

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: June 8, 2017 **Agenda Item 6****

Companies: Minnesota Energy Resources Corporation (MERC)
Northern States Power Company d/b/a/ Xcel Energy

Docket No. G-011, G-002/C-17-305
In the Matter of the Complaint and Petition for Relief by Minnesota Energy Resources Corporation (MERC) Against Northern States Power Company d/b/a Xcel Energy (Xcel-Gas) for Violations of Minn. Stat. § 216B.01 and Commission Policy.

Issues: Does the Commission have jurisdiction over MERC’s complaint against Xcel-Gas?

a) If yes, would a Commission investigation into MERC’s allegations against Xcel-Gas be in the public interest?

b) If no, should the Commission dismiss this docket and close the case?

If the Commission chooses to investigate the complaint, how should the Commission proceed? Alternatively, should the Commission make its decision based on available information at this Agenda Meeting?

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Relevant Documents

Minnesota Energy Resources Corporation (MERC) – ComplaintApril 19, 2017
PUC - Notice of Comment PeriodApril 21, 2017
Xcel Energy (Xcel-Gas) – Response to ComplaintApril 28, 2017
Xcel Energy (Xcel-Gas) – Notice of Motion and Motion to ExpediteApril 28, 2017
MERC – Initial CommentsMay 3, 2017
MERC – Other Informational FilingMay 5, 2017
MERC – Reply Comments (Trade Secret)May 15, 2017
Xcel Energy (Xcel-Gas) – Reply Comments (Trade Secret)May 15, 2017
Office of the Attorney General-RUD (OAG) – Letter in lieu of Reply CommentsMay 15, 2017
MV Eagan Ventures, LLC (Vikings) – Reply CommentsMay 15, 2017
Department of Commerce (Department) – Reply Comments (Trade Secret).....May 16, 2017

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Statement of the Issues

Does the Commission have jurisdiction over MERC's complaint against Xcel-Gas?

- a) If yes, would a Commission investigation into MERC's allegations against Xcel-Gas be in the public interest?
- b) If no, should the Commission dismiss this docket and close the case?

If the Commission chooses to investigate the complaint, how should the Commission proceed? Alternatively, should the Commission make its decision based on available information at this Agenda Meeting?

Introduction

In January 2016, the Minnesota Vikings (Vikings) purchased a 200 acres land plot in the City of Eagan. The Vikings plan to develop the land into its new corporate headquarters and practice facility, along with residential, commercial, and industrial development (Planned Development).¹ The land was formerly owned by Northwest Airlines (NWA) and was their headquarters.² The Vikings contracted with Kraus-Anderson to provide construction services for the proposed facility. In September 2016, Kraus-Anderson started construction at the new Eagan site.³

The construction will be completed in phases. Phase 1 consists of the redevelopment of 40 acres to construct the team headquarters and related practice facilities. The remaining 160 acres will be redeveloped in different stages over the next 10 to 15 years.

Until April 2017, MERC provided natural gas services to the Eagan site, when the Vikings requested MERC to remove its facilities, MERC accommodated the Vikings request.

In March 2017, Xcel-Gas and the Vikings entered into a Natural Gas Competitive Agreement (Agreement), where Xcel-Gas will provide natural gas services to the entire 200-acre development site. In April 2017, Xcel-Gas notified MERC of its Agreement with Vikings.

¹ The "Planned Development" was approved by the City of Eagan in June 2016 when the City changed the land-use designation of the site of the planned Vikings development from Major Office to Mixed Use to support a Preliminary Planned Development (known as "Viking Lakes"). This approval authorized the Vikings (through MV Eagan Ventures, LLC) to pursue an overall 200 acre redevelopment that includes offices, retail, residential, hospitality and a conference center – with the Vikings headquarters and practice facilities (Phase I) as the development anchor. See MERC Reply Comments, Exhibit A, Attachment DOC 2A and Attachment DOC 2B (Trade Secret), MERC's Response to Department's Informational Request No. 2.

² The NWA site has been vacant since the 2008 merger between NWA and Delta Airlines, which re-located the headquarters to Atlanta, Georgia.

³ MERC Complaint, p. 3.

Summary of Party Positions

MERC

On April 19th, MERC filed its Complaint that alleges Xcel-Gas plans to extend natural gas service to “the new Vikings headquarters and training complex in Eagan, Minnesota – an area that is located entirely in MERC’s natural (although not exclusive) service territory and that has long been served solely by MERC.”⁴ MERC alleges that Xcel-Gas’s actions are inconsistent with the provisions of Minn. Stat. § 216B.01 and existing Commission policies.

MERC argued that Xcel-Gas was infringing upon its natural service area and was constructing duplicate facilities.⁵ MERC’s Complaint states that it currently has under-utilized capacity and is able to provide natural gas services to the entire proposed development.

Xcel

In September 2016, Xcel Energy provided the Vikings its natural gas service proposal for the entire development site. Xcel-Gas believed that MERC provided its proposal to the Vikings during the same timeframe. After each gas utility provided its service proposal to the Vikings, which Xcel-Gas characterizes as a competitive bidding process, the Vikings selected Xcel-Gas as their preferred natural gas service provider. Xcel Energy will provide natural gas and electric service to the Vikings at tariff rates.⁶

Department

The Department recommended the Commission dismiss MERC’s Complaint.

OAG

The Office of the Attorney General Residential Utilities Division (OAG) took no position on MERC’s Complaint, but did recommend the Commission reserve the right to review this situation for prudence in Xcel-Gas’s and MERC’s next general rate case.

MV Eagan Ventures, LLC (Vikings)

The Vikings submitted a letter that stated it used a competitive process in selecting Xcel-Gas as its preferred natural gas provider, Xcel-Gas.

Public Comments

The Commission did not receive any public comments in this docket.

⁴ MERC Complaint, p.1.

⁵ MERC also posits that it has the exclusive right to provide natural gas service to the Vikings’ new facility based on its prior service to its former customer, Northwest Airlines (NWA).

⁶ Xcel-Gas further claimed that it did not flex (discount) its natural gas service rates in order to provide the service.

Procedural Background

On April 19, 2017, MERC filed with the Commission its formal Complaint against Xcel-Gas.

On April 21, 2017, the Commission issued a Notice of Comment Period. The Notice provided for an initial comment period that closed on May 4, 2017 and a Reply Comment period that closed May 15, 2017.

On April 28, 2017 Xcel-Gas filed its Response to MERC's Formal Complaint. Xcel-Gas's response included a legal analysis in which it concluded that MERC's complaint was without merit and requested that the Commission dismiss the Complaint without further investigation. Also, Xcel-Gas filed a Motion to Expedite the filing of Reply Comments from May 15th to May 9th.

On May 3, 2017 MERC filed its Initial Comments, in which it disagreed with Xcel Gas's proposal to advance the filing date for Reply Comments to May 9 from May 15, 2017. The Commission did not act on Xcel-Gas's Motion to Expedite.

On May 5, 2017 MERC filed an Informational Filing.

Between April 21 and May 1, 2017 the OAG, and the Department each sent several information requests to MERC and Xcel-Gas. In addition, MERC asked Xcel-Gas several information requests.

On May 15, 2017, MERC, the OAG, MV Eagan Ventures, LLC, and Xcel-Gas filed their Reply Comments.

On May 16, 2017, the Department filed its Reply Comments.⁷

Relevant Minn. Statutes and Rules

Minn. Stat. § 216B.01 Legislative Findings.

It is hereby declared to be in the public interest that public utilities be regulated as hereinafter provided in order to provide the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of public utilities and their need to construct facilities to provide such services or to otherwise obtain energy supplies, to avoid unnecessary duplication of facilities which increase the cost of service to the consumer and to minimize disputes between public utilities which may result in inconvenience or diminish efficiency in service to the consumers. [Emphasis Added]

⁷ On May 15th, the Department requested that the Commission grant a one-day extension of time to submit its Reply Comments. The Commission did not act on Department's extension of time request, but accepted the Department's Reply Comments on May 16th.

Minn. Stat. § 216B.17 Complaint Investigation and Hearing.

Subdivision 1. Investigation. On its own motion or upon a complaint made against any public utility, by the governing body of any political subdivision, by another public utility, by the department, or by any 50 consumers of the particular utility that any of the rates, tolls, tariffs, charges, or schedules or any joint rate or any regulation, measurement, practice, act, or omission affecting or relating to the production, transmission, delivery, or furnishing of natural gas or electricity or any service in connection therewith is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with notice, to make such investigation as it may deem necessary. The commission may dismiss any complaint without a hearing if in its opinion a hearing is not in the public interest.

A complete copy of Minn. Stat. § 216B.17 and the procedural rules (Minn. Rules 7829.1700 through 7829.1900) covering formal complaints are attached, see Attachment A.

Minnesota Energy Resources Corporation (MERC)

MERC is a wholly-owned subsidiary of WEC Energy Group, Inc. and delivers natural gas to more than 232,000 customers in Minnesota. MERC has provided natural gas service to certain commercial facilities located in the City of Eagan for the last three decades, which included NWA headquarters. In order to provide this natural gas service, MERC first constructed natural gas pipeline and related infrastructure in 1985, which remains in-service.

April 19, 2017 MERC Complaint

MERC filed its Complaint and Request for Expedited Action (Complaint) against Xcel-Gas for encroachment into its service area, where MERC currently provides natural gas distribution services and has available capacity to provide additional service. MERC requested that the Commission:

- hold a hearing as required under Minn. Stat. § 216B.17;
- issue an order stating that Xcel-Gas is in violation of Minn. Stat. § 216B.01 and Commission policy – concerning natural gas being provided by more than one utility in a given service area;
- issue an order declaring that, under the circumstances, MERC has the exclusive right to provide natural gas service to a new proposed development; and
- provide any additional relief that the Commission deems just and equitable.

Further, MERC expressed the following concerns:

- Safety –related to the placement of Xcel’s proposed distribution line, which would traverse a MERC distribution line;
- Stranded Costs - the recovery of MERC’s stranded costs associated with the facilities that currently serve the former NWA site; and

- “Customer poaching” - the potential financial effects on rates of allowing existing large customers the opportunity to require natural gas local distribution companies to compete for their loads.⁸

Until April 2017, MERC stated that it provided natural gas service to Kraus-Anderson (the Vikings contractor) to meet its construction-related demand. MERC had incurred approximately \$140,000 in direct costs from August 2016 to date in order to install meters and facilitate hookups for the construction-related natural gas service, which included the meter installation to serve the Proposed Development once completed.⁹ At the Vikings request, MERC also abandoned approximately 2,900 feet of 4 inch polyethylene pipe to facilitate the Phase 1 Viking construction that was providing service (heating) to the NWA headquarters building.¹⁰

MERC believed that its working relationship with Kraus-Anderson supported its belief that the Vikings intended to receive service from MERC post-construction. There was no indication that the Vikings were seeking other bids for natural gas service. In April 2017, Xcel-Gas notified MERC of its plans to be the exclusive natural gas provider to the proposed Vikings facilities and to other proposed future development. MERC stated that in order to provide the proposed service, Xcel-Gas will need to install new pipeline that will cross under Interstate 494 and over MERC’s existing facilities that encroaches on MERC’s “natural” service territory.

MERC stated that prior to Xcel-Gas’s announcement, it was the sole retail natural gas distribution provider in the City of Eagan, which granted MERC a non-exclusive franchise license to operate in its municipality borders.¹¹ MERC believed that Xcel-Gas’s action violates prior Commission polices concerning duplication of distribution facilities (Minn. Stat. § 216B.01), causes safety concerns, and could result in stranded MERC investment which is detrimental to other MERC customers. MERC further believed that if Xcel-Gas is permitted to construct the necessary facilities and provide natural gas distribution service, it will cause a fundamental change in how Minnesota natural gas utility companies operate.¹²

[Staff Note: Staff has not determined whether Xcel-Gas has requested or the City of Eagan has granted Xcel-Gas a non-exclusive franchise license to operate within the municipality’s border. The Viking facilities are within the municipality’s borders, and the City of Eagan would have to issue a franchise license to Xcel-Gas to operate inside it borders if Xcel-Gas does not already have such license.]

⁸ MERC referred to this as the “First in the Field” rule.

⁹ This amount is not currently being recovered by MERC in its current base rate. This amount would have a negative impact on MERC’s system customers once it seeks recovery in its next general rate case if Xcel-Gas is the natural gas provider to the Vikings.

¹⁰ MERC is currently recovering the pipe costs in base rates, and will seek to continue cost recovery through base rates even though the facilities have been abandoned until the full cost has been recovered.

¹¹ MERC currently provides retail natural gas services to residential, commercial, and industrial customers.

¹² MERC Complaint, pp. 3-4.

May 3, 2017 Initial Comments

In its Initial Comments, MERC addressed the Commission questions from its April 21, 2017 Notice of Comment Period. Specifically, MERC stated that Minn. Stat. § 216B.17 provides the Commission with jurisdiction over its Complaint, to hold a hearing on any complaint made by a public utility against another public utility. Minn. Stat. § 216B.01 informs the Commission of policies that apply in regulating Minnesota public utilities.

Further, MERC recommended the Commission deny Xcel-Gas's April 28, 2017 Motion to Expedite the Commission schedule in resolving this Complaint.

May 5, 2017 Other Informal Filing

MERC submitted a letter informing the Commission that Xcel-Gas began its construction at the Vikings facility after MERC filed its Complaint. MERC believed Xcel-Gas's actions are irregular considering that MERC filed a Complaint against Xcel-Gas and the Commission has not yet rendered its decision. MERC requested that the Commission direct Xcel-Gas to discontinue installing natural gas infrastructure to serve the Vikings until this matter is resolved by the Commission.

May 15, 2017 Reply Comments

MERC reiterated its request that the Commission issue an order declaring that Xcel-Gas's provision of natural gas service for the Planned Development violates Minn. Stat. § 216B.01 and Commission policy, and that MERC has the exclusive right to provide natural gas service to the Planned Development.

MERC contests Xcel-Gas's Comments stating that MERC is a disgruntled utility seeking to undermine the Commission policies favoring customer choice and competition.¹³ MERC stated that Xcel-Gas's interpretation of the facts and the law were incorrect. MERC believed that the Commission must balance a number of factors in determining which utility should be allowed to serve the customer, that Minn. Stat. § 216B.01 and past Commission decisions provide clear guidance, such factors including safety concerns, non-duplication of facilities, and potential harm to existing system customers.

MERC believes that if Xcel-Gas provides natural gas service to the Vikings, the result will be unnecessary duplication of facilities, and negative impacts on MERC's existing system customers, and will also raise safety concerns since Xcel-Gas' proposed facilities would mirror MERC's facilities.

Further, MERC believes that Xcel-Gas's statements about charging maximum tariff rates is incorrect, since Xcel-Gas was effectively offering a discount through the promotional and conservation incentives it has granted the Vikings. MERC believes that these non-tariffed incentives raise concerns with how Xcel-Gas approaches competition and whether Xcel-Gas's

¹³ Further, MERC disagreed with Xcel's statements that MERC is upset because it lost out on the competitive bidding process and that the Commission should dismiss MERC's Complaint because of precedent previously set by the Commission.

incentives are discriminatory contrary to Minn. Stat. §§ 216B.03 and 216B.06. Because Xcel-Gas's tariff does not include a provision covering promotional incentives, Xcel-Gas could be in violation of its tariff.

As previously mentioned, MERC believes that its relationship with Kraus-Anderson and the Vikings was an indication that the Vikings planned to continue its natural gas service with MERC post-construction. MERC does not understand Xcel-Gas's statements concerning a competitive bidding process, because MERC was not asked to take part of such process.

Northern States Power Company d/b/a Xcel Energy (Xcel-Gas)

April 28, 2017 Initial Comments

Xcel-Gas stated that it entered into the Natural Gas Competitive Agreement (Agreement) with the Minnesota Vikings to be their exclusive natural gas provider as a result of a competitive bidding process. Xcel-Gas argued that Commission precedent does not support using the complaint process to subvert customer choice and side-step a full and fair competitive process. Rather, Commission precedent supports customer choice and the competitive process. Xcel-Gas believes that MERC is attempting to delay the Vikings construction schedule, since MERC knows it cannot prevail in its Complaint.

Procedural Posture

Xcel-Gas's response noted that the Commission reviews formal complaints using a two-step process. The first step of the process involves two questions:

- Does the Commission have jurisdiction over the complaint?
- Are there reasonable grounds to open an investigation?

If the answer is no to either of the questions, the Commission must dismiss the Complaint without further investigation. Xcel-Gas supported its statement with Minn. R. 7829.1800, subp. 1, which states:

The commission shall review a formal complaint as soon as practicable to determine whether the commission has jurisdiction over the matter and to determine whether there are reasonable grounds to investigate the allegation. *On concluding it lacks jurisdiction or that there is no reasonable basis to investigate the matter, the commission shall dismiss the complaint.* [Emphasis added]

Xcel-Gas acknowledged the Commission jurisdiction over the Complaint, but believes MERC's complaint should be dismissed on the basis of prior Commission precedent, sound policy and decades of industry practice.

Xcel-Gas Justification¹⁴

Xcel-Gas believes that MERC's Complaint did not provide credible justification based on its review of Commission precedent and Minn. Statutes and Rules. Xcel-Gas stated that the Commission has consistently demonstrated a commitment to respect the customer's decision in selecting its natural gas service provider, and that in this case the Vikings choice of Xcel-Gas followed its competitive bidding process.

In support, Xcel-Gas points to the Commission's decisions in Docket Nos. 91-731¹⁵ and 96-1062¹⁶. In these dockets, the Commission dismissed the complaints without opening an investigation because "*special circumstances*" did not exist to warrant further investigation of the complaints. In the 91-731 docket, Great Plains filed its complaint against Peoples (MERC's predecessor) for encroachment into its existing service area and its poaching of a current customer. The Commission's Order in Docket No. 91-731 stated:

[T]he complaint rests entirely on the contention that Great Plains has an exclusive right to serve this load. This contention has no basis in law or policy. Minnesota does not have assigned service areas for gas utilities. It does have assigned service areas for electric utilities, which suggests that the Legislature intentionally treated the two types of utilities differently. Peoples, then, is free to serve this new load, in the absence of special circumstances, such as unnecessary duplication of facilities or harm to existing ratepayers, requiring Commission intervention.

Xcel-Gas believes that an individual customer's choice of a natural gas provider is only reviewed by the Commission if special circumstances exist, and that the Commission previously decided that these circumstances do not exist when a gas utility provides service to the new load of a long-time customer of another utility or a new customer on the same site as the former customer of another utility.

In the 96-1062 docket, Peoples filed a formal complaint against Northern States Power Co. (NSP) who was the natural gas provider of choice for proposed developments that were contiguous to an area served by Peoples and not contiguous to NSP. Peoples stated that NSP would be constructing duplicate facilities in violation to Minn. Stat. § 216B.01. Peoples requested that the Commission find these duplicate facilities constitute a special circumstance that warrant an investigation. The Commission was not persuaded by Peoples arguments. The Commission concluded that the proper place to analyze the economic consequences of redundant facilities was in the utility's next general rate case. Xcel-Gas characterized the Commission's decision as choosing to respect the customer's choice of service provider and dismissed People's Complaint without opening an investigation.

¹⁴ Xcel-Gas April 28, 2017 Initial Comments, pp. 4-8.

¹⁵ *In the Matter of the Complaint of Great Plains Natural Gas Company Against Peoples Natural Gas Company and UtiliCorp United, Inc.*, Docket No. G-004,-011/G-91-731, ORDER DISMISSING COMPLAINT (Dec. 20, 1991) (hereinafter Great Plains Complaint).

¹⁶ *In the Matter of a Complaint of Peoples Natural Gas against Northern States Power Company regarding its Construction of Distribution Facilities*, Docket No. G-011/C-96/1062, ORDER DISMISSING COMPLAINT (Oct. 21, 1996) (hereinafter Peoples Complaint).

Conclusion

Xcel-Gas stated that it and MERC competed to provide natural gas services to the Vikings facility and future growth opportunities, and Xcel-Gas won. Xcel-Gas believes that prior Commission precedent has consistently upheld customer choice. Xcel-Gas requested the Commission dismiss MERC's complaint without further investigation.

May 15, 2017 Reply Comments

In its Reply Comments, Xcel-Gas did not submit further argument, but submitted all the informational data responses that it provided to the parties. Xcel-Gas:

- Provided responses to MERC's informational data requests 1 through 12.
- Provided responses to the Department data requests 7 through 10.¹⁷
- Provided responses to the OAG-RUD data requests 100 through 103.¹⁸

Department of Commerce

The Department recommended that the Commission should dismiss the MERC Complaint. Further, its analyses found no reasonable basis to reverse the Commission's prior determinations regarding new natural gas load. The competition between Xcel and MERC for the Vikings new facility produced results that support dismissal of the complaint - cost savings for the customer (the Vikings in this instance) without undue harm to MERC's ratepayers.

For the balance of the Department's Comments, see the discussion below.

MV Eagan Ventures, LLC (Vikings)

On May 15, 2017, the Vikings expressed in a letter support for natural gas service from Xcel-Gas at its new Eagan development. Further, the Vikings stated that they carefully reviewed natural gas rate options from both MERC and Xcel-Gas and selected the latter to be its preferred natural gas provider. In addition the Vikings stated that timing was crucial because they need natural gas service to one of its new buildings by August 2017.

Office of the Attorney General-RUD (OAG)

On May 15, 2017, the OAG submitted its letter in response to the Notice of Comments Period issued by the Commission. The OAG stated that it takes no position with regard to the substantive merits of MERC's Complaint or Xcel-Gas's request to dismiss the complaint without an investigation. However, if the Commission dismisses MERC's Complaint without further investigation the Commission should act to protect the existing ratepayers of both MERC and Xcel-Gas by:

¹⁷ MERC responded to the Department's data requests 1 through 6.

¹⁸ MERC responded to the OAG data requests 1 through 4.

- Making a statement in its Order that the prudency determination with regard to Xcel-Gas's new rate base facilities or MERC's abandoned facilities will be reviewed in their next general rate case, that all parties can address prudency concerns at that time. The OAG believes this would be consistent with past Commission treatment of allegedly redundant natural gas facilities.¹⁹
- Requiring Xcel-Gas to protect its existing customers from bearing the risks of extension costs by agreeing to remove the pipeline from rate base if the facilities are abandoned before construction costs are fully recovered. Similar to the Commission requirement in Docket 91-731, where the Department of Public Service²⁰ had similar concerns.²¹

The OAG believes that regardless of the Commission decision regarding this Complaint, it should protect ratepayers by ensuring that ratepayer advocates retain the right to challenge the prudency of related costs in future proceedings and require the removal of the project from Xcel-Gas rate base if it does not recover all of the related construction costs before it abandons the facilities.

Should the Commission Open an Investigation?

Pursuant to Minn. Stat. § 216B.17, subd. 1 - Complaint Investigation and Hearing, a public utility may submit a Complaint against another public utility with respect to any furnishing of natural gas service that it believes is unreasonable, insufficient, or unjustly discriminatory practices.²²

MERC (the Complainant) asks the Commission to open an investigation of Xcel-Gas's proposed facilities to serve the Vikings in Eagan. MERC believes that Xcel-Gas's construction of new natural gas facilities to serve the Vikings and subsequent customers in the Planned Development would lead to duplication of such facilities and that Xcel-Gas is "poaching" an existing MERC customer.

¹⁹ In the Matter of a Complaint of Peoples Natural Gas against Northern States Power Company regarding its Construction of Distribution Facilities, Docket No. G-011/C-96/1062, ORDER DISMISSING COMPLAINT (Oct. 21, 1996) ("the proper place to analyze the economic consequences of redundant piping is in a rate case proceeding. In a rate case proceeding, the Commission can examine the prudence of utility construction to determine if costs may be placed into rate base.") (Emphasis added).

²⁰ The predecessor to the Department of Commerce, Division of Energy Resources.

²¹ In the Matter of the Complaint of Great Plains Natural Gas Company Against Peoples Natural Gas Company and UtilitCorp United, Inc., MPUC Docket No. G-004, 011/C-91-731, ORDER DISMISSING COMPLAINT at p. 2 (Dec. 20, 1991).

²² Also, see Minn. Stat. § 216B.17, subd. 2 and subd. 3.

In response to MERC's Complaint, the Commission issued its Notice of Comment Period. The Commission requested parties to address the following questions:²³

- Does the Commission have Jurisdiction over the Subject Matter of this Complaint?
- Is it in the Public Interest for the Commission to Investigate these Allegations?
- If the Commission Chooses to Investigate the Complaint, What Procedures should be used to do so?

Does the Commission have Jurisdiction over the Subject Matter of this Complaint?

MERC, Xcel-Gas, and the Department

Both MERC and Xcel-Gas agree that the Commission has jurisdiction. The Department believes that the Commission has jurisdiction over MERC's Complaint based on the language from Minn. Stat. § 216B.01.

PUC Staff

PUC staff agrees with the parties that the Commission has authority over MERC's Complaint.²⁴

Is it in the Public Interest for the Commission to investigate these Allegations?

MERC

In its May 3rd Initial Comments, MERC states that it believed that an investigation of its Complaint is in the public interest because the Commission's decision could impact how natural gas public utilities compete within the state. Commission guidance will provide a full understanding of operational rights and future obligations. MERC acknowledged that competition among utilities for new customers is a longstanding practice.²⁵ However, MERC believes that Minn. Stat. § 216B.01 provides guidance to the Commission regarding the siting of Minnesota natural gas facilities and the need to avoid duplication of such facilities.

Minn. Stat. § 216B.01 states that:

It is hereby declared to be in the *public interest* that public utilities be regulated as hereinafter provided in order to provide the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of public utilities and their *need to construct facilities to provide such services or to otherwise obtain energy supplies, to avoid unnecessary duplication of facilities which increase the cost of service to the consumer and to minimize disputes between public utilities which may result in inconvenience or diminish efficiency in service to the consumers.* [Emphasis added]

²³ See Commission Notice of Comment Period dated April 21, 2017.

²⁴ Pursuant to Minn. Stat. § 216B.01 and Minn. Stat. § 216B.17.

²⁵ Ibid; 1974 MN Legislature enacted the MPUA, but did not establish exclusive natural gas service territories for natural gas utilities.

Xcel-Gas

In its April 28th Initial Comments, Xcel-Gas states that it believed that an investigation of MERC's Complaint is not in the public interest. Further, it believes the Commission should reach the same conclusion as in prior complaints and dismiss this docket because MERC failed to provide any facts that would support a different result. The Commission should not be persuaded by MERC's arguments regarding safety issues, duplicate facilities, the Viking's customer status (new versus old customer status), and MERC's use of the term "natural service territory".²⁶

Department

The Department concluded that this docket's facts were similar to the facts from previous dockets, and cited Commission precedent used by both MERC and Xcel-Gas. The Department provided the Commission its analyses of those previous dockets in its Reply Comments.²⁷ The Department believes that an additional investigation is not in the public interest based on its analysis of Commission precedent and review of the information request responses of both MERC and Xcel-Gas.²⁸

If the Commission Chooses to Investigate the Complaint, What Procedures should be used to do so?**MERC**

MERC believes that Minn. Stat. § 216B.17 provided the Commission jurisdiction over its Complaint authorizing the Commission to hold a hearing on any complaint made by a public utility against another public utility. Minn. Stat. § 216B.01 informs the Commission of policies that apply in regulating Minnesota public utilities.²⁹

Xcel-Gas

Xcel-Gas believes that the Complaint should be dismissed.

Department

The Department recommended the Commission dismiss this Complaint and believes this question is moot.

PUC Staff Comment

The Commission must decide whether to accept MERC's Complaint against Xcel-Gas for further investigation based on its merits or to dismiss the Complaint because the Complaint does not have merit and thus further investigation is not in the public interest. If it decides to accept MERC's Complaint, the Commission will need to decide how it wishes to conduct its investigation.

²⁶ Xcel-Gas Initial Comments, pp. 6-8.

²⁷ See Department Reply Comments, Attachment A, pp. 1-8 (Docket No. 91-731); Attachment B, pp. 1-8 (Docket No. 96-1062); Attachment C, pp. 1-13 (Docket No. 90-563).

²⁸ See Xcel-Gas's May 15th Reply Comment for all its data responses.

²⁹ See MERC Initial Comments filed May 3, 2017.

Minn. Stat. § 216B.17 provides some guidance to the Commission, which states:

...the commission shall proceed, with notice, to make such investigation as it may deem necessary. The commission may dismiss any complaint without a hearing if in its opinion a hearing is not in the public interest. [Emphasis added]

Minn. R. 7829.1900 provides further guidance, which states:

The commission shall deal with a formal complaint through a contested case proceeding, informal proceeding, or expedited proceeding.

If the Commission decides to accept MERC's Complaint, the Commission alternatives are:

- Refer this matter to the Office of Administrative Hearings (OAH) for an investigation (as directed by the Commission) and ask the OAH to render its Report by a specific date; or
- Direct Commission staff to issue another Notice to solicit comments from interested parties; or
- Make a determination from the docket's record that has been previously provided.
- Develop some other methodology to determine who should provide natural gas service to the new Vikings' facility.

If the Commission decides that MERC's Complaint is without merit, the Commission could dismiss MERC's Complaint as not in the public interest.

The Commission may wish to consider the following discussion:

Commission Precedent

All parties to this docket reference Commission precedent concerning MERC's Complaint. However, the parties' interpretations are different as to the actual precedent set by the Commission Orders cited.

Docket No. G-999/CI-90-563³⁰

This docket addressed certain Commission concerns regarding competition between natural gas utilities in the State of Minnesota. As a result of a previous Order,³¹ the Commission initiated a study group to investigate the impact on current natural customers of certain practices the utilities were engaging in to compete with other utilities for the same customers. In the 90-563 docket, the Commission reviewed certain issues of concern regarding natural gas competition, they are as follows:³²

³⁰ In the Matter of an Inquiry into Competition Between Gas Utilities in Minnesota

³¹ Docket No. G-010/CI-90-148, In the Matter of Midwest Gas Service Extension Complaints Dated April 1, 1991; and Commission Order INITIATING STUDY GROUP dated April 4, 1991.

³² See Docket No. G-999/CI-90-563, 1995 WL 594725 (Minn. P.U.C. Mar. 31, 1995), *In the Matter of an Inquiry into Competition Between Gas Utilities in Minnesota*, pp. 3-7; Department Reply Comments, Attachment C.

- Service to areas not currently served;
- Commission response to multiple service providers in an area; and
- Review of Local Distribution Companies (LDC) service extension contracts.

On March 31, 1995, the Commission issued its Order summarizing the conclusions of the study group and terminating the investigation. The Order stated that there were both economic advantages and disadvantages to the provision of gas service by multiple providers in the same general area. The Commission recognized benefits to customers such as providing access to natural gas for a greater number of people and, hence, reducing these customers' heating costs. The Commission also recognized that competition may cause a detriment to customers such as *wasteful duplication of service* and higher per customer costs, and that utilities may be tempted to waive certain tariffed charges for new customers to the detriment of existing customers.

The Commission noted that Minnesota Statutes do not establish exclusive gas services areas or require that gas utilities get certificates of authority before piping into a new area, even one already served by another utility. In its 90-563 Order, the Commission stated that it must balance the interests of the utilities, competed-for customers, and current customers on a case by case basis.³³

*No ultimate judgement on this subject is required. First, while recognizing the negative potential cited above, the fact remains that there is no statutory prohibition against competition by two or more gas providers in the same territory. Moreover, it appears that the Commission has the capacity to balance the interests of the utilities, competed-for customers, and current customers on a case by case basis.*³⁴

Docket No. G-004, 011/C-91-731

Great Plains filed a complaint against Peoples for violating several provisions of Minnesota law and People's own tariff. The docket addressed two natural gas utilities operating in the same area, but did not specifically address the question of facilities duplication. The Commission dismissed Great Plains complaint because the load to be served by Peoples was not an existing natural gas load for Great Plains, but was a new load open to competition from other natural gas utilities.³⁵ The Commission Order addressed the non-exclusive nature of natural gas service territories by stating:

Presumably, there would be no issue at all, since gas utilities do not have exclusive service territories and generally can serve *any new load their distribution facilities can reach*....³⁶ [Emphasis added]

³³ See Docket No. G-999/CI-90-563, 1995 WL 594725 (Minn. P.U.C. Mar. 31, 1995), *In the Matter of an Inquiry into Competition Between Gas Utilities in Minnesota*.

³⁴ Ibid, p. 5; Department Reply Comments, p. 6, Attachment C (the Commission Order in this docket).

³⁵ Great Plains was serving the existing Minnesota Corn Producers (MCP) load primarily providing heat to its corporate office and MCP's decision to convert an ethanol plant located elsewhere on its premises (from coal to natural gas) was considered by the Commission to be a new load. MERC competed for the new load and was awarded the contract to provide gas service to MCP's converted ethanol plant.

³⁶ *In the Matter of the Complaint of Great Plains Natural Gas Company Against Peoples Natural Gas Company and UtiliCorp United, Inc.*, ORDER DISMISSING COMPLAINT at 4 (December 20, 1991); see Department Reply Comments, pp. 3-4, Attachment A.

Docket No. G-011/C-96-1062

Peoples filed a complaint against Northern States Power Company Gas (NSP). Peoples alleged that NSP violated Minn. Stat. § 216B.01, by constructing facilities to serve customers in two areas which Peoples was willing and able to serve, Eagandale Corporate Center and Casselberry Ponds. Both of these areas did not currently have natural gas services.

Peoples claimed that these areas were contiguous to its existing system, but not contiguous to any NSP facilities. Peoples argued that NSP customers would pay higher rates than if Peoples provided service, and that NSP's facilities possibly cause safety concerns by crossing over existing Peoples facilities. NSP countered by stating that the Office of Pipeline Safety will oversee the facilities' construction, thus there should be no consideration given to Peoples' safety concerns. NSP also that it would be providing service under its existing tariff and that economic concerns should be addressed in NSP's next general rate case.

In its Order, the Commission saw no reason to change its policy developed in the 90-563 docket, that the proper place to analyze the economic consequences of redundant piping is in a general rate case proceeding. In a rate proceeding, the Commission can examine the prudence of utility construction to determine if costs may be placed into rate base. The Commission can also determine if rates resulting from the service addition are just and reasonable. The Commission determined that the complainant (Peoples) did not raise any economic issue which warranted further investigation at that time. The Commission denied People's Motion to Expedite Consideration of the Complaint and Request for an Interim Cease and Desist Order, and dismissed the complaint.³⁷

MERC Comment on Commission Precedent

MERC believes that the Commission can decide each Complaint on a case-by-case basis – supporting its position that Xcel-Gas proposes to construct duplicate facilities and is “poaching” an existing MERC customer.

Xcel-Gas Comment on Commission Precedent

Xcel-Gas believes that MERC's Complaint does not have merit and should be dismissed - stating that the Commission previously decided that this type of complaint does not have merit.

Department Comment on Commission Precedent

The Department believes that previous Commission precedent supported its recommendation to dismiss MERC's Complaint.

PUC staff Comment on Commission Precedent

Both MERC and Xcel-Gas used Commission precedent to support their positions. Staff agrees with the Department's analysis that MERC's Complaint does have similarities to previous Commission decisions discussed above, but staff believes that there are substantial differences that the Commission may wish to consider before rendering its decision, as discussed below.

³⁷ Department Reply Comments, pp. 4-6 and Attachment B (Commission's Order in this docket).

Proposed Rate Structures

MERC

MERC proposed to provide service to the Vikings development through its firm sales service applicable to the projected load, at tariffed rates. MERC did not require the Vikings to provide a Contribution In Aid of Construction (CIAC) for the necessary facilities to provide service (in accordance with its main and service line extension tariff). MERC's last general rate case was Docket No. 15-736.

Xcel-Gas

Xcel-Gas's proposal to provide service to the Vikings development included a mixture of firm and interruptible sales services. A portion of the Vikings' service would be through a firm sales agreement appropriate to the projected load, at tariffed rates. The remaining service would be provided through an interruptible sales service agreement that has a limited firm feature, pursuant to Xcel-Gas's Limited Firm Service tariff, where the Vikings would be able to guarantee its service for a limited number of days during the winter heating season (this service does provide the Vikings with possible savings). Xcel-Gas's tariff specifies the maximum number of days for firm service. Xcel-Gas did not propose to charge the Vikings a CIAC for facilities (also in accordance with its main and service line extension tariff). Xcel-Gas's last general rate case was Docket No. 09-1153. Xcel-Gas states its proposed rate structure would offer lower rates to the Vikings, while maintaining their service requirements.

In addition, Xcel-Gas offered the Vikings a stimulus package consisting of *promotion incentives*, *potential tax savings*, and *conservation rebates* for signing its Natural Gas Competitive Agreement. Xcel-Gas and the Vikings have not yet entered into a service agreement.³⁸

PUC staff

It appears to Staff that the proposed revenue generated from the proposed Vikings' Development will create a revenue surplus when compared to the investment costs of either utility, therefore, the project will not require a CIAC. Further, it appears that both MERC and Xcel-Gas are offering natural gas service to the Vikings development in accordance with their respective tariffs. It does not appear the Vikings are eligible for any kind of flexible, market-rate, negotiable or discounted pricing under either MERC's or Xcel-Gas's tariffs.

But, as stated above, Xcel-Gas is offering the Vikings a "stimulus package" consisting of *promotion incentives*, *potential tax savings*, and *conservation rebates*.³⁹ Essentially, Xcel-Gas is paying the Vikings to take its service. From its initial review, staff cannot determine if all the trade secret amounts are guaranteed or are contingent on a certain set of circumstances. Staff is uncertain of the legality of Xcel-Gas's incentives offered to the Vikings or if the incentives are in accordance with Xcel-Gas's tariff. Staff believes that the Commission may wish to accept

³⁸ Xcel-Gas Reply Comments, Xcel-Gas's Response to MERC Information Request No. 3, Attachment A, pp. 1-5 (includes Attachment B to the Agreement), marked as *Trade Secret*.

³⁹ This information has been marked as *Trade Secret*.

MERC's Complaint and conduct an investigation of these non-tariffed incentives before rendering its decision.

In addition, Xcel-Gas stated that it will save the Vikings an annual sum through charging lower rates than MERC. From staff's initial review of Xcel-Gas annual revenue savings calculation, it appears that some inconsistencies may exist in how the annual savings were calculated. These inconsistencies involve Xcel-Gas's cost of gas calculation. When combining this calculation with the fact that Xcel-Gas has not filed a rate case since Docket No. 09-1153 (2010 test-year), the Commission may wish to further investigate this calculation before rendering its decision.

Duplicate Facilities

MERC

MERC believes that it would be inefficient and duplicative for Xcel-Gas to install facilities near existing MERC facilities. MERC believed it can provide natural gas service to the entire Vikings' development with little investment compared to the Xcel-Gas's investment.⁴⁰

Department

The Department believes that the Commission previously allowed for some duplication of facilities in its previous Orders (the 91-731 docket). The Department stated that it could not identify a compelling reason in this proceeding to recommend a different Commission conclusion.

PUC staff

After reviewing the maps of facilities configurations provided by both MERC and Xcel-Gas in their Comments and Reply Comments,⁴¹ it appears to staff that if the Commission dismisses the MERC Complaint, *duplicate facilities will result* to provide service to the proposed Vikings development. One of the reasons staff is concerned about duplicate facilities is that MERC provided its estimated construction costs to provide natural gas service to the Vikings proposed headquarters and maintenance building and MERC's estimates were substantially less than Xcel-Gas's estimated construction costs.

Further, Xcel-Gas's proposed facilities would cross underneath Interstate 494 and would involve construction along various county highways, whereas MERC's construction would involve constructing service lines from its pre-existing main. Staff believes that the Commission may wish to consider whether, given the facilities MERC already has in place in the area, it is more cost efficient for MERC or Xcel-Gas (and their respective non-Viking customers) to provide service to the Vikings before rendering its decision.

⁴⁰ Investment amounts are *Trade Secret*.

⁴¹ For MERC – see MERC Complaint, Exhibit A; MERC Reply Comments, p. 12; MERC Reply Comments, Exhibit A, Attachment DOC 2A. For Xcel-Gas – see Xcel-Gas Reply Comments, Xcel-Gas's Response to MERC Information Request No. 5, Attachment A, p. 1 of 1; Xcel-Gas's Response to MERC Information Data Request No. 5, Attachment B, pp. 5-11.

In addition, MERC stated that if the Commission dismisses MERC's Complaint, the result could eventually be increased rates for existing facilities because MERC's customers would have to absorb costs incurred to provide service to the Vikings contractor and possibly abandoned facilities costs that could result from Xcel-Gas competition.

If the Commission chooses to dismiss MERC's Complaint, the Commission may wish to require Xcel-Gas to make payment to MERC for remaining facilities costs and revenue losses caused by the Vikings construction plans. This might be considered relatively normal if this complaint involved two electric utilities because the law in certain circumstances entitles the electric utility to compensation if it was serving an area and then loses the right to serve that area (Minn. Stat. § 216B.47)

Economic Impacts

Direct and Indirect Costs

MERC

MERC incurred approximately \$155,700⁴² in direct costs that included meters and service lines to provide natural gas service to the Vikings contractor (Klaus-Anderson). MERC stated that it has not recovered these costs through a general rate case. Plus, MERC incurred indirect evaluation costs in projecting the potential load for the Vikings headquarters and maintenance building and further incurred cost in evaluating the future forecast of other customers.

These costs were necessary for MERC to calculate the potential revenue stream generated from the proposed development. Further, this work was necessary to determine if MERC would require a Contribution In Aid of Construction (CIAC) under its main and service line extension tariff.⁴³ Based on its analysis, MERC believes that if the Commission dismisses its Complaint, MERC's existing customers will be economic consequences.

In addition, MERC noted that it will lose current revenue from the service it provides to the NWA building since the Vikings are removing the building from the property.⁴⁴ Further, MERC believes that its existing customers will be negatively impacted by abandoned facilities costs since the Vikings plan to demolish (if not already demolished) the NWA building requiring MERC to remove facilities. MERC has already or will have to remove approximately 2,900 feet of service line from the NWA facility.

Xcel-Gas

Xcel-Gas did not directly address the economic impacts in its April 28th Comments or its informational data responses.

⁴² MERC initially stated this amount at \$140,000, but later revised the amount to \$155,676 when it provided its response to DOC Information Request #1.

⁴³ MERC May 15th Reply Comments, pp. 14-15 (marked as *Trade Secret*).

⁴⁴ MERC provided heat for the building.

Department

The Department, OAG and MERC all asked discovery that attempted to identify the costs and benefits of the transaction as structured for the different parties involved. MERC responded to the Department's Information Request #1 by providing its estimated facilities costs of approximately \$155,700 to provide service to the Vikings development. The Department's analysis indicated that approximately \$39,000 was clearly related to providing service, approximately \$4,000 related to the abandoned NWA facilities, and that approximately \$112,000 was related to MERC's system integrity project for Ames Crossing (main installation).⁴⁵ The Department stated that no more than half of the \$112,000 costs should be attributed to the Vikings development (approximately \$56,000).

The Department believes that MERC's total investment to provide service to the Vikings development would be approximately \$99,000,⁴⁶ instead of MERC's proposed amount of approximately \$155,700. The Department noted that MERC did not require the Vikings contractor to pay an initial CIAC to install the necessary facilities to provide service. It does not appear the Vikings or the Vikings contractor have or intend to reimburse MERC for these costs.

The Department further believes that the abandoned costs that MERC identified of approximately \$887,500 should not be considered by the Commission when making its decision.⁴⁷ The Department's analysis concluded that approximately \$8,100 should be considered abandonment costs, since the remaining facilities are still in-service. The Department believes that approximately \$879,400 represented used and useful assets that were under-utilized.

If the Commission dismisses MERC's Complaint, the Department believes that:

- MERC's ratepayers may see a higher revenue deficiency in MERC's next rate case.
- MERC would lose the revenue from the NWA facility, regardless of which utility serves the Vikings' new facility, and would not be able to offset that lost revenue with revenue from the Vikings' new facility.
- The Department did not attempt to identify the annual lost revenue stream from the NWA building since MERC would lose that amount of revenue regardless of which utility were to serve the Vikings' new facility.⁴⁸

Xcel-Gas's ratepayers likely would see a slightly smaller revenue deficiency in its subsequent rate case if Xcel-Gas serves the Vikings' new facility, due to additional revenue that service to the Vikings new facility would provide, reduced to some extent by the associated increase in the capital costs that the provision of service to that facility would require.

⁴⁵ The Department believed the Ames Crossing was a system reliability project completed in August 2016.

⁴⁶ Calculated by adding $\$39,000 + \$4,000 + \$56,000 = \$99,000$

⁴⁷ Based on MERC's response to the Department's Information Request #2.

⁴⁸ Further, the Department believes that regardless of which utility serves the Vikings' new facility, MERC's ratepayers may benefit from the additional investment in the area surrounding the Vikings parcel since MERC provides natural gas service to the surrounding area.

PUC Staff

PUC staff believes that MERC accommodated the Vikings request to remove the NWA facilities (incurring abandonment costs) because it believed it would be the Vikings natural gas service provider. The demolition of the old NWA facilities would create a detriment to MERC's other ratepayers by reducing its annual revenue stream collected from the property and further causing it to incur abandonment costs.

Further, the Commission may wish to consider these detriments before rendering its decision, that MERC was not concerned because it believed it would provide service to the Vikings headquarters and other development – the Vikings' revenue would offset any detriment to existing ratepayers and result in a net benefit to those customers.

PUC staff generally agrees with the Department's calculations, but believes that the Department relied on general assumptions in its analysis. If the Commission takes this into consideration, it may wish to accept MERC's Complaint to require additional investigation. Staff does not believe either utility would be providing an undue amount of new facilities to provide service to the Vikings based on the likely amount of gas that will be consumed by the Proposed Development.⁴⁹

If the Commission decides to dismiss MERC's Complaint, the Commission may wish to state in its Order that Xcel-Gas is not permitted to recover its facilities investment through its Gas Utility Infrastructure Cost Rider because its investment would not meet the definition of gas utility infrastructure cost in Minn. Stat. § 216B.1635, Subd. 1.

Contribution In Aid of Construction (CIAC)**PUC Staff**

Both MERC and Xcel-Gas have main and service line extension tariffs. It appears to staff that both companies are in compliance with their tariffs, that neither company is required to charge the Vikings or the Vikings' contractor a CIAC for natural gas services. The companies have tariff provisions that require a calculation to determine if CIAC is required, especially if the project produces a revenue deficiency. After reviewing parties' comments, staff is of the opinion that the Vikings development will generate revenues that exceed the costs to provide service. Both companies would benefit their existing customers and their shareholders by providing service to the Vikings because of the excess revenues over projected costs.

Demand entitlement costs**PUC staff**

The demand entitlement cost issue was not directly addressed by the parties. But, MERC stated in its Reply Comments that the Commission recently approved its Rochester Expansion Project, and as a result MERC has excess NNG capacity with the ability to use 20 percent of this capacity

⁴⁹ It would also be unlikely that either utility would be at risk for a disallowance from rate base in its next general rate case for installing an undue amount of new facilities to provide service to the Vikings.

at secondary delivery points. MERC believed that it could use this NNG capacity to supply natural gas to the Vikings development.

PUC staff agrees with MERC that the Rochester Project's excess capacity could be used and that MERC has the ability to use secondary points at no additional cost to customers. Staff believes this benefits MERC's existing customers by providing a use for already approved excess capacity. Staff understands that the MERC/NNG transportation contract has been signed or will be soon.

Policy Issues

Service Territories

MERC

MERC stated that it recognizes it does not have exclusive service rights to any territory. However, MERC believes Xcel-Gas's proposal violates MERC's pre-existing service rights because MERC was serving the Vikings contractor and the previous property owner, NWA. MERC's current facilities completely surround the 200-acre Vikings development project. MERC has under-utilized capacity, caused by the NWA departure, and can serve all of the Planned Development with minimal additional facilities – resulting in less construction costs and less construction disruptions to the area.

MERC provided the Vikings' property with natural gas from the construction's inception (September 2016) until April 2017, when MERC was notified by Xcel-Gas that it and the Vikings entered into the Natural Gas Competitive Agreement.

If the Commission dismisses MERC's Complaint, MERC believes that this action could fundamentally change how natural gas utilities compete for new load or compete for existing load of other natural gas utilities. The Commission may wish to consider how natural gas utilities compete for new businesses.

Xcel-Gas

Xcel-Gas believes that MERC's policy arguments are contrary to established Commission precedent. For example, MERC argued the Vikings were somehow an existing MERC customer and that Xcel-Gas was encroaching on MERC's natural service territory, and that it would make it unsafe and inefficient for Xcel-Gas to install facilities near existing MERC facilities.

However, Xcel-Gas believes that the proposed Vikings facility does not qualify as a MERC existing customer because the facility was still under construction, so that the Vikings were a "new" customer subject to competition.⁵⁰

If the Commission dismisses MERC's Complaint, Xcel-Gas stated that it would have the exclusive rights to provide natural gas services to the entire Vikings development.

⁵⁰ Xcel-Gas further argues that MERC failed to define its "natural" service territory and failed to provide any Commission rule or precedent defining its claims.

Department

The Department supported the parties' statements – that natural gas utilities do not have exclusive rights to any customer or group of customers because the utilities do not have exclusive service territories. The Department believes that the previous dockets provide helpful insight. For example, the 91-731 docket involved a natural gas utility (Great Plains) providing natural gas service to a customer prior to another utility (Peoples), proposing to provide service to a new load that the customer was developing, the Commission Order stated:

...gas utilities do not have exclusive service territories and generally can serve any new load their distribution facilities can reach. [T]he complaint rests entirely on the contention that Great Plains has an exclusive right to serve this load. This contention has no basis in law or policy. Minnesota does not have assigned service areas for gas utilities. It does have assigned service areas for electric utilities, which suggests that the Legislature intentionally treated these two types of utilities differently. Peoples, then, is free to serve this new load, in the absence of special circumstances, such as unnecessary duplication of facilities or harm to existing ratepayers, requiring Commission intervention.

The Department believes that MERC's concerns regarding the potential for Xcel-Gas or other natural gas service providers to "poach" other existing customers and their existing load are overstated. The Department summarized its position by stating that the Commission reviewed past complaints concerning Minnesota law and policies involving service territory disputes, and the Commission reserved the right to review these types of complaints on a case-by-case basis.

PUC staff

Staff agrees with the parties that natural gas utilities do not have exclusive service areas similar to electric utilities exclusive service territories. Minnesota Statutes (Legislature) encourage utilities to avoid duplicating each other's facilities and established a system of exclusive (assigned) service territories for electric utilities, but did not establish the same for natural gas utilities.

But staff cautions the Commission not to render its decision in this docket based solely on the fact that natural gas utilities do not have exclusive service area rights. The Commission should perhaps consider other factors, too.

It has been approximately 20-years since the Commission last reviewed its natural gas competition policies. Staff believes that the Commission may wish to review prior Commission precedent to ensure that its previous decisions regarding natural gas utility service are complaints are consistent with the dynamics of today's competitive natural gas market.

The Commission may wish to consider that this docket's facts are distinguishable from the facts of the 91-731 docket in that natural gas service previously existed at this site and distribution facilities and services lines exist to serve the Vikings. If Xcel-Gas provides service to the Vikings, staff believes that this could create duplicate facilities – or qualify as a "special circumstance" referenced in the Commission's 91-731 Order. In addition, MERC was the natural gas service provider to Klaus-Anderson, the Vikings contractor, and that the service

established MERC's service rights to the Vikings property.⁵¹ Further, the Commission may wish to consider MERC's assumption that it would continue as the Vikings provider once the construction is completed.

Further, staff believes that the Vikings cannot give Xcel-Gas exclusive rights to the entire proposed development, that the future natural gas customers may have the right to choose their natural gas provider. If the Commission does dismiss MERC's Complaint, staff believes that the Commission may wish to state Xcel-Gas does not have exclusive rights to serve future customers in its resulting Order.

The Department recommended that if the Commission wishes to review its previous service area competition policies and/or its incentives and disincentives policies, the Commission may consider opening a generic docket to review and investigate any potential policy change.

Safety Concerns

MERC

MERC stated that Xcel-Gas's encroachment into its service area could lead to an unsafe facilities configuration.

Xcel-Gas

Xcel-Gas believes that the Office of Pipeline Safety will assure that it properly constructs its proposed facilities alleviating MERC's safety concerns.

Department

The Department believes that the Commission should make a similar determination in this docket that was made by the Commission in previous dockets, that the Office of Pipeline Safety is responsible for safety.

PUC staff

Staff believes that the Office of Pipeline Safety would review facilities constructed to ensure both utilities operate safely, and that MERC's argument on this issue does not support its Complaint. PUC staff agrees with Xcel-Gas and the Department.

Reliability

Department

The Department expects reliable natural gas service will be provided by both MERC and Xcel-Gas.

⁵¹ MERC provided service from September 2016 to April 2017; MERC further supported its natural service area by stating it was providing natural gas service to the property's previous owner, NWA, but staff believes that this fact would not prevent competition between utilities because the new property owner would be a "new" natural gas customer to either utility.

PUC staff

PUC staff agrees with the Department that it would expect either MERC or Xcel-Gas to provide reliable natural gas service to the Vikings, as required by law.

Competitive Bidding Process

Xcel-Gas

In its April 28th Comments, Xcel-Gas stated that it participated in a competitive bidding process and it won the right to be the Vikings preferred natural gas provider. Further, it believes that because of the competitive bidding process, Xcel-Gas will be the exclusive natural gas provider for the entire Vikings' development, which includes future businesses, retail businesses, and residential development.

MERC

In its May 15th Reply Comments, MERC stated that it was unaware of any competitive bidding process and believed that such a process did not exist.

Vikings

The Vikings supported its selection of Xcel-Gas as its preferred natural gas provider by stating it reviewed competitive rate options from both MERC and Xcel-Gas. The Vikings did not reference a competitive bidding process in its letter, and there is no RFP in the record and there are no bids either.

PUC Staff

PUC staff believes that MERC was unaware of the competitive bidding process that Xcel-Gas used to support its position that the Vikings chose it to be the preferred natural gas provider. Xcel-Gas did not provide any evidence of this competitive bidding process in its April 28th comments. The Vikings did not reference a competitive bidding process in its letter, however, there is no Request For Proposal (RFP) in the record and no other utility submitted bids.

Decision Alternatives

Does the Commission have jurisdiction?

1. Find that the Commission has jurisdiction (MERC, Xcel, DOC), or
2. Find that the Commission does not have jurisdiction

Does the Commission have sufficient information to make a decision?

3. Yes (MERC, Xcel, DOC), or
4. No

If the Commission decides it has sufficient information, then:

5. Find that MERC has the exclusive right to provide natural gas service to the proposed development, including the new Minnesota Vikings headquarter and training facilities (MERC), or
6. Dismiss MERC's complaint without further investigation. (Xcel, Vikings, DOC)

If the Commission decides it needs additional information, then:

7. Refer this matter to the Office of Administrative Hearings (OAH) for additional investigation and a contested case proceeding. Ask the OAH to render its Report by a specific date; or
8. Direct Commission staff to issue another Notice to solicit comments from interested parties, and
 - a. Direct Commission staff to develop a list of questions for further investigation, and
 - b. Delegate authority to the Commission's Executive Secretary to issue notices and vary time periods for the duration of the investigation, or
9. Develop some other methodology to determine who should provide natural gas service to the Viking's proposed facility.

If the Commission dismisses MERC's Complaint, the Commission may wish to state the following:

10. The Commission is not making a determination with regard to prudence or whether or not Xcel's new facilities can be added to rate base. (OAG)
11. The Commission is not making any determination regarding allegedly abandoned facilities owned by MERC or any decision regarding the prudence of those investments or the recovery of the associated costs in this proceeding. (OAG)
12. Require Xcel to commit to removing any costs related to the extension of service to the new Viking's facilities from rate base if this project is abandoned before construction costs have been recovered. (OAG)
13. Xcel-Gas does not have exclusive rights to serve future Vikings development customers. (PUC staff)

If the Commission wishes to review its previous service area competition policies and/or the utilities' incentives and disincentives policies

14. Open a generic docket to review and investigate any potential policy change. (DOC)
15. Open a generic docket to review and investigate the use of promotional incentives and other non-tariffed payments provided by utilities to their existing customers and potential future customers. (PUC staff)

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Minn. Stat. § 216B.17 COMPLAINT INVESTIGATION AND HEARING.

Subdivision 1. Investigation. On its own motion or upon a complaint made against any public utility, by the governing body of any political subdivision, by another public utility, by the department, or by any 50 consumers of the particular utility that any of the rates, tolls, tariffs, charges, or schedules or any joint rate or any regulation, measurement, practice, act, or omission affecting or relating to the production, transmission, delivery, or furnishing of natural gas or electricity or any service in connection therewith is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with notice, to make such investigation as it may deem necessary. The commission may dismiss any complaint without a hearing if in its opinion a hearing is not in the public interest.

Subd. 2. Notice of complaint. The commission shall, prior to any formal hearing, notify the public utility complained of that a complaint has been made, and ten days after the notice has been given the commission may proceed to set a time and place for a hearing and an investigation as provided in this section.

Subd. 3. Notice of hearing. The commission shall give the public utility and the complainant ten days' notice of the time and place when and where the hearing will be held and the matters to be considered and determined. Both the public utility and complainant are entitled to be heard and to be represented by counsel. A hearing under this section is not a contested case under chapter 14.

Subd. 4. Notice to local governments and interested persons. Notice shall also be given to the governing bodies of affected municipalities and counties, and to any other persons the commission shall deem necessary.

Subd. 5. Combined notice. The notice provided for in subdivisions 2 and 3 may be combined but if combined the notice shall not be less than ten days.

Subd. 6. Complaint petition. The commission shall have the power to hear, determine, and adjust complaints made against any municipally owned gas or electric utility with respect to rates and services upon petition of ten percent of the nonresident consumers of the municipally owned utility or 25 such nonresident consumers whichever is less. The hearing of the complaints shall be governed by this section.

Subd. 6a. Cooperative electric associations. For the purposes of this section, public utility shall include cooperative electric associations with respect to service standards and practices only.

Subd. 7. Evidence. Section 14.60 shall be applicable to all contested cases before the commission.

Subd. 8. Further action by commission. If after making an investigation under subdivision 1 and holding a hearing under this section, the commission finds that all significant factual issues raised have not been resolved to its satisfaction:

- (1) for investigations concerning the reasonableness of rates of a public utility, if the commission is unable to resolve the complaint with the utility, the commission may order the utility to initiate a rate proceeding under section 216B.16, provided, however, that the

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- (2) utility must be allowed at least 120 days after the date of the commission's order to initiate the proceeding; and
- (3) for investigations of other matters, the commission shall order that a contested case proceeding be conducted under chapter 14.

Minn. R. 7829.1700 FORMAL COMPLAINT.

Subpart 1. Content. A formal complaint must include the following information: the name and address of the complainant; the name and address of complainant's counsel, if any; the name and address of respondent; the name and address of respondent's counsel, if known; the statute, rule, tariff, or commission order alleged to have been violated; the facts constituting the alleged violation; and the relief sought by complainant.

Subp. 2. Mailing and filing. A formal complaint must be mailed to the respondent, the department, and the Office of the Attorney General, as well as filed with the commission. Formal complaints may also be filed in a manner consistent with the electronic filing requirements of Minnesota Statutes, section 216.17, subdivision 3. If filed electronically, a formal complaint does not need to be mailed to the state agencies.

7829.1800 INITIAL CONSIDERATION OF FORMAL COMPLAINT.

Subpart 1. Initial commission review. The commission shall review a formal complaint as soon as practicable to determine whether the commission has jurisdiction over the matter and to determine whether there are reasonable grounds to investigate the allegation. On concluding that it lacks jurisdiction or that there is no reasonable basis to investigate the matter, the commission shall dismiss the complaint.

Subp. 2. Answer. On concluding that it has jurisdiction over the matter and that investigation is warranted, the commission shall serve the complaint on the respondent, together with an order requiring the respondent to file an answer either stating that it has granted the relief the complainant requests, or responding to the allegations of the complaint. The answer must be filed with the commission and served on the complainant, department, and Office of the Attorney General within 20 days of service of the complaint and order.

Subp. 3. Reply. Replies are not required unless the answer alleges that respondent has granted the relief sought by complainant. In that case, the complainant shall file a reply within 20 days admitting or denying that relief has been granted. If the complainant fails to file the reply, the commission shall dismiss the complaint. Copies of the reply must be served on the respondents, department, and Office of the Attorney General.

Subp. 4. Failure to answer. If the respondent fails to answer a complaint served by the commission under subpart 2, the commission shall consider the allegations of the complaint denied.

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**Minn. R. 7829.1900 COMMISSION ACTION ON FORMAL COMPLAINT;
COMMENTS.**

Subpart 1. Nature of proceedings. The commission shall deal with a formal complaint through a contested case proceeding, informal proceeding, or expedited proceeding.

Subp. 2. Initial comments. A person wishing to comment on a formal complaint shall do so within 30 days of the date of a commission order requiring an answer to the complaint. Comments must be served on the complainant, respondent, department, Office of the Attorney General, and any other known parties.

Subp. 3. Reply comments. A commenting party has ten days from the expiration of the original comment period to file reply comments. Reply comments must be limited in scope to the issues raised in the initial comments and must be served on the complainant, respondent, department, Office of the Attorney General, and any other known parties.

Subp. 4. Petition to intervene. If a person who files initial or reply comments is not entitled to intervene in commission proceedings as of right and desires full party status, the person shall file a petition to intervene before the initial or reply comment period expires. The intervention petition may be combined with the comments on the complaint.

Subp. 5. Comments to include procedural recommendation. A person commenting on a complaint shall specify whether the person believes the matter requires a contested case proceeding, informal proceeding, expedited proceeding, or some other procedural treatment, together with the reasons for recommending a particular procedural treatment.

Subp. 6. [Repealed, 40 SR 1329]

Subp. 7. [Repealed, 40 SR 1329]

Subp. 8. [Repealed, 40 SR 1329]

Subp. 9. Comment periods extended at department's request. At the request of the department, the commission shall extend the comment periods established in this part up to an additional 30 days, except for comment periods set by statute.