STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
Dr. David C. Boyd	Commissioner
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Betsy Wergin	Commissioner

IN THE MATTER OF A PETITION BY MINNESOTA ENERGY RESOURCES CORPORATION FOR AUTHORITY TO INCREASE NATURAL GAS RATES IN MINNESOTA

DOCKET NO. G-011/GR-13-617

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

I. INTRODUCTION.

Pursuant to Minnesota Statutes section 216B.27 and Minnesota Rules Part 7829.7300, the Office of the Attorney General – Antitrust and Utilities Division ("OAG") files this Petition for Reconsideration of the Minnesota Public Utilities Commission's ("Commission") Findings of Fact, Conclusions, and Order ("Order") in this matter.

Any party who is "aggrieved" and directly "affected" by a Commission order may file a petition for rehearing or reconsideration within 20 days.[1] The Commission may reverse or change its original decision if it appears that the "original decision, order, or determination is in any respect unlawful or unreasonable."[2] The OAG limits its request to two of the Commission's decisions that should be reconsidered because they are unlawful and unreasonable. First, the Commission should reverse its Order regarding the allocation of income taxes because the Order takes a position that is the opposite of how the Commission voted during its deliberations.

[1] Minn. Stat. § 216B.27; Minn. Rules part 7829.3000, subp. 1.
[2] Minn. Stat. § 216B.27, subd. 2.

Second, the Commission should reverse its decision on travel and entertainment expenses because its decision incorrectly applies Minnesota law.

II. THE COMMISSION SHOULD MODIFY ITS ORDER ON THE ALLOCATION OF INCOME TAXES TO ACCURATELY REFLECT THE COMMISSION'S DECISION DURING DELIBERATIONS.

During the Commission's deliberation, it considered two decision alternatives related to the allocation of income taxes in future cases:[3]

> 157. Determine that, in future cases, MERC should allocate income taxes by class on the basis of taxable income that fully and only reflects the CCOSS.
> 158. Make no determination regarding the treatment of income tax in the CCOSS of future rate cases.[4]

The Commission initially considered a motion to adopt Decision Alternative 157 and rule that income taxes should be allocated in a manner that "fully and only reflects the CCOSS" in the future.[5] In discussion of the motion, several commissioners said that they would prefer not to foreclose or prevent discussion of the issue in future cases, and would therefore prefer not to rule on the issue in this case.[6] The motion failed by a vote of 2-3, and the Commission continued on to other matters.[7] The Commission did not adopt Decision Alternative 157; in doing so, the Commission explicitly decided *not* to rule that income taxes should be allocated in a manner that "fully and only reflects the CCOSS" in future cases.

The Commission's Order, however, states the opposite. In its Order, the Commission stated:

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[3] Video and audio recordings of the Commission's deliberation on September 24, 2014 are available on the Commission's website. http://www.mn.gov/puc/.
[4] Revised Deliberation Outline, e-Docket 20149-103205-01 (Sept. 22, 2014).
[5] The Commission's discussion of income tax allocation begins at approximately 5:34:09 and continues to approximately 5:36:50.
[6] *Id.*
[7] *Id.*

> Basing interclass income-tax allocations on taxable income from the revenues collected from each customer class necessarily departs from cost-causation principles and incorporates the policy judgments built into the rates that generated those revenues. Such policy judgments do not belong in the class cost of service study, but in the rate design decisions made in the course of the rate case.
>
> Instead, for purposes of allocating income-tax expense among customer classes, a class's taxable income should be based on the allocation of costs within the class cost of service study.[8]

The OAG disagrees with the Commission's decision for the reasons described in the OAG's testimony and briefs.[9] But the OAG's greater concern at this juncture is that the language in the Commission's Order directly contradicts the Commission's vote during deliberations. The Order indicates that the *correct* way to allocate income taxes is the method preferred by MERC. This Order will be cited by MERC and other utilities for the proposition that this issue has been resolved going forward because the language of the Order gives that impression. But during its deliberations, the Commission explicitly decided *against* reaching that conclusion. The Commission voted on whether to decide the proper allocation method to be used in future cases, and the vote failed.

It is wholly unreasonable for the Commission to issue an Order that contravenes decisions that the Commission made during its deliberations. As such, the OAG asks the Commission to modify its Order to accurately reflect the Commission's decision. The Commission's order should clearly state that the Commission made no finding on the proper method to use in the future.

[8] Order, at 43–44.
[9] *See* Ex. 151, at 26–28 (Lindell Direct); Ex. 153, at 6–9 (Lindell Rebuttal); Ex. 154, at 12–15 (Lindell Surrebuttal); OAG Initial Brief, at 38–41.

III. THE COMMISSION SHOULD RECONSIDER ITS ORDER ON TRAVEL AND ENTERTAINMENT EXPENSES BECAUSE ITS ORDER DOES NOT FOLLOW MINNESOTA LAW OR COMMISSION PRECEDENT.

A. THE COMMISSION'S DECISION TO ALLOW RECOVERY OF UNREPORTED TRAVEL AND ENTERTAINMENT EXPENSES DOES NOT CORRECTLY APPLY MINNESOTA LAW.

MERC has requested authority to collect $284,725 in travel and entertainment expenses for its test year.[10] In addition to the expenses that it itemized in its filing, however, MERC also requested authority to collect an unknown amount of travel and entertainment expenses that were allocated from its service company, Integrys Business Services ("IBS").[11] By failing to identify and separately itemize the travel and entertainment expenses that were allocated from IBS, MERC failed to comply with a reporting statute that requires the utility to specifically itemize *all* travel and entertainment expenses.[12] When the OAG discovered that MERC had not itemized the travel and entertainment expenses allocated from IBS, the OAG asked MERC to itemize the expenses so that they could be analyzed and measured.[13] MERC refused to provide the information.[14] The OAG raised its concerns with the expenses in its testimony and briefing, and asked the ALJ and Commission to deny recovery of the expenses that were not itemized as required by Minnesota law. Because the total amount of the expenses was unclear, the OAG recommended that the Commission take the amount of reported travel and entertainment expenses, $284,725, as a proxy for the unreported expenses.

When it considered the issue, the Commission agreed with the OAG that "MERC should have itemized the IBS expenses."[15] The Commission declined, however, to order any

[10] Ex. 151, at 21 (Lindell Direct).
[11] *Id.* at 23.
[12] Minn. Stat. § 216B.16, subd. 17.
[13] Ex. 152, JJL-9 (Schedules to Lindell Direct).
[14] *Id.*
[15] Order, at 26.

disallowance for failing to comply with the reporting statute. In doing so, the Commission unreasonably deviated from its own precedent and failed to correctly apply Minnesota law.

The reporting statute is very clear in requiring MERC, and all other utilities, to separately itemize "*all* travel, entertainment, and related employee expenses."[16] The law provides that "the commission *may not allow*" travel and entertainment expenses that do not "comply" with the reporting requirements.[17] When it stated that "MERC should have itemized the IBS expenses" in its Order, the Commission acknowledged that MERC violated the reporting statute by requesting recovery for unreported travel and entertainment expenses.[18] Once the Commission reached this conclusion, the only lawful and reasonable subsequent action was for the Commission to disallow the unreported expenses.

Furthermore, to the extent that there was any doubt about the amount of expenses, or whether the expenses should have been reported, Minnesota law unequivocally *required* the Commission to decide the issue "in favor of the consumers."[19] The Commission did not do so. Instead, the Commission provided a series of justifications for failing to correctly apply the law, which is not sufficient.

B. THE COMMISSION'S REASONING FOR ALLOWING THE UNREPORTED EXPENSES IS FLAWED.

In its Order, the Commission stated three primary reasons for allowing MERC to recover expenses that were not itemized as required by law: first, the Commission stated that the expenses were "necessary for the provision of utility service;"[20] second, the Commission stated that excluding the IBS expenses "would be unduly punitive, since MERC did not intend to

[16] Minn. Stat. § 216B.16, subd. 17.
[17] Minn. Stat. § 216B.16, subd. 17(a), (b).
[18] Order, at 26.
[19] Minn. Stat. § 216B.03.
[20] *Id.*

violate the law;"[21] and, third, the Commission stated that MERC "has agreed to itemize these expenses in a future rate case."[22] These reasons do not provide sufficient justification for allowing recovery of expenses that violate Minnesota law or failing to resolve any doubts about the unreported expenses in favor of the ratepayers.

A further concern with the Commission's reasoning is that the justifications that the Commission provided in its Order were not discussed during the Commission's deliberation. Instead, during deliberations the Commission primarily discussed *different* reasons that were not included in the resulting Order. Such confusion may perpetuate and encourage improper claims for recovery of similar expenses in future cases.

During deliberations, the Commission discussed two reasons for allowing MERC to recover travel and entertainment expenses that were not reported as required by Minnesota law.[23] First, several commissioners indicated that they were not in favor of disallowance because they did not know the total amount of expenses that were unreported, and that any disallowance would only be possible by picking a number out of the air.[24] Second, several commissioners stated that they were concerned that the OAG has not raised the same argument with other utilities in the past.[25] The Commission did not discuss whether the expenses were "necessary for the provision of utility services" or whether a disallowance would be "unduly punitive" because

[21] *Id.*
[22] *Id.*
[23] The OAG recognizes that the Commission speaks primarily through its Orders. Minn. Stat. § 216A.05, subd. 1. However, because several of the Commissioners raised concerns that were not fully reflected in the Commission's Order, the OAG believes that it is necessary to respond to those additional concerns in order to fully state its position.
[24] The Commission's discussion of travel and entertainment expenses begins at approximately 2:47:13.
[25] *Id.*

MERC did not intend to violate the law. Following this discussion, the Commission voted 3-2 to allow MERC to recover the unreported travel and entertainment expenses.[26]

As a threshold issue, the OAG notes that it is concerning that the Commission's Order does not reflect the reasoning the Commission discussed during deliberations. While the Commission speaks primarily through its orders, it is troubling that in this instance, and in the case of income tax allocation, the Commission's Order fails to accurately reflect the decisions, and the underlying reasoning, that the Commission discussed and voted on during deliberations. Given that the Commission is subject to Minnesota's Open Meeting Law,[27] the Commission has an obligation to make its decisions in public deliberations. That decision-making includes the Commission's discussions about the underlying reasons for its decisions. After the Commission makes its decisions, the purpose of the Commission's Orders is to reflect the decisions that were made during its meetings. The Commission does not fulfill that purpose when its Orders do not accurately reflect what took place during deliberations.

Between its written Order and deliberations, the Commission articulated five reasons for allowing the expenses through its Order and during deliberations, but none of these reasons justify the Commission's decision to allow MERC to recover expenses that were not reported as required by Minnesota law. Initially, the Commission's statement that the "expenses are necessary for the provision of utility service" cannot be supported by the record in this case. MERC did not itemize or report the expenses at issue; therefore, any conclusion about whether the expenses were necessary to provide utility service is unfounded and unsupported. The Commission does not know if the expenses were necessary, because the Commission, like the OAG, does not know what the expenses were or even how much they were. Furthermore,

[26] *Id.*
[27] Minn. Stat. § 13D.01.

whether the expenses were "necessary for the provision of utility service" is not relevant to the OAG's recommendation for disallowance. The OAG recommended that the IBS expenses be disallowed because they were not itemized, not because they may have been for an unreasonable purpose. If the expenses were not necessary for the provision of utility service, that would be another reason to recommend disallowance, but it does not have any impact on whether the expenses were properly itemized as required by Minnesota law.

Second, MERC's intent in failing to itemize the expenses is also irrelevant to the issue of whether the expenses should be recovered from ratepayers. The reporting statute does not give utilities a "free pass" if they violate the statute unintentionally, and neither does any other provision of the Minnesota Public Utilities Act. In fact, it seems to be presumed that most violations would be unintentional, as individuals who intentionally violate the Act are subject to a monetary penalty.[28] Furthermore, while MERC claims that it did not "intend" to violate the law, its failure to correct the error when given the opportunity makes it equally culpable for the violation. The OAG sent an information request asking MERC to itemize the IBS expenses on January 30, 2014.[29] MERC had many opportunities over the following months to correct the violation, but chose not to do so. Even if MERC did not "intend" to violate the law, MERC is still culpable for the violation because it failed to act to correct the violation when it had the chance to do so. For the Commission to imply otherwise is a dangerous precedent.

Third, the fact that MERC has agreed to itemize IBS expenses in its future rate cases does not protect the interests of ratepayers who are currently being asked to pay for expenses that violate Minnesota law. Minnesota law requires that every utility rate be "just and reasonable."[30]

[28] Minn. Stat. § 216B.57.
[29] Ex. 152, JJL-9 (Schedules to Lindell Direct).
[30] Ex. 216B.03.

A rate that includes unreported travel and entertainment expenses would not be just and reasonable because the expenses are in violation of Minnesota law; the fact that MERC will not request similar unreported expenses in the future does not change the fact that it would be unjust, unreasonable, and unlawful to collect unreported expenses from ratepayers in this case.

Fourth, the fact that no party raised similar issues in other cases is not a reason to allow the expenses in this case. One reason that the OAG has not raised this issue in other cases is that other utilities have reported and itemized the expenses that are allocated from their service companies in their rate cases. For example, in its 2013 rate case, Docket 13-316, CenterPoint reported and itemized the travel and entertainment expenses allocated from its service company through the testimony and workpapers of Kirk Nesvig. Specifically, Mr. Nesvig's testimony provides a summary of the travel, food, entertainment, dues, gifts, and lobbying expenses that were allocated from CenterPoint's service company.[31] Mr. Nesvig then provided a complete itemization for all expenses in each of those categories in Schedule 28 Workpapers 8, 9, 10, 11, 12, and 13.[32] When the OAG reviewed CenterPoint's itemization, it determined that many of the expenses were unreasonable to recover from ratepayers and recommended disallowance.[33] In response, CenterPoint agreed to remove $856,420 in travel and entertainment expenses from its test year.[34]

[31] Nesvig Workpapers Volume 3 of 4, Part 1 of 8, Schedule 28, eDocket Number 20138-89828-02, *In the Matter of the Application of CenterPoint Energy Resource Corp. for Authority to Increase Natural Gas Rates in Minnesota*, at 19–33, Docket No. 13-316.

[32] *Id.* The itemization Workpapers are not attached to this filing because they are several thousand pages long, but they are can be found at eDocket Numbers 201310-92820-01, 201310-92822-01, and 201310-92826-01.

[33] Direct Testimony of John Lindell, *In the Matter of the Application of CenterPoint Energy Resource Corp. for Authority to Increase Natural Gas Rates in Minnesota*, at 19–33, Docket No. 13-316 (Nov. 26, 2013).

[34] Rebuttal Testimony of Kirk Nesvig Direct Testimony of John Lindell, *In the Matter of the Application of CenterPoint Energy Resource Corp. for Authority to Increase Natural Gas Rates in Minnesota*, at 28, Docket No. 13-316 (Dec. 23, 2013).

Xcel provided similar reporting and itemization in its pending rate case, Docket 13-868.[35] In its initial filing, Xcel included an Employee Expense Report in Volume 3 of its Required Information filing.[36] Xcel's filing, like CenterPoint's, is thousands of pages long. And, as with CenterPoint's itemization, when the OAG reviewed the expenses, it determined that some expenses were unreasonable and recommended disallowance.[37]

CenterPoint and Xcel, unlike MERC, reported and itemized the expenses allocated from their service companies. Because the expenses were reported in those cases, the OAG focused on whether the expenses were reasonable, rather than on whether they were properly reported. And when the OAG determined that some of the expenses were *not* reasonable, the OAG brought those concerns to the attention of the Commission. In this case, when the OAG determined that MERC had not itemized any of its service company expenses, it sent an information request to get that information. MERC refused to provide it. The OAG did not raise the issue of service company expenses in other cases because other utilities provide that information. MERC did not.

Further, the Commission has previously recognized that a utility cannot hide behind the fact that an issue is raised for the first time and was not addressed in previous rate cases. The Commission has previously stated:

> Every rate case implicates literally hundreds of issues that must be addressed, deferred, or treated as non-issues in the course of a tight (normally, ten-month) time frame. The parties make their best

[35] *In the matter of the Application of Northern States Power for Authority to Increase Rates for Electric Service in Minnesota*, Docket No. 13-868.

[36] This report is largely contained in parts 13, 14 and 15 of Volume 3 Required information, although some portions of it were produced in the form of a cd. Those portions that were filed in the eDockets system can be found at eDocket Numbers 201311-93291-01, 201311-93291-02 and 201311-93291-03. Many of the schedules indicate on the top left corner of the page that the expenses reported are for "NSP-MN and XES." XES stands for Xcel Energy Services, a service company that provides similar services as IBS.

[37] Direct Testimony of John Lindell, *In the matter of the Application of Northern States Power for Authority to Increase Rates for Electric Service in Minnesota*, at 47–57, Docket No. 13-868 (June 5, 2014).

> judgments on which issues merit litigation during the rate-case timeframe, and they do not lose the right to raise other issues in subsequent cases.[38]

This case, and the expenses that MERC seeks to recover in this case, should be judged on their merits alone, not on the basis of adjustments made (or not made) in other cases. This is especially true since the issues appears to be relevant *only* to MERC; because other utilities like CenterPoint and Xcel *do* report and itemize their allocated travel and entertainment expenses, the OAG has not had to raise the issue before. Either way, in this case, the OAG discovered that MERC had not complied with the reporting statute, and determined that the expenses should have been reported. The Commission reached the same conclusion. The fact that the OAG did not raise the issue in other cases is not a reasonable justification for knowingly collecting expenses from ratepayers that were not reported as required by law, especially since it was not necessary to raise the issue in other cases.

Fifth, given the Commission's discussion during deliberations, it appears that the primary concern of several commissioners was that the total amount of unreported expenses is unknown. It is correct that the record does not reflect the total amount of unreported expenses, but the Commission's precedent makes clear that uncertainty about financial totals should not be a shield that leads to recovery for the utility. In Xcel's 2008 rate case, the OAG and the Department challenged Xcel's method of allocating costs from its service company.[39] The Commission agreed with the Department that Xcel's allocation method had resulted in over-charging Minnesota ratepayers, but Xcel argued that the Department's proxy recommendation to

[38] *See In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in Minnesota*, Docket No. E-002/GR-08-1065, at 21 (Oct. 23, 2009).
[39] *Id.* at 18

disallow costs was inappropriate because the Department could not precisely identify the total amount that had been overcharged.[40] The Commission rejected Xcel's argument, and stated:

> [U]ncertainty about how much the ratepayers are being overcharged in cost allocation does not trump the Commission's duty to do something about it. And the burden of proof lies with the Company – under Minn. Stat. § 216B.03, any doubt as to the reasonableness of any rate must be resolved in favor of the consumer.

The Commission specifically disagreed with the ALJ's conclusion that the proxy disallowance was unreasonable because the record did not reflect a specific number.[41] The Commission continued by concluding that neither the Department or the OAG were "obligated to prove that the disallowances are necessary or reasonable."[42] Instead, the utility is "obligated to prove that it has adequately remedied the [violations that] . . . both exist and harm Minnesota ratepayers."[43] The Commission's conclusions are supported by Minnesota law: MERC, like all other utilities, has the burden to prove that its expenses are reasonable; and when there is "any doubt as to reasonableness," it must be "resolved in favor of the consumer."[44]

The Commission's precedent is clear. Once the Commission decided that MERC should have reported the travel and entertainment expenses, the Commission should not allow "uncertainty" about the amount of the expenses to "trump the Commission's duty to do something about it."[45] In this case, the Commission's "duty" was to correctly apply Minnesota law, which provides that the Commission may not allow recovery of travel and entertainment

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[40] *Id.* at 20–21.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Minn. Stat. §§ 216B.03, 216B.16, subd. 17.
[45] *In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in Minnesota*, Docket No. E-002/GR-08-1065, at 20–21 (Oct. 23, 2009).

expenses that are not reported and requires all doubts about the reasonableness of expenses to be resolved in favor of the consumer.[46]

It is true that, as a result of MERC's failure to report the expenses, the Commission does not know the true amount of unreported expenses. It is possible that the OAG's proxy recommendation is greater than the total of unreported expenses. On the other hand, it is also possible that the OAG's proxy recommendation under-estimates the unreported expenses, and that MERC would be happy to escape with the disallowance that has been requested. As discussed above, MERC could have "remedied" the uncertainty by producing information about the IBS expenses. In fact, if the proxy was significantly larger than the unreported expenses, MERC would have every incentive to provide a total amount that was lower than the proxy. Since MERC chose not to provide the total amount of expenses, it is more likely that the OAG's proxy does under-estimate the total amount of unreported expenses. Either way, to satisfy both the Commission's precedent and Minnesota law, the Commission must meet its obligations to uphold Minnesota law and to resolve doubts in favor of consumers by accepting the reasonable proxy proposed by the OAG.

C. THE COMMISSION'S DECISION WOULD RESULT IN UNSOUND PUBLIC POLICY.

The Commission should reconsider its decision because it departed from the Commission's precedent and did not correctly apply Minnesota law. The Commission should also reconsider its decision because it would create a poor precedent for the future. One way to interpret the Commission's decision is that a utility is likely to get full recovery of an expense if the Commission does not have enough information to determine the precise amounts that should be disallowed. The public policy concerns of this precedent are clear and significant.

[46] Minn. Stat. § 216B.03.

Profit maximizing firms, like MERC and other utilities, will have every incentive to under-report or conceal information on every issue where they anticipate a challenge to their recovery. For example, by refusing to itemize or explain the unreported expenses either in its direct filing or when the OAG asked for more information, MERC effectively guaranteed recovery of the unreported expenses because it did not provide the Commission with the data necessary to determine a precise number. If the Commission's decision stands, it is likely that other utilities will conceal or refuse to provide similar information in future cases in order to maximize their chance at full recovery.

IV. CONCLUSION

The Commission should reconsider both income tax allocation and travel and entertainment expenses. The Commission's Order on income tax allocation is not representative of the Commission's discussion and vote on the issue. In fact, the Order adopts language that was explicitly rejected by a majority of the commissioners. As a result, the Commission should modify its Order to accurately represent its votes during deliberation. The Commission should also reconsider its decision on travel and entertainment expenses because the Commission failed to follow its own precedent and Minnesota law. The Commission agreed with the OAG that MERC should have reported the travel and entertainment expenses that were allocated from IBS, and Minnesota law requires that only expenses that comply with the reporting requirements be allowed and that the Commission resolve any doubts about the issue in favor of consumers.

The Commission's reasoning for allowing the costs does not provide sufficient justification for failing to correctly apply the law and would set a dangerous precedent if not corrected.

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Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

s/ **Ryan Barlow**
RYAN P. BARLOW
Assistant Attorney General
Atty. Reg. No. 0393534

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1473 (Voice)
(651) 297-7206 (TTY)

ATTORNEYS FOR OFFICE OF THE ATTORNEY GENERAL-ANTITRUSTAND UTILITIES DIVISION