

Minnesota Power's rate case was filed in a manner largely similar to *Otter Tail Power* (and every other general rate case) and included a separate interim rate petition with corresponding schedules. As in *Otter Tail Power*, the Commission in this case analyzed the utility's interim rate petition and accompanying evidence. There is thus no reason for *Otter Tail Power* to be inapplicable. It is therefore surprising that Minnesota Power claims (without citation) that the interim rate statute renders the Commission's review of the interim rate proposal a ministerial act. *Relator's Brief*, pg. 24. Minnesota Power is simply incorrect. *Otter Tail Power*, 417 N.W.2d 677 at 680. Minnesota

Power's statement that a finding of exigent circumstances does not authorize the Commission to adjust the enumerated list of items the Commission allegedly "shall include" (e.g., cost of equity) is also wrong. *Relator's Brief*, pg. 26. Again, the Commission used exigent circumstances in *Otter Tail Power* to justify decreasing the cost of equity below the utility's proposal and the level approved by the Commission in the prior rate case. *Id.* at 679.<sup>2</sup>

It is therefore difficult to understand what legal authority supports Minnesota Power's unique reading of the interim rate statute. Both a plain reading of the statute and case law permit the Commission to review the interim rate petition and accompanying evidence to determine whether exigent circumstances exist to justify deviation from the interim rate formula. Based on the evidence and authority set forth below, the Commission's finding of exigent circumstances was warranted.

**C. A Finding of Exigent Circumstances is Not Unusual and was Justified by the Facts of this Case**

To be clear, it is fairly common for the Commission to cite "exigent circumstances" as a justification for not adhering to the strict statutory formula. In fact, the Commission found exigent circumstances in Minnesota Power's present case to modify the interim rate formula on issues not subject to appeal. The Commission stated:

The Company proposed three minor variations from strict adherence to the terms of the interim rates statute. These three variations apply to proposed amounts for rate of return, depreciation expense, and asset-based wholesale margins and

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<sup>2</sup> Oddly, Minnesota Power conceded this point two pages after alleging the cost of equity must be set at a level approved in the most recent rate case. *Relator's Brief*, pg. 28.

result in reductions in interim rates. All three variations are reasonable, have strong factual foundations, and benefit ratepayers; *the Commission finds that exigent circumstances justify approving them.*

Rel. Add. 1, 2 (emphasis added). There are numerous other instances where the Commission determined exigent circumstances justified modifying the interim rate formula. *See In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in Minnesota*, E-002/GR-10-971, Order Setting Interim Rates (December 27, 2010) (finding exigent circumstances justifying the company's proposed depreciation rates and excluding costs associated with a particular transmission line); *In the Matter of the Application of Northern States Power Company, a Minnesota Corporation and Wholly Owned Subsidiary of Xcel Energy Inc., for Authority to Increase Rates for Natural Gas Service in Minnesota*, G-022/GR-06-1429 (January 4, 2007) (finding exigent circumstances exist to impute, but not collect, revenues from (i) customers under the fixed monthly payment program and (ii) negotiated transportation customers); *In the Matter of a Petition for General Rate Case for Xcel Energy*, G-002/GR-04-1511 (November 16, 2004) (finding exigent circumstances exist to account for substantial organizational changes, a merger, in modifying allocation methodologies); *In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in Minnesota*, E-002/GR-05-1428 (December 30, 2005) (finding exigent circumstances exist to (i) reduce rate of return if requested rate of return is less than that approved in most recent rate case and (ii) account for substantial organizational changes,

a merger, in modifying allocation methodologies and (iii) account for MISO schedules 16 and 17); *In the Matter of a Proposed Increase in Electric Rates of Interstate Power and Light Company*, E-001/GR-05-748 (July 8, 2005) (finding exigent circumstances exist to refrain from including anticipated, but not yet received, capital infusion); *In the Matter of a Petition by Interstate Power and Light Company for Authority to Increase Electric Rates in Minnesota*, E-001/GR-03-767 (July 17, 2003) (finding exigent circumstances exist to account for substantial organizational changes – a merger); *In the Matter of a Petition by Peoples Natural Gas Company and Northern Minnesota Utilities, Divisions of UtiliCorp United Inc., for Authority to Increase Natural Gas Rates in Minnesota and to Consolidate the Two Utilities*, G-007, 011/GR-00-951 (September 29, 2000) (finding exigent circumstances exist to (i) reduce rate of return if requested rate of return is less than that approved in most recent rate case and (ii) modify rate design to account for risk of bypass); *In the Matter of the Application of Minnegasco, a Division of NorAm Energy Company, for Authority to Increase Natural Gas Rates in Minnesota*, G-008/GR-95-700 (October 10, 1995) (finding exigent circumstances existed to (i) account for newly enacted law related to low-income discounts and (ii) modify rate design to account for risk of bypass); *In the Matter of a Request by Interstate Power Company for Authority to Increase Its Rates for Electric Service in Minnesota*, E-001/GR-95-601 (July 31, 1995) (finding exigent circumstances to exist because interim increase so small that it would be administratively burdensome to implement); *In the Matter of the Application of Minnesota Power for Authority to Change Its Schedule of Rates for Retail Electric Service in the State of Minnesota*, E-015/GR-94-001 (February 25, 1994) (finding exigent

circumstances exist to account for statutory change (allowance of community development expenses)); *In the Matter of the Application of Northern States Power Company's Gas Utility for Authority to Change its Schedule of Gas Rates for Retail Customers Within the State of Minnesota*, G-002/GR-92-1186 (December 31, 1992) (finding exigent circumstances exist to (i) account for removal of certain gas storage costs as recovered elsewhere and (ii) include tax benefit transfers although not previously included because inclusion benefits ratepayers); *In the Matter of the Application of Minnegasco, Division of Arkla, Inc., for Authority to Increase Its Rates for Natural Gas Service in the State of Minnesota*, G-008/GR-92-400 (August 31, 1992) (finding exigent circumstances exist to reduce rate of return if requested rate of return is less than that approved in most recent rate case and stating "Even if the proposed rate were compared with the higher rate approved in the Company's last general rate case, changes in the economy in the past ten years could be considered exigent circumstances which warrant a lower interim rate of return on common equity."); *In the Matter of the Petition of Peoples Natural Gas Company, a Division of UtiliCorp United, Inc., for Authority to Increase its Rates for Natural Gas Service in the State of Minnesota*, G-011/GR-92-132 (May 29, 1992) (finding exigent circumstances exist to change rate design if no proposed increase for class and ability to bypass exists); *In the Matter of the Application of Dakota Electric Association for Authority to Increase its Rates for Electric Service in the State of Minnesota*, E-111/GR-91-74 April 19, 1991) (finding exigent circumstances exist to reduce rate of return if requested rate of return is less than that approved in most recent rate case); *In the Matter of the Application of Interstate Power Company for Authority to*

*Increase its Rates for Natural Gas Service in the State of Minnesota*, G-001/GR-90-700 (December 31, 1990); (finding exigent circumstances exist to (i) reduce rate of return if requested rate of return is less than that approved in most recent rate case (ii) account for customer deposits in rate base to avoid over-collection); *In the Matter of the Application of Midwest Gas, a Division of Iowa Public Service Company, for Authority to Increase its Rates for Gas Service in the State of Minnesota*, G-010/GR-90-678 (November 9, 1990); (finding exigent circumstances exist to reduce rate of return if requested rate of return is less than that approved in most recent rate case and stating the interim rate statute “was enacted in 1984, an inflationary time when utilities were requesting greatly increased returns on equity. The statute was meant to reduce the effects of these increases and to minimize over-collections by holding utilities to previous levels during the interim rate period.”); *In the Matter of the Application of Northern States Power Company for Authority to Increase its Rates for Electric Service in the State of Minnesota*, E-002/GR-89-865 (December 29, 1989) (finding exigent circumstances exist to include tax benefit transfers although not previously included because inclusion benefits ratepayers (allocation method referenced and followed in NSP gas case above). These varying situations in which the commission has found “exigent circumstances” demonstrate the Commission generally views the decision as one based on policy and facts in existence at the particular time of the utility’s request.

Here, the Commission determined on its own motion that three factors, taken together, warranted a finding of exigent circumstances on the issue subject to this appeal.

The Commission stated:

The Commission will also, *on its own motion*, 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*.

...

*Three 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 worse economic downturn in the past 60 years. Together, these factors clearly carry serious potential for rate shock – and even outright hardship – for MP's customers.

Rel. Add. 3 (emphasis added).

Minnesota Power's attempt to isolate each unique circumstance, and review whether that fact alone justifies a finding of exigent circumstances, misses the point. It is the confluence of extreme circumstances warranting a finding of exigent circumstances. Minnesota Power's observation that the Commission has never before or since made a similar finding of exigent circumstances to justify an across-the-board reduction to interim rates only serves to further support the Commission's position. There has never been a rate case filed one day after final rates from the previous case took effect, seeking to impose a significant rate increase during the worst economic downturn since the Great Depression. Stated another way, Minnesota Power's 2009 largest rate increase request

ever hit its customers at the absolute worst possible time. It is hard to imagine a situation where these facts wouldn't lead to a finding of exigent circumstances to protect ratepayers – protection the Commission recognized ratepayers desperately needed. After acknowledging there is a statutory right to refund to normally protect ratepayers, the Commission noted:

Here, however, that refund may not make some ratepayers whole. Households and businesses struggling under the current adverse 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. These are exigent circumstances.*

Rel. Add. 4 (emphasis added).

**D. The Commission's Process for Reducing Minnesota Power's Interim Rate Increase was Well Within its Statutory Authority**

As explained in detail above, the Commission is free to balance utility and ratepayer interests to arrive at interim rates after the Commission makes a finding of exigent circumstances.<sup>3</sup> Minnesota Power's claim that the Commission exceeded its statutory authority in imposing an across-the-board reduction is therefore entirely without merit. Furthermore, Minnesota Power's allegation that the Commission somehow prejudged the final decision should be rejected. The Commission's order demonstrates it attempted to balance utility and ratepayer interests. It stated:

The Commission must therefore balance the potential burdens faced by the Company and its ratepayers in light of these exigent circumstances, the Company's 22+ years of rate case

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<sup>3</sup> *Supra.*, pg. 5-6.

history, this Commission's regulatory expertise, and the public interest. The Commission concludes that the most reasonable and equitable course of action under these exigent circumstances is to reduce the Company's interim rate revenue requirement to 60% of its rate increase request, an amount slightly in excess of any final revenue requirement found in previous Company rate cases in the last 22 years.

Rel. Add. 4. There is no evidence of "prejudging" or imposition of the Commission's will. The Commission's decision was based on sound judgment and was therefore neither arbitrary nor capricious. Furthermore, there is no evidence Minnesota Power was denied any statutory right. To the contrary, the interim rate statute contemplates certain relief for the utility when interim rates are less than final rates. As explained in detail below, Minnesota Power exercised this right and will surcharge customers approximately \$3.2 million.

**IV. EVEN IF THE COMMISSION EXCEEDED ITS AUTHORITY,  
MINNESOTA POWER'S REMEDY IS LIMITED TO THE SURCHARGE  
ALREADY APPROVED BY THE COMMISSION**

Regardless of this Court's decision on "exigent circumstances," Minnesota Power is not entitled to a \$5 million claim for recoupment. The facts of this case are very different than those in the principal authority relied upon by Minnesota Power, *In the Matter of the Application of Minnegasco, a Division of Arkla, Inc., for Authority to Increase Its Rates for Natural Gas Service in the State of Minnesota*, 565 N.W.2d 706 (Minn. 1997). There, the issue on appeal was whether the Commission has the authority, on remand after a reversal of a determination made in the context the Commission's final (not interim) order, to order a recoupment remedy for lost revenue. *Id.* at 711. The court

answered in the affirmative. In so doing, the court relied upon section 216.27 of the Minnesota statutes, which states in pertinent part:

If the order of the commission is reversed, upon filing a copy of the order of reversal with the commission, it shall proceed to determine the reasonableness of the rates, fares, charges, and classifications on the merits.

MINN. STAT. § 216.27. While this statute may be utilized to justify a recoupment remedy for a utility after the Commission's final order, the same is not true for an interim rate order. The distinction between a final order and an interim rate order is important. Assuming this Court reverses the Commission's interim rate decision, the Commission will determine the reasonableness of interim rates, as required by section 216.27 of the Minnesota Statutes. Upon a finding that those interim rates were unreasonable, the Commission would be bound by the interim rate statute in fashioning a remedy.

But the interim rate statute does not contemplate recoupment from the date of the interim rate order until the date of the final order. When interim rates are less than final rates, the utility is only entitled to surcharge customers for lost revenues between the date of the final order and the date final rates take effect. The statute provides:

If, at the time of its final determination, the commission finds that the interim rates are in excess of the rates in the final determination, the commission shall order the utility to refund the excess amount collected under the interim rate schedule, including interest on it which shall be at the rate of interest determined by the commission...*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) (emphasis added). To nonetheless permit Minnesota Power to seek recoupment outside of the statutorily prescribed time period would render this provision meaningless. Minnesota Power's argument should therefore be rejected.

Furthermore, Minnesota Power has already exercised its right under the interim rate statute. Minnesota Power submitted a request to surcharge its customers approximately \$3.2 million on March 7, 2011. Add. 1. On May 24, 2011, the Commission approved Minnesota Power's request. Minnesota Power is therefore entitled to recover a shortfall due to the reduction in interim rates from the date of the final order (November 2, 2010) to the date rates take effect (June 1, 2011). Add. 7.

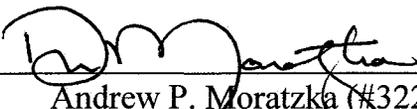
This \$3.2 million is all Minnesota Power should be entitled to collect under the interim rate statute. Minnesota Power's creative argument that the Commission's decision exceeded statutory bounds is essentially a request to expand the look-back period for Minnesota Power to increase this recovery. This matter should be denied not only for the legal reasons set forth above, but also from a policy standpoint. The \$5 million Minnesota Power believes it is entitled to recoup is based on a settlement and therefore arbitrary. Many issues, including test year sales and cost of common equity, were settled in Minnesota Power's case. Add. 8. Had these issues been litigated, it is conceivable that Minnesota Power's finally approved rate increase would have been less than the approved \$53.5 million, perhaps even less than the \$48.5 million allowed for

interim rates. To nonetheless set \$5 million as the definitive figure for Minnesota Power to recoup would set bad precedent and negatively impact future settlement negotiations.

### CONCLUSION

The Commission was well within its discretion to find “exigent circumstances” and adjust Minnesota Power’s interim rates by balancing Minnesota Power’s interests against ratepayers’ interests. This Court should defer to the Commission’s discretion in interpreting and applying the interim rate statute. Furthermore, the interim rate statute is clear on the type of recovery for utilities – if interim rates are less than final rates, the utility is entitled to recover the difference from the date of the final (not interim) order to the date final rates take effect. To accept Minnesota Power’s argument would render the statutory time limitation meaningless. After all, any utility aggrieved by a Commission’s decision on interim rates will take advantage of the statutory right to surcharge while at the same time proceeding with appeal for any loss between the date interim rates went into effect and the date of the final order. This is not how the legislature intended the interim rate statute to function. The Commission’s decision on interim rates should be affirmed.

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**CERTIFICATE OF COMPLIANCE**

Respondent Large Power Intervenors' Brief complies with the type-face requirements and word count limitation of Rule 132.01, subd. 3(a) of the Minnesota Rules of Appellate Procedure.

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