

**STATE OF MINNESOTA  
BEFORE THE PUBLIC UTILITIES COMMISSION**

Beverly Jones Heydinger	Chair
Betsy Wergin	Vice Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
John Tuma	Commissioner

**In the Matter of the Petition of Northern States Power Company for Approval of a Gas Utility Infrastructure Cost Rider**

**DOCKET NO. G-002/M-14-336**

**PETITION FOR RECONSIDERATION  
OF THE OFFICE OF THE ATTORNEY  
GENERAL - RESIDENTIAL UTILITIES  
AND ANTITRUST DIVISION**

**I. INTRODUCTION**

Pursuant to Minnesota Statutes section 216B.27 and Minnesota Rules part 7829.7300, the Office of the Attorney General – Residential Utilities and Antitrust Division (“OAG”) files this Petition for Reconsideration of the Minnesota Public Utilities Commission’s (“Commission”) Order (“Order”) regarding the Petition of Northern States Power (“Xcel” or “the Company”) to establish a Gas Utility Infrastructure Cost (“GUIC”) Rider.

While the OAG made several recommendations in its Comments, including the recommendation that Xcel’s request should be denied because the magnitude of the rate increase is far larger even than the type of increase that would be requested in a rate case, the OAG limits its petition for clarification and reconsideration to the issue of the East Metro Pipeline. The Commission should reconsider its decision that the East Metro Pipeline did not constitute a betterment because Xcel provided incorrect information about the increase in capacity, the decision was made without sufficiently considering the maximum allowable operating pressure (“MAOP”) that the new pipeline can achieve, which significantly affects capacity, and the Commission’s legal analysis of betterments was made without the benefit of legal briefing and

does not conform to Minnesota law. Moreover, regardless of whether the Commission reconsiders its finding that the East Metro Pipeline did not constitute a betterment, the Commission should reconsider the cost allocation associated with the excess installed capacity to fairly allocate costs from this improvement between firm and interruptible customers

## **II. STANDARD OF REVIEW**

Any party to a proceeding, or any person who is “aggrieved” and directly “affected” by a Commission order, may file a petition for rehearing or reconsideration within 20 days.<sup>1</sup> The Commission may reverse or change its original decision if it appears that the “original decision, order, or determination is in any respect unlawful or unreasonable.”<sup>2</sup>

Minnesota Statutes section 216B.1635 permits a utility to request recovery of GUIC through a rider mechanism, but limits what types of costs can be recovered through the rider. Specifically, the statute provides that the costs must be the result of replacing gas facilities as a result of public works construction, or as the result of “replacement or modification of existing natural gas facilities . . . that is required by a federal or state agency.”<sup>3</sup> The statute also provides that the costs recovered through a GUIC rider *may not* constitute a “betterment,” unless the betterment is “based on requirements by a [government agency], as evidenced by specific documentation.”<sup>4</sup> Because the increased capacity of the East Metro Pipeline was not required by state or federal law, and would provide significant benefits to some customer classes and Xcel, the Commission should clarify or reconsider its Order finding that the East Metro Pipeline does not constitute a betterment.

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<sup>1</sup> Minn. Stat. § 216B.27 (2014); Minn. Rules part 7829.3000, subp. 1.

<sup>2</sup> Minn. Stat. § 216B.27, subd. 2. (2014)

<sup>3</sup> Minn. Stat. § 216B.1635, subd. 1(c)(2).

<sup>4</sup> *Id.* subd. 1(b)(3).

### III. BACKGROUND

In the East Metro Pipeline project, Xcel is replacing approximately 11 miles of transmission pipeline that runs through a “heavily populated urban corridor between St. Paul and Roseville.”<sup>5</sup> Xcel estimates that the cost of the project will be between \$15 million and \$23 million annually for the next several years.<sup>6</sup> Until a few weeks before the Commission’s deliberation in this matter, Xcel had provided no additional information about the East Metro Pipeline Project.

On December 4, 2014,<sup>7</sup> the OAG received copies of information requests served on Xcel by Commission Staff on November 20, 2014. In this information request, Staff noted that the GUIC statute does not allow recovery of costs that constitute a betterment, and asked Xcel whether the East Metro Pipeline had increased in diameter or would operate under more pressure.<sup>8</sup> Xcel indicated that the East Metro Pipeline varied from 16 to 24 inches in diameter, but that the new pipeline would be 20 inches in diameter.<sup>9</sup> Xcel indicated that an 18 inch pipe would have been sufficient to meet the current capacity needs of the pipeline, but that Xcel decided to use a 20 inch pipe instead because Xcel considered the 18 inch pipe to be “non-standard” and because Xcel uses the 20 inch pipe in other parts of its system.<sup>10</sup> Xcel indicated that increasing the pipeline to 20 inch would increase the capacity of the pipeline from 5,275 Dth/hour to 5,980 Dth/hour, an increase of 695 Dth/hour, or 13%, if operated at 175 psi.<sup>11</sup> Further, Xcel indicated that the new pipe would allow the East Metro Pipeline to increase its MAOP from 175 psi to 650 psi, although Xcel claims that it has no plans to operate the pipeline

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<sup>5</sup> Petition, at 7.

<sup>6</sup> *Id.* at 20.

<sup>7</sup> Approximately 5 weeks after the OAG filed its Reply Comments on October 27, 2014.

<sup>8</sup> MPUC IR 1(6), Attachment A.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

above 175 psi and did not include any pressure increase in its capacity calculation.<sup>12</sup> Xcel did not provide any documentation of its claims, or describe any of the analysis it employed in making its decisions.

After reviewing Xcel's statements, the OAG served additional information requests on December 9, 2014. The OAG filed a letter requesting that the Commission reschedule the hearing set for December 18, 2014, to allow the OAG to complete its investigation.<sup>13</sup> The Commission declined to reschedule the hearing and allow the OAG to complete investigation of these issues before considering Xcel's petition on the merits.<sup>14</sup>

During the hearing, one of the primary matters of dispute was whether the East Metro Pipeline constitutes a betterment that may not be recovered through a GUIC rider. The OAG recommended that the Commission make no decision at the hearing on the East Metro Pipeline because the factual record was unclear, and because the Commission did not have the benefit of legal briefing to aid in determining the definition of a betterment. The OAG indicated that the East Metro Pipeline may be a betterment because the OAG's preliminary analysis indicated that installing 20 inch pipe would increase the capacity of the pipeline by at least 13 percent, and asked that the Commission allow the parties to submit legal briefing on the definition of a betterment. The Commission declined, and concluded that the East Metro Pipeline is not a betterment. Rather than basing its decision on any source of Minnesota law, the Commission supported its Order solely on one definition, out of several options, selected from Black's Law

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<sup>12</sup> *Id.*

<sup>13</sup> Correspondence to Dr. Burl W. Haar, Dec. 9, 2014.

<sup>14</sup> Order Approving Rider with Modifications, 1 (Jan. 27, 2015).

Dictionary.<sup>15</sup> Based only on this definition, the Commission concluded that the East Metro Pipeline was not a betterment because it “does not go ‘beyond repair or restoration.’”<sup>16</sup>

#### **IV. THE COMMISSION’S DECISION WAS BASED ON INCORRECT INFORMATION PROVIDED BY XCEL AND INCOMPLETE ANALYSIS**

The Commission should reconsider its conclusion that the East Metro Pipeline is not a betterment because the Commission was presented with incorrect information from Xcel and incomplete analysis on the issue of betterments. These issues are directly related to whether the East Metro Pipeline is a betterment and how the costs of the project should be recovered. Based on a complete analysis and accurate information, it is clear that the East Metro Pipeline is a betterment that cannot be fully recovered through the GUIC rider, and thus that the Commission’s decision was incorrect.

##### **A. NEW FACTS DEMONSTRATE THAT THE EAST METRO PIPELINE PROJECT WILL INCREASE CAPACITY MORE THAN TWICE AS MUCH AS CLAIMED BY XCEL.**

Newly discovered information shows that Xcel incorrectly calculated the capacity of the East Metro Pipeline both before and after the upgrades, and that Xcel significantly understated the increased capacity, and therefore increased sales to interruptible customers will be possible after the upgrade.

##### **1. Xcel Incorrectly Calculated the Capacity Increase for the East Metro Pipeline Project.**

In its Initial Petition, Xcel claimed that the East Metro Pipeline Project would increase the capacity of the transmission line by 695 Dth/hour, from 5,275 Dth/hour to 5,980 Dth/hour

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<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.* at 11.

assuming that the pipeline continued to operate at 175 psi.<sup>17</sup> According to Xcel's original calculation, the project would result in a 13 percent increase in capacity.

Based on the OAG's continued investigation after the Commission moved forward with its consideration of this matter, Xcel's calculation was not correct. In fact, Xcel's Petition incorrectly stated both the current capacity of the East Metro Pipeline and the capacity of the new Pipeline. On February 10, 2015, Xcel responded to information requests identifying that Xcel had dramatically understated the capacity increase of the project.<sup>18</sup> After correcting the calculations, Xcel's new estimate indicates that the East Metro Pipeline Project will increase the capacity of the pipeline by 1,269 Dth/hour, rather than the 695 Dth/hour Xcel stated in its original petition.<sup>19</sup> Xcel recalculated the current capacity of the pipeline as 4,403 Dth/hour, and stated that the upgrade will give the pipeline a final capacity of 5,672 Dth/hour at 175 psi.<sup>20</sup> Xcel's new calculation demonstrates that the proposed East Metro Pipeline will increase capacity by approximately 30 percent, not 13 percent. The increased capacity within the East Metro Pipeline could provide throughput sales for an additional 125,000 residential customers annually; The significance of the increase is put in perspective by considering that Xcel currently serves under 100,000 residential customers on the East Metro Pipeline.<sup>21</sup>

Also on February 10, Xcel responded to additional information requests with information about the capacity of the pipeline if Xcel increases the pressure along the line.<sup>22</sup> While Xcel currently operates the pipeline at 175 psi, and claims that it will continue to do so after the East Metro Pipeline Project is complete, the upgrades will allow the line to operate at 650 psi.

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<sup>17</sup> *Id.*

<sup>18</sup> Revised OAG IR 1019, Attachment A.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> This calculation is based on Xcel's 2009 rate case. *See* Initial Filing Vol. 3 of Docket No. 09-1153; *see* Initial Filing Attachment B of Docket No. 14-336.

<sup>22</sup> OAG IR 1044, Attachment B.

Increasing the pressure to 650 psi will increase the capacity of the line to 24,352 Dth/hour, an increase of 553 percent.<sup>23</sup> Even smaller increases in psi will lead to significant increases in capacity—increasing from 175 psi to 200 psi will increase the final capacity of the line by more than 1,000 Dth/hr.<sup>24</sup> Increasing the diameter of the East Metro Pipeline is the most important, and most costly step towards a massive capacity increase that will allow Xcel to pursue significant business opportunities from interruptible customers along the line.

**2. The Commission Should Determine the Appropriate Comparison to be Used when Old and New Pipeline Capacities are Compared.**

In considering Xcel's updated calculations, the Commission should be aware that Xcel's analysis does not make clear the significance that MAOP will have on the capacity of the line. Specifically, Xcel used the current MAOP, 175 psi, to calculate the current capacity of the East Metro Pipeline, but calculated the future capacity of the East Metro Pipeline using its current pressure, rather than the MAOP that will be possible in the future, 650 psi. Instead of comparing the current and future pipeline under the MAOP, the information Xcel presented to the Commission assumes that Xcel will never increase the pressure, even though it will now have the capability of doing so as a result of the project. A more accurate comparison would use MAOP on both sides of the comparison, or at least present that information in parallel so that the Commission has all relevant information when making its decision.

The pressure at which the East Metro Pipeline can be operated is important for at least two reasons. First, increasing the pressure of the line makes an enormous difference in calculating the capacity of the line. For example, if Xcel were to increase the capacity of the East Metro Pipeline to 300 or 650 psi, the capacity would increase from Xcel's proposed 5,672

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Dth/hour to 10,769 Dth/hour and 24,352 Dth/hour, respectively.<sup>25</sup> If a direct comparison were made between the current and proposed East Metro Pipelines at their respective MAOPs, the current line would have a capacity of 4,403 Dth/hour and the proposed pipeline would have a capacity of 24,352 Dth/hour, an increase of over 550%. Once upstream and downstream constraints are relieved, a process Xcel could decide to undertake at any time, Xcel can increase the pressure within the East Metro Pipeline, and thereby increase capacity by over 4 times the amount Xcel is currently claiming to have installed.

Second, the excess installed capacity should be used to determine the value of the new pipeline to firm customers as compared to the old pipeline. Xcel is currently fully serving firm capacity with 4,403 Dth/hour. After the upgrade, Xcel will still require only 4,403 Dth/hour to serve firm customers, which will be approximately 77 percent of capacity at 175 psi, but would be only 18 percent of capacity at MAOP. Under either pressure, the excess capacity will benefit *only* interruptible customers, in the form of fewer interruptions, and Xcel, in the form of increased sales. The costs of this project are not borne solely by those benefiting, however.

The Commission should determine that old and new pipelines should be compared using a direct comparison based on MAOP because it is a non-subjective metric that is not subject to change by the utility. Xcel claims that it has no plans to increase the pressure in the East Metro Pipeline, and that there are upstream and downstream constraints on the pipeline that would currently prohibit increasing the pressure.<sup>26</sup> Regardless of whether Xcel has “plans” to increase the pressure, though, having the *capability* to do so is a business advantage for Xcel. Moreover, it is not clear whether Xcel would have to notify the Commission if such an increase in pressure were to occur in the future. In addition, the Commission should clarify its Order to make clear

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<sup>25</sup> OAG IR 1044, Attachment B.

<sup>26</sup> *Id.*



that future pipeline projects should be compared by the MAOP, rather than the subjective pressure at which a utility chooses for its submission to the Commission.

**3. Xcel Should Have Informed the Commission About the Incorrect Calculation.**

The OAG learned that Xcel's Petition was based on incorrect information on February 10, 2014. As of the filing of this Petition for Reconsideration, there is no indication that Xcel has informed the Commission that Xcel's initial filing, and the Commission's Order, were based on incorrect information.<sup>27</sup> Because of Xcel's incorrect calculation, it appears that Xcel made investment decisions about the current and future capacity of the East Metro Pipeline, which will result in millions of dollars in costs for ratepayers, on the basis of incorrect information. Xcel included that error in its initial Petition in this matter, and the Commission's decision was made on the basis of that incorrect information. The Commission *must* have accurate information in order to make reasoned decisions, which requires utilities to be proactive about bringing errors to the Commission's attention when errors arise. Rather than waiting for the OAG to discover the error and bring it to the Commission's attention, Xcel should have informed the Commission about the incorrect information as soon as it learned of the error.

**4. The Commission Should Reconsider its Decision in Light of New Information.**

This new information highlights three significant problems with the East Metro Pipeline: First, the increased capacity installed on the East Metro Pipeline will provide a benefit for Xcel, and Xcel's interruptible customers, but will be paid for by firm customers who receive no benefit from increased capacity. Second, the magnitude of the increased capacity indicates that the East Metro Pipeline Project, or at least a portion of the project related to increased capacity, is a

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<sup>27</sup> It is also possible that Xcel has informed the Commission about the incorrect information, but the Commission has not yet filed an ex parte communication report.

betterment that cannot be recovered through the GUIC Rider, as discussed more below. Third, the new information suggests that Xcel may have had the option to replace the existing pipeline at a lower cost by installing a smaller pipeline, and operating it at a higher pressure, instead of installing a large pipeline and operating it well below its capacity. As a result, it is not clear whether Xcel's entire investment in the East Metro Pipeline was prudently incurred or was selected to provide the most financial benefit to Xcel.

**B. XCEL'S INCORRECT CALCULATION ALTERS ISSUES RELATED TO COST RECOVERY AND ALLOCATION.**

The East Metro Pipeline Project will result in dramatically increased capacity on the line. Xcel designs its transmission and distribution system based off of the requirements to serve solely firm demand requirements.<sup>28</sup> These firm customers pay all of the demand costs of Xcel's system; interruptible customer pay no demand costs.<sup>29</sup> Xcel does not claim, and has not produced any evidence showing, that the East Metro Pipeline needs more capacity to meet the demand of firm customers. Rather, the increased capacity on the line will be for the exclusive benefit of interruptible customers.

Xcel's interruptible customers will receive a significant advantage from the capacity increase, while firm customers will receive no advantage. Any capacity above the amount required to serve firm demand allows Xcel to provide additional service to interruptible customers that would have otherwise been impossible. For example, the excess capacity installed in the East Metro Pipeline will greatly reduce the frequency and quantity, possibly to zero, that interruptible customers will be curtailed, which provides increased revenues for Xcel and an obvious benefit to interruptible customers. This service increases the value of

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<sup>28</sup> OAG IR 1020, Attachment C.

<sup>29</sup> See Initial Filing Vol. 3 of Docket No. 09-1153.

interruptible service to those customers. Moreover, interruptible load is not a design consideration within Xcel's distribution and transmission system because these customers can have their demand curtailed at any time. For this reason, interruptible customers receive a lower rate for service and are not allocated some costs within the class cost of service study ("CCOSS"). The 30% increase in capacity on the East Metro Pipeline represents 15% of total system sales for 2009, and would serve the entire large interruptible class or both small and medium sized interruptible classes.<sup>30</sup>

Even though the benefit of the increased capacity will be entirely for interruptible customers, firm customers will be the ones paying for the capacity upgrades. Capacity costs,<sup>31</sup> like the cost of increasing the capacity of the East Metro Pipeline, within the CCOSS are allocated only to firm customers. None of the costs related to capacity are allocated to interruptible customers. Under this method, firm customers, including the residential class, will be required to pay for a massive pipeline upgrade that will provide them no benefit, but will be of significant benefit for interruptible customers.<sup>32</sup> The practical result of this decision is that firm customers will be paying for one hundred percent of the East Metro Pipeline upgrades, but will not receive any benefit from the significant immediate capacity upgrade or the massive capacity upgrade that Xcel will be able to pursue down the road.<sup>33</sup> This is clearly inequitable, and for that reason the cost recovery and allocation of the excess capacity within the East Metro Pipeline should be reconsidered and determined within a rate case.

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<sup>30</sup> *Id.*

<sup>31</sup> Or more specifically, design day demand costs.

<sup>32</sup> The increased capacity and improved business opportunity also indicates that the East Metro Pipeline Project is a betterment. *See infra* Part V.

<sup>33</sup> It may also be true that Xcel is providing a significant capacity increase that no customer class, including interruptible customers, has requested. In such a situation, it may be more appropriate for Xcel's shareholders to bear the cost of capacity increases that are not necessary to meet the demand of any customer.

**C. THE EAST METRO PIPELINE PROJECT WILL RESULT IN A BETTERMENT THAT MAY NOT BE RECOVERED THROUGH THE GUIC RIDER.**

The Commission should reconsider its decision that the East Metro Pipeline is not a betterment because that conclusion was based on incorrect facts and without the benefit of a thorough legal analysis of betterments. At the very least, the Commission should limit its decision to the facts of this case rather than permanently define a betterment without the benefit of legal briefing.

**1. The East Metro Pipeline is a Betterment.**

The Commission should reconsider its decision that the East Metro Pipeline was not a betterment, because the facts demonstrate that increasing the capacity of the pipeline by more than five times will increase the value of the pipeline beyond its original condition, and will provide more business opportunities than the original pipeline due to the additional installed capacity.

**a. A Betterment is an Improvement That Provides Additional Value to Property Beyond its Original Condition.**

The GUIC statute does not provide a definition of betterment. In its Order, the Commission stated that a betterment is an “improvement that goes ‘beyond repair or restoration.’”<sup>34</sup> In making this statement, however, the Commission’s only source of law was a legal dictionary. In making its determination, the Commission did not analyze the legal concept of betterment, for which there is a significant body of law.

The Minnesota Supreme Court has already provided guidance on the concept of betterments in other contexts. For example, for the purpose of determining the statute of repose for negligent improvement lawsuits, the Supreme Court has stated that a betterment “involves the

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<sup>34</sup> Order, at 10 (*citing* Black’s Law Dictionary 182 (9<sup>th</sup> ed. 2009)).

expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.”<sup>35</sup> When applying this definition to public utility property, the Supreme Court held that the three factors used to determine whether a betterment is an improvement to real property are whether the betterment “is permanent, whether it enhances the capital value of the property, and whether it is designed to make the real property more useful or valuable, *rather than intended to restore the property’s previous usefulness or value.*”<sup>36</sup> Given that the Supreme Court has already defined a betterment in this context, the Commission should not have proceeded without incorporating or distinguishing this definition in the context of utility infrastructure.

The concept of betterment is also relevant in construction law, where betterment is a defense related to some situations involving defective design, construction, or materials. According to one treatise,

[R]emediation ‘enhancements’ that give the nonbreaching party (1) more than what was originally bargained for, or (2) more than what was intended and otherwise would have been paid for if not inadvertently omitted from the original scope of work, must be credited to the damages claimed. Such enhancements are known in the construction industry as “betterment.”

...

The benchmark for the analysis of ‘betterment’ is the owner’s original project scope requirements and design intent . . . . Subsequent enhancements that give the owner a ‘better’ project than that for which the owner originally bargained must be excluded from the owner’s contract damages.<sup>37</sup>

A designer can also raise a betterment defense when an owner takes corrective measures for defective work that enhance the value of a project above what was typically negotiated. In

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<sup>35</sup> *State Farm Fire and Casualty v. Aquila Inc.*, 718 N.W.2d 879, 884 (Minn. 2006) (emphasis added).

<sup>36</sup> 793 N.W.2d 272, at 287 (Minn. 2011).

<sup>37</sup> Bruner on Construction Law § 19:26 (2012); *see also* Jerome V. Bales et al., *The “Betterment” Or Added Benefit Defense*, 26-SPG Construction Law. 14 (Spring 2006).

the seminal betterment case *St. Joseph Hospital v. Corbetta Construction Company, Inc.*, the hospital had contracted to install new plastic laminate paneling in a new hospital.<sup>38</sup> The paneling that was contracted for did not meet fire code, and the hospital spent approximately \$300,000 to replace it.<sup>39</sup> The Illinois Court of Appeals held that the defendants should *not* be held liable for the replacement panels, because such an award would effectively give the hospital “better and more expensive wall paneling than it had bargained for” free of charge.<sup>40</sup> Instead of allowing the hospital to recover the entire cost, the Court applied the concept of betterments to exclude the enhanced value of the replacement panels from the damage award.<sup>41</sup>

In both construction law and in Minnesota case law, the primary factor in determining whether an improvement is a betterment is whether the improvement was necessary to restore the property to its original condition, or whether the improvement has increased the value of the property beyond its original condition. Based on this understanding of a betterment, it is clear that the East Metro Pipeline Project is a betterment because it will increase the value of the East Metro Pipeline beyond its original condition, rather than returning it to the original condition.

## **2. The East Metro Pipeline Project is a Betterment that is not Eligible for Rider Recovery.**

A large portion of the East Metro Pipeline Project is a betterment because the Project will improve the Pipeline beyond its original condition, rather than returning it to its original condition. In its Order, the Commission determined that the East Metro Pipeline Project was not a betterment, and that, even if it were a betterment, it can be recovered through the GUIC rider because it is “based on” federal requirements.

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<sup>38</sup> 316 N.E.2d 51 (Ill. App. 1st Dist. 1974).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 58.

<sup>41</sup> *Id.* at 63.

**a. The East Metro Pipeline is a Betterment.**

In determining that the East Metro Pipeline Project is not a betterment, the Commission stated:

Using 20-inch rather than 18-inch pipe is not a betterment because it is the best engineering choice to restore the pipe to its original, safe condition. Had Xcel used 24- or 30-inch pipe, the situation would be different, since it would suggest that the Company was taking advantage of the replacement to increase its capacity. However, 20 inches is the pipe size that Xcel routinely uses when replacing its transmission lines. The East Metro project therefore does not go ‘beyond repair or restoration’ and is not a betterment.<sup>42</sup>

In making this statement, the Commission did not apply the proper analysis to determine whether the East Metro Pipeline Project will result in a betterment.

As discussed above, the primary factor in determining whether an improvement is a betterment is whether the improvement was necessary to restore the property to its original condition, or whether the improvement has increased the value of the property beyond its original condition. Instead of determining whether the value of the property had been increased or whether the 20-inch pipe was required to meet federal safety requirements, the Commission focused on Xcel’s claim that the Project is not a betterment because 20-inch pipe is standard. But that fact is irrelevant.<sup>43</sup> To analyze whether the Project will result in a betterment, the final result of the Project must be compared to the pre-existing condition of the East Metro Pipeline, including its potential value and capacity. If the Pipeline after the Project has additional value or usefulness when compared to the original pipeline, then there has been a betterment regardless of whether Xcel followed standard engineering practices.

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<sup>42</sup> Order, at 11.

<sup>43</sup> It is also unsupported by documentary evidence. In making its assertion, Xcel relied on narrative descriptions in information requests and unsupported oral statements during the hearing.

In performing that analysis, the Commission should have considered the increased value of the project, including the increased capacity, rather than focusing only on the size of the pipe used for replacement. While the size of the pipeline is one measure of the value of a pipeline, the true value of the pipeline is in its ability to transport gas, which is directly tied to capacity. Capacity is a function of pressure, size, and other variables. Regardless of the size of the pipe Xcel plans to install, the practical impact of the installation will be a significant capacity increase.

The East Metro Pipeline Project will increase the value and utility of the pipeline beyond its original condition. Xcel's proposal for the East Metro Pipeline will increase the capacity of the line by East Metro pipeline by 1,269 Dth/hour at minimum pressures, or 19,949 Dth/hour at MAOP.<sup>44</sup> The increased capacity at MAOP, which will always be available to Xcel, will allow Xcel to more than quadruple the service capacity on its line and service numerous additional interruptible customers well into the future. Xcel's filings in other cases make it clear that Xcel has been exploring possible uses for that additional capacity. For example, in Docket 14-958, Xcel stated that there may be "future projects that may feed into the High Bridge combined cycle generating facility."<sup>45</sup> Similarly, in a 2013 Certificate of Need filing, Xcel indicated that it would seek to "more fully utilize[]" the High Bridge plant in the future.<sup>46</sup> The East Metro Pipeline does not currently feed into the High Bridge facility, but the East Metro line terminus at Island Station is only a few hundred feet from the High Bridge facility. After Xcel has several thousand Dth/hr in capacity available on the East Metro Pipeline, it may seek to connect the system to the High

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<sup>44</sup> *Id.*

<sup>45</sup> Petition, *In the Matter of the Petition of Northern States Power Company for Approval of Property Transfer from Electric to Gas Operations*, Docket No. E,G002/M-14-958, at 7 (Nov. 4, 2014).

<sup>46</sup> Proposal, *In the Matter of the Petition of Northern States Power Company for Approval of a Competitive Resource Acquisition Proposal and for a Certificate of Need*, Docket No. E002/CN-12-1240, at 1-5 (Apr. 15, 2013).



Bridge facility to produce more electricity, or to any other large customer in order to sell more gas. In either event, the massive increase in capacity will clearly give the completed East Metro Pipeline a greater value and provide Xcel with additional business opportunities compared to the original pipeline. For these reasons, the East Metro Pipeline is a betterment.

Moreover, Xcel's claim that the 20-inch pipe is standard does not change the fact that the Project will result in a betterment. It does not matter if the 20-inch pipe was the most reasonable decision; the result of using the 20-inch pipe is a significant capacity increase, and that increase represents a betterment because it increases the value of the East Metro Pipeline beyond its original condition. Moreover, both Xcel and the Commission's Order fails to acknowledge that the issue of betterment is not an all-or-nothing proposition. The OAG does not suggest that the entire East Metro Pipeline project is a betterment. For example, the costs that were necessary to return the Pipeline to its original condition and value are not a betterment, and can be collected through the rider under Minnesota law. But the proportional further increase in value *is* a betterment that cannot be recovered through a GUIC rider under Minnesota law, and the Commission's decision, therefore, should be reconsidered.

**b. The East Metro Pipeline is Not a Permissible Betterment.**

The GUIC statute provides that a betterment may be recovered through a GUIC rider if “the betterment is based on requirements by a political subdivision or a federal or state agency.”<sup>47</sup> In determining that the Project is eligible for the GUIC rider even if it is a betterment, the Commission concluded that the “20-inch pipe is ‘based on’ requirements by a federal agency” because “using a 20-inch pipe is the most prudent choice incidental to fulfilling federally

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<sup>47</sup> Minn. Stat. § 216B.1635, subd. 1(b)(3).

mandated pipeline-integrity requirements.”<sup>48</sup> The Commission’s conclusion, by its own terms, impermissibly expands the type of costs that can be recovered through the GUIC rider. The GUIC statute states that betterments may be recovered if they are “based on” federal law.<sup>49</sup> But in its Order, the Commission allows Xcel to include not only betterments that are “based on” federal requirements, but betterments that are “incidental” to federal requirements. Things that are “incidental” are just that: incidental, and not required.

The California Court of Appeals has considered a similar issue while interpreting a statute comparable to Minnesota’s GUIC statute. California law requires the California Department of Transportation (“Caltrans”) to pay for the cost of relocating utility facilities for purposes of work involving state freeways.<sup>50</sup> Caltrans receives a credit, however, “in the amount of any betterment to the utility facility resulting from such removal or relocation.”<sup>51</sup> In *City of Anaheim v. Department of Transportation*, the California Court of Appeals considered whether moving power lines underground to accommodate freeway construction constituted a betterment.<sup>52</sup> The City of Anaheim, which operated its own utility, had a municipal code requiring electric transmission lines to be put underground when possible.<sup>53</sup> After construction was completed, Caltrans reduced payments to the City in the amount of a credit for the betterment related to undergrounding the transmission lines, and the City sued.<sup>54</sup>

The California Court of Appeals agreed that word “betterment” was ambiguous, stating “In its ordinary sense, the term ‘betterment’ suggests *any* improvement that makes something

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<sup>49</sup> Minn. Stat. § 216B.1635, subd. 1(b)(3).

<sup>50</sup> Cal. St. & H. Code § 703.

<sup>51</sup> Cal. St. & H. Code § 705.

<sup>52</sup> 37 Cal.Rptr.3d 393 (Cal. App. 2005), *rev. denied* (Cal. 2006).

<sup>53</sup> *Id.* at 395.

<sup>54</sup> *Id.*

better than it was before.”<sup>55</sup> The Court concluded that such a definition was too broad, and relied upon the Caltrans Right-of-Way manual to provide a technical definition.<sup>56</sup> The Caltrans Right-Of-Way Manual provides that “any increase in the size or capacity of the facility that is for the Owner’s benefit is considered the Owner’s benefit,” and that Caltrans should only pay for the “functional equivalent replacement of the impacted utility facility.”<sup>57</sup> There are several exceptions, including that betterments for increased size or capacity may be paid by Caltrans if they are “required by Federal or State law” or “required by current design practices regularly followed by the Owner.”<sup>58</sup> The California Court of Appeals concluded that neither of these conditions had been met because the undergrounding was not *required*.<sup>59</sup> While Federal or State law allowed the undergrounding, it was not required.<sup>60</sup> Similarly, while the City had a policy of undergrounding transmission lines, the “facilities . . . were not undergrounded due to any engineering need; rather they were undergrounded for other reasons” like aesthetics and service reliability.<sup>61</sup> Because the City had not demonstrated that the undergrounding was required, the Court concluded that it was not an exception to the policy allowing Caltrans a credit for betterments.<sup>62</sup>

In this case, just as in the California case, the 20-inch pipe is not “based on” federal law because it is not “required.” The language of the statute itself indicates that a permissible betterment should only include improvements that are “required” by federal or state law, because the statute requires that a permissible betterment must be “evidenced by specific documentation,

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<sup>55</sup> *Id.* at 532 (emphasis in original).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 529.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 533.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

an order, or other similar requirement from the government entity.”<sup>63</sup> Xcel had to make safety repairs to comply with federal law, but no federal or state law *required* Xcel to use 20-inch pipe and significantly increase the capacity of the pipe while doing so. Regardless of whether Xcel’s decision to use the 20-inch pipe was reasonable, it was not *required* from an engineering perspective, so the incremental advantage that Xcel received from that capacity increase by making that decision is a “betterment”<sup>64</sup> that cannot be recovered through a GUIC rider.

The California decision is particularly relevant to this case because the California statute is functionally similar to Minnesota’s GUIC statute before it was amended in 2013. Before the 2013 amendments, Minnesota Statutes section 216B.1635 only authorized a GUIC rider for costs related to “relocation and replacement of natural gas facilities located in the public-right-of-way required by the construction or improvement of a highway, road, street, public building, or other public work.”<sup>65</sup> In this earlier incarnation, the GUIC statute was directed only to gas infrastructure costs that were the result of road construction, or other similar work, just like the California code section interpreted in the *City of Anaheim* case.<sup>66</sup> The similarity between California and Minnesota law indicates that the California Court of Appeal’s reasoning is persuasive authority in this context.

### **3. The Commission Should Prohibit Xcel From Recovering the Value of the East Metro Pipeline Betterment Through the GUIC Rider.**

Based on the foregoing, the OAG recommends that the Commission prohibit Xcel from recovering those costs for the East Metro Pipeline in excess of the Pipeline’s original value.

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<sup>63</sup> Minn. Stat. § 216B.1635, subd. 1(b)(3).

<sup>64</sup> Increases are indicative of betterments in other venues. In railroad accounting matters, the United State Tax Court has held that “a betterment . . . includes an expenditure (with respect to a replacement) which to a substantial extent increases the usefulness, *capacity*, or efficiency of the property involved, or one which contributes to the durability or the property or increases the life of that property.” *Southern Pacific Transportation Co. v. Commissioner of Internal Revenue*, 75 T.C. 497, 719 (US Tax Court 1980).

<sup>65</sup> Minn. Stat. § 216B.1635 (2012).

<sup>66</sup> The previous version of the statute is attached as Attachment D. Minn. Stat. § 216B.1635 (2012).

There are several ways that the Commission could determine the proportion of the East Metro Pipeline costs that are related to betterment.

First, the Commission could determine the proportion of costs that are a betterment by comparing the capacity that is required to serve firm load. As discussed above, Xcel is able to fully serve firm capacity with the currently available 4,403 Dth/hr. After the upgrade, the East Metro Pipeline will have the capacity to provide 24,352 Dth/hr. As a result, only 18 percent of the capacity of the pipeline will be necessary to serve firm customers; because the remainder is not necessary to serve existing firm customers, it is an increased value of the line and it will allow Xcel to pursue other business opportunities—in other words, it is a betterment. If the Commission does allow Xcel to include the East Metro Pipeline in the GUIC Rider, Xcel should be permitted to recover only 18 percent of the East Metro Pipeline costs through the GUIC rider, and be required to request recovery of the remaining costs in a rate case proceeding.

Second, the Commission could determine the proportion of costs that are a betterment by obtaining a valuation estimate of the currently existing pipeline in its original condition. The valuation could estimate the lowest cost of installing a pipe capable of distributing 4,403 Dth/hr in capacity (that complies with current safety requirements) as compared to the cost of installing a pipe with the potential to have 24,352 in capacity, as Xcel has requested. The difference in value between the two estimates would constitute a betterment that Xcel cannot recover through a GUIC rider.

The OAG recommends that the Commission employ the first method because it does not rely on potentially imprecise valuation models. For that reason, the OAG recommends that, if the Commission allows recovery of the East Metro Pipeline in the GUIC rider, the Commission

limit recovery of the East Metro Pipeline costs in the GUIC rider to 18 percent of total costs, and require Xcel to request recovery of the remaining costs in a rate case proceeding.

**4. The Commission Should Clarify its Order.**

At the very least, the Commission should clarify its Order to make clear that its decision is limited to the facts of this case. Identifying a betterment is a fact-specific determination that should be performed individually for each case. And, especially given that the Commission ruled on the issue of a betterment without the benefit of legal briefing, the Commission's decision in this matter should not establish what is or is not a betterment for future cases. The Commission should clarify its Order to limit its decision to the facts of this case and specifically acknowledge that the Commission has not established a precedential rule for defining betterments.

**D. THE PRUDENCY OF THE ENTIRE EAST METRO PIPELINE SHOULD BE REVIEWED.**

In addition to the concerns about cost recovery and allocation and betterments, the OAG's continued investigation has revealed concerns about the prudence of the entire investment. Specifically, it is not clear that Xcel has chosen the least-cost option to perform safety upgrades on the East Metro pipeline. For example, if Xcel had first relieved up- and down-stream constraints in the system, it would be possible to run the East Metro Pipeline at a much higher pressure. At a higher pressure, Xcel may have been able to replace existing pipeline with a smaller diameter, less expensive pipe and still achieve the capacity necessary to serve firm customers. This could have, potentially, provided service to firm customers at a lower cost. Xcel has not discussed the upstream and downstream constraints on the East Metro Pipeline nor has it discussed the long term plan for the pipeline and the possibility of increasing pressure within the system as a whole. Xcel has stated that it does not currently have plans to increase the pressure on the East Metro Pipeline, but it is important to understand what happens

if Xcel does increase the pressure because it determines how and who should be paying for the infrastructure. As a result, the OAG has concerns about the prudence of the investment and recommends that the Commission require Xcel to demonstrate the prudence of the project by discussing possible alternatives before any recovery is permitted.

## **V. CONCLUSION**

The Commission's Order was based on inaccurate information and incomplete legal analysis. In light of the new information and analysis presented by the OAG, the Commission should reconsider its decision. The East Metro Pipeline will result in a significant capacity increase that is not necessary to serve firm customers. While the Commission may authorize Xcel to recover approximately 18 percent of the costs of the East Metro Pipeline through the GUIC rider, equivalent to the proportion of capacity that is necessary to serve firm customers, the remaining capacity increase is a betterment that Xcel may not recover through the GUIC rider. Additionally, the East Metro Pipeline will create a significant benefit for interruptible customers that would be paid for by firm customers who will receive no benefit. As a result, the Commission should require Xcel to recover the remaining costs through a rate case proceeding so that the Commission can address the significant problems of cost allocation. Finally, because the significant capacity increase is not necessary to serve firm customers, and it appears was not requested by interruptible customers, the Commission should require Xcel to produce more

information about the prudence of the East Metro Pipeline compared to other alternatives before permitting Xcel to recover any more than 18 percent of the cost of the pipeline.

Dated: February 17, 2015

Respectfully submitted,

LORI SWANSON  
Attorney General  
State of Minnesota

s/ **Ryan Barlow**

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ATTORNEYS FOR OFFICE OF THE  
ATTORNEY GENERAL-RESIDENTIAL  
UTILITIES AND ANTITRUST DIVISION



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 Public Document

Xcel Energy

Docket No.: G002/M-14-336

Response To: Office of the Attorney General Information Request No. 1019

Requestor: Ryan Barlow

Date Received: December 9, 2014 **Revised**

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Question:

For all responses show amounts for Total Company and the Minnesota jurisdictional retail unless indicated otherwise. Total Company is meant to include costs incurred for both regulated and nonregulated operations.

Reference: East Metro project and Commission IR 6

Provide the percentage of the pipelines capacity that was dedicated to firm capacity before construction and the percentage that will be for firm capacity after construction. Provide your answer for both 175 and 650 psi.

Response:

The original pipeline was constructed in phases over the course of many years based on firm load requirements at design day temperatures. The current design day in the St. Paul Metro Area is 91 degree days or -26 degrees Fahrenheit. Gas pipelines are not designed to serve interruptible customers, only firm customers. Each new extension of the pipeline was independently evaluated, and a diameter was selected. As a result, the pipeline was constructed of multiple diameters that ranged from 16-inch to 24-inch. Company engineers selected a 20-inch pipe diameter for the new pipeline based on the need to serve the existing demand as well as prudent operational considerations. A 16-inch diameter pipeline would not have been large enough to serve the existing demand. Xcel Energy does not use 18-inch pipe for new construction because it is non-standard and creates undesirable operational constraints such as limited availability of pipe fittings, longer lead times for pipe and fittings, and less availability of tapping and stopple equipment.

Prior to the current project, the East Metro pipeline operated at a Maximum Allowable Operating Pressure (MAOP) of 175 pounds per square inch (psi) with a capacity of ~~4,403~~ ~~5,275~~ Dth/hour. This capacity was fully dedicated to the Company's

firm customers at design day temperatures. After the project is completed in 2016, the new pipeline capacity will be ~~5,970~~ 5,672 Dth/hour and will operate at the same pressure (175 psig) as the pipeline being replaced. However, as a matter of sound engineering practice, it will be pressure tested to 1000 psig to ensure there are no manufacturing or construction flaws present. While this pressure test will qualify the pipe to be operated at higher pressures, up to 650 psig, the purpose of the pressure test is to ensure that the pipeline has no flaws that may present a current or future safety concern. Xcel Energy has no plans to operate the pipeline above 175 psig.

Revision:

In preparing the Company's response to the Office of the Attorney General's Information Request No. 1044 in this proceeding, an error was found in the SynerGEE model used to calculate the capacity of the East Metro pipeline. The error has been corrected, and the updated values are presented in red-line in the above response.

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Preparer: Eric Kirkpatrick  
Title: Director, Gas Engineering  
Department: Gas Engineering  
Telephone: (303) 571-3223  
Date: December 22, 2014

Revised: February 10, 2015

- Non Public Document – Contains Trade Secret Data
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- Public Document

Xcel Energy  
 Docket No.: G002/M-14-336  
 Response To: Office of the Attorney General      Data Request No.      1044  
 Requestor: Ryan Barlow  
 Date Received: January 29, 2015

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Question:

Reference: OAG 1029

Rerun the SynerGEE model used to calculate the 5,970 Dth/hour capacity of the 20-inch diameter pipe to calculate the capacity if the pipe were to run at 200, 300, 500, and 650 PSI.

Run the SynerGEE model to calculate the capacity of a 16-inch and 18-inch diameter pipe if the pipe were run at 200, 300, 500, and 650 PSI.

Response:

Please see the chart below and the assumptions the Company made for the requested SynerGEE model calculations. The capacity (Dth/hour) represented in the table are theoretical capacities at various pipe sizes and pressures assuming the assumptions and system constraints as indicated below.

Pipe Size	Capacity (Dth/hour)				
	175 psig	200 psig	300 psig	500 psig	650 psig
16	3,192	3,795	6,064	10,436	13,717
18	4,339	5,157	8,239	14,177	18,633
20	5,672	6,742	10,769	18,529	24,352

Note: The capacity of the 20-inch pipeline at 175 psig is 5,672 Dth/hour and not 5,970 Dth/hour as stated in the Company’s response to the Minnesota Public Utilities Commission’s Informal Information Request No. 6 and the Office of the Attorney General’s Information Request No. 1019. Additionally, the capacity of the existing line is 4,403 Dth/hour and not the 5,275 Dth/hour as stated in OAG-1019. The incorrect values were the result of an error in the SynerGEE model.

**Capacity Calculations Assumptions**

- Fixed pressure delivery from Mendota Station.
- No flow off the system except at the north most terminous.
- No flow into the system from the County Road B Line.
- No limitations for capacity through Mendota Station.

**System Constraints**

- Piping feeding the East Metro pipeline has an MAOP of 175 psig and is not currently capable of supplying pressures that are higher.
- Piping fed by the East Metro pipeline has an MAOP of 175 psig and is not currently capable of accepting higher pressures.
- Mendota Station is fed by Northern Natural Gas Company and the Company's Cedar Transmission Line. Both limit capacity into the East Metro pipeline.

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Preparer: Eric G. Kirkpatrick  
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Telephone: (303) 571-3223  
Date: February 10, 2015

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 Public Document

Xcel Energy  
Docket No.: G002/M-14-336  
Response To: Office of the Attorney General Information Request No. 1020  
Requestor: Ryan Barlow  
Date Received: December 9, 2014

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Question:

For all responses show amounts for Total Company and the Minnesota jurisdictional retail unless indicated otherwise. Total Company is meant to include costs incurred for both regulated and nonregulated operations.

Reference: East Metro project and Commission IR 6

Provide any and all analyses that indicate an increase in the capacity of the pipeline was required to serve firm load.

Response:

No such analysis exists, as the East Metro pipeline was not constructed at a consistent 20-inch to increase the capacity of the pipeline. The original pipeline was constructed in phases over the course of many years based on load growth. Each new extension of the pipeline was independently evaluated and a diameter was selected. As a result, the pipeline was constructed of multiple diameters that ranged from 16 inch to 24 inch. Xcel Energy engineers selected a 20-inch pipe for the new pipeline based on the existing firm demand as well as prudent operational considerations. A 16-inch pipe would not have been large enough to serve the existing demand. Xcel Energy does not use 18-inch pipe for new construction because it is a non-standard size and creates operational constraints such as limited availability of pipe fittings, longer lead times for pipe and fittings, and less availability of tapping and stopple equipment.

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Preparer: Joni Zich  
Title: Director, System Strategy and Business Operations  
Department: System Strategy and Business Operations  
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Date: December 22, 2014

**216B.1635 RECOVERY OF GAS UTILITY INFRASTRUCTURE COSTS.**

Subdivision 1. **Definitions.** (a) "Gas utility" means a public utility as defined in section 216B.02, subdivision 4, that furnishes natural gas service to retail customers.

(b) "Gas utility infrastructure costs" or "GUIC" means gas utility projects that:

(1) do not serve to increase revenues by directly connecting the infrastructure replacement to new customers;

(2) are in service but were not included in the gas utility's rate base in its most recent general rate case; and

(3) replace or modify existing infrastructure if the replacement or modification does not constitute a betterment, unless the betterment is required by a political subdivision, as evidenced by specific documentation from the government entity requiring the replacement or modification of infrastructure.

(c) "Gas utility projects" means relocation and replacement of natural gas facilities located in the public right-of-way required by the construction or improvement of a highway, road, street, public building, or other public work by or on behalf of the United States, the state of Minnesota, or a political subdivision.

Subd. 2. **Filing.** (a) The commission may approve a gas utility's petition for a rate schedule to recover GUIC under this section. A gas utility may petition the commission to recover a rate of return, income taxes on the rate of return, incremental property taxes, plus incremental depreciation expense associated with GUIC.

(b) The filing is subject to the following:

(1) A gas utility may submit a filing under this section no more than once per year.

(2) A gas utility must file sufficient information to satisfy the commission regarding the proposed GUIC or be subject to denial by the commission. The information includes, but is not limited to:

(i) the government entity ordering the gas utility project and the purpose for which the project is undertaken;

(ii) the location, description, and costs associated with the project;

(iii) a description of the costs, and salvage value, if any, associated with the existing infrastructure replaced or modified as a result of the project;

(iv) the proposed rate design and an explanation of why the proposed rate design is in the public interest;

(v) the magnitude and timing of any known future gas utility projects that the utility may seek to recover under this section;

(vi) the magnitude of GUIC in relation to the gas utility's base revenue as approved by the commission in the gas utility's most recent general rate case, exclusive of gas purchase costs and transportation charges;

(vii) the magnitude of GUIC in relation to the gas utility's capital expenditures since its most recent general rate case;

(viii) the amount of time since the utility last filed a general rate case and the utility's reasons for seeking recovery outside of a general rate case; and

(ix) documentation supporting the calculation of the GUIC.

Subd. 3. **Commission authority; rules.** The commission may issue orders and adopt rules necessary to implement and administer this section.

**History:** *2005 c 97 art 10 s 1,3*

**NOTE:** This section as added by Laws 2005, chapter 97, article 10, section 1, expires June 30, 2015. Laws 2005, chapter 97, article 10, section 3.



LORI SWANSON  
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# STATE OF MINNESOTA

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February 17, 2015

Mr. Daniel Wolf  
Executive Secretary  
Minnesota Public Utilities Commission  
121 7<sup>th</sup> Place East, Suite 350  
St. Paul, MN 55101

**RE: In the Matter of the Petition of Northern States Power Company for  
Approval of a Gas Utility Infrastructure Cost Rider  
Docket No. G-002/M-14-336**

Dear Mr. Wolf:

Enclosed and efiled in the above-referenced matter please find a *Petition For Reconsideration of the Office of the Attorney General – Residential Utilities and Antitrust Division*.

By copy of this letter all parties have been served. An Affidavit of Service is also enclosed.

Sincerely,

*s/ Ryan P. Barlow*

RYAN P. BARLOW  
Assistant Attorney General

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