

No. A07-653

STATE OF MINNESOTA

IN COURT OF APPEALS

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

**BRIEF OF RESPONDENT
MINNESOTA PUBLIC UTILITIES COMMISSION**

**ATTORNEYS FOR RELATOR
CENTERPOINT ENERGY
MINNESOTA GAS**

Eric F. Swanson (ID# 188128)
David M. Aafedt (ID #27561X)
WINTHROP & WEINSTEIN, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
(612) 604-6400

**ATTORNEYS FOR RESPONDENT
MINNESOTA PUBLIC UTILITIES
COMMISSION**

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

**ATTORNEYS FOR RESPONDENT
MINNESOTA OFFICE OF THE
ATTORNEY GENERAL
RESIDENTIAL AND SMALL
BUSINESS UTILITIES DIVISION**

Ronald M. Giteck (ID# 0289747)
Assistant Attorney General
Minnesota Attorney General's Office
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2130
(651) 284-4066

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iv
LEGAL ISSUES	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	7
SCOPE OF REVIEW	12
ARGUMENT	15
I. THE COMMISSION APPROPRIATELY FOUND THAT RELATOR FAILED TO MEET THE STANDARDS FOR A VARIANCE TO THE TRUE-UP RULE	15
A. Standard Of Law	15
B. The Commission Appropriately Found That Compliance With The True-Up Rule Would Not Impose An Excessive Burden on Relator.	16
1. The Amounts At Issue Are A Small Percentage Of The Company's Total Gas Costs And Do Not Impose An Excessive Burden On Relator.	16
2. Whether These Amounts Pose An Excessive Burden On Relator Is A Determination Requiring Application Of The Commission's Technical Knowledge And Expertise.	17
C. Relator Failed to Demonstrate That Granting A Variance Would Not Adversely Affect The Public Interest.	20
1. The Commission Is The Agency With The Expertise To Determine Whether The Requested Variance Would Adversely Affect The Public Interest.	22
D. Relator's Legal Analysis Failed To Justify Its Request For A Variance.	24
II. THE COMMISSION'S DECISION REFLECTS ITS CAREFUL CONSIDERATION OF THE ISSUES PRESENTED AND IS NOT ARBITRARY AND CAPRICIOUS.....	24
A. Standard Of Law	24
B. The Matter At Issue Here Is Distinguishable From Previous Cases In Which The Commission Has Granted A Variance.	24
1. Unlike The Cases Cited, Relator Has Had Two Intervening Rate Cases During The Time Period At Issue.	25
2. The Commission's Previously-Granted Variances To The True-Up Rule Were Based On Substantially Different Factual Circumstances.	27
a. NSP-GAS.....	27

	b.	IPL-Gas.....	30
	c.	Kansas Ad Valorem Tax.....	31
III.		THE COMMISSION’S DECISION IS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD.....	33
	A.	Standard Of Law.....	33
	B.	The Commission Based Its Decision On The Information Provided By Relator.	33
	C.	The Record Demonstrates The Commission Has Taken A “Hard Look” At This Issue.	34
IV.		THE COMMISSION’S DECISION DOES NOT REFLECT AN ERROR OF LAW AND IS NOT IN EXCESS OF ITS AUTHORITY.	35
	A.	Standard of Law.....	35
	B.	Relator Did Not Seek Timely Recovery Of Gas Costs Under The True-Up Rule And, Accordingly, The Request Must Meet The Requirements For A Variance Under Minn. R. 7829.3200, subp. 1.	36
	C.	The True-Up Is Complete On An Annual Basis.....	37
	D.	The Commission’s Decision Does Not Violate A “Regulatory Compact.”.....	38
V.		THE COMMISSION’S DECISION IS CONSTITUTIONAL.	39
	A.	Standard Of Law.....	39
	B.	Relator Failed To Avail Itself Of The Opportunity To Recover The Amounts At Issue As Provided By The True-Up Rule.....	40
	C.	Relator’s Choice To Write-Off The Amounts At Issue In A Single Year Does Not Equate To The Commission Establishing Confiscatory Rates Or Depriving Relator Of Its Due Process Rights.	41
	D.	Relator’s Analysis Is Flawed.	43
	E.	The Commission Did Not Rule On Whether The Costs Were Prudently Incurred.....	44
VI.		THE COMMISSION’S DECISION IS BASED UPON LAWFUL PROCEDURE.....	45
	A.	Standard Of Law.....	45
	B.	Nothing In Statute Or Rule Requires A Contested Case.	45
	C.	Denial Of Relator’s Request For a Contested Case Did Not Violate Relator’s Due Process Rights Under the Minnesota and United States Constitutions.....	47
	D.	A Contested Case Was Unnecessary To Decide The Matters At Issue.....	50

CONCLUSION 51

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Virginia</i> , 262 U.S. 679, 43 S.Ct. 675 (1923).....	2, 39, 40, 41
<i>Matthews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893 (1976).....	2, 47
STATE CASES	
<i>Cable Communications Bd. v. Nor-West Cable Communications P'ship</i> , 356 N.W.2d 658 (Minn. 1984).....	passim
<i>Fosselman v. Comm'r of Human Serv.</i> , 612 N.W.2d 456 (Minn. Ct. App. 2000).....	47, 48
<i>Geo. A. Hormel & Co. v. Asper</i> , 428 N.W.2d 47-48 (Minn. 1988).....	14
<i>In re Application of the Grand Rapids Pub. Util. Comm'n</i> , 731 N.W.2d 866 (Minn. Ct. App. 2007).....	1, 15
<i>In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater</i> , 731 N.W.2d 502 (Minn. 2007).....	14, 15
<i>In re Denial of Eller Media Co.'s Application for Outdoor Advertising Permits</i> , 664 N.W.2d 1 (Minn. 2003).....	14
<i>In re Detailing Criteria and Standards for Measuring an Electric Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. § 216B.1691</i> , 700 N.W.2d 533 (Minn. Ct. App. 2005), aff'd, 714 N.W.2d 426 (Minn. 2006).....	1, 13
<i>In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota</i> , 624 N.W.2d 264 (Minn. 2001).....	passim
<i>In re Minnesota Power's transfer of M.L. Hibbard Units 3 and 4 Boilers and Related Facilities to the City of Duluth</i> , 349 N.W.2d 147 (Minn. Ct. App. 1987).....	24
<i>In re Petition of Interstate Power Co.</i> , 419 N.W.2d 803 (Minn. App. 1988).....	43, 44

<i>In re</i> Petition of Minn. Power & Light Co., 435 N.W.2d 550 (Minn. Ct. App. 1989).....	43
<i>In re</i> Petition of N. States Power Co. Gas Util. for Authority to Change its Schedule of Gas Rates, 519 N.W.2d 921 (Minn. Ct. App. 1994).....	24, 38
<i>Markwardt v. State Water Resources Bd.</i> , 254 N.W.2d 371 (Minn. 1977).....	12
<i>Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency</i> , 644 N.W.2d 457 (Minn. 2002).....	passim
<i>Minnesota Public Interest Research Group v. Minnesota Environmental Quality Board</i> , 237 N.W.2d 375 (Minn. 1975).....	46
<i>Minnesota Public Interest Research Group v. Northern States Power Company</i> , 360 N.W.2d 654 (Minn. Ct. App. 1985).....	46, 47
<i>Reserve Mining Co. v. Herbst</i> , 256 N.W.2d 808 (Minn. 1977).....	14
<i>Schedule of Gas Rates</i> , 519 N.W.2d 921 (Minn. Ct. App. 1994).....	24, 38
<i>St. Otto's Home v. Minnesota Dep't of Human Serv.</i> , 437 N.W.2d 35 (Minn. 1989).....	14
<i>Vicker v. Starkey</i> , 265 Minn. 464, 122 N.W.2d 169 (1963).....	1, 13, 33
<i>White v. Minnesota Dep't of Natural Resources</i> , 567 N.W.2d 724 (Minn. Ct. App. 1997).....	13

STATE STATUTES

Minn. Stat. § 14.63 (2006).....	46
Minn. Stat. § 14.69 (2006).....	12, 35
Minn. Stat. § 116D.04 (2000).....	17
Minn. Stat. § 216B.03 (2006).....	19, 22
Minn. Stat. § 216B.08 (2006).....	19

Minn. Stat. § 216B.09 (2006).....	19
Minn. Stat. § 216B.098 (2006).....	23
Minn. Stat. § 216B.14 (2006).....	19
Minn. Stat. § 216B.16 (2006).....	passim
Minn. Stat. § 216B.164 (2006).....	22
Minn. Stat. § 216B.1691 (2006).....	22
Minn. Stat. § 216B.17 (2006).....	22
Minn. Stat. § 216B.23 (2006).....	40
Minn. Stat. § 216B.2422 (2006).....	22
Minn. Stat. § 216B.48 (2006).....	23
Minn. Stat. § 216B.49 (2006).....	23
Minn. Stat. § 216B.52 (2006).....	12, 46, 47
Minn. Stat. ch. 216B (2006).....	19, 21, 23
Minn. Stat. ch. 14 (2006).....	12, 46, 47

STATE RULES

Minn. R. 4410.1700 (1999).....	17, 18
Minn. R. 4410.3800 (1999).....	18, 19
Minn. R. 7825.2390-7825.2920 (2005)	3, 36
Minn. R. 7825.2700 (2005).....	passim
Minn. R. 7825.2810 (2005).....	3
Minn. R. 7825.2910 (2005).....	3, 37, 44
Minn. R. 7825.3200 (2005).....	passim
Minn. R. 7829.1000 (2005).....	2, 45

OTHER

Minnesota. Constitution Art. I..... 2, 39
U.S. Constitution Amendments V and XIV 2

STATE AGENCY DECISIONS

*In the Matter of an Investigation and Audit of Northern States
Power Company's d/b/a Xcel Energy's Service Quality Reporting*
MPUC Docket No. E,G-002/CI-02-2034 (March 10, 2004) 39

*In the Matter of the Complaint by Myer Shark, et al.
Regarding Xcel Energy's Income Taxes*
MPUC Docket No. E,G-002/C-03-1871 (October 1, 2004) 43, 44

*In the Matter of the Request to Vary Supplier Refund Rules Regarding a
Kansas Ad Valorem Production Tax Refund Made by Mobil Oil Corporation*
MPUC Docket No. G-999/AA-98-332 (June 2, 1998) 31,32

*In the Matter of the Review of Northern States Power Company d/b/a
Xcel Energy 2005 Annual True-Up Filing,*
MPUC Docket Nos. E,G-999/AA-05-1403, G-002/AA-05-1425
(February 14, 2007)..... 25

*In the Matter of the Review of the 1994 Automatic Adjustment
of Charges for All Gas and Electric Utilities*
MPUC Docket No. G,E-999/AA-94-762 (July 13, 1995) passim

*In the Matter of the Review of the 1997 Annual Automatic
Adjustment of Charges for All Gas and Electric Utilities*
MPUC Docket No. G,E-999/AA-97-1212 (May 28, 1998)..... 25, 30, 31

*In the Matter of the Review of the 2001 Annual Automatic
Adjustment of Charges for All Gas and Electric Utilities*
MPUC Docket No. G, E-999/AA-01-838 (December 23, 2002) 6, 21, 38, 40

*In the Matter of the 2002 Annual Automatic Adjustment for
All Gas and Electric Utilities*
MPUC Docket No. G,E-999/AA-02-950 (August 7, 2003) 6, 21, 38, 40

*In the Matter of the Review of the 2003 Annual Automatic
Adjustment of Charges for All Gas and Electric Utilities*
MPUC Docket No. G,E-999/AA-03-1246 (August 10, 2004) 6, 21, 38, 40

*In the Matter of the Review of the 2004 Annual Automatic
Adjustment Reports for All Natural Gas and Electric Utilities
and the 2004 Purchased Gas Adjustment True-up Filings for
All Natural Gas Utilities,
MPUC Docket No. G,E-999/AA-04-1279 (December 7, 2005) 6, 21, 38, 40*

*In the Matter of the Review of the 2005 Annual Automatic
Adjustment of Charges for All Electric and Gas Utilities,
MPUC Docket No. E,G-999/AA-05-1403 (February 28, 2006) 7*

LEGAL ISSUES

1. IS THE COMMISSION'S DECISION TO DENY RELATOR ITS REQUESTED VARIANCE ARBITRARY AND CAPRICIOUS?

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the negative.

Apposite Authority:

In re Detailing Criteria and Standards for Measuring an Electric Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. § 216B.1691, 700 N.W.2d 533 (Minn. Ct. App. 2005), *aff'd*, 714 N.W.2d 426 (Minn. 2006)

In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota, 624 N.W.2d 264 (Minn. 2001)

Cable Communications Bd v. Nor-West Cable Communications P'ship, 356 N.W.2d 658 (Minn. 1984)

2. IS THE COMMISSION'S DECISION TO DENY RELATOR ITS REQUESTED VARIANCE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD?

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the affirmative.

Apposite Authority:

Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457 (Minn. 2002)

Vicker v. Starkey,
265 Minn. 464, 122 N.W.2d 169 (1963)

In re Application of the Grand Rapids Pub. Util. Comm'n,
731 N.W.2d 866 (Minn. Ct. App. 2007)

Cable Communications Bd v. Nor-West Cable Communications P'ship,
356 N.W.2d 658 (Minn. 1984)

3. IS THE COMMISSION'S DECISION UNCONSTITUTIONAL?

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the negative.

Apposite Authority:

Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Virginia,
262 U.S. 679, 43 S.Ct. 675 (1923)

U.S. Constitution Amendments V and XIV
Minnesota Constitution Article I §§ 7 and 13
Minn. R. 7825.2700, subp. 7 (2005)
Minn. R. 7829.3200, subp. 1 (2005)

4. IS THE COMMISSION'S DECISION IN EXCESS OF ITS AUTHORITY OR OTHERWISE REFLECT AN ERROR OF LAW?

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the negative.

Apposite Authority:

Minn. Stat. § 216B.16, subd. 7 (2006)
Minn. R. 7825.2700, subp. 7 (2005)
Minn. R. 7829.3200, subp. 1 (2005)

5. IS THE COMMISSION'S DECISION MADE UPON UNLAWFUL PROCEDURE?

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the negative.

Apposite Authority:

Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976)

Minn. R. 7829.1000 (2005)

STATEMENT OF THE CASE

Minnesota Rules permit a natural gas distribution utility to recover changes in its gas costs through its monthly purchased gas adjustment (“PGA”). Minn. R. 7825.2390-7825.2920 (2005). Minnesota Rules part 7825.2700, subp. 7 (“True-Up Rule”) permits a gas utility to true-up any under- or over-recovery in the PGA on an annual basis. The Minnesota Public Utilities Commission (“Commission”) reviews each utility’s monthly PGA and annual true-up through the utility’s annual September 1 filing (“AAA Report and True-Up”). Minn. R. 7825.2810 and 7825.2910 (2005). The AAA Report and True-Up outlines for the Commission each utility’s true-up adjustment for the previous year commencing July 1 and ending June 30. Minn. R. 7825.2910, subp. 4 (2005).

Relator CenterPoint Energy Minnesota Gas (“Relator” or “Company”) submitted its AAA Report and True-Up for the 2004-2005 period on September 1, 2005. The Company subsequently notified the Commission that it had identified an error and would provide updated information to the Commission regarding the error. When the Company provided the additional information, however, the Company explained that the error was due to an accounting change initiated in November 2000, and that it had been repeated every month over the last five years. The Company requested a variance to the True-Up Rule to permit it to recover gas costs that it alleged went unrecovered over the previous five years.

Minnesota Rules part 7829.3200, subp. 1 (2005) states that the Commission shall grant a variance to its rule when it determines that: (1) enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule; (2) granting

the variance would not adversely affect the public interest; *and* (3) granting the variance would not conflict with standards imposed by law.

The Commission found that Relator had not satisfied the Commission's three-part test for granting a variance. The Commission found that enforcement of the rule would not impose an excessive burden on Relator and that in Relator's attempt to prove excessive burden, Relator improperly compared four years of errors to one year of operating income. The Commission found the analysis of the Minnesota Department of Commerce ("Department") persuasive that a comparison of five years of unrecovered gas costs to Relator's total gas costs for that five-year period resulted in an under-recovery of only 0.5 percent.

The Commission also was not persuaded that granting the variance would not adversely affect the public interest. The Commission found that the public interest is best served by ensuring that customer charges are calculated correctly for each year's true-up. Further, the Commission was not convinced that Relator had not been adequately compensated by ratepayers, since Relator had undergone the extensive review and examination of its rates and financial condition in both its general rate cases filed in 2004 and 2005. Further, the mismatch between the set of ratepayers who benefited and the set of ratepayers who would pay would differ by as much as ten years. The equities did not favor granting the extraordinary remedy of out-of-period gas-cost recovery.

Additionally, the Commission found inadequate support in the legal analysis offered to justify Relator's request for a variance. Relator attempted to rely on previous cases in which the Commission had granted a variance to the True-Up Rule. Neither of

those cases, however, involved the persistent and ongoing accounting errors at issue here, and in neither case had the utility undergone the extensive review of a rate case in the intervening time period.

Finally, for the 2004-2005 period, the Commission ordered an independent audit of Relator's financial statements, gas cost calculations, AAA Reports and True-Ups and outlined the requirements of what the audit should include, such as an evaluation of Relator's proposed methodology for accounting for unbilled revenues and lost and unaccounted for gas ("LUFG").¹

Relator petitioned for rehearing and reconsideration of the Commission's *Order Denying Variance and Ordering Independent Audit* ("Order"). The Commission did not grant Relator's petition. On its own motion, however, the Commission clarified its *Order* that the cumulative impact of Relator's errors was not \$2.4 million over a five-year period, and that the \$2.4 million referred to in the *Order* was the approximate amount of margin revenue that would have been collected on the un-billed sales volumes if those sales had occurred.

The Commission also noted Relator's argument that denial of recovery is punitive was undercut by the fact that it was the accounting changes initiated by Relator that caused the errors; that the errors were repeated every month during a five year period; and that Relator did not notice the errors until over five years after the accounting practices had been initiated. Since the approximately \$21 million in unrecovered gas

¹ The docket before the Commission is still pending with respect to the resolution of gas costs for which the Company sought timely cost recovery, July 1, 2004 to June 30, 2005.

costs equals only 0.5 percent of Relator's total gas costs of \$4.2 billion during the period at issue, the Commission found that this is not an excessive burden for Relator to absorb. Ratepayers are not a backup source of cash to indemnify Relator from the consequences of its own errors.

The Commission has not unconstitutionally deprived Relator of its property without just compensation. The True-Up Rule allows a gas utility to true-up its under- or over-recovered gas costs on an annual basis, and includes a one-year look back period. The Commission's decision gives effect to the True-Up Rule. There is no dispute that Relator has filed annual true-ups for each of the years at issue and that it has recovered its timely-reported gas costs as allowed by the True-Up Rule.² It is Relator's failure to avail itself of the opportunity to recover these costs that has resulted in the alleged under-recovery here.

The Commission's decision is consistent with the statutes, rules and prior orders regarding the recovery of gas costs. The Commission's decision is based on the evidence

² See *Order Addressing 2001 Annual Automatic Adjustment Report, In re Review of the 2001 Annual Automatic Adjustment of Charges for All Gas and Electric Utilities*, MPUC Docket No. G,E999/AA-01-838 (December 23, 2002), Commission App. 8 (Commission App. is hereafter referred to as "C.A."); *Order Acting on Gas and Electric Utilities' 2002 Annual Automatic Adjustment Reports and Setting Further Requirements, In re 2002 Annual Automatic Adjustment of Charges for All Gas and Electric Utilities*, MPUC Docket No. G,E999/AA-02-950 (August 7, 2003), C.A. 25; *Order Acting on Gas Utilities' 2003 Annual Automatic Adjustment Reports and Setting Further Requirements, In re Review of the 2003 Annual Automatic Adjustment of Charges for All Gas and Electric Utilities*, MPUC Docket No. G,E999/AA-03-1264 (August 10, 2004), C.A. 34; *Order Acting on Gas and Electric Utilities' 2004 Annual Automatic Adjustment Reports and Setting Further Requirements, In re Review of the 2004 Annual Automatic Adjustment Reports for All Natural Gas and Electric Utilities and the 2004 Purchased Gas Adjustment True-Up Filings for All Natural Gas Utilities*, MPUC Docket No. G,E999/AA-04-1279 (December 7, 2005), C.A. 43.

in the record, reflects the Commission's reasoned judgment and is made upon lawful procedure. The Commission's decision should be affirmed.

STATEMENT OF FACTS

Relator submitted its AAA Report and True-Up covering the twelve-month period from July 1, 2004 through June 30, 2005, on September 1, 2005. Administrative Record Items 2 and 3.³ On January 13, 2006, Relator informed the Commission that it overstated system sales volumes going back to calendar year 2000, and that, as a consequence, Relator's September 1, 2005 filing required correction. R. 42. Relator requested that the Commission hold the docket open while Relator and its internal auditors reviewed the matter. R. 42. In its February 28, 2006 *Order Acting On Certain Gas Utilities' Annual Reports And True-up Proposals, Deferring Action On Others, And Setting Further Requirements*, the Commission deferred action on Relator's AAA Report and True-Up to permit further analysis and information gathering. C.A. 3.

On April 5, 2006, Relator filed its additional comments and a request for a variance ("April Filing"). R. 51. In its April Filing, Relator stated that its September 1, 2005 AAA Report and True-Up misrepresented its unrecovered gas costs for the July 1, 2004 - June 30, 2005 period and that unrecovered gas costs were \$9,230,255 more than initially reported. R. 51 at 6-7. It was also in the April Filing that the Company indicated that the total unrecovered balance from 2000-2004 was over \$12.5 million. R. 51 at 7. Relator explained that it had filed its required AAA Report

³ Items from the Administrative Record are herein after referred to as "R. ___."

and True-Up on September 1 of each of the prior reporting years and provided a table illustrating the financial impact of the unbilled sales adjustment on these AAA Reports and True-Ups. R. 51 at 7. Relator claimed that its auditors reviewed the methodologies used to ensure accuracy. R. 51 at 8, Ex. B. Relator requested a variance to the True-Up Rule to recover all of the unrecovered amounts from 2000 to the current period in its PGA over a three-year period beginning September 1, 2007. R. 51 at 8-9.

Relator explained that two factors contributed to its cumulative overstatement of unbilled volumes. R. 51 at 4. First, Relator misstated its calculations of LUFG and, beginning in the November 2000 unbilled revenue calculation, the Company calculated LUFG only on firm volumes rather than total volumes. R. 51 at 4. According to Relator, this led to an understatement of LUFG in the unbilled sales determination, which further led to an overstatement of the system throughput used to determine recovered gas costs. R. 51 at 4. The Company assumed it would receive revenues associated with the overstated volumes that it claimed it did not receive since the gas was not actually used by customers. R. 51 at 4.

Second, Relator stated that again, beginning in November 2000, the Company accelerated the month-end accounting closing process, which required that an estimate of unbilled sales be made before the end of the calendar month. R. 51 at 4-5. Each month, the Company then estimated the sendout for the final days of the month and made the unbilled sales calculations and entry associated with those volumes. R. 51 at 5. Each month going forward an addition or subtraction was made to reflect the new month's estimate without making a reversing entry for the previous month. R. 51 at 5. Relator

indicated that, as a result, the Company's books reflected an accumulation of unbilled sales because the estimated month-end sendout report volumes were not trued-up to the actual sendout report. R. 51 at 5. Neither of these accounting changes were approved by the Commission.

Relator explained that the misstatement of unbilled volumes resulting from its accounting errors was not sufficiently large on a monthly or annual basis to be noticed. R. 51 at 5. Relator claimed it only became aware of the problem when the *cumulative* volume of unbilled sales over the five years at issue became "unreasonably large." R. 51 at 5.

Relator submitted supplemental information regarding the unrecovered gas costs on June 16, 2006, and on October 31, 2006. R. 63 and 85. In its June 16, 2006 filing, Relator provided an additional explanation for why the differences were undetected for so long. R. 63. Relator explained, "[t]he incorrect calculation of [LUFGE] and unbilled sales was not detected for a period of years because the dekatherm volumes of the misstatement in any month *or year* in relationship to the total throughput was *so small*." R. 63 (emphasis added).⁴

In its October 31, 2006 filing, Relator again corrected its calculations and claimed the new figures were "correctly stated at approximately \$28 million." R. 85 at 3. Relator claimed that although the previously reported volumes of gas for which it had not

⁴ The pages are not numbered in this record item. The referenced provision may be found in section two of the page entitled, "Original audited true-up statements and audited corrected true-up statements."

recovered costs were correct, the pricing for that gas had been incorrectly calculated. R. 85 at 2. The October 31, 2006 filing came over 10 months after the Company notified the Commission of the issue, and over 6 months after the Company had made its claim that its total unrecovered balance from 2000 - 2004 was over \$12.5 million, and that these numbers had been reviewed to “ensure accuracy.” R. 51 at 6-7.

The Commission met on November 9, 2006 to consider the matter. R. 99. By a 5-0 vote, the Commission found that Relator had not satisfied the Commission’s three-part test for granting a variance under Minn. R. 7829.3200, subp. 1 (2005) and denied Relator’s request for a variance. App. 1-10.⁵ The Commission found that the amounts at issue were only 0.5 percent of the Company’s \$4.2 billion in gas costs for the period and that enforcement of the rule would not impose an excessive burden on Relator. App. 6.

The Commission was not persuaded that granting the variance would not adversely affect the public interest. App. 6. The Commission found that the public interest is best served by ensuring that customer charges are calculated correctly for each year’s true-up. App. 6. Further, Relator had filed general rate cases in 2004 and 2005 and neither rate case proceeding indicated that Relator had not been fully compensated by ratepayers. App. 7. The unrecovered amounts did not pose the kind of severe financial threat that might trump general regulatory principles of inter-generational equity and the practice of matching the set of ratepayers who bear the costs with the set of ratepayers for whose benefit the costs were incurred. App. 7.

⁵ Items included in Relator’s Appendix are referred to as “App. ___.”

Finally, the Commission found inadequate support in the legal analysis offered to justify Relator's request for a variance and denied the variance accordingly. App. 7. Additionally, for the July 1, 2004 - June 30, 2005 period for which the Company timely sought recovery, the Commission ordered an independent audit of Relator's financial statements, gas cost calculations, AAA Reports and True-Ups and outlined the requirements of what the audit should include. App. 7.

Relator petitioned for rehearing and reconsideration of the Commission's *Order*, challenging various factual findings and conclusions, and included a detailed list of its disputed items. App. 11-12. The matter came back before the Commission at its February 8, 2007 meeting. App. 28. Although a motion was made to reconsider, the motion failed and the Commission did not grant Relator's petition. App. 42-43. On its own motion, however, the Commission clarified that the cumulative impact of Relator's errors was not \$2.4 million. *Order Clarifying Order Denying Variance and Ordering Independent Audit ("Clarifying Order")*, App. 58. The Commission recognized that the \$2.4 million was the approximate amount of margin revenue that would have been collected on the un-billed sales volumes if those sales had occurred. App. 58. The Commission recognized, however, the approximately \$21 million in unrecovered gas costs equals only 0.5 percent of Relator's total gas costs of \$4.2 billion during the period at issue, and, therefore, the amounts did not impose an excessive burden on Relator. App. 58.

SCOPE OF REVIEW

An appeal from a decision and order of the Commission may be commenced in accordance with Minn. Stat. ch. 14. Minn. Stat. § 216B.52, subd. 1 (2004). In a judicial review of an agency decision:

the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, 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.

Minn. Stat. § 14.69 (2006). On appeal from an agency decision, the party seeking review bears the burden of proving that the agency's conclusions violate one or more provisions of Minn. Stat. § 14.69. *Markwardt v. State Water Resources Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

The court reviews the Commission's factual findings to determine whether they are supported by substantial evidence or whether its conclusions are arbitrary and capricious. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277-279 (Minn. 2001) ("*Blue Cross & Blue Shield*"). Substantial evidence for purposes of appellate review of an administrative agency's decision is: (1) such

evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety. *Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 668 (Minn. 1984) (citations omitted).

A reviewing court may not substitute its own judgment for that of an administrative agency when the finding is properly supported by the evidence. *Vicker v. Starkey*, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963). Courts defer to the agency's fact-finding process and it is the challenger's burden to establish that the findings are not supported by the evidence. *Id.*

A decision may be deemed arbitrary and capricious if the decision reflects the agency's will and not its judgment. *Blue Cross & Blue Shield*, 624 N.W.2d at 277 (citation omitted). To satisfy the arbitrary and capricious test, the agency must explain the connection between the facts found and choices made. *Id.* An agency decision is not arbitrary and capricious if the agency, presented with opposing points of view, reaches a reasoned decision that rejects one point of view. *In re Detailing Criteria and Standards for Measuring an Electric Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. § 216B.1691*, 700 N.W.2d 533, 539 (Minn. Ct. App. 2005) (citation omitted), *aff'd*, 714 N.W.2d 426 (Minn. 2006). A reviewing court will affirm the agency's decision if it was not arbitrary or capricious "even though [the court] may have reached a different conclusion had it been the fact-finder." *White v. Minnesota Dep't of Natural Resources*, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997).

Further, this Court accords deference to an agency's expertise that is exercised within the scope of its authority. *Blue Cross & Blue Shield*, 624 N.W.2d at 278. Agency decisions are presumed correct and deference should be shown to agency expertise and special knowledge. *Id.* (citing *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977)).

Relator mistakenly suggests that the Commission's decision is subject to *de novo* review. This Court retains the authority to review *de novo* errors of law which arise when an agency decision is based on the meaning of words in a statute, see *In re Denial of Eller Media Co.'s Application for Outdoor Advertising Permits*, 664 N.W.2d 1, 7 (Minn. 2003), but "an agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature." *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47-48, 50 (Minn. 1988) (citations omitted). *De novo* review, however, is only appropriate where the matter at issue is a question of law. There is no question of law in this case.

The matter at issue in this case is whether Relator met the standard for a variance under the Commission's rules. Courts give deference to an agency interpretation of its own regulations. *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 514 (Minn. 2007) ("*Maple Lake*"), (citing *St. Otto's Home v. Minnesota Dep't of Human Serv.*, 437 N.W.2d 35, 39-40 (Minn. 1989)). Further, courts defer to the agency's application of a regulation when it is "primarily factual and necessarily requires application of the

agency's technical knowledge and expertise to the facts presented." *Minnesota Ctr. for Envtl Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002) ("MCEA"); see *Maple Lake*, 731 N.W.2d at 515, n.9. This is especially true in matters concerning policy considerations and value judgments within the agency's expertise. *In re Application of the Grand Rapids Pub. Util. Comm'n*, 731 N.W.2d 866, 871 (Minn. Ct. App. 2007) (citing *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977))

The matter at issue in this case is whether the evidence in the record supports the Commission's determination and whether the Commission's decision is arbitrary and capricious. Because the Commission's decision is based on substantial evidence in the record and reflects the Commission's judgment and not its will, the Commission's decision should be affirmed.

ARGUMENT

I. THE COMMISSION APPROPRIATELY FOUND THAT RELATOR FAILED TO MEET THE STANDARDS FOR A VARIANCE TO THE TRUE-UP RULE.

A. Standard Of Law

Minnesota Rules part 7829.3200, subp. 1 states that the Commission shall grant a variance to its rules when it determines that the following conditions have been met:

1. Enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;
2. Granting the variance would not adversely affect the public interest; and
3. Granting the variance would not conflict with standards imposed by law.

The conditions for granting a variance were not met in this case. Accordingly, the Commission appropriately declined to vary its rules to permit the out of period gas cost recovery requested.

B. The Commission Appropriately Found That Compliance With The True-Up Rule Would Not Impose An Excessive Burden on Relator.

1. The Amounts At Issue Are A Small Percentage Of The Company's Total Gas Costs And Do Not Impose An Excessive Burden On Relator.

First, the amounts at issue were only 0.5 percent of the Company's total \$4.2 billion in gas costs for the period at issue and, therefore, these amounts did not impose an excessive burden on the Company. App. 6; R. 76 at 8-9. Relator impermissibly attempts to inflate the impact of amounts at issue by comparing four years of errors to one year of operating income, and argues that the allegedly unrecovered gas costs amount to over 25% of the Company's 2006 operating income. Relator's Br. 30.⁶ Contrary to Relator's argument, an accurate comparison between the errors and operating income must weigh four years of errors against four years of operating income, or one year of errors against one year of operating income. App. 6. The Commission agreed with the Department that attributing the losses to the year they were incurred results in a significantly lower impact on the Company. App. 6; R. 74 at 7.

Second, in its April Filing, Relator explained that, "[o]n either a monthly or an annual basis, the misstatement of unbilled volumes associated with these two factors was

⁶ Relator's Brief will hereafter be referenced as "Rel. Br."

not sufficiently large to stand out and call for further analysis.” R. 51 at 5. Relator indicates that the error only became apparent when it identified that the total volume of unbilled sales became unreasonably large. R. 51 at 5; Rel. Br. 8. Relator repeats these statements in its brief. Rel. Br. 8. The Commission correctly found that if these amounts are not sufficiently large for the Company to notice, these amounts are not sufficient to impose an excessive burden on the Company. App. 6 and 59.

2. Whether These Amounts Pose An Excessive Burden On Relator Is A Determination Requiring Application Of The Commission’s Technical Knowledge And Expertise.

Whether these amounts impose an “excessive burden” on Relator is uniquely within the expertise of the Commission. The Commission is the agency with the authority and expertise to review and determine rates, and to determine compensation for a utility that maintains its financial integrity. Relator acknowledges that as the party requesting the rule variance, it bears the burden of demonstrating that such a variance is warranted. R. 59 at 6. Relator failed, however, to meet its burden.

The Minnesota Supreme Court’s decision in *MCEA* is directly on point. In that case, the Minnesota Center for Environmental Advocacy (“MCEA”) petitioned for review of the decision of the Minnesota Pollution Control Agency (“MPCA”) that a project proposed by Boise Cascade Corporation (“Boise”) did not have the “potential for significant environmental effects” under Minn. Stat. § 116D.04, subd. 2a and, therefore, an Environmental Impact Statement (“EIS”) was not required. 644 N.W.2d 457, 459 (Minn. 2002). In that case, Minn. R. 4410.1700, subp. 7 set forth the criteria that the MPCA was to consider when deciding whether a project had the potential for significant

environmental effects and whether preparation of an EIS was necessary. Minn. R. 4410.1700, subp. 7.

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

Also at issue was MCEA's claim that the MPCA's use of the 1994 Generic EIS for Timber Harvesting and Forest Management ("Forestry GEIS") was improper. *Id.* at 464.⁷ The Court emphasized that the EQB specifically approved the Forestry GEIS for use in this project and that it remained adequate for use in accordance with Minn. R. 4410.3800, subp. 8. *Id.* The Court explained that it defers to an agency's interpretation of its own regulations and that the MPCA had the technical expertise to evaluate the

⁷ A GEIS may only be used in project-specific environmental review if the Environmental Quality Board ("EQB") determines that it remains adequate at the time the specific project is subject to review. *MCEA*, 644 N.W.2d at 460, n.5. In this case, the EQB determined that the Forestry GEIS remained adequate so long as it was "used, interpreted and qualified properly in project-specific review." *Id.*

issues in that case. *Id.* The Minnesota Supreme Court deferred to the MPCA regarding the use and application of the Forestry GEIS. *Id.* at 456.

The matter at issue in the present case is directly analogous to that at issue in *MCEA*. Here, the issue is whether the alleged unrecovered gas costs impose an “excessive burden” on Relator pursuant to the Commission’s rules. Minn. R. 7825.3200, subp. 1 (2005). The Commission is entitled to deference in the interpretation of its own regulation. *MCEA*, 644 N.W.2d at 464. Further, the Commission is specifically charged with setting rates and evaluating the financial integrity of public utilities in this State. Minn. Stat. §§ 216B.03; 216B.08 (“The commission is hereby vested with the powers, rights, functions, and jurisdiction to regulate . . . every public utility as defined herein. The exercise of such powers, rights, functions and jurisdiction is prescribed as a duty of the commission.”); 216B.09 (“The commission . . . may ascertain and fix just and reasonable standards, classifications, rules, or practices to be observed and followed by any or all public utilities with respect to the service to be furnished.”); 216B.14 (“The commission . . . whenever it may deem it necessary in the performance of its duties may investigate and examine the condition and operation of any public utility or any part thereof.”); and 216B.16 (the Commission has authority to determine just and reasonable rates); *see generally* Minn. Stat. ch. 216B.

Applying its technical knowledge and expertise, the Commission appropriately found that the Company’s attempt to prove excessive burden improperly compared four years of errors to one year of operating income. App. 6. The Company admits that the unrecovered gas costs are only 0.5 percent of the Company’s total gas costs of \$4.2

billion during the period at issue. R. 76 at 8-9. As the agency charged with setting rates and evaluating the financial condition of the utilities operating in this State, the Commission is the agency with the expertise to determine that this amount does not pose an excessive burden for the Company to absorb. App. 6 and App. 58.

C. Relator Failed to Demonstrate That Granting A Variance Would Not Adversely Affect The Public Interest.

The Commission found insufficient support for Relator's position that granting a variance would not adversely affect the public interest. The extraordinary mismatch between the set of ratepayers who benefited and the set of ratepayers who would pay the costs due to the Company's errors is too significant for the Commission to find that the public interest was not adversely affected. The Commission noted that the public interest is best served by ensuring that customer charges are calculated correctly for each year's true-up. App. 6.

Given the years at issue, there is no dispute that there will be changes in the set of ratepayers between those who received gas during the period at issue and those who would be charged for the true-up of these costs. The Commission appropriately found that the amounts here, "do not pose the kind of severe financial threat that might trump general regulatory principles of inter-generational equity and the resulting practice of matching, as closely as possible, the set of ratepayers who bear costs with the set of ratepayers for whose benefit the costs were incurred." App. 6.

Relator's request to recover these costs over a three year period beginning September 1, 2007, results in a mismatch of up to 10 years. Under Relator's proposal,

customers that receive gas in 2010 will be paying for gas delivered in 2000. As the Commission noted, the losses at issue are due to factors entirely and solely within Relator's control. App. 7. As the Commission explained in its *Clarifying Order*, ratepayers are not a backup source of cash for the company and this record does not support burdening present period ratepayers with the costs of the company's mistakes made years earlier. App. 59.

Further, there is no dispute that Relator has been in front of the Commission four times during this period for approval of its yearly AAA Reports and True-Ups. *See supra* n.1. Relator has had four separate opportunities to seek present period recovery, but instead has come before the Commission four times with inaccurate information regarding costs it passed through to its customers. As the Commission noted, "[a]llowing the Company to bill for four prior years of errors provides literally no incentive to ensure that its accounting practices and internal financial controls provide an accurate true-up for the annual filing." App. 6.

In its brief, Relator argues nearly exclusively about the impact on the Company but gives little attention to the impact on its future ratepayers. The Company asserts that the amounts "could have and should have" been recovered from ratepayers during the prior periods, and, therefore, that the Company should be able to recover these costs over the next several years. Rel. Br. 27. Relator fails to acknowledge that the set of ratepayers who benefited and the set of ratepayers that will pay will differ by up to a decade. Further, Relator acknowledged that there would be mismatches and that the Company could not even identify the extent of the mismatch. R. 99 at 41:21-42:1. This

impact on future ratepayers that did not receive the benefit of the amounts at issue cannot be disregarded. Ratepayer impacts are just as important as impacts on the Company, and are at least an equal criterion under the standard for a variance. *See also* Minn. Stat. § 216B.03 (2006) (“Any doubt as to the reasonableness [of rates] should be resolved in favor of the consumer”).

1. The Commission Is The Agency With The Expertise To Determine Whether The Requested Variance Would Adversely Affect The Public Interest.

Similarly to the *MCEA* case, the Court should defer to the Commission’s knowledge and expertise regarding whether the variance would adversely affect the public interest. The Legislature has specifically charged the Commission with considering the public interest in evaluating utilities’ actions. *See* Minn. Stat. §§ 216B.03 (“Any doubt as to reasonableness [of rates] should be resolved in favor of the consumer.”); 216B.16, subd. 6 (the Commission shall consider the public need for adequate, efficient and reasonable service in setting rates); 216B.164, subd. 1 (“This section shall at all times be construed in accordance with its intent to give the maximum possible encouragement to cogeneration and small power production consistent with protection of the ratepayers and the public.”); 216B.1691, subd. 2(c) (The Commission shall establish criteria and standards to evaluate a utility’s good faith effort to achieve the renewable energy objectives [that] protect against undesirable impacts on the reliability of the utility’s system and economic impacts on ratepayers and that consider technical feasibility.”); 216B.17 (“The commission may dismiss any complaint without a hearing if in its opinion a hearing is not in the public interest.”); 216B.2422, subd. 2 (The

Commission shall approve, reject or modify the resource plan of a public utility consistent with the public interest.”); 216B.48, subd. 3 (The Commission shall approve an affiliate interest agreement between a utility and its affiliate only if it clearly appears and is established upon investigation that it is reasonable and consistent with the public interest.); 216B.49, subd. 4 (The Commission shall grant its permission for the issuance of securities if the Commission finds the issuance is reasonable and proper and in the public interest.”); *see generally* Minn. Stat. ch. 216B.

The Commission found Relator had not shown that the requested variance would not adversely affect the public interest. *The accounting errors at issue here were entirely within the Company’s control.* Ratepayers had no role in the Company’s failure to seek timely recovery. Yet the Company made no suggestion that it should share responsibility in any way for the problem that it created.⁸ As noted by the Department, to grant a variance, “would have the effect of rewarding the company for not properly calculating gas rates that are crucial to customers.” R. 99 at 16. The Commission found that the public interest was best served by the Company timely seeking recovery of its costs. Accordingly, the Commission denied the requested variance.

⁸ Although Relator indicated it did not seek recovery of its carrying costs for these amounts, R. 76 at 9, the Department and Staff correctly noted that Minnesota Statutes would preclude any interest being applied to these amounts. R. 79 at 4 and R. 86 at 14 (citing Minn. Stat. § 216B.098 (2006)).

D. Relator's Legal Analysis Failed To Justify Its Request For A Variance.

The Commission did not find the request violated standards imposed by law, Minn. R. 7829.3200, subp. 1(C) (2005), but, as discussed further below, noted that Relator's legal analysis failed to justify its request for a variance.

II. THE COMMISSION'S DECISION REFLECTS ITS CAREFUL CONSIDERATION OF THE ISSUES PRESENTED AND IS NOT ARBITRARY AND CAPRICIOUS.

A. Standard Of Law

To satisfy the arbitrary and capricious test, the agency must explain the connection between the facts found and choices made. *Blue Cross & Blue Shield*, 624 N.W.2d at 277. "A reviewing court must not substitute its judgment on a question the agency is authorized to decide." *In re Minnesota Power's Transfer of M.L. Hibbard Units 3 and 4 Boilers and Related Facilities to the City of Duluth*, 399 N.W.2d 147, 149 (Minn. Ct. App. 1987) (citation omitted).

B. The Matter At Issue Here Is Distinguishable From Previous Cases In Which The Commission Has Granted A Variance.

Relator argues that the Commission has failed to follow its own precedent and that such action is arbitrary and capricious. Rel. Br. 23. However, Relator's request in the instant matter is clearly *unprecedented*. "[W]here the evidence in the record differs from previous cases, results may differ as well." *In re Petition of N. States Power Co. Gas Util. for Authority to Change its Schedule of Gas Rates*, 519 N.W.2d 921, 925 (Minn. Ct. App. 1994) ("*NSP*") (citation omitted). The matter at issue here is fundamentally different than the previous cases cited, as described by the Department and the Respondent Office of the Attorney General Residential and Small Business Utilities

Division (“OAG-RUD”), and the Commission recognized and explained the facts distinguishing these cases. R. 74 at 5-6; R. 79 at 2; R. 80 at 6-8; App. 7 and 59. None of the cases cited by Relator involved recovery of gas costs that had gone unrecovered due to an error that occurred every month for five years, and that continued despite the utility coming in twice for a rate case during the time period at issue. App. 59.⁹

1. Unlike The Cases Cited, Relator Has Had Two Intervening Rate Cases During The Time Period At Issue.

Relator claims that the Commission should have granted its variance because of the variances granted to Northern States Power Company Gas Division (“NSP-Gas”) and Interstate Power and Light Gas Utility (“IPL-Gas”) and that “similar accounting errors” were at issue. Rel. Br. 4 and 23.¹⁰ As explained below, the cases are substantially different. Additionally, however, it must be noted that Relator did not request a variance to go back one year, as in the case of NSP-Gas, or two years, as in the case of IPL-Gas. Rather, Relator asked the Commission to go back *five* years.

Significantly, none of the past Commission decisions cited as precedent by Relator involve a utility that had gone through the extensive examination of a single ratemaking proceeding during or after the accounting errors had occurred. Certainly none of the

⁹ Contrary to Relator’s argument that the Commission has granted variances in the “only” two prior instances where a utility’s mistakes led to unrecovered gas costs, Rel. Br. 23, other utilities have had unrecovered gas costs, but have not always sought a variance to pass those costs on to future ratepayers. See *Order, In re Review of Northern States Power Company d/b/a Xcel Energy 2005 Annual True-Up Filing*, MPUC Docket Nos. E,G999/AA-05-1403, G002/AA-05-1425 (Feb. 14, 2007).

¹⁰ Relator mistakenly quotes the Commission’s decision in the NSP-Gas as stating that NSP had discovered due to an internal “accounting” change the amounts at issue had been deducted twice. Rel. Br. 23. Rather, as indicated in the Commission’s order, at issue was an internal reporting change. App. 76.

utilities involved had undergone *two* ratemaking proceedings during the time period at issue. In contrast, Relator filed a general rate case in 2004 and 2005. App. 7.¹¹ As the Commission aptly stated, “[a]fter twice going through the extensive examination and analysis of a general ratemaking proceeding, there has been no showing that the Company has not been fully compensated by ratepayers.” App. 7.

The Commission, as the entity charged with setting rates, acknowledges that gas costs recovered through the PGA are not trued-up in a rate case. Contrary to Relator’s claims, however, the ratemaking proceeding and the True-Up are related.¹² R. 74 at 9; R. 79 at 3-4; R. 81 at 2-5. While the PGA is not trued-up in a rate case, a ratemaking proceeding does analyze the costs and expenses of the utility, and the revenue deficiency. Thus, the issue is not whether the gas costs were trued-up in a rate case but, rather, when the Commission conducted its thorough review of the Company’s rates, including consideration of the financial integrity of the Company, whether this review and rate-setting did not otherwise adequately compensate the Company for its costs of serving its customers.

Both of Relator’s 2004 and 2005 ratemaking proceedings lasted several months, involved hundreds of pages of written testimony and days of evidentiary hearings. If the aggregate amount of these errors, which began in 2000, were significant enough to

¹¹ Relator filed a general rate case in 2004 with a test year ending September 30, 2005. R. 99 at 28:9-13. Relator filed another general rate case in 2005 with a calendar 2006 test year. R. 99 at 14:10.

¹² Since Relator submitted its own assessment of how the rate case was impacted by the issues raised, it is unclear how Relator can thereafter claim that the matters unrelated. R. 80 at 6, Attachment.

impose an “excessive burden” on the Company, the errors should have been discovered, at a minimum, in the context of the extensive financial reviews that occurred in these ratemaking proceedings, including the calculation of the Company’s revenue deficiency.

There has been no showing that the Company has not been fully compensated by ratepayers during the time period at issue. The Department specifically noted the implications of the 2004 rate case on this matter and raised numerous concerns about the relationship between the alleged errors and the Company’s 2004 general rate case filing, MPUC Docket No. G008/GR-04-901. R. 74 at 5. As the Department correctly recognized, the 2004 rate case may have included a higher revenue deficiency than it would have without the errors and, accordingly, the Company may have already been compensated by ratepayers for these errors. To authorize recovery now could result in a windfall to Relator and would certainly call into question the rates set by the Commission in the 2004 and 2005 rate cases.

2. The Commission’s Previously-Granted Variances To The True-Up Rule Were Based On Substantially Different Factual Circumstances.

a. NSP-GAS

In its July 13, 1995 *Order Accepting Annual Automatic Adjustment Reports (“1994 AAA Order”)* in MPUC Docket No. G,E999/AA-94-762, the Commission granted a variance to the True-Up Rule to allow NSP-Gas to recover \$1.05 million in unrecovered commodity gas costs. App. 76. NSP-Gas had inadvertently deducted certain commodity gas costs twice in its true-up report for the July 1, 1992 to June 30, 1993 period. App. 76.

As more fully described in the Department's August 18, 2006 comments in this matter, the true-up at issue was the first true up after Federal Energy Regulatory Commission ("FERC") Order 636 was implemented. R. 74 at 6.¹³ On November 1, 1992, Northern Natural Gas Company ("Northern"), had implemented its "new services" and changed its bills to NSP-Gas. R. 74 at 6. Due to this initial phase of unbundling pursuant to FERC Order 636, natural gas commodity purchases changed from natural gas being supplied directly by Northern and billed by Northern, to gas purchases being supplied from third-party providers with costs appearing on non-Northern invoices. R. 74 at 6. NSP-Gas, however, erroneously continued its practice of deducting gas costs for its non-regulated affiliate from its true-up calculations, even though the gas costs were no longer included in the Northern invoices. R. 74 at 6. Contrary to the matter at issue here, NSP-Gas' omitted costs were not due to several years of complicated accounting errors and adjustments, but rather were the result of continuing its existing accounting practices despite a change in billing for its gas purchases.

In its request, NSP-Gas stated that its proposed adjustment was an appropriate and necessary "true-up of the true-up," and that no rule variance was necessary. App. 76. The Department had noted that the request by NSP-Gas was not a true-up of the true-up, but rather an out-of-period adjustment, and that the True-Up Rule only allows adjustments for over- or under-recoveries from the previous 12-month period. App. 76-

¹³ Contrary to Relator's arguments, the differences between the present case and that of NSP-Gas and IPL-Gas were fully discussed in the filings before the Commission and at hearing and addressed in the *Order* and *Clarifying Order*. Rel. Br. 23; R. 74 at 6; R. 79 at 2; R. 81 at 6-8; App. 7 and 59.

77. The Commission concurred and explained that the True-Up Rule does not contemplate a utility adjustment to correct an accounting error which occurred in a period prior to the past 12-month period. App. 77. The Commission granted a variance to the True-Up Rule to NSP-Gas, finding that the request met the three-part standard for a variance.

There are several fundamental differences between the variance request of NSP-Gas in the *1994 AAA Order*, and the instant variance request of Relator. First, the accounting error reported by NSP-Gas was a one-time accounting error that was the result of a significant change in the natural gas industry. In contrast, Relator's accounting error was repeated every month for a five-year period and was the result of its own internal accounting change. Second, NSP-Gas had not filed a rate case in the intervening time period. Here, Relator has filed two rate cases in the time at issue.

Additionally, in the *1994 AAA Order*, the Commission noted that \$1.05 million would not adversely affect the public interest and that the set of ratepayers who benefited and those that will pay would differ "somewhat." App. 78. In the instant matter, the amounts at issue are over \$20 million and the set of ratepayers who benefited and the set of ratepayers who are proposed to pay will differ by many years.¹⁴ This is more than the slight difference noted in the NSP-Gas matter.

¹⁴ Relator proposed to recover the amounts at issue over a three-year period beginning September 1, 2007. The set of the ratepayers who benefited and those that would pay would differ by up to a decade. Relator indicated that the timing was intended to correspond to the commencement of a new gas supply contract that would result in savings to ratepayers. App. 16. Since the Company could not correctly identify the amounts at issue for several months during the (Footnote Continued on Next Page)

Finally, the Commission noted in the *1994 AAA Order* that the company “could have and should have” collected the amounts as a normal cost during the 1993-1994 period. App. 79. However, Relator did not miss its opportunity to collect the costs in one year like NSP-Gas, but failed to collect these amounts over five years. The circumstances are substantially different and the Commission appropriately declined to grant Relator its request in the instant matter.

b. IPL-Gas

In its May 28, 1998 *Order Reviewing 1997 Annual Automatic Adjustment Reports And True-Up Filings (“1997 AAA Order”)*, the Commission granted a variance to IPL-Gas to recover out of period gas costs in its true-up. App. 64. In that case, IPL-Gas sought to recover synthetic storage gas charges incurred November 1994 through March 1995 and November 1995 through March 1996 that had been inadvertently-omitted from the company’s 1995 and 1996 true-up filings.¹⁵ App. 63. The Commission found that the request met the standard for a variance to the True-Up Rule. App. 64.

Similar to the case of NSP-Gas above, the time period at issue was considerably shorter than that at issue in the instant matter. IPL-Gas sought to recover underrecovered gas costs from 1995 and 1996, in 1997. The difference in the set of ratepayers from 1995 to 1997 is certainly far less than the difference in the set of ratepayers from 2000 to 2010.

(Footnote Continued From Previous Page)

proceeding, it is unlikely any recovery, had it been allowed, could have been implemented prior to that time frame in any case.

¹⁵ In the case of IPL-Gas, the company had already included part of the costs associated with the use of synthetic storage gas, i.e. the commodity costs associated with the injection of synthetic storage gas into storage, but failed to include the related synthetic storage gas transportation charges in its 1995 and 1996 true-up filings.

Further, IPL-Gas had filed its last general rate case in 1995 with a 1994 test year adjusted for known and measurable changes in 1995. IPL-Gas' errors occurred in its 1995 and 1996 true-ups, subsequent to the rate case test year. In this case the Commission found that the three-step test for granting a variance had been met.

c. Kansas Ad Valorem Tax

The refund of taxes collected under the Kansas Ad Valorem tax bears no relationship to the matters at issue here. The issue in front of the Commission in that case was the manner in which a refund under Minn. R. 7825.2700, subp. 8 ("PGA Refund Rule") would be distributed. The matter simply did not involve issues related to the True-Up Rule.

The refund at issue in the Kansas Ad Valorem case had been in and continued to be in litigation for several years. The proceeding at the Commission was ultimately triggered by the September 10, 1997 Order of the Federal Energy Regulatory Commission implementing the decision of the U.S. Court of Appeals for the District of Columbia that the ad valorem tax levied by the State of Kansas was not a state severance tax within the meaning of Section 110 of the Natural Gas Policy Act of 1978, and that refunds would be due going back to 1983. *Order Granting Variances, Requiring Interim Report and Refund Plans*, MPUC Docket No. G999/AA-98-332 (June 2, 1998), C.A. 54. Mobil, a producer who had been assessed and paid the Kansas ad valorem tax and who had recovered that tax in the gas price it charged to pipelines such as Northern, chose to refund to Northern approximately \$30 million. C.A. 54. The refund to Northern included approximately \$12.1 million for Minnesota local gas distribution companies

("LDCs"). C.A. 54. Northern had previously recovered the amounts it paid from its customers, the LDCs, and accordingly passed along the refunds to those LDCs. C.A. 55. The issue before the Commission was how the LDCs should proceed to refund their customers. C.A. 55.

The PGA Refund Rule specifically provided for refunds received from suppliers or transporters of purchased gas and attributable to the cost of gas previously sold, and outlined a methodology for distributing those refunds. Due to the uncertainty of the amount of the refund, however, there was the possibility that anyone who received an immediate refund could later be subject to a surcharge. C.A. 56. Accordingly, the Commission granted the requested variance and ordered further proceedings so that the final refund amounts could be ascertained. C.A. 59.

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

III. THE COMMISSION'S DECISION IS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD.

A. Standard Of Law.

A reviewing court may not substitute its own judgment for that of an administrative agency when the finding is properly supported by the evidence. *Vicker*, 265 Minn. at 470, 122 N.W.2d at 173. Courts defer to the agency's fact-finding process and it is the challenger's burden to establish that the findings are not supported by the evidence. *Cable Communications Bd.*, 356 N.W.2d at 668 (citations omitted).

B. The Commission Based Its Decision On The Information Provided By Relator.

The Commission's decision was based on substantial evidence in the record. The Commission relied on the information and statements provided by the Company in evaluating the impact of the unrecovered amounts. R. 51 at 9 (unrecovered gas costs for the 2000-2001 through 2003-2004 true-up periods equals approximately \$12.6 million); R. 76 at 8 (the Company under recovered approximately \$21.8 million and this reflects approximately 0.5% underrecovery during the five-year period at issue); R. 85, Exh. A (total unrecovered gas costs are now \$28 million, \$7.3 million of which is attributable to the open 2004-2005 PGA True-Up docket).

The Company indicated that the unrecovered gas costs at issue were approximately 0.5 percent of the Company's \$4.2 billion in total gas costs over the period at issue. R. 76 at 8-9. Further, for the purpose of evaluating Relator's request for a variance, the Commission accepted that the amounts alleged to be unrecovered were approximately \$21 million as indicated by the Company. Accordingly, the

Commission's decision, based on the information provided by Relator, is based on substantial evidence in the record. *See Cable Communications Bd.*, 356 N.W.2d at 668.

Relator admits that the volumes at issue were insignificant on a monthly or annual basis and, as such, escaped notice for several years. R. 51 at 5, R.63, R. 76 at 5, Rel. Br. 8. Further, almost a year after the Company first alerted the Commission to the error, and several months after it provided its analysis of the amounts at issue, the Company realized again that it had miscalculated the unrecovered costs. R. 85 at 3, R. 86 at 1.

Thus, not only had the Company failed to notice that these amounts were unrecovered for five years, the Company failed to identify the full extent of the amount at issue by over \$6 million during its own review. R. 85 at 3, R. 86 at 1. Accordingly, the Commission appropriately found that these amounts do not impose an excessive burden. Relator did not notice these gas costs for months and years and even then proceeded to miscalculate the alleged unrecovered amount by several million dollars.

Further, the Commission's decision is based on the evidence provided by Relator and assumes, for purposes of determining whether to grant a variance, that the facts as presented are true. Accordingly, the Commission's decision is based on substantial evidence in the record and no further record development was necessary.

C. The Record Demonstrates The Commission Has Taken A "Hard Look" At This Issue.

The Commission proceedings in this case lasted over a year and involved numerous filings and three substantive hearings. Relator's argument that the Commission failed to take a hard look at the issues is without merit. The Commission's

decisions clearly articulate standards and reflective findings on the issues presented and demonstrate that the Commission has taken a hard and extensive look at the matters in this case. App. 1-10 and 57-59; see *Cable Communications Bd.*, 356 N.W.2d at 669 (“[i]f an administrative agency engages in reasoned decisionmaking, the court will affirm, even though it may have reached a different conclusion had it been the factfinder”).

The Commission notes that it had initially made an error regarding the amounts at issue in its *Order*. App. 58. The Staff briefing papers in this matter fully describe how the error developed. R. 93 at 8-10. Despite its initial error, however, the Commission found that the amounts at issue did not impose an excessive burden on Relator. App. 58. The fact that the Commission recognized its error and made this change demonstrates that the Commission took a “hard look” at the evidence presented.

IV. THE COMMISSION’S DECISION DOES NOT REFLECT AN ERROR OF LAW AND IS NOT IN EXCESS OF ITS AUTHORITY.

A. Standard of Law.

A decision of an administrative agency may be overturned if it is affected by error of law or otherwise in excess of the agency’s statutory authority or jurisdiction. Minn. Stat. § 14.69 (2006). Because the Commission’s decision is consistent with Minnesota Statutes and Rules, and is not otherwise in excess of its authority or jurisdiction, the Commission’s decision should be affirmed.

B. Relator Did Not Seek Timely Recovery Of Gas Costs Under The True-Up Rule And, Accordingly, The Request Must Meet The Requirements For A Variance Under Minn. R. 7829.3200, subp. 1.

Relator indicates that both Minn. Stat. § 216B.16, subd. 7 and the True-Up Rule allow the Company to recover all gas costs under any circumstances. While utilities may seek timely recovery of prudently-incurred gas costs, Relator argues there is no limit to how far back the Company may reach to find costs that may have inadvertently gone unrecovered and seek to recover the amounts from present-day ratepayers. Such a proposition is untenable.

Relator cites Minn. Stat. § 216B.16, subd. 7 to support its position that it is the Legislature's intent to allow the Company to recover the amounts at issue here. Rel. Br. 15. Relator fails to acknowledge the discretion granted to the Commission by Minn. Stat. § 216B.16, subd. 7, which states, “[n]otwithstanding any other provision of this chapter, the commission *may* permit a public utility to file rate schedules containing provisions for the automatic adjustment of charges for public utility service in direct relation to changes in . . . direct costs for natural gas delivered[.]” (emphasis added).

The Commission adopted Minn. R. 7825.2390-7825.2920 pursuant, in part, to this grant of authority. As the statutes and rules illustrate, utilities are authorized to seek cost recovery through an automatic adjustment of those costs authorized under Minn. R. 7825.2390-7825.2920 (2005). The time limit under the rules, however, is one year. The Commission is not required to permit a utility to recover unrecovered costs going back several years solely because the Company did not include the costs in its true-up filings. Further, Relator *admits* it needs a variance to recover the amounts at issue. Rel. Br. 4.

Relator has failed to meet the standard for a variance. Thus, the fact that the statute and rules otherwise authorize *timely* cost recovery is not at issue.

C. The True-Up Is Complete On An Annual Basis.

Relator mistakenly claims that the true-up is perpetual because the amount remaining uncollected or overcollected at the end of a year is included in the next year's true-up calculation. Rel. Br. 16, n.1; *see* Minn. R. 7825.2700, subp. 7. However, the True-Up Rule only permits amounts under- or over-collected in the prior year to be carried over in the next year. It does not establish that amounts under-collected five years ago may now be included in the present period true-up calculation because they were omitted due to the Company's errors.

The True-Up Rule indicates that the true-up amount is, "the difference between the commodity and gas revenues by class collected by the utility and the actual commodity-delivered gas costs and demand-delivered gas cost by class incurred by the utility during the year." The true-up adjustment is then computed annually for each class by dividing the true-up amount by forecasted sales volumes. *Id.* Beginning on September 1 of each year, gas utilities implement the adjustment calculated under the True-Up Rule for the previous year commencing July 1 and ending June 30. Minn. R. 7825.2910, subp. 4 (2005).

The true-up process is completed on an annual basis. Each true up is final with respect to the year at issue. Only amounts left unrecovered in the previous July 1 - June 30 period are included for recovery the following year. As noted by the Commission in its *1994 AAA Order*,

[t]he rule recognizes that weather and sales variables will often cause the amounts collected in the prior year through PGA calculations to differ from actual gas costs and revenues in the year. A true-up mechanism is allowed in order to facilitate the utility's recovery of actual gas costs from the prior year. The rule does *not* contemplate a utility adjustment to correct an accounting error which occurred in a period prior to the past 12-month period.

App. 78 (emphasis in original).

Relator has been before the Commission in each of the years at issue with its AAA Report and True-Up. *See supra* n.1. The Commission has issued orders accepting each of those filings and allowing the proposed true-up. *Id.* The Company has had four separate opportunities to timely recover the costs at issue here and failed to avail itself of the cost recovery provisions outlined under Minnesota Rules.

D. The Commission's Decision Does Not Violate A "Regulatory Compact."

The Commission sets rates in a rate case in consideration of the right of the utility and its investors to a reasonable return, while establishing a rate for consumers which reflects the cost of service plus a reasonable profit for the utility. *NSP*, 519 N.W.2d at 924 (citation omitted). Relator refers to this as the "regulatory compact." Rel. Br. 20.

Relator argues that the Commission's decision in this case violates the regulatory compact because it denies the Company the ability to recover the costs at issue. Rel. Br. 21. The Commission has, however, provided Relator with the opportunity to recover its costs. *See supra* n.1. The Commission has previously reviewed the Company's AAA Report and True-Up for each of the years at issue. *Id.* The AAA Report and True-Up is the mechanism that provides the opportunity to recover present-period gas costs through

the PGA; the Company's failure to file for timely recovery does not result in the Commission's violation of a theoretical regulatory compact.

Further, the regulatory compact to which the Company refers certainly imparts to the Company the responsibility to provide regulators with accurate and reliable information. As noted by Commissioner Marshall Johnson,

Regulation cannot succeed without a high degree of trust between the Commission and all stakeholders. The Commission must trust that documents filed in its proceedings are offered in good faith and contain truthful and accurate information. The stakeholders must trust that the Commission acts with competence and integrity. Without this mutual trust, regulation loses its legitimacy.

Dissenting Opinion of Commissioner Marshall Johnson, In re Investigation and Audit of Northern States Power Company's d/b/a Xcel Energy's Service Quality Reporting, MPUC Docket No. E,G002/CI-02-2034 (March 10, 2004), C.A. 71.

V. THE COMMISSION'S DECISION IS CONSTITUTIONAL.

A. Standard Of Law.

Private property may not be taken for public use without payment of just compensation. Minn. Const. art. I § 13. "Rates which are not sufficient to yield a reasonable return on the value of property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment." *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Virginia*, 262 U.S. 679, 690, 43 S. Ct. 675, 678 (1923).

B. Relator Failed To Avail Itself Of The Opportunity To Recover The Amounts At Issue As Provided By The True-Up Rule.

Contrary to Relator's assertions, there has been no "taking." Minnesota Statutes and Rules clearly provide for cost recovery and the manner in which it must be commenced. Minnesota Statutes and Rules provide the Company with the opportunity to recover its costs of serving its customers. Relator failed to avail itself of these opportunities for cost recovery.

Relator impermissibly characterizes the Commission's *Order* as "denying CenterPoint Energy *any* ability to recover over \$21 million in prudently incurred gas costs used to serve Minnesota customers." Rel. Br. 32 (emphasis added). In fact, the Commission has not denied Relator "any" ability to recover its gas costs. As noted, Relator has been in front of the Commission for each of the years at issue and the Commission has authorized the recovery of gas costs identified in those petitions. *See supra* n.1. It is Relator's own failure to seek timely recovery that has resulted in the alleged underrecovery at issue here.

Further, Relator cites *Bluefield Waterworks* for the proposition that utilities are entitled to a reasonable and fair return on their investments. Rel. Br. 33. Relator fails to acknowledge, however, that the issue in *Bluefield Waterworks* was a state public utilities commission order establishing rates in a general rate case. 262 U.S. 683, 43 S.Ct. 676. A general rate case is not a mechanism to recover amounts left unrecovered in a prior period, but is a mechanism for establishing rates to be paid on a prospective basis. Minn. Stat. § 216B.23, subd. 1 (2006). Further, Relator ignores the U.S. Supreme Court's

analysis of the rate of return set by the state public commission in *Bluefield Waterworks*. Specifically, the U.S. Supreme Court noted how the rate of return affects investment by outside investors and explained,

The fact that the company *may not insist as a matter of constitutional right* that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it.

262 U.S. at 694, 43 S.Ct. 679 (emphasis added). As the U.S. Supreme Court so aptly explained, the Company is not entitled to recovery of its alleged past losses.

C. Relator's Choice To Write-Off The Amounts At Issue In A Single Year Does Not Equate To The Commission Establishing Confiscatory Rates Or Depriving Relator Of Its Due Process Rights.

Relator cites to several U.S. Supreme Court cases for the proposition that denial of the gas costs at issue here will result in the Company not meeting its authorized rate of return and, therefore, such a decision is confiscatory. Rel. Br. 33-34. In a ratemaking proceeding, the Commission sets an authorized rate of return for the Company. Relator, however, is granted only the *opportunity* to earn the fair rate of return and is not *guaranteed* to earn the authorized rate. If, through Relator's own actions, it fails to achieve its authorized rate of return, ratepayers are not required to make up the difference.

For example, as noted by Relator, the Commission authorized a 9.71% rate of return in the Company's most recent rate case. Rel. Br. 32. Once the rates are set in a rate case, however, it is the utility's burden to effectively manage its operations to achieve the authorized rate. If the Company fails to achieve the rate set by the

Commission due to its own management, ratepayers are not held responsible. Ratepayers have no control over the internal operation of the utility and cannot be considered an endless cash resource to guarantee a return for the Company's shareholders. Thus, the one-year look back period provides the appropriate balance between the interests of ratepayers and the interests of shareholders.

Relator further asserts that the *Order* results in a taking because it "forced" CenterPoint Energy to write-off over 25% of its 2006 annual operating income and effectively reduced its return on equity to 5.35% for 2006. Rel. Br. 32. Although Relator argues the impact of its write-off in one year, as noted throughout this proceeding, the amounts at issue accumulated over several years, and the Company indicated that, on an annual basis, the amounts at issue were so small that they escaped notice. R. 51 at 5, Rel. Br. 8. Further, when asked by Commissioner Nickolai whether the Company had restated its income for the years at issue, the Company's Director of Regulatory Services responded:

Commissioner Nickolai, not exactly. What we did is we didn't go back and reopen all those years, we knew what the cumulative effect of that was and we wrote that off in this past year. So we didn't go back, *we could have gone back and restated each year, we didn't, we just took . . . we took the cumulative impact of it and wrote it off in this year.*

App. 30, p. 12:7-14 (emphasis added). The Commission appropriately rejected Relator's attempt to inflate the impact of the amounts at issue. Further, any failure to achieve the authorized rate of return is due to the Company's own error.

D. Relator's Analysis Is Flawed.

As discussed above, Relator cites to numerous decisions regarding general rate cases for the proposition that the Commission may not set rates that are confiscatory. Rel. Br. 33-34. Relator's analysis simply does not apply in this circumstance. The matter at issue is not a rate set in a rate case, but the pass-through to current ratepayers of allegedly unrecovered costs for gas purchased several years ago.

In a rate case, the Commission considers appropriate expenses, revenues, and investment for a twelve-month period, commonly referred to as a 'test year.'" *In re Petition of Interstate Power Co.*, 419 N.W.2d 803, 805 (Minn. App. 1988). "The test year concept is designed to produce a measure of a regulated utility's earnings for a known period of time, to enable the regulatory body to make an accurate prediction of revenues and expenses in the reasonably near future." *In re Petition of Minn. Power & Light Co.*, 435 N.W.2d 550, 556 (Minn. Ct. App. 1989) (quotation omitted), *review denied* (Minn. Apr. 19, 1989).

In the intervening years between rate cases, costs and revenues may not exactly match those used in the test year. *See Order Amending Docket Title and Dismissing Complaint*, MPUC Docket No. E,G002/C-03-1871 (October 1, 2004), C.A. 64. "Although individual cost components that were used to develop the rates may vary (increase or decrease) after the rates are set, no adjustment (with the exception of pass-

throughs) is made outside of a rate case for increases or decreases in the individual components of rates.” *Id.*¹⁶ (citations omitted).

Similar to the rate case, the True-Up Rule addresses cost-recovery for a 12-month period. Minn. R. 7825.2910, subp. 4 (2005). The difference between a rate case and the true-up, however, is that the true-up is permitted by statute and implemented through the Commission’s rules. Minn. Stat. § 216B.16, subd. 7 (2006); Minn. R. 7825.2700, subp. 7 (2005). Because the true-up is implemented under the Commission’s rules, the Commission may vary the rule if the request meets the standard for a variance. Minn. R. 7829.3200, subp. 1 (2005). Thus, the issue in this case is not confiscatory rates based on the Company’s test year, but, rather, whether the request meets the standard for a variance under Minn. R. 7829.3200, subp. 1. For the reasons set forth in this brief, Relator failed to meet that standard and the request was appropriately denied.

E. The Commission Did Not Rule On Whether The Costs Were Prudently Incurred.

Relator indicates that the Commission has denied recovery of its prudently-incurred gas costs. Rel. Br. 32. However, the Commission did not rule on whether the alleged gas costs at issue were “prudently incurred.”¹⁷ Rather, the Commission based its analysis on the information provided by the Company. For the limited purpose of

¹⁶ “Pass-throughs” refer to automatic adjustment provisions, such as the PGA.

¹⁷ Relator cites to Commissioner Reha’s statement as support for its claim that the costs were prudently incurred. Rel. Br. 7. However, Relator fails to include that Commissioner Reha stated that there was no indication that the gas purchases were not made in a prudent manner. R. 97 at 21:16-18. Further, the statement of a single Commissioner during deliberation does not equate to a determination by the agency. The Commission’s decision is reflected in its order.

deciding Relator's petition, the Commission essentially accepted that the costs were prudently incurred, but denied the request for recovery because the request did not satisfy the standard for a variance. Thus, further analysis of whether the costs were in fact prudently incurred was unnecessary.

VI. THE COMMISSION'S DECISION IS BASED UPON LAWFUL PROCEDURE.

A. Standard Of Law.

The Minnesota Public Utilities Commission's rules provide that:

If a proceeding involves contested material facts and there is a right to a hearing under a statute or rule, or if the commission finds that all significant issues have not been resolved to its satisfaction, the commission shall refer the matter to the Office of Administrative Hearings for contested case proceedings[.]

Minn. R. 7829.1000 (2005). Since there are no contested material facts and it is clear that the Commission found that all significant issues had been resolved to its satisfaction, the Commission declined to order a contested case in this matter.

B. Nothing In Statute Or Rule Requires A Contested Case.

For Relator to be entitled to a contested case hearing, Relator must show that it is entitled to a hearing under a statute or rule *and* that there are contested material facts. Relator, however, ignores the two-part test in the first clause of the rule, neither part of which was met here. First, there is no right to a contested case, express or implied, where the Legislature has indicated the Commission "may permit" a utility to file rate schedules providing for the automatic adjustment for natural gas costs. Minn. Stat. § 216B.16, subd. 7 (2006). Second, there were no contested material facts. The issue in dispute is whether the Company met the standard for a variance. Such a determination is within the

Commission's expertise to determine. Additionally, the Commission is the arbiter of whether all the significant issues have been resolved to its satisfaction. Here, the Commission was satisfied that the issues had been fully vetted.

Relator argues in error that the Statements of the Case filed by the Commission and Respondent OAG-RUD support its contention that the right to a contested case is found in the express statutory language of Minn. Stat. §§ 14.63 and 216B.52.¹⁸ Minnesota Statutes section 216B.52 states, “[a]ny party to a proceeding before the commission or any other person, aggrieved by a decision and order and directly affected by it, may appeal from the decision and order of the commission in accordance with chapter 14.” In Minnesota Statutes chapter 14, the procedures for judicial review are outlined under § 14.63 in the section entitled “Judicial Review of Contested Cases.”

The fact that § 216B.52 incorporates the procedure for appellate review under § 14.63 does not equate to a right to a contested case, but rather provides that the same procedures for appellate review apply to decisions made under chapter 216B and those made under chapter 14. *Minnesota Public Interest Research Group v. Northern States Power Company*, 360 N.W.2d 654, 657 (Minn. Ct. App. 1985) (“MPIRG”). Following Relator's argument would mean that any party to a proceeding before the Commission would be entitled to a contested case.

¹⁸ Relator's reliance on *Minnesota Public Interest Research Group v. Minnesota Environmental Quality Board*, 237 N.W.2d 375, 381 (Minn. 1975), is also misplaced since the issue in that case was whether the agency decision was subject to judicial review. The Minnesota Supreme Court determined that an agency hearing was a “contested case” under the statute at issue. *Id.*

In *MPIRG*, this Court considered its jurisdiction where no contested case hearing had been conducted, and directly addressed the interplay between Minn. Stat. § 216B.52 and Chapter 14. *Id.* Holding that it had jurisdiction to determine whether the Commission wrongly deprived a party of a contested case, this Court stated:

We read 'in accordance with chapter 14' in §216B.52 as indicating that APA review procedures should be used, rather than as limiting this court's jurisdiction to review only 'contested case' actions of the PUC.

Id. at 656. This Court held that it had jurisdiction to review the Commission's decision not to refer the matter to a contested case proceeding and upheld the Commission's decision. *Id.* at 658. Similarly here, it was within the Commission's discretion to deny Relator a contested case proceeding.

C. Denial Of Relator's Request For a Contested Case Did Not Violate Relator's Due Process Rights Under the Minnesota and United States Constitutions.

The Commission received several rounds of comments and conducted several hearings on the matter at issue in this case. The Commission's decision did not violate Relator's due process rights. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976).

Although Relator relies on this Court's decision in *Fosselman v. Commissioner of Human Services*, this case is fundamentally different. In *Fosselman*, the Commissioner of Human Services disqualified relators from employment in positions involving direct contact with persons receiving services from programs licensed by the Department of

Human Services (“DHS”) or unlicensed personal-care-provider programs, for failure to report maltreatment. 612 N.W.2d 456, 458 (Minn. Ct. App. 2000). This Court determined that an agency hearing was required. *Id.* at 465.

Relators in this case have had *several* hearings. As noted, the Commission accepted numerous written filings on this matter and Relator presented oral argument to the Commission at three separate hearings. App. 28, 98, 99. For purposes of evaluating Relator’s requested variance, the Commission accepted that the gas costs at issue were what Relator claimed. Accordingly, the Commission relied upon the information provided by the Company in making its determination. A contested case was not necessary.

Further, the Commission did not deny Relator the opportunity to develop a record in this case. The Commission essentially followed the procedure recommended by the Company in its May 22, 2006 Reply Comments and August 18, 2006 Supplemental Comments. R. 59; 70 and 76. After receiving the Company’s January 13, 2006 notice that an error had been discovered, the Commission specifically deferred action on its petition to allow further fact-finding and information gathering. R. 48 at 4. The Commission accepted additional filings from the Company in 2006 on April 5, May 22, June 16, August 8, August 18, September 15, and October 31, all before the Commission issued its *Order*. R. 51, 59, 63, 73, 76, 80, 85. The Company clearly has not been denied the opportunity to present information sufficient to support its petition.

Relator makes a spurious argument that it was “prevented from calling witnesses to elicit their testimony, prevented from introducing documents into evidence, and

prevented from cross-examining adverse witnesses.” Rel. Br. 43. Relator itself indicates that it submitted “detailed filings” to the Commission on April 5, June 16, and October 31, 2006, and that no party disputed this “evidence.” Rel. Br. 7 and 10. While the Commission did not take sworn testimony at the hearings in this matter, Relator could have introduced such testimony through affidavits.¹⁹ Relator did not. Further, as the record demonstrates, Relator was clearly not prohibited from introducing statements or documents into the record. The Company submitted, and the Commission accepted, hundreds of pages of documents, including tables outlining its calculations and auditors’ reports. The Company fails to identify any statement or document it submitted that was not accepted.

Further, while Relator argues that a contested case is necessary, Relator repeatedly argued before the Commission that the record was sufficient in order to grant it a variance. R. 51 at 9, R. 76 at 11, 16. Only in its September 15, 2006 reply comments did Relator raise the issue of referring the matter to the Office of Administrative Hearings for contested case proceedings. R. 80. It is implausible that a record could be sufficient to burden ratepayers with costs that were incurred up to ten years prior, but the record is insufficient to deny a variance to the rule the Company should have availed itself of in the first place.

¹⁹ Additionally, the Company indicated at hearing that the relevant Company employees were present to answer questions and, contrary to Relator’s statement that the Commission impermissibly relied on argument of counsel, Relator’s own Director of Regulatory Services presented, in part, the Company’s position to the Commission. R. 99:3:10-18; App. 28-56.

D. A Contested Case Was Unnecessary To Decide The Matters At Issue.

Relator claimed at the November 9, 2006 hearing that the factual issue in dispute was whether the amount at issue would have a substantial detrimental financial impact on the Company. R. 99 at 33:23-25. The calculations of the amounts at issue were provided by the Company itself. Thus, the dispute was not about the amount of the prior period gas costs alleged to be unrecovered, but whether the impact of denying the requested variance would impose an "excessive burden" on Relator. The determination of whether the amounts alleged to be unrecovered would impose an excessive burden on the Company is within the expertise of the Commission to decide. There was no need to send the determination of whether this matter met the standard for a variance to a contested case when the determination could be made on the information already provided.

Relator further disputes whether a contested case was necessary to evaluate the impacts of the rate case. The Commission is the agency with the expertise necessary to determine whether the issues raised in this petition are, in fact, related to the rate case. The Commission reviews and decides both matters and, accordingly, it is unnecessary for a fact witness to be examined under oath regarding the relationship between the two.

Further, the issue of whether the Company could have been reasonably compensated by ratepayers due to the intervening rate cases was not determinative of this case, but rather supported the Commission's conclusion that there was no excessive burden given the small amount of gas costs unrecovered in comparison to the total gas costs. Additionally, the Commission has the expertise necessary to evaluate potential

impacts of the rate cases and whether the comparison of unrecovered gas costs to total gas costs is appropriate.

Finally, a review of the transcripts in this case shows the thorough vetting this case received. The hearings in this matter were lengthy, during which the Commissioners heard arguments, asked questions and were presented with the thoughts and opinions of the other Commissioners. R. 97, 98, 99. The Commission's order reflects its thoughtful analysis of the issues presented that were clearly within the Commission's authority to decide. A contested case proceeding was not required.

CONCLUSION

Based on the foregoing, the Commission respectfully requests the Court affirm the Commission's order.

Dated: June 21, 2007

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



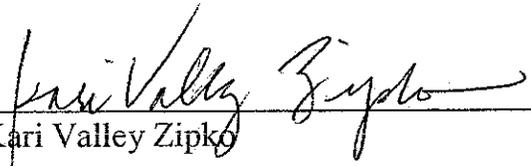
KARI VALLEY ZIPKO
Assistant Attorney General
Atty. Reg. No. 330413

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 296-1408 (Voice)
(651) 296-1410 (TDD)

CERTIFICATE OF COMPLIANCE

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

The undersigned certifies that the Brief submitted herein contains 13,868 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.


Kari Valley Zipko