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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

**INITIAL COMMENTS OF THE  
MINNESOTA DEPARTMENT OF  
COMMERCE**

**INTRODUCTION**

In its December 2025 notice, the Minnesota Public Utilities Commission invited parties to address what, if any, prepaid pension asset return should be incorporated into Xcel Energy’s test-year revenue deficiencies for its 2021 electric and 2023 natural gas rate cases.<sup>1</sup> As discussed below, the Commission should find that (1) Xcel has only a limited prepaid pension asset interest; and (2) the interest’s value is nominal. Given the interest’s nominal value, Xcel should earn a negligible return. Alternatively, if the Commission believes Xcel deserves a larger return, Xcel should still not receive a prepaid pension asset return exceeding the long-term debt cost rate.

**PROCEDURAL HISTORY**

In November 2021, Xcel filed an electric rate case application with the Commission. The Commission referred the matter to the Court of Administrative Hearings for a contested case in December 2021. Following the contested case, the Commission issued a final order in July 2023.

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<sup>1</sup> NOTICE OF COMMENT PERIOD (Dec. 23, 2025) (eDocket no. [202512-226164-01](#)).

As part of its decision, the Commission denied Xcel a return on the prepaid pension asset.<sup>2</sup> Xcel appealed.<sup>3</sup>

During the appeal's pendency, parties to Xcel's 2023 natural gas rate case entered into a comprehensive settlement agreement. As part of the settlement, the parties agreed to resolve prepaid pension in a manner consistent with the outcome of the 2021 electric rate case.<sup>4</sup>

In January 2025, the Minnesota Court of Appeals held that the Commission must give "due consideration" to a utility's mandatory contributions to pension plans in determining the utility's rate base.<sup>5</sup> The court then reversed and remanded the matter to the Commission to determine whether any return on prepaid pension asset should be included in rate base. The court added that the Commission could reopen the record at its discretion.<sup>6</sup>

In July 2025, the Commission issued an order reopening the evidentiary record for the limited purpose of addressing the court's prepaid pension instructions.<sup>7</sup> Consistent with its order, the Commission then noticed a comment period soliciting input from interested parties in December 2025.<sup>8</sup>

## FACTS

Addressing the questions noticed by the Commission requires an overview of state and federal laws governing retirement plans and trust instruments, how pension costs are treated for

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<sup>2</sup> FINDINGS OF FACT, CONCLUSIONS, & ORDER at 155 (July 17, 2023) (eDocket no. [20237-197559-01](#)).

<sup>3</sup> NOTICE OF COMMENT PERIOD at 2 (Dec. 23, 2025) (eDocket no. 202512-226164-01).

<sup>4</sup> Settlement Agreement (June 26, 2024) (eDocket No. [20246-207989-01](#)).

<sup>5</sup> *In re Appl. by N. States Power Co.*, No. A23-1672, 2025 WL 249995, at \*9 (Minn. Ct. App. Jan. 21, 2025) (citing *In re Appl. by Minn. Power for Auth. to Increase Rates for Elec. Serv.*, 12 N.W.3d 477, 493 (Minn. App. 2024)).

<sup>6</sup> *Id.* at \*10.

<sup>7</sup> ORDER AUTHORIZING NOTICE & COMMENT AFTER REMAND at 3 (July 23, 2025) (eDocket no. [20257-221347-01](#)).

<sup>8</sup> NOTICE OF COMMENT PERIOD.

accounting and ratemaking purposes, and the prepaid pension asset's nature and distinguishing characteristics.

### ***Defined Benefit Pension Plans***

Employers may offer “welfare plans” and “pension plans” to provide medical care, accident and disability, retirement, and other benefits to plan participants and their beneficiaries.<sup>9</sup> If an employer chooses to offer these benefits, the employer must comply with federal Employee Retirement Income Security Act (“ERISA”) and Internal Revenue Code (“IRC”) requirements. These laws require that employers make annual minimum contributions. The annual minimum contribution is the sum of benefits accrued during the plan year, plan-related expenses, and the amortization of any shortfalls for the plan year and the six prior years.<sup>10</sup> These requirements help ensure that employers cover benefits accrued during the plan year plus eliminate shortfalls that can arise when plan asset values decline due to poorer than expected market returns or when plan liabilities increase due to interest rate changes.<sup>11</sup>

Employers must deposit these contributions into a trust.<sup>12</sup> A trust creates a fiduciary relationship with respect to property.<sup>13</sup> A person, the trustee, holds legal title to trust property for the benefit of another, the beneficiary, who holds equitable title to the property.<sup>14</sup> The trustee's interest is a limited one. The trustee holds the property in his or her name, but the interest's benefits must flow to the beneficiary.<sup>15</sup>

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<sup>9</sup> 29 U.S.C. § 1002(1)–(2).

<sup>10</sup> 29 U.S.C. § 1083(a)–(c); *see also* 26 U.S.C. §§ 412, 430 (requiring employers to meet minimum funding standards as a condition to tax qualification).

<sup>11</sup> *Dornfeld Aff., Ex. 1* at 7 (p. 12 of 29).

<sup>12</sup> 29 U.S.C. § 1103(a).

<sup>13</sup> *Sec. Bank & Tr. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 916 N.W.2d 491, 501 (Minn. 2018).

<sup>14</sup> *Id.*

<sup>15</sup> *Norwest Bank Minn., N.A. v. Ode*, 615 N.W.2d 91, 95 (Minn. Ct. App. 2000); Restatement (Third) of Trusts § 42 (2003).

ERISA relies on these common-law trust concepts, but in many instances makes those requirements more stringent or explicit.<sup>16</sup> For example, ERISA requires that plan fiduciaries discharge their duties “solely in the interest of the participants and beneficiaries” and for “the exclusive purpose of providing benefits to participants and their beneficiaries.”<sup>17</sup> ERISA likewise prohibits plan assets from benefiting any employer.<sup>18</sup> This prohibition has one relevant exception.<sup>19</sup> If a pension plan is terminated and all plan liabilities are satisfied, then residual trust assets may be distributed to the employer.<sup>20</sup>

### ***Pension Expense Accounting***

Unlike pension trust contributions which are governed by ERISA and the IRC, employers must record pension costs as an income statement expense under Generally Accepted Accounting Principles (“GAAP”).<sup>21</sup> Minnesota utilities, in turn, recover these pension expenses reported on the income statement as a necessary operating cost for ratemaking purposes.<sup>22</sup>

Xcel has two separate pension plans.<sup>23</sup> One plan is available to bargaining employees.<sup>24</sup> The other is for non-bargaining employees.<sup>25</sup> Assets from both plans are pooled in a single trust.<sup>26</sup>

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<sup>16</sup> *Donovan v. Mazzola*, 716 F.2d 1226, 1231–32 (9th Cir. 1983); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989).

<sup>17</sup> 29 U.S.C. § 1104(a)(1)(A).

<sup>18</sup> *Id.* § 1103(c)(1).

<sup>19</sup> The other exceptions permit an employer to withdraw plan assets if a contribution is made by mistake, 29 U.S.C. § 1103(c)(2), or if a contribution is conditioned on qualification of the plan by the IRS or tax deductibility. *Id.*, (b)-(c).

<sup>20</sup> *Id.* § 1344(d)(1).

<sup>21</sup> Dornfeld Aff., Ex. 2.

<sup>22</sup> See, e.g., FINDINGS OF FACT, CONCLUSIONS OF LAW, & RECOMMENDATION ¶ 301 (Mar. 31, 2023) (eDocket no. [20233-194394-01](#)) (noting that the Commission has historically regarded pension expense as an operating cost and allowed recovery on that basis).

<sup>23</sup> Dornfeld Aff., Ex. 3 at 1.

<sup>24</sup> *Id.*, Ex. 3 – Attach. A (Xcel Energy Pension Plan for Bargaining Employees).

<sup>25</sup> *Id.*, Ex. 3 – Attach. B (Xcel Energy Pension Plan).

<sup>26</sup> *Id.*, Ex. 3 – Attach. C (Master Pension Trust Agreement).

For accounting and ratemaking purposes, Xcel uses one of two GAAP-approved methods to calculate pension expense:

- The Aggregate Cost Method (“ACM”) determines the amount as a constant percentage of payroll that would need to be paid into the pension fund each year to pay all future benefits under the plan.<sup>27</sup>
- The Financial Accounting Standard 87 (“FAS 87”) Method, in contrast, calculates pension expense by summing distinct components including service costs, interest costs, and the expected return on assets.<sup>28</sup>

Although the exact pension expense calculations vary, both methods are systematic approaches to reflect a steady accrual of cost necessary to satisfy pension obligations over the remaining service lives of active employees.<sup>29</sup> In contrast, ERISA- and IRC-required pension trust contributions can vary depending on unexpected market return or plan liability changes.

### ***Prepaid Pension Asset***

Xcel, and other utilities, refer to a utility’s cumulative contributions to a qualified pension plan in excess of cumulative pension expense as a “prepaid pension asset.”<sup>30</sup> On the other hand, an “accrued pension liability” occurs where cumulative pension plan contributions are less than cumulative pension expense.<sup>31</sup> Prepaid pension assets and accrued liabilities function like a balancing account measuring the difference between pension plan contributions and pension expense.<sup>32</sup> A summary of Xcel’s actual pension expense, pension trust contributions, and the cumulative difference is shown in the table below.<sup>33</sup>

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<sup>27</sup> Ex. Xcel-57, RRS-D-5 at 1 (Schrubbe 2021 Direct) (eDocket no. [02110-179124-01](#)).

<sup>28</sup> *Id.* at 3.

<sup>29</sup> Ex. Xcel-57 at 9 (Schrubbe 2021 Direct).

<sup>30</sup> Hunt Aff. ¶ 4.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* ¶¶ 4–5.

<sup>33</sup> Ex. Xcel-30 at 56, RRS-D-10 (Schrubbe 2023 Direct) (eDocket no. [202311-200098-09](#)).

Year	Beginning Asset Balance	Pension Expense	Pension Trust Contributions	Other	Ending Asset Balance
2009	-	-	-	-	(20,181,500)
2010	(20,181,500)	(6,481,000)	20,182,000	-	(6,480,500)
2011	(6,480,500)	(12,728,000)	41,375,000	-	22,166,500
2012	22,166,500	(28,981,000)	79,584,333	(1,080,000)	71,689,833
2013	71,689,833	(41,706,000)	72,411,729	-	102,395,562
2014	102,395,562	(38,911,000)	52,114,844	-	115,599,406
2015	115,599,406	(34,213,000)	32,734,611	-	114,121,017
2016	114,121,017	(33,981,000)	49,429,675	-	129,569,692
2017	129,569,692	(34,862,000)	60,740,655	(620,000)	154,828,347
2018	154,828,347	(34,465,000)	63,147,000	-	183,510,347
2019	183,510,347	(34,707,000)	46,817,855	-	195,621,202
2020	195,621,202	(31,384,000)	43,959,000	-	208,196,202
2021	208,196,202	(31,811,000)	34,109,000	(369,000)	210,125,202
2022	210,125,202	(27,379,000)	4,907,000	-	187,653,202
2023	187,653,202	(30,377,000)	23,279,000	-	180,555,202
2024	180,555,202	(28,798,000)	20,623,000	-	172,380,202

Xcel is seeking to earn returns on the ending asset balances for the 2022 through 2024 test years in connection with its 2021 electric rate case, and a return for the 2024 test year for its 2023 natural gas rate case.

### ANALYSIS

The Commission must give “due consideration” to Xcel’s mandatory pension contributions, but that inquiry ends with the correct valuation of Xcel’s legal interest.<sup>34</sup> Xcel’s interest has only nominal value. Applying any rate of return to a nominal asset produces a negligible return for ratemaking purposes. If the Commission does grant a larger prepaid pension return, Xcel should still not receive a return exceeding the long-term cost of debt rate.

<sup>34</sup> *In re Appl. by N. States Power Co.*, No. A23-1672, 2025 WL 249995, at \*9 (Minn. Ct. App. Jan. 21, 2025) (citing *In re Appl. by Minn. Power for Auth. to Increase Rates for Elec. Serv.*, 12 N.W.3d 477, 493 (Minn. App. 2024)).

**I. XCEL SHOULD ONLY EARN A RETURN COMMENSURATE WITH ITS LIMITED PREPAID PENSION ASSET INTEREST.**

Xcel is entitled to a return on the prepaid pension asset.<sup>35</sup> But Xcel wrongly presumes that “due consideration” entitles it to a return on the asset’s full value. Xcel cannot earn a return on an asset it does not own. Xcel has only a speculative future interest. Given the interest’s nominal value, Xcel is entitled to a negligible return. And any argument that Xcel might proffer to distinguish the prepaid pension asset from the pension trust should be rejected.

**A. Xcel Has a Speculative, Future Prepaid Pension Asset Interest.**

Xcel lacks legal title to the prepaid pension asset held in the pension trust because it is not the trustee. Instead, Xcel has a right to leftover pension trust assets following the trust’s termination and the satisfaction of all remaining liabilities. Xcel should only earn a return on this future interest.

Xcel does not own the prepaid pension asset. Instead, Xcel has a “contingent reversionary interest” in the prepaid pension asset. A transferor creates a contingent reversionary interest when it conveys property to another, but retains a future possessory interest not guaranteed to take effect.<sup>36</sup> Xcel’s relationship to the prepaid pension asset has all the hallmarks of a contingent reversionary interest. First, Xcel conveys pension contributions to the “Xcel Energy Inc. Master Pension Trust.”<sup>37</sup> This trust is distinct from Xcel Energy, Inc. and its subsidiaries and affiliates.<sup>38</sup> Second, Xcel lacks a present interest in trust assets. Consistent with ERISA and trust law

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<sup>35</sup> *In re Appl. by N. States Power Co.*, No. A23-1672, 2025 WL 249995, at \*9 (Minn. Ct. App. Jan. 21, 2025) (citing *In re Appl. by Minn. Power for Auth. to Increase Rates for Elec. Serv.*, 12 N.W.3d 477, 493 (Minn. App. 2024) (holding the Commission must give “due consideration” to a utility’s mandatory contributions to pension plans in determining the utility’s rate base.))

<sup>36</sup> Restatement (Third) of Property § 25.2 (2011) (“A future interest is either a reversion or a remainder. A future interest is a reversion if it was retained by the transferor. A future interest is a remainder if it was created in a transferee.”); *id.* § 25.3 (“A future interest is either contingent or vested. A future interest is contingent if it might not take effect in possession or enjoyment. A future interest is vested if it is certain to take effect in possession or enjoyment.”).

<sup>37</sup> Dornfeld Aff., Ex. 3 – Attach. C § 1.1 (p. 3 of 30).

<sup>38</sup> *Id.*, Ex. 4 at 2.

principles, trust funds are instead held “separate and apart” from Xcel’s assets.<sup>39</sup> The plans, moreover, prohibit trust funds from being used for “purposes other than for the exclusive benefit of Beneficiaries.”<sup>40</sup> Third, Xcel is neither a beneficiary with equitable title nor a trustee with legal title to trust property.<sup>41</sup> Last, Xcel only has a future property interest. Under ERISA and the plan documents, Xcel is only entitled to residual assets following plan termination after all liabilities to plan beneficiaries are satisfied.<sup>42</sup>

In sum, Xcel does not own the pension trust or the assets contained within it. Nor is Xcel ever guaranteed to benefit from trust assets. Only if the trust is terminated and all the obligations to beneficiaries are fulfilled and something is left will Xcel receive residual trust assets. Xcel cannot credibly claim ownership of pension trust property. Xcel’s interest is far less. It has a right to leftover assets when the trust terminates.

**B. Xcel’s Prepaid Pension Asset Interest Has Nominal or No Ascertainable Value and Therefore Should Earn a Negligible Return.**

Xcel is only entitled to earn a return on its interest. But contingent reversionary interests, such as Xcel’s prepaid pension asset interest, almost always have nominal or no ascertainable value. And as a practical matter, Xcel appears to agree that its interest lacks value.

Xcel is not entitled to earn a return on property above-and-beyond its actual interest. Minnesota and many other states apply the same rule: you cannot earn on more than you own. For example, the Minnesota Court of Appeals upheld a Commission decision excluding contributions made by Peoples Natural Gas to an interstate transmission provider for pipeline construction. The

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<sup>39</sup> *Id.*, Ex. 3 – Attach. A § 13.2 (p. 90 of 167), Ex. 3 – Attach. B § 13.2 (p. 97 of 200).

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

<sup>41</sup> *Id.*, Ex. 4 at 2; *Sec. Bank & Tr.*, 916 N.W.2d at 501.

<sup>42</sup> Dornfeld Aff., Ex. 3 – Attach. A § 10.2 (p. 76 of 167) (“Any funds held by the Trustee after making the allocations described in [29 U.S.C. § 1344] shall revert to and be paid to the Employer.”); Ex. 3 – Attach B. § 10.2 (p. 84 of 200) (“Any funds held by the Trustee after making the allocations described in [29 U.S.C. § 1344] shall revert to and be paid to the Employer.”).

court reasoned that the pipelines were not Peoples’s “utility property” under Minn. Stat. § 216B.16, subd. 6, and the utility was not entitled to a return on its contributions.<sup>43</sup> In Pennsylvania, an appeals court upheld a determination that parent company property could not be included in rate base because the utility itself did not own it.<sup>44</sup> In another case, the Rhode Island Supreme Court again affirmed a decision to only permit the portion of shared facilities owned by a utility to be included in rate base.<sup>45</sup> These cases establish that unless the utility owns it—even property connected to utility service—no return on it is required. The Commission should apply the same principle here.

The Commission should only permit Xcel to earn a return on its reversionary interest’s value. Such interests, however, have no “ascertainable value” unless they will be realized soon.<sup>46</sup> For example, a federal district court dismissed a 2020 property dispute, concluding that a reversionary interest—in a property with a possible \$12.3 million market value—was worth less than the \$75,000 amount necessary to confer subject-matter jurisdiction.<sup>47</sup> The court explained it had found no caselaw and plaintiff had offered none to establish an “ascertainable and non-nominal value” for the property interest.<sup>48</sup> This rule is mostly unchanged in other contexts. Even in eminent domain cases extinguishing a future interest, the typical rule remains that an owner is not entitled

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<sup>43</sup> *In re Appl. of Peoples Nat. Gas Co. for Auth. to Increase Rates for Gas Serv. in Minn.*, 413 N.W.2d 607, 615 (Minn. Ct. App. 1987).

<sup>44</sup> *Popowsky v. Pa. Pub. Util. Comm’n*, 674 A.2d 1149, 1155–56 (Pa. Commw. Ct. 1996).

<sup>45</sup> *S. Cnty. Gas Co. v. Burke*, 486 A.2d 606, 608 (R.I. 1985).

<sup>46</sup> 28 Am. Jur. 2d *Estates* § 189 (2020) (“Generally, a possibility of reverter has no ascertainable value when the event upon which the possessory estate in fee simple defeasible will end is not likely to occur in the near future.”); Restatement (First) of Property § 53 (1936) (treating the owner of an estate in fee simple defeasible as identical with that of an owner of a estate in fee simple absolute for purposes of eminent domain).

<sup>47</sup> *6810 S. Hazel St. LLC v. Jefferson Hosp. Ass’n*, No. 5:19-CV-00322-LPR, 2020 WL 7028704, at \*4 (E.D. Ark. Nov. 30, 2020)

<sup>48</sup> *Id.*

to compensation because the “interest is too remote and contingent.”<sup>49</sup> And even courts that have adopted more forgiving standards still only mandate “nominal” compensation unless the owner can establish their post-reversion property usage constitutes the highest and best use.<sup>50</sup>

The “no ascertainable value” rule applies to Xcel’s prepaid pension asset interest. Xcel concedes it will not realize this interest soon—or likely ever. Xcel expects the trust to operate in perpetuity. And even if Xcel did intend to terminate the trust, it would be impossible to calculate the value of its interest now. In fact, Xcel concedes if the trust terminated today nothing would revert to the company because its pension “plan is currently underfunded.”<sup>51</sup> As a result, Xcel’s prepaid pension interest has little value today.

Applying a rate of return to an asset with nominal or no ascertainable value produces a negligible revenue requirement adjustment. For example, if the Commission determined that Xcel’s interest had a nominal value, the return would be Xcel’s approved weighted average cost of capital (6.84% to 6.95%) multiplied against an “insignificantly small” value.<sup>52</sup> The result would be like multiplying any value with zero: close to zero. Given this mathematical fact, the Commission should grant Xcel a return on \$1,000 of rate base. This amount both reflects the

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<sup>49</sup> *State by Mondale v. Indep. Sch. Dist. No. 31*, 123 N.W.2d 121, 127 (Minn. 1963) (quoting *Chandler v. Jam. Pond Aqueduct Corp.*, 125 Mass. 544, 547 (1878)); see also *United States v. Certain Land in Cook Cnty., State of Minn.*, 248 F. Supp. 681, 682–83 (D. Minn. 1965) (explaining that the owner of reversionary interest is entitled to “nominal compensation” when that interest is extinguished).

<sup>50</sup> *State by Mondale*, 123 N.W.2d at 129–30.

<sup>51</sup> Dornfeld Aff., Ex. 5 at 2.

<sup>52</sup> FINDINGS OF FACT, CONCLUSIONS, & ORDER at 92–93 (July 17, 2023) (eDocket no. 20237-197559-01); *Nominal*, American Heritage Dictionary (5th ed. 2022).

minimum practical rate adjustment (anything less would round to \$0.00) and acknowledges that Xcel has some future possessory interest.<sup>53</sup>

**C. The Commission Should Reject Any Claim that the Prepaid Pension Asset is Distinct from the Pension Trust Funds.**

In response, Xcel may argue that the Department is conflating the pension trust balance and the prepaid pension “regulatory asset.”<sup>54</sup> But that argument misses the point. Even if true, the Commission not Xcel determines a regulatory asset’s dimensions. Those dimensions should follow Xcel’s actual, real-world property interest. And any claim that the prepaid pension asset is distinct from the pension trust ignores the undisputed fact that the funds comprising the asset are held in a trust that Xcel does not own.

Property rights arise—not from the Constitution—but from independent sources such as state law or existing rules.<sup>55</sup> That means regulatory assets stem from regulatory agency decisions taking into consideration relevant state laws, past decisions, and accounting rules.<sup>56</sup> In Minnesota, the Commission’s deferred accounting policies and Financial Accounting Standard 71 (“FAS 71”)

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<sup>53</sup> Cf. *Dean v. City of Winona*, 868 N.W.2d 1, 8 (Minn. 2015) (involving a claim for “nominal damages of \$1.00” for constitutional violations); *Newcomb v. Meiss*, 116 N.W.2d 593, 595 (Minn. 1962) (involving a jury instruction restricting damages to a nominal amount, such as \$1.00).

<sup>54</sup> See *In re N. States Power Co.’s Appl. for Auth. to Increase Elec. Serv. Rates in Minn.*, Docket E-002/GR-24-320, Xcel Reply Brief at 89–90 (Feb. 25, 2026) (eDocket no. 20262-228661-01).

<sup>55</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *Hale v. Viking Trucking Co.*, 654 N.W.2d 119, 124–25 (Minn. 2002); see also *Batra v. Bd. of Regents of the Univ. of Neb.*, 79 F.3d 717, 720 (8th Cir. 1996) (holding for a property interest to arise, a plaintiff must have more than a “mere subjective expectancy.”).

<sup>56</sup> See, e.g., *City of Corpus Christi v. Pub. Util. Comm’n of Tex.*, 51 S.W.3d 231, 238 (Tex. 2001) (“Regulatory assets are essentially bookkeeping entries that reflect a charge to be included in a utility’s future rates.”); *Tex. Agencies & Insts. of Higher Learning v. Pub. Util. Comm’n of Tex.*, 450 S.W.3d 615, 646 (Tex. App. 2014) (“[T]he creation of regulatory assets is a function of the Commission’s discretion but is limited by its statutory authority.”); *Off. of Consumer Couns. v. Dep’t of Pub. Util. Control*, 905 A.2d 1, 11 (Conn. 2006) (“[T]he creation of a regulatory asset . . . is governed by Statement No. 71, while the recovery of a regulatory asset in a rate proceeding is a matter within the department’s broad discretion[.]”).

often inform a regulatory asset's contours. The Commission may permit a utility to book a regulatory asset when the company incurs an expense that is unforeseeable, unusual, and large enough to transform the utility's financial condition, or when necessary to meet important public policy mandates.<sup>57</sup> Under FAS 71, a regulator may also permit a utility to recover a past cost from customers in future rates.<sup>58</sup> But a regulator may adjust or even eliminate a claimed regulatory asset's value.<sup>59</sup> And other regulators, such as the Federal Energy Regulatory Commission, also reject attempts to categorically treat prepaid pension as an asset for ratemaking.<sup>60</sup> These independent sources establish that the Commission exercises considerable discretion in "creat[ing]" and setting the "dimensions" of a utility's regulatory property interest.<sup>61</sup>

The Commission should not accept any claim that Xcel might make that it has a regulatory asset equal to the cumulative difference between all pension trust contributions and pension expense. As a factual matter, Xcel neither sought nor obtained Commission approval to record such an asset. And even if Xcel seeks approval, the Commission should exercise its discretion and expertise in determining the dimensions of any such asset.<sup>62</sup> A regulatory asset should track a utility's real-world property interests. That is consistent with the "you cannot earn on more than you own" rule. It also comports with long-standing notions of ownership. Future estate holders

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<sup>57</sup> *In re Pet. for Approval of Deferred Acct. Treatment of Costs Related to the 2016 Storm Response & Recovery*, Docket No. E-015/M-16-648, ORDER DENYING PETITION FOR DEFERRED ACCOUNTING TREATMENT at 5 (Jan. 10, 2017) (eDocket no. [20171-127956-01](#)).

<sup>58</sup> Hunt Aff. ¶¶ 6–7, Ex. 1 ¶ 9.

<sup>59</sup> *Id.* ¶ 10; see, e.g., *Bus. & Pro. People for Pub. Int. v. Ill. Com. Comm'n*, 585 N.E.2d 1032, 1062–63 (Ill. 1991) (explaining that Illinois commission was under no obligation to approve recovery of the "full amount recorded" for a deferred charge.)

<sup>60</sup> Hunt Aff. ¶¶ 8–9, Ex. 3.

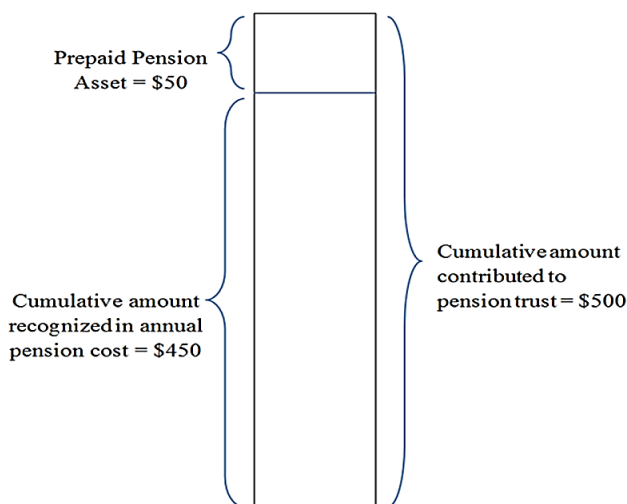
<sup>61</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 538; see also Hunt Aff. ¶ 10.

<sup>62</sup> Minn. Stat. § 216A.03; Hunt Aff. ¶¶ 10–11.

have no present right to income or profits generated by the property.<sup>63</sup> Given that Xcel’s property interest is weaker than many future estate holders enjoy, there is even less basis for the Commission to deviate from those principles here. The Commission should not permit Xcel to claim a regulatory asset based on property it does not own, and from which it may never benefit.

Any attempt by Xcel to strip the prepaid pension asset away from the pension trust would ignore the facts. The funds representing the prepaid pension asset must be held in trust to exist at all. According to Xcel, the prepaid pension asset is the portion of annual pension fund contributions that has not already been expensed.<sup>64</sup> And pension fund contributions are held in a trust.<sup>65</sup> So the prepaid pension asset also must be held in the pension trust. Xcel appears to acknowledge that the prepaid pension asset must be a trust fund component as illustrated by Figure 1 in witness Richard Schrubbe’s direct testimony.<sup>66</sup>

**Figure 1**



<sup>63</sup> *In re Perkins’ Est.*, 182 N.W.2d 881, 886 (Minn. 1970; *Ashbaugh v. Wright*, 188 N.W. 157, 158 (Minn. 1922); *Cf. Weber v. Eisentrager*, 498 N.W.2d 460, 464 (Minn. 1993) (observing that Minnesota law follows the ancient axiom that “one can only convey what one has.”).

<sup>64</sup> Ex. Xcel-57 at 60 (Schrubbe 2021 Direct).

<sup>65</sup> Dornfeld Aff., Ex. 4 at 2.

<sup>66</sup> Ex. Xcel-57 at 62 (Schrubbe 2021 Direct); Ex. Xcel-30 at 50 (Schrubbe 2023 Direct).

Given that all pension contributions are held in the trust, any argument that the prepaid pension asset is somehow separate and distinct from the pension trust holds no water.

In sum, the Commission should reject any argument that Xcel might advance that the prepaid pension asset is somehow distinct from pension trust funds. The Commission not Xcel sets a regulatory asset's dimensions. And Xcel's prepaid pension regulatory asset should not exceed its real-world interest.

**II. IN THE ALTERNATIVE, THE COMMISSION SHOULD NOT GRANT XCEL A RETURN ON THE PREPAID PENSION ASSET EXCEEDING THE LONG-TERM DEBT RATE.**

Although Xcel is not entitled to it, if the Commission decides to grant Xcel a larger return, Xcel should not receive a prepaid pension asset return exceeding the long-term cost of debt rate. The long-term debt cost rate is appropriate for several reasons. As discussed above, Xcel has a limited prepaid pension asset interest. Beyond Xcel's limited interest, prepaid pension assets are materially distinct from other rate base assets. And using the long-term debt cost rate would be consistent with public policy.

Prepaid pension lacks the characteristics shared by other rate base assets. Most rate base assets cost are known and paid upfront at the time the asset is placed in rate base. These costs are recovered from customers through depreciation and a return built into rates over a predictable period. In contrast, prepaid pension represents the difference between pension contributions and pension expenses. And pension expense is already recovered from ratepayers. Put another way, most rate base assets reflect a one-time capital outlay to construct or purchase a physical object that declines in value over time.<sup>67</sup> In contrast, prepaid pension fluctuates in value based on timing differences.<sup>68</sup>

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<sup>67</sup> FINDINGS OF FACT, CONCLUSIONS, & ORDER at 26–27.

<sup>68</sup> *Id.*

Limiting Xcel’s return to no more than the long-term cost of debt also advances public policy. Xcel is entitled to recover its cost of service, but no more.<sup>69</sup> Allowing Xcel to earn a return not exceeding the long-term debt cost would allow Xcel to “maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.”<sup>70</sup> The permitted recovery would, moreover, almost certainly exceed the required return given the nominal value of Xcel’s interest. If the Commission chooses to proceed down this path, the calculations for each test year are summarized below:

**Long-Term Debt Rate Return<sup>71</sup>**

	<b>2022</b>	<b>2023</b>	<b>2024</b>
<b>Docket No. E-002/GR-21-630</b>	\$5,529,229	\$5,746,660	\$6,443,735
<b>Docket No. G-002/GR-23-413</b>	--	--	\$544,842

**CONCLUSION**

You cannot earn a return on an asset you do not own. And Xcel does not own the prepaid pension asset. It has a contingent future interest. Applying long-standing property law and ratemaking principles, the Commission should only allow Xcel to annually earn a return on \$1,000 of rate base. If the Commission chooses to be more generous, Xcel still should not receive a return exceeding the long-term cost of debt rate.

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<sup>69</sup> See *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm’n of W. Va.*, 262 U.S. 679, 692–93 (1923) (holding a public utility “has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.”).

<sup>70</sup> *Id.* at 693.

<sup>71</sup> Hunt Aff. ¶¶ 12–13, Ex. 4.

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