STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Katie Sieben	Chair
Joseph K. Sullivan	Vice Chair
Hwikwon Ham	Commissioner
Audrey Partridge	Commissioner
John Tuma	Commissioner

In the Matter of the Application of Xcel Energy for Authority to Increase Rates for Electric Service in the State of Minnesota	DOCKET NO. E-002/GR-21-630
In the Matter of the Application of Xcel Energy for Authority to Increase Rates for Natural Gas Service in Minnesota	DOCKET NO. G-002/GR-23-413

REPLY COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL— RESIDENTIAL UTILITIES DIVISION

INTRODUCTION

The Office of the Attorney General—Residential Utilities Division (OAG) respectfully submits the following reply to Xcel's comments regarding the court of appeals' remand of the Commission's order from Xcel's 2021 rate case. Xcel presents variations on the theme of its appellate argument that the Commission is required by law to award Xcel full recovery.[1] But the court of appeals held that the Commission has authority to disallow or limit Xcel's request for rate recovery of executive compensation.[2] For all of its bluster, Xcel fails to articulate any basis for the Commission to reverse course and accept the arguments that the court of appeals already rejected. The Commission should disallow Xcel's request for rate recovery of compensation for its ten

[1] Xcel admits that this would still be subject to the Commission's separate decision limiting incentive compensation for all employees.
[2] *In re N. States Power Co.*, No. A23-1672, Opinion at 21 (Jan. 21, 2025), available at https://mn.gov/law-library-stat/archive/ctapun/2025/OPa231672-012125.pdf (Court of Appeals Opinion).

highest paid executives in its entirety. In the alternative, the Commission should clarify its original order to provide further explanation of why the limit the Commission ordered is reasonable.

ANALYSIS

At their core, Xcel's comments simply rehash arguments that the court of appeals already rejected in the Commission's favor. On appeal, Xcel's arguments were that the Commission was legally required to grant recovery of executive compensation,[3] and that the decision to cap executive compensation at the level of the governor's salary was arbitrary and capricious.[4] In Xcel's comments, Xcel again argues that the Commission is legally required by the record in this case to grant recovery of executive compensation and bases this argument on a case discussing the arbitrary and capricious standard.[5] The court of appeals already held that "on this record" the Commission has the authority to deny recovery of executive compensation,[6] and that, while the limit the Commission previously set was arbitrary and capricious,[7] the Commission may set the same limit so long as it explained its decision.[8] The Commission should reject Xcel's attempt to relitigate issues it already lost.

I. THE COURT OF APPEALS ALREADY HELD THAT THE COMMISSION HAS THE AUTHORITY TO DENY OR LIMIT XCEL'S REQUEST ON THIS RECORD.

Xcel rehashes the evidentiary record in an attempt to suggest that the only reasonable interpretation of the evidence is Xcel's. In doing so, Xcel overlooks that the court of appeals already found that the conclusions the Commission drew from the record – namely, that Xcel had failed to carry its burden to demonstrate that forcing ratepayers to pay for its top-ten executive

[3] *In re N. States Power Co.*, No. A23-1672, Principal Brief of Petitioner Xcel Energy at 41-43 (Jun. 14, 2024) (Excerpt attached).
[4] *Id.* at 43-49.
[5] Comments of Xcel Energy at 18 (Aug. 25, 2025) (Xcel Comments).
[6] Court of Appeals Opinion at 24.
[7] *Id.* at 26.
[8] *Id.* at 27, n. 6.

compensation – were reasonable. Xcel's attempt at a new narrative also fails to account for important facts.

The evidentiary record now is no different from what it was before. Xcel had hiked rates on ratepayers nearly every year for the preceding decade.[9] Its 2021 rate case was one of the largest requests it had ever made, even after Xcel reduced parts of its request.[10] Contrary to Xcel's suggestion that its request was tempered,[11] it actually requested recovery of more Annual Incentive Program (AIP) pay than it had been granted since at least 1992[12] and recovery of two of its three Long-Term Incentive (LTI) programs, neither of which have ever been approved.[13] The majority of executive compensation was paid through these incentive programs, which the Commission denied because of the clear focus on shareholder interests they incentivize.[14] Though Xcel's filed testimony included references to a schedule that would have shown its executives' compensation,[15] it did not file the actual schedule until after the contested case proceedings had concluded.[16] The evidence that it did file regarding compensation demonstrated that Xcel generally pays its employees similarly to how other companies pay their employees,[17] but it neither specifically

[9] Docket No. E-002/GR-21-630, Findings of Fact, Conclusions, and Order at 21 (July 17, 2023) (2021 Rate Case Order).
[10] *Id.*
[11] Xcel Comments at 4.
[12] Docket No. E-002/GR-21-630, Initial Brief of the Minnesota Department of Commerce at 46 (Jan. 11, 2023).
[13] *See id.* at 43.
[14] 2021 Rate Case Order at 14-15, 18-19.
[15] Xcel Comments at 5-7.
[16] *Id.* at 6-7.
[17] Court of Appeals Opinion at 24.

discussed top-ten executive compensation[18] nor explained why it would be just or reasonable for *ratepayers* to pay Xcel's executives at the market rate.[19]

On this evidentiary record, the court of appeals rejected Xcel's argument that the Commission was required to grant recovery of executive compensation, the same argument Xcel made in its August 25 comments, stating "we conclude that the Commission lawfully rejected Xcel's proposed amount."[20] The court of appeals explained that the Commission chose to specifically address executive compensation after receiving more than 20 public comments on the issue. It then recounted the findings that the Commission made in its denial of Xcel's requested amount, including that the overall compensation structure focused "the executive team on shareholder benefits, which are not necessarily aligned with the interests of ratepayers."[21] The court of appeals concluded that

> the commission's denial of Xcel's proposed expense amount accords with its statutory mandate and is not contrary to law. Xcel had the burden to show not only that it would incur the expense but "that it is just and reasonable that the ratepayers bear the costs of those expenses." *N. States Power*, 416 N.W.2d at 723. Any doubt about the reasonableness of rates must be resolved in favor of consumers. Minn. Stat. § 216B.03. Although Xcel provided general testimony that it set its employee compensation based on market comparisons with other corporate employers, it did not specifically address the compensation levels for its ten highest-paid executives—an issue that the commission may closely consider.[22]

The court further explained that Xcel's evidence that it compensates its employees generally at the market rate did not compel the Commission to allow it to recover its requested level of compensation.[23]

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[18] *See generally* Direct Testimony of Ruth K. Lowenthal (Oct. 25, 2021); Rebuttal Testimony of Ruth K. Lowenthal (Nov. 8, 2022).
[19] 2021 Rate Case Order at 22.
[20] Court of Appeals Opinion at 21.
[21] *Id.* at 22.
[22] *Id.*
[23] *Id.* at 24.

Xcel takes umbrage with the court's findings, suggesting that the court's (and the Commission's) conclusion is simply wrong.[24] It argues that the Commission's separate disallowance of AIP and LTI require that the Commission allow it to recover the remainder of executive compensation.[25] This is a red herring; Xcel's burden to prove that executive compensation should be included in rates is unaffected by whether it met its burden to prove any other aspect of its request. The fact that Xcel failed to demonstrate that it would be just and reasonable for ratepayers to pay for those forms of incentive compensation does not mean that Xcel must be allowed to recover the remaining compensation.

Xcel also attempts to present "facts [that] cannot be disputed" and argues that, because they are "indisputable," it must be allowed to recover executive compensation.[26] This argument is specious both because the evidence it recounts do not require the conclusion it desires and because the "facts" are not even entirely correct. The evidence that Xcel cites tends to demonstrate that Xcel has executives who run the company and whose actions impact customers, Xcel compensates those executives, shareholders pay for the portion of executive compensation that is excluded from rates, and intervenors did not challenge Xcel's request for recovery of their compensation.[27]

Nothing here requires the outcome Xcel desires. Xcel has the burden of proof; the fact that the issue was raised by members of the public rather than intervenors does not change this. Executives' decisions may indeed "have a significant impact on customers,"[28] but those impacts may be negative if executives prioritize shareholder interests over ratepayer interests. And the fact that Xcel was denied its request for incentive compensation (it did not "forego" recovery) such

[24] Xcel Comments at 23.
[25] *Id.*
[26] *Id.* at 25-26.
[27] *Id.*
[28] *Id.* at 25.

that "shareholders covered more than 60 percent" of overall executive compensation[29] does not mean that ratepayers must therefore cover the remaining compensation expense. In other words, the fact that Xcel spends money to pay its executives does not mean that ratepayers must be charged for it.[30]

Xcel's argument that the Commission must allow it to recover executive compensation has already been addressed and rejected by the court of appeals. However Xcel might try to reinterpret the record in this case, the fact remains that the Commission has the authority to draw its own "inferences and conclusions" from the record,[31] and its conclusion that Xcel failed to carry its burden was upheld by the court of appeals. The Commission is under no obligation to reverse itself.

II. THE COMMISSION'S DECISION WILL NOT BE "ARBITRARY AND CAPRICIOUS" SO LONG AS IT EXPLAINS ITS RATIONALE

Xcel's argument is, at its core, a misapplication of the arbitrary and capricious standard of review. Xcel argues that the Commission is bound to grant rate recovery of executive compensation because the Commission granted such recovery in prior rate cases, even though the issue was not specifically addressed in prior cases.[32] Xcel bases this argument on a case in which the Minnesota supreme court held that the Commission is not obligated to follow the same "principles" as it established in prior cases, so long as it explains its rationale for its decision.[33] Xcel's argument fails both because the Commission did not even depart from prior principles,

[29] *Id.* at 26.
[30] Court of Appeals Opinion at 24.
[31] *In re Petition of N. States Power Co.*, 416 N.W.2d 719, 722-23 (Minn. 1987).
[32] Xcel Comments at 16-26.
[33] *In re Review of 2005 Annual Automatic Adjustment Charges for All Electric and Gas Utilities,* 768 N.W.2d 112, 119-120 (Minn. 2009).

rendering an explanation unnecessary, and because the Commission provided a reasoned explanation for its disallowance of top-ten executive compensation.

A Commission decision is not arbitrary and capricious so long as the Commission explains the basis for its decision, even when the facts are similar to prior cases. In the case Xcel cites, the Commission rejected a utility's request for a rule variance to remedy a true-up accounting error even though the Commission had previously granted similar variances to other utilities.[34] Specifically, the Commission had found that denying the variance would not impose an excessive burden on the utility even though it had found the existence of such a burden in previous cases, reasoning that "each case was fact intensive and 'specific to the economic conditions of the times.'"[35] The Commission had also found that granting the variance would not be in the public interest.[36]

The supreme court held that Commission decisions are given significant deference and are not arbitrary and capricious so long as the Commission articulates a "rational connection between the facts found and the choice made."[37] The court agreed with the Commission that the prior decisions finding the existence of an excessive burden in similar accounting-based variance requests were not determinative because the "context" was different in each case.[38] The court further held that the Commission's determination of what was in the public interest was a legislative decision that is afforded even greater deference by reviewing courts.[39]

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[34] *Id.* at 116-118.
[35] *Id.* at 121.
[36] *Id.* at 123-124.
[37] *Id.* at 120.
[38] *Id.* at 122.
[39] *Id.* at 123.

As an initial matter, review of the Commission's decision on executive compensation under the standard articulated in this case is inappropriate because the Commission did not individually address compensation paid to executives in prior cases. In the supreme court case cited by Xcel, the appellant utility requested a rule variance to surcharge ratepayers for an accounting error.[40] The requested variance was the same variance that had been granted in two prior cases.[41] In this case, Xcel argues that, because the ALJ in Xcel's 2012 rate case discussed employee compensation generally in a prior case when granting recovery of a portion of AIP, and because "all employee compensation" includes within it "executive compensation," the Commission is bound by an ALJ report from 2012 to grant its request for compensation paid to Xcel's ten highest-paid executives.[42] The ALJ in 2012 did not did address compensation paid to Xcel's ten highest-paid executives as a distinct issue.[43]

The instant situation is not like the supreme court decision Xcel cites to, nor like 2012. Instead, the Commission here scrutinized top-ten executive compensation separately from compensation paid to other employees. In prior cases, the Commission had not analyzed executive compensation separately from other employees, but it was clearly authorized to do so,[44] just as it may scrutinize any part of any utility's rate request. Had the Commission made a different decision on AIP from the portion of the 2012 rate case quoted by Xcel,[45] supreme court precedent may have required an explanation that would withstand arbitrary and capricious review. However, in this

[40] *Id.* at 115.
[41] *Id.* at 116.
[42] Xcel Comments at 17-18.
[43] *See generally* Docket No. E002/GR-12-961, Findings of Fact, Conclusions of Law and Recommendations (Jul. 3, 2013).
[44] Court of Appeals Opinion at 24 (*stating* executive compensation is "an issue that the commission may closely consider, especially given the utility's statutory obligation to provide specific information about that pay." (citation omitted)).
[45] And it did not.

situation, where the Commission addressed an issue it had not previously addressed at all, the Commission was only required to support its decision with substantial evidence, as it must support all of its decisions, and which it did. Notably, "substantial" as a standard of review means "of substance," *not* "a large quantity" as it might mean in colloquial speech.[46]

If the Commission is nevertheless concerned about review under the arbitrary and capricious standard, the Commission can simply explain in its forthcoming order why it is disallowing executive compensation now and did not disallow it previously. So long as the explanation is reasonable, the Commission's decision will stand, even if there is "room for differing opinions" about whether the explanation is correct.[47] In other words, courts give the Commission significant deference.

The supreme court has held that the existence of different facts between cases is a sufficient basis to depart from a previous decision, which applies here to Xcel's 2012 rate case argument.[48] By 2021, Xcel had raised rates nearly every year since 2011, and initially requested to raise rates by another $677.72 million,[49] whereas in 2012, there had been three rate cases filed in the preceding decade.[50] The 2021 rate case also happened amidst historically high levels of inflation,

[46] "Substantial evidence" is a legal standard of review applied by appellate courts that means "more than a scintilla of evidence[,] more than some evidence[, and] more than any evidence." *Reserve Min. Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977). In other words, it means sufficient relevant evidence to support a conclusion. *In re Request of Interstate Power Co.*, 574 N.W.2d 408, 415 (Minn. 1998).

[47] *In re Review of 2005 Annual Automatic Adjustment Charges for All Electric and Gas Utilities,* 768 N.W.2d at 123.

[48] *Id.* at 121-122. In highlighting facts specific to the case at issue, the supreme court held that the Commission had not "articulated a new rule, nor has it varied from previous decisions." Instead, the court examined whether the case at issue was indeed factually distinct from the previous cases that turned on a similar legal question, and found that it was distinct despite the existence of some similar facts.

[49] 2021 Rate Case Order at 21.

[50] Docket No. E-002/GR-10-971; Docket No. E-002/GR-08-1065; Docket No. E-002/GR-05-1428.

high energy surcharges due to extreme weather events, and the lasting effects of the largest pandemic in a century.[51] Xcel's 2021 rate case simply occurred in a drastically different context – for both ratepayers and the company – from its 2012 case.

In addition to factual distinctions, the Commission may provide policy reasons, including ratepayer interests and the public interest, in its explanation.[52] For example, disallowance of top-ten executive compensation helps ensure that utilities carry their burden to prove their full rate request even when intervenors do not highlight an issue to the Commission,[53] as the utility's burden and the Commission's role in determining just and reasonable rates are both independent of what intervenors choose to testify about.[54] This protects ratepayers from unsupported rate hikes and protects the public interest by ensuring the integrity of the regulatory process.

In sum, Xcel's argument that the Commission cannot disallow top-ten executive compensation in this rate case because the Commission tacitly allowed it in previous rate cases lacks merit. Such a contention suggests that the utility does not need to carry its burden of proof and that the Commission can never scrutinize aspects of a rate case that intervenors did not directly highlight. On the contrary, utilities carry the burden, and the Commission always has the authority to "draw its own inferences and arrive at its own conclusions from the undisputed basic facts"[55] in carrying out its duty to ensure that rates are just and reasonable. However, to the extent that the Commission is concerned that Xcel might appeal this issue yet again, the Commission need simply

[51] 2021 Rate Case Order at 20.
[52] *See In re Review of 2005 Annual Automatic Adjustment Charges for All Electric and Gas Utilities,* 768 N.W.2d at 123-24.
[53] *See id.* at 124, where the court approved of the Commission's policy-based justification that denying the variance would incentivize "public utilities to ensure accurate accounting in the future."
[54] *See* Minn. Stat. § 216B.03; Minn. Stat. § 216B.16, subd. 4.
[55] *In re Petition of N. States Power Co.*, 416 N.W.2d at 723.

explain why it chose to disallow top-ten executive compensation in the 2021 rate case and had not made that disallowance before. It may base this explanation on facts in the record (including facts regarding economic conditions), previous orders, policy justifications, or a combination thereof.

CONCLUSION AND RECOMMENDATIONS

Xcel's argument that the Commission is legally required to grant its request for executive compensation was already rejected by the court of appeals. Executive compensation was a newly-scrutinized issue in this case, so the fact that Xcel recovered it in previous rate cases because it flew under the radar does not change the Commission's authority to disallow it in this case. The OAG continues to recommend:

1. The Commission should disallow Xcel's request for executive compensation in its entirety because Xcel failed to carry its burden of proof. The Commission may add further reasons for its decision, relying on facts in the record, policy justifications, or both.
2. In the alternative, the Commission should provide additional explanation for why using the governor's salary is a reasonable proxy for limiting rate recovery of executive compensation.

Dated: September 9, 2025

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ **Joey Cherney**
JOEY CHERNEY
Assistant Attorney General
Atty. Reg. No. 0403219

445 Minnesota Street, Suite 600
St. Paul, Minnesota 55101
(651) 300-7569 (Voice)
(651) 296-9663 (Fax)
joey.cherney@ag.state.mn.us

ATTORNEY FOR MINNESOTA
OFFICE OF THE ATTORNEY GENERAL—
RESIDENTIAL UTILITIES DIVISION

Attachment 1

No. A23-1672

State of Minnesota
In Court of Appeals

In the Matter of the Application by Northern States Power Company d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in the State of Minnesota

PRINCIPAL BRIEF OF PETITIONER XCEL ENERGY

Thomas H. Boyd, #200517
Eric F. Swanson, #0188128
Kyle R. Kroll, #0398433
Winthrop & Weinstine, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402

Matthew E. Price (*pro hac vice*)
Arjun R. Ramamurti
Jenner & Block LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001

Counsel for Petitioner Northern States Power Company, dba Xcel Energy

Jeffrey K. Boman, #0396253
Susan Gretz, #0209235
Minnesota Attorney General's Office
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128

Counsel for Respondent Minnesota Public Utilities Commission

Commission's decision to exclude the prepaid pension asset from rate base was contrary to law, unsupported by substantial evidence, and arbitrary and capricious.

IV. THE COMMISSION UNLAWFULLY IMPOSED AN ARBITRARY CAP ON THE RECOVERY OF EXECUTIVE COMPENSATION EXPENSE.

A. Minnesota Law Requires the Commission to Permit the Company to Recover Its Executive Compensation Costs.

As noted, the Commission is required to allow utilities to charge "just and reasonable rates," which includes ensuring that utilities have "revenue sufficient to enable it to meet the cost of furnishing the service." Minn. Stat. § 216B.16, subd. 6. "Just and reasonable rates" are only just and reasonable if they include reasonable costs associated with compensating employees and officers, including high-level employees and officers who lead the Company's service efforts. *See Minnegasco*, 549 N.W.2d at 909 ("The cost of furnishing utility service typically includes: 'labor….'") The Commission did not dispute that the Company is permitted to recover the necessary costs of compensating the Company's leadership; however, it objected to the level of compensation the Company paid.

Here, the record contains extensive and undisputed testimony regarding the reasonableness of the Company's executive compensation. The Company sets compensation for its non-bargaining employees—including its highest-paid employees and officers—based on what the market requires to hire such employees and officers. Doc. 134 at GR015566. Company witness Ms. Lowenthal testified that the Company's compensation, including its executive compensation, targets the 50th percentile of the market for each position at the Company. *Id.* at GR015565. Her testimony was supported

by the 2020 Willis Towers Watson (WTW) Study attached as Schedule 2, which demonstrates that, as a whole, Xcel Energy is between 3.2 percent below and 1.9 percent above the median for all positions. Doc. 135 at GR015747 (Sched. 2 p. 19). Accordingly, the Company should have been permitted to recover these costs in its rates. Indeed, in every rate case prior to this one, the Company was allowed to recover these same necessary costs of doing business and offering service. That result makes sense: a utility can only fulfill its mandate of offering adequate and reliable service if it is able to recruit qualified employees—including executive leaders—by offering competitive compensation.

The Commission nevertheless refused to allow the Company to recover these reasonable and necessary costs of service, suggesting that the Company had not "meaningfully consider[ed] the impact of this high cost on ratepayers or explor[ed] the possibility of reducing any component of the executive compensation packages it offers as a means of shouldering the burdens of inflation alongside its customers." Order at 21 (XcelADD32).

The Company strongly disagrees with the Commission's conclusory assertion. The Company's final rate request for 2022 was 40% less than its original request, reflecting the Company's concerted effort to reduce the burden on its customers. Doc. 529 at GR028591 (table showing reduction in the Company's rate request over the course of the proceeding). And undisputed testimony showed that the Company has sought to limit the rate burden on customers related to executive compensation specifically. As Ms. Lowenthal testified, the Company's request "endeavored to strike a balance between recognizing the Commission's expressed concerns around recovery of some elements of executive level compensation

with the Company's interest in lessening the gap between the Company's market-based compensation expenses and the recovery of those expenses in rates." Doc. 134 at GR015558.

In any event, however, given prevailing market rates for compensation, no prudent utility manager could feasibly hire executive leadership at a fraction of what such individuals would receive elsewhere. It is reasonable for the Company to pay what the market demands for such leadership. Although the Commission stated that the "Company has been and continues to be free to compensate its employees at levels in excess of its authorized rate recovery if it chooses to do so," Order at 23 (XcelADD34), this ignores the legal framework governing rate-setting that the Commission is bound to apply. If the Company establishes that its costs are reasonable—as it has done in this case—then it *must* be permitted to recover them under Minnesota law. *See* Minn. Stat. § 216B.16, subd. 6 (authorizing the utility to collect "revenue sufficient to enable it to meet the cost of furnishing the service").

B. The Commission's Unilateral Imposition of a Cap on Recovery Was Arbitrary and Capricious.

Not only did the Commission act contrary to law in denying recovery of reasonable executive compensation expense, but it also arbitrarily and capriciously limited the Company's recovery to an aggregate of $1.5 million per year for its top ten executives. An "agency decision is arbitrary and capricious if there is no 'rational connection between the facts found and the choice made.'" *Minn. Internship Ctr. v. Minn. Dep't of Educ.*, 996 N.W.2d 34, 52 (Minn. Ct. App. 2023) (quoting *In re Excess Surplus Status of Blue Cross*

& Blue Shield of Minn., 624 N.W.2d 264, 277 (Minn. 2001)). In particular, "[i]n applying the arbitrary or capricious standard, we consider whether a combination of danger signals suggests that the agency has not taken a hard look at the salient problems and has not genuinely engaged in reasoned decision-making." *Matter of Denial of Contested Case Hearing Requests*, 993 N.W.2d 627, 646-47 (Minn. 2023). "Stated differently, an agency decision is arbitrary and capricious if it reflects the agency's will and not its judgment." *Minn. Internship Ctr.*, 996 N.W.2d at 52 (citation omitted).

Here, the substantive inadequacy of the Commission's reasoning and the procedural irregularity of the Commission's decision provide the requisite "danger signals" that the Commission's $1.5 million cap was not the product of reasoned decision-making. This arbitrary cap reflects the exercise of will, not judgment.

1. The Commission's Reasoning Was Unsupported by Substantial Evidence and Was Arbitrary and Capricious.

The record does not support the Commission's stated rationales for limiting the Company's recovery for high-level executive compensation to an average of $150,000 for each of the top ten executives. Indeed, absolutely nothing in the record suggests that $150,000 each is a reasonable level of compensation for Company leadership. The only stated basis provided for the Commission's choice of this "cap" is a comparison to the *Governor's* salary. Order at 23. But the Commission did not point to anything that establishes that the Governor's salary is an appropriate benchmark by which to determine rate recovery for the top ten highest paid officers and executives of a public utility. Instead, the Commission pulled this comparison out of thin air based on the notion that the

Governor is also an executive. This comparison ignores the specific question of what pay is necessary for a utility like Xcel Energy to attract and retain qualified leadership to furnish service—and thus what the Commission is required to permit the Company to recover consistent with the regulatory compact. *See* Minn. Stat. § 216B.16, subd. 6. As the record clearly establishes, the answer to that question is dictated by market forces, not a superficial comparison between business executives and a politician.

Much of the rest of the Commission's flawed logic turned on concerns irrelevant to the specific question of executive compensation. First, the Commission pointed to the *overall* amount of the Company's initial requested rate increase. *See* Order at 21 (XcelADD32) ("Xcel initially requested rate increases of $677.72 million," and "its final request is still one of the largest rate-increase proposals the Commission has ever considered"). Setting aside that the Company has worked diligently with the Commission to lower its rate proposal to the greatest extent possible in conjunction with the Commission, the overall level of the request plainly does not provide the Commission with a reasoned basis upon which to reduce the Company's rate recovery with respect to top-ten executive compensation. If the Commission believed that other aspects of the rate request were unjustified, it could reject them. But so long as costs are prudent and reasonable, the Company is entitled to recover the costs—and the same is true for the specific cost of executive compensation. *See* Minn. Stat. § 216B.16, subd. 6. The law does not permit the Commission to deny recovery of prudent and reasonable costs of service. *See id.*

The Commission also referenced Minn. Stat. § 216B.16, subd. 17(a)(5) to suggest

that "Minnesota law requires the Commission to review costs related to a utility's highest-paid executives closely." Order at 21 (XcelADD32). But the cited provision falls within a section dealing with "travel, entertainment, and related employee expenses," and creates only a recordkeeping obligation for the utility to disclose the "expenses for the ten highest paid officers and employees, including and separately itemizing all compensation and expense reimbursements." Minn. Stat. § 216B.16, subd. 17(5). This provision does not vest the Commission with authority to deny recovery of reasonable costs associated with high-level executive compensation—nor does it establish any exception to the Commission's ultimate obligations under Chapter 216B.

Moreover, a neighboring provision to § 216B.16, subd. 17(a)(5) confirms the Company's position that executive compensation must be set in relation to market forces. Specifically, Minn. Stat. § 216B.16, subd. 17(c) permits the Commission or ALJ, with some exceptions, to withhold salary information "if the utility establishes that the *competitive disadvantage* to the utility that would result from release of the salary outweighs the public interest in access to the data." Minn. Stat. § 216B.16, subd. 17(c) (emphasis added). The underlying purpose of this law is to protect against disclosure of high-level compensation, which is the subject of fierce competition among utilities inside and outside Minnesota.

Indeed, the Commission itself acknowledged that the Company "generally aims to set non-bargaining employee compensation at a level consistent with the median for comparable positions to remain competitive in the labor market." Order at 20 (XcelADD31); *see also id.* at 22 (XcelADD33). In contrast to that well-supported practice

of the Company, the Commission offered only cursory and abstract mischaracterizations. For example, the Commission objected to the Company undertaking market comparisons with "other corporate officers" who have a fiduciary duty to shareholders and allegedly "no comparable duty to ratepayers," as well as with the Company's practice of providing compensation packages that are tied to earnings. *Id.* at 21 (XcelADD32). But corporate comparisons are the relevant ones in a competitive market for executive talent: to secure a qualified leader, any prudent utility must offer compensation reasonably in line with its competitors for talent, which include not only other utilities, but other large companies more generally. In providing compensation in this manner, the Company has acted consistently with the regulatory compact to secure leadership that will ensure safe, efficient, adequate, and reliable service. The Commission's reasoning regarding executive compensation was unsupported by the record and does not provide an adequate explanation for the Commission's determination.

2. The Commission's Decision Followed Irregular Procedures.

The Commission issued its substantively unsound decision following a highly irregular procedure. This Court may reverse a conclusion of the Commission if it is "made upon unlawful procedure." *See* Minn. Stat. § 14.69(c). Moreover, the Supreme Court of Minnesota has recently clarified that "[e]ven if an *irregular* procedure of an agency does not rise to the level of an *unlawful* procedure under Minn. Stat. § 14.69(c), an irregularity in procedure may constitute a 'danger signal[]' that may be considered in determining whether an agency decision is 'arbitrary or capricious' under Minn. Stat. § 14.69(f)." *Matter of Denial of Contested Case Hearing Requests*, 993 N.W.2d 627, 648 (Minn. 2023)

(citation omitted).

There are serious procedural concerns with the Commission's Order. Rate case decisions are generally made only after development of an evidentiary record, with all parties highlighting issues of concern through testimony and evidentiary submissions, along with input from public hearings. For example, Minnesota law provides that if all significant issues related to the reasonableness of the proposed rate increase cannot be resolved to the satisfaction of the Commission, it shall refer the matter to the Office of Administrative Hearings—as it did in this case (and does in most rate cases). *See* Minn. Stat. § 216B.16, subd. 2(b). The ALJ makes recommendations based on that record. After the ALJ issues a report, Commission Staff review the entirety of the record and prepare briefing papers with decision options related to each issue. The parties and the Commission use those briefing papers to settle on preferred decision options and develop questions and arguments.

None of these steps was followed here with respect to high-level executive compensation. Instead, the notion of limiting recovery of executive compensation to no more than the Governor's salary was raised for the first time during oral argument before the Commission—by the Commission itself. During that limited colloquy, the Company was given no opportunity to respond to the cap proposal, let alone address that proposal with testimony. Oral Arg. 5-23-23, Tr. 146:19-148:11.

Similarly, the Commission's reliance on a small handful of public comments, rather than record evidence, to take a "closer review" of top-ten executive compensation is also unusual and unprecedented. Order at 22 (XcelADD33). The Order states that the

"Commission received more than 20 public comments expressing dissatisfaction with the high level of executive compensation paid to Company executives." *Id.* While public comments should be considered, these commenters represent just a fraction of the public comments submitted in the case and are miniscule in comparison to Xcel Energy's approximately 1.3 million customers in Minnesota. The assertions in those comments were not subjected to any meaningful testing for accuracy, nor was the Company given an opportunity to respond to the particular snippets of those comments on which the Commission ultimately relied. In any case, the views of a minute subset of the public do not provide a reasoned basis on which to deny requested recovery of costs that are fully supported by the record and to which no party objected.

These "procedural irregularities . . . suggest that the [agency] exercised 'its will and not its judgment'" in denying the Company recovery of just and reasonable costs of service arising from the compensation paid to its top-ten executive leaders. *Matter of Denial of Contested Case Hearing Requests*, 993 N.W.2d at 653 (quoting *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977)).

* * *

In sum, the Company was legally entitled to recover the necessary costs it has incurred and will incur to pay the market price for executive leadership. The Commission's decision with respect to executive compensation was contrary to law, lacked substantial evidence, and was arbitrary and capricious, and it must be reversed.

CONCLUSION

For the foregoing reasons, the Order should be reversed. The matter should be

remanded to the Commission for the Company's rates and revenues arising from the underlying rate case to be adjusted in light of the Commission's errors.

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Respectfully submitted,

s/Thomas H. Boyd

WINTHROP & WEINSTINE, P.A.
Thomas H. Boyd (MN Bar No. 200517)
Eric F. Swanson (MN Bar No. 188128)
Kyle R. Kroll (MN Bar No. 398433)
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
(612) 604-6400

--and--

JENNER & BLOCK LLP
Matthew E. Price (*pro hac vice*)
Arjun R. Ramamurti
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for Petitioner Northern States Power Company, dba Xcel Energy