

NO. A11-352

State of Minnesota
In Court of Appeals

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

Relator,

v.

Minnesota Public Utilities Commission,

Respondent.

REPLY BRIEF OF RELATOR

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INTRODUCTION

The purpose of a utility rate case is to set rates that will allow a utility to recover its cost of service based upon a particular test year – in this case, calendar year 2010. Because of procedural requirements, final rates are typically not determined until the test year is nearly over (in this case, November 2, 2010), and then the final rates are applied prospectively to the period immediately following that determination. As a result, a utility's ability to recover its cost of service during the first 10 months of the test year depends on interim rates. Because final rates are not applied retroactively when interim rates are set too low (i.e. below final rates), there is no statutory mechanism to recover the shortfall.

For this reason, the legislature provided an interim rate formula that is designed to minimize any shortfall. If that formula had been applied here, Minnesota Power would have been able to recover the cost of service ultimately approved for the test year. But the Minnesota Public Utilities Commission ("Commission" or "MPUC") did not follow the formula. It allowed Minnesota Power to recover only \$48.3 million in increased rates for the test year – a deficiency of \$5 million less than the \$53.5 million ultimately determined by the Commission to be the just and reasonable increase. *See* App. 100 (Commission's Final Determination) ("The above Commission findings and conclusions result in a Minnesota jurisdictional gross revenue deficiency for the 2010 test year of \$53,530,424"). The Commission permitted Minnesota Power to recoup about \$600,000 of that shortfall for the two-month period after the November 2 final rate determination,

but provided no remedy to recoup the \$4.4 million shortfall for the first ten months of 2010.

The Commission, Office of the Attorney General ("OAG"), and Large Power Intervenors ("LPI"), (collectively, "Respondents"), do not deny that the \$4.4 million is part of the Company's Commission-approved just and reasonable costs of service for the 2010 test year.¹ Instead, the Commission's unprecedented rejection of the interim rate formula forces Respondents to take a position that is too extreme to have any credibility – that a finding of "exigent circumstances" eliminates all criteria for setting interim rates and permits the Commission to set them at any level it subjectively chooses – from zero to some arbitrary flat percentage of requested final rates, to an as-yet unidentified formula developed in a future case.

This attempted justification creates tremendous uncertainty for all Minnesota utilities, and it fails as a matter of law for any one of several alternative reasons. First, the interim rate statute requires that interim rates "shall include" the minimum elements of the rate formula, even if exigent circumstances are present. Second, even if the statute did not so provide, the circumstances relied on here could not qualify as "exigent" because they involve utility action specifically permitted by statute or considerations irrelevant to the formula for setting interim rates. Third, even if there had been true

¹ Because Respondents' position that the Company is not entitled to the shortfall rests solely on what they deem to be "fairness to ratepayers," it is important to reiterate that in reaching its final rate determination of \$53.5 million the Commission has, as a matter of law, determined that this amount is just and reasonable for the utility and ratepayers. Minn. Stat. § 216B.16, subs. 4, 5, and 6; App. 62 (Commission's Final Determination).

exigent circumstances, that would not authorize the Commission to set interim rates by prejudging, before the contested case proceeding occurred, the level that might ultimately be set for final rates.

ARGUMENT

I. THE EXIGENT CIRCUMSTANCES PROVISION OF THE INTERIM RATE STATUTE IS NARROW AND DOES NOT WHOLLY OVERRIDE THE STATUTE'S INTERIM RATE FORMULA.

Respondents assert that the statutory rate formula is inapplicable once the Commission finds "exigent circumstances" and that the Commission may then make any adjustment it sees fit to a utility's interim rate request. As the Commission asserts:

The only reasonable way to read this statute is that if there are *not* exigent circumstances, the interim rate schedule is calculated using the statutory formula in Subdivision 3. If, however, exigent circumstances exist, then the formula does not apply.

Commission Br. at 13 (*italics in original, underlining added*).

Under the Commission's theory, then, it could determine that exigent circumstances allow it to deny the utility any rate of return on new rate base items, or deny the utility recovery of any cost increases during the interim rate period. The statute cannot fairly be read to provide this unfettered discretion.

A. The Plain Language of the Interim Rate Statute Does Not Allow the Commission to Ignore the Statutory Interim Rate Formula Upon a Finding of Exigent Circumstances.

Respondents assert that the "exigent circumstances" exception in the interim rate section can only sensibly be read as applying to everything that 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 . . . equal to that authorized . . . in the utility's most recent rate proceeding; (2) rate base or expense items of the same nature and kind as those allowed . . . 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). Of course this claim reads the second exception in the above provision – "except that [the interim rate schedule] shall include" – right out of the statute. If the statute is read as the Commission argues, there would be no point to identifying the utility's current return on equity, new rate base items/expenses of the same nature and kind, and current rate design as "exceptions" to the interim rate schedule items that are subject to Commission adjustment when exigent circumstances exist. This violates the legislative mandate that a statute must be read to give effect to all its provisions if possible. Minn. Stat. § 645.16.

Minnesota Power's reading of this statutory provision does not mean, as Respondents suggest, that no adjustment whatsoever can be made to interim rates where true exigent circumstances are found. *See, e.g.*, MPUC Br. at 19 (claiming that Minnesota Power's interpretation "would render the 'exigent circumstances' language meaningless"); *see also* OAG Br. at 16. To the contrary, Minnesota Power has acknowledged that a finding of exigent circumstances authorizes the Commission to make adjustments to the elements of the statutory formula (rate of return on common equity, rate base or expense items, and rate design) that are affected by the exigency. Minnesota Power Initial Br. at 27-28. But the Commission does not have unfettered discretion to adjust interim rates based upon a finding of exigent circumstances; rather,

the statutory formula is very specific about what "shall" be included, such that any adjustment to interim rates based on exigent circumstances must stand or fall in terms of its consistency with the statutory formula. This is further confirmed by the Commission's past practice. As discussed below, the Commission has never before adjusted interim rates across the board, but rather has only made adjustments to the specific elements of the formula.

B. Even if the Language of the Interim Rate Statute is Ambiguous, the "Exigent Circumstances" Exception Cannot be Read to Allow the Commission to Adjust Interim Rates Without Any Regard for the Statutory Formula.

Minnesota Power's challenge of the Commission's Interim Rate Order is supported not only by the language of the statute, but also by the purpose of the statute as explained by the courts in *Peoples Natural Gas, Minnesota Power & Light*, and *Inter-City Gas*. That purpose is to balance the interests of the utility and its ratepayers during the interim rate period.² And as the Commission has itself noted in the past, "a major goal of interim rate proceedings" is to "keep[] the utility whole while final rates are determined." MPUC

² The interim rate statute was enacted to replace the "bonding system," which involved a utility posting a bond to cover the interim rate increase it was requesting. The interim rate statute created certainty about what may and may not be included in interim rates, and gave the Commission authority to examine the utility's request for interim rates and supporting documentation (unlike the bond system by which the utility essentially chose its interim rate levels and the Commission simply established the amount of the bond). The statute also established a streamlined interim rate-setting process that included no public hearing, no immediate Commission reconsideration, and no party appeals in the interim rate proceeding. *In re the Application of Peoples Natural Gas Co. for Authority to Increase Rates for Gas Utility Service in Minnesota*, 389 N.W.2d 903, 908 (Minn. 1986) ("*Peoples Natural Gas*"). In this case, the Commission undercut the statute's goals and procedures by conducting a public hearing and jettisoning the interim rate formula.

App. at 100. The statutory formula accomplishes these purposes by setting interim rates on the basis of the return on common equity and rate design previously approved by the Commission, while allowing new costs and rate base items only to the extent they are of the same kind previously approved by the Commission. *Peoples Natural Gas*, 389 N.W.2d at 909. So long as the utility proposes interim rates consistent with this formula, and subject to refund with interest if final rates are lower than interim rates, this balancing is achieved. *Id.* at 908. It is illogical to suggest that what the courts have referred to as this "careful" balancing of interests may be disregarded altogether once the Commission finds that exigent circumstances exist.³

C. Respondents' Citations to the Commission's Past Exigent Circumstance Findings Confirm the Primacy of the Statutory Interim Rate Formula.

Respondents claim that many of the Commission's past interim rate adjustments show that once exigent circumstances are found, the Commission has complete discretion to adjust interim rates without any regard to the statutory formula. But those past decisions show just the contrary. While certain Respondents argue that a Commission finding of exigent circumstances is not new, none has cited a single decision where the Commission (i) found exigent circumstances to exist without referring to one of the three parts of the statutory interim rate formula, (ii) made an across-the-board adjustment to

³ Yet at the interim rate hearing three Commissioners recognized that the reduced interim rate increase covered only the increased capital costs added to rate base as a result of the legislature's environmental mandates. T. 53, 56-57 and 58-59. This necessarily meant that the interim rate increase would not cover any of the Company's increased capital costs for other new rate base items, nor increases in expenses of the same nature and kind as those the Commission had authorized in the past. Even more, the interim rates would not include a rate of return on those items.

interim rates, and (iii) undertook both actions without the utility's agreement and waiver of objections.

Appended as Attachment 1 to this Reply Brief is a summary of all the exigent circumstances interim rate adjustment cases cited by Respondents. It documents that the Commission justified each unilateral adjustment consistent with the requirements of the statutory interim rate formula, underscoring that the balance of interests between the utility and ratepayers was maintained.

II. THE COMMISSION IMPROPERLY DECIDED WHAT MAY CONSTITUTE "EXIGENT CIRCUMSTANCES."

The Commission also argues that there is no statute or case law that limits the Commission's discretion to determine what event or combined events may constitute exigent circumstances. MPUC Br. at 21. For example, Respondents claim that the Commission may consider a utility's statutory right to seek recovery of increased costs at a certain time as nonetheless happening "too soon." Then, inexorably, Respondents suggest a utility's overall rate request may be "too high" in comparison to the utility's past rate requests – or even more remarkably, in comparison to other utilities' rate requests – even if the request is based on the utility's right to cover its costs of service. Both arguments substitute the Commission's subjective interpretation of "exigent circumstances" for specific, unambiguous statutory rights conferred upon the utility.

Minnesota law on interim rates gives utilities the specific legal right to bring a new rate case within timeframes established by the legislature. *See* MPUC Brief at 16, n.5 (citing *Minnesota Power & Light*, 435 N.W.2d at 557); Minn. Stat. § 216B.16, subd. 3(c).

Similarly, the Commission recognizes that it cannot make any determination regarding whether a utility's rate increase request is "too high" absent a contested case proceeding, so long as the request is based on increases that are of the same kind and nature as previously approved in rates. MPUC Br. at 30-31; Minn. Stat. § 216B.16, subd. 3(b).

Likewise, it is clear that the state of the economy at the time of Minnesota Power's Interim Rate Order was not sufficient by itself to create exigent circumstances, as the Commission acknowledged in the rate cases brought by Xcel Energy and CenterPoint Energy before and after Minnesota Power's. *In the Matter of the Application of N. States Power Co. d/b/a Xcel Energy for Auth. to Increase Rates for Elec. Serv. in Minn.*, ORDER SETTING INTERIM RATES, Docket No. E-002/GR-10-971 (Order of December 27, 2010); *In the Matter of an Application by CenterPoint Energy for Auth. to Increase Natural Gas Rates in Minn.*, ORDER SETTING INTERIM RATES, Docket No. G008/GR-08-1075 (Dec. 22, 2008).⁴ In each case, the Commission declined to find that the very same economic recession that it found to be an exigent circumstance in Minnesota Power's rate case constituted an exigent circumstance in those two rate cases. Moreover, as discussed in Minnesota Power's initial brief, the impact of the economy on ratepayers does not change a utility's incurred costs, and therefore is not an appropriate reason to make an across-the-board modification to the level of interim rates allowed by statute. Minnesota Power

⁴ While the cited Orders do not discuss the basis for exigent circumstance proposals in each case, the Commission's public deliberations of those proposals centered on whether the state of the economy justified a finding of exigent circumstances. Concluding that it did not, the Commission declined to find that exigent circumstances existed.

Initial Br. at 34-35.⁵ Consequently, the state of the economy should not play any role in an exigent circumstance finding.

Perhaps recognizing that the individual bases for finding exigent circumstances were not independently sufficient, LPI argues that the combination of these circumstances is enough: "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." LPI Br. at 13. This argument merely attempts to bootstrap three invalid bases for finding exigent circumstances into one valid basis. But three times zero equals zero.

Moreover, the Commission's decision assumed that all three of the bases for "exigent circumstances" were valid. If any one was invalid, as demonstrated above, the finding of exigent circumstances fails.

III. EVEN IF THE COMMISSION PROPERLY FOUND EXIGENT CIRCUMSTANCES, IT COULD NOT SIMPLY ADJUST TOTAL INTERIM RATES TO A LEVEL IT PREDICTED FOR FINAL RATES.

The Commission defends the methodology it used to adjust Minnesota Power's interim rate request on two grounds: (i) its methodology considered different levels for interim rates before picking one (MPUC Br. at 21-23); and (ii) its methodology could not

⁵ Even if the state of the economy could play such a role, the Commission noted its obligation to balance the economic impact on ratepayers with the economic impact on the utility but did not actually carry out any such balancing. Add. 3 (noting that the utility had made its request "in good faith with careful documentation and detailed explanation," but failing to address the known revenue loss Minnesota Power had already experienced as a result of the economy or the potential impact on the utility of the Commission's decision to reduce Minnesota Power's interim rates).

have pre-judged the final rate determination because final rates were higher than interim rates (MPUC Br. at 23-24). Neither defense withstands scrutiny.

The essence of the Commission's first defense is that its only obligation was to consider different levels of potential interim rates before picking one that allowed Minnesota Power to recover "some portion" of its interim rate request. *See* MPUC Br. at 22 (arguing that the Commission need only "honor[] the twin principles that rates approved by the Commission in the last rate case are assumed to be just and reasonable and that utilities are normally entitled to begin collecting some portion of their claimed new, increased revenue requirements while their rate cases are pending"). In other words, any interim rate increase short of no interim rate increase would pass muster if there are exigent circumstances.

The Commission bases this extraordinary claim on its interim rate determination in a 1995 Minnegasco rate case. MPUC Br. at 23; MPUC App. at 95-104. There, the utility claimed exigent circumstances warranted reducing the interim rates allocated to certain customers because these customers (i) could take service from other energy suppliers and (ii) might leave if charged the same interim rate increase as all other ratepayers pursuant to the utility's current rate design. The Commission agreed, finding that requiring Minnegasco to risk the loss of these customers "conflicts with a major goal of interim rate proceedings: keeping the utility whole while final rates are determined." MPUC App. at 100. However, the Commission imposed a 1% increase for these customers, rather than no increase as Minnegasco proposed, because they would eventually bear some of Minnegasco's increased costs. *Id.* at 99-100.

This case is completely different. First, Minnesota Power did not propose to deviate from the interim rate formula; rather, third parties did so in violation of the statutory requirement that the interim rate process be handled ex parte. Second, upon deciding to deviate from the statutory formula and not allow Minnesota Power to recover its authorized return and costs for new rate base and expense items, the Commission failed to conduct any analysis showing its decision was consistent with the “major goal” of keeping the Company whole while final rates are determined. Instead, the Commission justified its decision solely on its speculation that in the event interim rates were higher than final rates, “some” ratepayers “might” not be made whole by the statutory remedy of a refund with interest. The Commission’s order does not even mention that if the Commission’s final determination of final rates is higher than interim rates, there is no statutory provision that would make Minnesota Power whole.⁶

The Commission is also dead wrong in asserting that it did not prejudge the outcome of Minnesota Power's rate case. The \$48.3 million interim rate level was not determined by reference to the Company's proposed \$73.3 million interim rate request. Instead, the Commission first considered the ratio of the rate increase requested in Minnesota Power's last three rate cases to the amount of final rates approved in those cases, then applied that approximate ratio to the Company's final rate increase request in this case, arriving at \$48.3 million in interim rates. Setting interim rates by making an adjustment to the Company's final rate request can only be understood as a prediction or

⁶ It is also worth noting that a prior Commission action, let alone one that was not challenged in court and was based on different facts, is not legal precedent justifying the Commission's arbitrary setting of interim rates in this case.

assumption, before the requisite contested case hearing was conducted, that Minnesota Power's request for a final rate increase would likely be reduced to this level. T. 53-54.

The Commission also argues that since it ultimately established Minnesota Power's final rates at a level above the interim rates set by the Commission, it therefore could not have prejudged the likely level of final rates. MPUC Br. at 24. This claim makes no sense.

We agree that the Commission did not ultimately rely on its prejudgment of final rates for the purpose of setting final rates; instead, it conducted an evidentiary hearing that proved its prejudgment was incorrect. But this does not rectify the harm flowing from the Commission's decision to base interim rates on its unauthorized speculation that final rates would be \$48.3 million or less. As a result of that improper prejudgment, during the test year Minnesota Power was precluded from fully recovering the costs of service the Commission ultimately found to be just and reasonable for final rates, let alone the amounts warranted by the interim rate statutory formula. Thus the Commission misses the point when it focuses on the impact of its prejudgment on final rates; the detrimental impact on interim rates is the harm this appeal seeks to remedy.

IV. THE COMMISSION MAY NOT USE THE PUBLIC COMMENT PROCESS AS A MEANS TO CIRCUMVENT THE STATUTORY REQUIREMENT THAT IT SHALL SET INTERIM RATES EX PARTE.

A. The Commission Did Not Act Ex Parte.

The Commission's Interim Rate Order is further flawed because it violated the procedural requirement that it be made ex parte. The Commission argues that it acted "*on its own motion*" (emphasis in original). MPUC Br. at 6. This was clearly not the

case, as non-parties to the ex parte proceeding were permitted to file comments requesting an interim rate reduction on the basis of exigent circumstances (App. 7-20; MPUC App. at 8), and the Commission both acknowledged those requests for an interim rate reduction and invited the attorneys to participate in the supposedly ex parte interim rate-setting hearing. MPUC App. 11-13. The Commission did so while at the same time acknowledging the prohibition on public commentary. *Id.* Claiming that the Commission conducted an ex parte hearing or then decided on its own motion to reduce interim rates mischaracterizes the manner in which these proceedings were actually carried out.

B. The Rules on Public Comment Do Not Override the Statutory Requirement for an Ex Parte Process.

Respondents argue that because the public has the ability to send or file commentary with the Commission at any time, the Commission may respond to commentary from future interveners at the ex parte hearing on interim rates. OAG specifically argues that Minn. R. 7845.7400, which allows ex parte communication with parties in the interim rate process,⁷ supplants the statutory requirement to establish the interim rate schedule "ex parte without a public hearing." OAG's argument is incorrect for several reasons, and demonstrates a fundamental misunderstanding of the difference between an ex parte proceeding and ex parte communications.

⁷ "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 after reconsiderations." Minn. R. 7845.7400, subp. 4.

To begin with, Minn. Stat. § 216B.16, subd. 3(a) expressly states that the interim rate schedule shall be set "ex parte without a public hearing." This statutory section contains no exceptions. Consequently if, as OAG argues, Rule 7845.7400 allows ex parte communication where the statute flatly does not, the rule contradicts the statute and is perforce invalid.

The better reading of Minn. R. 7845.7400 is that it does not alter the meaning of the statute but instead exists for a different purpose. This is because the use of "ex parte communication" in the rule addresses a particular kind of one-on-one communication, while the statute addresses a particular kind of proceeding. *Compare* Black's Law Dictionary at p. 597 (West Group 7th ed. 1999) (defining "ex parte communication" as "a generally prohibited communication between counsel and the court when opposing counsel is not present") *with* p. 1221 (defining an "ex parte proceeding" as "a proceeding in which not all parties are present or given the opportunity to be heard") (emphasis added); *see also* <http://legal-dictionary.thefreedictionary.com/Ex+parte> (June 15, 2011) ("An ex parte judicial proceeding is conducted for the benefit of only one party. Ex parte may also describe contact with a person represented by an attorney, outside the presence of the attorney.")

Rule 7845.7000, subp. 4, likewise defines "ex parte communication" as "an oral or written, off-the-record communication made to or by commissioners or commission decision-making personnel, without notice to parties, that is directed to the merits or outcome of an on-the-record proceeding." Tellingly, the Rule does not define nor refer to an "ex parte proceeding." But consistent with the general definition of ex parte

communication, the Rule refers to certain off-the-record communications that may or may not be permissible. The Rule cannot be read as addressing whether the Commission may convert an ex parte hearing into a public hearing in which adversarial commentary and argument are heard.⁸

The logical and harmonious conclusion is that the statute requires an ex parte determination of a utility's proposed interim rate schedule, while the rule permits the utility to communicate with the Commission or its staff ex parte during the interim rate setting process. This reading is likewise consistent with *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), as cited by LPI. This Court confirmed that the Commission is not required to "simply adopt a utility's proposal with no examination." *Id.* at 680. Rather, the Commission must examine the "petition and accompanying evidence" submitted by the utility. *Id.* This Court did not suggest that the Commission should conduct a public hearing or accept evidence other than that submitted by the utility; instead, its discussion simply reinforces that the Commission should establish interim rates on the basis of its review of the utility's filing, historically including clarifying conversations with the utility.

⁸ The Commission erroneously states that "the Commission's own rules specifically allow the Commission to receive ex parte communication from a party or participant." Commission Br. at 26, n.10 (emphasis added). But Minn. R. 7845.4000 only allows ex parte communication "with a party" in the setting of interim rates. The Commission's argument therefore overlooks an important distinction, because at the time of the interim rate proceeding neither LPI nor Boise had filed petitions to intervene and were not yet "parties" within the meaning of Rule 7845.4000.

C. The Ex Parte Hearing Issue Was Not Waived and is Not New.

Certain Respondents argue that the Company's petition for reconsideration did not preserve the ex parte issue for appellate review. These respondents misconstrue the issue.

A utility's request for reconsideration "shall set forth specifically the grounds on which the applicant contends the decision is unlawful or unreasonable." Here, no party disputes that the Company consistently objected, at each phase of the proceeding, that there was insufficient legal authority and basis for the Commission's Interim Rate deliberations and Order. Its motion for reconsideration reiterated that objection.

Further, Minnesota Power's request for reconsideration specifically stated that the Commission's Interim Rate Order violated due process and exceeded its statutory authority. App. 55; App. 141. This incorporated Minnesota Power's concern for and objection to the submission of potential intervenor commentary from its first opportunity to do so. *See* App. 17 (Company Reply Comments on Interim Rates). The Commission acknowledged the limitation on public hearing commentary and ex parte concerns during its interim rate hearing, but nonetheless expressly chose to conduct a public hearing with full party and non-party participation. *See* T. 12-13. The Company also raised due process and statutory authority issues in the memorandum that later formed its basis for reconsideration. App. 55-57. Consequently, all parties had notice of the issue and were aware that it was part and parcel of the Company's objections to the interim rate-setting process.

V. THE COMMISSION'S ERROR OF LAW REQUIRES A REMEDY.

Various Respondents argue that because the interim rate statute provides a limited remedy when the Commission appropriately sets interim rates below final rates, there is no other remedy for the Commission's violation of statutory and constitutional authority. MPUC Br. at 26; LPI Br. at 15; OAG Br. at 24. This argument misconstrues the statute and ignores supreme court precedent. It also fails to distinguish between situations where the Commission properly set interim rate levels below final rates and where the Commission set interim rates "too low" due to an error of law.

The interim rate statute addresses the need for the Commission to establish a surcharge method when it correctly follows the interim rate statute but sets interim rate levels below final rates. As noted in the Company's initial brief:

If final rates exceed interim rate levels (as when the limitations of the interim rate statute do not allow recognition of full cost increases), the Commission must prescribe a method by which the utility can recover the difference for the months between the initial order on final rates and the effective date of the final rates. [Minn. Stat. § 216B.16, subd. 3(c).] Accordingly, Minnesota Power has filed a plan with the Commission for recoupment of the shortfall in interim rates for the period from the Commission's initial order on final rates (November 2, 2010, as defined by Minn. Stat. § 216B.16, subd. 2(g)) to the date final rates go into effect (not yet determined but estimated to be June 1, 2011).

MP Br. at p. 40. Pursuant to this statute, Minnesota Power received approval on May 24, 2011 to recover the limited portion of lost revenues addressed in Minn. Stat. § 216B.16, subd. 3(c). But approval of the limited surcharge did not make the Company whole. And because Minn. Stat. § 216B.16, subd. 3(c) deals with adjustments to interim rates

properly made under the statutory scheme – not with a remedy for Commission legal error – the effect of Commission error in reducing interim rates played no part in its discussion or implementation of the limited surcharge.

Thus, Minn. Stat. § 216B.16, subd. 3(c) does not address whether a remedy exists when a Commission departs from its statutory interim rate authority. Rather, that specific situation is addressed in Minn. Stat. § 216.27, which "governs Commission authority and procedure after a rate order is reversed by a reviewing court." *Minnegasco*, 565 N.W.2d 706, 711 (Minn. 1997). Section 216.27 provides:

If the order of the commission is reversed [on appeal], 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 classification on the merits.

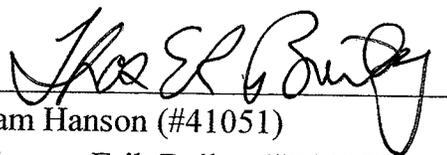
The supreme court specifically determined that this statute does not limit the remedy for reversible Commission error to a prospective period (e.g., from the time of the Commission's final order forward), but rather imposes an obligation on the Commission to correct the error by providing a recoupment remedy. *Minnegasco*, 565 N.W.2d at 711-12.

CONCLUSION

Minnesota Power respectfully requests that the Court reverse the Commission's Interim Rate Order on any or all of the grounds discussed above, and remand the matter to the Commission for establishment of a method and schedule for recouping the Company's lost revenues.

Dated: June 30, 2011

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ATTACHMENT 1

Prior Commission Decisions on Exigent Circumstances Cited By Respondents¹

In the Matter of the Application of N. States Power Co. for Auth. To Increase its Rates for Elec. Serv. In the State of Minn., ORDER SETTING INTERIM RATES, Docket No. E002/GR-89-865 (Dec. 29, 1989).

- Company agreed to deviation from capital cost and rate base requirements to reorganize the tax benefit so capital structure would not exceed previously-approved equity ratio.

In the Matter of the Application of Midwest Gas, A Div. of Iowa Pub. Serv. Co., for Auth. To Increase its Rates for Gas Serv. in the State of Minn., ORDER SETTING INTERIM RATES, Docket No. G010/GR-90-678 (Nov. 9, 1990).

- Company agreed to deviation from rate base requirement because tariff at issue was approved by Commission after the company's last rate case.
- Company agreed to deviation from rate of return requirement to avoid overcollection.
- Company agreed to deviation from capital structure because of new parent company.

In the Matter of the Application of Interstate Power Co. for Auth. to Increase its Rates for Natural Gas Serv. in the State of Minn., Docket No. G001/GR-90-700 (Dec. 31, 1990).

- Deviation from rate base requirement because excluding known and measurable customer deposits from rate base, as in prior cases, would have resulted in an inflated rate base.
- Company agreed to deviation from rate of return requirement to reduce rate of return in light of changed marketplace.

In the Matter of the Application of Dakota Elec. Ass'n for Auth. to Increase its Rates for Elec. Serv. in the State of Minn., ORDER SETTING INTERIM RATES, Docket No. E111/GR-91-74 (Apr. 19, 1991).

- Company agreed to deviation from rate of return requirement (reduction in return) to avoid overcollection.

¹ The purpose of this Attachment is to illustrate that such decisions resulted in targeted adjustments to the interim rate formula while otherwise maintaining the overall interim rate structure, except in one instance where the utility voluntarily waived its right to interim rates.

In the Matter of the Petition of Peoples Natural Gas Co., a Div. of UtilitCorp United, Inc., for Auth. to Increase its Rates for Natural Gas Serv. in the State of Minn., ORDER SETTING INTERIM RATES, G011/GR-92-132 (May 29, 1992).

- Customer agreed to deviation from rate design requirement because exempting large volume customers from interim rates prevented these customers from bypassing the system and leaving residential customers with “substantial, permanent rate increases.”

In the Matter of the Application of Minnegasco, a Div. of Arka, Inc., for Auth. to Increase its Rates for Natural Gas Serv. in the State of Minn., ORDER SETTING INTERIM RATES, Docket No. G008/GR-92-400 (Aug. 31, 1992).

- No required deviation from rate of return requirement because Commission approved the modified rate of return in a separate docket after the last rate case.
- Deviation from existing rate design was inappropriate because “rate design shall remain unchanged from the last rate proceeding unless exigent circumstances exist” and “in this case a change in rate design is not warranted.”

In the Matter of the Application of N. States Power Co.’s Gas Utility for Authority to Change its Schedule of Gas Rates for Retail Customers Within the State of Minn., ORDER ADOPTING INTERIM RATES, Docket No. G002/GR-92-1186 (Dec. 31, 1992).

- Deviation from existing rate base and removal of certain component costs from rate base even though they were “of the same in kind and nature” as other costs included, because recovery was available via a separate method.
- Company agreed to deviation from cost of capital because inclusion of tax benefits reduced the revenue requirement, benefitting ratepayers.

In the Matter of the Application of Minn. Power for Auth. to Change its Schedule of Rates for Retail Elec. Serv. in the State of Minn., ORDER SETTING INTERIM RATES, E015/GR-94-001 (Feb. 25, 1994).

- Company agreed to deviation from rate base and expenses requirement because costs associated with legislatively-mandated economic and community development programs were not included in previous rate case.

In the Matter of a Request by Interstate Power Co. for Auth. to Increase its Rates for Elec. Serv. in Minn., ORDER SETTING INTERIM RATES, Docket No. E001/GR-95-601 (July 31, 1995).

- Company chose to waive right to interim rates, arguing that implementing less than one percent interim rate increase would create an administrative burden.

In the Matter of the Application of Minnegasco, A Div. of NorAm Energy Co., for Auth. to Increase Natural Gas Rates in Minn., ORDER SETTING INTERIM RATES, Docket No. G006/GR-95-700 (Oct. 10, 1995).

- Company agreed to deviation from expenses requirement because a legislatively-directed pilot low-income program did not exist during company's last rate case.
- Company agreed to deviation from existing rate design where the customer class had rates separately negotiated and agreed upon and company planned to recover a small portion of the proposed rate increase from these customers.

In the Matter of a Petition by Peoples Natural Gas Co. and N. Minn. Utils., Divs. Of UtiliCorp United, Inc., for Auth. to Increase Natural Gas Rates in Minn and to Consolidate the Two Utils., ORDER SETTING INTERIM RATES, Docket No. G007,011/GR-00-951 (Sept. 29, 2000).

- Company agreed to deviation from rate of return requirement because each consolidating company had a different rate and application of the higher of the two rates would result in overcollection.
- Company agreed to deviation from existing rate design because the affected customer class could turn to alternative fuel sources, which would result in "substantial and permanent rate increases for the remaining customers."

In the Matter of a Petition by Interstate Power and Light Co. for Auth. to Increase Elec. Rates in Minn., ORDER SETTING INTERIM RATES, Docket No. E001/GR-03-767 (July 17, 2003).

- Deviation from "same nature and kind" expense requirement for nuclear decommissioning expenses because merger occurred, giving rise to new, unavoidable expenses.

In the Matter of a Petition for General Rate Case for Xcel Energy, ORDER SETTING INTERIM RATES, Docket No. G002/GR-04-1511 (Nov. 16, 2004).

- Company agreed to deviation from rate design because, after a major merger of companies, "the old allocation methodologies [were] essentially invalid and unusable" and Commission accepted new methodologies developed by companies.

In the Matter of a Proposed Increase in Elec. Rates of Interstate Power and Light Co., ORDER SETTING INTERIM RATES, Docket No. E001/GR-05-748 (July 8, 2005).

- Customer agreed to deviation from the test year cost of capital because of incoming capital infusion.

In the Matter of the Application of N. States Power Co. d/b/a Xcel Energy for Auth. to Increase Rates for Elec. Serv. in Minn., ORDER SETTING INTERIM RATES, Docket No. E002/GR-05-1428 (Dec. 30, 2005).

- Company agreed to deviation from rate of return requirement to avoid overcollection;
- Company agreed to deviation from rate design requirement because of company's substantial changes in organizational structure;
- Company agreed to deviation from rate base requirement to allow inclusion of new administrative costs because the Commission approved recovery of these costs in separate docket, explaining companies can recover costs "through the rate case process," but this was company's first rate case since Commission approved cost recovery.

In the Matter of the Application of N. States Power Co., a Minn. Corp. and Wholly Owned Subsidiary of Xcel Energy Inc., for Auth. to Increase Rates for Natural Gas Serv. in Minn., ORDER SETTING INTERIM RATES, Docket No. G002/GR-06-1429 (Jan. 4, 2007).

- Company agreed to deviation from rate base requirement allowing imputation, but not collection, of revenues associated with unique calculation methodology of certain rates.

In re the Application of Minn. Power for Auth. to Increase Electric Service Rates in Minn., ORDER SETTING INTERIM RATES, Docket No. E015/GR-08-415 (Jul. 21, 2008).

- Company agreed to deviation from rate of return requirement to prevent overcollection.
- Company agreed to deviation from rate design requirement to exempt large energy customers from interim rates because large customers arguably could bypass the system.

In the Matter of the Application of N. States Power Co. d/b/a/ Xcel Energy for Auth. to Increase Rates for Elec. Serv. in Minn., ORDER SETTING INTERIM RATES, Docket No. E002/GR-10-971 (Dec. 27, 2010).

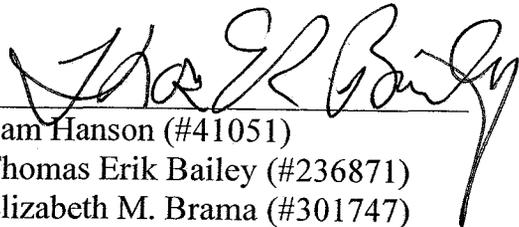
- Company agreed to deviation from rate of return because without reduction in depreciation rates from company's last rate case, "interim rates would exceed the amount requested for final rates."

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Relator, certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately-spaced typeface utilizing Microsoft Word 2007, and contains 6,579 words including headings, footnotes and quotations, and Attachment 1 to this brief.

Dated: June 30, 2011

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