

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 RESPONDENT MINNESOTA PUBLIC
UTILITIES COMMISSION**

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LEGAL ISSUES

1. Whether the Commission properly exercised its statutory authority to find exigent circumstances and adjust Minnesota Power's interim rate request?

The Commission found that exigent circumstances existed and properly adjusted interim rates.

Apposite Authorities:

Minn. Stat. § 216B.16, subd. 3

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 (Minn. 1986)

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

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

STATEMENT OF THE CASE

Minnesota Power (“MP”) challenges the Commission’s exercise of its statutory authority finding exigent circumstances and adjusting MP's interim rate request in its 2009 electric rate case. Interim rates are governed by Minnesota Statutes section 216B.16, subdivision 3. The statute provides a formula by which interim rates are set “[u]nless the Commission finds that exigent circumstances exist.” Minn. Stat. § 216B.16, subd. 3(b) (2010). If the Commission finds exigent circumstances exist, the Commission may adjust an interim rate to address the exigency.

After reviewing MP’s proposed \$73.3 million interim rate request, the Commission determined that due to the “unprecedented” size of the proposed increase, MP’s very recent rate increase, and the severe economic downturn gripping MP’s service territory, exigent circumstances existed. To address the exigency, the Commission authorized a \$48.5 million interim rate increase, which was approximately 60% of the final rate increase requested by MP. The Commission found that an increase of that magnitude protected MP by recognizing its need for increased revenues, and protected ratepayers by limiting the size of the immediate increase.

MP moved for reconsideration of the Commission’s December 30, 2009 interim rate order. On January 20, 2011, the Commission denied Minnesota Power’s request for reconsideration. MP then brought this appeal.

STATEMENT OF THE FACTS

I. MINNESOTA POWER'S RATE FILING.

On November 2, 2009, MP filed a rate case seeking to increase its electric rates by over \$80.9 million. Rel. Add. at 1.¹ MP proposed an interim rate increase of approximately \$73.3 million -- a 17.1% increase from its current just and reasonable rates. *Id.* at 1-3. MP filed its 2009 rate case the day after a \$20.4 million increase was imposed on customers from its previous rate case filed in May 2008. Rel. App. at 22.

After reviewing MP's interim rate increase request, three groups representing the interests of business and residential consumers -- the Large Power Intervenors, Boise Cascade, Inc., and the Office of the Attorney General-Residential Utilities Division ("RUD") -- filed unsolicited comments.² Rel. App. 7, 9, and 11. All requested that the Commission reduce MP's interim rate request in some manner. *Id.*

II. THE COMMISSION HEARING ON MP'S INTERIM RATE REQUEST.

On December 15, 2009, the Commission considered MP's request for the \$73.3 million dollar interim rate increase. At that hearing, a record was developed on the circumstances facing Minnesota Power's service territory. RUD discussed the deep recession facing MP's ratepayers and the unemployment in MP's service territory. MPUC App.³ 14 (Transcript of the Commission's December 15, 2009 Interim Rate Hearing). It also discussed exigency in terms of the rate increase that had just gone into effect for MP's customers, MPUC App. 14, and distinguished MP's interim rate request

¹ "Rel. Add." refers to Relator's Addendum, "Rel. App." refers to Relator's Appendix.

² The groups eventually intervened in the rate case.

³ "MPUC App." refers to Respondent's Appendix.

from Xcel Energy's interim rate request which was heard later the same day. RUD argued that there was no exigency in the Xcel case because Xcel's proposed interim rate increase was not as large as MP's and it had been several years since Xcel had filed a rate case. MPUC App. 17-18. RUD also argued that MP should receive no interim rate increase. MPUC App. 15.

Boise Cascade (a large industrial customer) discussed the challenges that it was facing as a result of the economy including operating at reduced levels for over a year, termination of its pension plan, and frozen salaries. MPUC App. 20. Boise noted that it operated in a competitive global market and that it was not in a position to be able to absorb an interim rate increase of the magnitude proposed by MP. MPUC App. 20.

In addition to Boise Cascade, a group of MP's large power customers commented at the hearing on the economic challenges they were facing. They noted that taconite production was at its lowest point since 1964 and that individuals and industries were struggling. MPUC App. 24. These large power customers also discussed the exigency created by the combination of the timing of MP's rate case and the economy. MPUC App. 22. The large power customers suggested that the Commission limit the increase to 5% instead of the approximately 17% MP requested. MPUC App. 24.

The Energy Cents Coalition, which did not file written comments, also addressed the impact of MP's interim rate request and provided information about the dire economic situation in MP's service territory. *See* MPUC App. 29-30. Energy Cents noted that since MP's last rate case unemployment had increased in all but 2 of the 24 counties served by MP. MPUC App. 29-30. For example, in Lake County

unemployment went from 4.6 to 8 percent, in Chisago from 6 to 8.4 percent, and in Mower from 6.3 to 9 percent. Energy Cents' primary concern was that customers “that are getting hit with [an] enormous rate increase[], particularly those who heat with electricity, [will] see increased inability to pay and service disconnections.” MPUC App. 30. Energy Cents stated that in these circumstances the usual after-the-fact refund “really doesn’t 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.” MPUC App. 30.

In deliberations, the Commissioners found exigent circumstances and discussed the delicate balancing between the interests of the customers and the company in setting interim rates.⁴ Commissioner O’Brien believed that an exigency existed due to the “highly significant and painful levels of unemployment,” reduction in government services, “the onset of cold weather, and a new and recent large rate increase within a matter of months” of these proposed interim rates. MPUC App. 43. He noted that it was the Commission's job to balance the competing interests and “to do otherwise would be an abrogation of [the Commission’s] responsibility to protect the public interest [and] a troublesome delegation of our public responsibilities to a private entity.” MPUC App. 43. Commissioner Pugh reiterated the need for the Commission to balance the competing interests during the period in which interim rates would be in effect. He stated “[w]e have to kind of balance who is more likely to survive the next 13 months if

⁴ The Commission speaks through its orders. *See* Minn. Stat. § 216A.05, subd. 1. The deliberations, however, give additional insight into the Commission’s consideration of the interim rate issue.

somebody either overpays or under recovers.” MPUC App. 50-51. Commissioner Pugh reasoned that under the law any doubts as to that question had to be resolved in favor of the ratepayers. MPUC App. 51. Commissioner Pugh concluded that ratepayers were not in a position in which they could bear paying more than they should while awaiting an eventual refund, while MP would be able to survive if it ultimately undercharged for some period of time. MPUC App. 51.

III. THE COMMISSION’S INTERIM RATE ORDER.

The Commission’s December 30, 2009 order reflects this balancing. In the order setting the interim rate, the Commission *on its own motion* concluded that Minnesota Power’s requested \$72.3 million interim rate increase would “carry serious potential for rate shock - and even outright hardship - for MP’s customers,” and that three “extraordinary circumstances combine[d] to create exigent circumstances.” Rel. Add. at 3.

The first extraordinary circumstance was the unprecedented size of Minnesota Power’s \$81 million requested rate increase. *Id.* at 3. The company’s three previous requested increases were for \$4.4 million, \$34.4 million, and \$45 million. *Id.* The second extraordinary circumstance was the filing of this rate case only one day after the increase approved in its last rate case went into effect. There were substantially longer intervals between the company’s three previous rate cases which were brought in 1987, 1994, and 2008. *Id.* The final extraordinary circumstance was the severe economic downturn in the nation and in particular in MP’s service territory at the time, “marked by widespread and persistent unemployment and reduced commercial and industrial output.”

Id. The Commission noted that MP's "requested 17% increase in the price of electricity, an essential service for every household and business in the Company's territory, raises serious concerns about rate shock and economic harm for the Company's ratepayers." *Id.*

The Commission did not end its analysis with the extraordinary circumstances and hardships facing MP's ratepayers. The Commission next balanced these extraordinary circumstances against the "impact on the Company of reducing its interim rate request."

Id. The Commission noted that the rate case statute recognizes that a utility's requested rate increase typically "substantially exceeds" the final rate case award by granting ratepayers a refund of any over collection during the interim rates period. *Id.* The Commission determined, however, that under these extraordinary circumstances the remedy of a refund to ratepayers was inadequate and would not make ratepayers whole.

Id. Specifically, there were exigent circumstances because "[h]ouseholds 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 increase -- may face economic deprivations, business losses, and even disconnections that an eventual refund would not redress." *Id.* at 3-4.

The Commission authorized an interim rate increase of \$48.5 million, which was an increase of 11.3% above existing rates and represented 60% of the final rate increase requested by MP. *Id.* at 4. In setting the interim rate, the Commission balanced "the potential burdens faced by the Company and its ratepayers in light of these exigent circumstances, the Company's 22+ years of rate case history, [the] Commission's regulatory expertise and the public interest." *Id.* The Commission determined that the

increase protected MP by “recognizing its stated need for additional revenue.” *Id.* It also protected “ratepayers by substantially limiting immediate rate increases.” *Id.* Finally, it protected “the public interest by honoring 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 rate cases are pending.” *Id.*

IV. THE FINAL RATE ORDER.

On November 2, 2010, the Commission issued its Findings of Facts, Conclusions, and Order in the rate case. *See* Rel. App. at 59. In that order, the Commission authorized a \$53.5 million annual rate increase. *Id.* at 127. The allowed increase was \$27.3 million less than what MP sought in its initial filing. *See id.* at 59. The final \$53.5 million annual increase also was only \$5 million more than the \$48.5 annual interim rate increase set by the Commission. *See* Rel. Add. at 4. The \$5 million difference represents only about 1% of the total annual revenue that MP is authorized to collect from its Minnesota retail customers. *See* Rel. App. at 102, 127 (showing the utility operating revenues and the increase authorized by the Commission).

STANDARD OF REVIEW

As the party seeking review of the Commission’s decision, MP has the burden of proof. *In re Minn. Dep't of Commerce for Comm'n Action Against AT&T*, 759 N.W.2d 242, 246 (Minn. App. 2009). In ascertaining whether MP can meet its burden, the Commission’s actions must be reviewed consistent with the statutory requirement that

“[a]ny doubt as to reasonableness should be resolved in favor of the consumer.” Minn. Stat. § 216B.03 (2010).

Minnesota Statutes section 14.69 (2010) outlines the limited scope of review of an agency decision. An agency’s decision will be affirmed unless the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

On appeal, agency decisions enjoy a presumption of correctness and “deference should [therefore] be shown by courts to the agencies’ expertise and their special knowledge in the field . . .” *City of Moorhead v. Minn. Public Utilities Comm’n*, 343 N.W.2d 843, 846 (Minn. 1984) (citations and quotations omitted); *see also In re Review of the 2005 Annual Automatic Adjustment of Charges for all Elec. and Gas Utilities*, 768 N.W.2d 112, 118-119 (Minn. 2009) (deferring to a Commission decision that relied on application of the agency’s technical knowledge and expertise to the facts presented).

Courts give substantial deference to an agency’s fact-finding process. *See In re Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 279 (Minn. 2001) (“*Blue Cross*”) (citation omitted). Further, a reviewing court may not substitute its own judgment for that of an administrative agency when the agency’s

decision is supported by the evidence. *Vicker v. Starkey*, 122 N.W.2d 169, 173 (Minn. 1963).

The scope of judicial review under the arbitrary and capricious standard is limited. A decision may be deemed “arbitrary and capricious” only if the decision reflects the agency’s will and not its judgment. *See Trout Unlimited, Inc. v. Minn. Dep’t of Agric.*, 528 N.W.2d 903, 907 (Minn. App. 1995). The arbitrary and capricious test is satisfied where the agency explains the connection between the facts found and choices made. *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991). An agency decision is not arbitrary and capricious if the agency is presented with opposing points of view and reaches a reasoned decision that rejects one point of view. *See In re Pet. Of Minn. Power For Authority To Change Its Schedule Of Rates For Retail Elec. Serv.*, 545 N.W.2d 49, 51 (Minn. App. 1996).

While this Court reviews questions of law de novo, “judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing.” *Blue Cross*, 624 N.W.2d at 278 (citations and quotations omitted); *see also In re Minn. Dep’t of Commerce for Comm’n Action Against AT&T*, 759 N.W.2d at 246. Reviewing courts “adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training, education, and experience.” *Blue Cross*, 624 N.W.2d at 278.

ARGUMENT

The Legislature gave the Commission broad authority to adjust interim rates when the Commission finds exigent circumstances. Relator asks this Court to ignore the plain language of the statute, and rewrite the law stripping the Commission of its broad authority to adjust interim rates in exigent circumstances. Relator seeks to preclude the Commission from exercising the very discretion that the Legislature provided to the Commission. Had the Commission ignored the exigent circumstances that existed in this case, ratepayers who were affected by the severe economic downturn in MP's service territory would have had to pay interim rates approximately \$19.8 million higher than MP's final rate.

The statutory process for setting interim rates worked as intended. The Commission carefully reviewed the interim rate request and determined that exigent circumstances existed. The Commission then tailored the remedy (a reduction in interim rates for all users) to the exigency (the dire economic circumstances faced by MP's customers, the size of the increase, and the proximity to the previous increase).

I. THE COMMISSION HAS BROAD STATUTORY AUTHORITY TO ADJUST AN INTERIM RATE REQUEST WHEN EXIGENT CIRCUMSTANCES EXIST.

MP's interpretation of the interim rate statute is contrary to the language of the statute. The plain language of the statute allows the Commission to make adjustments to interim rates that are necessary to address an exigency. Further, even if the statute is ambiguous, the intent of the legislature and precedent demonstrate that the interim rate statute gives the Commission broad authority to address exigent circumstances.

A. The Plain Language Of The Statute Allows The Commission To Adjust Interim Rates When Exigent Circumstances Exist.

When interpreting a statute, a court first must determine whether the statute's language, on its face, is clear or ambiguous. "A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (citation and quotations omitted). "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16 (2010).

"Provisos shall be construed to limit rather than to extend the operation of the clause to which they refer." Minn. Stat. § 645.19 (2010). "The natural and appropriate office of a proviso is to modify the operation of that part of the statute immediately preceding the proviso, or to restrain or qualify the generality of the language that it follows." *Dahlberg v. Young*, 42 N.W.2d 570, 575 (Minn. 1950). "An exception in a statute exempts from its operation something that would otherwise be within it." *State v. Goodman*, 288 N.W. 157, 159 (Minn. 1939). Simply put, if something is excepted from a statute, the remainder of the statute cannot be construed to apply to the thing that is excepted.

In light of this well-established principle and applying basic grammatical rules, there is no question that when the Commission finds exigent circumstances, it does not apply the formula for determining interim rates in the remainder of the statute. Section 216B.16, subdivision 3(b) provides:

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.

(emphasis added). 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.

This Court and the Minnesota Supreme Court read the statute the same way. The Minnesota Supreme Court recognized that section 216B.16, subdivision 3 “*does permit departure from the statutory formula where there are exigent circumstances.*” *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. 1986) (emphasis added) (“*Peoples*”). Likewise, this Court stated “[t]he legislature has provided that ‘*unless the Commission finds that exigent circumstances exist,*’ the Commission should calculate an interim rate schedule in accordance with procedures set forth in the statute.” *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. App. 1988) (emphasis added) (“*Otter Tail*”).

Relator’s reading of the statute that applies the “except it shall include” portion of the statutory formula even when there are exigent circumstances is contrary to *Peoples*,

Otter Tail, the language of the statute, and basic grammar. Under Relator's reading, on finding an exigency, the Commission cannot tailor an adjustment in interim rates to address the exigency. Instead, the Commission must adjust the rates based on a formula without regard for the exigency. This Court should reject Relator's unreasonable interpretation of the statute because the plain language of the statute gives the Commission broad authority to find exigent circumstances and adjust the interim rate to address the exigency.

B. Even If Ambiguous, The Statute Gives The Commission Broad Authority To Find Exigent Circumstances And Adjust Rates Accordingly.

Even if the statute is deemed ambiguous, the purpose of the statute and prior decisions interpreting the statute demonstrate that the Commission has broad authority to find exigent circumstances and adjust interim rates to address an exigency.

When a statute is ambiguous, the intent of the legislature is ascertained by considering factors including:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16 (2010). In ascertaining the intent of the legislature, it is presumed that "the legislature intends the entire statute to be effective and certain," and that it

“intends to favor the public interest as against any private interest.” Minn. Stat. § 645.17 (2010).

1. The purpose of the interim rate statute.

Before the current interim rate statute was enacted in 1982, when a utility filed a rate case, the Commission would suspend the existing rates and the utility could petition for implementation of the new rate schedule under a bond that allowed for the refund of any amount collected in excess of the final rates. *In re Petition of Inter-City Gas Corp. for Authority to Change its Schedule of Rates for Gas Service in Minnesota*, 389 N.W.2d 897, 899 (Minn. 1986) (“*Inter-City*”). “The practice of imposing rates under bond caused frequent and wide fluctuations in consumer charges, and these drastic fluctuations, together with delays in making refunds and the payment of what consumers sometimes regarded as inadequate compensation for the use of their funds, engendered public dissatisfaction.” *Id.* at 901. The interim rate statute was enacted in response to this public dissatisfaction. *Peoples*, 389 N.W.2d at 908. The purpose of this change was “to inhibit rate fluctuations and reduce the necessity for refunds.” *Inter-City*, 389 N.W.2d at 901; *see also Peoples*, 389 N.W.2d at 908.

“The thrust of the statute is a balancing of interests. The statute provides for interim rates geared to permit the utility to maintain its current rate of return *but not to improve it* pending consideration of its request to increase its rates.” *Peoples*, 389 N.W.2d at 909 (emphasis added). In balancing these interests, the legislature determined that the “utility bears any shortfall during the interim between the filing of its petition for

a rate increase and [the Commission's] final determination.”⁵ *Id.* at 908. Further, as part of this balancing, the legislature gave the Commission authority to adjust rates in exigent circumstances. *See* Minn. Stat. § 216B.16, subd. 3; *Peoples*, 389 N.W.2d at 907. “[I]t is not for the courts to question the wisdom of the legislative scheme for balancing these competing interests.” *Inter-City*, 389 N.W.2d at 903.

The history and purpose of this statute -- which was enacted in response to rates under bond that typically greatly exceeded final rates -- support the conclusion that the Legislature gave the Commission broad authority to balance interests and find exigent circumstances when warranted. This is especially true in this case in which the Commission determined in light of the circumstances facing MP's customers that the remedy of a refund of an over collection in interim rates would be inadequate to ensure reasonableness.

2. Court and Commission precedent support the use of exigent circumstances in a broad array of circumstances.

MP contends that exigent circumstances must be limited to the ratemaking formula in the interim rate statute and that the Commission may not adjust factors listed

⁵ MP argues that it bears all risk with regard to interim rates since it must refund an over collection but may not collect a shortfall before a final order. Rel. Br. 24. This is not the case. Utilities have significant procedural advantages in the rate-making process. For example, utilities control the timing and content of filings, and the size of requested rate increases. *See In Re the Petition of Minn. Power & Light Company for Authority to Change its Schedule of Rates for Electric Utility Service Within the State of Minn.*, 435 N.W.2d 550, 557 (Minn. App. 1989) (The timing of a rate case filing is within a utility's control). Indeed, MP is essentially arguing here that it had a legal right to over collect by \$19.76 million during the interim rate period despite the circumstances facing its customers. MP's customers have none of these advantages and must pay whatever interim increases are put in place.

in the law after the “except that it shall include” language. *See* Rel. Br. 26-28. This argument is not only contrary to the plain language and purpose of the statute, it is inconsistent with judicial and Commission precedent.

As discussed above, the statutory formula does not apply where there are exigent circumstances. *See Peoples*, 389 N.W.2d at 907. Further, the Minnesota Supreme Court has not limited the definition of “exigent circumstances” to something that affects the statutory ratemaking formula as Relator seeks to do.⁶ Instead, the Supreme Court has broadly defined an exigent circumstance under the interim rate statute as a circumstance that “bespeaks urgency or emergency.” *Id.* Similarly, this Court has not limited the circumstances under which an exigency may be found. Instead it has stated broadly that “[i]n order for the Commission to find ‘exigent circumstances,’ the Commission must first analyze the petition and accompanying evidence.” *Otter Tail*, 417 N.W.2d at 680. There is no authority for limiting exigent circumstances to something “that impacts the Company’s cost of capital, rate base, revenues, or expenses.” *See* Rel. Br. at 28.

Furthermore, MP’s argument that the Commission may not adjust factors listed in Section 216B.16, subdivision 3(b) after the “except that it shall include” language is contrary to the Commission’s past precedent. For example, in setting interim rates in the 2008 MP rate case, the Commission found that exigent circumstances warranted using a lower return on common equity than that authorized in the previous rate case -- one of the items listed in 216B.16, subdivision 3 that MP now argues cannot be adjusted. *In re the*

⁶ Likewise, the Commission has not so limited the phrase “exigent circumstances,” as MP erroneously suggest.

Application of Minn. Power for Authority to Increase Electric Service Rates in Minn., Order Setting Interim Rates at 3, Docket No. E-015/GR-08-415 (Jul. 21, 2008) (“2008 MP Order”) (MPUC App. at 70); Rel. Br. at 26.

Likewise, in MP’s 2008 rate case, the Commission excluded two groups of customers from the interim rate increase due to exigent circumstances facing those customers. *2008 MP Order* at 4 (MPUC App. at 71). The exclusion of certain customers from an interim rate increase while permitting the interim increase for other customers alters the existing rate design -- another item that MP now argues cannot be altered even when exigent circumstances exist. *Id.*; Rel. Br. at 26. In its 2008 rate case, however, MP agreed to these adjustments to interim rates due to exigent circumstances. *2008 MP Order* at 3-4 (MPUC App. at 70-71).⁷

In addition, in a 2000 gas rate case decision, the Commission ordered changes to rate design and return on equity due to exigent circumstances. *See In re Petition of Peoples Natural Gas Company and Northern Minnesota Utilities, Divisions of UtiliCorp United Inc., for Authority to Increase Natural Gas Rate in Minnesota and to Consolidate the Two Utilities*, Order Setting Interim Rates at 4-5, Docket No. G-007,001/GR-00-951 (MPUC App. at 81-82). In each of these past cases, the Commission appropriately

⁷ MP fails to reconcile its new illogical interpretation of the interim rate statute with the position it took in the 2008 rate case. *See* Rel. Br. at 26 (arguing that the Commission cannot adjust items listed in 216B.16, subds.3(b)(1)-(3) in setting interim rates even when exigent circumstances exist); *2008 MP Order* at 3-4 (MPUC App. 70-71). Likewise, in the 2008 rate case, MP recognized that economic circumstances facing its customers could constitute exigent circumstances that necessitated exempting those customers from the interim rate increase. *2008 MP Order* at 4 (MPUC App. 71). Yet, in a complete change of position, MP now argues that economic circumstances are irrelevant to the determination of whether exigent circumstances exist. Rel. Br. at 33-34.

determined that because exigent circumstances existed, it could depart from the statutory formula and set interim rates to address the exigency. This Commission precedent provides further proof that MP's current interpretation of the statute is erroneous.

MP relies on the statement in *Inter-City* that the reasonableness of an interim rate increase is assured by the provision for a refund, to support its argument that the Commission's discretion to adjust interim rates is extremely limited. *See* Rel. Br. at 25. The language MP relies on, however, is inapplicable as it does not address what occurs when there are exigent circumstances. *See Inter-City*, 398 N.W.2d 897. Minnesota courts have been clear that when there are exigent circumstances, the Commission has considerable discretion and the statutory formula for setting interim rates does not apply. *See Peoples*, 389 N.W.2d at 907; *Otter Tail*, 477 N.W.2d at 680.

Finally, MP's interpretation of the statute is illogical. The interpretation would render the "exigent circumstances" language meaningless and give utilities additional incentives to overstate their interim rate requests. The plain language of the statute, construction of "exigent" circumstances by Minnesota courts, and Commission precedent demonstrate that the Commission has broad authority to find exigent circumstances and to adjust an interim rate request to address an exigency.⁸ As explained below, the Commission appropriately exercised that authority in this case.

⁸ While the Commission's authority to find exigent circumstances is broad, the Commission has exercised this authority judiciously. Despite requests from ratepayers in several subsequent rate cases to adjust interim rates for all customers due to economic conditions, the Commission has not found such exigent circumstances in these cases. *In Re the Application of N. States Power Co. d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in Minn.*, Order Setting Interim Rates at 3, Docket No. E- (Footnote Continued on Next Page)

II. THE COMMISSION PROPERLY FOUND EXIGENT CIRCUMSTANCES AND ADJUSTED THE INTERIM RATE.

The Commission's decision finding an exigency and adjusting the interim rate was a reasonable policy decision. In exercising the Court's limited scope of review over the Commission's decision, it is important to bear in mind that "[r]easonableness is a concept of some flexibility and moderation, not exclusivity; a determination that one course of conduct is reasonable is not a determination that any other course is unreasonable." *Peoples*, 389 N.W.2d at 908. Furthermore, in the interim rate statute the Legislature gave the Commission the ability to find exigent circumstances and determine the interim rate based on the exigency. It is not for the courts to question the legislative scheme for balancing the interests of consumers and utilities. *See Inter-City*, 389 N.W.2d at 903.

A. The Commission Acted Within Its Authority In Finding Exigent Circumstances.

The Commission properly found exigent circumstances based on the combination of the unprecedented size of the company's requested rate increase, the impact of the severe economic downturn on ratepayers and the timing of this request for an increase on the heels of MP's last increase. The Commission's order details each of these factors. Based on the cumulative impact of these factors, the Commission determined that the remedy of a refund to ratepayers of any over collection was inadequate. Rel. Add. at 3. The Commission found that requiring customers to overpay during the interim rate period

(Footnote Continued From Previous Page)

002/GR-10-971 (Dec. 27, 2010) (MPUC App. at 93); *In re the Application of Minn. Energy Resources Corporation for Authority to Increase Rates for Natural Gas Service in Minnesota*, Order Setting Interim Rates at 3, Docket No. G-007,011/GR-10-977 (Jan. 28, 2011) (MPUC App. at 89).

could result in economic deprivations, business losses, and even disconnections of electric service that an eventual refund would not redress. *Id.* at 3-4. As a result, in these exigent circumstances, the reasonableness of the increase could not be assured by the provision for a refund. Such a result would be contrary to the purpose of the interim rate statute which was enacted “to inhibit rate fluctuations and reduce the necessity for refunds.” *Inter-City*, 389 N.W.2d at 901.

Relator contends that the consideration of these factors was improper for a variety of reasons. *See* Rel. Br. 30-35. There is, however, no support in statute or otherwise for Relator’s arguments. For example, the fact that the Company was legally permitted to file a rate case at the time of the 2009 filing does not limit the Commission’s ability to consider the timing of the rate case as one of many factors in determining that exigent circumstances exist. Similarly, there is nothing in the statute or case law prohibiting the consideration of the unprecedented size of MP’s increase, or the impact of that increase on customers facing a severe economic downturn “marked by widespread and persistent unemployment and reduced commercial and industrial output.” *See* Rel. Add. at 3. Relator improperly asks this Court to read additional language into the statute and to substitute its judgment for the Commission’s judgment.

B. The Commission Acted Within Its Authority In Adjusting The Interim Rate.

As discussed above, the formula in the interim rate statute does not apply when the Commission finds exigent circumstances. Accordingly, the Commission has broad

authority to adjust interim rates in a manner that addresses the exigency. That is precisely what occurred in this case.⁹

In setting the interim rate, the Commission carefully balanced “the potential burdens faced by the Company and its ratepayers in light of these exigent circumstances, the Company’s 22+ years of rate case history, [the] Commission’s regulatory expertise and the public interest.” Rel. Add. at 4. The Commission rejected the proposals to limit the interim rate increase to 0% and 5%, and instead authorized an interim rate increase of 11.3% or a \$48.5 million increase. This amount is 60% of MP’s proposed \$80.9 million final rate increase request and is equal to 66% of MP’s proposed \$73.3 million interim rate request. Rel. Add. 4. The Commission determined the amount of the interim increase based on consideration of MP’s need for additional revenue, the hardships facing ratepayers, and “honoring 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 rate cases are pending.” Rel. Add. 4. The Commission appropriately exercised its authority in balancing competing considerations and setting the interim rate in a manner that addressed the exigency. The Commission’s action was not arbitrary and

⁹ Arguably, the decision about the level at which to set interim rates in light of the exigent circumstances is a quasi-legislative decision because it involved the balancing of public policy and private needs. *See St. Paul Area Chamber of Commerce v. Minn. Public Serv. Comm’n.*, 251 N.W.2d 350, 357 (Minn. 1977). Because of the nature of this balancing, courts will not second guess the Commission’s judgment on quasi-legislative decisions “unless statutory authority has been exceeded or discretion abused.” *Id.* The level at which the Commission set the interim rate passes muster regardless of what standard of review this Court applies.

capricious, and the 11.3% interim rate increase authorized by the Commission can hardly be called unreasonable.

The Commission's actions were also consistent with its precedent. For example, in Minnegasco's 1995 rate case, Minnegasco asked the Commission to find exigent circumstances and exclude certain customers from the interim rate increase because the customers were subject to competition. *In re the Application of Minnegasco, a Div. of NorAm Energy Co., for Auth. to Increase Natural Gas Rates in Minn., Order Setting Interim Rates at 5, Docket No. G-008/GR-95-700 (Oct. 10, 1995) (MPUC App. at 99-101).* The Commission found exigent circumstances but did not exempt the customers from interim rates entirely. *Id.* at 7 (MPUC App. 101). Instead, the Commission balanced the exigency (the risk of losing these customers) against the burden that falls to other groups of customers and set the interim rate increase at 1% for these customers. *Id.* The Commission performed a similar balancing here in setting the interim rate when it balanced the exigent circumstances against MP's ability to recover.

Relator's claim that the Commission prejudged the rate case because it considered past rate cases is without foundation. In balancing the competing interests the Commission considered MP's request to recover additional revenue during the interim period and the exigent circumstances facing MP's customers. Instead of randomly choosing the interim rate increase amount, the Commission used the information available to it, including MP's recent rate case history. Using available information is not pre-judging the outcome of the rate case.

Furthermore, it is unclear how MP can claim the Commission prejudged the rate case when its final rate was higher than the interim rate. *See Otter Tail*, 417 N.W.2d at 680 (noting that because the Commission changed its determination on the rate of return between the interim and final orders it demonstrated that “that the Commission did take a new look at the evidence when issuing its final order, rather than simply relying upon its decision in the interim rate order”). The Commission’s 72-page final order demonstrates an independent and lengthy examination of the issues in the rate case and conclusively establishes that the Commission did not prejudice MP’s rate increase request. *See Rel. App.* at 59-130; *Otter Tail*, 417 N.W.2d at 680 (Utility’s “argument that the Commission arbitrarily reinstated the equity ratio figure that it had adopted in the interim rate proceeding is speculative, and without any real support in the record. In fact, the Commission’s final order demonstrates an independent and lengthy examination and explanation of the equity ratio issue.”)

C. Relator Waived The Argument That The Commission Violated The Ex Parte Requirement Of The Statute, And In Any Event, The Commission Properly Considered Public Comments.

Relator argues that the Commission violated Minn. Stat. § 216B.16, subd. 3(a) when it accepted unsolicited comments on the interim rates and heard from interested persons at the proceeding. Relator Br. 38-39. Relator waived this argument. Even if this Court considers the argument, the Commission did not violate the statute.

An issue can *only* be raised in an appeal from a Commission decision if that “ground” is “specifically” set forth in a request for rehearing before the Commission. Minn. Stat. § 216B.27, subd. 2 (2010). This codifies the long standing principle that a

party to an agency proceeding is required to exhaust its administrative remedies. *See City of Richfield v. Local No. 1212, Int'l Ass'n of Fire Fighters*, 276 N.W.2d 42, 51 (Minn. 1979).

Relator failed to specifically raise this issue in its petition for reconsideration. Nowhere in its 15-page Petition For Reconsideration does Relator claim that the Commission violated the *ex parte* language in section 216B.16, subd. 3(a). *See Relator App.* 131-145. Because Relator did not specifically raise the issue as a ground for reconsideration, this Court must decline to address the issue. *See Minn. Stat. § 216B.27, subd. 2; In re Interstate Power Co.*, 416 N.W.2d 800, 803 (Minn. App. 1987) (declining to address issues on appeal that were not raised in an application for rehearing before the Commission).

In any event, the Commission did not violate the statute. Relator construes the term *ex parte* too narrowly. Consistent with the purpose of the interim rate statute, *ex parte* means that the rates are to be set without full-blown evidentiary hearings, the procedure reserved for final rates. *Inter-City*, 389 N.W.2d at 902; *Otter Tail*, 417 N.W.2d at 680 (stating “[T]he term ‘*ex parte*’ does not require that the Commission simply adopt a utility's proposal with no examination . . . Certainly, the Commission must be expected to examine the evidence”). The statute is properly interpreted to allow comments from interested persons, like those in this case, on issues relating to exigent

circumstances and interim rates.¹⁰ Moreover, there is no policy reason why interested persons should be prohibited from commenting on such important issues.

D. Relator Is Not Entitled To A Refund Of The Difference Between Interim Rates And Final Rates.

MP argues that if the Commission's interim rate decision exceeded its statutory authority, this Court has the ability to order the Commission to implement a recoupment mechanism as a remedy for the violation. Because the Commission acted within the scope of its authority, this Court need not address the question of whether MP may recover the difference between its interim rates and the final rates. The Commission properly exercised its broad statutory authority when it adjusted MP's \$73.3 million interim rate request to address the exigent circumstances facing MP's customers. In the event the Court concludes otherwise, the Court should remand the matter back to the Commission so that the Commission may consider an appropriate remedy.

¹⁰ In fact, the Commission's own rules specifically allow the Commission to receive written and oral ex parte comments from a party or participant "in the setting of interim rates...." Minn. R. 7845.7400 (2010).

CONCLUSION

The Commission respectfully requests that the Court affirm the Commission's December 30, 2009 order.

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Respectfully submitted,

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