

UTILITY REFORM NOW!

January 28, 2025

In the Matter of Possible Rulemaking to Amend
Minnesota Rules, Chapter 7825

**Rebuttal Comments of
Utility Reform Now!**

MPUC Docket No. E,G-999/R-26-81

Members of the Commission:

On behalf of Utility Reform Now! (URN), an association of Minnesota ratepayers, please accept these rebuttal comments in support of its earlier Petition for Rulemaking.

URN urges the Commission to carefully review the initial comments filed by the Minnesota Attorney General, Residential Utilities Division (RUD) and the consortium of the state's largest rate-regulated utilities (the Joint Utilities). A close read of those comments highlights – rather than shoos away – the defects in Minnesota's approach to rate regulation and how rulemaking can address those shortcomings. Please read those comments with care.

I. The RUD Cites the Statutory Exemption in Minn. Stat. § 14.06(b) (2024) But Does Not Apply It

The Commission should not credit the RUD's arguments on the scope of the exemption in Minn. Stat. § 14.06(b). The RUD points to the statute, but does not apply the text.

URN maintains that the text of the exemption was crafted by the Legislature to be narrowly circumscribed, covering specific types of agency outputs: *The bases for decisions*.¹ Notwithstanding RUD's wish-casting, any broader limitation on the "rights available to the public,"² *that do not involve final agency action*, is unlawful in Minnesota if it is not in a statute or a rule.³ At least since 2001.⁴

But it is simple enough for the Commission to do its own side-by-side comparison of the text in the 1982 Policy Statements, with the definition of a rule in Chapter 14,⁵ and the limitations

¹ Minn. Stat. § 14.06(b) (2024).

² Minn. Stat. § 14.06(a) (2024).

³ Compare Minn. Stat. §§ 14.06(b) with Minn. Stat. § 14.381 (2024).

⁴ 2001 Minn. Laws ch. 179, § 8.

⁵ Minn. Stat. § 14.02, subd. 4 (2024).

of section 14.06’s exemption to “bases for [the Commission’s] decisions.”⁶ For example, consider these excerpts from the 1982 Statement of Policy on Interim Rates:

Directive from the Policy Statement on Interim Rates (Emphasis added)	Is this an agency statement of general applicability and future effect adopted to implement the law administered by the MPUC?	Would the directive from the Policy Statement be “a basis for the Commission's decision” (and therefore within the exemption)?
If the Commission finds that the interim rates are in excess of the rates in the final determination, <u>the Commission will order a refund based on its authority under Minn. Reg. PSC 401B.</u>	Yes.	No. The finding triggers the refund, not the policy.
<u>The utility must refund</u> to the customers or credit to the customers' accounts the excess amount collected under the interim rate schedule.	Yes.	No. The finding triggers the refund, not the policy.
The utility will be ordered to begin distribution of the refund within 120 days of the final order, <u>not subject to rehearing or appeal.</u>	Yes.	No. A cutoff of appeal rights is not a basis for decision.
The Commission interprets that "no change in the existing rate design" <u>applies to both the allocation of revenue responsibility among customer classes (or product and service categories) and the structure of the individual rates.</u>	Yes.	No. The breadth of the regulatory interpretation spans beyond the decision in any one case.
[Existing rate schedules with an interim rate adjustment equal to the overall requested interim increase percentage is a] <u>procedure [that] will assure that consumption decisions will be made on the same basis as under existing rates and will allow refunds, if necessary, to be made across-the-board to all customers such that the final rates are prospective only.</u>	Yes.	No. A procedure that applies “across-the-board to all customers” does not follow from the facts of a particular case.

These are rules under Minn. Stat. § 14.02, subd. 4.

Here’s a good way for the Commission to check its reasoning in this docket: If there is not a principled bases to distinguish between the kind of filing directives quoted above, and the type of filing instructions found in Minn. R. 7825.2500 to 7825.4600 (2025), then it should grant the Petition. The former was the product of staff drafting long ago, and the latter followed from

⁶ 1995 Minn. Laws ch. 233, § 8.

transparent and inclusive rulemaking. While the respective subject matters are pretty similar, the quality, transparency and accessibility of the two sets of instructions are light years apart.

It's also true that one objective of URN's Petition for Rulemaking is to have the Commission delineate, in some way to the public, its view on the scope of the exemption in Minn. Stat. § 14.06 (b) (2024). And that is a lawful and legitimate purpose for Minnesotans to pursue. How else would we know if our laws are being "faithfully executed" by the agency?⁷

URN members share the Administrative Procedure Act's hopes of "increas[ing] public access to governmental information," "increas[ing] public accountability of administrative agencies," and "increase[ing] public participation in the formulation of administrative rules."⁸ Rulemaking is healthy and good for our body politic. It shouldn't be resisted.

By contrast, a construction of Minn. Stat. § 14.06 (b) that includes a wide exemption – spacious enough to swallow important ratemaking procedures – is really worrying. Why should the Commission assume that the state's best wordsmiths were on its staff in 1982? The APA doesn't assume such a thing. Instead, it summons the best thinking from wherever it may be.

II. The RUD Relies on the Disclaimer that Wasn't

The RUD maintains that the 1982 Statements of Policy are regulatory nothing-burgers because the Commission declared the statements were "an expression of the Commission's general intention which will be followed unless circumstances demonstrate the policy to be inappropriate."⁹ A few points are worth special emphasis.

It is important to remember when reading this phrasing, that it predated, by some fifteen years, the 2001 amendments prohibiting unadopted rules.¹⁰ If we translate the dusty dictums of the 1982 Statements, into the more modern parlance of the 2001 amendments, the Statements make: A rule of general applicability plus a variance procedure for the appropriate case.

That result is not an unusual or unique occurrence in Minnesota; that's the regulatory environment that flows naturally from the Administrative Procedure Act every single day.¹¹

And the 2001 amendments to the Administrative Procedure Act are a clearer and better guide on how the Commission should proceed today than the fraying and brittle sheets of the 1982 Statements. It's the difference between a statute and a circular. A statute has the expert drafting skills of an Assistant Revisor,¹² whereas it is unlikely that the Commission used the Revisor's Office when developing its informal policy sheets.

⁷ Minn. Const. Art. V, § 3 (The Executive Department "shall take care that the laws be faithfully executed").

⁸ Minn. Stat. § 14.001 (2024).

⁹ *Statement of Policy on Interim Rates*, at 1 (https://mn.gov/puc-stat/documents/pdf_files/012031.pdf).

¹⁰ See 2001 Minn. Laws ch. 179, § 8.

¹¹ Compare Minn. Stat. § 14.02, subd. 4 with Minn. Stat. § 14.055, subds. 3, 4 (2024).

¹² See Minn. Stat. § 3C.03, subd. 2 (2024).

And isn't the difference in quality between the two, obvious? That's why the Legislature insists that state agencies use the Revisor's Office when drafting administrative procedures.¹³ It doesn't want agencies freelancing in this area.¹⁴ And the Commission is no exception.

What the RUD doesn't mention is even more revealing. Before the Commission made its non-disclaiming disclaimer, it more forthrightly stated:

The purpose of this policy is to inform regulated companies of the expectations of the Minnesota Public Utilities Commission (the Commission) concerning petitions for approval of interim rates which are filed in conjunction with general rate cases.¹⁵

The implication of that statement is pretty clear to everyone who can read: Fail to meet the Commission's "expectations" and good luck in getting your interim rates approved. The 1982 Statements are binding rules. And every utility in the state got that message loud and clear.

III. Dismissal as a Sanction for Submitting a Filing that the RUD Finds "Unhelpful," is Not a Thing

The RUD complains that URN did not submit with its Petition "a page and line" draft setting forth URN's hoped-for regulations.¹⁶ Even the RUD concedes, however, that the formatting it prefers "is not mandatory."¹⁷ Yet, it still urges dismissal of URN's Petition if the requested page and line draft is not attached to these rebuttal comments.¹⁸

That's psychotic. Dismissal is reserved for the most egregious violations of statute and rules.¹⁹ It appears that the RUD is trying to lure the Commission into committing legal error when it suggests that permissible stylistic choices on formatting, could result in a complete forfeiture of URN Members' rights to "petition their government for a redress of grievances."²⁰

But just because the RUD's argument is shameful and wrong-headed, is not to say that the Commission shouldn't pay very close attention to it. To the contrary, it is the veritable "play

¹³ Minn. Stat. § 14.07, subd. 2 (2024).

¹⁴ Minn. Stat. § 14.07, subd. 1(b) (2024).

¹⁵ *Statement of Policy on Interim Rates*, at 1 (emphasis added).

¹⁶ Initial Comments of the Residential Utilities Division, MPUC Docket No. R-26-81, at 8-10.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 9-10.

¹⁹ *Givens v. A.H. Robins Co., Inc.*, 751 F.2d 261, 263 (8th Cir. 1984) ("Dismissal with prejudice is an extreme sanction and should be used only in cases of willful disobedience of a court order or continued or persistent failure to prosecute a complaint"); see generally *Martin v. DaimlerChrysler Corp.*, 251 F.3d 691, 694-96 (8th Cir. 2001) (affirming a dismissal sanction for lying during a deposition); *In the Matter of the Appeal by Koliengo*, OAH 21-1800-36445 (Ct. Minn. Admin. Hrgs. 2020) ("dismissal is the most extreme sanction and should be imposed with caution").

²⁰ U.S. Const., 1st Amend.

within the play.”²¹ The RUD demonstrates *in this docket* exactly how state agencies apply the 1982 Policy Statements in rate cases: They take guidance which is unadopted and unenforceable, and then insist upon strict adherence to those standards, on the threat of having the applicant’s submission thrown out. And that is precisely what happens in rate cases, year-in and year-out.

Washing its hands and channeling its inner Pontius Pilate, the RUD points to the crowd:

But the Commission does not and cannot dictate what persuasive material utilities or other parties may cite to. And citations or discussion from utilities or other parties certainly does not equate to the Commission “enforcing or attempting to enforce” the Policy Statements as “as though [they] were a duly adopted rule.”²²

If the Commission would not be “*shocked, shocked*” to learn that there is gambling in Casablanca,²³ it won’t be surprised to discover that utilities adhere to every syllable of the 1982 Policy Statements because *they believe* that there will be very nasty consequences if they don’t.

And of course they understand the Statements that way. Consider these examples:

- (1) The RUD urged a complete disallowance of advertising costs because written descriptions of the advertisements were submitted by the utility instead of “*examples of these advertisements consistent with the Commission’s Statement of Policy on Advertising.*”²⁴
- (2) The Department objected to recovery of Great Plains’ membership dues for the Minnesota Utilities Investors because the company “did not show that any the activities of the MUI organization fall within *the boundaries described in the Commission’s Statement of Policy on Organizational Dues.*”²⁵

Such demands were as unlawful and abusive in those cases as they are in this docket.

IV. Beware: The RUD is No Friend of the Commission

In a remarkable turn of phrase, our state’s senior legal officer – “act[ing] as the attorney for all state officers and all boards or commissions created by law in all matters,”²⁶ suggests that

²¹ W. Shakespeare, *Hamlet*, Act III, Scene 2 (Folger Shakespeare Library, 1992) (Hamlet stages a reenactment of a murder to be performed for his mother and uncle, and by their reactions, Hamlet hopes to discover whether they were complicit in his father’s death).

²² Initial Comments of the Residential Utilities Division, at 4.

²³ *Casablanca* (1942) (Captain Louis Renault feigns outrage on discovering a gambling operation at Rick’s Cafe, declaring “I am shocked—shocked to find that gambling is going on in here,” just moments before a club croupier hands the Captain his winnings from an evening of wagering).

²⁴ Initial Brief, *In the Matter of the Application of Northern States Power Company*, MPUC Docket No. GR-21-630, at 38-39 (emphasis added) (eDocket No. [20231-192066-01](#)).

²⁵ Proposed Findings on Disputed Issues, *In the Matter of the Petition by Great Plains Natural Gas Co.*, MPUC Docket No. GR-19-511, at 2-5 (emphasis added) (eDocket No. [20204-162527-01](#)).

²⁶ Minn. Stat. § 8.06 (2024).

a lawsuit against the Commission in the Court of Administrative Hearings is a more appropriate outcome than rulemaking.²⁷

With friends like that, the Commission doesn't need enemies.

And URN will likely never agree that litigation amongst the Commission's stakeholders is preferable to the more collaborative and inclusive methods of policy development. We just won't. And in that stance, we are in the very best company there is: The drafters of the APA. Their words call out to us now:

[T]he intention of this chapter is to strike *a fair balance between these purposes and the need for efficient, economical, and effective government administration*. The chapter is not meant to alter the substantive rights of any person or agency. *Its impact is limited to procedural rights with the expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained.*²⁸

With that call in mind, the Commission should ask itself: When in our history has litigation ever resulted in the most "efficient, economical, and effective government administration" or "better substantive results ... in the everyday conduct of state government...."?²⁹ URN doubts that there is such an example. Certainly this record doesn't point to one.

URN asserts that the Commission's resort to contested case procedures, and the clockwork-like frequency with which it declares that "all significant issues raised [in a rate case] have not been resolved to its satisfaction,"³⁰ is not a sign of regulatory health. These are symptoms of very poor health.

Worse still, they're contagious. There is good reason to worry that the consumptive disease known as "Maslow's hammer" has overtaken the RUD. Named for the world-renowned psychologist Abraham Maslow, it describes real cognitive bias. In his ground-breaking book *The Psychology of Science*, Maslow wrote: "[I]t is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."³¹ The hammer that RUD loves to swing around is withering, impoverishing litigation; and they hammer relentlessly on rate applications and rule proposals.

The Commission should respond to this unhealthy mindset by guiding the RUD into new forms of public service. Help redirect them into using their skills to build better procedures. You'd be doing them a real favor: Developing improvements to existing methods, and reducing burdens for ratepayers, is a better way to spend one's workday than dreaming up discovery requests.

²⁷ URN, to the OAG's knowledge, has chosen to request the Commission adopt the Policy Statements as rules rather than following the process available in law to challenge unadopted rules.

²⁸ Minn. Stat. § 14.001 (emphasis added).

²⁹ *Id.*

³⁰ See Minn. Stat. § 216B.16, subd. 2(b) (2024).

³¹ A. Maslow, *The Psychology of Science: A Reconnaissance*, at 15-16 (1966).

V. The Joint Utilities' Argument Should Worry the Commission Far More than URN's Petition for Rulemaking

For their part, the Joint Utilities make the most troubling claim. In unison, they all declare: “[G]iven the volume and importance of the many regulatory matters currently before the Commission, the Joint Utilities are concerned that pursuing such a rulemaking would divert scarce resources from these existing matters.”³²

Translated for ordinary readers, the Commission's largest and most familiar stakeholders publicly express doubt that, notwithstanding the agency's staff of 80 Full Time Equivalents,³³ and an \$18 million budget,³⁴ that the Commission likely could not meet the obligation that is placed on every other agency in state government: Namely, the duty to set forth “the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public.”³⁵ That's a pretty serious expression of “concern.”

As to the Commission's portfolio of “existing matters,” the Joint Utilities do not believe that the MPUC can both litigate, in its customary style, and promulgate as required by the APA. If the Commission were a parliamentary body, instead of a five-member board, wouldn't such a declaration be in the nature of a “no-confidence vote”?

URN's view of this bracing assessment, is that it is an alarm bell that should have the Commission rethinking its approaches. It is a signal that the agency has really lost its way.

Taking one obvious example, the rate case involving Minnesota's smallest rate-regulated utility, had six Commission analysts assigned to it.³⁶ Perhaps the Commission could reduce that kind of over-weighting in rate cases by at least one FTE, and then send that person to either the Annual Rulemaking Seminar³⁷ or to apprentice under veteran rule-writer and Commission staffer Eric B. Witte. In URN's view, that kind of reimagining would take the Commission one tiny step closer to the “superior achievement in meeting the agency's regulatory objectives” called for by our State's Regulatory Policy.³⁸

Secondly, the Joint Utilities are very quick to have the Commission buck its statutory obligations when it comes to the statutes that protect ratepayers – like Minn. Stat. § 14.06 (a). But the Commission should try this thought experiment in the place of the Joint Utilities' recommendation: Instead of abandoning statutory duties on rulemaking, in order to assure the flow of staff resources for litigation, would the Joint Utilities be content if the Commission

³² Initial Comments of the Joint Utilities at 1.

³³ Public Utilities Commission - Agency Expenditure Overview, 2026-27 Biennial Budget Pages at 4 (January 2025)

³⁴ Forecasted Base for Fiscal Year 2026, Revised 2026-27 Biennial Budget Pages (March 2025).

³⁵ Minn. Stat. §§ 14.06(a) (2024).

³⁶ See Staff Briefing Papers, MPUC Docket No. GR-24-350 at 1 (eDocket No. [202510-223509-01](https://www.health.state.mn.us/data/rules/manual/index.html)).

³⁷ See generally Minnesota Rulemaking Seminar (<https://www.health.state.mn.us/data/rules/manual/index.html>).

³⁸ Minn. Stat. § 14.002 (2024).

ignored the statutory features that support litigation, so as to re-route staff resources towards policy development?

The Commission could just as easily ignore the statutory mandates to determine the completeness of rate applications within 60 days,³⁹ or to make a determination on final rates within 10 months.⁴⁰ Doubling those time periods would certainly make time for staff to work on new administrative rules. But we know what would happen if the proverbial shoes were ever on the other feet. The howls from the Joint Utilities would be so deafening that no one at the Commission would be able to do any work at all. And rightfully so. The statutes that protect rate-regulated utilities are just as important as those that protect ratepayers.

And it is here, at this very spot in the road, where the Commission lost its way. The MPUC has long since forgotten what the world would be like if its own revenues and operations were determined in the same manner that it sets revenue and operational requirements for others. Again, the recently-decided GMG case points up the breadth of the disconnect. Consider:

<u>Entity</u>	<u>Biennial Revenue Requirement</u>	<u>FTEs</u>	<u>Pages of Filings Relating to its Revenue Request</u>	<u>Are Lawyers Needed to Present the Request</u>	<u>Hearing Time Spent Being Questioned on the Revenue Request</u>
Minnesota PUC	\$18 Million	80	About 30	No	A few minutes
Greater Minnesota Gas	\$18 Million	25	2,500 +	Always and absolutely	More than 6 hours over the course of 2 days

If the Commission would not be content to have its budget established in the same fashion that regulated parties must endure when appearing before the Commission, that is a real problem.

And there really shouldn't be that much daylight between those two processes. After all, the Commission satisfies its annual "revenue requirements" in exactly the same way, and right alongside, the utilities meeting their own requirements – by assessing ratepayers those costs.⁴¹

The Golden Rule for all of humanity is also the Golden Rule for rate-regulation: Do unto others as you would have them do unto you.⁴²

³⁹ See Minn. Stat. § 216B.16 (2024).

⁴⁰ See Minn. Stat. § 216B.16, subd. 2(a), (e).

⁴¹ Compare Minn. Stat. § 216B.62, subd. 2 (2024) with Agency Profile, 2026-27 Biennial Budget at 1 (January 2025) ("Nearly 100% of the agency's expenditures are recovered through special assessment authority [Minnesota Statutes, Sections 216B.62 and 237.295] and returned to the state general fund").

⁴² See The Gospel of Matthew 7:12 (New International Version) ("So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets"); Talmud, Shabbat: 31a ("That which is hateful to you do not do to another; that is the entire Torah, and the rest is its interpretation. Go study.").

URN maintains that the Commission's over-dependence upon litigation to answer important policy questions increases costs and beleaguers every single ratepayer.

It is also a trap for the Commission. A culture of litigation and lawsuits is as consumptive, disorienting and enfeebling to the agency as quicksand. Just ask our state's largest utilities: The Commission is drowning now and struggles to keep its head above all of the red tape.⁴³

However, better rules, better statutory provisions, and better business processes, are the life-lines out of that sticky morass. Rulemaking is an opportunity. The Petition should be granted.

Very truly yours,

/s/ Eric L. Lipman

Eric L. Lipman,
Chief Advocacy Officer

⁴³ See Initial Comments of the Joint Utilities at 1 (“[G]iven the volume and importance of the many regulatory matters currently before the Commission, the Joint Utilities are concerned that pursuing such a rulemaking would divert scarce resources from these existing matters”).