STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

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In the Matter of the Application of Xcel Energy for Authority to Increase Rates for Electric Service in the State of Minnesota	DOCKET NO. E-002/GR-21-630
In the Matter of the Application of Xcel Energy for Authority to Increase Rates for Natural Gas Service in Minnesota	DOCKET NO. G-002/GR-23-413

COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL— RESIDENTIAL UTILITIES DIVISION

INTRODUCTION

The Office of the Attorney General—Residential Utilities Division (OAG) respectfully submits the following Comments in response to the Public Utilities Commission's Notice of Comment Period issued on March 6, 2025 regarding the Court of Appeals' remand of the Commission's order from Xcel's 2021 rate case. The Notice asks what process the Commission should follow in making its decision on executive compensation and whether the Commission should reopen the record to make additional findings on executive compensation.

The Commission need not reopen the record. The Commission should amend its order to disallow Xcel's request for rate recovery of compensation for its ten highest-paid executives in its entirety. In the alternative, the Commission should clarify its original order with additional findings explaining why the Commission's limit on ratepayer recovery of executive compensation is reasonable. If the Commission decides to reopen the record, it should order a process that ensures

robust discovery about the purported benefit that Xcel's highest-paid executives provide to ratepayers.

BACKGROUND

In Xcel's 2021 rate case, the Commission found that Xcel had failed to meet its burden to show that requiring ratepayers to pay for compensation of its ten highest-paid executives was just and reasonable.[1] Xcel's only evidence supporting its request was that Xcel paid its executives comparably to executives at other companies.[2] The Commission observed that the request for executive compensation needed to be viewed in the context of Xcel's repeated large rate requests over the preceding decade. The Commission also pointed to public comments opposing Xcel's high executive compensation packages and public comments decrying the financial burden Xcel's constant rate increases placed on ratepayers.[3]

The Commission then explained three main reasons that actively cut against Xcel's request. First, the Commission observed that, unlike regulated utilities, the executives Xcel used as a comparison have fiduciary duties to their shareholders but no duties to their customers.[4] Second, the Commission found that the structure of Xcel's executive compensation packages demonstrated that these positions were primarily focused on shareholder benefits.[5] Finally, the Commission suggested that Xcel had not considered the impact of high costs on ratepayers.[6]

Having determined that Xcel's request was unreasonable and should not be included in rates, the Commission went on to allow inclusion of $150,000 per executive in rates, totaling $1.5

[1] Docket No. E-002/GR-21-630, Findings of Fact, Conclusions, and Order at 22-23 (July 17, 2023) (Electric Rate Case Order).
[2] *Id.* at 22.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

million.[7] Finding it reasonable for ratepayers to pay an amount equivalent to what Minnesotans pay their own state-government executives, the Commission permitted rate recovery of executive compensation at the governor's salary.[8]

Xcel failed to convince the Commission to reconsider its decision and then appealed. The Court of Appeals held that the Commission's decision denying Xcel's request was lawful, rejecting Xcel's argument that capping rate recovery of executive compensation was contrary to law.[9] The Court observed that Xcel had the burden to show that including executive compensation in rates was just and reasonable, that doubts must be resolved in favor of the consumer, and that the Commission acted within its statutory mandate in finding that Xcel failed to meet its burden.[10]

However, the Court also held that the Commission's decision to allow rate recovery equal to the governor's salary for each of the ten highest-paid executives was arbitrary and capricious.[11] The Court opined that the Commission had not explained its decision apart from identifying the governor as the state's highest executive officer:[12] "By not describing how or why the governor's salary was the appropriate measure to meet the needs of the ratepayer and the utility, the Commission 'failed to consider an important aspect of the problem.'"[13] The Court further clarified that it "expressed no opinion as to an appropriate measure of recoverable compensation" and specifically did not foreclose the Commission from "setting compensation at the same amount if

[7] *Id.* at 23.
[8] *Id.*
[9] *In re N. States Power Co.*, No. A23-1672, Opinion at 24 (Jan. 21, 2025), available at https://mn.gov/law-library-stat/archive/ctapun/2025/OPa231672-012125.pdf (Opinion).
[10] *Id.* at 24.
[11] *Id.* at 26.
[12] *Id*. In a partial dissent, Judge Tracy M. Smith argued that the Commission had sufficiently explained its decision. *Id.* at C/D-2.
[13] *Id.*

just and reasonable."[14] The Court remanded the case to the Commission to make additional findings regarding compensation, leaving it up to the Commission whether to reopen the record.[15]

ANALYSIS

I. THE COMMISSION SHOULD DENY RECOVERY OF XCEL'S TOP-TEN COMPENSATION ENTIRELY OR, ALTERNATIVELY, CLARIFY ITS ORDER AND AFFIRM ITS DISALLOWANCE OF TOP-TEN COMPENSATION EXCEEDING $1.5 MILLION.

The portion of the Commission's order disallowing recovery of executive compensation in rates was lawful, and the Commission should simply disallow rate recovery of executive compensation in its entirety. The Court of Appeals held that the Commission acted within its authority in denying Xcel's request for recovery of executive compensation after finding that Xcel had failed to meet its burden to prove inclusion of executive compensation in rates was just and reasonable.[16] Because the burden of proof is on the utility, when the utility fails to prove its request would result in just and reasonable rates, the Commission may either deny the request entirely, or make adjustments to ensure rates are just and reasonable.[17] The Commission found that Xcel's request was not reasonable and should therefore deny recovery of executive compensation in rates.

Alternatively, the Commission may choose to make additional findings to support selection of $1.5 million as a reasonable limit on executive compensation in rates. The Court of Appeals held that the choice of the governor's salary was arbitrary and capricious because the Commission did not explain why basing recovery on the governor's salary was reasonable.[18] In remanding the case to the Commission, the Court explicitly noted that the Commission could select the same amount as before, so long as it offered an adequate explanation.[19] Therefore, if the Commission

[14] *Id.* at 27, n. 6.
[15] *Id.* at 27.
[16] Opinion at 24-25.
[17] *Application of Interstate Power*, 500 N.W.2d 501, 504 (Minn. App. 1993)
[18] Opinion at 26.
[19] *Id.* at 27, n. 6.

chooses not to disallow executive compensation entirely, the Commission should clarify its order by providing further explanation of its choice to cap executive compensation at $1.5 million.

A. Having Found That Inclusion of Xcel's Request for Executive Compensation in Rates Is Not Just and Reasonable, the Commission Should Disallow Xcel's Request in Its Entirety.

Because Xcel failed to prove that its request for executive compensation would result in just and reasonable rates, the Commission should simply remove executive compensation from rates without reopening the record. The burden to prove that a rate increase would be just and reasonable is on the utility.[20] All doubts must be resolved in favor of the consumer.[21] When a utility fails to establish the reasonableness of a cost, the Commission may disallow the cost outright, or it may adjust the utility's proposal to ensure that rates are just and reasonable.[22]

The Court of Appeals held that the Commission acted lawfully when it found that Xcel had failed to establish that inclusion of its request was just and reasonable.[23] In making this holding, the Court of Appeals observed that Xcel had the burden not only to show that it would incur the expense of paying its executives, but that it would be just and reasonable to charge this expense to ratepayers.[24] The Court also stated that the Commission has the prerogative to "closely consider" compensation levels for Xcel's highest-paid executives, given the statutory requirement that Xcel provide information regarding their pay.[25] The Court therefore held that the Commission lawfully

[20] Minn. Stat. § 216B.16, subd. 4.
[21] Minn. Stat. § 216B.03.
[22] *Application of Interstate Power*, 500 N.W.2d 501, 504 (Minn. App. 1993); *see also In re Petition of N. States Power Co.*, 416 N.W.2d 719, 726 (Minn. 1987) (holding that the Commission could substitute a hypothetical capital structure for the utility's actual but unreasonable capital structure).
[23] Opinion at 21.
[24] Opinion at 24 (*citing N. States Power Co.*, 416 N.W.2d at 723).
[25] *Id.*

concluded that Xcel had not "satisfied its burden to prove that its requested recoverable compensation cost . . . that is appropriate for ratepayers to pay."[26]

Because the Court of Appeals affirmed the Commission's determination that Xcel failed to meet its burden and the denial of Xcel's request, the Commission should end the inquiry with the denial. The Commission's order addressed the issue of executive compensation in two steps. First, the Commission found that including Xcel's request in rates would not be just and reasonable. The Commission then made an independent decision to adjust Xcel's request by limiting rate recovery of executive compensation to the level of the governor's salary. In line with the Commission's two-step order, the Court of Appeals made two independent holdings: (1) the disallowance was lawful, but (2) the adjustment was arbitrary and capricious. These were independent holdings; the lawfulness of the disallowance was not contingent on the fact that the Commission then made an adjustment. Rather, the disallowance was lawful because Xcel failed to carry its burden. As numerous cases have held, when a utility fails to meet its burden, the Commission has the discretion to deny the utility's request entirely, just as a court will deny relief to a party in litigation that fails to meet its burden.[27] Between a record devoid of evidence in favor of Xcel's position and the statutory mandate that doubts be resolved in favor of the consumer, it was just and reasonable to deny Xcel's request. The Commission should simply deny Xcel's unsupported request to include compensation for its ten highest-paid executives in rates.

[26] Opinion at 24-25.
[27] *In re Petition of N. States Power Co.*, 416 N.W.2d 719, 726 (Minn. 1987); *Application of Interstate Power*, 500 N.W.2d 501, 504 (Minn. App. 1993).

B. In the Alternative, the Commission Should Make Further Findings Explaining Its Disallowance of Executive Compensation Exceeding $1.5 Million.

If the Commission wishes to keep $1.5 million of executive compensation in rates, it should do so by clarifying its order with additional findings, not by reopening the record. The Court of Appeals found that the Commission did not explain why the governor's salary was an appropriate comparison for determining rate recovery of executive compensation beyond stating that the governor is the state's top executive.[28] The Court also suggested that the Commission's order did not demonstrate due consideration of the utility's need for sufficient revenue to cover the cost of providing service.[29] However, in remanding for additional findings, the Court explicitly stated that it did not foreclose the Commission from setting the rate-recoverable portion of executive compensation at the same level as in its initial order.[30] The Court also stated that the Commission could decide whether to reopen the record or not.[31] Thus the Commission need only provide additional explanation for why $150,000 per executive is a reasonable limit on rate recovery of executive compensation, which it can do without reopening the record.

The Commission stated that it was reasonable for ratepayers to pay Xcel's executives what they pay their state's top executives without specifying reasons for doing so, though there are many reasons to choose the governor's salary as a benchmark. For example, the governor is an executive whose time and responsibilities are focused entirely on the public interest, making the governor's salary a reasonable proxy for the value ratepayers derive from Xcel's executives. Or, just as there is a special responsibility of state government to keep the governor's compensation affordable for taxpayers who have no choice but to pay their taxes, there is a special responsibility of the

[28] Opinion at 26.
[29] *Id.*
[30] *Id.* at 27, fn. 6.
[31] *Id.* at 27.

Commission to keep utility expenses affordable for ratepayers who have no choice but to pay utility rates. The Commission needs only to amend its order to provide a reasonable basis for its choice of cap.

As for giving due consideration to the utility's "need for revenue sufficient to enable it to meet the cost of furnishing the service,"[32] the Commission can demonstrate that it did so in at least two ways. In determining the amount of executive compensation that goes into rates, the Commission is deciding whether shareholders or ratepayers should bear that cost.[33] The Commission has broad discretion, and an explanation of why the governor's salary is appropriate inherently demonstrates the due consideration given to the utility's needs. However, if the Commission wished to make an explicit finding regarding Xcel's revenue, the fact that Xcel dropped its appeal of the Commission's decision on return on equity – the amount of profit that Xcel can make on its investments in the utility – shows that its needs have been met in the time since the Commission placed a cap on executive compensation.[34]

Therefore, if the Commission does not disallow all recovery of executive compensation, it should simply make additional findings explaining why limiting rate recovery of executive compensation to $1.5 million is reasonable. It does not need to reopen the record to do so.

II. IF THE COMMISSION REOPENS THE RECORD, IT MAY CHOOSE TO REMAND THE ISSUE TO OAH.

The Commission's notice asks commenters to address the applicability of *Matter of Surveillance and Integrity Review* (*SIRS*)[35] to any further proceedings it may order. *SIRS*'s holding involved a different procedural posture than *Xcel* and is not applicable here. In *SIRS*, the Minnesota

[32] Minn. Stat. § 216B.16, subd. 6.
[33] *In re Request of Interstate Power,* 574 N.W.2d 408, 413–14 (Minn. 1998).
[34] Court of Appeals Docket No. A23-1672, Xcel Correspondence Withdrawing Issue from Appeal (Apr. 10, 2024).
[35] 996 N.W.2d 178 (Minn. 2023).

Supreme Court held that the Department of Human Service could not remand a case to OAH where Human Services also failed to accept, reject, or modify the ALJ's recommendation.[36] *SIRS* did not involve the situation here, where the Commission accepted an ALJ report with modifications, the Commission's decision was appealed, and an appellate court has remanded with instructions that the Commission may open the record.[37]

Because *SIRS* does not apply, the Commission may, if it chooses to reopen the record, remand the case to OAH for further proceedings to supplement the contested-case hearing record. The OAG opposes reopening the record on executive compensation. The OAG takes no position on whether the prepaid-pension issue should be reopened or whether the issue should be remanded to OAH if the Commission chooses to reopen the record. The OAG's only process-related recommendation is that, if the Commission reopens the executive-compensation issue, it should order a process that allows for thorough discovery into the benefits that Xcel's highest-paid executives provide to ratepayers. This recommendation is discussed in the next section.

III. IF THE COMMISSION REOPENS THE EVIDENTIARY RECORD, IT SHOULD ORDER A PROCESS THAT ALLOWS FOR ROBUST DISCOVERY ON THE BENEFITS THAT XCEL'S TEN HIGHEST PAID EXECUTIVES PROVIDE TO RATEPAYERS.

If the Commission chooses to reopen the evidentiary record on executive compensation, it should order a process that ensures robust discovery regarding the activities that Xcel's highest paid executives engage in and the benefit they provide to ratepayers. The purpose of reopening the record would be to examine how much time and effort Xcel's executives devote to activities that benefit ratepayers versus those that benefit shareholders. This would require Xcel to cooperate

[36] *See id.* at 183, 187.
[37] *See McNitt v. Minn. IT Servs.*, 14 N.W.3d 284, 289–90 (Minn. Ct. App. 2024), *review granted* Feb. 18, 2025 (distinguishing *SIRS* where MNIT rejected an Administrative Law Judge's recommendation to grant summary disposition and remanded to the Office of Administrative Hearings for an evidentiary hearing).

fully in a robust discovery process, as Xcel has an enormous incentive to control the flow of information on an issue of great concern to the public.

The need for a robust discovery process would be particularly great if the Commission develops the record through the informal notice and comment process. Whereas the evidence in the rate case was submitted under oath, developed through multiple rounds of testimony, and subject to cross examination, the informal process would necessarily result in the introduction of unvetted evidence. Furthermore, in a notice and comment process, Xcel could engage in improper discovery tactics, knowing that the Commission is not as well-positioned to resolve discovery disputes as the Office of Administrative Hearings is. Both the process and access to information would thus be unfairly stacked in Xcel's favor, undermining the legitimacy of the fact-finding process and eventual outcome.

Accordingly, if the Commission wishes to proceed with the informal process, it should ensure that all parties have an appropriate opportunity to build their case. First, it should order Xcel to respond to discovery requests made by any party to its 2021 rate case. This is necessary because Xcel may attempt to argue that it is not obligated to respond to discovery from non-governmental intervenors.

The Commission should also order that Xcel will not be allowed to introduce evidence on a matter if another party demonstrates that Xcel failed to engage in discovery in good faith as to that matter. Additionally, the Commission should order that, if Xcel fails to produce sufficient discovery responses on a matter, the Commission will consider that matter established in favor of the requesting party. Both of these recommendations are standard sanctions when a party fails to engage in discovery in good faith.[38] They are necessary here to heighten the rigor of the discovery

[38] *See* Minn. R. Civ. P. 37.02(b).

process if the Commission orders an informal notice and comment period. Because Xcel already failed to carry its burden and would be getting a second chance to do so, it is reasonable to allow parties to move directly for discovery sanctions if Xcel is not forthright in its responses. This would also help prevent discovery disputes from further delaying final disposition of the 2021 rate case.

While the OAG does not recommend reopening the evidentiary record, if the Commission chooses to do so, it should ensure that robust discovery can take place. Because the Commission is not able to make decisions on discovery motions and disputes as swiftly as an ALJ, if the informal process is used, the Commission should explicitly order the above guardrails to ensure that Xcel complies with discovery requests. The OAG also does not object to returning the proceeding to OAH for a contested case on the remaining issues.

CONCLUSION AND RECOMMENDATIONS

Reopening the record on executive compensation would allow Xcel to introduce new evidence regarding an issue on which it already failed to carry its burden. Giving Xcel such a "redo" would be particularly strange in the current situation, given Xcel filed a new massive rate hike request in November 2024.

The following procedural options would comply with the Court of Appeals' remand while protecting ratepayers and the ratemaking process:

1. The Commission should disallow Xcel's request for executive compensation in its entirety because Xcel failed to carry its burden of proof, without reopening the evidentiary record;
2. In the alternative, the Commission should make additional findings explaining why using the governor's salary is a reasonable proxy for limiting rate recovery of executive compensation, without reopening the evidentiary record;
3. If the Commission does reopen the record, it should order that:

a. Xcel must respond to discovery requests from all parties to PUC docket number GR-21-630;

b. If a party demonstrates that Xcel failed to respond in good faith to a discovery request on a particular matter, Xcel not be allowed to introduce its own evidence as to that matter; and

c. If Xcel fails to produce sufficient discovery responses on a particular matter, the Commission will consider that matter established in favor of the party who submitted the discovery request to Xcel.

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Respectfully submitted,

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